

Good Governance and the Extractive Industry in Burma:



Complications of Burma's Regulatory Framework

Shwe Gas Movement
June 2013

SHWE GAS MOVEMENT

Shwe Gas Movement (SGM) is a community-based organization campaigning against the Shwe Gas Project and China's Trans-Burma pipelines, for human rights, environmental justice and revenue transparency in the oil and gas sector in Burma.

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EXECUTIVE SUMMARY

Burma has been praised in recent years for the return to a civilian government and for the implementation of legislative reforms; international economic sanctions are being lifted and President Thein Sein became the first Burmese politician to enter the White House since 1966. However, this common picture does not reveal the depth and complexity of the current situation in Burma.

Now is a crucial time. Despite taking superficial steps towards reform, encounters with local populations show that little substantial change in terms of extensive environmental degradation, human rights, and government transparency is actually being witnessed on the ground. On the contrary, in the face of frequently discussed reform, issues such as civil war, ethnic cleansing, extensive human rights abuses, blatant disregard for rule of law, and other contentious topics continue to characterize life for significant proportions of the population. All the while, existing legislation continues to centralize government power, restrict basic human freedoms, and deter those inside from establishing adequate, equitable and legitimate social change. In this light, a sound understanding of Burma's existing legal framework is vital to truly comprehend the state of affairs.

As the country begins to open up for the first time in more than 60 years, foreign investors and energy consumers worldwide are beginning to look progressively towards Burma and its rich natural resources. Aimed at policy makers, investors, corporations, various governments, intergovernmental groups and other stakeholders, this briefer seeks to highlight the necessity of a sound domestic legal framework in Burma through a critical analysis of the current limitations and implications thereof. Burma's Constitution and legislation must not solely represent a centralized government, but simultaneously protect the people and environment of Burma. Pending the essential policy changes recommended in this briefer, natural resource development, foreign direct investment and other relevant activities, particularly in the extractive industry, should be put to a halt. Any parties engaging in these activities choose to ignore serious environmental, social, and transparency related issues. They may, therefore, be accused of lacking the due diligence necessary to ensure good global governance in Burma.



ACRONYMS

ADB	Asian Development Bank
BEWG	Burma Environmental Working Group
BNI	Burma News International
CBS	Convention on Biological Diversity
CNPC	China National Petroleum Corporation
CSO	Civil Society Organization
EI	Extractive Industry
EIA	Environmental Impact Assessment
EITI	Extractive Industries Transparency Initiative
FDI	Foreign Direct Investment
FPIC	Free and Prior Informed Consent
GDP	Gross Domestic Product
HLP	Housing, Land and Property
ICCPR	International Covenant on Civil and Political Rights
ILO	International Labor Organization
INGO	International Non-Governmental Organization
MNHRC	Myanmar National Human Rights Commission
MOECF	Ministry of Environmental Conservation and Forestry
MOGE	Myanmar Oil and Gas Enterprise
MSG	Multi-stakeholder Group
NBSAP	National Biodiversity Strategic Action Plan
NCEA	National Commission for Environmental Affairs
NGO	Non-Governmental Organization
OHCHR	Office of the UN High Commissioner for Human Rights
PHCR	Physical Cultural Resources
RGI	Resource Governance Index
SIA	Social Impact Assessment
SPDC	State Peace and Development Council
UNDP	United Nations Development Program
USDP	Union Solidarity and Development Party
WWF	World Wide Fund for Nature

KEY SHORTCOMINGS OF EXISTING LAW

1.Environment:

- a.** 2008 Constitution, Chapter 4, Section 96, centralizes government control of the environment, seeming to grant no State or Regional power over legislation relating to environmental protection and conservation and no power to legislate or regulate large-scale natural resource development. Constitutional amendment is needed to clarify the scope of authority at the Union and sub-national levels.
- b.** Insufficient status of the NCEA, structural and financial constraints;
- c.** Vagueness of *2012 Environmental Conservation Law* renders it difficult to implement;
- d.** Lack of EIA, SIA, FPIC.

2.Human Rights

- a.** 2008 Constitution lacks right to freedom of information, participation in natural resource management, land ownership, benefit sharing, etc.;
- b.** Legislation that unfairly restricts freedom of assembly and freedom of expression, i.e. the *Peaceful Assembly and Peaceful Procession Law*, Penal Code 505(b);
- c.** Legislation that restricts the freedom of association, i.e. the *1908 Unlawful Association Act*, *1988 Law Relating to Forming of Organizations*, and the proposed NGO registration law;
- d.** Legislation that restricts basic economic and social rights, such as the government-centered HLP Laws, i.e. *Land Acquisition Act*, and the two "land reform laws", *Farmlands Law* and *Vacant, Fallow and Virgin Land Management Law*;
- e.** Restriction of freedom of expression and media freedoms: Post-publication censorship, ability of Ministry of Information to register/de-register media publications; *Electronic Transactions Law (2004)*, *Motion Picture Law (1996)*, *Computer Science Development Law (1996)*, *Television and Video Law (1985)*, *Printers and Publishers Registration Act (1962)*, *Wireless Telegraphy Act (1933)*;
- f.** Problematic Housing, Land and Property rights: *Land Acquisition Act*, *The Farmlands Law*, and the *Vacant, Fallow and Virgin Land Management Law*;
- g.** Non-existent legislation regarding labor rights.

3. Transparency and Natural Resource Management

- a.** Lack of institutional and legal setting for transparency (also poor reporting mechanisms, non-existent safeguards and quality controls for extractive projects, and a backdrop deficient in rule of law or democratic voice);
- b.** EITI implementation is underway, but not yet legitimate;
- c.** Legislation that gives the central government control of all natural resources, i.e. Section 37 of the 2008 Constitution;
- d.** Legislation that gives the central government control over the economy without stipulation of fair income distribution, i.e. Section 96 and 188 of the 2008 Constitution;
- e.** 75% parliamentary approval requirement for amending the 2008 Constitution;
- f.** Constitutional provisions grant the military an automatic 25% of parliamentary seats without legitimate election;
- g.** Lack of EIA, SIA FPIC.

INTRODUCTION: Neoliberal Globalization and Good Governance

Neoliberal globalization, or the removal of barriers to free trade and closer integration of national economies,¹ has been characteristic since the shift to a more global economy at the end of the Cold War and has allowed for serious transformations in both economic and political arenas. While some scholars may present the stance that the globalized nature of today's world produces a force with an incredible 'potential to enrich everyone in the world, particularly the poor', other arguments portray a picture in which globalization today is not working for much of the global economy, the environment, or the world's poor.²

In Burma, it is often the case of the latter argument: globalization, despite some positive qualities, is not inherently constructive. Rather, it must be properly managed in order to assure equitable benefits and adequate protection of the local populations and the local environments, which become increasingly penetrated by global forces. Familiarity with this transition and the emerging role of various spheres of authority in securing good global governance is crucial to fully grasp the complexity of governing natural resource extraction in an effective, equitable, and responsible manner. This briefer seeks, therefore, to analyze the Shwe Gas Project with regard to the challenges and opportunities of regulating the extractive industry in Burma from various levels and realms of spheres of authority.

It is no longer the nation-state alone, but rather various spheres of authority that play a role in generating good governance. Yet Burma's existing legal structure, coupled with a refusal to incorporate international norms into domestic laws, and working with corporations such as China National Petroleum Corporation (CNPC), which has been repeatedly chastised for poor transparency and reprehensible actions in other extraction projects, have set the stage for a failure of good governance. Domestic, international, and corporate actors have allowed for the Shwe Gas Project to continue despite social and environmental dangers. It is for this reason that the Shwe Gas Project provides ample grounds for examination.

This briefer provides a critical analysis with which problematic governance concerns, particularly those regarding Burma's existing legal infrastructure, are brought into the public sphere for examination and conversation. While the Shwe Gas Movement does not disregard that Burma may be taking steps in the right direction, this work seeks to address those issues and policies that still need improvement. Ultimately this briefer should be valuable not only for those concerned with the Shwe Gas Project and the extractive industry, but additionally it should be constructive for policy makers, and all Non-Governmental Organizations (NGOs) and

What is Good Governance?

"Good governance is, among other things, participatory, transparent and accountable. It is also effective and equitable. And it promotes the rule of law. Good governance ensures that political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision-making over the allocation of development resources."³

Civil Society Organizations (CSOs) who are concerned with the limitations and implications of Burma's current legal framework with regard to issues such as environment, human rights, transparency and an overarching process of good governance.

BACKGROUND & PRESENT SIGNIFICANCE: Burma's Political Climate

According to Burma News International (BNI), "The 2010 elections in Myanmar followed by the installation of a nominally civilian government have brought exciting developments in both economic and political liberalization."⁴ Despite a shaky political transition and the reigniting of old conflicts alongside intensified sectarian violence,⁵ Burma today is being opened to the neo-liberal forces of globalization for the first time in more than 60 years. It is in this light that Burma, especially due to its rich natural resources, will likely be seeing a vast increase in the extractive industry in approaching years.

Yet the opportunities of globalization, especially in terms of foreign direct investment (FDI) and natural resource development projects, are not without challenges, especially for the people and environment of Burma. Having been under military rule since 1962, local communities have repeatedly faced vigorous opposition to pro-democracy uprisings, arrests of over 1,400 political prisoners, and illegitimate elections held to appease the consciences of international actors. Years of stringent intelligence administration, oppression and strict communication regulations have silenced large portions of the Burmese population, while many others have fled as refugees or migrant workers into neighboring Thailand, India and Bangladesh. Clearly the people of Burma have experienced the direct force of the Burmese military regime.

In this oppressive context, citizens are not fairly consulted and kept aware of development plans, rather decisions and agreements between the military and foreign corporations are made with little or no transparency and all too often to the disadvantage of local people and the local environment. According to Clare Lockhart, in the World Economic Forum's 2013 report, *Natural Riches? Perspectives on Responsible Natural Resource Management in Conflict-affected Countries*, "Ultimately, the ability for Myanmar to translate natural resource wealth into prosperity will be dependent upon its ability to set the rules of the game for all stakeholders [...] A variety of institutions within Myanmar require strengthening for a robust sector that can generate economic development [...]"⁶ As such, it is increasingly necessary to assure that any resource extraction, whether ongoing or potential future undertakings, occurs at a standard that acknowledges and protects both people and the environment.

Shaky Grounds

- Ethnic Conflict Continues
- Increased presence of military forces around pipeline
- Not all political prisoners have been released
- Legal framework for FDI and EI is insufficient

A NEED FOR GOOD GOVERNANCE: Implications of Extractive Industries, Shwe Gas Project

The Shwe Gas Movement acknowledges a few key areas of concern that result from a failure to appropriately govern the Shwe Gas Project, namely: environmental degradation, human rights abuses, and an entrenchment of military control.

Environmental Degradation

Environmental degradation is a harsh consequence of the Shwe Gas Project. As Burma experiences increasing energy needs, the country's natural resources continue to be exported and kept unavailable to the local population. Consequently, communities, especially in Arakan State, ironically one of the most resource rich areas in the nation, remain off-the-grid in terms of electricity. People here have turned to wood burning to meet fuel and energy demands, leading to deforestation. Moreover, the Shwe Gas Project passes through biodiversity heartlands, splitting forests into two sections, impacting one of the ten most vulnerable forests in the world by requiring deforestation all along the pipeline's path.⁷ As infrastructure development for the Shwe Gas Project continues, the local fishing industry is additionally threatened. Fishermen are physically restrained from coming within a 10 mile radius of the gas and oil pipelines and drilling locations. There also exist severe environmental contamination from the outflow of chemicals, gas blowouts, and other hazardous substances that reach waterways and deplete oxygen levels, raising concerns about the sustainability of



marine life. Environmental Impact Assessments (EIA) have been carried out arbitrarily, but to date there has been no disclosure of results by government or corporations.

Human Rights Abuse

In a country known for extensive human rights abuses, it may come as no surprise that the exploitative process of massive natural resource extraction in Burma contributes significantly to this already present issue. Among many other mistreatments, the most pressing abuses directly linked to the Shwe Gas Project have been land confiscation, forced labor, extortion, intimidation, killings and beatings. While there are many documented cases of forced labor, other 'paid' workers experience deplorable conditions, notoriously imposing overtime work with little or no compensation, threatening loss of jobs for those who complain. Beatings and killings related to the increased presence of military battalions surrounding the pipeline corridor and unfair taxes for local fisherman and farmers are also rampant. Finally, forced eviction and land confiscation with little and often no compensation continues unchecked, robbing families not only of their dignity in the present, but also compromising their livelihood for generations to come.

Entrenching Military Control

The matter of military regimes reaping unfair benefits from natural resources is an observable fact in resource rich countries the world over. This has been no different in the case of Burma's military regime (SPDC) acting as the beneficiary of the fully state-owned, Myanmar Oil and Gas Enterprise (MOGE). Given the existing political climate in Burma, it is obvious that natural resources in this country have allowed for the junta to maintain power by capitalizing on funds from natural resources to finance military expenditures.

With an estimated annual income of US\$900 million for each of the oil and gas pipelines, the total revenue generated by the project will be approximately US\$1.8 billion annually.⁸ Add to this a 16% value added tax levied on the crude oil,⁹ and it becomes obvious that the Shwe Gas Project will provide significant revenue for Burma in upcoming years. However, a failure to establish government transparency means that the designation of these funds may continue to go unregulated. In this opaque condition official military expenditures have in the past decade accounted for up to 40 percent of the country's national budget, while UNDP statistics estimated Burma's health and education expenditures at a grim 0.4 percent and 0.5 percent respectively,¹⁰ each ranking the lowest in the world. This is changing as the military budget was cut to approximately 21 percent as of March 2013, with 3.9 percent and 4.4 percent being allocated to health care and education respectively.¹¹ Yet in light of a growing overall GDP, largely thanks to increased

income from the extractive industry and related foreign investment, this one percent budget decrease actually accounts for an increase in terms of real money. The military allotted US\$1.15 billion will go towards funding military hardware, aircraft, ships, vehicles, military industries, military construction, and weapons.¹² Meanwhile, health and education, areas that could truly help the people of Burma, receive a mere fraction of this sum.

CURRENT REGULATIONS AND LEGISLATION

This segment examines the current means of governing the extractive industry at three spheres of authority: (1) the nation state, (2) international institutions and (3) transnational corporations. As true global governance demands the compatibility or at least mutual accountability of these three distinct actors, it is clear that the current non-complimentary nature of these spheres, mostly because of Burma's domestic legislation, presents a massive challenge in assuring good governance of the extractive industry in Burma.

1. The Nation State

Burma's internal framework for governance, the national government, is arguably the most problematic realm. According to Andrew Huxley in *The Last Fifty Years of Burmese Law*, "since 1988 the Burmese state has been delegalized".¹³ For the last half century, the successive military governments have readily displayed a dismissive attitude towards the rule of law,¹⁴ causing the legislative process to be considered illegitimate and the judicial process devastatingly inequitable. Yet

Governing EI in Burma?

"In Burma, no law requires an EIA or Social Impact Assessment (SIA) before a development project is implemented. Public access to government information is restricted, and prior approval from agencies is required to release information about development projects. Ongoing development projects in Burma such as construction of roads and dams, mining, logging, as well as coal, oil and gas extraction do not have any standardized measure of negative impacts [...]"¹⁸

the law in Burma is not only illegitimate and inequitable, but also ambiguous. In *Burma: Beyond the Law*, this problem is addressed as such: "the manifest unfairness of many Burmese laws and the arbitrary manner in which they are applied is often compounded by the inaccessibility and vagueness of some of the statutory provisions."¹⁵ While on one hand tangible texts of Burmese laws are tough to locate, those laws that are existing and concrete are often inconsistent with international standards or simply fail to acknowledge and incorporate the international standards and norms into domestic law.¹⁶ When law is as unapproachable, inconsistent, and arbitrary, as it is in Burma, it is undeniable that the basic administrative and legal structures, standards, safeguards and political will cannot sufficiently govern the extractive industry in its own country.¹⁷

When addressing regulations and legislation of the extractive industry, there is a tendency for provisions to be made applicable to either environmental, human rights, or transparency related elements; these serve as the three main fields for the analysis of relevant regulations.

Environment

In terms of domestic environmental legislation pertinent to the extractive industry, there exist severe obstructions to maintaining a healthy, protected environment. First and foremost, it should be noted that there is no constitutional right ensuring a clean and healthy environment to the people of Burma. Furthermore, the 2008 Constitution, according to Chapter 4, Section 96, serves to centralize the Union government's environmental control by giving national legislature the power, but not the obligation, to enact environmental protection and natural resource laws. While Chapter 4, Section 188¹⁹ of the Constitution gives States and Regions some legislative control, Schedule II (which outlines the range of legislative power) lacks any provision relating to environmental conservation.²⁰ Sections 188 and 196 grant state/divisional authority to regulate certain types of resource extraction (small and medium sized, and not part of national grid), but ambiguities of the constitution make the full scope of their control unclear and creates a severe imbalance between Union and sub-national level authorities. Although sustainable protection of the environment is first and foremost in the interest of the local communities, they lack any control. The Union government has not met the needs of States by creating adequate environmental regulation.

Perhaps surprisingly, Burma does maintain an authority on environmental protection, the National Commission for Environmental Affairs (NCEA), which was formed in 1990. However, this commission was chaired by the Minister of Foreign Affairs until 2005, thus putting its legitimacy at stake and contributing to the suspicion that its creation was primarily a means of gaining international

endorsement. The NCEA is responsible for the setting of environmental standards, for the creation of environmental policies for using natural resources, for regulating pollution control, and for creating environmental policies that should not only focus on attaining development but also balance environmental needs,^{23,24} However, severe constraints on the legal structure and budget have arguably handicapped the functioning capacity of the NCEA.

Despite drafting an environmental policy in 1994, there was no recognized environmental law in Burma until *The Environmental Conservation Law* was enacted in 2012. What could have been a major victory in terms of protecting Burma's environment is a disappointingly weak law that instructs the Ministry of Environmental Conservation and Forestry (MOECF) to form an 'environmental conservation committee' responsible for "mobilizing activities for environmental conservation". Put simply, this law gives the Ministry the capacity of planning environmental management at national and regional levels; planning, implementing and monitoring environmental conservation and promotion and preventing, controlling and reducing environmental pollution; but the law itself does not regulate any of these activities.²⁵

An additional glaring hole in Burma's legislation is the absence of domestic mandate for environmental impact assessments (EIA), social impact assessments (SIA), free and prior informed consent (FPIC), or even a norm based interaction with the public and local communities in the informing or decision making of natural resource development projects. While Article 7 of the *Environmental Conservation Law* gives the MOECF the power to establish a potential system for assessments, it does not mandate the utilization of EIA or SIA (or FPIC) in any way.

The Asian Development Bank's (ADB) November 2012 analysis of Burma's environmental legal framework, noted that in terms of Environmental Assessment, Biodiversity Protection and Sustainable Natural Resource Management, Pollution Prevention and Abatement, Occupational Health and Safety, and Physical Cultural Resources (PHCR) Protection, Burma failed to satisfy ADB Environmental Safeguard properties.²⁶ This should not be forgotten as ADB projects, natural resource development endeavors, and other means of foreign direct investment look towards Burma's extractive industry in upcoming days, weeks, months, and years.

Given a lack of political motivation coupled with a faulty internal legal structure, it is no surprise that in 2011 BEWG reported, "There are no laws that comprehensively regulate pollution, no standards to adequately protect biodiversity, develop resettlement plans, or provide compensation. The lack of environmental protection legislation has left room for unabated ecological degradation."²⁷



Human Rights

Domestic legislation ensuring a healthy, protected citizenry is not prioritized within existing regulations of the 2008 Constitution. Internationally, the Right to Security of the Person indicates an inherent belief in an individual's right to life, liberty and security without violation of arbitrary deprivation of life, extrajudicial killing, slavery, torture, cruelty, inhumanity or degrading treatment, sexual violence, and physical or mental threat.²⁸ Although the Myanmar National Human Rights Commission (MNHRC) was established in 2011 by Presidential Decree, this Commission fails to act in accordance with the Paris Principles.²⁹ Furthermore, the MNHRC has been noted for failing to fulfill both its own mandates and its complaint reporting mechanisms,³⁰ thus deeming it by and large inadequate. Asian Forum for Human Rights offers a damning assessment: "[I]n an environment where the rule of law and independent and impartial justice system are still absent, the MNHRC has also largely failed in providing additional safeguards and protection of human rights."³¹ It is in this regard that a blatant deprivation and opposition by national human rights provisions pose a colossal obstacle to good governance in the extractive industry.

Civil and Political Rights—Basic Human Freedoms

Only a decade ago, Freedom House appeared before the United Nations Commission on Human Rights, listing Burma as one of the nine countries judged as the "worst of the worst" in terms of civil liberties and political rights.³² Despite reform, the Human Rights Watch *World Report 2012: Burma* argues that, "Burma's human rights situation remained dire in 2011 despite some significant moves by the government [...] freedoms of expression, association, and assembly remain severely curtailed."

³³

Freedom of peaceful assembly is significantly threat-

ened in Burma by mechanisms such as the *Peaceful Assembly and Peaceful Procession Law*, which demand government permission for public assembly, and various provisions in the Penal Code, i.e. Section 505 (b), which gives the government the right to imprison and fine anyone that makes, publishes or circulates statements, rumors, or reports that could potentially cause alarm to the public or induce offences against the State.³⁴

Freedom of association is also restricted, especially to student and political activists, by legislation such as the *1908 Unlawful Associations Act* and the *1988 Law Relating to Forming of Organizations*. Meanwhile, a new NGO registration law, which could serve to further restrict the right to freedom of association by strengthening government controls of NGOs, has been proposed by the Burmese government and is currently being drafted.³⁵

Freedom of expression and media freedoms, despite movement towards reform of pre-publication censorship, still faces "serious concerns over the possibility of continued control of the media through post-publication censorship, as well as the Ministry of Information's powers to register and de-register media publications, which may possibly be exercised arbitrarily," according to Asian Forum for Human Rights and Development.³⁶ Legislation in the form of the *Electronic Transactions Law* (2004), *Motion Picture Law* (1996), *Computer Science Development Law* (1996), *Television and Video Law* (1985), *Printers and Publishers Registration Act* (1962), *Wireless Telegraphy Act* (1933) and many others remain in place to restrain total freedom of expression.³⁷

In light of the fact that freedom of expression, association, and assembly remain strictly curtailed, it is clear

how affected populations and civil society organizations lose the power to interact and protect themselves from potential issues arising in the extractive sector. Moreover, the 2008 Constitution makes no reservation for the right of citizens to a clean and healthy environment and there is no guarantee of the right to “freedom of information, participation in natural resource management, customary land ownership, information and local languages, and equitable benefit sharing.”³⁸

Economic and Social Rights—Housing, Land and Property (HLP)

Along with civil and political rights, another set of basic rights granted to a person are the economic and social rights that constitute, but are not limited to water, food, clothing, housing, medical care and necessary social treatment. Such rights should also serve to protect an individual's livelihood in cases of circumstances beyond that individual's control. Yet in the case of Burma's legislation and 2008 Constitution, these rights are not only unprotected, but in fact often revoked through regulations that serve to centralize government power, giving the government the power to seize land, which is frequently the very source of livelihood itself, to the disadvantage of local landowners.

With regard to Housing, Land and Property Rights (HLP), a 2009 legal report by Scott Leckie and Ezekiel Simperingham of the INGO Displacement Solutions claims that, “the SPDC keeps a stranglehold on all HLP sectors as a part and parcel of its aim of preserving power and control.”³⁹ On one hand, Chapter 1, Section 37 of the 2008 Constitution gives the government ultimate ownership of all land and natural resources in the first place.⁴⁰ On another hand, the destruction of approximately 3,300 villages by the junta in Eastern Burma alone since 1994 attests to the fact that, “existing HLP laws in the country such as the *Land Acquisition Act* are used to justify and bolster this control.”^{41,42} In fact, the *Land Acquisition Act*, still in effect, formally establishes the government's right to seize any land with compensation to original owners, while the *1953 Land Nationalization Act* and *1963 Tenancy Law* gave further legal power for state seizure and redistribution of land.⁴³

In March 2012, two new laws, the *Farmlands Law* and the *Vacant, Fallow and Virgin Land Management Law*, constituting Burma's “land reform” were passed against recommendations and criticism from experts and activists. While the *Farmlands Law* actually replaces the *1963 Tenancy Law* and *1963 Protection of Peasants' Rights Law*, and repeals the *1953 Land Nationalization Act*, this new law in fact simply reiterates previous mandates of land nationalization and retains government authority in the seizure of land and determination of land usage.

The *Vacant, Fallow and Virgin Lands Management Law* was established to complement the new

Foreign Investment Law and to aid in the definition and distribution of land utilized for large-scale investment. The *Vacant, Fallow and Virgin Lands Management Law* is essentially an instrument for appraising, allotting, monitoring and protecting new and unused lands. While in theory this law should be utilized singularly for new and unused lands, as it expands the government's ability to seize land without compensation, in practicality it has been at times twisted and perverted to the disadvantage of local populations. Predominantly in ethnic areas, the government has been able to utilize this law to deem lands as ‘unoccupied’ or without an official registered owner, as these lands commonly lack statutory land registration, and ‘unproductive’, when fields are left fallow in the traditional process of shifting agriculture. In both of these cases, the *Vacant, Fallow and Virgin Lands Management Law* justifies the government's ability to seize lands that are neither ‘new’ or ‘unused’ without compensation.

The dismal truth is that even if laws did exist to better govern HLP rights, according to the 2008 Constitution, the Tamatdaw, or Burmese Army, continues to remain outside of civilian law, giving them the continued ability to confiscate land as they deem necessary. As natural resources provide a considerable incentive for the seizure and ownership of resource rich lands, it becomes apparent why the legislation and governance of land is such a significant issue related to the extractive industry.

Labor Rights—Employment

International labor rights indicate that individuals have the right to attain a livelihood through free choice of employment; just, favorable and healthy conditions of work; safeguard against unemployment; fair wages and equal pay; elimination of workplace discrimination; and freedom of association to form and join trade unions.⁴⁴ Yet legislation in Burma is nearly non-existent in regard to this basic right, thus giving corporations and the military power to enforce slave labor, allow for work in unfavorable conditions, unjustly lay off or fire employees, pay unfair and unequal wages, discriminate against women and various ethnic groups, and discourage (or outright ban) the freedom of association with regard to unions and issues in the workplace.

More specifically, domestic human rights legislation with regard to labor is in a grim state according to Amnesty International's 2012 Annual Report, as the ILO noted ‘no substantive progress’ towards incorporating ILO recommendations on forced labor regulations into domestic law.⁴⁵ In fact, while the Information Minister Kyaw Hsan attested to being ‘almost free from forced labour’, the ILO recorded an increase to nearly 30 forced labor complaints per month in 2011, compared with 21 per month in 2010, and only 10 per month in 2009.⁴⁶ While the majority of this labor was related to under-age military recruitment, these statistics portray

lack of accountability and national regulation, which could protect citizens from forced labor scenarios when dealing with transnational natural resource development projects.

Transparency & Natural Resource Management

The significance of overarching transparent governance practices and transparent land and resource management is mentioned repeatedly in the World Economic Forum's 2013 Report, *Natural Riches? Perspectives on Responsible Natural Resource Management in Conflict-affected Countries*. In the segment, "The Essentials: Transparency and Accountability across the Resource Chain", chapter editor Patrick Alley discusses a phenomenon known as the resource curse in which, rather than boosting development and prosperity, the exploitation of natural resources has a tendency to increase poverty and suffering; resource-rich countries, in this light, generally perform worse in terms of growth, equality, political stability and violent conflict than those lacking natural resources.⁴⁷ In order to avoid this curse, good governance, namely through transparent government and private practices becomes key.

In terms of national legislation that could ensure transparency of the extractive industry, the country again lacks a sufficient regulatory framework. According to The Heritage Foundation, in partnership with the Wall Street Journal, *The 2013 Index of Economic Freedom* gave Burma an overall economic freedom score of 39.2 out of 100, thus ranking at number 172 of freest

Transparency and Accountability in Natural Resource Management

"Harnessing the benefits and avoiding the risks posed by natural resource extraction cannot be achieved without transparency and accountability of government and the private sector."⁴⁸

countries in the world, followed only by Eritrea (36.3), Venezuela (36.1), Zimbabwe (28.6), Cuba (28.5), and North Korea (1.5).⁴⁹ While Burma's score increased by 0.5 in comparison to 2012 figures thanks to provisional institutional reforms in 2012, Burma is still ranked 40th out of the 41 countries in the Asia-Pacific.⁵⁰ It is in this light that the Heritage Foundation accuses Burma of maintaining a regulatory environment that is "hampered by a lack of legal transparency" with much business activity concentrated inside of state-owned enterprises.⁵¹ Moreover, pervasive corruption characteristic of Burma's military government is reportedly worsening, despite the 2012 reforms.

In the Revenue Watch Institute's recent *2013 Resource Governance Index* Burma received a "failing" score of four out of 100, subsequently ranking last out of 58

Figure 1. Revenue Watch Institute: *The 2013 Resource Governance Index*⁵⁴

BURMA (Myanmar) 2013 RESOURCE GOVERNANCE INDEX				
	Institutional & Legal Setting	Reporting Practices	Safeguards and Quality Controls	Enabling Environment
What it means:	The degree to which the laws, regulations and institutional arrangements facilitate transparency, accountability and open/fair competition.	The actual disclosure of information by government agencies.	The presence and quality of checks and oversight mechanisms that encourage integrity and guard against conflicts of interest.	The broader governance environment based on more than 30 external measures of accountability, government effectiveness, rule of law, corruption and democracy.
Score (out of 100):	8/100	5/100	2/100	2/100
Rank (out of 58):	58 th /58	57 th /58	57 th /58	58 th /58
TOTAL SCORE 4/100				
FINAL RANK 58TH/58				

different countries in its quality of governance in the oil, gas and mining sector.⁵² In each of the four individual categories evaluated, namely Institutional and Legal Setting, Reporting Practices, Safeguards and Quality Controls, and Enabling Environment, Burma was ranked repeatedly in 57th or 58th place out of the 58 countries,⁵³ thus further attesting to the lack of a sufficient transparency related legal framework in Burma.

Becoming Compliant with the Extractive Industry Transparency Initiative (EITI) is one way in which Burma could potentially improve its transparency related legal setting. EITI is a G8 endorsed international standard for revenue transparency in the extractive industries. Formed in 2002, the initiative began implementation in 2006 and since that time the EITI has been gaining signatories, developing nation-specific strategies, and coordinating unique multi-stakeholder groups (MSG) of governments, civil society and company shareholders to synchronize revenue transparency, especially in resource-rich developing countries. EITI compliant countries are required to publish what they pay to governments, and likewise governments are obligated to publish what they obtain from companies. Independent officials then reconcile these figures; an annual EITI report publishes these payments made and received by companies and governments partnered in extractive projects.

President Thein Sein announced the Burmese government's intention to sign the EITI in July 2012, noting that "We are preparing to be a signatory to the Extractive Industries Transparency Initiative to ensure that there is maximum transparency in these sectors and try to make sure the benefits go to the vast majority of the people and not to a small group." According to the Burmese Government's official EITI timeline, Burma was expected to become a candidate by the year 2013. In reality Burma has met only two of the five sign-up requirements for candidacy. Burma has (1) announced a public statement of its intention to implement the EITI, and (2) appointed a senior individual to lead on the implementation of the EITI. Meeting the requirements of working with civil society and companies on the EITI; establishing a multi-stakeholder group to oversee the implementation of the EITI; and establishing, with participation from all actors of the MSG, a fully costed work plan, are items yet to be completed.

Bearing this information in mind, it becomes obvious that Burma does not yet have the framework or civil society participation to claim candidacy with the initiative. However, while Burma is under pressure to improve transparency or halt natural resource development projects and contracts until some sort of transparency framework is set in place, Burma's government must take caution not to rush the EITI process, as the EITI is a nationally determined initiative. The mistake of rushing EITI implementation could leave out meaningful participation with civil society groups and could result in inefficient watered-down legislation; if any of these two repercussions should occur, transparency would not be effectively improved, and the entire EITI process would be subsequently illegitimate. Furthermore, it should be recognized that becoming EITI compliant is only one step in an overall fight for transparency. EITI compliance would not solve the issue of non-disclosed (and often simply non-occurring) EIA and SIA. Nor would it automatically implicate meaningful civil society participation and policy reform.

Additional steps must be taken to ensure transparency at all levels. An evaluation of policies such as Section 37 of the 2008 Constitution is necessary as this section gives the government (a) ultimate ownership of 'all lands and all natural resources above and below the ground, above and beneath the water and in the atmosphere of the Union' and (b) the ability to enact necessary laws for the extraction and utilization of State-owned natural resources by economic forces. An evaluation of Sections 96 and 188 would also be desirable as these give the central government considerably more control than the state and regional authorities over economic regulation and profit management of extractive projects. Centralized power outweighs state and regional powers even within ethnic states, with no specific mandates for fair and adequate income distribution.

Figure 2. Burma's Failure to Meet the EITI Sign-Up Requirements⁵⁵

SIGN-UP REQUIREMENTS (5)	STATUS
The government is required to issue an unequivocal public statement of its intention to implement the EITI;	ACCOMPLISHED
The government is required to commit to work with civil society and companies on the implementation of the EITI;	IN PROGRESS
The government is required to appoint a senior individual to lead on the implementation of the EITI;	ACCOMPLISHED
The government is required to establish a multi-stakeholder group to oversee the implementation of the EITI;	FAILED
The multi-stakeholder group, in consultation with key EITI stakeholders, should agree and publish a fully costed work plan, containing measurable targets, and a timetable for implementation and incorporating an assessment of capacity constraints.	FAILED

In Burma, 65 percent of the population, or approximately 35 million people, depend on the land and forest to ensure their livelihoods.⁵⁶ In such a situation, faulty legislation and centralized government control of land and natural resources often fails to protect local populations from corruption and may lead to growing inequalities or frustrations between rich and poor, state and civilian, and also between and amongst various ethnic groups and numerous regions of the country. According to Dan Smith, again in the World Economic Forum 2013 report, such results may impede social cohesion, and, along with institutional deficiencies and economic deficiencies, may provide 'fertile soil in which conflicts are generated, grow and explode'.⁵⁷ In this regard, it becomes apparent how a lack of transparency in terms of government and private practices fuels conflicts and even civil war.

Other transparency-related governance doubts arise when one considers the difficulty of amending the 2008 Constitution. At present, a nearly impossible 75% parliamentary approval is mandatory for amendment to occur. Furthermore, existing Constitutional provisions stipulate that military is entitled to an automatic 25% of parliamentary seats—even without being legitimately elected.

In sum, given that at present the state maintains significant ownership of three state-owned enterprises in the gas sector that regulate and collect foreign gas company payments on the state's behalf,⁵⁸ that the military regime is the sole beneficiary of Myanmar Oil and Gas Enterprise (MOGE), and that the USDP and military together control over 75% of parliamentary seats under current constitutional settings, it becomes obvious that both the state and the military benefit highly from current constitutional provisions and subsequent stakes in natural resources. Therefore, it may be doubtful that an acceptable and transparent framework would be installed willingly in the immediate future.

Until Burma's legal framework is developed in a manner that does not singularly represent the interests of the centralized government power, but rather protects the people and environment of Burma, it remains unlikely that governing natural resource extraction at the domestic level will occur in a socially and environmentally friendly manner.

2. International Institutions

International institutions provide another SOA outside of the realm of the nation state with which it is possible to govern the extractive industry. At present the United Nations and its various branches maintain numerous conventions, provisions, and texts regarding norms and responsibilities of states and occasionally corporations, especially with regard to issues of human rights, environment, and transparency measures. Burma has signed 31 international treaties with regard to the en-

vironment,⁵⁹ a handful of which are relevant to the extractive industry and endeavors like the Shwe Gas Project, and Burma is currently a party to a few human rights treaties.⁶⁰

Burma ratified the Convention on Biological Diversity (CBD) in 1994, which would ideally assure the respect, preservation, and promotion of indigenous knowledge, innovations, and practices relevant for conservation and sustainable use of biological diversity (Article 8j).⁶¹ Given that the Shwe Gas Project passes through biodiversity heartlands, splitting forests into two sections, impacting one of the ten most vulnerable forests in the world,⁶² and cutting through the Naga-Manipuri-Chin Hills Moist Forests and the Northern Indochina Subtropical Forests, classified as Global 200 Eco regions by the World Wide Fund for Nature (WWF) as crucial areas for global biodiversity, it seems obvious that the CBD would apply to the issues at stake in the Shwe Gas Project. Yet despite some government follow-up reports, Burma's National Biodiversity Strategic Action Plan (NBSAP) has rather marginalized indigenous people's contribution to biodiversity conservation and fails to consult or inform indigenous peoples or environmental groups regarding the NBSAP, thus coming into immediate contradiction with the principles of the CBD.⁶³

The UN Declaration on the Rights of Indigenous Peoples, which was officially endorsed by Burma in September 2007, provides a good demonstration of Burma's tendency to sign on to international treaties without necessarily respecting or following the principles advocated by that particular declaration. In the Declaration on the Rights of Indigenous Peoples, for example, Article 32 maintains the right to FPIC, Article 10 regards the rules of forcible relocation, and Article 26 establishes land rights.⁶⁴ Similarly, the International Labor Organization (ILO) Convention 169, Article 14 "recognizes the rights of ownership and possession of peoples traditionally occupying land" and Article 15 safeguards "the rights to natural resources—including participation in their use, management and conservation".⁶⁵ ILO Convention 29 on Forced Labor also provides that state parties undertake measures to limit the use of forced labor.⁶⁶ Yet the previous discussion of domestic law in Burma displays the complete disregard for the principles determined by both of these Declarations and Conventions.

Burma is party to only two major human rights treaties; the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women.⁶⁷ While becoming signatory is a step in the right direction, all of the aforementioned discussion on human rights in Burma effectively demonstrate that the two conventions Burma has endorsed are not being properly implemented.

3. Transnational Corporations (TNCs)

Corporate stakeholders could potentially be a source of governance. Unfortunately, CNPC has failed to take action in its potential role of governing the Shwe Gas Project. CNPC maintains a notorious reputation, particularly soured by their active role in materially supporting the Sudanese government during the Darfur genocide. Furthermore, according to *Crude Beginnings: An Assessment of China National Petroleum Corporation's Environmental and Social Performance Abroad*, CNPC lacks established mechanisms, "through which community groups, civil society organizations and investors can engage the company on relevant issues."⁶⁸ CNPC has been cited for "numerous environmental pollution violations [...] producing unconventional, dirty fuels, which can significantly increase its environmental

footprint," and has invested in detrimental ventures such as the production of super-heavy oil in Venezuela's Orinoco belt, an area with great biological diversity, and Alberta, Canada's tar sands project, also known as "the most destructive project on earth".⁶⁹

The outlook for appropriate self-regulation by CNPC remains bleak. According to Transparency International's 2011 Corruption Index, CNPC operates in seven of the 10 most corrupt countries.⁷⁰ Furthermore, CNPC has historically received a low overall company result of revenue transparency, often disclosing only geographical information, with little provision of relevant revenue transparency information.⁷¹ CNPC also received a low rating in the three fields of payment transparency, operation transparency, and anti-corruption programs of international oil transactions.⁷²



CONCLUDING REMARKS & RECOMMENDATIONS

While Burma may be taking steps in the right direction, the Burmese government is still far from being one of good governance. Until the Burmese government develops its own sound policy framework to protect and sustainably develop its natural resources in a way that meets 'good governance' guidelines, no amount of international treaties or corporate regulation will mitigate the damage of natural resource development projects like the Shwe Gas Project.

Until Burma's internal framework meets these standards, foreign direct investment, particularly in extractive industries, should not be an option. This is a call for all investors, corporations, stakeholder governments, intergovernmental groups, and various others to utilize their means and authority to pressure the Burmese government. Pending the necessary policy changes, all parties involved may be lacking the due diligence necessary to ensure good global governance.

The following recommendations should be undertaken with the UN rights based approach as a basis, in which 'people are recognized as key actors in their own development, rather than passive recipients of commodities and services.'

To the Government of Burma

Regarding Environment

- Develop, ratify, and implement domestic environmental policies that meet international environmental norms and standards. Some examples include, but are not limited to: Demanding full, independent FPIC, EIA and SIA for all extractive projects;
- Furthermore, these assessments must be conducted in collaboration with local communities and affected populations, and the release of assessment findings should be mandatory;
- Ratify and also implement core environmental rights treaties;
- Review existing duties and mechanisms of the NCEA, and, if necessary, establish a new independent body with an adequate budget and legitimate decision-making power to focus on guaranteeing social and environmental justice.

Regarding Human Rights

- Review and amend existing legislation and the 2008 Constitution to assure that domestic legislation meets international human rights norms and standards. Some examples include, but are not limited to: Repealing legislation that unfairly restricts freedom of assembly and freedom of expression, i.e. the *Peaceful Assembly and Peaceful Procession Law* and any additional provisions in the Penal Code that are inconsistent with international human rights norms and standards; repealing legislation that restricts the freedom of association, i.e. the *1908 Unlawful Association Act*, *1988 Law Relating to Forming of Organizations*, and the proposed NGO registration law; revisiting and amending legislation that restricts basic economic and social rights, such as the government-centered HLP Laws, i.e. *Land Acquisition Act*, and the two "land reform laws", *Farmlands Law* and *Vacant, Fallow and Virgin Land Management Law*;⁷³
- Develop, ratify, and implement new legislation and/or amend the 2008 Constitution with regard to international labor rights demands; new legislation should meet ILO norms and standards;
- Assure that the proposed enabling law of the MNHRC complies with the Paris Principles and incorporates participation from various stakeholders, i.e. opposition parties, civil society organizations, and ethnic groups;
- Not only ratify, but also implement core human rights treaties and corresponding protocols, i.e. International Covenant on Civil and Political Rights (ICCPR);
- Actively engage with the Office of the UN High Commissioner for Human Rights (OHCHR) for ongoing reforms.

Regarding Transparency & Natural Resource Management

- Become a signatory to EITI: Ensure CSO involvement in EITI preparation and implementation;
- Until Burma becomes EITI compliant, the government should adopt the following policy guidelines to mitigate existing flaws in extractive industry governance:⁷⁴ disclose contracts signed with extractive companies; ensure that regulatory agencies publish timely comprehensive reports on their oil, gas and mining operations, including detailed revenue and project information; extend transparency and accountability standards to state-owned companies and natural resource funds;
- Develop, ratify, and implement new legislation and amend the 2008 Constitution, revoking the ability of the government (and its state-owned enterprises) to function despite a lack of transparency, this may include: repealing legislation that gives the central government control of all natural resources, i.e. Section 37 of the 2008 Constitution; repealing legislation that gives the central government control over the economy without stipulation of fair income distribution, i.e. Section 96 and 188 of the 2008 Constitution; modifying the 75% parliamentary approval requirement for amending the 2008 Constitution; modifying Constitutional provisions that grant the military an automatic 25% of parliamentary seats without legitimate election;
- Adopt international reporting standards for governments and companies.

To International Institutions

- Maintain better oversight with regard to international conventions, treaties, etc., and hold faltering governments accountable for failure to meet the norms and standards established therein: formally discuss Burma's ratification, but lack of implementation regarding the standards set in the Convention on Biological Diversity, Declaration on the Rights of Indigenous Peoples, Convention on the Rights of the Child, and the Convention on the Elimination of all Forms of Discrimination Against Women, to name a few; encourage member states to stop lifting economic sanctions and encouraging Foreign Direct Investment in Burma until the government of Burma meets standards of signed treaties;
- Facilitate a legitimate policy change in Burma, which should include meaningful participation from multi-stakeholder groups.

To Transnational Corporations

- Apply international standards of corporate social responsibility, due diligence and sustainable development principles to any and all endeavors in Burma. This includes, but is not limited to: conducting EIAs and SIAs, establishing FPIC, disclosing financial contracts and assessments to the public, and participating in benefit sharing;
- In cases where Burma's domestic legislation is unavailable or inadequate to ensure the aforementioned practices, corporations and investors should follow their home country or international standards of corporate responsibility, whichever one promotes better well-being for the people and environment;
- Cease any and all business related activities or new forms of engagement in the extractive industry until Burma's government effectively institutes and implements the necessary reforms outlined above.

**Additional Recommendations to
Civil Society**

- CSOs should work not only amongst themselves, but also with all portions of the population in Burma, the Burmese government and relevant corporations to advocate policy reforms and development that is both meaningful and participatory;
 - CSOs should assist in educating the general public on issues such as environment, human rights and transparency; the general public may then understand why political reform is important to their individual cases and how they as individuals may play a role in shaping this potential reform;
 - CSOs should monitor the state, private and transnational actors in all aspects of the extractive industry in order to assure that social and environmental concerns are met in all project undertakings.
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