



**COMPLAINT TO THE SOUTH KOREA NATIONAL CONTACT POINT
UNDER THE SPECIFIC INSTANCE PROCEDURE OF THE OECD GUIDELINES FOR
MULTINATIONAL ENTERPRISES**

**REGARDING NATURAL GAS DEVELOPMENT BY DAEWOO INTERNATIONAL AND
KOREA GAS CORPORATION (KOGAS) IN BURMA (MYANMAR)**

**FILED BY EARTHRIGHTS INTERNATIONAL (ERI) ON BEHALF OF
THE SHWE GAS MOVEMENT (SGM)**

CO-COMPLAINANTS ARE:

**THE KOREAN HOUSE FOR INTERNATIONAL SOLIDARITY (KHIS)
KOREAN CONFEDERATION OF TRADE UNIONS (KCTU)
FEDERATIONS OF KOREAN TRADE UNIONS (FKTU)
CITIZEN'S ACTION NETWORK (CAN)
PEOPLE FOR DEMOCRACY IN BURMA
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HUMAN RIGHTS SOLIDARITY FOR NEW SOCIETY
THE ASSOCIATION FOR MIGRANT WORKERS' HUMAN RIGHTS
BURMA ACTION KOREA**

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I. INTRODUCTION

i. Identity and Interest of the Complainants

EarthRights International (ERI), on behalf of the Shwe Gas Movement (SGM), brings this complaint alleging that Daewoo International and the Korea Gas Corporation (KOGAS) have breached and will continue to breach a number of the OECD *Guidelines for Multinational Enterprises* (the “*Guidelines*”) related to their activities in Burma (Myanmar).¹ These breaches are related to the companies’ exploration, development, and operation of the natural gas project in Burma known as the *Shwe Gas Project*, meaning “gold” in Burmese (hereinafter “Shwe Project”).

ERI is registered in the United States as a not-for-profit, nongovernmental (NGO) organization specializing in human rights, the environment, and corporate and government accountability. Since 1994, ERI has collected on-the-ground information about human rights abuses connected to large-scale natural gas projects in Burma. This has included gathering witness and victim testimony in Burma and on Burma’s western and eastern border areas. ERI represented Burmese victims of human rights abuses who sued the US-based oil company Unocal Corporation in U.S. courts for complicity in human rights abuses connected to that company’s involvement in the Yadana natural gas pipeline in Burma.² The organization represents plaintiffs in various litigation in U.S. courts who allege that corporations were complicit in the human rights abuses that they suffered.

The Shwe Gas Movement (SGM) is a coalition of civil society organizations and individuals from Arakan State in western Burma, including representatives from populations directly affected by Daewoo International’s and KOGAS’s natural gas extraction plans.³ For this reason, SGM has standing as a legitimate stakeholder in the Shwe Project. Initiated in 2002 by the All Arakan Student and Youth Congress (AASYC), the SGM currently includes AASYC, the Shwe Gas Campaign Committee-India, Arakan Oil Watch (AOW), SGM Bangladesh, and EarthRights International (ERI). The SGM mission is to prevent human rights and environmental abuses connected to the Shwe Project and to promote genuine, inclusive, and democratic participation in development decisions in Burma.

Co-complainants are the Korean House of International Solidarity (KHIS), Korean Confederation of Trade Unions (KCTU), Federations of Korean Trade Unions (FKTU), Citizen’s Action Network (CAN), People for Democracy in Burma, Writers for Democracy in Burma, Human Rights Solidarity for New Society, The Association for Migrant Workers’ Human Rights, and Burma Action Korea.

ii. Identity of the Corporations Involved

Daewoo International is a public company incorporated in Seoul, South Korea and holds a 51 percent stake in the consortium (the “Shwe consortium”) that controls the A-1 and A-3 natural gas blocks located offshore in Burma’s Arakan State.⁴ Korea Gas Corporation (KOGAS) is a publicly listed, state-controlled company that holds an 8.5 percent stake in the Shwe consortium. The South Korean government holds the largest stake in KOGAS (26.9 percent), followed by the majority state-owned

¹ Burma was renamed Myanmar in 1989 by the ruling military junta without consulting the citizens. While the terms *Bama* and *Myanma* are used interchangeably in the Burmese language, the use of the term “Burma” in the English language is generally preferred by the pro-democracy movement and by the complainants.

² See EarthRights International, *Doe v. Unocal*, <http://www.earthrights.org/legal/unocal/>.

³ For a description of the direct impacts of Daewoo’s and KOGAS’s gas development project on local people in Burma, see sections I.iv and V of this complaint.

⁴ See <http://www.daewoo.com/english/index.jsp>.

Korea Electric Power Corp. (KEPCO), local governments, and individual investors.

iii. Previous Contact between the Corporations and the Complainants

Daewoo International spoke on the telephone with a representative of the Korean House for International Solidarity (KHIS) on December 12, 2005, in response to KHIS's public opposition to the Shwe Project. The company later sent a fax to the KHIS office in which Daewoo offered no reasons why KHIS and its partners should not oppose the Shwe Project, but the company did state in the fax that they were open to "reasonable dialogue."⁵

In November 2006, ERI and the Korean Federation for Environmental Movement (KFEM) sent letters to both Daewoo International and KOGAS, expressing concern that the Shwe Project would lead to human rights and environmental abuses, similar to those that occurred in conjunction with the Yadana and Yetagun natural gas pipeline projects in Burma (see section *IV.i.* below). The letter requested that, pursuant to international standards,⁶ the companies prepare an Environmental Impact Assessment (EIA), a Social Impact Assessment (SIA), and a Human Rights Impact Assessment (HRIA) for the Shwe Project. To date, neither company has acknowledged or responded to these letters.

In April 2008, eleven Korean NGOs - including co-complainants KHIS, KCTU, FKTU, People for Democracy in Burma, Human Rights Solidarity for New Society, The Association for Migrant Workers' Human Rights, and Burma Action Korea - filed a request for policy recommendations and investigation with the National Human Rights Commission of Korea (NHRCK). The Commission rejected the petition for policy recommendations and investigation because it decided that it lacked jurisdiction according to the NHRCK Act, Article 32, but it is still considering other aspects of the issues presented in the petition.

iv. Summary of Breaches by Daewoo International and KOGAS in Burma

As described in this complaint (in sections *IV.ii* and *V*), Daewoo's and KOGAS's natural gas project in Burma has already been linked to human rights abuses. Local community members who have exercised their human right to express opposition to the Shwe Project have been met with intimidation and force by the military regime.⁷ Since April 2008, students in Arakan State have been detained, interrogated, and forced into hiding based on the suspicion they are opposed to the Shwe project and for allegedly hanging posters in public places expressing opposition to the Daewoo-led project.⁸ After a public

⁵ Unofficial translation of fax sent by Daewoo International Inc. to KHIS on December 12, 2005, on file with complainants.

⁶ See letters from EarthRights International and the Korean Federation for Environmental Movement to Daewoo International and KOGAS detailing the international law and Korean law requirements for conducting an environmental impact assessment (EIA) for the Shwe Project, November 16, 2006, available at http://www.earthrights.org/submissions/update_shwe_gas_project.html (last visited September 30, 2008). As the letters describe, the requirement of an EIA for projects that will have a significant impact on the environment is widely regarded by legal experts to be part of customary international law. It is required under the Stockholm Convention (1972), Principles 15 and 17 of the Rio Declaration (1992), and in addition, many international lenders have adopted EIA procedures, requiring compliance as a precondition before providing project or development funding. All multilateral development banks have adopted environmental assessment policies, which apply to proposed project activities. The Asian Development Bank established EIA procedures in the early 1980's. The World Bank's Environmental Assessment Directive was first issued in 1989. Likewise, South Korean law requires EIAs for projects that will have significant impact on the environment in South Korea (The Environmental Preservation Act (1977); the Basic Environmental Act (1990)).

⁷ EarthRights International interview 032-2008, Sittwe, Arakan State, Burma, September 9, 2008, on file with ERI; SGM interviews, on file with SGM.

⁸ *Id.*

awareness campaign in June and July 2007 that questioned the Shwe Project, a local curfew was temporarily imposed by authorities, followed by the arrest of local activists suspected to have been involved in the campaign.⁹ Since the project began, several local people and their immediate and extended families have been detained, interrogated, and forced into hiding by the military due to suspicions they are either opposed to the project or in communication with people who are opposed to the project.¹⁰

The Shwe project has been linked to forced relocations in Arakan State.¹¹ There are reports of the forced displacement of five villages on Baday Island, where residents have reportedly been told they must leave so that the island may be given over for the use of the energy industry; they were offered no compensation.¹²

The waters surrounding offshore drilling rigs in the Bay of Bengal are now military-patrolled exclusion zones and local people are prevented from fishing in what was once a principal and abundant fishing area. There are reports of the military violently beating and arresting fisherfolk for fishing in these restricted waters; for violating restrictions that were unbeknownst to them.¹³ Boats owned by local people are routinely confiscated by local government authorities to ferry passengers to offshore sites believed to be connected to the Shwe Project. The confiscated boats are also reportedly used by the authorities to patrol the waters that became restricted when Daewoo's and KOGAS's offshore exploration and drilling began; boat owners are given no monetary or fuel compensation.¹⁴ Refusal to submit property to the authorities is uncommon as it is widely understood that it can bring repercussions on the financial and physical security of property owners.¹⁵ According to one Arakan trader, "When the authorities would like to go to offshore drilling sites, local boats are expected to carry people there. The authorities don't provide any oil or anything...If the boat owner refuses [to take the authorities out to sea], sooner or later they would be arrested or their business would be stopped."¹⁶

Given the Burmese military's well-documented human rights record and pattern of grave violations associated with large-scale development projects,¹⁷ and given the proposed plans of Daewoo and KOGAS to construct a cross-country pipeline from their offshore operations, it is foreseeable that without intervention these abuses and others will continue to occur and increase in connection to the Shwe Project. The gas pipeline slated for construction will transport the Shwe gas to China and could pass through at least 24 townships and through several dense population centers in Burma, where

⁹ See *infra* note 176, "Arakan State under military control," Kaladan News, June 8, 2007 available at http://www.bnionline.net/index.php?Itemid=6&id=1805&option=com_content&task=view (last visited Sept. 5, 2008).

¹⁰ *ERI and SGM Interviews supra* note 7.

¹¹ See *Amnesty Report, infra* note 89.

¹² "Our Friends in the North", *infra* note 141. Graeme Jenkins, *Burmese Junta Profits From Chinese Pipeline*, The Daily Telegraph, Jan. 16, 2008, available at <http://www.telegraph.co.uk/news/uknews/1575571/Burmese-junta-profits-from-Chinese-pipeline.html> (last visited October 28, 2008).

¹³ *Id.*; *Supply and Command infra* note 140 at 22, 31.

¹⁴ *ERI Interview supra* note 7.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See *E.g., Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997); See also EarthRights Int'l (ERI) & Southeast Asian Information Network (SAIN) *Total Denial* (2000); EarthRights Int'l (ERI) & Southeast Asian Information Network (SAIN), *Total Denial Continues: Earth Rights Abuses Along the Yadana and Yetagun Pipelines in Burma* (2001); EarthRights Int'l (ERI), *More of the Same: Forced Labour Continues in Burma* (2001); EarthRights Int'l (ERI), *Total Denial Continues: Earth Rights Abuses Along the Yadana and Yetagun Pipelines in Burma* (2003); EarthRights Int'l, *The Human Cost of Energy: Chevron's Continuing Role in Financing Oppression and Profiting from Human Rights Abuses in Military-Ruled Burma (Myanmar)* (2008).

incidents of forced displacement and other human rights abuses, such as forced labour, will likely occur.

Environmental concerns are equally serious: construction of the proposed Shwe pipeline to China will pass through environmentally sensitive eco-regions, such as mangrove swamps and estuaries that face irreparable damage in the absence of intervention and sound environmental planning. As explained in Sections *V.i*, *V.iii*, and *V.v* of this complaint, the companies have failed to conduct an environmental impact assessment (EIA), failed to disclose information to affected communities, and failed to consult with local communities.

Through their involvement in the Shwe Project, Daewoo International and KOGAS are currently and/or potentially in breach of the following *OECD Guidelines for Multinational Enterprises*, described fully in Section *IV* of this complaint:

- *OECD Guideline* Ch. II, § 1 and 2 by failing to contribute to sustainable development and failing to respect the human rights of people affected by the Shwe Project;
- *OECD Guideline* Ch. III, § 1 and Ch. V, § 2 by failing to disclose relevant information about their activities and financial performance to the public and affected communities, and failing to consult with communities affected by their activities;
- *OECD Guideline* Ch. IV, § 1(c) by failing to contribute to the elimination of forced labour;
- *OECD Guideline* Ch. V, § 3 by failing to conduct an EIA, despite having already undertaken extensive offshore exploration.

v. Specific Requests of the South Korean NCP

The complainants make the following specific requests of the NCP:

- To facilitate negotiations between the complainants and the companies regarding solutions to the breaches herein;
- To urge Daewoo International and KOGAS to ensure relevant stakeholders agree upon the realization of preventative measures designed to protect human rights and the environment before the project proceeds;
- To commit, in writing, upon receipt of this complaint, to respond to this complaint in a clear and timely manner;
- To inform the complainants of the NCP's progress in handling this complaint;
- To translate into English language the NCP's documentation related to this complaint that is provided to SGM and the public.
- To write and make public a final statement, translated into English, on the outcome of the NCP's handling of this complaint.

In the absence of intervention and a meaningful dialogue between the companies and the complainants toward real solutions to the ongoing breaches of the *Guidelines*, the SGM maintains the reasonable demand that the companies and the Korean government postpone the Shwe Project. The SGM is confident that the NCP can facilitate a mutually amicable solution to these very grave incidents and threats of human rights and environmental abuses connected to the Shwe Project.

II. APPLICABILITY

i. Why Daewoo International and KOGAS, and this Complaint, are Subject to the Guidelines

As an OECD member country and signatory to the *Guidelines*, South Korea is committed to encouraging multinational companies headquartered in South Korea to follow the *Guidelines* in their operations worldwide. All multinational Korean companies and their activities are subject to the *Guidelines*, regardless of where the companies' activities occur.

Daewoo International and KOGAS are subject to the principles and standards in the *Guidelines* by virtue of the fact that the companies are incorporated in South Korea and listed on the Korea Stock Exchange (KOSCOM).

Daewoo International is incorporated in Seoul, South Korea and has a 51 percent stake in the consortium that controls the A-1 and A-3 natural gas blocks located offshore in Burma's (Myanmar's) Arakan State.¹⁸ It is listed on the Korea Stock Exchange (KOSCOM 047050) and traded on the OTC market (DWOIF.PK).

Korea Gas Corporation (KOGAS) holds an 8.5 percent stake in the Shwe consortium. The South Korean government holds the largest stake in the company (26.9 percent), followed by Korea Electric Power Corp. (KEPCO), local governments, and individual investors. It is headquartered in Seongnam, South Korea, and traded on the Korea Stock Exchange (KOSCOM 036460) and on the OTC market (KRAGF.PK).

The *Guidelines* provide that the NCPs should make themselves easily accessible to NGOs and address issues raised "in an efficient and timely manner."¹⁹ This complaint details current violations of the *Guidelines*, as well as the immediate likelihood of future, more serious and widespread violations.

ii. Why NCP Involvement is Requested and Necessary at this Time

Burma is not an adhering country to the OECD and does not have a NCP; Daewoo and KOGAS are legally incorporated and headquartered in South Korea, making the Korean NCP the appropriate venue to file this complaint. Korean companies and the Korean government have a combined majority stake in the Shwe Project.

Oil and gas developments in Burma have directly resulted in human rights abuses.²⁰ As explained in this complaint, numerous *Guidelines*, including those regarding consulting with affected communities, are already being violated by KOGAS and Daewoo, and the companies are at risk of complicity in additional and more egregious violations as this project proceeds. It is reasonably foreseeable that Daewoo's activities will further undermine sustainable development and environmental protection, and further contribute to forced labour, forced relocation, and other human rights abuses that have been

¹⁸ See <http://www.daewoo.com/english/index.jsp>.

¹⁹ *OECD Guidelines for Multinational Enterprises: Decision of the Council*, June 2000, "Procedural Guidance" *Implementation in Specific Instances*, available at http://www.oecd.org/document/39/0,3343,en_2649_34889_1933095_1_1_1_1,00.html (last visited Sept. 30, 2008).

²⁰ See *supra* note 21.

well-documented in connection to similar projects in Burma. Members of Burma's non-Burman ethnic nationalities will likely be the victims of such abuses, as will ethnic Burmans in Central Burma, many of whom are extremely poor and include especially vulnerable subsistence and plantation farmers.

Daewoo International is the operator of the Shwe Project. The combined majority interest of Daewoo and KOGAS in the project means the companies have the ability and responsibility to ensure that the project, to the extent possible, complies with the *Guidelines*. By hearing this complaint, the NCP has an opportunity to prevent serious human rights abuses and environmental damage, and to potentially mitigate the abuses that are already occurring, thereby fulfilling the purpose of the *Guidelines*: to provide an international standard for corporate responsibility and a forum for working toward mutually satisfactory solutions to international issues.

The South Korean office of the NCP has a history of success in pro-actively handling complaints regarding alleged breaches of the *Guidelines*. In 2002, for example, the South Korean NCP was involved in the resolution of a labour dispute between a Korean textile company operating in Guatemala and its Guatemalan workers²¹ in which violations of Chapter IV of the Guidelines (Employment and Industrial Relations) were alleged.²² The Korean NCP mediated several meetings, including a meeting between several Korean ministers and representatives of the company,²³ and the complaint was concluded when the management of the company and the trade union reached a collective agreement in July 2003.²⁴

III. BACKGROUND on BURMA

i. Geography and Demographics

Burma is the largest country by land mass in mainland Southeast Asia with a population estimated by the current military government to be over 57,000,000.²⁵ Ethnic Burmans comprise an estimated 60 percent of the population, while the remaining 40 percent of the population comprise seven other major ethnic nationalities - including the Arakan, Chin, Kachin, Karen, Karenni, Mon, and Shan – and at least 130 smaller ethnic groups.²⁶ The country is divided into seven states and seven divisions, separated by ethnic-racial boundaries that were drawn by the British in the colonial era (1826-1948).²⁷ Hundreds of languages are spoken; the Burman-dominated military government recognizes only Burmese as the official language. Over eighty percent of the population in Burma is Buddhist with smaller representations of Christianity, Islam, and Hinduism.

²¹ OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: 2002 ANNUAL MEETING OF THE NATIONAL CONTACT POINTS, REPORT BY CHAIR 10-11, JUNE 18, 2002, available at <http://www.oecd.org/dataoecd/24/4/1956371.pdf> (last visited Sept. 5, 2008).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *The New Light of Myanmar*, May 27, 2008, Volume XVII, Number 39. In a statement by the Chairman of Commission for Holding the Referendum, the population of the entire country is listed as 57,504,368.

²⁶ Myanmar Ministry of Hotels & Tourism, The 8 Major National Ethnic Races in Myanmar, <http://www.myanmar.gov.mm/ministry/hotel/fact/race.htm> (last visited Sept. 5, 2008).

²⁷ Ethnic states draw their name from the dominant ethnic nationality in the area, while the divisions are predominantly Burman, but neither states nor divisions are racially exclusive. The Divisions are Irrawaddy, Bago, Magwe, Mandalay, Sagaing, Tennasserim, and Rangoon. The States are Chin, Kachin, Karen, Karenni, Mon, Arakan, and Shan. Burma's lucrative natural resources are disproportionately located in areas historically controlled by the country's ethnic nationalities.

ii. Government and Politics

An understanding of Burma's government and politics is relevant to an understanding of the broader political challenges and political environment in which Daewoo International and KOGAS conduct business in Burma.

Burma has been ruled by a military dictatorship since 1962. The current regime, the State Peace and Development Council (SPDC), is led by Senior General Than Shwe.

In 1990, the opposition National League for Democracy (NLD), led by Daw Aung San Suu Kyi, captured over 80 percent of the seats in Parliament in general elections.²⁸ The military junta, then known as the State Law and Order Restoration Council (SLORC), did not recognize the results of the election.²⁹ Suu Kyi has spent nearly 13 of the last 18 years under house arrest and on May 27, 2008 it was extended for another year.³⁰ In 1991, she was awarded the Nobel Peace Prize for her struggle for democracy and human rights in Burma.³¹

Civil war has raged in Burma since independence from colonial rule in 1948. Several ethnic nationality groups have taken up arms against successive regimes for a range of social, political, and economic reasons, and several of these armed struggles continue today.³² Since 1989, a total of seventeen ceasefire agreements have been agreed upon between the military junta and various armed ethnic groups, but these agreements have failed to bring about lasting peace or political settlement, or human rights and environmental protection.³³

On May 10 and 24, 2008, in the midst of the country's worst ever humanitarian crisis caused by Cyclone Nargis, the current military regime held a national referendum on a draft constitution, despite international pressure to postpone the process.³⁴ The draft constitution was the result of a 14-year-long National Convention condemned internationally as repressive and undemocratic.³⁵ Criticism of the convention in Burma was expressly forbidden by law.³⁶ Likewise, the subsequent national referendum was widely discredited as unfair, with reports of overt voter coercion and intimidation by the military, vote tampering, and voter obstruction.³⁷ Some voters were reportedly forced to vote "yes".³⁸

²⁸ U.S. Dept. of State, *Background Note: Burma* (2007), <http://www.state.gov/r/pa/ei/bgn/35910.htm> (last visited Sept. 5, 2008) (hereinafter *Background Note*).

²⁹ *Id.*

³⁰ "West Dismayed Over Suu Kyi Detention", by Aung Hla Tun, Reuters, May 28, 2008, <http://www.reuters.com/article/topNews/idUSBKK1919620080528?sp=true> (last visited Sept. 5, 2008).

³¹ The Nobel Peace Prize 1991, http://nobelprize.org/nobel_prizes/peace/laureates/1991 (last visited Sept. 5, 2008).

³² For example, the Karen National Union (KNU), the Shan State Army South (SSA-S), and the Karenni National Progressive Party (KNPP) continue to wage what they refer to as wars of resistance along remote parts of the Thai border. The SPDC has been implementing an ongoing counter-insurgency to divide the ethnic nationalities and defeat political and armed opposition, resulting in severe human rights abuses against civilians in many parts of eastern Burma.

³³ Oo, Zaw and Win Min (2007) *Assessing Burma's Ceasefire Accords*, East-West Center, Washington D.C., Policy Studies 39 (Southeast Asia) at 1.

³⁴ Human Rights Watch, *Burma: Postpone Referendum to Save Lives*, May 9, 2008, <http://hrw.org/english/docs/2008/05/08/burma18783.htm> (last visited Sept. 5, 2008).

³⁵ Human Rights Watch, *Burma: Reject Constitutional Referendum*, May 17, 2008, <http://hrw.org/english/docs/2008/05/17/burma18862.htm> (last visited Sept. 5, 2008).

³⁶ Human Rights Watch, *Burma, Country Report, January 2008*, at 1, available at <http://hrw.org/wr2k8/pdfs/burma.pdf> (last visited Sept. 5, 2008).

³⁷ *Id.*

³⁸ "Myanmar Junta Dismisses Suu Kyi Victory", The Associated Press, July 6, 2008, available at

The Constitution was ratified by the regime on May 29, 2008 with the alleged support of 98.12 percent of over 27 million eligible voters. The regime claims this nullifies the 1990 victory of the opposition NLD and national elections are planned for 2010.³⁹ Most relevantly here, the constitution lacks provisions providing for land and housing rights or any compensation for land expropriated by the state,⁴⁰ despite that these are critical issues for the resource-rich country and are common abuses connected to development projects in Burma.⁴¹

iii. Economy

Information about Burma's economy provides a background understanding of the wider economic context in which Daewoo and KOGAS are conducting business in the country. The current state of Burma's economy also serves to highlight the broader economic implications of Korean investment in Burma's oil and gas sector, beyond the requirements and protections enumerated in the *Guidelines*.

Burma's economy is plagued by severe economic mismanagement by the current military regime.⁴² Spending in excess of revenues, the regime has historically resorted to printing currency, leading to skyrocketing inflation and "monetary chaos".⁴³ Most domestic corporations are owned or operated by elite members of the military regime or close partners of the regime, and in 2007, Burma was listed as the world's most corrupt country, tied with Somalia, and slightly more corrupt than Iraq.⁴⁴ According to U.N. criteria, the country maintains its status as a "Least Developed Country".⁴⁵

Despite this status, the country is rich in commercially exploitable natural resources, including oil, gas,

<http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2008/07/05/international/i215733D69.DTL&feed=rss.business> (last visited Sept. 5, 2008).

³⁹ *Id.*

⁴⁰ Human Rights Council, Seventh Session, Item 4, "Human Rights Situations that Require the Council's Attention," Report of the Special Rapporteur on the Situation of human rights in Myanmar, Paulo Sergio Pinheiro, A/HRC/7/18, 7 March 2008, at 16, available at <http://daccessdds.un.org/doc/UNDOC/GEN/G08/115/16/PDF/G0811516.pdf?OpenElement> (last visited Sept. 5, 2008).

⁴¹ *Supra* note 21; For weblinks and reports by various NGOs on the human rights and environmental impacts connected to the hydropower sector in Burma, see Salween Watch at www.salweenwatch.org. For the impacts of mining in Burma, see ERI, *Turning Treasure Into Tears*, Chiang Mai, Thailand, January 2007; ERI and Karen Environmental and Social Action Network (KESAN), *Capitalizing on Conflict: How Logging and Mining Contribute to Environmental Destruction in Burma*, 2003; Smith, Matthew "Environmental Governance of Mining in Burma" in *Myanmar: The State, Community and the Environment*, Monique Skidmore and Trevor Wilson ed.'s, The Australian National University E-Press and Asia Pacific Press, 2007; Roger Moody, *Gravediggers: A Report on Mining in Burma*, Canada Asia Resource Network, Sept. 1999; 8808 For Burma and All Kachin Student and Youth Union (AKSYU), *Blood Jade: Burmese Gems and the Beijing Games*, August 2008; Images Asia and Pan Kachin Development Society (PKDS), *At What Price? Gold Mining in Kachin State, Burma*, Nopburee Press, Chiang Mai, 2004. For the impacts of logging, see Global Witness, *A Choice for China: Ending the Destruction of Burma's Frontier Forests*, 2005; Global Witness, *A Conflict of Interests: The Uncertain Future of Burma's Forests*, 2004.

⁴² See Turnell, Sean, "Burma's Economy 2008: Current Situation and Prospects for Reform" Burma Economic Watch/Economics Department, Macquarie University, Sydney, Australia, May 2008; See also "Gas Attack" by Sean Turnell, Wall Street Journal Online, Sept. 4, 2007, available at http://burmalibrary.org/docs4/Gas_Attack-Sean_Turnell.pdf (last visited Sept. 5, 2008).

⁴³ Turnell, Sean (May 2008) "Burma's Economy 2008: Current Situation and Prospects for Reform" Burma Economic Watch/Economics Department, Macquarie University, Sydney, Australia, at 3.

⁴⁴ Transparency International, "Global Perceptions Index 2007", available at http://www.transparency.org/policy_research/surveys_indices/cpi/2007 (last visited Sept. 5, 2008).

⁴⁵ U.N. Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, "The Criteria for the Identification of the LDCs", <http://www.un.org/special-rep/ohrlls/lcd/lcd%20criteria.htm> (last visited Sept. 5, 2008).

timber, gold, copper, nickel, gems, and jade. There is an estimated 90 trillion cubic feet of recoverable natural gas reserves and approximately 3.2 billion barrels of recoverable crude oil in 19 onshore fields, and in three major offshore fields.⁴⁶ Rent seeking behavior by the military regime is common.⁴⁷

Agriculture, forestry, and fisheries account for approximately 50 percent of Burma's GDP. The country's economic growth is forecast to remain weak in 2008-09 at around 1-2% (real GDP growth for 2008 is estimated at 1.5%).⁴⁸ The long term economic impacts of Cyclone Nargis are expected to drive the country into a deeper economic crisis: agricultural output is in serious decline after at least 50 percent of the country's rice-growing area was inundated by the cyclone.⁴⁹ A substantial portion of the area was either washed away entirely or has become unusable due to soil salinization, which has undermined the country's food security.⁵⁰ These problems were exacerbated further by the military regime's obstruction of aid to the effected region.

Most of Burma's economy is controlled by the state through state-controlled enterprises, or through enterprises closely aligned with the state. This includes the Myanmar Oil and Gas Enterprise (MOGE), which is the business partner of Daewoo and KOGAS in the Shwe Project. Burma's trade volume is at a record high, registering at US\$ 8.7 billion in 2007. This is largely due to natural gas export sales to Thailand through the Yadana and Yetagun pipelines, which in 2007 generated US\$ 2.7 billion for the military regime, or roughly 45 percent of all exports, and in 2006 generated US\$ 2.16 billion. Estimates suggest the regime spends 40 percent of its budget on military spending, 1.2-1.5 percent on health, and 4-5 percent on education.⁵¹

Like trade, foreign direct investment (FDI) in Burma is at record highs and mostly in natural resources. In 2007, more than 90 percent of FDI in Burma was in the oil and gas sectors, according to official figures.⁵² Official FDI was US\$ 504.8 million, of which US\$ 474.3 million was in the oil and gas sectors.

Compared to the oil and gas sectors, other sectors are much less significant to Burma's fledgling economy. For the purposes of this complaint, Korea's overall economic relationship with Burma outside the energy sector is negligible: approximately 2.1 percent of Burma's exports go to Korea, and

⁴⁶ "China, Daewoo in Swap Talks", International Gas Report, July 28, 2008, at 14.

⁴⁷ "Rent seeking" can be defined as states seeking economic rents from foreign parties, in this case for the extraction of lucrative natural resources, and it is commonly accompanied by corruption and marked by a lack of popular participation. The frequency of rent seeking behavior in Burma can be measured generally by the increasing frequency of inward foreign direct investment (FDI) in Burma's oil and gas sector - which involves the signing of understandings, agreements, and production sharing contracts between the military regime and foreign corporations for the exploration, extraction, and sale of natural resources - and the correlating lack of accountability between the military government and the people of Burma in regard to these arrangements.

⁴⁸ Economist Intelligence Unit, "Burma (Myanmar) Country Report," June 2008, at 8 (hereinafter *EIU*).

⁴⁹ *Id.* at 2.

⁵⁰ See Tripartite Core Group comprised of Representatives of the Government of the Union of Myanmar, the Association of Southeast Asian Nations, and the United Nations, with the support of the Humanitarian and Development Community, "Post Nargis Joint Assessment", July 2008, available at http://ocha.unog.ch/humanitarianreform/Portals/1/cluster%20approach%20page/Myanmar/21_07_08_asean_nargis.pdf.

⁵¹ *Human Cost of Energy*, *supra* note 21, at 21-23. Burma is the only country in the region whose defense budget is greater than that of health and education combined. See Turnell, Sean (May 2008) "Burma's Economy 2008: Current Situation and Prospects for Reform" Burma Economic Watch/Economics Department, Macquarie University, Sydney, Australia, qtd. at 3.

⁵² "Foreign Investment in Myanmar oil and gas sectors more than tripled last year", Associated Press, *International Herald Tribune*, June 30, 2008, available at <http://www.iht.com/articles/ap/2008/06/30/business/AS-FIN-ECO-Myanmar-Foreign-Investment.php> (last visited Sept. 5, 2008).

approximately 2.7 percent of Burma's imports originate in Korea.⁵³ In 2007, non-oil and gas South Korean investment in Burma accounted for US\$12 million in Burma's fishing industry.⁵⁴ Daewoo International was invested in a weapon's factory in Burma - contravening Korean law - for which executives from the company stood trial in Seoul and were convicted (see below section v.).⁵⁵

While not explicitly related to this complaint or to the *Guidelines*, the South Korean NCP may find it helpful to consider how other countries have adjusted their foreign policies to reflect their interpretation of risks they associate with investment in Burma. Several governments impose economic sanctions on Burma. The strongest of these are sanctions imposed by the U.S., which prohibit investment in Burma by U.S. persons and prohibit U.S. persons from facilitating foreign persons' investment in Burma.⁵⁶ Further U.S. sanctions ban all imports to the U.S. from Burma, freeze the assets of certain state institutions in Burma, and extend visa restrictions on junta officials.⁵⁷ In 2007, after the violent crackdown against peaceful, monk-led pro-democracy protests (see below), U.S. President Bush issued two Executive Orders, the first targeting the assets of government officials in Burma and the second targeting individual human rights abusers and junta members responsible for public corruption.⁵⁸ Moreover, U.S. Congress recently passed legislation to specifically restrict the import from third countries of gems that originate in Burma.⁵⁹ Likewise, the European Union imposes sanctions that include restrictions on the import of Burmese gems, timber, and metal, as well as visa bans and asset freezes against members of the Burmese military government.⁶⁰

iv. Cyclone Nargis

The recent humanitarian crisis associated with the aftermath of Cyclone Nargis underscores the nature and priorities of the military regime - with which Daewoo and KOGAS are partnering - with regard to the overall welfare of the people of Burma. Cyclone Nargis struck the Irrawaddy Delta region on May 2-3, 2008, directly affecting approximately 2.4 million people; approximately 138,000 are confirmed dead or missing, 450,000 homes are completely destroyed, and at least 800,000 people were displaced.⁶¹ In the wake of the disaster the Burmese junta was widely criticized for obstructing domestic and international relief efforts⁶² and was accused of "criminal neglect".⁶³ On June 10 new

⁵³ *EIU*, *supra* note 52, at 18. Burma's largest trading partners are Thailand and China.

⁵⁴ *Id.*

⁵⁵ "14 South Koreans convicted of illegally exporting weapons technology, equipment to Myanmar," International Herald Tribune, Nov. 15, 2007, available at <http://www.iht.com/articles/ap/2007/11/15/asia/AS-GEN-SKorea-Myanmar-Arms-Export.php> (last visited Sept. 5, 2008).

⁵⁶ U.S. Executive Order 13407, May 20, 1997, President William Jefferson Clinton. The U.S.-based Chevron Corporation maintains its investment in Burma because of a caveat in the order that precludes investments that pre-date the sanctions.

⁵⁷ "Burmese Freedom and Democracy Act of 2003 and Executive Order," July 28, 2003, President George W. Bush. The Act has been renewed annually since 2003. Available at http://www.treas.gov/offices/enforcement/ofac/legal/statutes/bfda_2003.pdf (last visited July 21, 2008).

⁵⁸ U.S. Executive Order 13310, Sept. 27, 2007, under which the U.S. Department of Treasury designated 25 senior Burmese government officials as subject to an asset block under; and Executive Order 13348, October 19, 2007, which expanded the authority to block assets to individuals who are responsible for human rights abuses and public corruption.

⁵⁹ See "US Senate Bans Import of Burmese Gems" by Lalit K Jha, The Irrawaddy, July 23, 2008. Available at http://www.irrawaddy.org/highlight.php?art_id=13500 (last visited Sept. 5, 2008).

⁶⁰ "EU Implements Sanctions on Myanmar Junta" by Ingrid Melander, Reuters, November 19, 2007, available at <http://www.reuters.com/article/mapNews/idUSL19999620071119>.

⁶¹ "Myanmar cyclone damage at a glance", The International Herald Tribune, July 21, 2008; See also Tripartite Core Group, *Post-Nargis Joint Assessment*, July 2008.

⁶² Human Rights Watch, *supra* note 38; "Burma hits out at cyclone reports", BBC News, June 6, 2008, available at <http://news.bbc.co.uk/2/hi/asia-pacific/7439222.stm> (last visited Sept. 5, 2008).

⁶³ "Gates Accuses Myanmar of 'Criminal Neglect'", by Eric Schmitt, New York Times, June 2, 2008, http://www.nytimes.com/2008/06/02/world/asia/02gates.html?_r=1&hp&oref=slogin (last visited June 27, 2008).

guidelines for humanitarian organizations operating in the country were introduced, which were expected to further hamper already restricted relief efforts.⁶⁴ After international pressure, the regime reverted to its previous guidelines,⁶⁵ but these too are regarded as unreasonably restrictive and antithetical to the fundamental principles of delivering humanitarian aid.⁶⁶ The U.N. recently acknowledged that the international relief effort has lost millions of dollars due to the regime's foreign exchange controls, adding that the whereabouts of the missing money is unclear.⁶⁷ This problem was theoretically resolved when the SPDC succumbed to pressure to allow outside donors to avoid its lucrative foreign exchange controls and to pay local companies directly.⁶⁸

v. Military Support

The Burmese military enjoys material and financial support from various governments, most notably China⁶⁹ and India.⁷⁰ While unrelated to the Shwe Project, Daewoo International has also been involved in the arms trade with the Burmese regime, contravening Korean law and revealing the company's questionable regard for rule of law, human rights, and responsible corporate practice. In December 2006, fourteen high level executives from a total of seven firms, including former Daewoo President and Chief Executive Lee Tae-yong, were indicted for violating trade restrictions by supplying hardware used to manufacture weapons in Burma, and they later faced trial in Seoul.⁷¹ On November 15, 2007, all fourteen executives were found guilty.⁷²

vi. Human Rights

Beyond human rights abuses directly connected to the Shwe Project (described below in Sections and IV.ii and V), human rights abuses in Burma are widespread, systematic, and have been well-documented by the United Nations, governments, and local and international non-governmental organizations (NGOs).

⁶⁴ Human Rights Watch, "Burma: New Rules Further Delay Relief Effort", June 12, 2008, <http://www.hrw.org/english/docs/2008/06/12/burma19124.htm> (last visited Sept. 5, 2008).

⁶⁵ "Burma Drops New Operating Guidelines", *The Irrawaddy*, June 24, 2008, by Wai Moe, available at http://www.irrawaddy.org/article.php?art_id=12944 (last visited Sept. 5, 2008).

⁶⁶ Human Rights Center, Univ. of California, Berkeley and Center for Public Health and Human Rights, Johns Hopkins Bloomberg School of Public Health, *Gathering Storm: Infectious Diseases and Human Rights in Burma*, July 2007, at 4-5.

⁶⁷ "U.N. Acknowledges Foreign Exchange Loss in Myanmar Relief (Roundup)", Deutsche Press-Agentur, July 24, 2008, available at http://www.monstersandcritics.com/news/asiapacific/news/article_1419255.php/UN_acknowledges_foreign_exchange_loss_in_Myanmar_relief_Roundup (last visited Sept. 5, 2008).

⁶⁸ "UN, Myanmar Resolve Aid Currency Problem, In Theory" by Ed Cropley, August 18, 2008, Reuters, available at http://uk.reuters.com/article/homepageCrisis/idUKBKK241627.CH_242020080818?rpc=401& (last visited Sept. 5, 2008).

⁶⁹ "China: Key Arms Supplier to Human Rights Abusers", by Thalif Deen, *The Irrawaddy*, August 7, 2008, available at http://www.irrawaddy.org/article.php?art_id=13764 (last visited Sept. 5, 2008); Amnesty International report (June 11, 2006) *People's Republic of China: Sustaining Conflict & Human Rights Abuses* available at <http://www.amnesty.org/en/library/info/ASA17/030/2006> (last visited Sept. 5, 2008).

⁷⁰ "Burma's Generals on a Buying Spree" by David Fullbrook, *Asia Sentinel*, Dec. 18, 2008, available at http://www.asiasentinel.com/index.php?option=com_content&task=view&id=309&Itemid=31 (last visited Sept. 5, 2008).

⁷¹ "14 South Koreans convicted of illegally exporting weapons technology, equipment to Myanmar", *International Herald Tribune*, Nov. 15, 2007, available at <http://www.iht.com/articles/ap/2007/11/15/asia/AS-GEN-SKorea-Myanmar-Arms-Export.php> (last visited Sept. 5, 2008).

⁷² *Id.*; See also Shwe Gas Movement "Activists Outraged At Lenient Sentencing Of Daewoo International Executives for Arms Export to Burma," Nov. 15, 2007, available at http://www.earthrights.org/burmafeature/activists_outraged_at_lenient_sentencing_of_daewoo_executives_for_arms_export_to_burma.html (last visited Sept. 5, 2008).

For decades, the Burmese military regime has implemented counter-insurgency campaigns that have included direct attacks on civilians, especially ethnic nationalities, predominantly in eastern Burma.⁷³ Between 1996 and 2006, the Burmese armed forces (*Tatmadaw*) destroyed approximately 3,000 villages⁷⁴ and there are approximately 500,000 internally displaced people in Burma.⁷⁵

The International Labour Organization has repeatedly condemned the pervasive use of forced labour in Burma.⁷⁶ In most of the country, civilians are commonly forced by the military to construct and maintain army camps, to cultivate crops for the army, build roads, porter loads, provide sentry duty, and to work in minesweeping.⁷⁷ In March 2008 the ILO reported that forced labour in Burma “continues to be a serious problem”⁷⁸ and forced labour by the military connected to corporate development projects has been well-documented.⁷⁹

The *Tatmadaw* has a record of killing, torture, and rape of civilians. Soldiers often detain and kill civilians to retaliate for activities of armed opposition groups and to punish civilians who are suspected of having ties to those groups.⁸⁰ Torture is used during interrogations, to enforce rules, and to ensure prompt compliance with military demands.⁸¹ These abuses are carried out with impunity and are widespread and systematic.⁸² Rape of women is used by the army as a means of demoralizing ethnic nationalities;⁸³ it is committed by both soldiers and officers and generally goes unpunished.⁸⁴

⁷³ U.S. Dept. of State, *Country Reports on Human Rights Practices for 2007: Burma* (2008), <http://www.state.gov/g/drl/rls/hrrpt/2007/100515.htm> (last visited Sept. 5, 2008) (hereinafter *State Department*).

⁷⁴ Thai Burma Border Consortium (TBBC), *Internal Displacement in Eastern Burma: 2006 Survey* (2006), available at <http://tbbc.org/idps/report-2006-idp-english.pdf> (last visited Sept. 5, 2008).

⁷⁵ *State Department*, *supra* note 77.

⁷⁶ See International Labour Organization (ILO), *Forced Labour in Myanmar (Burma): Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the International Labour Organization to examine observance by Myanmar of the Forced Labour Convention* ¶ 528 (1998), available at: <http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm> (last visited June 19, 2008) (hereinafter *ILO Commission Report*); Press release, International Labour Organization, *ILO Governing Body opens the way for unprecedented action against forced labour in Myanmar*, November 17, 2000, available at http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_007918/index.htm (last visited Sept. 5, 2008); International Labour Organization, *Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No.29)*, March 10, 2008, available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_gb_298_5_2_en.pdf (hereinafter *ILO Developments*) (Last visited Sept. 5, 2008).

⁷⁷ International Confederation of Free Trade Unions, *Burma: ICFTU submits over 1,600 pages of new evidence of forced labour to the ILO* (2005) available at <http://www.icftu.org/displaydocument.asp?Index=991223008&Language=EN>.

⁷⁸ *ILO Developments*, *supra* note 80.

⁷⁹ ERI Reports *supra* note 21.

⁸⁰ Amnesty International, *Crimes against humanity in eastern Myanmar 2* (2008), available at <http://www.amnesty.org/en/library/info/ASA16/011/2008> (last visited Sept. 5, 2008).

⁸¹ *Id.* at 16.

⁸² *Id.* at 2. See also The Shan Human Rights Foundation & The Shan Women’s Action Network report (2002) *License to Rape: The Burmese Military Regime’s Use of Sexual Violence in the Ongoing War in Shan State*, available at <http://www.shanland.org/resources/bookpub/humanrights/LtoR/> (last visited Sept. 5, 2008); EarthRights International report (1998) *School of Rape: The Burmese Military and Sexual Violence*, by Betsy Apple, available at <http://www.earthrights.org/files/Reports/schoolforrape.pdf> (last visited Sept. 5, 2008).

⁸³ DLA Piper Rudnick Gray Cary, *Threat to the Peace: A Call for the UN Security Council to Act on Burma*, 36 (2005) (hereinafter *Threat to the Peace*) at 47.

⁸⁴ *Supra* note 86.

There are an estimated 2,052 political prisoners in detention in Burma, some arrested decades ago.⁸⁵ They may be tortured in prison and held in very poor conditions.⁸⁶ Real or suspected opposition to development projects can bring detention, arrest, and other abuses, which have been documented impacts of the Shwe Project by Daewoo and KOGAS, as described below.⁸⁷

Burma is believed to have one of the highest numbers of child soldiers in the world.⁸⁸ Over 50,000 children serve in government and non-government armed forces in Burma,⁸⁹ the vast majority in the *Tatmadaw*.⁹⁰

There are no property rights in Burma. Confiscation of property, cash, and food from civilians by the military is routine.⁹¹ In many parts of Burma, the *Tatmadaw* confiscates farmland without compensation in order to pursue development projects,⁹² while also commonly confiscating livestock, fuel, fishponds, food and drinks, and vehicles for its own use.⁹³

Freedom of expression is routinely violated by the state: foreign journalists face obstacles to entering the country, and extreme censorship laws carry draconian sentences.⁹⁴ All written materials for publication in Burma are required to be submitted to the Ministry of Information's Press Scrutiny and Registration Division, where they are vetted for content deemed unsuitable. Restrictions on expression have expanded to include internet repression; the regime heavily filters political opposition sites, human rights organizations' sites, and e-mail service providers.⁹⁵ During the 2007 crackdown against pro-democracy demonstrators, for example, the regime cut major telecommunication lines and managed to block 85 percent of e-mail service providers in an attempt to completely stop the flow of information into and out of the country.⁹⁶ Leading up to the one-year anniversary of the crackdown, in September 2008 a sophisticated cyber attack, allegedly carried out by the Burmese regime, completely disabled the online presence of key outlets of the Burmese media in exile, including the websites for *The Irrawaddy*, the Democratic Voice of Burma, and *New Era*.⁹⁷ This reveals a concerning aspect of

⁸⁵ Assistance Association for Political Prisoners (Burma), <http://www.aappb.org/prisoners1.html>; See also Amnesty International, *Amnesty International Report 2008: State of the World's Human Rights: Myanmar* (2008), <http://thereport.amnesty.org/eng/regions/asia-pacific/myanmar> (last visited Sept. 5, 2008) (hereinafter *Amnesty Report*).

⁸⁶ Assistance Association for Political Prisoners (Burma), *Eight Seconds of Silence: The Death of Democracy Activists Behind Bars*, May 2006, available at <http://www.aappb.org/publications.html>; Assistance Association for Political Prisoners (Burma), *The Darkness We See: Torture in Burma's Interrogation Centers and Prisons*, December 2005 available at <http://www.aappb.org/publications.html>; Amnesty International, *Continuing Arrests in Myanmar*, <http://www.amnesty.org/en/news-and-updates/news/continuing-arrests-in-myanmar> (last visited Sept. 5, 2008) (Hereinafter *Continuing Arrests*).

⁸⁷ See Sections IV.ii and V of this complaint; See also *ERI and SGM interviews*, *supra* note 7.

⁸⁸ Coalition to Stop the Use of Child Soldiers, *Global Report 2001* (2001) at 16, available at <http://www.child-soldiers.org/document/get?id=1262> (last visited Sept. 5, 2008) (hereinafter *Coalition*).

⁸⁹ *Id.* at 299.

⁹⁰ Human Rights Watch report (2002) *My Gun Was As Tall As Me: Child Soldiers in Burma 2*, by Kevin Heppner, available at <http://www.hrw.org/reports/2002/burma/Burma0902.pdf>; Human Rights Education Institute of Burma, *Despite Promises: Child Soldiers in Burma's SPDC Armed Forces* (Sep. 2006), available at <http://www.hreib.com/images/pb/csreport.pdf> (last visited Sept. 5, 2008).

⁹¹ *State Department*, *supra* note 77.

⁹² See *ERI Reports*, *supra* note 21; *Threat to the Peace*, *supra* note 87 at 35.

⁹³ *State Department*, *supra* note 77.

⁹⁴ Reporters Without Borders, "Burmese Journalists Continue to be Arrested, Foreign Journalists Still Unwelcome", June 25, 2008, available at http://www.rsf.org/article.php3?id_article=27618 (last visited Sept. 5, 2008).

⁹⁵ OpenNet Initiative, *Pulling the Plug: A Technical Review of the Internet Shutdown in Burma* (2007), available at http://opennet.net/sites/opennet.net/files/ONI_Bulletin_Burma_2007.pdf (last visited Sept. 5, 2008).

⁹⁶ *Id.*

⁹⁷ At the time of writing, these websites remain disabled. See "The Burmese Regime's Cyber Offensive" by Aung Zaw,

the nature of the Burmese military regime, the chosen business partner of Daewoo and KOGAS.

Last year, natural gas became a deeply politicized commodity in Burma, the governance of which led to nationwide public demonstrations that were met with force. In August 2007, the SPDC suddenly raised fuel prices, including a 500 percent increase in the price of natural gas.⁹⁸ The hikes sparked peaceful demonstrations that later came to be led by Buddhist monks, intensifying throughout the month of September. Demonstrators demanded a decrease in commodity prices, a release of all political prisoners, and national reconciliation.⁹⁹ Over several weeks there were over 200 protests in at least 66 towns and cities.¹⁰⁰ On September 25, 2007, the *Tatmadaw* began a violent crackdown, beating people with sticks and firing live rounds of ammunition into crowds of peaceful protestors.¹⁰¹ While state media reported nine deaths,¹⁰² it is believed that over 100 people were killed.¹⁰³ Between 3,000 and 4,000 people were detained.¹⁰⁴ There were reports of torture and beatings by authorities and an unconfirmed number of prisoners died while in custody.¹⁰⁵ There were at least 72 confirmed cases of forced disappearance.¹⁰⁶ At the end of 2007, seven hundred people who were arrested during the crackdown were believed to still be in detention.¹⁰⁷ Likewise, people in the area of the Shwe Project do not enjoy freedom of speech, association and expression, and they are effectively prevented from expressing their opinion or participating in decisions about the Shwe Project, as described below.

IV. BACKGROUND TO THIS COMPLAINT

i. Previous Natural Gas Projects in Burma: The Yadana and Yetagun Pipelines

The experience of the Yadana and Yetagun gas projects and pipelines in Burma demonstrates a history of the grave environmental and human rights consequences of gas development in the country. In 1992, the French oil company Total signed a contract with the military regime to develop offshore natural gas fields and construct a pipeline across the Tenasserim area in Burma to deliver the gas to Thailand.¹⁰⁸ The American company Unocal, the Thai company PTT Exploration and Production (PTTEP), and the SPDC-owned Myanmar Oil and Gas Enterprise (MOGE) subsequently joined the project.¹⁰⁹

Sept. 18, 2008, posted on a temporary substitute web blog to *The Irrawaddy* website, available at <http://theirrawaddy.blogspot.com/> (last visited Sept. 19, 2008).

⁹⁸ *Human Cost of Energy*, *supra* note 21 at 49.

⁹⁹ *Id.*; See also Nat'l Coal. Gov't Burma Hum. Rts. Documentation Unit, *Bullets in the Alms Bowl: An Analysis of the Brutal SPDC Suppression of the September 2007 Saffron Revolution* (2008), available at <http://burmalibrary.org/docs4/BulletsInTheAlmsBowl.pdf>; and Human Rights Watch, *Crackdown: Repression of the 2007 Popular Protests in Burma*, 19 Hum. Rts. Watch Rep. 1 (2007), available at <http://www.hrw.org/reports/2007/burma1207/burma1207web.pdf>.

¹⁰⁰ *Id.*

¹⁰¹ *Amnesty Report*, *supra* note 89.

¹⁰² "'Nine killed' in Burma crackdown", BBC News, Sept. 27, 2007, available at <http://news.bbc.co.uk/2/hi/asia-pacific/7016608.stm> (last visited Sept. 5, 2008).

¹⁰³ *Amnesty Report*, *supra* note 89.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See generally "Production Sharing Contract for Appraisal, Development and Production of Petroleum in the Moattama Area Between Myanma Oil & Gas Enterprise and Total Myanmar Exploration & Production" (July 9, 1992), pages 2462-2553 of Ex. 1 to the partial trial of *Doe v. Unocal Corp.*, BC 237980 (Sup. Ct. Cal., L.A. County) (admitted into evidence, Dec. 11, 2003).

¹⁰⁹ See "Deed of Assignment By and Between Total Myanmar Exploration & Production, Unocal Myanmar Offshore Co. Ltd., PTTEP Int'l Ltd., and the Myanma Oil & Gas Enterprise" (Oct 31, 1995), Ex. 4(F) to the partial trial of *Doe v. Unocal*

Meanwhile, a separate consortium of Premier Oil (U.K.), Petronas (Malaysia), Nippon Oil (Japan), PTTEP, and MOGE took part in the Yetagun project, exploiting a separate natural gas field also in the Andaman Sea.¹¹⁰ Both projects involved pipelines carrying natural gas across an approximately 60-km (40 mile) stretch of southern Burma to the Thai-Burma border.¹¹¹ The pipelines followed virtually identical routes.¹¹²

The construction of the pipelines had serious consequences for the local population. Prior to the project, there was no permanent military presence in the area¹¹³ and at the outset of the project, the *Tatmadaw* moved in to “secure” the area for the consortium. In detailed interviews with ERI, soldiers who defected from the *Tatmadaw* have explained their mandate to provide security for the project.¹¹⁴ To date, at least 14 different infantry battalions have regularly performed pipeline security duties;¹¹⁵ two of which have been widely known as the “Total Battalions”, a colloquial name in reference to battalions working for Total, the main oil company involved in the Yadana project.¹¹⁶ The militarization brought severe human rights abuses against people living in the vicinity of the project, including forced relocation, forced labour, rape, killings, torture, and confiscation of property.

Lacking access to justice in Burma, in 1996, victims of human rights abuses related to the Yadana pipeline filed suit in United States courts against Unocal (now Chevron).¹¹⁷ The plaintiffs, represented by EarthRights International and others, sought to hold Unocal accountable for complicity in abuses perpetrated by the military during the construction of the pipeline.¹¹⁸ In March 2005, after a partial trial, Unocal agreed to settle the case and to provide compensation to the plaintiffs.¹¹⁹ Additional cases were brought against Total in Belgium and France by victims of abuses committed by the military during construction of the pipeline; the case in France resulted in an out-of-court financial settlement

Corp., BC 237980 (Sup. Ct. Cal., L.A. County) (admitted into evidence, Jan. 14, 2004) art. 1.2.

¹¹⁰ EarthRights International, *Total Denial Continues: Earth Rights Abuses Along the Yadana and Yetagun Pipelines in Burma* 13 (2d ed. 2003), available at <http://www.earthrights.org/files/Reports/TotalDenialCont-2ndEdition.pdf> (hereinafter *Total Denial Continues*).

¹¹¹ See generally “Export Gas Sales Agreement between Myanma Oil and Gas Enterprise and Total Myanmar Exploration and Production and Unocal Myanmar Offshore Co. Ltd and PTTEP Int’l Ltd. and Petroleum Authority of Thailand” (Feb. 2, 1995), Ex. 5B to the partial trial of *Doe v. Unocal Corp.*, BC 237980 (Sup. Ct. Cal., L.A. County) (admitted into evidence, Dec. 16, 2003).

¹¹² *Total Denial Continues*, supra note 21 at 19.

¹¹³ *Total Denial Continues*, at 23-37.

¹¹⁴ *Human Cost of Energy*, supra note 21 at 29-31.

¹¹⁵ See *Human Cost of Energy*, supra note 21 at 29 (all battalions, especially 273, 401, 402, 403, 404, 405, 407, 408, 409), at 72 (battalions 273, 282), at 94-95 (battalions 273, 401, 403, 407, 408, 409); see also Matthew Smith and Naing Htoo, “Energy Security: Security for Whom?” 11 YALE HUM. RTS. & DEV. L.J. (2008) at 228-230; EarthRights International & Southeast Asian Information Network, *Total Denial: A Report on the Yadana Pipeline Project in Burma* 13-14 (1996), available at <http://www.earthrights.org/files/Reports/TotalDenial96.pdf> (battalions 273, 401, 406, 407, 408, 409, 410); EarthRights International, *Supplemental Report: Forced Labour Along the Yadana and Yetagun Pipelines* (2001) at 3 (supplement to *More of the Same: Forced Labour Continues in Burma*) available at <http://www.earthrights.org/files/Reports/supp.pdf> (battalions 273, 282); Confidential ERI Interview #23 (2002), on file with ERI (defector confirming pipeline security duties of battalions 104, 273, 282, 401, 403, 405, 409).

¹¹⁶ *Total Denial Continues*, supra note 21 at 72.

¹¹⁷ In 2005, Chevron Corporation acquired Unocal, including its assets in Burma, for approximately US\$18 billion. See “Chevron Swoops for Unocal,” Int’l Petroleum Finance, April 11, 2005.; See also Rick Jurgens, “Unocal Approves Sale to Chevron,” *Contra Costa Times*, August 11, 2005.

¹¹⁸ See, e.g., *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997).

¹¹⁹ See EarthRights International, “Historic Advance for Universal Human Rights: Unocal to Compensate Burmese Villagers”, 2005, available at http://www.earthrights.org/legalfeature/historic_advance_for_universal_human_rights_unocal_to_compensate_burmese_villagers.html (last visited Sept. 5, 2008).

between the plaintiffs and Total in 2005¹²⁰ and the case in Belgium was dropped in 2007.¹²¹

The Yadana pipeline is now complete and operational and abuses against the population in the area continue, many of which are directly connected to the project. Military battalions continue to operate in the area to provide security for the pipeline.¹²² Soldiers continue to kill civilians without provocation and continue to commit rape and torture.¹²³ There are recent reports of violent rape by soldiers and of beatings of civilians who protest the confiscation of their property.¹²⁴ Soldiers have conducted public displays of violence against villagers to intimidate the population.¹²⁵ Forced portering and forced sentry duty continue in the pipeline corridor.¹²⁶

The Yadana and Yetagun projects have substantially enriched the military regime. Nearly 75% of the income from Yadana, about \$969 million, goes to the SPDC annually.¹²⁷ This, combined with income from Yetagun, represents the SPDC's largest official source of income, and it has not led to Burma's development, but instead correlates with a deteriorating human rights situation.¹²⁸

Despite the consortium's asserted efforts to contribute to social and economic development in the project area, the companies' socio-economic projects bring little benefits to the local population.¹²⁹ According to ERI's research, many of the social benefits promised by the companies to the villages along the pipeline route have not materialized. Health care and education have seen little improvement; villagers continue to go to the refugee camps on the Thai-Burma border in order to receive medical care.¹³⁰ Moreover, only about 100-110 of the Yadana project's nearly 760 million cubic feet per day of gas goes for Burma's domestic consumption; the rest is exported to Thailand.¹³¹ In the pipeline region, the army continues to recruit forced labour¹³² and to confiscate goods and money.¹³³ Villagers are unable to meet their own needs due to demands placed on them by the army. This has led to a continuous decline in their living standards and prompted significant numbers of people to flee the pipeline region for refugee camps in Thailand.¹³⁴

The Daewoo-led Shwe Project involves a pipeline considerably longer than the Yadana and Yetagun pipelines, and several sections of the pipeline will pass through densely populated rural areas where the risks of these and other negative impacts will be comparatively greater in scale.¹³⁵

¹²⁰ "Total Settles Rights Case: Payout Covers Forced Labour in Myanmar" International Herald Tribune, November 29, 2005, available at <http://www.iht.com/articles/2005/11/29/business/total.php> (last visited Sept. 5, 2008).

¹²¹ "Belgium Drops Myanmar Rights Case Against Total" AFP, March 5, 2008, available at <http://afp.google.com/article/ALeqM5g03FLW0Ks50sU4WgQuGU-Gay-P-w> (last visited Sept. 5, 2008).

¹²² *Human Cost of Energy*, supra note 21 at 30; See also Matthew Smith and Naing Htoo, "Energy Security: Security for Whom?", 11 YALE HUM. RTS. & DEV. L.J. (2008) at 228-230.

¹²³ *Human Cost of Energy*, supra note 21, at 31.

¹²⁴ *Id.* at 33.

¹²⁵ *Id.* at 33-34.

¹²⁶ *Id.* at 35-39.

¹²⁷ *Id.* at 20.

¹²⁸ *Id.* at 21.

¹²⁹ *Human Cost of Energy*, supra note 21, at 41-48.

¹³⁰ *Id.* at 43.

¹³¹ Total S.A., *Total in Myanmar: A Sustained Commitment 7* (2007) available at http://burma.total.com/en/publications/sustained_commitment.pdf (last visited Sept. 5, 2008).

¹³² *Human Cost of Energy*, supra note 21, at 46.

¹³³ *Id.* at 48.

¹³⁴ *Id.* at 46-47.

¹³⁵ The distance of the Yadana pipeline in Burma was approximately 40 miles-long. The direct distance between Sittwe and Kunming is approximately 1,100 miles; the pipeline itself will necessarily be longer than 1,100 miles given variations in

ii. The Shwe Natural Gas Project of Daewoo International, KOGAS et al

In August 2000, Daewoo International Corporation signed a production sharing contract with MOGE to explore, produce, and market natural gas reserves located in the of Bay of Bengal.¹³⁶ Discovered in 2004, the Shwe fields contain one of Southeast Asia's largest proven reserves of natural gas.¹³⁷ It is estimated that the three Shwe wells – Shwe, Shwe Phyu, and Mya - contain at least between 5.4 and 9.1 trillion cubic feet (tcf) of natural gas.¹³⁸

In 2001 and 2002, stakes in the contract were sold to Oil and Natural Gas Corporation of India (ONGC Videsh) (20%), Gas Authority of India, Ltd (GAIL) (10%), and Korean Gas Corporation (KOGAS) (10%).¹³⁹ Daewoo International retained a 60% stake.¹⁴⁰ These stakes were altered in June 2008 when the wholly state-owned Myanmar Oil and Gas Enterprise (MOGE) exercised its right to buy into the Shwe consortium, taking a 15% stake. The current ownership allots Daewoo a 51% stake, ONGC 17%, MOGE 15%, GAIL 8.5%, and KOGAS 8.5%.

On June 23, 2008, Daewoo International announced that it had signed a Memorandum of Understanding with China National Petroleum Corporation (CNPC) for the sale and transport of all of the Shwe natural gas to CNPC.¹⁴¹ The MoU involves plans to construct a transnational overland pipeline that will transport the gas from western Burma to Yunnan Province, China. Daewoo announced it may participate with CNPC in building the pipeline, while maintaining the largest stake in the consortium developing the deposits.¹⁴² According to Daewoo, commercial production of the Shwe wells is expected to begin in 2012,¹⁴³ which means pipeline construction may have to begin in earnest in 2009, if not by late 2008, in order to meet this production timeframe.¹⁴⁴ PetroChina, the 88 percent-owned subsidiary of CNPC, announced that it will take responsibility for distributing the gas delivered through the pipeline, providing urban natural gas distribution to Kunming city.¹⁴⁵

The proposed overland pipeline from Burma to China will traverse over an estimated 1,100 miles (1,800 km) of land that separates western Burma from Kunming, China – much farther than the

topography along the proposed route, the likelihood that the pipeline will, where possible, follow pre-existing roads, and due to the existence of geographical obstructions to constructing a pipeline along the direct route. Estimates of the pipeline distance are as high as 1,479 miles (2,380 km) (“Chinese Dilemma Over Burma Protests” by Michael Bristow, BBC News, Beijing, Sept. 25, 2007, available at <http://news.bbc.co.uk/2/hi/asia-pacific/7011746.stm> (last visited Sept. 5, 2008)).

¹³⁶ Shwe Gas Movement, *Supply and Command: Natural Gas in Burma Set to Entrench Military Rule* (2006) at 11, available at <http://www.shwe.org/media-releases/publications/file/SUPPLYANDCOMMAND.pdf>. (hereinafter *Supply and Command*)

¹³⁷ “Our Friends in the North”, *The Economist*, Feb. 9, 2008, available at http://www.economist.com/world/asia/displaystory.cfm?story_id=10653874 (last visited Sept. 5, 2008).

¹³⁸ “Daewoo Verifies Myanmar Gas Reserves” Daewoo International, Aug. 22, 2007, available at http://www.rigzone.com/news/article.asp?a_id=49311 (last visited Sept. 30, 2008).

¹³⁹ *Supply and Command*, supra note 140, at 12.

¹⁴⁰ *Id.*

¹⁴¹ “Daewoo to Sell All Burma Gas to China”, *Chosun Daily*, June 24, 2008, available at <http://english.chosun.com/w21data/html/news/200806/200806240028.html> (last visited Sept. 5, 2008).

¹⁴² *Id.* China is also preparing to construct an oil pipeline across Burma to China's southwestern Yunnan province, following the same route as the proposed Shwe gas pipeline. The oil pipeline would reportedly carry crude oil from Burma's western port city of Sittwe to the city of Kunming in Yunnan province, allowing China to continue its imports of oil from Africa and the Middle East while reducing China's dependence on traffic through the Strait of Malacca.

¹⁴³ “Daewoo Inks Huge Natural Gas Deal” by Yi Yi Htwe with agencies, *The Myanmar Times*, July 30-July 6, 2008, available at <http://www.mmtimes.com/no425/b001.htm> (last visited August 21, 2008).

¹⁴⁴ *Supra* note 145.

¹⁴⁵ “PetroChina Inks 1st Natural Gas Distribution Agreement” *China Knowledge*, Oct. 3, 2008, available at <http://www.chinaknowledge.com/News/news-detail.aspx?type=1&id=17891> (last visited Oct. 3, 2008).

approximately 40-mile long Yadana and Yetagun pipelines before it.¹⁴⁶ The specific coordinates of the pipeline route are not confirmed, but possible routes indicate it will pass through at least 24 townships in Burma, and through or near several large population centers in Arakan State, Bago Division, Magwe Division, Mandalay Division, and Shan State.¹⁴⁷ There are numerous villages along this route where human rights impacts of the pipeline will most likely be heightened: a village's potential for heightened human rights impacts can be discerned by its proximate location to the proposed pipeline and by its proximate location to any current or future military deployments.

Likewise, there are several areas along the proposed pipeline route where the risk of negative environmental impacts of the pipeline are particularly high. The most environmentally sensitive locations along the route are in Arakan State, where the proposed pipeline will bisect a national marine park, environmentally important mango swamps, and estuaries. It also appears likely to cross 5-6 small rivers that drain on the west side of the Arakan Yoma Range, which forms the natural boundary between Arakan State and Magwe Division.¹⁴⁸ The proposed pipeline will also cross the Irrawaddy River, where a leak or burst pipeline would have serious environmental, social, and economic impacts on downstream populations that rely heavily on the river, as well on the immediate environment. The risk of spills in the Bay of Bengal, where the gas is to be extracted, would be especially destructive to offshore, coastal, or inshore fisheries.¹⁴⁹

Once onshore, the pipeline will traverse five distinct eco-regions, as defined by the World Wildlife Fund.¹⁵⁰ These are the Mizoram-Manipur-Kachin rainforests, the Chin Hills-Arakan Yoma montane forests, the Irrawaddy dry forests, the Irrawaddy moist deciduous forests, and the Northern Indochina subtropical forests. Within these distinct and environmentally sensitive eco-regions there exist several highly sensitive areas, including mangrove swamps,¹⁵¹ areas that are crucial water sources for Burma's dry zone,¹⁵² a wildlife sanctuary,¹⁵³ and a bird sanctuary.¹⁵⁴ In Shan State and Mandalay Division, there are no existing or proposed formally protected areas, which is not to say these areas are without environmental concern.

¹⁴⁶ *Supra* note 139. The Yadana and Yetagun pipelines are approximately 40-miles long in Burma. The pipelines converge to one pipeline at the border with Thailand. The 40-mile length does not account for the pipeline laid in Thailand. In the Shwe project, the estimated distance between Sittwe and Kunming indicates the distance of the direct route between the two cities. The actual Shwe pipeline is likely to be much longer than 1,100 miles due to variations in topography along the route and the existence of geographical obstructions to a more direct route.

¹⁴⁷ This includes 3 townships in Arakan State, 2 townships in Bago division, 5 townships in Magwe division, 8 townships in Mandalay division, and 6 townships in Shan state. See Matthew Smith and Naing Htoo, "Energy Security: Security for Whom?", 11 YALE HUM. RTS. & DEV. L.J. (2008) at 239.

¹⁴⁸ The rivers include Tanlwe and Taungtok (Taunggup). The headwaters of the Thade may also be affected if the pipeline is built on the southern side of the highway between Taungain/Taungup/Taunggok and Pyay/Pyi/Promei.

¹⁴⁹ Food and Agricultural Organization of the United Nations, Fishery Country Profile: Union of Myanmar, May 2006, <http://www.fao.org/fi/oldsite/FCP/en/MMR/profile.htm> (last visited Sept. 5, 2008).

¹⁵⁰ An eco-region is a defined by the WWF as a large area of land or water that contains a geographically distinct assemblage of natural communities that: a) share a large majority of their species and ecological dynamics; b) share similar environmental conditions, and; c) interact ecologically in ways that are critical for their long-term persistence. WWF, "Science – Ecoregions", <http://www.worldwildlife.org/science/ecoregions/item1847.html> (last visited Sept. 5, 2008).

¹⁵¹ If the pipeline crosses from Sanei to Ma-ei, it will bisect Nat Ma Taung National Marine Park and adjacent mangrove swamps. The coordinates of this area are 20°58'42" N. and 94°7'42" E.

¹⁵² The proposed pipeline could pass Popa Mountain Park, which is linked to reservoirs and dams including the Kyetmakaung Dam. These are crucial water sources in the Dry Zone of central Burma. The coordinates of this area are 20° 53' N. and 95° 15' E.

¹⁵³ The proposed pipeline could pass the Minsontaung Wildlife Sanctuary is located at 21° 28' N. and 95° 43' E.

¹⁵⁴ The proposed pipeline could pass Pyi Oo Lwin Bird Sanctuary (Maymyo), 40 miles north of Mandalay at the bottom of Shan plateau, located at 22° 00' N. and 96° 30' E.

Due to a marked increase in militarization in the resource-rich Arakan State,¹⁵⁵ residents have already been forced to build barracks, work at quarries, construct roads and bridges, cultivate crops, and porter at the demand of the army.¹⁵⁶ They have been required to gather materials for the army such as fuel and water.¹⁵⁷ Land confiscation for military-run paddy farms and cash crop plantations is common.¹⁵⁸ Residents also suffer from the army's practices of arbitrary taxation and extortion.¹⁵⁹ These abuses in Arakan State and elsewhere along the proposed pipeline route are expected to increase during and after pipeline construction, when more military battalions will be deployed to provide security for the project.

Similar human rights abuses are also already happening in other areas along the proposed pipeline route, most notably in Shan State, where civilians in some areas face torture, rape, forced labour, forced displacement, and killings by the military.¹⁶⁰ For decades, the regime has been engaged in a brutal counter-insurgency campaign against ethnic Shan armed opposition groups.¹⁶¹ The pipeline construction and its attendant militarization threaten to exacerbate these abuses and this ongoing armed conflict.

Preparation for Daewoo's project is already directly linked to forced relocations in Arakan State.¹⁶² There are reports of the forced displacement of five villages on Baday Island, where residents have reportedly been told they must leave so that the island may be given over for the use of the energy industry.¹⁶³ They are being offered no compensation.¹⁶⁴ In addition, off-shore exploration is having impacts on the ability of local people to sustain their livelihood. Military-patrolled exclusion zones surrounding drilling rigs in the Bay of Bengal prevent local people from fishing in what was once a principal and abundant fishing area.¹⁶⁵ Although the exact boundaries of the zones and the times when they are enforced are confusing to local people, the exclusion of fisherfolk from these zones is harshly and violently enforced by the state.¹⁶⁶ In 2004, four men, unaware that they were in a restricted zone because they had frequently fished in the area, were arrested, beaten, and imprisoned.¹⁶⁷ In 2005, a local boat owner and his crew were arrested and beaten for being within an exclusion zone, and the boat and catch were seized.¹⁶⁸ Aside from losing the opportunity to fish in the restricted areas, the men suffered long-term effects on their abilities to provide for their families, due to their imprisonment and the loss of their fishing boats.¹⁶⁹ Boats owned by local people are routinely confiscated by local government authorities to ferry passengers to offshore sites believed to be connected to the Shwe Project. The confiscated boats are also reportedly used by the authorities to patrol the restricted waters;

¹⁵⁵ *Supply and Command*, *supra* note 140, at 22.

¹⁵⁶ *Id.* at 25.

¹⁵⁷ *Id.* at 26.

¹⁵⁸ *Id.* at 27.

¹⁵⁹ *Id.* at 30.

¹⁶⁰ Shan Herald Agency for News, "Human Rights", <http://www.shanland.org/resources/bookspub/humanrights/> (last visited Sept. 5, 2008).

¹⁶¹ The notable armed opposition group in this area of Burma is the Shan State Army-South (SSA-S), whose goal is an autonomous Shan state.

¹⁶² *Amnesty Report*, *supra* note 89.

¹⁶³ "Our Friends in the North", *supra* note 141. Graeme Jenkins, *Burmese Junta Profits From Chinese Pipeline*, *The Daily Telegraph*, Jan. 16, 2008, available at <http://www.telegraph.co.uk/news/uknews/1575571/Burmese-junta-profits-from-Chinese-pipeline.html> (last visited October 28, 2008).

¹⁶⁴ *Id.*

¹⁶⁵ *Supply and Command*, *supra* note 140, at 22.

¹⁶⁶ *Id.* at 31.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

boat owners are given no monetary or fuel compensation. Refusal to submit property to the authorities is uncommon as it is widely understood that refusal can bring repercussions on the financial and physical security of property owners.¹⁷⁰ According to one trader, “When the authorities would like to go to offshore drilling sites, local boats are expected to carry people there. The authorities don’t provide any oil or anything...If the boat owner refuses [to take the authorities out to sea], sooner or later they would be arrested or their business would be stopped.”¹⁷¹

There are regular abuses of the civil and political rights of Arakan people by the military regime, and some of these abuses have been directly related to the Daewoo-led Shwe Project. Open opposition to the Shwe project, like most public dissent in Burma, has been met with intimidation and force. On June 4, 2007, student activists in Arakan State hung posters in public places opposing the Daewoo-led project.¹⁷² The next day a curfew was imposed by the regime between 9pm and 5am and, two days later three students were reportedly arrested for reasons connected to hanging the posters.¹⁷³ Several other local people were detained and interrogated for their suspected connection to these activities.¹⁷⁴ Likewise, since Daewoo’s project began, several local people have been detained and interrogated by the military authorities due to suspicions they are either opposed to the project or in communication with people who are opposed to the project.¹⁷⁵

Daewoo has made at least two public statements regarding its investments in Burma that raise questions about the company’s corporate ethics and sense of obligation to abide by OECD *Guidelines*.¹⁷⁶ In a 2006 response to specific questions about the human rights impacts of the Shwe Project, Daewoo claimed, “Our position is that it’s not the right time to discuss a human rights abuse issue because we are still at a stage of exploring the gas field and have yet to begin development.”¹⁷⁷ This statement indicates at least three points relevant to the background of this complaint: 1) It reflects a certain lack of regard for thorough preliminary development planning, especially in a human rights-sensitive context such as Burma, where natural gas development leaves a large footprint in the host communities; 2) It assumes incorrectly that the exploration stage of natural gas projects is free from potential human rights impacts; and 3) The company’s assertion in 2006 that it was “not the right time to discuss human rights” implies that the company envisions a more appropriate time for a discussion of the human rights impacts of its project, although the company did not specify when they regard that time to be, or with whom they intend to discuss the protection of human rights.

V. SPECIFIC BREACHES OF THE GUIDELINES BY DAEWOO INTERNATIONAL AND KOGAS IN BURMA

¹⁷⁰ *ERI Interview, supra* note 7.

¹⁷¹ *Id.*

¹⁷² The posters read, in the local language: “The Arakan natural gas is for Arakanese people; You can’t sell gas without the consent of the Arakanese people; Save our forest; Don’t destroy the forest; Keep Arakan green.” See “Arakan State under military control,” *Kaladan News*, June 8, 2007 available at http://www.bnionline.net/index.php?Itemid=6&id=1805&option=com_content&task=view (last visited Sept. 5, 2008).

¹⁷³ *Id.*

¹⁷⁴ *ERI Interview, supra* note 7.

¹⁷⁵ *Id.*

¹⁷⁶ After the violent crackdown on pro-democracy protestors in 2007, when the international community was condemning the SPDC’s behavior, Daewoo International responded by saying, “Politics is politics. Economics is economics,” implying that the company regards their investments in Burma as apolitical. “Daewoo Says No Plan to Change Myanmar Investment” *Reuters*, Sept. 28, 2007, available at <http://www.ibtimes.com/articles/20070928/daewoo-myanmar.htm> (last visited Oct. 2, 2008).

¹⁷⁷ “Korean, Indian firms urged to withdraw from Myanmar”, by N. Wong-Anan, *Reuters*, July 11, 2006.

i. Section II.1, Enterprises should contribute to economic, social and environmental progress with a view to achieving sustainable development.

Section II.1 of the *Guidelines* encourages enterprises to further the goal of achieving sustainable development. The *Commentary to the Guidelines* explains that “[t]here should not be any contradiction between the activity of multinational enterprises (MNEs) and sustainable development.” The *Commentary* further stresses the necessary link between “economic, social, and environmental progress.” Commonly accepted definitions of sustainable development are contained in the Brundtland Report, the Rio Declaration, and United Nations Agenda 21.

a) International Standards

The most commonly recognized definition of sustainable development is contained in the 1987 Brundtland Report, which defines “sustainable development” as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”¹⁷⁸ The Report further describes that “[s]ustainable development requires meeting the basic needs of all and extending to all the opportunity to satisfy their aspirations for a better life.”¹⁷⁹ This definition is enshrined in Rio Declaration Principle 3, and further elaborated throughout the Declaration.¹⁸⁰ The Rio Declaration sets forth essential principles of sustainable development, including: 1) the “integral” role of environmental protection in the development process (Principle 4); 2) the “eradication [of] poverty as an indispensable requirement” (Principle 5); 3) the “effective participation” of indigenous peoples (Principle 22); and 4) that human beings be “at the centre of concerns for sustainable development” (Principle 1).¹⁸¹

These principles are further defined in UN Agenda 21, which sets forth a comprehensive action plan for achieving world-wide sustainable development.¹⁸² UN Agenda 21 sets forth action plans regarding several integral principles of sustainable development, including: 1) “combating poverty” and “enabling the poor to achieve sustainable livelihoods” (Ch. 3); 2) “protecting and promoting human health” (Ch. 6); 3) “integrating environment and development in decision-making” (Ch. 8); and “recognizing and strengthening the role of indigenous people and their communities” (Ch. 26).¹⁸³

b) Breaches of Section II.1

Daewoo and KOGAS are currently breaching section II.1 of the *Guidelines* by failing to disclose vital information regarding the project, and by failing to consult the indigenous communities affected. See section V.iii (below) detailing current breaches of sections III.1 and V.2 of the *Guidelines*. These are equally applicable to section II.1 of the *Guidelines*, as disclosure of information is essential to the participation of indigenous communities in development, which is a vital component of sustainable development. By failing to disclose essential information necessary for effective participation of the

¹⁷⁸ Report of the World Commission on Environment and Development (“Brundtland Report”), U.N.G.A. A/42/427 (4 Aug. 1987) at Ch. 2, para. 1, available at <http://www.worldinbalance.net/pdf/1987-brundtland.pdf> (last visited Sept. 5, 2008).

¹⁷⁹ *Id.* at Ch. 2, para. 4.

¹⁸⁰ Rio Declaration on Environment and Development (“Rio Declaration”) (Jun. 1992), available at <http://www.unep.org/Documents/Multilingual/Default.asp?DocumentID=78&ArticleID=1163>.

¹⁸¹ *Id.*

¹⁸² UN Agenda 21 is available at <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm#sec1>.

¹⁸³ *Id.*

indigenous communities affected by the Shwe project, and by failing to consult those communities, Daewoo and KOGAS are failing to further the goal of achieving sustainable development as encouraged by Section II.1 of the *Guidelines*.

Learning from the Yadana Gas Project Experience

In light of the environmental and human rights abuses that occurred – and continue to occur – in the Tenasserim region as a result of the Yadana gas project, the complainants are justifiably concerned that further breaches of Section II.1 can be expected as the Shwe project moves ahead. The Shwe project can be expected to increase the poverty of those living in the project area, negatively affect human health, and degrade the environment. These near imminent impacts are in stark contrast to the most important cornerstones of sustainable development and their likelihood constitutes a likely breach of Section II.1.

For example, in the vicinity of the Yadana project, increased militarization of the region in order to clear the area and provide project security has caused devastating consequences for proximate communities.¹⁸⁴ Soldiers forced community members to grow food for them, coercing families to use their own time and resources to grow food for the military. In turn, families were less able to provide food for their own survival. Soldiers also reportedly stole money and food directly from families, further exacerbating the situation.¹⁸⁵ As formerly self-sufficient families struggled to produce enough food, health deteriorated; the situation was compounded by health-related effects of gas releases from the project.¹⁸⁶ Anecdotal evidence attributes an increase in mosquitoes – dangerous in malarial Eastern Burma – to the import of new livestock imported by the companies.¹⁸⁷ Environmental degradation of the area affected wildlife, forests, and soil.¹⁸⁸ Recent reports suggest that conditions in the area of the Yadana project have not improved.¹⁸⁹

In Arakan State, militarization has steadily increased in the past two decades.¹⁹⁰ Forced labour and forced portering have also been reported,¹⁹¹ as have land confiscations¹⁹² and the extortion of money and food from families.¹⁹³ The ability of families to earn their livelihoods has been further endangered by the heavy – and at times brutal – restrictions placed on fisherfolk, as described earlier in this complaint.¹⁹⁴

ii. Section II.2, [Enterprises should] Respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.

Section II.2 of the *Guidelines* specifically requires business to respect human rights consistent with international law—in particular, “the host country’s international obligations.” In this case, this

¹⁸⁴ See generally *Total Denial Continues*, *supra* note 21, and *The Human Cost of Energy* *supra* note 21.

¹⁸⁵ *Total Denial Continues*, *supra* note 21, at 100-114.

¹⁸⁶ *Id.* at 131-132.

¹⁸⁷ *Id.* at 129.

¹⁸⁸ *Id.* at 149-159.

¹⁸⁹ *The Human Cost of Energy*, *supra* note 21, at 41-48.

¹⁹⁰ *Supply and Command*, *supra* note 140, at 22.

¹⁹¹ *Id.* at 25-26.

¹⁹² *Id.* at 27-28.

¹⁹³ *Id.* at 29-30.

¹⁹⁴ *Id.* at 31-32.

requires an examination of Burma's international human rights obligations. International law obligations arise both from customary international law and treaty law.

a) Customary International Human Rights Obligations

There is broad agreement among legal scholars and the United Nations that a number of human rights protections form part of customary international law and are binding on all nations. Thus, these customary law provisions must be considered part of the "international obligations" of Burma. Moreover, such obligations forming the corpus of international law are also considered binding on non-state actors, and accordingly must be respected by companies operating on Burmese territory.¹⁹⁵

A number of human rights provisions fall into this category. One resolution of the United Nations Human Rights Commission condemned the following abuses committed in Burma:

Extrajudicial killings, rape and other forms of sexual violence persistently carried out by members of the armed forces, continuing use of torture, renewed instances of political arrests and continuing imprisonment and other detentions . . . forced relocation; destruction of livelihoods and confiscations of land by the armed forces; forced labour, including child labour; trafficking in persons; denial of freedom of assembly, association, expression and movement; discrimination and persecution on the basis of religious or ethnic background . . . systematic use of child soldiers . . .¹⁹⁶

Many of these violations constitute breaches of norms of customary international law. For example, state sanctioned torture,¹⁹⁷ trafficking in persons, and slavery, including child labour and the use of child soldiers are all accepted norms of customary international law.¹⁹⁸ Moreover, when torture becomes systematic or widespread, this encompasses a further group of crimes known as "crimes against humanity". This category, which "are beyond any doubt part of international customary law",¹⁹⁹ includes the practice of systematic or widespread murder, forced disappearances, deportation and forcible transfer, arbitrary detention and persecution on political or other grounds.²⁰⁰ While this is not a comprehensive list, it covers many of the relevant human rights obligations of customary international law.

Protection against forced relocation, also commonly referred to as forced displacement, is not explicitly guaranteed in international law but the protection against arbitrary displacement or relocation is implicitly accepted as a norm of customary international law through the expression of other derivative basic human rights, such as the freedom of movement, freedom from interference with one's home, and

¹⁹⁵ Andrew Clapham, *The Human Rights Obligations of Non-State Actors*, Oxford University Press, 2006.

¹⁹⁶ U.N. Human Rights Commission, Resolution 2005/10, U.N. Doc. E/CN.4/RES/2005/10 ¶ 3(f) (Apr. 14, 2005).

¹⁹⁷ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (entry into force June 26, 1987).

¹⁹⁸ *Convention on the Rights of the Child* (CRC) (entry into force, Aug. 14, 1991); *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* (Entry into force July 25, 1951); *Forced Labor Convention, 1930* (No. 29) (Entry into force May 1, 1932); *Abolition of Forced Labor Convention, 1957* (No. 105) (Entry into force Jan. 17, 1959).

¹⁹⁹ *Report of the Secretary General pursuant to paragraph 2 of Security Council resolution 808*, U.N. Doc. S/25704, (1993) (arguing that crimes against humanity do not draw their legality only from international law treaties or other written international instruments, but are also established under international customary law).

²⁰⁰ S.C. Res. 808, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/808 (1993); S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994)

the right to housing.²⁰¹

The *Guiding Principles on Internal Displacement*, while not legally binding, is the internationally recognized normative framework used to identify the rights and guarantees relevant to the internally displaced in all phases of displacement.²⁰² This includes protection against arbitrary displacement, a basis for protection and assistance during displacement, and guarantees for safe return, resettlement and reintegration.²⁰³ Of particular relevance is Part 2(a) of Principle 6, which prohibits displacement as arbitrary “in cases of large-scale development projects that are not justified by compelling and overriding public interests.”²⁰⁴

Principle 9 of the *Guiding Principles* additionally states that:

States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists, and other groups with a special dependency on and attachment to the land.²⁰⁵

b) Obligations Under Treaty Law

Burma is a member of the United Nations and a party to the United Nations Charter, which as a basic matter commits Burma to “promoting and encouraging respect for human rights and for fundamental freedoms.”²⁰⁶ While the specific rights are not enumerated in the Charter, this is an additional source that requires Burma to observe the customary law of human rights. Burma is also a party to two major human rights treaties, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (entry into force, Aug. 21, 1997) and the Convention on the Rights of the Child (CRC) (entry into force, Aug. 14, 1991). CEDAW generally prohibits discrimination against women and requires “legal protection of the rights of women.”²⁰⁷

The CRC more comprehensively protects the human rights of all minor children. It protects the “inherent right to life” of all children,²⁰⁸ a provision that necessarily forbids the arbitrary killing of any child. It also protects the right of every minor to be free from “arbitrary or unlawful interference with his or her privacy, family, or correspondence,”²⁰⁹ a right that prohibits the arbitrary forcible relocation of families and their dwellings. It also requires states to take appropriate measures to assist families

²⁰¹ Universal Declaration of Human Rights art. 12, 13(1), and 25(1); International Covenant on Civil and Political Rights art. 12(3) and 17; The International Covenant on Economic, Social and Cultural Rights art. 11; The Covenant on the Rights of the Child art. 27; The Convention on the Elimination of All Forms of Discrimination against Women art. 14, paragraph 2(h); The International Convention on the Elimination of All Forms of Racial Discrimination art. 5(e)(iii); The 1949 Geneva Convention art. 33 and 49, and Additional Protocol art. 17; The ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries art. 16

²⁰² Francis Deng & et al., *Guiding Principles on Internal Displacement* presented to the United Nations Office for the Coordination of Humanitarian Affairs, Geneva, Switzerland (August 2, 1998), available at http://www.reliefweb.int/ocha_ol/pub/idp_gp/idp.html (last visited Sept. 2, 2008) (hereinafter *Guiding Principles*)

²⁰³ See Francis Deng, “Introductory Note by the Representative of the Secretary-General on Internally Displaced Persons,” to *Guiding Principles on Internal Displacement*, presented to the United Nations Office for the Coordination of Humanitarian Affairs, Geneva, Switzerland (August 2, 1998), available at http://www.reliefweb.int/ocha_ol/pub/idp_gp/idp.html (last visited Sept. 2, 2008).

²⁰⁴ *Guiding Principles*, *supra* note 206.

²⁰⁵ *Id.*

²⁰⁶ U.N. Charter art. I(3).

²⁰⁷ CEDAW art. 2(c).

²⁰⁸ CRC art. 6(1).

²⁰⁹ *Id.* art. 16(a).

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.”²¹⁰ This would forbid actions that deprive families of the ability to earn a livelihood to provide for their children, or that deprives them of housing. The CRC also requires the protection of children “from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s...development”²¹¹; from “all forms of sexual exploitation and sexual abuse,”²¹² and from “all other forms of exploitation prejudicial to any aspect of the child’s welfare.”²¹³ The CRC also protects a range of basic human rights for children, including prohibitions on torture and arbitrary detention.²¹⁴ Finally, the CRC prohibits the recruitment into military service of any child under 15 years of age, and requires states to ensure that these children “do not take a direct part in hostilities.”²¹⁵

Burma is also a party to the Geneva Conventions of 1949. Common Article 3 of the Geneva Conventions provides that in all cases of armed conflict, including internal conflicts, it is prohibited to commit murder, torture, “outrages upon human dignity, in particular humiliating and degrading treatment,” and summary executions.²¹⁶

c) Breaches of Section II.2

By participating in the Shwe Project, Daewoo and KOGAS are breaching and will continue to breach Section II.2 of the *Guidelines*. Daewoo and KOGAS are linked to violations of the fundamental human rights of people in the project area, contrary to Burma’s international obligations and commitments. These abuses are expected to continue and increase in frequency, and Daewoo and KOGAS have not exercised sufficient due diligence over the proposed security services for the project, which will in one way or another be provided by the Burmese military (*Tatmadaw*).

Here, the United Kingdom Afrimex decision is persuasive.²¹⁷ The UK NCP adopted John Ruggie’s definition of “due diligence”:

Due diligence can be defined as a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it. The scope of human rights-related due diligence is determined by the context in which a company is operating, its activities, and the relationships associated with those activities²¹⁸

Adopting this standard, Daewoo and KOGAS clearly do not fulfill the requirements of paragraph II.10 of the *Guidelines*. The lack of due diligence means that these companies have failed to fulfill the expectations of paragraphs II.1 and II.2 of the *Guidelines*. Payment to the Burmese authorities clearly funds activities, including forced labor and forced relocation and other situations in which numerous

²¹⁰ *Id.* art. 27(1), 27(3).

²¹¹ *Id.* art. 32(1).

²¹² *Id.* art. 34(1).

²¹³ *Id.* art. 36

²¹⁴ *Id.* art. 37.

²¹⁵ CRC art. 38(2)–(3).

²¹⁶ Geneva Convention Relative to the Treatment of Prisoners of War (hereinafter Third Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3316. available at <http://www.unhcr.ch/html/menu3/b/91.htm> (last visited Sept. 5, 2008).

²¹⁷ Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (Uk) Ltd., 28 August 2008

²¹⁸ www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf

human rights abuses will occur. These payments will prevent the economic, social and environmental progress key to achieving sustainable development and contributed to human rights abuses, as demonstrated below.

The Shwe Project has already been linked to forced relocations.²¹⁹ Villagers who have been found fishing in military-patrolled exclusion zones surrounding drilling rigs have been beaten.²²⁰ Local people who have expressed dissent regarding the extraction of natural gas from offshore Arakan State have been detained, interrogated, and arrested by authorities in Arakan State, as have other people based on the suspicion they harbor dissent or have supported activities of local activists who oppose the Shwe project.²²¹

Learning From the Yadana Gas Project

The experience of the Yadana gas project illustrates further the range of abuses relevant to Section II.2 of the *Guidelines* that are likely to result from the Shwe Project, which will stretch across over 1,100 miles of terrain and through 24 townships in 2 states and 3 divisions in Burma. The militarization of the much shorter Yadana pipeline corridor was accompanied by serious human rights abuses by soldiers, including extrajudicial killings, rape, and torture.²²² Soldiers forcibly relocated villagers and restricted their movements,²²³ making it difficult for villagers to sustain their livelihoods.²²⁴ Soldiers destroyed crops and homes,²²⁵ confiscated farmland,²²⁶ and recruited villagers, including children, for forced labour and forced portering.²²⁷ The ongoing military campaign against armed opposition groups in the area included the murder and torture of civilians.²²⁸

These abuses connected to the Yadana gas project were violations of both customary and treaty obligations to respect human rights. Torture, rape, and killings were violations of the customary international legal norms of the right to life, liberty, and security of person enshrined in the Universal Declaration of Human Rights (UDHR). The routine rape of villagers by soldiers was carried out with impunity²²⁹ and constituted violations of the obligation to protect women's legal rights under CEDAW. The military's destruction and confiscation of property, forced relocations, and diversion of villagers' labour and resources from subsistence activities to military activities violated customary rights to freedom of movement and association and freedom from arbitrary confiscation of property; it also violated children's rights, under the CRC, to freedom from interference with their families and to a standard of living adequate for physical, mental, spiritual, moral and social development. The use of forced labourers, including children, was a violation of both customary and CRC prohibitions on the use of slave labour and on economic exploitation and hazardous work for children. Torture and killing of civilians suspected of supporting the armed opposition were in violation of the Geneva Convention.

Rather than protect basic human rights, the Yadana project was a direct cause of violations of these rights. Given the military regime's unchanged human rights record and the way that the Shwe project is proceeding, the same abuses can legitimately be expected to occur as a result of the Shwe Project, in

²¹⁹ *Amnesty Report*, *supra* note 89.

²²⁰ *Id.* at 31.

²²¹ *ERI Interview*, *supra* note 7.

²²² *Total Denial Continues* *supra* note 21 at 24, 108, 113.

²²³ *Id.* at 43-48.

²²⁴ *Id.* at 114.

²²⁵ *Threat to the Peace*, *supra* note 87.

²²⁶ *Total Denial Continues*, *supra* note 21, at 110.

²²⁷ *Id.* at 24, 31, 53-60.

²²⁸ *Total Denial*, *supra* note 21, at 22-23.

²²⁹ *Id.* at 113.

excess of the abuses that are already occurring in connection to the project. This is particularly true as the military arrives to secure the vast area for construction of the gas pipeline, and as the project increasingly encroaches on communities near the Bay of Bengal. In the absence of preventative measures, the participation of Daewoo and KOGAS in the Shwe Project will continue to contribute to human right abuses rather than respect them, breaching Section II.2 of the *Guidelines*.

iii. Section III.1 & V.2, *Enterprises should 1) ensure that timely, regular, reliable and relevant information is disclosed regarding their activities, structure, financial situation and performance & 2) provide timely information and consult with affected communities*

Under Section III.1 of the *Guidelines*, enterprises are encouraged to disclose information to parties directly affected by the enterprise's activities. This information should include the foreseeable risks of enterprises' projects and systems for managing these risks. In the 2000 Commentary on the *Guidelines*, enterprises are advised to be transparent in their operations and are encouraged to disclose information on the social, ethical, and environmental policies of the enterprise. Several international initiatives direct companies to disclose relevant information, including the Global Reporting Initiative (GRI), which was endorsed by the *Guidelines*.

Section V.2 of the *Guidelines* encourages enterprises to:

- a) Provide the public and employees with adequate and timely information on the potential environment, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance; and
- b) Engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.

a) International Standards

The importance of corporate transparency has been highlighted in a number of international initiatives, including GRI, the UN Global Compact, the Extractive Industries Transparency Initiative (EITI), and the Global Transparency Initiative (GTI).

The GRI provides guidelines for enterprises to measure, track, and improve their economic, environmental, and social performance in order to improve sustainable development.²³⁰ The GRI guidelines, which have been endorsed by KOGAS,²³¹ include numerous standard indicators that should be a part of all enterprise reports. GRI guidelines recommend the disclosure of the "nature, scope, and effectiveness of any programs and practices that assess and manage the impacts of operations on communities, including entering, operating, and exiting."²³² The GRI also recommends that enterprises disclose information on the activities of subcontractors and joint venture partners when these entities

²³⁰ *Sustainability Reporting Guidelines*, Global Reporting Initiative, October 2006, pg. 3. Available at http://www.globalreporting.org/NR/rdonlyres/ED9E9B36-AB54-4DE1-BFF2-5F735235CA44/0/G3_GuidelinesENU.pdf (last visited Sept. 5, 2008).

²³¹ KOGAS Sustainability Report, 2006. Available at http://www.unglobalcompact.org/data/ungc_cops_resources/02B3F878-022E-4775-9EB5-C3956F908696/COP.pdf (last visited Sept. 5, 2008).

²³² *Sustainability Reporting Guidelines*, *supra* note 234 at 35.

have a significant impact on enterprise activities or on project implementation.²³³

The UN Global Compact is an initiative aimed at building the social legitimacy of businesses and markets. Under the Global Compact, enterprises are encouraged to design projects in compliance with ten core principals that promote human rights, labour rights, environmental protection, and transparency. Principal 8 of the Global Compact recommends that enterprises “measure, track, and report progress in incorporating sustainability principles into business practices, including reporting against global operating standards.”²³⁴ Principal 10 encourages enterprises to be transparent in their activities and accountable to the public. KOGAS joined the Global Compact on April 17, 2007 and KOGAS’ 2006 Sustainability Report stated that KOGAS is committed to following the Global Compact’s Principals. In the same report, KOGAS claimed the following:

Environmental/social Risks: These are risks that accompany the energy development business. In order to prevent delays and stoppages in construction, we meet with local communities and stakeholders to gain their input. Furthermore, we are also interested in the risks involved; the social environment, working conditions, the natural environment, biodiversity, and the exhaustion of natural resources.

We have incorporated economic risks into our strategy as well as environmental/social risks, that is, we expect to provide very effective innovation opportunities to improve the welfare of our stakeholders.²³⁵

KOGAS has also received ISO 14001 certification, meaning that KOGAS implements Environmental Management Systems and is committed to identifying, controlling, and reporting on the environmental impact of its projects.²³⁶

The Extractive Industries Transparency Initiative (EITI), an intergovernmental initiative which received endorsement from the World Bank and the Asian Development Bank, encourages disclosure of revenue and payments from oil, gas, and mining projects.²³⁷ The Global Transparency Initiative (GTI) is a network of civil society organizations that encourage disclosure of information on project activities by international financial institutions (IFIs), and public participation in the development policies and projects that affect their lives.²³⁸ Many of the principles advocated by GTI have been adopted by the World Bank and the Asian Development Bank.

b) Obligations Under Treaty Law

Burma has an obligation under international law to consult with indigenous communities if a significant impact to these communities is expected. Burma ratified the Convention on Biological Diversity on November 25, 1994. This treaty entered into force on December 29, 1993, and contains

²³³ *Id.* 18-19.

²³⁴ *The Ten Principles*, UN Global Compact. Available at: <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Sept. 5, 2008).

²³⁵ *KOGAS Sustainability Report*, *supra* note 235 at 7.

²³⁶ ISO 14000 Essentials, International Organization for Standardization. Available at http://www.iso.org/iso/iso_catalogue/management_standards/iso_9000_iso_14000/iso_14000_essentials.htm (last visited Sept. 5, 2008).

²³⁷ Extractive Industries Transparency Initiative, <http://eitransparency.org/eiti/summary> (last visited Sept. 5, 2008).

²³⁸ The Global Transparency Initiative, <http://www.ifitransparency.org/about.shtml> (last visited Sept. 5, 2008).

provisions for respecting indigenous peoples' right to public participation. Article 8 of the Convention provides in part that:

Each Contracting Party shall, as far as possible and as appropriate:

...

(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holder of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.²³⁹

c) Breaches of Section III.1

Daewoo and KOGAS are currently breaching Section III.1 of the *Guidelines* by failing to consult with affected communities and by failing to inform them about the project, despite having completed extensive exploration of the offshore gas fields and despite having already proceeded to the development stage of the project. Daewoo entered into a contract with the Burmese military regime in August 2000 and began test drilling in late 2003.²⁴⁰ At present, five years after test drilling began, there has been no consultation with local stakeholders such as SGM, with communities near the Bay of Bengal, or with communities living in the 24 townships across which the proposed pipeline route will traverse.²⁴¹

Section III.1 of the *Guidelines* requires that companies promptly and regularly inform communities of all relevant information regarding their activities and performance.²⁴² Reporting to local communities and the public about the Shwe Project has not only failed to be prompt and regular – it has been virtually non-existent. The lack of communication and transparency and its likely negative effects will also be discussed in more detail below, with respect to Section V.2 of the *Guidelines*.

The Burmese regime's actions will have a significant impact on the enterprise's project, by virtue of the fact that the military regime is a 15% stakeholder in the project through the state-controlled entity MOGE, and by virtue of the likelihood that the Burmese Army will provide security for the project. Despite that, Daewoo and KOGAS have not disclosed information to the public or local communities regarding the Burmese government's activities in association with the project, as required by the *Guidelines*. This is a cause of considerable concern. During the construction and ongoing operation of the Yadana and Yetagun pipelines, the Burmese army battalions provided, and continue to provide, pipeline security for Chevron and Total.²⁴³ These security forces committed and continue to commit abuses typical of the Burmese military, including forced labour, killings, rape, and beatings.²⁴⁴ In light of this knowledge of the patterns of behaviour of the Burmese Military, and pursuant to the *Guidelines* themselves, Daewoo and KOGAS should publicly disclose any arrangements they have with the Burmese military regarding pipeline security or other sharing of responsibility.

²³⁹ *Convention on Biological Diversity*, Rio de Janeiro, 5 June 1992. Available at: <http://www.cbd.int/doc/legal/cbd-un-en.pdf> (last visited Sept. 5, 2008).

²⁴⁰ *The Human Cost of Energy*, *supra* note 21, at 57.

²⁴¹ *Id.* at 57.

²⁴² *OECD Guidelines for Multinational Enterprises, Revision 2000* at 20.

²⁴³ *The Human Cost of Energy*, *supra* note 21, at 29-30.

²⁴⁴ *Id.* at 31-36.

In addition, section III.1 of the *Guidelines* provides that companies should disclose information regarding their “financial situation.” Payments to the military regime, both now and in the form of royalties in the future, are undoubtedly a material aspect of the companies' financial situations, and according to the *Guidelines* must therefore be disclosed to the public. Daewoo and KOGAS have not published any details of their payments to the Burmese government to date.

d) Breaches of Section V.2

As will be described further in relation to Section V.3 of the *Guidelines* regarding Environmental Impact Assessment (EIA), the Shwe Project is already reportedly having adverse effects on the natural environment. Moreover, local communities have not been consulted or even briefed by any of the corporations involved in the project, as required under Section V.2 of the *Guidelines*.

As explained above and below in Section *e.*, Daewoo's and KOGAS's proposed pipeline will pass several environmentally sensitive locations, both onshore and offshore, posing risks that have not been addressed by the company to the public, as required in Section V.2 of the *Guidelines*.

Moreover, the waters of the Bay of Bengal and nearby rivers could be adversely affected by pollution and are home to endangered species, such as the dugong.²⁴⁵ The risk of earthquakes is also an important consideration, given that the proposed pipeline will pass through recognized seismic fault zones in Burma.²⁴⁶ On the China side of the proposed pipeline earthquakes are also a serious consideration. The massive earthquake in Sichuan, China on May 12, 2008 raised concerns when it seriously threatened that country's longest fuel pipeline that carries 70 percent of Sichuan's oil supplies,²⁴⁷ and another earthquake struck the China-Burma border on August 20, 2008, forcing over one thousand evacuations.²⁴⁸ Likewise, western Burma is prone to cyclones, landslides,²⁴⁹ and other natural disasters that add to the environmental risks involved.²⁵⁰

Impacts on local people's health are also of concern, and the companies have not provided communities with any information about potential health impacts of the project. Local communities in Arakan State and along the proposed pipeline path depend upon the natural environment for their food and water. Access to fresh water sources, aquatic and other animal life, and nuts and fruits from the forest are crucial to the survival of local people. The Shwe pipeline and its security forces will cut through extensive forests and jeopardize access to these resource and these important subsistence activities. In

²⁴⁵ Dugongs are large grey mammals which spend their entire lives in the sea; internationally, the dugong is listed on Appendix I of the Conservation of International Trade in Endangered Species (CITES), and on Appendix II of the Convention on Migratory Species (the CMS). See Australian Government Department of the Environment, Water, Heritage and the Arts, “Dugongs”, <http://www.environment.gov.au/coasts/species/dugongs/index.html> (last visited Sept. 5, 2008).

²⁴⁶ See Socquet, Anne et al. “India and Sunda Plates Motion and Deformation along their Boundary in Myanmar Determined by GPS”, *Journal of Geophysical Research*, Vol. 111, B05406, 2006.; Vigner, Christopher et al. “Present-Day Crustal Deformation around Sagaing Fault, Myanmar” *Journal of Geophysical Research*, Vol. 108, No. B11, 2533, 2003.

²⁴⁷ “Earthquake Lake Threatens China's Longest Oil Link” by Wang Ying, June 6, 2008, Bloomberg, available at <http://www.bloomberg.com/apps/news?pid=20601087&sid=aeYsZAB0iWbY&refer=home> (last visited August 20, 2008).

²⁴⁸ “Earthquake Hits China Border with Myanmar” AFP, August 20, 2008, available at http://afp.google.com/article/ALeqM5jD9ICqDKCK_AenEkD2XJc23z8g1Q (last visited Sept. 5, 2008); “Earthquake Raises Concern Over Mega Dams” by Violet Cho, The Irrawaddy, August 20, 2008, available at http://www.irrawaddy.org/highlight.php?art_id=13944 (last visited Sept. 5, 2008).

²⁴⁹ “Landslide Kills Six in Myanmar” AP, August 20, 2008, available at <http://www.gmanews.tv/story/114910/Landslide-kills-six-in-Myanmar> (last visited Sept. 5, 2008).

²⁵⁰ See, e.g., *Total Denial supra* note 21, at 55.

2005 there were reports of approximately 10,000 dead fish in the Kaladan River, near the site of Daewoo's offshore drilling in the Bay of Bengal. Residents of Arakan State report catching small fish with deformed intestines.²⁵¹ While the specific cause of this is unclear, in the absence of dialogue with the company about the impacts of the Shwe Project, the companies' activities can not be ruled out as a cause. Moreover, the pipeline will very likely involve forced relocation,²⁵² a human rights violation that has been proven to adversely affect the health of the displaced people and to exacerbate poverty.²⁵³

Lastly, local people are justifiably concerned about the safety impacts of the Shwe Project, none of which have been discussed or addressed by the companies. The Shwe project is already resulting in human rights abuses in Arakan State, and these abuses are likely to increase in frequency and severity. Given the regime's unchanged human rights record, extensive militarization will undoubtedly accompany the project across the country, almost certainly leading to an increase in abuses such as forced labour, forced relocation, extrajudicial killings, rape, and violence. Daewoo and KOGAS have not consulted with communities about these areas of grave concern, in breach of the *Guidelines*.

iv. Section IV.1(c), *Enterprises should contribute to the elimination of all forms of forced or compulsory labour.*

Section IV.1(c) of the *Guidelines* stipulates that enterprises should eliminate all forms of forced or compulsory labour "within the framework of applicable law, regulations and prevailing labour relations and employment practices." International obligations regarding forced labour arise from both customary international law and treaty law. In addition, Burma's domestic law explicitly prohibits the use of forced labour.

a) Customary International Law Regarding Forced Labour and Forced Portering

Prohibitions on the use of forced labour are so widespread as to constitute customary international law. Moreover, forced labour is so widely condemned that it has achieved the status of a *jus cogens* violation,²⁵⁴ and it is recognized as a modern form of slavery.²⁵⁵ The Universal Declaration of Human Rights bans forced labour when it bans all forms of slavery.²⁵⁶ Forced labour has been explicitly prohibited in numerous international treaties including the International Covenant on Civil and Political Rights,²⁵⁷ the Rome Statute,²⁵⁸ and the International Labour Organization Fundamental

²⁵¹ See Dale, *Over 10,000 Giant Sea Perch Dead, Hitsu Deformed: Daewoo & Shwe Block A-1 Gas Operation*, The Shwe Gas Bulletin, Vol. 1, Issue 5 (Sept. 2005).

²⁵² See *supra* note 21; *Total Denial*, *supra* note 21, at 41-43; *The Human Cost of Energy*, *supra* note 21, at 46-47.

²⁵³ Back Pack Health Worker Team, *Chronic Emergency: Health and Human Rights in Eastern Burma*, Sept. 2006, at 44-47, available at <http://www.geocities.com/maesothtml/bphwt/index.html> (last visited Sept. 5, 2008); See Downing, TE. "Avoiding New Poverty: Mining-Induced Displacement and Resettlement" in *Mining, Minerals, and Sustainable Development (MMSD)*, April 2002, No. 58, available at http://www.ied.org/mmsd/mmsd_pdfs/058_downing.pdf (last visited Sept. 5, 2008).

²⁵⁴ *Jus Cogens*, Latin for "compelling law," is a term used in reference to peremptory norms under international law from which no derogation is ever permitted.

²⁵⁵ See *eg.* Symeonides, Symeon, *Choice of Law in the American Courts in 2002*, 51 Am. J. Comp. L. 1, 49 (Winter 2003); *John Doe I v. Unocal Corp*, 395 F.3d 932, 945 (9th Cir. 2002).

²⁵⁶ *Universal Declaration of Human Rights*, G.A. Res. 217(A)III (1948), Article 4 (prohibiting all forms of slavery), available at <http://www.un.org/Overview/rights.html> (last visited Sept. 5, 2008).

²⁵⁷ The United Nations International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 1966, Art. 8 (prohibiting forced labour). Available at: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm

²⁵⁸ *Rome Statute of the International Criminal Court*, Rome 1988, Art. 8 (making enslavement a crime against humanity), available at <http://www.un.org/children/conflict/keydocuments/english/romestatuteofthe7.html> (last visited Sept. 5, 2008).

Conventions.²⁵⁹ Forced labour was also made a war crime under the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal.²⁶⁰

b) Obligations Under Treaty Law

On March 4, 1955, Burma ratified the Convention Concerning Forced or Compulsory Labour, which entered into force May 1, 1932. Article 4 of this Convention stipulates 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.” Article 5 adds that “[n]o concession granted to private individuals, companies or associations shall involve any form of forced or compulsory labour for the production or the collection of products which such private individuals, companies or associations utilise or in which they trade.”

As a member of the ILO, Burma is obligated to uphold the ILO’s eight fundamental, or core conventions.²⁶¹ This includes the Abolition of Forced Labour Convention, (ILO No. 105), which came into force January 17, 1959. Article 1(b) of this convention prevents the use of forced labour “as a method of mobilising and using labour for purposes of economic development.”

c) Obligations Under National Law

Pursuant to its obligations under international law, Burmese law also prohibits forced labour. Order No. 1/99 “directs responsible persons not to exercise powers...relating to requisition of forced labour and stipulates actions that are to be taken against any violation.”²⁶² On October 27, 2000, the Ministry of Home Affairs, under the direction of the State Peace and Development Council (SPDC), issued Order Supplementing Order No. 1/99, rendering the requisition of forced labour illegal and making the use of forced labour a criminal offense.²⁶³ Under this Order, authorities are prohibited from forcing citizens to work. The only exception, under Clause 1(b), is “when an emergency arises due to fire, flood, storm, earthquake, epidemic disease, war, famine and epizoodic [sic] that poses an imminent danger to the general public and the community.” Under Clause 6, “[a]ny person who fails to abide by this Order shall have action taken against him under the existing law.”²⁶⁴

²⁵⁹ *Convention Concerning Forced or Compulsory Labour*, (ILO No. 29), 39 U.N.T.S. 55, 1930, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C029> (last visited Sept. 5, 2008); *Abolition of Forced Labour Convention*, ILO No. 105, 17 January 1959, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C105> (last visited Sept. 5, 2008).

²⁶⁰ *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal*, Aug. 8, 1945, Art. 6, 82 U.N.T.S. 280 (making enslavement a war crime), available at <http://humanrights.law.monash.edu.au/instree/1945a.htm> (last visited Sept. 5, 2008).

²⁶¹ *ILO Declaration on Fundamental Principles and Rights at Work*, 86th Session, Geneva, June 1998, available at http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT, “[a]ll Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely . . . the elimination of all forms of forced or compulsory labour.” (last visited Sept. 5, 2008)

²⁶² The Union of Myanmar, The State Peace and Development Council, Letter No. 04/Na Ya Ka (U)/Ma Nya, November 1, 2000, “Subject: Prohibiting Requisition of Forced Labour” available at [http://www.mol.gov.mm/8.Home/Home_link/spdc\(Eng\).pdf](http://www.mol.gov.mm/8.Home/Home_link/spdc(Eng).pdf) (last visited Sept. 5, 2008).

²⁶³ *Id.*

²⁶⁴ ORDER SUPPLEMENTING ORDER NO. 1/99, translation reported by Human Rights Foundation of Monland, August 30, 2001, available at http://www.burmalibrary.org/docs/HURFOM's_Forced_Labour_Report.htm (last visited Sept. 5,

d) Breaches of Section IV.1(c)

Daewoo and KOGAS are not currently in breach of section IV.1(c) by contributing to the practice of forced labour, but breaches of this guideline are imminent when the project proceeds onshore; when the Burmese military provides security for the project, formally or informally, and when the project brings militarization along the proposed pipeline route. Based on the experience of the Yadana gas pipeline, and the already pervasive use of forced labour in Arakan State and throughout Burma, it is highly likely that there will be further breaches as the project progresses.

The Yadana gas pipeline was responsible for increasing the use of forced labour before, during, and after construction. The military presence in the pipeline region was increased to ensure security of the project before construction began.²⁶⁵ As the Yadana pipeline area became more heavily militarized, conscription of local villagers for forced labour and portering increased.²⁶⁶ Soldiers forced thousands of civilians to build and maintain their army barracks, and carry heavy loads for battalions on patrol.²⁶⁷ Soldiers also forced villagers to cultivate crops for them.²⁶⁸

Aside from the forced labour associated with militarization of the Yadana pipeline region, forced labour directly facilitated the pipeline project. Soldiers recruited villagers to build infrastructure such as helipads and roads for the pipeline project and to clear the path of the pipeline.²⁶⁹ The only way to avoid conscription for forced labour was for villagers to pay “labour fees” or “porter fees” to the military when their labour was demanded; an option most villagers can not afford.²⁷⁰

Although the Yadana pipeline is now complete, the practice of forced labour in the region continues. Local villagers are still conscripted to provide sentry duty for the pipeline or to porter for the military that patrols the area.²⁷¹ The construction of the Yadana pipeline therefore not only contributed to the practice of forced labour during construction, but created conditions that entrenched the use of forced labour in the long term.

In the absence of an intervention or preventative measures, the same violations are likely to result from the Shwe Project. Despite the government’s stated commitments, forced labour continues to be a pervasive problem in Burma. Recent ILO and U.S. State Department reports found that the State Peace and Development Council (SPDC) continues to use forced labour throughout Burma despite the ratification of international conventions and national laws prohibiting its practice.²⁷² The United

2008).

²⁶⁵ *Total Denial Continues*, *supra* note 21, at 53

²⁶⁶ *Id.* 53-60.

²⁶⁷ *Id.* at 24-26, 34, 53-60.

²⁶⁸ *Id.* at 110.

²⁶⁹ *Id.* at 84-89.

²⁷⁰ *Total Denial Continues*, *supra* note 21, at 101.

²⁷¹ *Human Cost of Energy*, *supra* note 21, at 35-39.

²⁷² *See, e.g., Effect Given by the Government of Myanmar to the Recommendations of the Commission of Inquiry Established to Examine the Observance of the Forced Labour Convention, 1930 (No.29)*, Intl Lab. Off., 279th Sess., Agenda Item 6, G.B. 279/6/1(Add.1)(Rev.1) (2000), available at <http://www.ilo.org/public/english/standards/realm/gb/docs/gb279/pdf/gb-6-2.pdf> (last visited Sept. 5, 2008); *Developments Concerning the Question of the Observance by the Government of Myanmar of the Forced Labour Convention: Report of the Very High-Level Team*, ILO Governing Body, 292nd Session, B.292/7/3 (2005), available at <http://www.ilo.org/public/english/standards/realm/gb/docs/gb292/pdf/gb-7-3.pdf> (last visited Sept. 5, 2008); *Conclusions Concerning Myanmar*, ILO Governing Body, 300th Session, GB.300/8(& Add.), 2007, available at

Nations (UN) Special Rapporteur on Myanmar continues to receive reports on the use of forced labour and forced recruitment by Burmese state and non-state actors throughout Burma.²⁷³ The ILO has also found the use of forced labour in Burma to be “widespread and systematic,”²⁷⁴ and has called on member states with relations to Burma to “take appropriate measures to ensure that the [Burma] cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labour.”²⁷⁵

Arakan State has seen a steady increase in militarization over the past two decades,²⁷⁶ and forced labour and forced portering have also been reported.²⁷⁷ The Shwe project will likely exacerbate this situation. The project will also increase the income of the SPDC from natural gas export sales by an estimated 150%,²⁷⁸ thus entrenching military rule in Burma and allowing these types of abuses to continue. Given this situation, there is every likelihood that the Shwe Project will directly contribute to an increase in the use of forced labour, during the construction of the project now and during its operation in the long term.

v. Section V.3, *Assess environmental impact and prepare an appropriate environmental impact assessment*

Section V.3 of the *Guidelines* requires enterprises to:

Assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle. Where these proposed activities may have significant environmental, health, or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessment.

The commentary to the *Guidelines* recommends that any perceived effect of the enterprise’s activities should be reported in accordance with the principals set out by the International Association for Impact Assessment (IAIA). This includes “identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals *prior* to major decisions being taken and commitments made” (emphasis added).²⁷⁹

a) The Requirement for Environmental Impact Assessment (EIA) Under Customary International Law

http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_087572.pdf (last visited Sept. 5, 2008); *Country Reports on Human Rights Practices for 2004: Burma*, U.S. Dept. of State, Feb. 28, 2005, available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41637.htm> (last visited Sept. 5, 2008).

²⁷³ *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, Special Rapporteur Paulo Sérgio Pinheiro, U.N. Human Rights Council, A/HRC/4/14, 4th Sess. February 12, 2007, available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/4/14 (last visited Sept. 5, 2008).

²⁷⁴ *Report of the Commission of Inquiry Appointed Under Article 26 of the Constitution of the International Labour Organization to Examine the Observance by Myanmar of the Forced Labour Convention*, ¶ 536, 1998, available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm> (last visited Sept. 5, 2008).

²⁷⁵ *Reports of the Selection Committee*, International Labour Conference, 88th Session, 2000, available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc88/com-seld.htm> (last visited Sept. 5, 2008).

²⁷⁶ *Supply and Command*, *supra* note 140, at 22.

²⁷⁷ *Id.* at 25-26.

²⁷⁸ *Id.* at 13.

²⁷⁹ *Principle of Environmental Impact Assessment Best Practice*, International Association for Impact Assessment (1999), available at http://www.iaia.org/modx/assets/files/Principles%20of%20IAIA_web.pdf (last visited Sept. 5, 2008).

In order to implement the goals of global environmental treaties and other international agreements, the EIA has increasingly become a very significant and useful tool. EIA is included in many international environmental treaties, declarations, and policies.²⁸⁰ The first international document to incorporate EIAs occurred in 1974. Article 9 of the Declaration of Environmental Policy of the Organization for Economic Cooperation and Development (OECD) states that it is critical that “the environmental impact of significant public or private activity” be assessed prior to implementation.²⁸¹ Important international environmental documents that contain provision for EIA include the Rio Declaration on Environment and Development and U.N Agenda 21. The Rio Declaration acknowledges that “planning” requires an assessment of the environment impacts of proposed activities. Principle 17 of the Rio Declaration states that:

[e]nvironmental impact assessment [EIA], as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse effect on the environment and are subject to a decision of a competent national authority.²⁸²

An EIA generally ensures that *prior to* the approval of proposed activities, the following will occur:

1. Appropriate authorities will have fully identified and considered the environmental effects of the proposed activities under their jurisdiction; and,
2. Affected citizens will have had the opportunity to understand the proposed activities and will have been able to express their views to the decision makers.²⁸³

²⁸⁰ See e.g., *World Charter for Nature*, G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, para. 11(c), at 17, U.N. Doc. A/RES/37/7 (1982) (Activities which may disturb nature shall be preceded by assessment of their consequences, and environmental impact studies of development projects shall be conducted sufficiently in advance, and if they are to be undertaken, such activities shall be planned and carried out so as to minimize potential adverse effects); *Protocol on Environmental Protection to the Antarctic Treaty*, Annex I, opened for signature Oct. 4, 1991, art. 8, 30 I.L.M. 1455, 1464, .1473-76 (EIA required prior to implementation of activities impacting the Antarctic environment or dependent/associated ecosystems); *United Nations: Convention on the Law of the Non-Navigational Uses of International Watercourses*, opened for signature May 21, 1997, art. 12, 36 I.L.M. 700, 1320 (requires an EIA for “significant adverse effect[s]” so that “possible effects of the planned measures” can be evaluated); *Convention for the Protection of the Natural Resources and Environment of the South Pacific Region*, done November 25, 1986, art. 16, 26 I.L.M. 38, 48; *Convention on the Protection and Development of the Marine Environment of the Wider Caribbean Region*, done Mar. 24, 1983, art. 12, 22 I.L.M. 227, 230; *Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment*, done Feb. 14, 1982, 9 *Envtl. Pol’y & L.* 56, 60-61 (1982); *Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region*, done Mar. 23, 1981, art. 13, 20 I.L.M. 746, 750; *Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution*, done Apr. 24, 1978, art. 11, 1140 U.N.T.S. 133, 158.

²⁸¹ See Article 9, OECD Declaration of Environmental Policy, available at <http://sedac.ciesin.columbia.edu/entri/texts/oeed/OECD-4.04.html> (last visited Sept. 5, 2008).

²⁸² United Nations Conference on the Environment and Development: The Rio Declaration on Environment and Development, June 13, 1992, Principle 17, 31 I.L.M. 874, 879. One legal scholar has interpreted the phrase “as a national instrument” as implying the use of a universal standard which is applicable both to activities within the domestic jurisdiction and those more likely to be of international concern. David A. Wirth, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?*, 29 *Ga. L. Rev.* 599, 633 (1995).

²⁸³ See John Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96 *Am. J. Int’l L.* 291, 297 (2002); David Hunter et al., *International Environmental Law and Policy* 366 (1998); Jon M. Van Dyke, *Sea Shipment of Japanese Plutonium*, 24 *Ocean Dev. & Int’l L.* 399, 402 (1993); Jain et al., R.K. Jain et al., *Environmental Assessment* 6, 8 (1993), at 6; Nicholas A. Robinson, *International Trends in Environmental Impact Assessment*, 19 *B.C. Env’tl. Aff. L. Rev.* 591, 594 (1992).

According to the IAIA's prescribed best practices, the EIA should be applied:

- As early as possible in decision making and throughout the life cycle of the proposed activity;
- To provide for the involvement and input of communities and industries affected by a proposal, as well as the interested public.²⁸⁴

b) Obligations Under Treaty Law

Burma is also required under treaty law to carry out EIAs when there is an expected significant impact on biological diversity. Burma is a party to the Convention on Biological Diversity, which requires it to conduct an EIA where there is likely to be a significant impact on biodiversity. Burma ratified the convention May 21, 1996. Article 14(1) provides that:

Each Contracting Party, as far as possible and as appropriate, shall:

- (a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures.²⁸⁵

Article 14 of the 1985 Agreement of the Association of South-East Asian Nations (ASEAN) on Conservation of Nature and Natural Resources, ratified by Burma in 1997, requires an environmental assessment for all proposed activities "which may significantly affect the natural environment."²⁸⁶ The final decision on the proposed activity must take the EIA into account.²⁸⁷ Article 206 of the 1982 United Nations Convention on the Law of the Sea, ratified by Burma in 1996, requires an EIA for any activity which is likely to cause significant and harmful changes to or pollution of the sea.²⁸⁸

c) Breaches of Section V.3

The *Guidelines* require an EIA when a proposed project "may have significant environmental, health, or safety impacts." As described above, the Shwe Project poses indisputable environmental, health, and safety risks. Yet, according to the SGM and local stakeholders, Daewoo and KOGAS have not, to date, conducted an EIA for the Shwe Project, despite having conducted extensive exploration and despite having already secured financing for the project. In order to fulfill the purpose of an EIA, it is critical that it be done *before* projects are implemented.

As mentioned above in Section VIII. b., the most environmentally sensitive locations along the proposed pipeline route in Burma are in Arakan State, where the proposed pipeline will bisect a

²⁸⁴ *Principle of Environmental Impact Assessment Best Practice*, International Association for Impact Assessment (1999), available at http://www.iaia.org/modx/assets/files/Principles%20of%20IA_web.pdf (last visited Sept. 5, 2008).

²⁸⁵ *Convention on Biological Diversity*, Rio de Janeiro, 5 June 1992, available at <http://www.cbd.int/doc/legal/cbd-un-en.pdf> (last visited Sept. 5, 2008).

²⁸⁶ ASEAN Agreement on the Conservation of Nature and Natural Resources, Kuala Lumpur, 09 July 1985, Art. 14, available at <http://www.ecolex.org/ecolex/ledge/view/RecordDetails;jsessionid=3698C2F040F509435F9D391B684FDAA9?id=TRE-000820&index=treaties> (last visited Sept. 5, 2008).

²⁸⁷ *Id.*

²⁸⁸ Third United Nations Conference on the Law of the Sea: Final Act, Oct. 21, 1982, art. 206, 21 I.L.M. 1245, 1309, 11th Sess., at 86, U.N. Doc. A/Conf. 62/122 (1982).

national marine park, sensitive mango swamps, and estuaries, and also appears likely to cross 5-6 small rivers that drain on the west side of the Arakan Yoma Range.²⁸⁹ The proposed pipeline will cross the Irrawaddy and Salween Rivers, where a leak or a burst pipeline would have serious environmental impacts on downstream populations, as well to the immediate environment.²⁹⁰ The proposed pipeline will also cross two active earthquake fault zones in Burma, and areas in Yunnan Province where earthquakes are common, making it particularly vulnerable to physical damage in the absence of sound environmental planning.²⁹¹

Offshore, and especially in the absence of sound environmental planning, natural gas projects create toxic wastes which can contaminate water and adversely affect marine life. The “drilling muds” produced during exploration contain toxic substances such as “arsenic, barium, lead, corrosive irons and naturally occurring radioactive materials.”²⁹² If drilling mud is dumped into the water, the toxic substances leach oxygen from the water, killing marine life such as shellfish.²⁹³ After extraction, toxic brine is often left behind, and its disposal can have “disastrous” effects on “wetlands, fish and wildlife.”²⁹⁴ Finally, daily gas emission from the drilling rigs is equivalent to “7,000 cars each driving fifty miles a day.”²⁹⁵ Such emissions contribute to air pollution and climate change, and are more likely in the absence of an EIA.

After being extracted from the Bay of Bengal, the Shwe natural gas will be transported by overland pipeline to China. As mentioned above in Section VIII. b., the pipeline will cut through 5 distinct and ecologically sensitive regions, all designated Global 200 Ecoregions by the World Wildlife Fund (WWF) for their extremely high biodiversity. Within these distinct and environmentally sensitive ecoregions exists several highly sensitive areas, including mangrove swamps,²⁹⁶ areas that are crucial water sources for Burma’s dry zone,²⁹⁷ a wildlife sanctuary,²⁹⁸ and a bird sanctuary.²⁹⁹

Two of these global hotspots are of particular concern: the Naga-Manuprui-Chin Hills Moist forests and the “vulnerable” Northern Indochina Subtropical Moist Forests.³⁰⁰ The Naga-Manuprui-Chin Hills are home to the endangered Hoolock gibbon and several endemic bird species. Habitat loss in this area has already caused local extinction of several animal species, including the guar, elephant, and

²⁸⁹ The rivers include Tanlwe and Taungtok (Taungup). The headwaters of the Thade may also be affected if the pipeline is built on the southern side of the highway between Taungain/Taungup/Taungok and Pyay/Pyi/Promei.

²⁹⁰ This complaint does not particularly focus on environmentally sensitive areas in Yunnan Province, China, where the pipeline also threatens a negative environmental footprint.

²⁹¹ *Supra* notes 251, 252, 253.

²⁹² *Total Denial*, *supra* note 21, at 54.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ If the pipeline crosses from Sanei to Ma-ei, it will bisect Nat Ma Taung National Marine Park and adjacent mangrove swamps. The coordinates of this area are 20°58'42" N. and 94°7'42" E.

²⁹⁷ The proposed pipeline could pass Popa Mountain Park, which is linked to reservoirs and dams including the Kyetmauktaung Dam. These are crucial water sources in the Dry Zone of central Burma. The coordinates of this area are 20° 53' N. and 95° 15' E.

²⁹⁸ The proposed pipeline could pass the Minsontaung Wildlife Sanctuary is located at 21° 28' N. and 95° 43' E.

²⁹⁹ The proposed pipeline could pass Pyi Oo Lwin Bird Sanctuary (Maymyo), 40 miles north of Mandalay at the bottom of Shan plateau, located at 22° 00' N. and 96° 30' E.

³⁰⁰ See National Geographic, “Wild World: Global 200,”

http://www.nationalgeographic.com/wildworld/global.html?id=0&mapServiceName=WW_G200&locWidth=120&locHeight=72&cMinx=96.732323&cMiny=20.24&cMaxx=97.199997&cMaxy=21.102398&size=undefined&detail=undefined

(last visited Sept. 5, 2008).

rhinoceros.³⁰¹ The Northern Indochina Subtropical Forests region “has the highest species richness for birds” in the Indo-Pacific region, “and ranks third for mammal richness.”³⁰² Mammal species include several endemic and near-endemic species, several other threatened species, and a critically endangered monkey.³⁰³ Several of the local bird species need “intact, mature forests” and do not tolerate human disturbance. These same birds play a crucial part in spreading the seeds of a number of forest species.³⁰⁴ Furthermore, local people depend upon the hardwood forests for food and medicines.³⁰⁵ Building a pipeline through this area will require clearing of the forest and without proper environmental planning will cause extensive habitat fragmentation. Such fragmentation could lead not only to the loss of animal species, but also to the loss of plant species that they support. Such habitat loss could lead to the extinction of endangered or endemic species, and push otherwise stable species into the endangered category.

Daewoo and its consortium partners will be required to “secure” a designated “pipeline corridor,” which will be the channel of land through which the pipeline will traverse. In some areas, this will require the construction of new roads and other infrastructure that pose special threats to the environment in military-ruled Burma. In addition to habitat fragmentation, clearing strips of land and road construction leaves areas vulnerable to increased illegal logging and hunting, as has been the case with the Yadana and Yetagun projects. Increased militarization in some areas can also lead to illegal logging and hunting.³⁰⁶ New construction of access roads in some areas can also cause erosion,³⁰⁷ threaten the purity of water supplies,³⁰⁸ and fragment habitat in a way that disrupts migration routes.³⁰⁹

Vandalism and the threat of cyclones, earthquakes, and landslides mean that accidental spills or leaks of toxic substances must be considered. The Bay of Bengal is prone to severe cyclones during the spring and fall.³¹⁰ Since natural gas is explosive, a leak could cause forest fires, a very real environmental concern.³¹¹ Earthquakes are also a consideration in both Burma and China, as noted above. The massive earthquake in Sichuan, China on May 12, 2008 seriously threatened that country’s longest fuel pipeline that carries 70 percent of Sichuan’s oil supplies,³¹² and another earthquake struck the China-Burma border on August 20, 2008, forcing over one thousand evacuations.³¹³

³⁰¹ World Wildlife Fund, “Chin Hills-Arakan Yoma montane forests,” available at http://www.nationalgeographic.com/wildworld/global.html?id=0&mapServiceName=WW_G200&locWidth=120&locHeight=72&cMinx=96.732323&cMiny=20.24&cMaxx=97.199997&cMaxy=21.102398&size=undefined&detail=undefined (last visited Sept. 5, 2008).

³⁰² World Wildlife Fund, “Northern Indochina subtropical forests,” available at http://www.nationalgeographic.com/wildworld/global.html?id=0&mapServiceName=WW_G200&locWidth=120&locHeight=72&cMinx=96.732323&cMiny=20.24&cMaxx=97.199997&cMaxy=21.102398&size=undefined&detail=undefined (last visited Sept. 5, 2008).

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ Palaung Youth Network Group (PYNG) *Under the Boot*, 2007, at 3.

³⁰⁶ *Total Denial Continues*, *supra* note 21, at 152-55.

³⁰⁷ *Id.* at 147-48.

³⁰⁸ *Id.* at 156-57.

³⁰⁹ *Id.* at 157.

³¹⁰ Atlantic Oceanographic and Meteorological Laboratory, Hurricane Research Division, “Frequently Asked Questions,” available at <http://www.aoml.noaa.gov/hrd/tcfaq/G1.html> (last visited Sept. 5, 2008).

³¹¹ *Total Denial Continues*, *supra* note 21, at 143. This risk was downplayed in PTT’s EIA for the Yadana pipeline.

³¹² “Earthquake Lake Threatens China’s Longest Oil Link” by Wang Ying, June 6, 2008, Bloomberg, available at <http://www.bloomberg.com/apps/news?pid=20601087&sid=aeYsZAB0iWbY&refer=home> (last visited Sept. 5, 2008).

³¹³ “Earthquake Hits China Border with Myanmar” AFP, August 20, 2008, available at http://afp.google.com/article/ALeqM5jD9ICqDKCK_AenEkD2XJc23z8g1Q (last visited Sept. 5, 2008).

A pipeline is also potentially threatened by being caught in the crossfire of an ethnic insurgency and “by specific attacks on the project itself.”³¹⁴ Such attacks on a gas pipeline are especially dangerous because they could ignite the gas and cause fires that would damage the surrounding area.³¹⁵ The proposed Shwe pipeline, like the Yadana and Yetagun pipelines before it, will likewise travel through an area of longstanding ethnic insurgencies in Shan State and thereby pose similar threats that are more likely to materialize in the absence of appropriate environmental and social planning.

The Shwe Project, in the absence of adequate and transparent environmental planning, has already begun to cause environmental damage. For example, as mentioned above in Section VIII. b., residents of Sittwe, near the offshore drilling site, have been catching unusually small fish with deformed intestines; residents also reported approximately 10,000 dead fish in the Kaladan River near Sittwe.³¹⁶ The causes of these incidents are unclear, but in the absence of sound environmental impact assessment and planning, the activities of Daewoo and KOGAS can not be ruled out as a cause.

EIAs conducted for other natural gas projects in Burma, including one by the Petroleum Authority of Thailand (PTT) for the Yadana pipeline, have been incomplete, marred by misinformation from the company, and lacking in adequate public participation.³¹⁷ An EIA can not be effective or adequate unless it includes informed and meaningful participation by the people who will be affected by the project.

Moreover, EIAs are commonly accompanied by a Social Impact Assessment (SIA), which is being supplemented by the emerging norm to conduct a Human Rights Impact Assessment (HRIA).³¹⁸ With regard to an assessment of human rights impacts of the project, in July 2006 Daewoo stated: “Our position is that it's not the right time to discuss a human rights abuse issue because we are still at a stage of exploring the gas field and have yet to begin development.”³¹⁹ This reflects a deep misunderstanding about development planning and impact assessment, missing the point that it is meant to occur prior to decisions about proceeding with a project, not during or after the project has begun. It also raises concern about Daewoo’s ethics and sense of obligation to abide by OECD *Guidelines*.

V. CONCLUSION

This complaint details violations of the *OECD Guidelines for Multinational Enterprises* by Daewoo International and KOGAS through their involvement in the Shwe Project in Burma (Myanmar), as well as the likelihood of future, more serious violations as the project progresses. Daewoo and KOGAS are in violation of the following *Guidelines*:

- Chp II, § 1 and 2 by failing to contribute to sustainable development and failing to

³¹⁴ *Total Denial*, *supra* note 21, at 13.

³¹⁵ *Total Denial Continues*, *supra* note 21, at 155.

³¹⁶ See Dale, *Over 10,000 Giant Sea Perch Dead, Hits a Deformed: Daewoo & Shwe Block A-1 Gas Operation*, *The Shwe Gas Bulletin*, Vol. 1, Issue 5 (Sept. 2005).

³¹⁷ *Total Denial Continues*, *supra* note 21, at 139-40.

³¹⁸ See Human Rights Council, Eighth Session, Agenda Item 3, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development, A/HRC/8/5, (7 April 2008) “Protect, Respect and Remedy: A Framework for Business and Human Rights” available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> (last visited Sept. 5, 2008).

³¹⁹ “Korean, Indian firms urged to withdraw from Myanmar,” by N. Wong-Anan, Reuters, July 11, 2006.

- respect the human rights of people affected by the Shwe Project;
- Chp III, § 1 and Chp V, § 2 by failing to disclose relevant information about their activities and financial performance to the public and affected communities, and failing to consult with communities affected by their activities;
- Chp IV, § 1(c) by failing to contribute to the elimination of forced labour;
- Chp V, § 3 by failing to conduct an EIA, despite having already undertaken extensive offshore exploration.

As mentioned above in Section *I(v)*, ERI and the SGM request that the NCP in Korea hear this complaint with the intention to implement the mandate of the NCP position, as well as to mitigate future abuses that will otherwise be imminent. We request that the NCP make every effort to postpone the Shwe Project until these breaches are addressed. We also request that the NCP respond to this complaint in a timely manner, and to inform the complainants of its consideration and response to this complaint.

In matters of correspondence regarding this complaint and with the complainants, please contact:

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