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Master's Thesis:

Constructive Engagement and Illegal Investment:

The Role of Firms in Preventing Human Rights Abuse and Conflict

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Table of Contents

Abstract

This thesis examines the role of transnational corporations in preventing human rights abuse and conflict, along with the limits to proactive strategies and engagement with host governments. It concludes by applying these principles in a case study: the oil and gas industry in Burma. The issue is approached both practically and theoretically from economic, legal and political approaches.

In some cases it is possible for companies to avoid or mitigate risks by adopting proactive strategies that might included training and community development programs. A firm that recognizes these issues and adopts a socially responsible strategy may justify their presence in a given country based on the overall effect it has, despite some negative consequences, such as financing a corrupt regime. Furthermore, it can be assumed in many cases that a firm that withdraws will quickly be replaced by another firm, which may be less sensitive to these concerns. Based on these grounds, a company might argue that their presence in a country where the government does not respect human rights represents constructive engagement with the host country's regime.

While this line of reasoning is certainly valid, and while this strategy is feasible in some cases, there are certain boundaries that firms should not cross. Firstly, any complicity in human rights abuses or any actions that directly lead to violence are unacceptable on both a legal and ethical basis. This holds true despite the sincerity and extent of the efforts made. Secondly, if the preventative measures or programs designed to benefit the community require the company to take on a role that is inappropriate for a private actor, in that it involves responsibilities that are normally reserved for governments or civil society, the company should choose not to invest.

After coming to these conclusions from a comparative approach, they are applied to the oil and gas industry in Burma, where companies have gone to great lengths to prevent abuses from occurring in connection with their operations. Despite this, some violations of rights persist. Likewise, firms have initiated extensive social programs, which have made some positive differences. However, implementing a strategy that would successfully justify investments on these grounds would require firms to take on more responsibility than they should, and wield influence that is not appropriate for private actors.

List of abbreviations

ASEAN	Association of South-East Asian Nations
ATCA	Alien Tort Claims Act
BP	British Petroleum
CDA	Collaborative for Development Assistance
EITI	Extractive Industry Transparency Initiative
EU	European Union
FDI	Foreign direct investment
ICC	International Criminal Court
IPIECA	International Petroleum Industry Environmental Agency
MAI	Multilateral Agreement on Investment
MOGE	Myanmar Oil and Gas Enterprise
NGO	Non-governmental organization
NLD	National League for Democracy
OECD	Organization for Economic Cooperation and Development
PPTEP	PPT Exploration and Production Co Ltd
SLORC	State Law and Order Restoration Council
SOE	State-Owned Enterprise
SPDC	State Peace and Development Council
TNC	Trans-national corporation
UN	United Nations
UNSC	United Nations Security Council
US	United States of America
WTO	World Trade Organization

Introduction:

As the world becomes more globalized, the reach of transnational corporations has extended to nearly every corner of the world. In addition to bringing greater economic influence to firms, this trend has put companies in the center of controversy over the role that economic activity plays in conflict and human rights abuse.

Research on the economics of conflict has demonstrated that the primary sector, particularly the extractive industries, plays a role in causing and exacerbating conflict. This has ignited a debate over the effect that foreign direct invest in conflict areas has in affecting the well-being of the local population. Similarly, investment projects have been linked to increases in human rights abuses, especially in areas where such violations are already common. Along with a wider concept of corporate social responsibility, these realizations have put pressure on firms, both legally and in the "court of public opinion," to take proper action to ensure that their investments do not have adverse effects.

A cautious approach that precludes investing in countries where any risk is present might be the best way to avoid complicity in violence or human rights abuse with absolute certainty. On the other hand, passing up all opportunities that have some potentially negative consequences represents not only a loss of profit for firms, but also a lost opportunity for the countries in which the projects are available. Foreign direct investment is often the only way in which countries can acquire the capital that is needed for development. In such cases, the optimal solution involves an investment plan that takes these issues into account and implements a strategy that includes cautionary and proactive steps to ensure that business activity does not lead to human rights abuse or contribute to conflict.

Such a strategy will most likely include studies on the impact of the project's activity and what modifications might be made in order to eliminate or at least mitigate the risks of negative social consequences. In some cases, a company might go further by conducting or funding programs to safe-guard against human rights abuse or to benefit the community. The company might negotiate contracts in such a way that revenues will not create social risks, but rather will facilitate development.

Firms that do business in countries where significant risks are present, perhaps on account of a repressive government, might argue that their strategy constitutes "constructive engagement" with the regime. The premise of this justification is that the firm is doing more good than harm by investing in the country and helping to facilitate positive change. Moreover, a firm that is truly

committed to socially responsible practices is preferable to one that is not. If such a "responsible" firm were to withdraw, there would most likely be multiple less responsible companies ready to take its place.[1] In other words, a company might justify its presence in a problematic country or region by claiming that it is better than the alternative. While this line of reasoning is valid, and is a sound justification in many circumstances, the degree to which it can be applied is limited.

This thesis examines the role of transnational corporations in preventing human rights abuse and conflict along with the limits to proactive strategies and constructive engagement with host governments. It concludes by applying these principles in a case study: the oil and gas industry in Burma.

Interaction with the community, government, civil society and other stakeholders is an essential part of this process, and investment in many areas is possible if and only if a strategy is adopted that includes training or community development programs. However, such a strategy is not an option in all situations, based on two types of restrictions.

Firstly, all entities, whether they be states, physical persons or legal persons, are bound by internationally accepted human rights standards. There is absolutely no excuse for complicity in illegal acts, regardless of the overall effect an investment project has on a country and regardless of the well-meaning steps a company takes.

While instruments for enforcing international human rights law on transnational corporations remain somewhat weak, there a range of judicial remedies available, principally in domestic courts. For example, the United States' Alien Tort Claims Act has emerged as a powerful tool, as it allows foreign nationals to bring civil litigation based on breaches of international law against virtually any firm, regardless of its nationality and regardless of where the alleged actions took place. The US court system is not alone however, and other domestic court systems have the jurisdiction to hear cases that originate abroad as well.

While not legally binding, codes of corporate conduct and voluntary principles, such as the United Nations Global Compact, the International Labour Organization's Tripartite Declaration and the Voluntary Principles on Human Rights and Security, provide standards for firms to follow. And while these documents are not intended as mandatory minimum requirements,[2] a consensus is at least beginning to form over what constitutes responsible behavior for firms in relation to human rights and conflict.

Secondly, there is a limit as to what types of activity are appropriate for private entities. When companies take measures to prevent their operations from resulting in human rights abuses or

1 Bray, John "Attracting Reputable Companies to Risky Environments: Petroleum and Mining Companies," in in Collier and Bannon, edts Natural Resources and Violent Conflict, Washington, DC: The International Bank for Reconstruction and Development/The World Bank, 2003,

2 Kinley, David and Chambers, Rachel, "The UN Human Rights Norms for Corporations: The Private Implications for Public International Law," *Human Rights Law Review,* 6:3, 2006, p.465.

conflict, they should not operate in an area that is typically reserved for government or civil society. The emergence of corporate citizenship as a concept has led to calls for firms to take on greater and greater roles in development. However, taking on too great a role gives undue influence to private companies. Likewise, the ability of a transnational corporation to influence a national government, even if the goal is to promote respect for human rights or to prevent conflict, poses a problem.

Th oil and gas sector in Burma presents an ideal case study for examining these limits. Transnational corporations that operate in Burma have used constructive engagement to justify their decision to remain in the country despite harsh criticism, and some of the most ambitious corporate-run and funded training and development programs have been implemented there. Despite these efforts, several civil cases have been brought against companies in domestic courts in both Europe and the United States in connection with human rights abuses that allegedly occurred as a result of business activities in Burma. In order to reliably prevent any connection with similar incidents and to have a net positive effect on the country, companies in the oil and gas sector would need to take actions that go beyond what is acceptable involvement for firms.

The first chapter of this work discusses the demand for foreign capital in the developing world in contrast to the negative consequences that foreign direct investment can have. It reviews the literature linking resources and conflict, examines the ways in which economic activity can lead to human rights abuse, and surveys the guidelines and initiatives that have been proposed for countries to profit from resource extraction without these negative results.

While chapter one primarily approaches the issue from a broader, country-based viewpoint, chapter two looks at the issue from the perspective of firms. This includes the legal protections enjoyed by foreign direct investments and what conditions are most attractive for companies looking for profitable opportunities. Both poor human rights standards and conflict decrease profits and therefore generally deter firms under most circumstances. Additionally, firms may aspire to act in a way that it is socially responsible, whether it be out of a true sense of responsibility or merely to cultivate a favorable public image.

Even if human rights abuse and conflict are not in the best interest of corporations the majority of the time, there will still be some opportunities for making a profit by acting irresponsibly, and even illegally. Chapter three is concerned with mechanisms for holding firms accountable, including international law, national legislation, instruments related to the United Nations and the growing body of standard-setting corporate codes and voluntary principles.

Chapter four deals with strategies that firms can take to avoid complicity in human rights abuse or conflict. This includes everything from simply conducting human-rights and conflict impact assessments to funding or carrying out programs to change the environment in which the company does business. This chapter concludes by discussing the limitations of these strategies.

The last chapter applies these standards to the oil in gas sector in Burma. This case study

demonstrates some of the approaches that companies have taken in order to operate in conditions that are extremely unfavorable from a human rights perspective and the challenges associated with making them work.

Sources and Methodology

This thesis takes a multi-disciplinary approach. Determining the proper role of firms that invest in conflict or human-rights-sensitive areas necessarily involves looking at the economic, legal, political and ethical dimensions of the issue. In light of this, the methods used are varied as well. Some aspects of this discussion are at a theoretical level, while other issues necessitate a more empirical analysis. Likewise, the sources used vary in both scope and in approach depending on the specific topic that is under investigation. These sources range from academic literature to official reports issued by international organizations and civil society.

The economic discussion in this work is generally at the theoretical level and is based on academic literature as well as information collected and analyzed by international organizations such as the United Nations Conference on Trade and Development and the World Bank. Two main economic debates are discussed: the role of foreign capital in development and the link between natural resources and conflict. Neither of these issues are presented for the purpose of critically analyzing competing theories, but rather serve as context for the rest of the discussion.

Similarly, the main goal of examining legal instruments and enforcement mechanisms is to identity the framework within which investments are protected, what constitutes illegal behavior and how transnational corporations are held responsible for illegal actions. This is accomplished by surveying theoretical approaches that are advanced in academic literature, but also empirically, by recounting human rights litigation that has been brought against corporations, for instance. In addition to academic sources, several civil society groups keep records of these cases and publish relevant information. The non-governmental organization Earth Rights International, to name one, has provided legal assistance in multiple human rights-based actions against corporations and releases valuable information and analysis on the legal and factual matters of these cases.

A major component in this this are voluntary guideliness and principles that codify emerging standards for transnational corporations that operate in conflict-sensitive areas. While not legally binding, some of these documents can be considered “soft law,” having a quasi-legal character and are generally followed. Analysis of these guides, along with academic literature commenting on them, provides a basis for making normative claims regarding the actions of firms. Added to those opinions that are based on existing norms, political and ethical viewpoints advanced by academics and civil society are also taken into account in this regard.

Relatedly, many international and non-governmental organizations have issued guides for companies that operate in conflict zones or in countries where there is a high risk that human rights

abuse will occur. This material is generally meant to be both descriptive and instructive and includes case studies of successful and unsuccessful attempts and engaging the community and government to promote social development and to avert human rights and conflict-related risk.

In this thesis, case studies are drawn from this and other literature to illustrate which projects have been successful and which pose legal and ethical risks.

Lastly, the case study on Burma applies the conclusions drawn in the previous chapters (primarily chapter four) to the experiences of transnational corporations operating in the oil and gas sector. This section draws on political and economic analysis of the situation in Burma, as well as information on the specifics of operations in that country which are collected from civil society groups in addition to information released by the companies themselves.

Chapter 1:

The "Resource Curse" and Development

In the post-cold war era, the developing world has increasingly turned towards foreign direct investment in order to fulfill its development needs. At the same time, there are more and more transnational corporations ready to sink cash into projects around the world. This seemingly complimentary situation is however one that has led to unfortunate consequences. As research over the past decade has shown, investments, particularly in the natural resource sector, are correlated with the outbreak of civil conflict. Resource dollars can also exacerbate corruption and lead to human rights abuses, either directly or a indirectly resulting from the presence of foreign business. This chapter will look at positive and negative effects that natural resources can have on a country, specifically, development, conflict and the human rights abuses as the result of investments.

This debate focuses primary commodities, specifically natural resources. The reason for this is that countries that lack infrastructure are often not suited for the manufacturing or service sectors. If there is ongoing conflict, a history of conflict or the perceived risk of future conflict, many firms will pull out of a country, and manufacturing and services tend to be the first to go. This often means that only companies engaged in extractive industries or involved in energy projects will be willing to stay. Human rights abuses also tend to repel retail and manufacturing before oil and gas or mining investments.[1] [2]

One factor that has been identified and advocated by several initiatives undertaken by governmental and civil society coalitions is transparency in reporting incomes from natural resources. By creating a system in which it is harder for officials to unduly profit from resource income and in which it is clear where the money is ending up, a country might reduce the risk of corruption, repression and conflict. Attracting responsible firms is certainly in a country's best interest, as those companies add to the development and stability of a country. A firm that operates with impunity towards human rights and activities that can lead to conflict can work to its disadvantage. Creating an environment in which responsible firms feel comfortable doing business without putting themselves in legal jeopardy or tarnishing their reputation can greatly increase the likelihood that resource wealth will lead to development.

1 Although, medical and pharmaceutical companies, arms and defense, public works and construction are less adverse then "oil gas and mining," given an "otherwise attractive investment opportunity." However, countries with poor human rights records are often LDCs that have few attractive investment opportunities outside of the primary sector.

2 Control Risks Group, 2002 as cited by Bray, John "Attracting Reputable Companies to Risky Environments: Petroleum and Mining Companies," in in Collier and Bannon, edts *Natural Resources and Violent Conflict,* Washington, DC: The International Bank for Reconstruction and Development/The World Bank, 2003, p.296.

A more complicated question is: under what terms is engagement desirable with states that do not make a sufficient effort to ensure accountability? The answer depends on striking a delicate balance between the risks and benefits of investing in unstable and underdeveloped countries – especially those in which there is a history or current tendency for repression, violations of rights or conflict.

1.1 The Importance of Foreign Direct Investment

The role that FDI plays globalization, development and politics cannot be understated, and this influence is on the rise. Nearly every study conducted on the link between economic growth and FDI shows that the two are positively related.[3] According to the 2008 UNCTAD World Investment Report, 2007 saw FDI levels reach an all time high, with a total of $1,833 billion, after three consecutive years of growth.[4] This is despite the global financial crisis, which started in the second half of the year.

Developed countries were both the largest sources and destination for FDI, but least developed countries (LDCs)[5] may be more dependent than ever on investment money from TNCs. Infrastructure projects, for example, that are typically financed by public funds in the developed world are often financed with FDI in LDCs. In fact, the 2008 World Investment Report is subtitled "Transnational Corporations and the Infrastructure challenge."

The report notes that achieving success in meeting the Millennium Development Goals[6] depends on improving infrastructure in LDCs, and that the financial needs of such projects are not being met by "states, the private sector and other stakeholders."[7] The governments of LDCs currently invest around three to four percent of GDP on average in infrastructure projects, but would need to spend as mush as seven to nine percent to "achieve broader economic growth and poverty reduction goals."[8]

The economist Jeffrey Sachs has offered the concept of a "poverty trap" to account for the inability of LDCs, specifically those in Sub-Saharan Africa, to better their economic conditions. According to this theory, poor countries face certain uphill battles in which positive growth is not feasible below a certain level of capital. Savings rates, for example, are typically low in poor

3 Onyeiwu, Steve and Shrestha, Hemanta "Determinants of Foreign Direct Investment in Africa," *Journal of Developing Societies,* Vol. 20, 2004, p.95.

4 "UNCTAD World Investment Report 2008," p.1.

5 The United Nations categorizes a nation as "least developed" if it has low per capita gross national product, a low score on the Human Asset Index or the Economic Vulnerability index. Currently there are fifty countries on the list of LDCs, as compiled by the UN Office of the High Representative for Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, http://www.un.org/special-rep/ohrlls/ldc/list.htm.

6 As summarized by the UN, "The eight Millennium Development Goals (MDGs) – which range from halving extreme poverty to halting the spread of HIV/AIDS and providing universal primary education, all by the target date of 2015 – form a blueprint agreed to by all the world's countries and all the world's leading development institutions. They have galvanized unprecedented efforts to meet the needs of the world's poorest," http://www.un.org/millenniumgoals/bkgd.shtml

7 Ibid, p.13

8 Ibid. p.

countries and may not keep up with population growth and depreciation – in effect lowering the capital stocks of an economy. Of particular interest for the subject at hand are the slow diffusion of technology from abroad and high transportation costs in Sub-Saharan Africa, both of which make growth difficult.[9] While Sachs' proposed solution to the problem is centered on aid, FDI is increasingly being looked towards as source of cash to build up infrastructure necessary to overcome poverty.[10] However, both the economic theory behind this approach and the solution are controversial.

An opposing view is offered William Easterly, who argues that the private sector is more efficient in allocating resources and question the "poverty trap" approach, arguing that incremental investments by private sector offer a more efficient approach.[11] Whatever the case may be, there are two conclusions that can conservatively be drawn: LDCs need cash for developing infrastructure and, for better or worse, those countries seem to be looking increasingly to FDI as their main source of fundin.

FDI, however, tends to shy away from some of the countries that need it most. LDCs that have poor infrastructure are simultaneously the countries that need an influx of capital the most and those least suited for most new investment projects. In addition to infrastructure, they usually lack stable regulatory environments, and educated workforces.

This leaves LDCs with few options. One of those options is to warmly welcome transnational corporations, especially those in the extractive and energy industries.

1.2 Resources and Conflict

Research on the link between natural resources and conflict conducted by Paul Collier and Anke Hoeffler [12] [13] dramatically changed the course of the discussion over resources, investment and conflict. Even though some their conclusions remain controversial and there is no unanimous consensus regarding the exact role that resources play in promulgating conflict, the course of the discussion has called attention to resources, and put man TNCs under the spotlight.

The principle concept developed by Collier and Hoeffler is that in regions in which primary commodities account for a certain percentage of economic output – somewhere around a quarter[14] – there is a higher risk that conflict will break out.[15] Extraction may be possible throughout the course

9 Sachs, Jeffrey et al. "Ending Africa's Poverty Trap," 29 April, 2004, www.earth.columbia.edu

10 Easterly, William "Planners vs. Searchers in Foreign Aid," paper prepared for the Asian Development Bank's Distinguished Speakers Program, in Manila, Philippines 18 January 2006.

11 Ibid.

12 Collier, Paul "Doing Well Out of War," Paper prepared for Conference on Economic Agendas in Civil Wars, London, April 26-27, 1999.

13 Collier, Paul and Hoeffler, Anke *Greed and Grievance in Civil War,* Washington D.C.: World Bank, Development Research Group, 2000.

14 Bannon, Ian and Collier Paul "Natural Resources and Conflict: What We Can Do," in Collier and Bannon, edts *Natural Resources and Violent Conflict,* Washington, DC: The International Bank for Reconstruction and Development/The World Bank, 2003, p.3.

15 The explanation for this is that when resources make up a higher percent, the government has enough funds to

of a conflict, whereas manufacturing and service industries usually disappear when fighting breaks out.

In such cases, valuable commodities such as oil, diamonds and mineral deposits might provide rebels with a reason to fight. This is the purist form of the so-called "greed" argument: rebel leaders start fighting because they hope to get their hands on some commodity in the area rather than because they are compelled to on account of some grievance. But, virtually all rebellions are at least publicly justified on some sort of ideological grounds or on accusations that the current government has failed in some drastic way. Given this, it would be impossible to prove that a war was fought solely for economic gain even if such a conflict existed.

To further complicate the matter, a grievance might arise from some economic reason. For example, the uneven distribution of resource wealth may exacerbate a sense of social injustice already felt by a disadvantaged group.[16] Conflicts might also grow out of some grievance, but then turn violent when there are available resources that can be looted to buy weapons and feed soldiers.[17]

As rebel commanders loot resources to perpetuate their operations, a war that started for non-material reasons might turn into a resource war as leaders become more interested in short-term profits than long term objectives. An example of this is the independence war in Guinea-Bissau, where the struggle became focused on looting, which delayed the long-term objectives of the fighters.[18]

Paramilitary groups like the FARC[19] in Columbia seem to have no clear long-term objectives. They seem to be concentrated more on financing operations – through the drug trade and kidnapping – rather than achieving some ideological or political end. The rebel groups, in effect, seem to operate under business model rather than military strategy.

On the other hand, the presence of natural resources is neither necessary nor sufficient in provoking conflict. A study conducted by Richard Snyder points out that "no civil war" is more frequent among countries producing resources typically identified as "conflict resources," like timber, alluvial diamonds and illicit drugs.[20] While he does not totally disregard the connection, he suggests that the relationship is much more complex. And while Collier's econometric studies

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guarantee stability and control the country, whereas a lower percentage is less influential in starting or sustaining conflict.

16 Herbst, Jeffrey "Incentives, Natural Resources and Conflict in Africa," *Journal of African Economics,* Vol.9 No.3, 2000 pp.272-3.

17 Collier, Paul and Hoeffler, Anke "On the Incidence of Civil War in Africa,"

18 Herbst, p.277

19 The ongoing fighting in Columbia between the FARC, the Columbian army and various paramilitary groups is related to the activities of oil companies in several ways. Rebels have raised funds by kidnapping and ransoming foreign workers, and military and private contractors hired to protect equipment have been linked to the violation the local population's rights.

20 Snyder, Richard "Does Lootable Wealth Bread Disorder?: a political economy of extraction framework," *Comparative Political Studies,* Vol.39, 2006, p.645.

identify ethnic cleavages as significant predictors,[21] some authors have suggested that wars attributed to resources are actually better understood through social identity.[22]

Even if there are no *pure* resource wars, there are two factors that come out of economic research on warfare that are particularly useful in understanding the relationship between resources and fighting. Firstly, the distribution of resource income can constitute a grievance which can cause a society to fracture, sometimes violently. Secondly, resource money makes potential rebellions viable and can prolong existing conflicts by giving rebels a steady source of income. Leaving aside the messy job of untangling the causes of conflict, it is possible to look at the effects of TNCs in this context; while resources are neither necessary nor sufficient for a civil conflict, it may push existing tensions over the edge towards violence and may create situations in which a rebellion that would otherwise die out might continue as a result of money from natural resources.

1.3 Resources, Corporations and Human Rights

As a general axiom, stability is preferable to conflict, but this is not to say that some of the most egregious violations of human rights do not take place under sovereign governments. Here too there is a role played by business, also principally within – but by no means limited to – the extractive industry. And again, as is the case with conflict, looking for a causal relationship between natural resources and the human rights abuses is difficult, although there are a few patterns.

Propping up a corrupt or abusive regime

National governments are usually parties to civil conflict and in many conflicts human rights atrocities are perpetrated by both sides, with no clear legitimacy enjoyed by anyone. Lootable resources, especially when production is principally private,[23] can destabilize a government or can strengthen the ruling regime, especially when controlled publicly.[24] When a regime does not respect the rights of its citizens, the presence of natural resources can perpetuate the rule of a corrupt government that does not have the support of its people. When foreign companies consider investing in such a country, they can potentially help to keep such a regime in power.

This might include making payments to a repressive or brutal government. In Chad, Chevron paid a $25 million signing bonus to the Debi regime, which immediately spent $4 million of that money on weapons,. In a similar case, Talisman Energy of Canada has made payments to the Sudanese government which have helped to fund what some consider genocide in the Darfur region.[25]

In Burma, a similar argument can be made against investments in the country which benefit the

21 Bannon and Collier, p.3.
22 *For example see* Aspinal, Edward "The Construction of Grievance: natural resources and identity in separatist conflict," *Journal of Conflict Resolution,* Vol. 51, 2007, pp.950-972.
23 Synder.
24 Ibid p.648.
25 Winston, Morton "Corporate Responsibility in Conflict Areas," in *Transnational Corporations and Human Rights,* Frynas and Pegg, Scott eds., UK: Antony Rowe Ltd., Cheppenham and Eastbourne, 2003, p.84.

ruling military dictatorship, the State Peace and Development Council. Evidence has shown that the junta uses funds from natural gas extraction and hydro-electric dams to fund its military and thus further entrench its dictatorial rule. Despite its lack of foreign military threats, the junta spends around forty percent of its budget on the army, while only spending around five percent on public education and only slightly more than one percent on health care.[26]

In addition to providing financing, some TNCs have assisted in the acquisition of weapons more directly. For example, certain oil companies have gained a competitive edge in securing production contracts by assisting the Angolan government in arms purchases.[27]

According to the circumstances, the level of involvement that is required with a national government can vary. Winning contracts and production permits might require companies to pay large signing fees or to agree to production-sharing agreements with state-owned enterprises (SOEs).[28] On the other hand, just paying taxes, operating, licensing, and even visa fees can help support the government. This might not constitute legal culpability,[29] but it serves to demonstrate the difficulty for investors in remaining apolitical. Even the most cautious and well meant efforts can have unintended consequences.

A perfect example of this occurred in Chad, where a consortium of TNCs led by Exxon Mobil, the Chad-Cameroon Petroleum Development and Pipeline Project, began construction on a pipeline in 2000, which was completed in 2003. In the midst of strong opposition from NGOs, the project went ahead as the consortium took extreme precautions to prevent the revenues from funding conflict or oppression. The funds were channeled into an off-shore account and controlled by a structured management program focused on health, education, rural development, infrastructure and the environment. Nonetheless, Chad's government eventually enacted that this money could be spent on the military regardless of the terms of the agreement.[30]

Local rights and environmental concerns

The equitable distribution of resources is something that even fully democratic, fair governments struggle with. In exploiting resources in poor countries, where the stakes are high, governments often act with extreme disregard towards the wishes and rights of local people that happen to be "in

26 Earth Rights International, "China in Burma: the increasing involvement of Chinese multinational corporations in Burma's hydropower, oil and natural gas and mining sectors (2008 updated version)," September 2008, http://www.earthrights.org/content/view/573/41/, p.2.

27 Winston p.81.

28 State-owned enterprises are those in which a national government owns a significant share of the company. There is no strict requirement for the percentage that must be owned by the state in order for a firm to be considered state-owned, but generally, and for the purposes of this work, the state must have a large enough stake that it has significant influence over company decisions.

29 UN Human Rights Council, "PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS,CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT: Clarifying the Concepts of 'Sphere of influence' and 'Complicity,'" Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie"

30 Crowson, Phillip "Adding Public Value: the limits of corporate responsibility," Oxford Public Policy Institute, April 2007, p.40.

the way" of an industrial project. This can become an issue if uncompensated expropriations of private land occur or if the distribution of resources is extremely inequitable. Minority or indigenous populations seem to particularly susceptible to these risks.

A local population living on top of valuable resources might be displaced by mining activities, not compensated personally or at the community level, and then suffer consequences of environmental damages as well. In Papua New Guinea the Ok Tedi mining project demonstrates this.

Although an original environmental assessment of the project called for a tailings dam to control the flow of mining byproducts into the Ok Tedi river, mining operations were allowed to continue, and proceeded to pollute the surrounding area. The Ok Tedi Mining Company, an Australian firm (Broken Hill Properties Ltd.) and a state-owned mining enterprise all profited from the endeavor, while the local population saw little, if any, of the profits. In the mean time, the livelihoods of many were disrupted by destroyed crops and reduced fish stocks in the river as a result of tailings from the mine. Many living in the area reported related health problems as well.[31] (The inhabitants of the Ok Tedi area filed a suit claiming damages in an Australian, the case was settled out of court.)

While the Ok Tedi case is a bit extreme (although by no means rare), projects that exploit natural resources can similarly infringe upon local rights in more subtle ways. Even if compensation is paid to those who are displaced by a project, many governments are poorly equipped or simply not motivated to carry out the proceedings fairly. In the instance that a certain minority group is already the victim of discrimination, the influx of money from an extraction project could exacerbate these inequalities.

Using local personnel is almost always preferable to importing foreigners as it creates jobs, however it can also lead to nepotism, discrimination, intimidation and even violence as different groups vie for what are often rare opportunities. This is known as the "honey pot effect"[32] and can cause tensions. If protest movements break out, abuses can occur in the process of silencing these movements.

Quelling Dissent

Oil drilling operations and a pipeline in the Niger Delta in the early 1990's prompted a response from the local community, principally the Ogoni people. Protests erupted around the destruction of property and the environment and over disrespect for human rights.[33] In response to the generally peaceful protests raised against these operations, several violent attempts were made by the ruling

31 Kirsh, Stuart "Mining and Environmental Human Rights in Papua New Guinea," in Frynas and Pegg, pp.117-120

32 Operating in Areas of Conflict: an IPIECA guide for the oil and gas industry," report issued by the International Petroleum Industry Environmental Agency, London, UK, March 2009, p.9.

33 Earth Rights International, "Wiwa v Royal Dutch Shell: Background of the Case," http://www.earthrights.org/content/view/647/62/

military government to quiet dissent. The torture and execution of Ogoni leader Ken Saro-Wiwa in 1995, who was put on trial for murder, can be seen as part of this campaign. After testifying at his trial, several witnesses have since said that they were bribed or intimidated into giving false testimony, implicating an effort by the ruling junta to silence Saro-Wiwa by fabricating charges and putting him on trial.[34]

A lawsuit brought in a US federal court against Royal Dutch/Shell, a partner in the drilling and pipeline project, claims that the firm was complicit in the abuses committed against Saro-Wiwa and three other individuals, including a woman who was shot while peacefully protesting the destruction of her crops by bulldozers that were building the pipeline.[35]

Even if a host government stops short of shooting and hanging innocent people, there are a range of abuses that can occur. If there is already a poor system in place for protecting rights, those who are involved in protesting might be incarcerated without a fair trial or face harassment or intimidation aimed at halting dissent. In countries where such activity is a routine part of politics, the introduction of a controversial issue, like an oil well or mine, runs the risk increasing the level of oppression.

In 1999 Nigeria held elections, ushering in a new era of quasi-democracy, but this has not succeeded in putting an end to violence in the country. Human Rights Watch reported in July 2008 that "[s]ince at least 2003, politicians from the ruling People's Democratic party, determined to maintain their control of oil revenues, have directly fueled escalating violence in the Niger Delta and elsewhere in Nigeria."[36] When corruption and violence is ingrained in the political system, resource wealth can make the situation worse by increasing the incentives for gaining power and creating more potential rents.

Security and Joint Operations

Firms that operate in areas where conflict, violence or criminality are rampant have understandable concerns over the safety of their personnel and equipment. A government that is profiting, whether it be through a direct production-sharing agreement or simply by collecting taxes, has an obvious interest in guaranteeing the safety of employees and installations. The problem arises when security forces, whether they be police, military or private, operate with impunity and disregard for the rights of those living in the area. The authorities can become overzealous in going after peaceful protesters, or they can violently overreact to legitimate threats, using unwarranted violence and denying offenders due process.

It is typical, particularly in the extraction industry, for foreign firms to work in collaboration with SOEs, and money set aside for security operations can sometimes go straight to military or

34 Mathiason, Nick "Shell in court over alleged Nigerian executions," *The Guardian,* April 5, 2009.
35 Earth Rights International, Wiwa vs. Royal Dutch Shell Case History, http://www.earthrights.org/site_blurbs/wiwa_v._royal_dutch_shell_case_history.html
36 Guttschuss, Eric "Nigeria's Delta blues", Human Rights Watch news release, www.hrw.org, July 17, 2008.

police units. In some cases a TNC can fund arms purchases for equipment that is to be used in securing installations. This has been alleged to have occurred in Nigeria as well as Burma.

Chevron is involved in litigation over a complaint filed against the company in a US federal court under the Alien Tort Claims Act, over the case of a protester named Larry Bowoto, who was shot and injured by Nigerian security forces. The security forces were actually summoned by Chevron officials, and Chevron equipment, such as boats and helicopters, was used in cooperation with state security forces in the incident.[37]

The plaintiffs in *Doe v Unocal*, a case also brought before a US federal court under the Alien Tort Claims Act, implicated Unocal as being complicit in human rights abuses carried out by the Burmese military in the process of protecting oil pipelines operated by Unocal and its partners in a consortium that included a Burmese SOE.[38] The case was settled out of court in March of 2005 after the case was set to go to trial.

The project delegated some of the construction tasks to the Burmese military, who most likely used forced labor to complete some of the work. The complaint alleges that villagers were forced by soldiers to work as porters and to clear the area where the pipeline would later be constructed and never compensated for their labor.

While there are fortunately only a handful of countries in which such brazen disregard for basic rights is practiced so unapologetically by the ruling government, the risk of unethical or illegal labor practices on the part of TNCs and their partners and subcontractors is present in many places. Each state has slightly different laws and practices regarding labor rights, and it is unrealistic to expect a TNC to uphold every domestic law and standard that exists in its home country when operating abroad. But, investing in a country where basic rights which are internationally recognized, for example those found in UN conventions, are not routinely protected introduces genuine concerns. Even if a given TNC is adamant that its own operations meet a certain standard, it is often extremely difficult, if not impossible, to ensure that partners, subcontractors and suppliers are meeting these same standards.

By creating more opportunities for profit and employment, FDI can also create more opportunities for abuse and unfair labor practices.

1.4 A Balancing Act

In many countries a conundrum exists: natural resources and FDI are the only plausible option that exists for many countries in desperate need of finances and infrastructure, but FDI and resource profits have the potential to create or inflame conflict and can lead to human rights violations. In addition to the human cost, this can cause severe damage to an economy as well. Conflict can have

37 Egelko, Bob "Chevron Faces Suit over Nigerian Violence," *The San Francisco Chronicle,* October 26, 2008.
38 Chambers, Rachel "The Unocal Settlement: implications for the developing law on corporate complicity for human rights abuses," *Human Rights Brief*, 13 no. 1, p.14.

a prolonged and devastating effect on an economy. In the pursuit of economic growth and development a country can end up worse off than before.

Despite the link between resources and conflict, Collier agrees that it is neither ideal nor plausible to "leave [resources] in the ground."[39] He notes that countries like Chad in fact have few other options when it comes to development. In those countries in which infrastructure, technical knowledge and financial support for launching industrial projects is lacking, FDI is usually essential. The task for resource-rich countries is then to exploit natural resources in a way that reduces the risk of social unrest, conflict and human rights abuses by attracting firms that will operate in a responsible manner and to create a transparent and functioning legal framework to facilitate cooperation and reduce corruption.

The legal framework for investment is essential in this process. If reputable firms are going to invest, there must be a degree of stability and certainty that the government will protect that those investments. In order for revenues to aid in development and not enrich corrupt officials, the arrangement must be transparent.

Transparency initiatives

In sovereign nations the laws governing the relationship between government and industry are principally within the realm of domestic law. But, an international effort to create standards of transparency in developing countries – especially resource-exporting nations – has resulted in a number of voluntary principles and guides for transparency that have influenced many countries' domestic legal arrangments.

An emerging standard is the Extractive Industry Transparency Initiative (EITI), which is based on a list of principles that was agreed upon in 2003 and is a coalition between firms, NGOs and governments. Likewise, the EITI is designed to benefit implementing countries, companies and investors as well as civil society.[40] The EITI is directed only towards resource exporting countries, but is sponsored by a number of developed countries and international NGOs.

The goal in encouraging countries to implement the EITI is to ensure that income from resource-related activities goes towards development does not disappear into the pockets of corrupt officials. The principles of th EITI affirm that "management of natural resource wealth for the benefit of a country's citizens is in the domain of sovereign governments to be exercised in the interests of their national development," although firms operating within the country are also deemed to be responsible for payments disclosure.[41]

Countries that wish to take part in the initiative are first considered as candidates and then deemed compliant after a validation process carried out by appointed validators. (The validators

39 Collier, "Natural Resources and Conflict in Africa."
40 EITI official website: www.eitransparency.org
41 EITI principles agreed at Lancaster House Conference, 2003, principles two and eleven, respectively, www.eitransparency.org/eiti/principles

examine the legal situation to see if there are effective processes in place to make resource revenues transparent, that revenues are independently audited, and that all companies, including SOEs, properly report income.)[42] A compliant country must have a multi-stakeholder group, in which the government, civil society and firms take part and have the chance for meaningful communication of concerns with policy makers.

Though it is envisioned to be an accepted international standard,[43] the EITI is meant to compliment other efforts at increasing transparency, including the Publish What You Pay (PWYP) campaign, which is a coalition of civil society groups, including Global Witness, Oxfam and the Soros Foundation.

The International Monetary Fund (IMF) is also involved in promoting transparency initiatives that mitigate the potential negative impacts of resource revenues. Its Guide on Resource Revenue Transparency highlights some of the problems and solutions regarding development, instability and resource extraction. It notes that the EITI is concerned only with upstream activities – those that occur before a product is sold on the market – and that it is only applicable to certain extractable resources.[44] The IMF Guide addresses some of these more complicated issues, such as quasi-financial activities.

Resource companies, particularly SOEs, engage in social and environmental activities and may at times provide explicit or effective subsidies on prices in the domestic market. In other words, SOEs can sometimes serve a public-sector function. While there is nothing wrong with this *per se*, actions that serve this goal, in contrast to profit-driven decisions, should be noted. According to the IMF guide, quasi-financial activities should be reported as such, as a failure to do so can lead to misrepresentations of government budgets and cause market distortions.[45]

The IMF Guide points to Botswana as a success story of proper resource management.[46] However, as the 2006 report issued by the International Advisory Group for the EITI notes, "Transparency initiatives such as EITI are relatively young and few academic studies have been carried out on which to analyse the actual impact of transparency." As more countries sing on, the data set increases and such systematic study of the EITI and other initiative should be easier.[47]

Countries in the Organization for Economic Cooperation and Development (OECD)[48] generally have laws and procedures for reporting income from foreign operations or from foreign subsidiaries.[49] This is not to say, however, that these companies have an absolute and binding

42 Report of the International Advisory Group for the Extractive Industries Transparency Initiative, 2006, p.33
43 Ibid, p.8.
44 "Guide on Resource Revenue Transparency," International Monetary Fund, 2007, p.45.
45 Ibid. p.27-28.
46 Ibid. p.39.
47 Report of the International Advisory Group for the Extractive Industries Transparency Initiative, 2006, p.25.
48 The OECD consists of thirty member countries, all from the developed world. For the purposes at hand, OECD membership is used as a proxy for a high level of development and solid regulatory standards.
49 Swanson, Philip; Oldgard, Mai and Lunde, Leiv *"*Who Gets the Money?: Reporting Resource Revenues*,"* in *Natural Resources and Violent Conflict,* p.48.

obligation to report all payments to host governments at home. In the UK, for example, companies are only required to report the total amount of foreign taxes paid. In the US, the Securities and Exchange Commission requires listed companies to keep records of foreign payments for access by regulators but not to publish these records publicly.[50]

Multi-Stakeholder approach: attracting reputable partners

The cooperation of NGOs and firms, both domestic and foreign, is essential in creating a healthy environment for stability and development. While plenty of large, seemingly reputable companies from OECD countries have been complicit in human rights infractions and unethical behavior, there is still an advantage in attracting such companies. These firms bring with them a culture of accountability and respect for the rule of law. Often they face legal consequences in their home countries (see chapter three) and have an incentive to act responsibly in order to protect their reputation at home (see the following chapter).

However, a lack of development and political instability tend to deter the most reputable firms and are uninviting conditions for the type of long-term investments that can make a real difference for a country's development. Human rights concerns have been shown to deter firms. A Pricewaterhouse Coopers survey in 2001 of thirty two "world class" firms found that forty one percent had withdrawn from a country because of concerns over corruption and that thirty three percent of mining companies had been deterred from or withdrawn from an investment on human rights grounds.[51] A similar survey conducted by the Control Risk Group found that both corruption and human rights abuses deter investments by firms from developed countries in a variety of sectors.[52] Interestingly, mining and petroleum firms were the most deterred by corruption, compared to other sectors, with more than half of firms reporting that they had been deterred from an otherwise attractive investment by corruption in the host country.[53] They were somewhat less sensitive to human rights infractions, with just under twenty two percent being deterred from an opportunity on account of human rights concerns (compared to over twenty eight percent of retail firms). Firms involved in power generation and transmission appeared to be least sensitive to human rights.

The developed world does not have a monopoly on technology or expertise in practically any industry, and for any given drilling, mining, hydro-electric or manufacturing project there are firms from the developing world that are willing and able to carry them out. While firms from OECD countries may be reluctant to invest if there are concerns over corruption, transparency or human

50 Ibid. p.50.

51 Bray, John "Attracting Reputable Companies to Risky Environments: mining and petroleum companies," in *Natural Resources and Violent Conflict,* p.295-6.

52 Ibid.

53 However, while other sectors maybe less deterred from "otherwise attractive investments, the role of extractive industries is still large, as there are typically fewer such attractive investments for manufacturing and service secotro industries in LDCs.

rights, firms from developing nations might be much more willing. This is the core argument used by firms that claim to be involved in constructive engagement: if "reputable" firms that are at least cognoscente and concerned about such issues stay out of a given country, less responsible firms will take their place.

There is reason to believe that this is to a large extent true, as emerging economies – China is usually singled out,[54] but is by no means alone in this regard – do not have a culture of corporate social responsibility nor the same legal restrictions on firms that engage in destructive behavior while doing business abroad.

Firms from Europe or North America can argue with merit that their presence can have a positive effect on the host country by brining with them practices of transparency and a concern over corruption and human rights abuses – although there are certainly lines which those firms should not cross and a point at which the net effect of their presence is negative. For example, the US Foreign Corrupt Practices Act makes it illegal for any US company to pay bribes to foreign officials anywhere in the world, and similar legislation has been implemented by countries who have signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[55] (currently the thirty OECD member states and eight others).[56] When firms based in any of these countries invest internationally, the host country benefits from the imported practices and enforcement mechanisms.

For this reason, a country that is serious about fighting corruption, preventing human rights abuses and creating a stable environment for economic development has an interest in attracting such companies. Initiatives such as the EITI involve sponsoring governments, civil society, TNCs and host governments because the input of all parties is necessary. TNCs need to feel comfortable that certain standards will be met, or reputable companies will be deterred. NGOs and the home governments of international firms should also be involved, in order that TNCs do not have to risk prosecution or damage to their reputations at home.

Of course, many LDCs do not have governments that are serious about fighting corruption, preventing human rights abuses or even about development. In these cases, the debate turns to the proper role of firms based on a different set of standards.

1.5 Conclusion

There are many contentions and unsettled questions regarding the role that economic activity plays in conflict and stability, as there are regarding which development strategies are best for LDCs to

54 For example Philip Crowson writes: "These [emerging economies] and especially the Chinese do not always have the same preoccupations with shareholders and with corporate reputations as companies headquartered in developed countries." Crowson, Philip "Adding Public Value: the limits of corporate responsibility," Oxford Policy Institute, April 2007, p.20.

55 Bray, p.306.

56 Organization for Economic Cooperation and Development Anti-Bribery Convention homepage: http://www.oecd.org/document/21/0,3343,en_2649_34859_2017813_1_1_1_1,00.html

pursue. There are, however, some conclusions that can be drawn, and it is clear that LDCs need cash in order to develop, especially for building infrastructure. Many countries around the world have few options to pursue other than exploiting natural resources or energy production. While there is certainly a link between activity in these sectors and conflict and human rights abuse, it is neither necessary nor sufficient to bring about negative consequences.

TNCs have a crucial role to play, as many LDCs do not have the capacity to jump-start industries without foreign capital and technological assistance. While this relationship has the potential to be productive, it also has the potential to lead to human rights abuses or conflict. If a host country's government routinely violates its citizens' rights, the infusion of foreign cash and heightened incentives for financial gain for doing so can lead to more egregious or more frequent abuses. Profits and jobs created by investments can cause unrest. This can lead to outright conflict, or to brutal repression.

There are some strategies, such as promoting transparency, that help to avoid this outcome. If countries take steps that reduce these risks, then companies with a higher regard for human rights will invest in the country, whereas a higher likelihood of abuses will deter some companies. The companies that are not deterred, are not as likely to import a culture of transparency and respect for human rights.

In terms of determining what the proper role for companies in countries where there there is the risk of or ongoing conflict or where there is poor regard for human rights, the arguments both for and against constructive engagement come out of this debate. It is very much the case that developing countries need FDI for development purposes, and that there are many firms willing to provide that will not be as deterred by the potential for human rights abuses. It is also true that there is a huge benefit for the long term stability of a country in doing business with responsible firms. However, there is a balance to be struck between the costs and benefits of constructive engagement in any situation and this most be considered. After all, there is a point at which a "responsible firm" ceases to be so after compromising standards too much.

Chapter 2:

Investor Protections and Concerns

Finding the proper role for TNCs in areas of conflict and in host countries where human rights are not respected is a matter of politics, law and economics, but it is also one of business. This chapter will focus on the decision to invest from the investor's point of view.

Whatever the nature of an investment, the calculation will involve a tradeoff between risk and expected return. While the latter part of this equation will be specific to each individual project, the legal framework under which an investment is made, the risk of conflict and respect for human rights in the host country are all relevant factors as well.

The first issue covered in this section is the legal framework under which FDI is protected and the legal rights that investors have in the current state of legal regimes. While investors have traditionally been protected under international law, the current situation is becoming increasingly complicated and heterogeneous. This state of affairs most likely affords more rights to investors than has previously been the case.

Next, human rights and conflict are examined as practical considerations for firms deciding where to invest. In addition to legal consequences that face TNCs that are complicit in the proliferation of conflict or human rights abuse (detailed in the following chapter), there are some reasons for steering clear of areas in which such factors are present which relate solely to traditional profit models.

An addendum to this "pragmatic approach," is the advantage that companies seen to be "good corporate citizens" can gain via public perception, and conversely the damage that can be done by a bad reputation. Some have argued that companies have a responsibility that goes even further than this, and equate "Corporate Social Responsibility" (CSR) with a degree of moral agency. The last section of this chapter will cover this debate, and how it affects the behavior of TNCs.

2.1 Legal Framework of FDI: Protections for Investors

Protections afforded to investors under international law in the past have come from customary law, which covers investors who use funds for projects that have a goal of generating income in a foreign country, in other words, adding to the GDP of the host country. If this is the "foreign" aspect of FDI, the "direct" is in reference to continued control and influence over the project. This can be distinguished from "portfolio" investments, which do not involve this managerial aspect, but only a

financial stake in a project – which international law has traditionally not covered.[1]

In the past, the legal debate regarding FDI mostly concerned protections for firms and investors against capricious state actions, such as uncompensated nationalizations. But the situation today is much different. M. Sornarajah describes the controversy over protections for investors versus. the rights of host states' national governments as cyclical, coming in "ebbs and "flows."[2]

In the post-colonial era, there was a wave of nationalism on the part of the newly independent states, which sought a more influence over international financial matters. Then, during the Cold War, these debates became interwoven with the ideologies of the time, with the non-aligned movement fighting for more domestic control over the economy.[3] Later, the Reagan/Thatcher neo-liberal mood, coupled with the end of the Cold War and pressure exerted on developing economies to embrace free-market principles from the International Monetary Fund and World Bank helped to reverse this trend.[4] After the 1980's, the "legal discussion on expropriation has lost much of its importance…" according to Thomas Pollen, "…whereas indirect or regulatory expropriation is still being asserted in a majority of claims."[5]

Even if some protections have stuck, Philip Crowson notes that some recent nationalizations may indicate that "the pendulum which had swung strongly in favour of foreign investors in the 1980s and 1990s has been swinging back in favour of host nations in response to recent changes in market conditions."[6]

One constant, however, seems to be that the global financial system is becoming more and more complex, and the status of FDI under international law has likewise become more and more complicated. There has been a progression from customary protections to a heterogeneous system of bilateral investment treaties (BITs), in which the situation differs greatly from country to country. This is in contrast to international trade, which is regulated by the near-ubiquitous World Trade Organization (WTO). The Multilateral Agreement on Investment (MAI) was proposed an equivalent regulation mechanism for foreign investment, but failed to win approval.

While the politics of trade deals tariff zones had been of little interest outside business and political circles, the 1990's saw a change in this trend. A coalition of NGOs and anti-globalization movements succeeded in bringing media attention to such issues – the so-called "Battle in Seattle," for example. Opposition to the MAI was one of the first issues around which this coalition came together.[7] The anti-MAI protesters feared that the investment rules agenda from the Organization for

1 Sornarajah, M. *The International Law on Foreign Investment, 2nd Edition,* Cambridge University Press, 2004, p.7.
2 Ibid. p.1
3 Ibid.
4 Ibid. p.2
5 Pollan, Thomas *Legal Framework for the Admission of FDI,* Eleven International Publishing, 2006, pp.55-6.
6 Crowson, Philip "Adding Public Value: the limits of corporate responsibility," report published by the Oxford Policy Institute, April 2007, p.18.
7 Andrew, Walter "NGOs, Business and International Investment: the Multilateral Agreement on Investment, Seattle and Beyond," *Global Governance,* Vo. 7, Issue 1, January – March, 2001.

Economic Cooperation and Development would simply be applied to investments as well as trade, and that this would constitute an expansion of rights for big business at the expense of national sovereignty[8] – especially that of smaller, less influential states. Many such states have opened their borders in any case, albeit on their own terms, under various trade agreements and BITs.

Although, the first modern BIT was signed between Germany and Pakistan in 1959,[9] there has been a marked increase in such treaties in the past two decades. The 2008 World Investment Report, issued by the United Nations Conference on Trade and Development (UNCTAD) identified 2,608 BITs in existence as of 2007.[10] The report identifies a trend towards more and more such treaties, and the subsequent replacement of BITs with free trade agreements (FTAs)[11] – which typically go further than BITs in opening economies to investors.

While each BIT varies in regards to specifics, there are some common features that the majority of such agreements share. Most provide for disputes to be resolved in arbitration, the result of which is binding. A report prepared for Rights and Democracy, an NGO sponsored by the Canadian government, identifies a few additional common features:

- "Arbitrators must interpret what constitutes "unfair" or "inequitable" treatment in light of the facts of a dispute…"
- Host governments must ensure basic security for foreign-owned property.
- Assurance that foreign investors and investments are treated comparably to host state nationals and their investments.
- Foreign investors are given Most Favored Nation status: they are treated comparably to foreign investors from third states.
- Any investment that is subject to direct or indirect expropriation must be fairly compensated.
- "Investors are guaranteed the right to repatriate investment-related funds."[12]

Despite these similarities, there are nonetheless significant differences from treaty to treaty, and despite the prevalence of BITs, many pairs of countries are without such agreements. This leads many TNCs to "shop around" for the best country in which to incorporate, thus availing themselves of the advantages of that country's investment arrangements.[13]

In terms of the host country, there is a perceived incentive – attracting more FDI – in signing BITs, although it is not clear if this belief is entirely well founded. The conventional view is that

8 Ibid.
9 Peterson, Luke Eric "Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law within Investor-State Arbitration," report prepared for Rights and Democracy, International Centre for Human Rights and Democratic Development , Montreal, Canada, 2009, p.12.
10 "UNCTAD World Investment Report 2008: Transnational Corporations and the Infrastructure Challenge," New York and Geneva: United Nations, 2008, p.8
11 Ibid.
12 Peterson, p.13.
13 Ibid, p.17.

signing a BIT will directly increase the cash flow from a partner country. Another view is that, while a BIT does not directly influence investors' actions, it serves as a signaling device, indicating that the country is committed to protecting investors and their investments. Other studies, however, challenge both of these views and find no causal relationship between signing such treaties and an increase in investments.[14]

2.2 Practical Implications of Human Rights and Conflict

The legal protections provided to foreign investors in a given country, whether through BITs, domestic law or simply a general attitude, is one set of factors that influences the decision of a TNC to invest in a given country or not. Added to this decision there are naturally a variety of pragmatic factors involving the feasibility and profitability of a given project. This aspect of the decision-making process is mostly industry specific, and technical in nature. However, factors like human rights and proximity and risk of conflict are part of the equation as well.

Human rights and conflict can affect the nature and extent of the project, as well as the conduct of the corporation once it has set up shop. A decision might be based on legal concerns, voluntary guidelines and principles of corporate social responsibility. These issues will be discussed in later sections, however, and the present section will approach the effect of human rights and conflict on investment decisions from a pragmatic angle.

An investor's weariness in moving into a country in which an ongoing conflict is taking place is intuitive: fighting can damage equipment, put the lives of staff – both foreign and domestic – in danger, and introduces a drastic degree of uncertainty into all projects undertaken in such a country. Likewise, it is clear why countries in which there is a substantial risk of conflict would become less attractive.

To this end, many TNCs will perform a risk analysis to ascertain the likelihood that a conflict will arise in a certain state or geographical area. In addition to this, the International Petroleum Industry Environmental Conservation Agency (IPIECA), an industry association with links to the UN, recommends two additional levels of analysis: a conflict analysis, to look into the nature of the conflict, and whether fighting might resume in the case of a previous conflict; and a conflict impact assessment to look at the effects of the conflict and what impact that might have on the industry and operations in the area.[15] [16]

Human rights abuses as a strictly financial factor are a bit less intuitive. A common stereotype of big business offers the opposite portrayal: TNCs, especially those in the extractive and garment

14 *See* Aisbett, Emma "Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation," Munich Personal RePEc Archive, March 2007, http://mpra.ub.uni-muenchen.de/2255/.

15 "Operating in Areas of Conflict: an IPIECA guide for the oil and gas industry," report issued by the International Petroleum Industry Environmental Agency, London, UK, March 2009, p.9.

16 As mentioned in Chapter 1, the petroleum industry is particularly susceptible to conflict risks, as it is areas of operation are determined by the location of reserves rather than other factors which can be described as "conflict adverse".

industries, thrive in countries where workers' and citizens' rights are not protected. One author claims that "[i]n the globalised economy, capital tends to follow the path of least resistance and highest returns, often at the expense of labour, environmental and human rights standards."[17]

While it is certainly true that a variety of TNCs are responsible for human rights violations around the globe, there is some evidence to suggest that an environment that provides ample protection of rights has intrinsic advantages for business operations – that is, even before taking into account possible legal repercussions in TNCs' home countries and public opinion.

While there is an apparent advantage for a TNC working with a dictator, in that it there may be fewer legal obstacles to setting up shop, more security provided to operations and carte blanc to carry out business without taking local and environmental concerns into consideration, these advantages are entirely dependent on the continued support of the authoritarian power. Just as it is easier for such a government to disregard initial protests to a project, it is likewise easier for the authority to change conditions for the TNC. For example, an authoritarian government that signs a contract with an international extraction company might prove to be initially beneficial, in that the company may not need to worry about redistribution of resources and local claims to land rights. However, as the political tide turns, the regime might embark on its own program of redistribution in order to replenish its power base.[18] An authoritarian government may be both willing and able to seize assets more quickly and less predictably than a democratic one.

Even if everything goes according to plan, there is evidence to suggest that respect for human rights creates a more productive work environment. A study carried out by Shannon Lindsey Blanton and Robert G. Blanton demonstrates this point nicely. In an analysis using FDI levels and indexes of political repression, the study concluded that while human rights do not play a significant role in "selection criteria," deciding in which countries to invest, subsequent investments occur at a higher rate in areas in which there is greater respect for rights.[19] Criticisms that are damaging to public image may be leveled against companies for operating in a country where human rights abuses are rampant or for doing business with a regime known for violating rights. Once in the country however, it seems that, to a certain extent, the damage to the company's public image is done. The data, which suggest that the human rights record in a given country affects levels of investment but not the decision to invest, therefore suggests that there is a link between productivity and human rights. Companies find that their projects perform better – thus warranting subsequent funds – when there is an environment of respect for rights.

17 Fielding, Alex "Yahoo? Reining in the Wild West with the Alien Tort Claims Act," *Human Rights Review,* Vol.9, 2008 p.515.

18 Harms, P., & Ursprung, H. "Do civil and political repression really boost foreign direct investments?" *Economic Inquiry*, 40, 2002651-663.

19 Blanton, Shannon Lindsey and Blanton, Robert G., "Human Rights and Foreign Direct Investment: A Two-Stage Analysis," *Business & Society,* 2006, Vol. 45, p.477-8.

2.3 Corporate Social Responsibility and the "Triple Bottom Line"

If a TNC sacrifices profit in order to advance a humanitarian or social cause, or abandons a project on these grounds, it may be doing so to avoid legal consequences or to avoid bad publicity. If this is the case, it can still be viewed within the traditional paradigm of the "bottom line": a company follows the law and stays on the public's good side, but all in the pursuit of higher returns for the shareholders. A newer, broader version of "good corporate citizenship" goes beyond this.

Pierre-Yves Néron and Wayne Norman, divide literature on corporate citizenship into minimalist and expansionist conceptions. The former comprises corporate philanthropy and community projects – a more traditional approach. The latter is often equated with CSR and entails a deeper-seated responsibility to the communities in which a firm operates: "Good corporate citizenship on this account involves fundamentally rethinking relations with all major stakeholder groups..."[20]

CSR, or the "expansionist concept" of corporate citizenship, seems to change what constitutes a firms interest. This is also expressed by the "triple bottom line," which equates social and environmental impact with the traditional "bottom line."[21]

As awareness of human rights increased in the twentieth century – along with treaties and legal norms protecting those rights – the process of globalization gave more influence to TNCs. Corporate Social Responsibility is the result of both these trends: as corporations have become larger and wield greater influence, they are expected to play a greater societal role that goes beyond promoting their own interests.

Scott Pegg identifies three factors that led to the evolution of CSR as a concept: conservative reforms of the 1980s along with liberalizations and free market reforms that occurred after the fall of communism have given firms more autonomy relative to the sovereignty of national governments; globalization means that labor and environmental activists protest company actions not only in their home country, but internationally; and lastly, "the rapid development and spread of communication technology has made it dramatically easier to monitor corporate performance around the world."[22]

Today, literature produced by academics and NGOs frequently uses the vocabulary of CSR to promote the idea that corporations have a duty to look out for diverse societal interests even when it is not in their own best financial interest.[23] Corporations employ this terminology as well, outlining

20 Néron, Pierre Yves, and Norman, Wayne "Citizenship Inc.: do we really want businesses to be good corporate citizens," *Business Ethics Quarterly,* Vol. 18 Issue 1, 2008, p.4.

21 Pegg, Scott "An Emerging Market for the New Millennium: Transnational Corporations and Human Rights," in Frynas, Jedrzej George and Pegg, Scoot, eds., *Transnational Corporations and Human Rights,* New York, NY: Palgrave Macmillan: 2003, p.9.

22 Pegg, pp. 9-10.

23 *See* Néron and Norman (supra note 20) and Banerjee, Subhabrata Bobby "Corporate Social Responsibility: the good the bad and the ugly," *Critical Sociology,* Vol. 34, Issue 1, 2008, pp.51-79.

their principles of social responsibilities and corporate citizen projects on company web sites and in promotional literature.[24]

A key question regarding CSR and its role as a motivator for corporations to avoid policies that lead to conflict or violations of human rights is whether it can serve as an intrinsic motivation for companies or whether it is a subsidiary to financial concerns. Néron and Norman question whether the vocabulary of "corporate citizenship" is productive, as the analogy between the rights and responsibilities accorded to a physical person and a corporation is strained at best.[25]

Even if corporations are not "citizens," however, the development of CSR has led to the expectation that TNCs adhere to international norms regarding human rights and attempt to minimize conflict when investing in sensitive regions. According to Morton Winston:

> The expectations that society has for business have widened and will not contract, and global media communications and an active global civil society will leave transnational companies that fail to act responsibly with no place to hide… Those companies that move most quickly to close the gap between social expectations and corporate performance will be the ones that will advance and prosper in the global economy of future. This is the essence of the 'business case' for corporate social responsibility.[26]

It is this "business case" that seems the most appropriate when discussing the motivation for TNCs in pursuing responsible policies.

Obviously it is the actions of firms that will receive – and should receive – the most amount of attention, but firms usually signal their commitment to CSR by adding provisions relating to ethical business practices in their corporate codes of conduct, by adopting industry association codes and by participating in voluntary government and civil society efforts to promote conflict- and human-rights-sensitive business.[27] The OECD, for example, has published a set of "Guidelines for Multinational Enterprises, which consist of "recommendations jointly addressed by governments to multinational enterprises..." and "provide principles and standards of good practice consistent with applicable laws," although "[o]bservance of the *Guidelines* by enterprises is voluntary and not legally enforceable."[28] Similarly the Voluntary Principles for Security and Human Rights, sponsored by the governments of the UK, US, Norway and the Netherlands, the International Labour Associations' Tripartite Declaration, the UN Global Compact, Business Leaders' Initiative on Human Rights and other efforts give businesses guidance and allow them to publicly commit to responsible practices.

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24 Montiel, Ivan "Social Responsibility and Corporate Sustainability: separate pasts, common futures," *Organization & Environment,* Vol.21 Issue 3, September 2008, pp.245-6.

25 Néron and Norman.

26 Winston, Morton "Corporate Responsibility for Preventing Human Rights Abuses in Conflict Areas," in *Transnational Corporations and Human Rights,* p.86.

27 Wawryk, Alex "Regulating Transnational Corporations through Corporate Codes of Conduct," in *Transnational Corporations and Human rights,* p.53.

28 Organization for Economic Co-operation and Development, "Guidelines for Multinational Enterprises," 2008, p.12 http://www.oecd.org/dataoecd/56/36/1922428.pdf

While the OECD Guidelines were drafted by national governments for the benefit of business, some voluntary codes and principles are the result of a collaborative process between different stakeholders. The Voluntary Principles on Security and Human Rights, for example, are the process of a dialogue between businesses, NGOs and the sponsoring governments.[29]

While corporate codes of conduct and voluntary principles are limited in that they are generally not enforcible if breached (see the following chapter), they contribute to CSR by giving companies better direction in forming corporate policies and in decision making, and attract negative attention if a company agrees to a certain principle and then violates it.

2.4 Conclusion

When deciding where to invest, TNCs will naturally be most concerned with feasibility, expected risk and expected returns. The legal protections offered by a host state will certainly be a part of this process, although it cannot be taken for granted that more protections necessarily means more investments. The current state of investment law varies greatly from country to country. This leads TNCs to "shop around" for the best country in which to incorporate – an increasingly easy task given the multinational nature of many firms.

While the failure of the MAI shows that there is a great deal of resistance to giving up sovereignty to create a more uniform regulatory environment for investors, but many of the BITs that states have since signed nonetheless transfer authority to binding arbitration bodies. Ironically, this could hamper states' ability to protect certain rights of the citizens if it conflicted with investors' rights under a BIT.[30]

There are reasons for TNCs to respect human rights and avoid conflict that go beyond legal responsibilities including the productivity and public image. Although there are reasons to doubt the sincerity of claims that corporations can head social responsibility by virtue of "citizenship," those corporations are, after all, made up of flesh and blood citizens you, for the most part, have moral consciences.

However, as a number of unfortunate instances have shown, there are still incidents when TNCs are willing to forgo the aforementioned benefits in pursuit of profit – and often there is real profit to be made in violating rights.

29 http://www.voluntaryprinciples.org/participants/index.php
30 Peterson, 2009.

Chapter 3:

Enforcement and Accountability

The basis for classifying the most egregious of violations illegal under international law is well established, although the mechanisms for applying this to corporations, generally, are not. International law is principally concerned with states, and although individuals can be held liable for violating crimes against humanity, corporations have remained outside the scope of the International Criminal Court and other venues.

Perhaps the most effective and limiting restrictions on FDI come in the form of UN sanctions, although they are rarely enacted due to political reasons. Nonetheless, targeted commodity sanctions have been used recently to stem the promulgation of violence through resource sales, most notably against diamonds in Angola and against oil in Iraq.

Other UN instruments, such as resolutions and conventions, along with international treaties are applicable through enforcement in domestic courts, either directly or through national laws that are enacted to comply with these treaties. Some states have universal jurisdiction laws that allow for original jurisdiction over foreign citizens and acts committed abroad which are in violations of the law of nations. But again, these laws are usually, although not always, criminal proceedings against individuals. A major exception is the US Alien Tort Claims Act, which has been used in recent years to sue corporations over complicity in human rights abuses committed over seas.

In response to a growing concern over the role of TNCs in human rights abuses, there has been an effort to hold corporations responsible, but this has been mostly in the area of so-called "soft-law,"[1] which is not directly enforceable.

This chapter is a survey of these instruments of enforcement as they apply to human rights abuses for which corporations are responsible or in which they are complicit. Firms are increasingly held accountable for the gravest breaches of international human right norms and illegal complicity in conflict. However, there are no clear minimum standards that can be universally applied and considered binding. The differing voluntary principles to which a firm conforms and domestic laws in its home and host countries will shape the decisions that it makes. Thus, the basis for justifying investments, whether it be in a legal, ethical or political context, are applied in a flexible manner which may or may not lead to a favorable outcome.

1 For the purposes at hand, "soft law" refers to non-binding agreements, principles and declarations. While such instruments do not have the same effect as binding sources of international or domestic law, they can be considered quasi-legal in that they are generally followed, might be used to interpret binding law, and may eventually become binding as customary law.

3.1 Judicial Recourse

There is no question as to the binding nature of a number of principles in international law that make certain types of human rights abuses illegal for all governments, individuals and legal persons everywhere.

Despite this, there is a problem that arises in enforcing international law when those accused of committing crimes are legal persons, rather than individuals and or states. International law has traditionally acknowledged state sovereignty in that it was principally between states, which in turn were responsible for applying it to their respective citizens. While individuals and legal persons are now considered subjects of international law, at least in some cases, the role of enforcement in regards to human rights violations still lies mainly with domestic courts.[2]

International law is regarded as directly applicable in some states, a monist conception, while other states generally require international norms to be mirrored by complementary domestic laws, a dualist conception.[3] M. Shah Alam makes the argument that this gap is narrowing, and that "qualitative changes in international law in the last few decades seems to have made participation of domestic courts in the application and enforcement of international law conceptually inevitable and legally essential."[4] This is on account of the recognition of individuals as subjects of international law, and that internationally recognized human rights extend to individuals. Domestic courts have no choice but to recognize and protect these rights, regardless of domestic laws.[5]

In countries with functioning, fair legal systems in which the judiciary is independent and the government acts with respect to human rights the majority of the time, domestic courts are the most practical solution. However, in the absence of these conditions, there exists a gap in enforcement, particularly with regards legal persons such as corporations.

While the International Criminal Court (ICC) has been suggested as a possible venue for trying firms that are accused of crimes against humanity[6] – or as is more common, the aiding and abetting thereof – its mandate does not currently put legal persons under its jurisdiction.[7] This, of course, does not preclude the individuals that work at corporations from ICC trials. However, thus far this has not happened.

There are three regional bodies that accept individuals' petitions: The European Court of Human Rights (ECHR), the African Commission on Human and Peoples' Rights and the Inter-American Commission on Human Rights. These bodies provide recourse to citizens of countries

2 Alam, M. Shah "Enforcement of International Human Rights Law by Domestic Courts: a theoretical and practical study," *Netherlands International Law Review,* 53:3, 2006, p.400-1.
3 Ibid, p.404.
4 Ibid. p.402.
5 On the other hand, the "dualist" conception is contracting in that many treaties require states to change their domestic codes reflect human-rights standards.
6 Le Billon, Philip, "Getting it Done: instruments of enforcement," in *Natural Resources and Violent Conflict,* p.241
7 Kyriakakis, Joanna, "Corporations and the International Criminal Court: the complementarity objection stripped bare," *Criminal Law Forum*, 2008 No. 19 p.115

that are members of the Council of Europe, African Union or Organization of American States, respectively. If a petitioner feels that their domestic court system has failed to protect rights afforded by international law and the relevant treaties and founding documents of the respective regional body, they may appeal their case. However, none of these has real legal authority, and may only rule that the domestic court erred in its handling of given case.[8]

When TNCs are alleged to have been involved in human rights abuses and the host country's judiciary is unwilling or unable to properly address the issue, domestic courts in other states are increasingly available as a venue to hold firms accountable. The state (or states) in which a TNC is incorporated might have laws regulating the actions of the firm abroad – the US Foreign Corrupt Practices Act to name one. Alternatively, there are some states that have universal jurisdiction for human rights abuses committed abroad.

In 2002 in Belgium, for example, four Burmese refugees filed a lawsuit against Total for human rights abuses allegedly committed in connection with construction of the Yadana pipeline in Burma. The case was dismissed after a 2003 law restricted cases brought under an earlier universal jurisdiction law to citizens.[9] However, the Constitutional Court determined that this law was unconstitutional, and, based on the official refugee status of one of the victims,[10] the case was allowed to proceed, though the prosecutor eventually dropped the case.[11]

Domestic criminal courts are not the best venue, however, for holding corporations responsible, since only individuals can be tried – a similar problem as with the ICC. When a corporation engages in behavior that is in breach of international human rights law, it is usually the result of general policy decisions and therefore difficult to hold any one individual at the company criminally responsible. On the other hand, corporations can be parties in civil cases. In addition to the Belgian case, Total faced a civil action in its home country, France in 2002 over the same Burmese pipeline project. Eight plaintiffs and four witnesses alleged that Total was liable for damages, as the Burmese military used forced labor to complete work on the Yadana pipeline. The case was settled out of court, and while Total claims its settlement payment of $6 million into a special "compensation fund" is proactive rather than defensive, the plaintiffs have each received $12 thousand. Many human rights groups suspect the settlement was made to avoid an unfavorable outcome in court.[12]

In the United States, the Alien Tort Claims Act (ATCA), has emerged as useful instrument in holding corporations accountable. It gives US federal courts original jurisdiction for civil actions that arise from violations of the law of nations regardless of where they may occur and regardless of

8 Although the ECHR does have the power to award damages, its decisions are not legally binding.
9 Business and Human Rights Resource Center, "Case Profile: Total lawsuit in Belgium (re: Burma), http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TotallawsuitinBelgiumreBurma
10 Lichfield, John "French Oil Firm Accused of Complicity with Military Regime," *The Independent,* 4 October, 2007.
11 Business and Human Rights Center
12 Rose, James "A Total Settlement," *Ethical Corporation,* February 2006, p.36

the nationality of the plaintiffs or defendants. The ATCA was enacted by the US congress in 1789 as an anti-piracy measure, but has been used since 1980 (*Filartiga vs. Pena-Irala*) to address human rights violations.[13] A lawsuit filed under the ATCA, *Sosa v. Alvarez-Machain*, reached the Supreme Court in 2004,which ruled that although the ATCA had been enacted to deal with the limited set of international laws recognized as common law in the eighteenth century, there was no reason that it can not be applied to standards that have since emerged, including those relating to human rights, as long as they are "specific, universal and obligatory."[14]

In 1997, a US federal district court agreed to hear *Doe v. Unocal*, which opened the door for litigation against corporations under the ATCA. In 2005 a trial date was finally set, but the case was settled out of court beforehand.[15] The allegations brought against Unocal[16] were similar to those against Total in France and Belgium, and also stemmed from the allegations of abuses committed by the Burmese military in connection with the Yadana gas field.

The Burmese government itself was named alongside Unocal in the original complaint, but this part of the case was dismissed on the ground that military junta was immune under US federal law, which grants foreign governments immunity from legal action under certain circumstances.[17] [18] Unocal, on the other hand, was not accused of directly using forced labor, displacing persons or committing acts of violence, but only of knowingly aiding and abetting in these crimes. The plaintiffs were required to demonstrate that "practical assistance or encouragement that [had] a substantial effect on the perpetration of the crime."[19]

In *Bowoto v. Chevron,* which is currently on trial, also under the ATCA, a district judge ruled that Chevron Nigeria could be held liable for the death of protesters killed by the Nigerian Army directly, as they had transported soldiers despite knowing that they were prone to use excessive force and had actually agreed to a plan that involved attacking protesters,[20] but also that the parent company, Chevron, could be held indirectly responsible. In a 2004 ruling US District Court Judge Susan Ilston found that the relationships between the two companies were sufficient for establishing relationship of agency, for under which Chevron could be held liable.[21] As TNCs typically operate through webs of subsidiaries and partnerships, holding firms responsible through agency relationships has the potential to vastly increase accountability.

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13 Davis, Jeffrey "Human Rights in US Courts: Alien Tort Claims Act Litigation after *Sosa v. Alvarez-Machain," Human Rights Law Review,"* July 2007, p.341

14 Sosa v. Alvarez-Machain, __ US___, ___, 124 S.Ct. 2739, 2761, 159 L.Ed.2d 718 (2004), as cited by Davis, Jeffrey, p.342.

15 "Doe v. Unocal Case History," Earth Rights International, 30 January 2006, http://www.earthrights.org/index2.php?option=com_content&do_pdf=1&id=189

16 In 2005, Unocal merged into Chevron, which now controls Unocal's former assets.

17 The 1976 US Foreign Sovereign Immunities Act.

18 Doe v. Unocal, 2002 WL 31063976 (9th Cir. 2002) "I. Factual and Procedural Background, D. Proceeding Below."

19 Davis, p.342.

20 Herz, Rick and Simons, Marcos "Bowoto v. Chevron Case Overview," Earth Rights International, http://www.rights.org/site_blurbs/bowoto_v_chevrontexaco_case_overview.html

21 Davis, p.355-6.

The ATCA offers the unique combination of allowing civil cases to be brought on the basis of international law by virtually anyone against parties regardless of nationality and allows such actions to be brought against legal persons. The growing body of precedence that allows the ATCA to be used against TNCs over complicity in human rights abuses makes the US federal court system a very attractive venue for bringing human rights litigation against corporations.

3.2 The Role of the United Nations

Although the UN is a political organ, its actions overlap with international law. Chapter VII of the UN charter the states that the body is responsible for maintaining peace and stability. Enforcing international law can be seen as part of this task, and in issuing resolutions, like those imposing sanctions, its activities can be seen as having a "quasi-legal" character.[22]

A number of UN-sponsored treaties on human rights contain provisions that have become accepted as customary law. In addition to the charter-based Human Rights Council, the UN sponsors bodies to monitor the nine core human rights treaties.[23] While these bodies have no judicial authority, they can identify states that fail to comply with a given treaty or international norm, which has an indirect effect on TNCs, as they are held accountable by domestic courts.

The UN is also involved in multi-stakeholder efforts and other "soft-law" regulatory initiatives. The UN Global Compact, one of the most ambitious and visible of these, is a voluntary regime of principles and standards for companies to follow. Its non-binding nature makes it similar to other voluntary human rights regimes, like the International Labour Organization's Tripartite Declaration and the Voluntary Principles on Security and Human Rights[24] and OECD Guidelines for Multinational Enterprises.[25] The proposed UN Human Rights Norms for Corporations would be a step forward in that they are "legally framed" and not intended to be voluntary.[26] In lieu of this, sanctions regimes are the most direct and binding on TNCs' activity of all UN instruments.

Sanctions and certification regimes

The UN Charter authorizes the Security Council (UNSC) to issue sanctions. As such, sanctions can be any sort of non-military, binding action that has the aim of restoring peace or mitigating a threat to peace. Once sanctions are passed, all member states are bound to accept and carry them out in accordance with chapter V, article 25 of the Charter.[27]

22 Farrall, Jeremy Matam *United Nations Sanctions and the Rule of Law,* Cambridge University Press, 2007, p.17.
23 Office of the United Nations High Commissioner for Human Rights, http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx
24 Voluntary Principles on Human Rights and Security, www.voluntaryprinciples.org
25 Kinley, David and Chambers, Rachel, "The UN Human Rights Norms for Corporations: The Private Implications for Public International Law," *Human Rights Law Review,* 6:3, 2006, p.456.
26 Ibid. p.484.
27 Le Billon, Philip, p.230

Chapter VII, article 41 of the charter lays out the Security Council's authority to create sanctions regimes and what forms they may take:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

This list is meant to be inclusive, not exclusive nor exhaustive. In fact no two sanctions regimes, with the exception of arms embargoes, have been exactly the same, although a general distinction can be made between economic and non-economic sanctions.[28] Usually they have been tailored to address a specific problem, and comprehensive economic sanctions have only been applied five times – even then with humanitarian exceptions.[29]

The grounds for sanctions can result from either internal threats to peace – civil conflict, repression or a humanitarian crisis, for example – or from threats to peace arising from international conflict.[30]

The veto power afforded to the five permanent members of the UNSC has made it difficult for sanctions to be used as a tool for reining in human rights abuses, although it has become much easier – and thus there have been more uses of UN sanctions – in the two decades since the cold war has ended.[31] There is an ongoing debate over whether sanctions, particularly economic ones, are effective in achieving their goals, with some arguing that they do more harm to innocent civilians than good by influencing the actions of those responsible for threats to peace.

In 1990, after the Iraqi army invaded Kuwait, the UNSC introduced comprehensive sanctions on the country, which remained in effect – although with some alterations – until 2003, after the invasion led by the United States and United Kingdom. While the initial response to the sanctions regimes was positive, concerns over the humanitarian effects on the people of Iraq began to draw criticism.[32] In 1997, under resolution 986 of 1995, the Oil-For-Food Program came into operation, in an attempt avoid the adverse effects of the sanctions without rescinding them. According to a report released by the Campaign Against Sanctions on Iraq, "[t]hough Oil-for-Food brought undoubted short term benefits to a desperate population, it never eliminated the humanitarian crisis."[33] [34]

The discourse over the morality and efficacy of these sanctions is perhaps responsible for

28 Farrall, Jeremy Matam, p.106.
29 Ibid. p.107.
30 Ibid. p.86, 92.
31 Farrall, Jeremy Matam United Nations Sanctions and the Rule of Law, p.14.
32 See, for example, "Group Criticizes Iraq, Security Council on Sanctions," Human Rights Watch press release, September 20, 2000, www.hrw.org
33 Campaign Against Sanctions on Iraq, et al. "Iraq Sanctions: Humanitarian Implications and Options for the Future," August 6, 2002, section 5.1 (retrieved from www.globalpolicy.org).
34 The legacy of this program is, of course, additionally marred by the allegations of improper action on the part of UN officials. Regardless of the merit of these claims, the concept of breaking sanctions in this was is definitely tainted.

reforms to the process by which sanctions are enacted and how they are enforced once they are in place. In the past decade, there have been several panels sponsored by the UN and carried out by national governments to asses and refine sanctions regimes. The first of these, the Interlaken Process, which met in March of 1998 and 1999, was composed of representatives from national governments, the UN, civil society, academia and the private sector, with the goal of making recommendations for improving targeted financial sanctions. Among the recommendations were a clear legal basis for sanctions and the establishment of a committee to oversee each sanctions regime.[35]

Subsequently, the German Foreign Office, working with the United Nations Secretariat and Bonn International Center for Conversion, "led an effort to examine the use of travel bans, aviation sanctions, and arms embargoes by the United Nations," to be used along side financial embargoes in targeting "certain groups, economic sectors or individuals."[36] The Bonn-Berlin Process, as it is known, was followed by the Stockholm Process, sponsored by the UN Secretariat and Uppsala University's Department of Peace and Conflict Research. The Stockholm Process gathered 120 experts together to recommend steps at making sanctions more effect, particularly in regards to implementation.[37]

It is the Kimberly Process, however, which has produced the most innovative and celebrated approach to sanctions. The Process and the Kimberly Certification Scheme in which it resulted were born out of UN sanctions applied in West Africa to combat the sale of so-called "blood diamonds."

Diamond sanctions were first enacted in 1998 against Angola, then later in Sierra Leone and Liberia in response to UNITA (the National Union for the Total Independence of Angola), the Revolutionary United Front and the regime of Charles Taylor, respectively. While these sanctions were deemed to be somewhat successful, they were did not totally stem the flow of diamonds from these countries.[38] The Kimberley Process, held in Kimberly, South Africa, was organized to provide a solution to the problem. And to this end the Kimberley Process Certification Scheme was proposed as a means of insuring that diamonds mined illegally could not be misrepresented and enter the world market as "legal" under false pretenses. Previous sanctions on conflict diamonds involved certification regimes as well, but the Kimberley Process created a comprehensive and uniform certification system for multiple countries. On January 28, 2003, the UNSC adopted resolution 1459, which supported the Kimberly Process and welcomed the Certification Scheme, and subsequent sanctions, have been issued in accordance with it. Countries, like Liberia for example, have been required to establish Certificate of Origin regimes in conformity with the Kimberley Certification Scheme and to the sanctions issued require countries to change necessary laws in order that they are compliant as well.[39]

While it seems that the Kimberley Process has been a success – even if it has not created a

35 October 2006 Security Council Sanctions and the Kimberly Process," Security Council Report, October 2006, www.securitycouncilreport.org
36 Ibid
37 Ibid.
38 Ibid.
39 Ibid.

completely air-tight system – it is questionable whether the same principle could be applied to sanctions regimes on other resources, which are more difficult to physically account for. The Oil-for-Food program, for example, was undermined by smuggling operations in which oil was sold elsewhere, and Saddam Husein's regime was able to collect profits from bribes.[40]

In terms of the effects that UN sanctions have on TNCs, they are unique among other instruments of international law in that they are typically enforced fairly well. While it is nearly impossible to create a sanctions regime that is one hundred percent effective, as smuggling will always take place, this is usually done by low-level, local operators. International firms are virtually never willing to directly break UN sanctions, although TNCs might deal in illegal commodities by purchasing them later in the supply chain after they have been smuggled out of a county. This is exactly the problem that the Kimberly Process has attempted to circumvent.

The Global Compact and UN Norms

The UN-sponsored program that is most directly focused on companies and human rights is the UN Global Compact, which is a voluntarily adopted set of ten human rights principles that are applicable to firms. For example, the first principle urges "[b]usinesses should support and respect the protection of internationally proclaimed human rights within their sphere of influence."[41] Other principles are related to labor conditions, the environment and corruption.

In many ways, the Global Compact is similar to other emerging corporate standards for human rights, being the collaborative result of a dialogue between stakeholders. In this case a group of business leaders met with Kofi Annan following the 1999 Davos World Economic Forum,[42] although "Civil society organizations have been an integral part of the Global Compact since its creation", and according to the Compact, "[t]heir perspectives, expertise and partnership-building capabilities are indispensable in the evolution and impact of the Global Compact."[43]

Unlike some standards regimes, the Global Compact has no monitoring nor enforcement mechanism; the Global Compact is a list of principles that firms should ideally strive to meet, but there is no consequences for failing to do – at least none that derive from the compact. However, the principles could some day become binding if they were to be accepted as customary law, be adapted at the domestic level or both.[44]

The proposed Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms) would have been binding, but currently exist only in draft form. Proposed by the UN Sub-Commission on the Promotion and Protection of Human Rights,[45] the Norms were ultimately abandoned after a Special Representative to the

40 Le Billon, Philip "Getting it Done: instruments of enforcement," in *Natural Resources and Violent Conflict,* p.231
41 United Nations Global Compact, http://www.unglobalcompact.org/AbouttheGC/TheTENPrinciples/principle1.html
42 Williams, Oliver, p.229.
43 United Nations Global Compact http://www.unglobalcompact.org/ParticipantsAndStakeholders/civil_society.html
44 Kinley and Chambers p.484.
45 Amnesty International, "UN Norms for Business: taking corporate responsibility for human rights to the next level,"

Secretary General concluded in February of 2006 that they should not be pursued.[46]

3.3 Civil Society, Business Associations and Multi-stakeholder Initiatives

In the absence of an instrument like the UN norms, companies are left to navigate through the web of other initiatives that exist. These can be supported by business associations, national governments, NGOs or combinations thereof as "multi-stakeholder initiatives."[47] Codes like the EITI that are aimed at national governments can have real legal consequences at the domestic level, but those adopted by firms are a bit different. Guidelines and principles for corporations have already been discussed (in the previous chapter) in connection with corporate social responsibility, and they are most applicable to that category, as most of these regimes are completely voluntary, and thus, largely unenforceable. Corporate codes of conduct that are ado
pted privately by companies as part of internal literature or mission statements are similarly toothless. However, there are a couple of real ways that these instruments can have an effect on other enforcement measures, indirectly aiding in enforcing compliance with human rights and conflict laws and norms.

At a bare minimum, signing onto codes of conduct and voluntary principles demonstrates that a company is aware of what is acceptable behavior and that it understands what effects investments can potentially have on human rights and conflict, making statements of ignorance more difficult. In order to demonstrate compliance, companies may hire independent organizations to asses their actions and hold them against the standards of a voluntary code, whether it be international or a internal company code. In addition to the embarrassment that can be caused in the "court of public opinion," these documents create hard evidence of what companies know and when they know it, which can be used in court.

Furthermore, a national court might use such codes – even internal ones – in interpreting law and evaluating whether a certain practice violated it or not.[48] Similar reliance on codes of conduct and guidelines might occur in the international arena. For example, a UN panel charged with investigating the "illegal" resource extraction in the Democratic Republic of the Congo used the OECD Guidelines for Multinational Enterprises as a basis for criticizing the actions of firms from OECD countries (although the OECD, in subsequently criticized use of the guidelines in this way).[49]

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http://www.amnestyusa.org/business-and-human-rights/legal-accountability/un-norms-for-business/page.do?id=1101637

46 Kinley and Chambers, p.450.

47 Multi-stakeholder initiatives can be defined as those that bring more than one type of entity together in drafting – if not adopting – a set of norms or guidelines. These typically involve at least NGOs and TNCs, sometimes including governments. This can be contrasted with "collaborative standards" which are similarly reached through multi-party dialogues, but might involve only one type of entity – members of a business associations, for example. *See* Fransen, Luc and Kolk, Ans "Global Rule-Setting for Business: a Critical Analysis of Multi-stakeholder Standards," *Organization,* 2007, vol. 14, pp.667-84.

48 Wawryk, Alex "Regulating Transnational Corporations through Corporate Codes of Conduct," in *Transnational Corporations and Human Rights,* p.62

49 "Conflict Sensitive Business Practices: Guidance for Extractive Industries," report issued by International Alert,

Table 3.1

Codes of Conduct for Corporations	*Year in effect*	*Sponsoring governments and organizations*	*Issues covered*
UN Global Compact[50]	2000	United Nations	human rights, labor, environment, anti-corruption
Voluntary Principles on Rights and Security[51]	2000	US, UK, Norway, Netherlands	human rights, security
ILO Tripartite Declaration[52]	1977	International Labour Organization	Labor, social policy (in relation to firms), workers' safety and rights.
OECD Guidelines for Multinational Enterprises[53]	1976	The Organization for Economic Cooperation and Development	Employment, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation
Publish What You Pay[54] (NGO transparency campaign that is directed at TNCs)	2002	Global Witness, Oxfam, Soros Foundation et al.	Transparency in reporting foreign income.

A code sponsored by a treaty can instantly gain status as international law, although guidelines and principles that are not intended to be binding can also become legally binding, in time, if they become accepted as customary law.[55] Despite this, most codes that regulate TNCs and international business remain voluntary in nature, and do not have the status of law. This includes the OECD Guidelines, the Voluntary Principles on Human Rights and Security, the International Labour Organization's Tripartite Declaration as well as the UN-sponsored Global Compact (see table 3.1).

3.4 Efficacy and Gaps in Enforcement Mechanisms

A number of actions are both well defined and agreed to be universally illegal.[56] Even though international law has traditionally deferred to state sovereignty, grave breaches of human rights and crimes against humanity can now be applied directly. This can be done by any domestic court or by the ICC. The problem arises when trying to apply this law to legal persons, like corporations.

While the individuals who work at corporations are not immune to prosecution, this has not proven to be an effective method. The role that corporations usually play in human rights abuse or in contributing to conflict is usually indirect. The allegations in *Bowoto v. Chevron,* for example,

March 2005, p.6 at note 1.

50 UN Global Compact Brochure, published by the United Nations Global Compact Office, October 2008, http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf

51 Voluntary Principles official website, www.voluntaryprinciples.org

52 International Labour Organization, "Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy," 3rd ed, International Labour Office, Geneva Switzerland, 2001.

53 Organization for Economic Cooperation and Development official website, www.OECD.org

54 Publish What You Pay Campaign official website, http://www.publishwhatyoupay.org/en/content/history

55 Wawryk, p.58.

56 For example, rights protected in the International Bill of Human Rights, as well as customary law regarding prohibition of genocide and codified in the Genocide Convention, and peremptory norms against slavery that have been applied to modern-day cases of forced labor.

involve Chevron employees communicating with the Nigerian army over dealing with protesters, providing them with material support and having knowledge that doing so may result in illegal acts.[57] This aiding and abetting involves individuals of course, but is carried out at an institutional level.

Civil suits are therefore the best avenue for judicial action against firms. While several domestic court systems allow universal jurisdiction, the Alien Tort Claims Act is unique in allowing non-citizens to bring suits over incidents occurring anywhere. The application of the ATCA to human rights cases is certainly a positive development and will add to pressure on firms to avoid irresponsible behavior. This said, it is an incomplete solution, and US courts are not the answer for all complaints that alleging human rights abuses on the part of corporations.

If international law is to be applied more effectively and uniformly to corporations, human rights standards for TNCs need to be more effective and uniform. Clear and mandatory guidelines need to be established before any reliable mechanism for holding firms accountable can be put into place. In light of this, it is unfortunate that the UN Norms did not succeed.

Voluntary regimes like the UN Global Compact go beyond the bare minimum of requirements, and are therefore ill-suited as standards of accountability. Companies can rightly claim that fulfilling all of the UN Global Compact's requirements is not necessary, and this is true with other voluntary regimes as well. Firms can then choose which requirements to follow and which to disregard at their convenience, while claiming that they are generally compliant. David Kinley and Rachel Chambers sum up nicely the problem posed by the current state of voluntary regimes: "companies may either pay lip service to human rights, using codes as mere public relations exercises, or they may follow a code until such time as serious profits are at stake, at which point human rights considerations are pushed aside."[58]

The discussion in the previous chapter over the benefits of working in concert with respect for human rights and avoiding conflict demonstrates this point: most of the time, rights, conflict and profit go together. The problem arises when there is real profit to be made in acting illegally or irresponsibly, and it is because of these cases that minimum standards need to be established.

As long is it is not clear how companies should apply international law, it is difficult to hold them accountable in domestic courts (or international ones for that matter). Decisions to invest and how to run operations deviate from what is legal according to standards and become ethical and political. Companies may take a range of strategies to justify their behavior, including that they operate with a greater respect for human rights than another firm that could take their place. In the absence of clear rules, this line of justification makes for a sliding scale depending on a variety of factors unique to a given country.

57 Herz and Simons.
58 Kinley and Chambers, p.492.

All of this is not to say that *some* standards do not exist. Direct aggravation of conflict or participation in human rights abuse, whether it be direct or indirect, is tolerated less and less in more and more places around the world. As a result, increasingly globalized TNCs can expect to be held accountable for the most egregious infractions.

Chapter 4:
Engagement with the Community and State

The previous three chapters have demonstrated that there is both a tremendous need for TNCs to invest in developing countries, but that these investments, particularly in the resource and energy sectors, can lead to conflict and human rights abuses; and that there are some very good reasons for companies to avoid conflict and respect human rights, including legal consequences, but TNCs are not always held accountable. Even if a firm adheres to principles of corporate social responsibility and remains generally committed to human rights, some opportunities might provide such an incentive to behave recklessly, immorally, or even illegally, that these standards slip, if even momentarily.

If an energy, mining or petroleum project comes up that has the potential to produce serious profits but raises ethical or even legal concerns, there is still a good chance that there will be a handful of companies out there willing to invest. Some developing nations, such as India and China, have an ever-increasing demand for natural resources and energy, and many firms and state-owned enterprises have fewer qualms in investing under questionable circumstances than do firms from OECD countries, generally. This is not to say that a firm from North America or Europe will necessarily respect human rights whereas a firm from the developing world as a rule will not, and there are of course many examples to the contrary. However, the inevitability of investment in the energy and extractive sectors has given Western firms a line of argument for justifying controversial investments: "constructive engagement."

Companies that make investments that potentially raise the likelihood of conflict or human rights abuses recognize that another firm would quickly take their place if they were to withdraw, and that their actions are designed to minimize the harmful effects of operations in the given country. Firms from OECD countries in particular claim that their awareness of human rights and risk of conflict along with transparent and corruption-adverse practices make a positive impact on the country that would be absent were a less reputable company to take their place.

This chapter will deal with the proper role of firms: when companies should invest and when they should walk away, and if the firm chooses to invest, how far they should go in implementing programs that change the situation in such a way that their operations become justifiable. First the appropriate level of involvement of firm is examined, and proceeded by a qualitative survey of the types of programs that companies have funded or run in host countries. Finally, some conclusions

are drawn regarding the acceptable level and type of involvement.

In some cases, firms become actively involved in peace-building, security training, community development or even judicial training. This might serve one of two goals. The programs might be intended to change the circumstances in such a way that undertaking an investment project is possible without a risk that it will spur conflict or lead to human rights abuses. The second goal behind training and development programs is to change the net effect that a company's presence has in a country. If paying taxes props up a corrupt regime, then spending on community projects, such as education and health care, might make up for it. On the one hand, funding projects that make a real difference in improving human rights, preventing conflict or increasing the standard of living for the local population can be beneficial. But, there are some serious issues that come along with this type and level of involvement by TNCs.

Firstly, can the occasional negative effects of a corporation's operations in a given country be excused if, through infrastructure development or capacity building projects, the net effect of their presence in the country is still positive? While the essence of this argument is sound, and the indirect effects that a company has might be off-set by funding development projects, this is only possible within limits. As discussed in the previous chapter, there are clear, binding laws that are universally applicable that ban egregious violations of human rights, including, but not limited to, the use of forced labor and torture. If a firm is directly involved in such activities, or as is more common, if it knowingly aids or abets actors who commit such abuse, there is no amount of good works that may compensate for this.

A second question relates to the proper role of a company and what issues are appropriate for a company to be involved in. To what extent should corporations, ultimately driven by profit, be involved in issues that have traditionally been considered the realm of governments, politics and civil society? This is an issue regardless of whether the goal is to affect the overall impact on a country or if the firm is only concerned with safe-guarding against abuses in a limited sphere in which it operates. For example, if the army is required to secure facilities and the only way to ensure that this will not have adverse effects on the local population is for the firm itself to retrain soldiers, this is going too far: there are limits on how far private firms should go in influencing public institutions in host countries.

4.1 The level of involvement

A TNC that is aware of certain negative consequences that might occur as a result of their presence in a given country might take one of several courses of action, ranging from a minimalist approach of just following the rules, to a proactive approach that involves participation with governmental and non-governmental actors.

Both the London-based NGO International Alert and the IPIECA have issued guides that

provide useful frameworks for dividing levels of involvement, and this a good place to start in examining the role of firms. International Alert's Conflict Sensitive Business Practice guide for the extractive industries divides strategy into a three-level pyramid, the foundation of which is "compliance" followed by "do no harm," with "peace-building" at the tip.[1] In the same vein, the IPIECA's "Guide to Operating in Areas of Conflict" classifies strategies that companies can take in regards to their impact on conflict into three categories: "do no harm," "do something" and "do something ++," ostensibly taking compliance with domestic and international laws for granted.[2] [3] While both of these guides are geared towards preventing conflict, the principle in preventing human rights abuses can be viewed in similar terms. These categories, while not mutually exclusive nor definitive, provide a useful framework for examining the strategies that TNCs in sensitive areas can adopt.

"Compliance," according to International Alert, means "[a]t a minimum, companies should comply with national regulations (even if host governments are not implementing or monitoring them effectively) and internationally agreed laws, conventions and standards."[4] Although this seems to be somewhat of a platitude, the most egregious examples of TNCs exacerbating conflict or playing a part in human rights abuses could have been avoided by following the applicable laws and adhering to the voluntary norms and standards, even if the no legal consequences are likely to result. "Doing no harm" involves going a bit further by analyzing both the direct and indirect effects of a companies operations, with the goal of minimizing the effect on conflict. If possible, companies should design their projects in a way that avoids contributing to conflict – and the same logic can be applied to human rights abuses.

"Compliance" and "doing no harm" are basically passive approaches to responsible investment: choosing carefully where to invest, designing investment strategies that will have a minimal negative impact and conducting analyses of the ongoing threats and effects of operations. International Alert provides a number of categories of concern, some of which, a substantial risk of forced labor in connection with a project for example, are "showstoppers."[5] If such a risk is present, a company cannot responsibly invest in the country under any circumstances.

Assuming that there are no "show-stoppers," a potential investment might still be feasible, if only through a more active course of action. This might involve not only tailoring the plans of the investment and company policy, but actually changing the environment in which a firm operates, to

1 "Conflict Sensitive Business Practices: Guidance for Extractive Industries," report issued by International Alert, March 2005.

2 "Operating in Areas of Conflict: an IPIECA guide for the oil and gas industry," report issued by the International Petroleum Industry Environmental Conservation Association, London, UK, March 2009, p.3.

3 These guides address similar issues and use similar terms to describe levels of involvement. However, they are fundamentally different in that the IPIECA is an industry group, although it is linked to the UN, and International Alert is an NGO.

4 International Alert, section 1, p.9.

5 International Alert, section 3, p.3.

make it more suitable, or possible, as a host for FDI.

To this end, companies might adopt what the IPIECA calls the "do-something approach," which could involve "investing in the company's front-line and backup conflict management capacities; increasing conflict sensitivity of operations and of community outreach projects; and establishing early warning systems for areas prone to violent conflict."[6] The "do-something ++" approach should, according to the IPIECA be "handled with great sensitivity, but can include: building external conflict management capacity (e.g. supporting local and national conflict management resources; providing training; funding study tours to regions where successful conflict management has been achieved etc.); and providing funding and/or technical assistance to national and/or international conflict resolution efforts." International Alert's "peacebuilding" similarly "requires a spectrum of conditions and activities... through core business, social investment or policy dialogue activities."[7]

We can think of programs that go beyond a firm's core business as justifying investments in sensitive areas in two basic ways. A course of action might target changing conditions to the extent that the firm's core business becomes possible without having an effect on conflict or leading to human rights situations. For example, an oil company that operates in conflict-prone area that depends on government security forces to protect its installations might institute training programs for all personnel assigned to posts in connection with the project in order to prevent incidents directly related to its operations. A second, wider conception of involvement relates to the net effect that a company has on a country or region, which might involve building schools, health clinics and instituting other community programs.

Considering whether a firm should invest based on its net effect involves some trade-offs. Any company that is operating in a country like the Sudan, for example, is, after all, propping up a controversial regime by paying taxes. As senior Oxfam policy adviser Sophia Tickell points out, "[a] successful community programme that benefits 100,000 people is important, but counts as nothing,if the taxes ...you are paying keep in power a corrupt and dictatorial government …"[8] But, this logic if taken to the extreme would bar all investments in countries with repressive governments. This is, in effect, what UN or unilateral sanctions aim to do. Even if TNCs have an absolute responsibility to be aware of the effects of their actions in the "bigger picture," it does not seem appropriate to hold a company accountable for paying taxes to a sovereign government in the absence of sanctions. This seems to be an issue for states and international community to decide.

The Genocide Intervention Network's Sudan Divestment Task Force, which is committed to

6 IPIECA, 2009 p.3.

7 International Alert, p.11.

8 As quoted in Ward, Halina "Corporate Citizenship: international perspectives on the emerging agenda," Royal Institute of International Affaris, Energy and Environmental Programme, June 2000, p.4 (Quote also appears referenced to the same source in Bray, John "Attracting Reputable Companies to Risky Environments: Petroleum and Mining Companies," in in Collier and Bannon, edts *Natural Resources and Violent Conflict,* 2003, p.298.)

stopping investments that enable the conflict in Darfur to continue, respects this sentiment, and thusly does not target all firms for simply having a presence in the country and paying taxes. This is despite the atrocities that have been linked to the current regime in Khartoum, under Omar Hassan al-Bashir, for whom an arrest warrant for allegations of Crimes Against Humanity has been issued by the ICC. Rather, The Sudan Divestment Task Force looks at the whether companies provide benefits to the "disadvantaged populations of Sudan," in addition to their relationship with the Sudanese government and whether the company has "developed a substantial business-practice policy addressing the fact that the company may be (sometimes inadvertently) contributing to the government of Sudan's genocidal capacity."[9] This means that even if a company contracts with the Sudanese government, but has a business plan that takes sensitive issues into consideration and if the operations can be show to support certain groups, the investment is not deemed to warrant targeting for divestment.

This meshes with a constructive-engagement strategy: if responsible firms stay away, others will take their place, so, as long as a companies presence is conforming to a certain level of standards and having a net positive effect on the country, investment is justifiable.

If there are concerns over some of the effects that an investment project has, like funding an autocratic regime, a firm might be compelled to engage in community development projects that address health-care, education or other development-related issues in order to definitively make a positive impact on its area of operations. There are numerous examples of companies contributing and even running the types of projects that have traditionally been the realm of NGOs and governments.

Business, especially investments that account for a large slice of the GDP of developing nations, will be, without exception, political at least in some aspects. But, there is a question of how far firms should cross over into this territory. Whether it be in pursuit making core business activities possible or by trying to tip the balance of its net effect, there are some who argue that firms simply should not be involved activities that put them in too close contact with governments or in activities that are considered to be within the scope of government responsibility.

Marina Ottaway is one such author, and she draws a parallel between charter companies from the colonial period and "oil-company executives lecturing developing-country officials on human rights and democratic governance.... All that's missing are the pith helmets."[10] Neither, in Ottaway's opinion, are TNCs well suited for the job of promoting human rights and development, as "taking on the role of imposing change on entire countries does not fit the nature of these organizations."[11] But there is some basis in the developing body of investment principles and guidelines that holds

9 "Sudan Divestment Resource Guide," report issued by the Sudan Divestment Task Force, a project of the Genocide Intervention Network, Washington, DC, March 2008, p.5. http://www.sudandivestment.org/docs/resource_guide.pdf

10 Ottaway, Marina "Reluctant Missionaries," *Foreign Policy,* July/August 2001, p.53

11 Ibid.

firms accountable beyond their core operations.

The term "sphere of influence" was first originated by the UN Global Compact to describe the activities over which a company should be held accountable.[12] The first principle of the Compact, that "Businesses should support and respect the protection of internationally proclaimed human rights," should be practiced in a firm's sphere of influence:

> "The extent of a company's ability to act on its human rights commitment may vary depending on the human rights issues in question, the size of the company, and the proximity between the company and the (potential) victims and (potential) perpetrators of human rights abuses... Similarly, the *closeness of a company's relationship with authorities* or others that are abusing human rights may also determine the extent to which a company is expected by its stakeholders to respond to such abuse." (emphasis added)[13]

The converse of holding firms accountable according to their ability to affect situations and sway government officials is that firms will then need to take precautions in those areas if they are to avoid being held liable. As a report issued Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, points out, there are some problems with the "sphere-of-influence" concept. One problem is that "influence" can be taken to mean "impact" as well as "leverage," the latter of which should be used sparingly as it is not "desirable to require companies to act wherever they have influence, particularly over Governments."[14] An additional problem is that "companies cannot be held responsible for the human rights impacts of every entity over which they may have some leverage."[15] Ruggie's report concludes that this concept is a useful metaphor, but "of limited utility in clarifying the specific parameters of [companies'] responsibility to respect human rights."[16]

For the time being, there seems to be no recognized agreement over how much a firm should lean on foreign governments to change their ways, or to what degree they can be held responsible for failing to take advantage of this influence. Similarly, there is a question as to what type of activities are appropriate for TNCs and which areas should be reserved for governments and civil society. In the mean time, there are plenty of examples of efforts undertaken by firms both to change the net effect of their presence in a country or to change conditions to make operations possible without running to high a risk of infringing on rights or contributing to conflict.

4.2 Training and Development Projects

Qualitatively, there are several ways in which firms might engage with the community, government, civil service and civil society. Whether the motivation in launching projects is to ensure that it is

12 "Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Clarifying the Concepts of 'Sphere of Influence' and 'Complicity,'" Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, 15 May 2008,, p.4

13 United Nations Global Compact, http://www.unglobalcompact.org/AbouttheGC/TheTENPrinciples/principle1.html

14 Ruggie, p.5.

15 Ibid.

16 Ibid. p.6.

possible to carry out the company's core business without causing problems, or to positively impact the community in a broader sense will affect the way in which a program run and at whom it is targeted. However, these goals typically overlap. Some programs might begin as ways of making core business possible, and then be extended to reach society at large in the name of CSR. For example, human-rights-sensitivity training for police that are assigned to protect an oil company's installations might be limited to the handful of officers working on site, but would most likely include some officers who have nothing to do with the project. Similarly, a company might want their workers – both locals and expatriots – to have access to quality health care or education, which may require funding clinics and schools that are available to the general public as well.

TNCs' roles in training or development programs range from comprehensive involvement to hands-off financial backing. Some programs are collaborative efforts involving international and local NGOs, host governments and the firm's employees.

Training Programs

The first priority for a company wishing to prevent the possibility of its activities leading to illegal or unethical consequences is to train staff in the principles of human rights and to commission studies to determine what effects a given project might have on the people living in the area.[17] In many cases projects might require the participation of various contractors in building and protecting infrastructure. Particularly when the investment is a joint venture with an SOE, the company will have to rely on the military for security. This presents the potential for increasing conflict risks and human rights abuses in many countries. Human rights training for involved staff and independent contractors is an essential precaution, and may be extended to police officers and other officials who work in sensitive areas.

In Columbia, British Petroleum (BP) funded a training program for 8,000 soldiers, although it did not run it. A representative from BP noted that actually training the army would have gone beyond what the company considered to be its role.[18] Premier Oil, on the other hand, did in fact carry out trainings itself in Burma in 2001 and 2002 – in contrast to Columbia, the Burmese authorities are not able to reliably carry out this task. It funded and ran programs that trained not only those officers working at the immediate facility of Premier's property, but police officers and officials from the Burmese military as well.[19] Premier's role in this project is somewhat unique, and the general trend in running training programs seems to be more in line with BP's approach. In many cases, oil companies are willing partners and contribute funding for programs, but collaborate with other stakkeholders. Often NGOs have a leading role in coordinating these efforts.

Also in Columbia, Occidental Oil Company and Ecopetrol worked with International Alert to

17 International Alert, the IPIECA, Rights and Democracy, and the Danish Institute for Human Rights and other organizations suggest this course of action diagnostic tools or guidelines for carrying out such assessments.

18 Webb and Carstens, p.5. (The BP representative was Christine Bader).

19 Webb and Carstens, p.10.

develop conflict sensitive business practices in with regard to the civil conflict.[20] This project centered on a "holistic" approach to conflict, of which training programs were a part, along with a range of other measures that were taken to deal with issues contributing to violations of rights and conflict.

A similar holistic strategy has led to judicial trainings, as the just application of law with respect for human rights depends on a judiciary that both understands applicable laws and standards and is willing to apply them. The death of Ken-saro Bowoto is evidence of this: he was arrested by military personnel and executed after a trial for murder charges that many consider to be fabricated and politically motivated.[21] To avoid similar outcomes, TNCs have funded human-rights training for judges in the areas in which they operate. In Venezuela, Statoil[22] sponsored a program run by Amnesty International that trained a group of judges in 1999, who in turn ran workshops for other members of the Venezuelan judiciary two years later.[23] In Nigeria, where Statoil is also active, the company decided to fund organizations working on human rights issues in the country. Legal Defence Assistance Project was selected and received support in training judges from Sharia courts in applying human rights standards.[24]

While sensitivity training for employees and contracted security personnel is almost entirely confined to a firms core business, this last example has almost nothing to do with Statoil's operations, but is part of a broader CSR policy designed to benefit the community as a whole. This demonstrates that programs which are similar on the surface can serve varying and often overlapping goals.

Community Development Projects

CSR in developed countries usually takes the form of donations to community programs with the goal of raising the company's public profile. A donation to a hospital or public park is seen as fairly uncontroversial, and even if cynics might question the corporation's motivation, the merits of the projects themselves are rarely called into question. While community development projects undertaken by TNCs in developing countries will be more familiar in form to those accustomed to CSR in the developed world – new schools or health clinics for example – the implications in areas with extremely low levels of development, conflict or repressive governments can be very different.

On the surface, these projects make a huge difference in the lives of the individuals affected by them. Health clinics opened in Burma funded by Total, for example have drastically increased the

20 IPIECA, 2003, p.27.

21 Earth Rights International, "Royal Dutch/Shell to go to Trial for Complicity in Torture and Murder of Nigerian Protesters," www.earthrights.org

22 The program was initiated by Statoil Venezuela, a subsidiary of Statoil, which is a Norwegian SOE. Statoil is now StatoilHydro.

23 Bray, p.329.

24 "Human Rights and Ethics," report issued by the IPIECA, London, UK, August, 2008, p.20; *Also See* Webb and Carstens p.13-15.

access that villagers living near the Yadana pipeline,[25] although this has created a huge discrepancy between these select villages and the majority of the rest of the country. This effect, similar to the "honey pot" phenomenon caused by the creation of jobs, can cause unrest. Moreover, it masks the inadequacy of services provided by the regime, which makes a profit off of the Yadana project.[26]

Education and job training programs have been undertaken by firms as well. In Yemen, Nexen has instituted a program for recruiting and training in order to increase the percentage of Yemenis working on site.[27] Training employees rather than importing them benefits society at large by boosting the economy, and educated workforces bring benefits that outlast the company's presence. A program initiated by OMV in Pakistan involved a similar effort to increase the amount of native staff, but went further with income generating projects, not connected with oil, for local people.[28]

Engagement with the government

Working with host governments is usually essential in the energy and extractive industries. In many countries mining, oil and gas or power projects are possible only through contracts with SOEs, and this might entail a high degree of involvement and cooperation. Of course, working with a non-democratic government opens firms up to a barrage of criticisms.

In extreme cases, firms can make the situation far worse by actually advancing a repressive governments military aims. For example, foreign oil companies operating in Angola have sought favor with the government by mediating arms deals.[29] Of course, this is reprehensible and not in line with any conception of ethical behavior. But, even well intentioned firms can unwittingly contribute to conflict by supplying a government with cash.

Exxon-Mobil was the leader of a consortium that constructed a pipeline in Chad and Cameroon from 2000 to 2003. A certain amount of the proceeds were put into a special off-shore fund and designated for rural development projects, improvements to health care facilities, infrastructure and environmental projects. This degree of caution proved insufficient however, as the Chadian government later declared that the funds could be used to purchase military equipment.[30]

Engaging directly with host governments over overtly political issues is something to be handled with extreme care, and TNCs should not use political capital in host countries too much, regardless of the merits of the agenda they are trying to advance. Although refraining from doing so can put firms at a disadvantage against SOEs from countries whose governments are willing to intervene in exchange for more favorable treatment. Indian investment in Burma, both by SOEs and

25 Anderson, Mary B. and Ganson, Brian "Report of Fifth CDA/CEP Visit to the Yadana Pipeline," report issued by the Collaborative for Development Action, 2008, p.3.

26 "The Human Cost of Energy: Chevron's Continual Role in Financing Oppression and Profiting from Human-Hights Abuses in Military-Ruled Burma (Myanmar)," report published by Earth Rights International, April, 2008, p.8.

27 IPIECA, 2008, p.16.

28 Ibid, p.18.

29 Winston, Morton "Corporate Responsibility for Preventing Human Rights Abuses in Conflict Areas," in *Transnational Corporation and Human Rights,* p.81.

30 Crowson, Phillip "Adding Public Value: the limits of corporate responsibility," Oxford Public Policy Institute, April 2007, p.40.

private companies, has been accompanied by arms deals.[31] China's relationship with the Burmese junta is similar.[32] Chinese companies in Africa are also at an advantage on account of the state's strategic infrastructure spending in countries such as Nigeria, Sudan and Angola.[33]

This harks back to the discussion over the effectiveness of aid and private capital in development. Infrastructure and development aid are certainly lacking, however adverse consequences are more likely when foreign development funds are spent in accordance with commercial goals rather than who needs it most. And of course, conflict and human rights abuses can be exacerbated, Sudan being a perfect example of this.[34] For those firms that are forced to compete, this presents an incentive to engage in similar types of collaborations with state partners.

4.3 The Proper Role of Firms

The proper role of TNCs varies greatly depending on the situation and the issues involved and there is no universal rubric that can be applied to all investments. Besides the uniqueness of every investment project, host government and domestic legislation, the already ambiguous political and ethical dimensions of TNCs' activities are further complicated by the cultural intricacies of each nation. The discourse between academics, civil society, state governments – both LDCs and developed countries – and firms covers a wide range of opinions. NGOs have generally expected the most from firms, both in their willingness to walk away from enticing deals because of human rights concerns and in the administration of services. Unsurprisingly, firms usually argue for the greatest deal of flexibility in what constitutes responsible investment.

The role of firms in funding development projects seems to be waning, and there is a growing consensus that this job is primarily that of governments and NGOs.[35] In other words, the idea that firms have the responsibility to take a role in development in areas that are outside the scope of their business activities is loosing its popularity. However, firms continue to fund development and training projects, not out of sense of responsibility, but rather to boost the image of the company. If there is a controversy over the merits of propping up a corrupt regime or exacerbating human rights abuses, funding projects that benefit the community can mitigate criticism.

Companies that do not wish to fund or carry out any training programs, development projects or take part in multi-stakeholder programs to prevent human rights abuse, must pass up some otherwise attractive investment opportunities if they are to behave in a legal and ethical manner.

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31 "India: Indian helicopters for Myanmar: making a mockery of embargoes?" Amnesty International, London, UK, July 16, 2007, http://www.amnesty.org/en/library/info/ASA20/014/2007

32 "Burma: Security Council Should Impose Arms Embargo," Human Rights Watch, New York, October 7, 2007.

33 Hong Zhao, "China's Oil Venture in Africa," *East Asia,* 2007, Vol.24, p.406.

34 Chinese spending on infrastructure boosts the profile of the Bashir regime which allows it to stay in power, thus leading to a continuation of the atrocities occurring in the Darfur region.

35 For example, the IPIECA notes that "NGOs frequently criticize company-run development projects on grounds that they are unsustainable or fail to meet the social and economic needs of the people. But there is increasing recognition that the primary responsibility for delivering economic development lies with the state. Oil companies can support this effort, but cannot substitute for it," IPIECA, 2008, p.24.

This passive approach nonetheless requires carrying out or commissioning human-rights and conflict impact assessments if there is any reason to believe that a project might have adverse consequences. If the results of this study conclude that there is a risk, the company has two choices: it can walk away, or it can devise a more active strategy to protect against this risk.

This chapter divided corporate training and development programs into those that pertain to a company's core business and those that benefit the community at large. There is a good deal of overlap between these two categories, and most strategies are a combination of the two. Many training programs that are intended to principally make business activities possible without illegal or unethical behavior can have wider-reaching effects in the community. However, a human-rights and conflict strategy that takes precautions against potential abuses differs from a broader policy that is aimed at justifying a TNC's presence in a given country by ostensibly making up for actions that have a negative effect – like paying taxes to a brutal regime that uses those funds to buy arms. Although, a firm in this situation would most likely take steps to prevent any negative effects of its core operations as well.

In evaluating whether a firm's presence is justifiable in a given country, the first consideration should involve compliance with laws in the host country and international standards for human rights. As outlined in the previous chapter, international law does establish some basic rights that must be universally respected, even if enforcement mechanisms remain weak. This includes aiding and abetting the violation of said rights. Any benefit that a TNC brings to a country should be considered only in the absence of this. If a substantial risk that such abuses will be committed by partners in a project, thus making a firm complicit, the company should stay away. Even if it is likely that another company will come to take their place, there is no excuse for this.

Protecting against this type of abuse by conducting training programs can be effective, and if it is sufficient in lowering risks to an acceptable level, then investments should go ahead. Likewise, if a company can operate without the risk that rights will suffer in connection with their business, but their overall presence supports conflict or a corrupt regime that infringes on the rights of its citizens, they might balance these effects by running or funding programs that benefit the community.

In either case, the test is whether the company's activities go beyond what is appropriate for a business. Ottaway's comparison of modern oil companies to charter companies of the nineteenth century may be hyperbolic, but this is an extremely relevant criticism. TNCs should neither be expected to be the primary providers of development funds nor should they be responsible for reforming governments. According to this same line of reasoning, TNCs should not become entangled with political or military institutions to such a degree that they are performing duties that would normally be performed by the government. This standard will undoubtedly vary from country to country and even from project to project, but should be upheld as a general principle in all cases.

While engaging constructively with a repressive regime and instituting training and development programs are an acceptable element to human-rights and investment strategies, they should be confined within these limits.

Chapter 5:
Constructive engagement in Burma's oil and gas sector

The combination of ongoing conflict, truly abysmal human rights abuses and vast opportunities in mineral resources, timber, natural gas and hydroelectric energy make Burma[1] both a potential target of investments for TNCs and also creates the potential for grave consequences. A number of firms from North America, Europe and Asia are active in the country's extractive and energy sectors, and these have varying sensitivities and approaches to human rights. Incidents in which human rights abuses allegedly were the result of TNCs' activities in Burma have landed companies in courts in both Europe and America, with landmark decisions in both Belgium and the US. Firms that have chosen to operate in Burma have used arguments of constructive engagement and pointed to their beneficial effect on the community to justify their presence. Companies, most notably Total, have instituted programs – including human rights trainings for soldiers and police officers – in attempts to achieve conflict- and human-rights-sensitive business practices.

These efforts are severely limited by conditions in Burma and the unwillingness of the military government to change its methods. The ruling junta has proven itself to be among the most brutal regimes in power today. In some parts of the country, there is active fighting going on between rebel groups and government soldiers, resulting in poor living conditions for the local population at best, and extremely dangerous conditions at worst. The xenophobic and paranoid regime has also exhibited perpetual unwillingness to waiver on human rights issues, even against overwhelming pressure from the international community. The effect that TNCs operating inside the country can realistically have on the situation, and the degree to which the development effect of their investments can trickle down to average Burmese is, in most cases, minimal.

Therefore, determining whether profitable investments can be made in Burma in a legal and ethical way represents an extreme scenario, and thusly it is illustrative in demonstrating the limits of constructive engagement. The previous chapter outlined what should be considered acceptable strategies for firms that operate in human-rights or conflict-sensitive regions. Most importantly, firms should not operate in a country if doing so poses any serious threat that serious infringements of rights will occur as a result of their operations, regardless of the net benefit they may have in the country. While a company can engage in development and training programs, either to offset the negative consequences of funding a corrupt regime or to ensure that employees, subcontractors and

1 Also known as Myanmar. I will use “Burma,” however, as do the majority of academics and activists, as the newer “Myanmar” is a label applied to the country by the non-democratic junta.

government partners are sensitive to rights and conflict, it must only do so within certain boundaries. Training soldiers and other activities that are the realm of the state are not acceptable tasks for companies to take on. With those standards in mind, this chapter will examine the approaches that some firms have taken in investing in Burma, after introducing the human rights and investment situation in the country.

The disconnect between literature produced by oil companies and organizations that support their policies in Burma and the NGO and activist community is huge. While some companies, most notably Total, argue that their investments and community programs have made a huge difference in the lives of the local population, some activist groups claim that any economic activity in Burma is by definition unethical because it finances the regime.[2] The truth lies between these two extremes. The experience of companies operating in Burma, again Total is the best example, have demonstrated that it is possible to reasonably safeguard against the most egregious violations of rights. Though preventing all human rights abuses is extremely difficult if the militarily is present, which is usually the case. Development programs have also shown that the net effect test is arguably passable. Some advocacy groups argue that companies operating in Burma are not doing enough to change conditions there, and should do more if they intend to stay.[3] However, the steps necessary for meeting both of these conditions require taking on responsibilities that should be met by the government, and have put these firms in positions that are totally inappropriate for private actors to be in. If the allegations that human rights abuses do occur in connection with a company's operations in Burma are credible, or if the financial support they provide the regime is not offset by positive consequences, those companies should withdraw rather than doing more.

5.1 Conditions in Burma

The Burmese military, or *Tatmadaw,* has been the most influential force in politics since the country's independence from Britain in 1948. The Country has been under military dictatorship since a short-lived post-colonial democratic government was deposed in 1962, when General Ne Win came into power in a *coup d'etat* under the banner of the Burmese Socialist Programme Party. The Ne Win regime pursued an isolationist course, remaining non-partisan during the Cold War, despite its nominally socialist leanings. In 1979, Burma even withdrew from the Non-Aligned movement, claiming that it had become to closely linked with the Soviet Bloc.[4]

In 1988, the pro-democracy National League for Democracy (NLD) was at the forefront of mass demonstrations against the junta, which were met with violence by the military. These protests

2 For example, the Burma Campaign UK takes this position. A recent opinion piece in the Indian-based Burmese exile news site went so far as to criticize humanitarian aid on the grounds that the regime makes a profit by controlling the official exchange rate: Moe Myint, "Asking for More Aid for the Generals' Coffers," *Mizzima,* 5 May 2009, www.mizzima.com.

3 *See* Earth Rights International, "The Human Cost of Energy: Chevron's Continuing Role in Financing Oppression and Profiting from Human Rights Abuses in Burma (Myanmar), April 2008, p.11.

4 Selth, Andrew "Burma and Superpower Rivals in Asia-Pacific," *Naval War College Review*, Spring 2002.

led to the fall of Ne Win's regime, which was replaced by a new junta, the State Law and Order Restoration Council. Democratic elections were held in 1990 and the NLD emerged as the clear winner, under its charismatic leader Aung San Suu Kyi. However, the junta, which changed its name to the State Peace and Development Council (SPDC) in 1997, refused to honor these results and cede control. The subsequent two decades have involved the brutal treatment of political dissenters, disastrous mismanagement of the economy, neglect of public services and the proliferation of violence in a number of conflicts between the *Tatmadaw* and various armed rebel groups.

There are currently an estimated 2,156 political prisoners in incarcerated in Burma.[5] Freedom House gives Burma a "seven" on both its Political Rights and Civil Liberties Indexes – the worst possible result in each category.[6] Despite the vast amount of natural resources found in Burma, such as timber, natural gas, and gemstones, Burma ranks 135th out of 179 countries on the Human Development Index.[7] This is not the result of leaving those resources in the ground, but rather a result of the SPDC's spending priorities. While Burma has no external threats (and cease-fire agreements with many of the rebel groups) the junta spends around forty percent of its budget on the army, while only spending around five percent on public education and only slightly more than one percent on health care.[8]

At the operational level, the Burmese army has been linked with a variety of egregious human rights violations, including the use of forced labor, extra-judicial killing and uncompensated land seizures.[9] The military has used forced labor and extortionate practices in the course of completing public works projects such as railways and construction projects.[10] This poses obvious risks for companies who contract with the government in any sort of construction project.

Two events over the past two years stand out as bellwethers of the regime's attitude and reluctance to change its ways. In the autumn of 2007, protests led by monks in response to a rise in government regulated fuel prices quickly evolved and spread across the country. The military's response to the so-called "Saffron Revolution," named for the color of Burmese monks' robes, involved shooting live rounds at protesters, which resulted in an undetermined number of civilian casualties.[11] This demonstrates that despite talk of democratic reforms, the SPDC still has a very low of tolerance for political dissent.

The second event was a natural disaster, but one that has been demonstrative of the regime's

5 According to the Association for the Assistance of Political Prisoners, Burma, www.aappb.org
6 Freedom House "Map of Freedom of the World" 2008 edition, www.freedomhouse.org
7 United Nations Development Programme "Human Development Reoports: Myanamar, 2008 statsical update,"www.undp.org
8 "China in Burma: the increasing involvement of Chinese multinational corporations in Burma's hydropower, oil and natural gas and mining sectors (2008 updated version)," Earth Rights International, September 2008, http://www.earthrights.org/content/view/573/41/, p.2.
9 Human Rights Watch "World Report 2009: Burma," http://www.hrw.org/en/node/79297
10 Ibid.
11 UN News Centre, "Myanmar: UN rights expert to probe allegations of abuse during crackdown," www.un.org.

character. In May 2008, cyclone Nargis devastated the Irrawaddy Delta, killing an estimated 140,000 people and affecting 2.4 million others.[12] The junta's initial response was slow and inadequate, and international aid was initially refused. Critics of TNCs that operate in Burma noted that the companies were unable to use their position to convince the government to allow humanitarian aid in more quickly. While the SPDC has yet to spend much of its own money on recovery efforts, it has come to allow aid groups to work more or less freely in the Delta region. Much of the rest of country remains off-limits to aid workers, however, and many regions of the country are in dire need of humanitarian help.[13]

The SPDC has announced that multi-party elections will take place in 2010 according to a democratization plan that involves a new constitution, approved in a referendum just days after Cyclone Nargis hit.[14] The constitution was written mostly by the junta and provides for continued governmental authority for the military. In other words, there is little hope that real democratic reforms will take place according to the current plan. Aung San Suu Kyi has been under house arrest for thirteen of the last nineteen years, and remains in detainment.[15] Without her participation, any claims that the regime makes regarding in support of bi-partisan cooperation are markedly empty.

5.2 Burma's foreign relations

FDI in Burma is closely related to the country's foreign relations as a result of the human rights situation and because of the large role the junta plays, through SOEs, in investment projects. The United States, for example, enacted a ban on all new investments in Burma in 1997 on account of the SPDC's human rights practices and dictatorial rule, although those companies that had pre-existing interests were allowed to stay.[16] In 2003, all imports from Burma were made illegal and recently the US has closed a loop hole in this legislation by barring the import of gemstones imported from Burma with a new law that bans the import of precious stones from Burma that have been cut and polished in third countries.[17] While EU firms are still allowed to operate in Burma – Total being the most conspicuous example – there is an EU-wide ban on arms imports to the

12 Human Rights Watch, "Burma: One Year After Cyclone, Repression Continues," Human Rights Watch, April 30, 2009, http://www.hrw.org/en/news/2009/04/30/burma-one-year-after-cyclone-repression-continues

13 Ibid, *see also* McGeown, Kate "Did the Cyclone Change Burma's Junta?" BBC News, 4 May 2009, http://news.bbc.co.uk/2/hi/asia-pacific/8029611.stm

14 The cyclone hit on 2-3 May and the referendum was held as scheduled on 10 May 2008, although voting was delayed in areas affected by the cyclone until 24 May 2008. The referendum was also criticized for the lack of information available on the new constitution, which was only made public a month beforehand, and for irregularities in voting. *See* Human Rights Watch "World Report 2009: Burma."

15 Two weeks before she her sentence of house arrest was officially to end, Aung San Suu Kyi was arrested and taken to Insein prison for charges of breaking the terms of her detainment after an American man swam to her compound, uninvited. One speculation is that the SPDC wants her out of the way for upcoming elections (many consider the conditions of the vote to be less than free and fair). *See* Fuller, Thomas and Mydan, Seth "Myanmar Junta Charges Democracy Leader," *New York Times,* 14 May 2009.

16 Human Rights Watch, "US: Burma Gem Ban Strengthened," 28 July 2008, www.hrw.org.

17 Ibid.

country.[18]

Burma's Asian neighbors have taken a different approach to dealing with the SPDC: India and China both supply the *Tatmadaw* with arms, and both countries are deepening their economic ties with Burma as well, mostly through gas and energy projects.[19]

The Association of South-East Asian Nations (ASEAN) admitted Burma as a member in 1997. While the organization faced international criticism for doing so, it was argued at the time that engagement was preferable to isolating the SPDC generals. Critics argued that allowing them into the club would only legitimize the regime and the methods it employs to stay in power. This debate was reignited in 2007 when Burma was scheduled to hold ASEAN's rotating presidency. In the end Burma deferred, letting the Philippines take the post, amidst increased pressure over human rights issues from newly democratic Indonesia as well as increased activism in the Philippines and Malaysia.[20]

Burma was again the center of controversy during the debate over the ASEAN charter, which introduced permanent institutions in the body. The Philippines, Thailand and Indonesia all had concerns over what real power would be granted to a new Southeast Asian human rights body, while Burma resisted in signing out of fear that the body would have too much power. Indonesia, which held its first truly free democratic elections in 2004, sought a firmer commitment from Burma on democratic reform and a human-rights oversight body that, at a minimum, would be able to criticize and provide recommendations. In the end, all ten ASEAN members ratified the document, with Indonesia being the last to do so in October 2008.

Thailand is the ASEAN country with the deepest ties and most pressing concerns. Thailand imports more Burmese gas than any country,[21] and has concerns over border security and narcotics smuggling.[22] Its stance on Burma seems to be pragmatic and centered on mutual economic benefit and security.

Burma's geographic location makes it an attractive opportunity to link India with Southeast Asia, and there is currently a tri-lateral highway project that under construction that will link India with Thailand via Burma.[23] China also sees Burma as a potential trade route, giving it access to Burma's ports on the Indian Ocean.

The history of relations between Burma and both India and China is long and complicated, and both states are doing an increasing amount of business with the country. Security issues aside, the

18 "India: Indian helicopters for Myanmar: making a mockery of embargoes?" Amnesty International, London, UK, July 16, 2007, http://www.amnesty.org/en/library/info/ASA20/014/2007

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20 Green, Michael and Mitchell, Derek "Asia's Forgotten Crisis: a new approach to Burma," *Foreign Affairs,* November/December 2007.

21 "Burma's Bumper Energy Sale," *The Irrawaddy,* September 2006, vol. 14, no.9.

22 Fuller, Thomas, "No Blowing Smoke: Poppies Fade in Southeast Asia," *New York Times*, September 16, 2007.

23 Tha Indian News: "Thailand-Myanmar to construct regional transport linkage to India," July 31, 2008. http://www.thaindian.com/newsportal/thailand/thailand-myanmar-to-construct-regional-transport-linkage-to-india_10078014.html.

main interest seems to be access to natural resources and, for China, trade access to the Indian Ocean.

In China's case, this has meant a huge influx of investment in energy projects in recent years. A recent report from the NGO Earth Rights International identifies sixty nine Chinese multinational corporations involved in energy and mining projects in Burma.[24] These arrangements are accompanied by condition-free loans and arm sales as well as political support; along with Russia – who may be planning to build a nuclear energy facility in Burma, despite its vast oil and gas resources[25] – China seems willing to veto any UN Security Council action that criticizes or penalizes Burma.

Neither China nor Burma are forthcoming with the details necessary to make clear the full extent and precise nature of their relationship, and this has led to a great deal of speculation over military ties. While some analysts maintain that the Burmese military is far too untrusting to allow any foreign military on their soil, others have suggested there is a deeper relationship that may even include Chinese military outposts within Burma. Even if this were the case – which it most likely is not – it would be unclear what Burma's position in regards to China is. Those who are skeptical of China's ability to control is so-called "client states" point – rather unreassuringly – to North Korea's apparent disregard for China's wishes and suggest that Burma might pursue a similar path of isolationism.[26] In a report leaked to *The Irrawaddy,* a Burmese exile news publication based in Thailand, Home Affairs minister Maj-Gen Maung Oo said that Burma was not "pro-China" but was China's "road to the sea of southern states."[27] In any case, it is clear that China is a major source of arms for Burma, and Burma a major source of natural resources for China.

While it is certainly not in India's best interests to have a North-Korean style regime next door, neither does it desire Burma to become a steadfast military ally of China.[28] This explains India's recent spate of arms deals to the SPDC, which runs contrary to the traditional support that India and the Congress Party, which currently leads the governing coalition, in particular has had for Burmese democracy. This goes back to the time when the Congress party supported Burma's independence. The current policies under the government of Manmohan Singh that allow arms sales and investment represent a pragmatic, competitive approach between India and China for regional influence and natural resources, while favouring security from cross border drug and rebel violence to democratic change. India is currently Burma's fourth largest trading partner.[29]

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24 "China in Burma: the increasing involvement of Chinese multinational corporations in Burma's hydropower, oil and natural gas and mining sectors (2008 updated version)," Earth Rights International, September 2008, http://www.earthrights.org/content/view/573/41/

25 Kanbawza Win "The 4th Burmese Empire with Nuclear Weapons," *The Asian Tribune*, October 21, 2008.

26 Selth, Andrew, "Burma, China and the Myth of Military Bases," *Asian Security,* September 2007, pp.279-307.

27 Min Lwin, "Burma, China Consolidating Military Relations," *The Irrawaddy*, October 29, 2008.

28 The Indian military has been one of the strongest proponents of the theory that China has military bases in Burma, although it has recently backtracked on this accusation. See Selth.

29 Green and Mitchell

5.3 Investment in Burma's Petroleum Sector

Burma exports more natural gas than any other country in the world,[30] and natural gas, unsurprisingly, accounts for more than half of Burma's exports and is the SPDC's single largest source of income.[31] Other significant sources of income include agricultural products, timber and gemstones (see Table 5.1). A relatively new source of income is hydroelectric power, and there are currently several dams under construction in collaboration with Indian[32] and Chinese companies.[33] It is possible that the sale of electricity from these dams to neighboring countries will take on increased importance in the future, however natural gas is currently by and large the most important resource from the viewpoint of both foreign investors and the government.

Table 5.1

Burma's Economy*

GDP: $ 16.3 billion (2007 Economist Intelligence Unit "EIU " estimate).

GDP per capita: $334 (2007 EIU estimate).

Natural resources: natural gas, timber, metals, coal, limestone, precious stones, hydropower, marine products, and petroleum.

Exports:
$6.1 billion.
Types: natural gas 41%, agricultural products 18%, precious and semi-precious stones 12%, timber and forest products 8% and marine products 5%.
Major markets: Thailand 42.04%, Hong Kong 11.6%, India 11.3 , , Singapore 8.8%, China 7.7%, and Malaysia 5.2% .

***Imports*:** $3.4 billion.(January to November 2008, Business Information Group (BIG) statistics)

Top Sources of FDI: Thailand, UK, Singapore, China, Malaysia, Hong Kong, France, USA, Korea, Indonesia. (Rank order according to cumulative approved investments as of 30 January 2008).**

* Source: US Department of State, Bureau of East Asian and Pacific Affairs, "Background Note: Burma," December 2008, www.state.gov, unless otherwise noted.
** US Department of State, Bureau of Economic Energy and Business Affairs, "2009 Investment Climate Statement – Burma," February 2009, www.state.gov.

The Yadana off-shore field off the cost of Burma, and accompanying pipeline which transports the gas to Thailand is currently the regime's single largest source of income.[34] The Yetagun field and pipeline accounts for most of the remaining current production. Currently, new drilling projects are planned off-shore in the Shwe gas field, which will increase gas profits by a projected 150 percent.

The Myanmar Oil and Gas Enterprise (MOGE) is an SOE that organizes joint ventures for all petroleum projects in Burma. Typically, foreign companies pay for exploration and initial costs, while MOGE is given a stake in the deal in exchange for the granting of exploitation rights.

The composition of investors in Burma's petroleum sector is a mix of North American, European and Asian investors, although more and more Asian companies are investing in the country, and some Western firms are pulling out over concerns over human rights. Premier Oil, for

30 CIA World Fact Book, "Rank Order - Natural gas – exports," 2008, accessed via EBSCO Academic Search Complete.
31 Human Rights Watch "Burma: Foreign Investment Finances Regime: Companies Should Condemn Crackdown," 2 October 2007, www.hrw.org.
32 Boot, William, "India's Support for Burmese Junta Pays Off," *the Irrawaddy,* September 24, 2008.
33 "China in Burma: the increasing involvement of Chinese multinational corporations in Burma's hydropower, oil and natural gas and mining sectors (2008 updated version)," Earth Rights International, September 2008, http://www.earthrights.org/content/view/573/41/, p.2.
34 Earth Rights International, "The Human Cost of Energy," p.8.

example took over operations of the Yetagun Oil Field from Texaco in 1998. It faced intense criticisms over the operations in Burma, despite the ambitious human-rights training program for military personnel discussed in the previous chapter. Due to these concerns, Premier withdrew in 2002 and sold its shares in the Yetagun project to the Malaysian firm Petronas.[35] Other partners in the firm are the Thai SOE, PPT Exploration and Production Co Ltd (PPTEP) and the Japanese Nippon Oil.[36]

The Yadana pipeline is run by a consortium of companies that includes Total of France, with a 31.25 percent stake, the American firm Chevron, which acquired its 28.25 percent stake after buying Unocal, PPTEP with a 25.5 percent stake and MOGE, with 15 percent.[37] The first production agreement for the Yadana project was signed in 1992, and during the 1990's, a pipeline was constructed to transport gas to Thailand. NGOs and activist groups allege that the construction of this pipeline, which was carried out in cooperation with the military, involved the use of forced labor and uncompensated relocations.[38] The *Doe v. Unocal* case resulted from these allegations, as were two cases against Total in France, and one in Belgium (see chapter three).

Construction of the pipeline was completed in 1998, however the allegations of abuse have not ceased. The NGO Earth Rights International, which provided legal assistance to the plaintiffs in *Doe v. Unocal* has released several reports on the issue and claims that in addition to propping up the corrupt junta, a myriad of abuses have occurred as a result of the Yadana and Yetagun projects.[39]

The Shwe gas project involves off-shore drilling plots that will be developed under similar production-sharing contracts. The South Korean company Daewoo International, along with Indian and South Korean SOEs, and MOGE are members of the consortium. The Canadian firm Talisman was involved as well, but halted operations after a public outcry over their activities at home.[40] American companies, such as Chevron, are barred from making new investments under the terms of the 1997 investment ban (although Chevron does own extraction rights for some offshore plots that were acquired by Unocal before the sanctions went into effect).[41]

This project has raised similar criticism as previous ones from NGOs and activists. The Shwe Gas Movement was founded solely to research the effects of the project and to shed light on the human rights consequences. It argues that, in addition to the project providing the regime with $580 million a year, the construction of on-shore pipelines will lead to similar problems as those that have occurred with the Yadana and Yetagun pipelines. Another concern is the potential violent

35 Shwe Gas Movement, "Supply and Command: Natural Gas in Western Burma Set to Entrench Military Rule," July 2006, p.8.
36 Human Rights Watch "Burma: Foreign Investment Finances Regime: Companies Should Condemn Crackdown," 1 October 2007, www.hrw.org
37 Earth Rights International, "The Human Cost of Energy," p.17.
38 For examle: The Burma Campaign, Human Rights Watch, Earth Rights International.
39 *See* Earth Rights International, "The Human Cost of Energy," 2008 and "Total Denial," 2003.
40 Shwe Gas Movement, 2006, p.8.
41 Human Rights Watch, "Burma: Foreign Oil and Gas Investors Shore Up Junta."

treatment of fishermen at sea near the drilling rigs.[42] A report issued by the Shwe Gas Movement points out that a proposed pipeline to China would cut through the Arakan and Chin states in which around ninety percent of people do not have access to electricity.[43] PetroChina has already signed a memorandum of understanding with for the purchase of 6.5 billion cubic feet of gas.[44]

All together there are twenty seven companies from thirteen countries that have investments in Burma's oil and gas sector. These include SOEs and private companies from China, South Korea, Indian and Thailand.[45]

5.3 Constructive Engagement: Total and Chevron

There is a robust community of NGOs and activist groups that are dedicated to exposing and criticizing the actions of the SPDC and TNCs, governments and organizations that operate in Burma. For example, the activist group Burma Campaign, UK publishes an annual list of international companies with with a connection to Burma called the "Dirty List."[46] The position taken by this and other groups is that all investments in Burma are unethical as they financially support the junta, regardless of steps companies take to minimize the negative impacts of doing business in Burma or the benefits that might arise from their CSR policies. (The "Dirty List" even names the Lonely Planet for publishing a travel guidebook, despite the fact that this book includes a discussion of the negative effects of visiting Burma and advice on how to avoid spending money at government-run establishments.) [47] Even NGOs that deliver humanitarian aid to people affected by Cyclone Nargis in the Irrawaddy Delta have been the subject of criticism on the grounds that they support the SPDC financially.[48]

When compared to the nuanced approach of the Sudan Divestment Task Force, it becomes apparent that the issue has become incredible hostile and political. However, there some NGO groups that provide well-researched and rational criticisms of companies that operate in Burma, most notably Human Rights Watch and Earth Rights International – both of which oppose FDI in Burma's petroleum sector.

On the other hand, perhaps unsurprisingly, the statements of TNCs and organizations commissioned to report on their activities argue that companies operating in Burma have a positive effect on its people through social development programs, that their policies respect human rights and adequately prevent against abuse. Companies claim that their contact with the SPDC amounts to engagement that will nudge the generals towards liberalized policies.

42 Shwe Gas Movement, 2006, p.15.
43 Ibid. pp.18-19.
44 Ibid.8.
45 Human Rights Watch, "Burma: Foreign Oil and Gas Investors Shore Up Junta," "Table Three: Companies." http://www.hrw.org/legacy/campaigns/burma/drilling/Burma_table3_companies.pdf
46 The Burma Campaign, UK, "The Dirty List," http://www.burmacampaign.org.uk/dirty_list/dirty_list.html#l
47 http://www.lonelyplanet.com/responsibletravel/myanmar.cfm
48 Moe Myint, "Asking for More Aid for Coffer of Generals," *Mizzima* 5 May 2009, www.mizzima.com.

The truth most likely lies somewhere in between these extremes. While there is a great deal of evidence that oil companies' operations in Burma have led to human rights abuses – as evidenced the documents released court cases in US, France and Belgium – the efforts made to improve the standard of living for ordinary Burmese have had at least some positive effects. If those companies that have made real efforts to implement socially responsible policies in Burma were to pull out, they would undoubtedly be replaced by less socially conscious firms, as was the case with Premier.

Total and Chevron are the two companies active in Burma's oil and gas sector that have have both received the most attention and have gone the furthest in developing investment strategies in Burma that take human rights and development into consideration. This is not ironic, but stems from the fact that the public in their home countries are the most sensitive to these criticisms and therefore groups see criticizing them as productive.[49]

Chevron became involved in Burma after it acquired Unocal in 2005, whose subsidiary, the Unocal Myanmar Offshore Co., had a stake in the Yadana project. Its minority share in the project is nonoperative, unlike Total, which has the largest share of any company in the Yadana Consortium.

Both companies have contributed funds to social development programs in the area and have mounted defenses of their investments on the grounds that they are doing all they can to influence the regime and that their presence is an overall benefit to the people of the country. There is some merit to these claims. Total has funded health clinics in the area[50] and Chevron has contributed to health care and microfinance schemes through cooperation with the NGO, Pact. Between 2003 and 2008, Chevron contributed $1,694,000 to a Pact health project combating diseases such as tuberculosis, HIV/AIDS and malaria. By 2010, this project will have, according to Chevron, have reached about 1.2 million people.[51]

Chevron also contributes money, along with other members of the consortium, to the Corporate Engagement Project of the Collaborative for Development Assistance's Collaborative Learning Projects.[52] The Collaborative for Development Assistance (CDA) has been highly involved in Total's community outreach programs in Burma as well. It has sent representatives to report on the situation in the Yadana region, both to asses the efficacy of community projects and to investigate

49 Throughout this work I have classified firms from OECD countries as being generally more sensitive to human rights. This holds true in the present case as well with Total of France and the American firm Chevron. The Korean firm Daewoo and the Japanese Nippon Oil are the only other two firms from OECD countries that operate in Burma's oil and gas sector. Both of these companies seem to be much less sensitive to the human rights situation in Burma. For example, a spokesman from Nippon has said "We see the political situation and energy business as separate matters," and a Daewoo spokesman similarly asserted that "Politics is politics. Economics is economics." Given this, the present analysis will focus on Total and Chevron. *See* Human Rights Watch, "Burma: Foreign Oil and Gas Investors Shore Up Junta," "Collected Company Statements," http://www.hrw.org/legacy/campaigns/burma/drilling/Burma_companystatements.pdf.

50 Anderson, Mary B. and Ganson, Brian "Report of the Fifth CDA/CEP Visit to the Yadana Pipeline," report issued by the Collaborative for Development Assistance, Corporate Engagement Program, February 2008.

51 The health project is "Strengthening Community Response to Disease," *see* Chevron's webpage: http://www.chevron.com/globalissues/humanrights/myanmar/

52 Ibid.

allegations of human rights abuses committed by the *Tatmadaw* in the vicinity of and in connection with the Yadana Consortium's operations.

CDA's reports have generally cast the Yadana pipeline project and the community development projects that have accompanied it in a favorable light. The most recent report, published in February 2008 after the fifth visit to the area, quotes villagers extolling the benefits of Total-funded health clinics and microfinance projects.[53]

While Total, in contrast to Chevron, admits that there may have been some uses of violence and forced labor in the early stages of the Yadana project that might have "escaped its attention," it maintains that the situation has since been rectified, and that currently it does not cooperate or provide logistical support to the military.[54] The findings of CDA on-site investigations support this claim. The most recent report goes a step further by claiming that the presence of Total in the vicinity of the pipeline makes life safer for ordinary Burmese, who, in addition to enjoying the benefits of community projects, no longer have to fear forced labor or conscription into the army. One interviewee is quoted as saying that "things would be better if there were three or four companies in the area like Total."[55]

Total argues that the cumulative effect of its investments are positive and that Burma will benefit from it in the long run. It responds to the criticism that it is financially supporting the SPDC by claiming that its policy of "constructive engagement" with the Burma is preferable to withdrawal:

> "Total's decision to stay in Myanmar, unlike a number of Western companies that have withdrawn, was a deliberate choice, but it does not signal approval of any regime. Rather, it expresses the [Total] Group's deep-seated belief that economic development and human rights progress go hand in hand. Exacerbating an impoverished country's problems through an embargo will not improve its people's lives."[56]

If Total were to leave, it argues that the it "would immediately be replaced by another company who might not apply the same social or ethical standards."[57] While critics have alleged that constructive engagement has not led to any improvements, Total maintains that it has, and that if other firms that operated in the country embraced similar policies, "the results that Total has obtained would be cascaded more widely."[58]

While Earth Rights International gives Total some credit for admitting to past abuses – it comes down harder on Chevron – it disputes much of the evidence offered by Total in defense of its investments, as do Human Rights Watch and other advocacy groups.[59]

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53 Anderson and Ganson, pp.4-6.
54 From Totals website: "The Allegations and Total's Response," http://burma.total.com/en/controverse/p_4_1.htm
55 Anderson and Ganson, p.4.
56 Total website: "The allegations and Total's response," http://burma.total.com/en/controverse/p_4_1.htm
57 Total website: Burma: frequently asked questions, http://burma.total.com/en/ow/faq.htm#faq10
58 Ibid.
59 Earth Rights Interantional, "The Human Cost of Energy," p.30.

The case against investment in Burma comes down to the core arguments discussed in the previous chapter: despite their best efforts, human rights are infringed upon as a result of their operations and the social programs and positive effects are not enough to offset the negative impact of financially supporting the regime.

On this first count, Earth Rights International raises evidence against Total and Chevron's version of events. For example, Total and Chevron both maintain that the Burmese military does not provide security for the pipeline, but Earth Rights International points out that evidence brought forth in *Doe v. Unocal*[60] disproves this. More recent observations indicate that the military is still patrolling the pipeline. In addition to the potential for abuse to occur when soldiers abuse civilians, there is compelling evidence to suggest that at least some of the soldiers have been forcibly conscripted.[61]

The net-effect argument is much more subjective. Groups such as Human Rights Watch point to the cash flow from oil and gas projects as a factor that allows the regime to stay in power.[62] And while Total may be correct in hypothesizing that its departure would be hastily followed by the arrival of another firm, this argument requires its constructive-engagement policies to be effective to a certain degree. Human Rights Watch points out that Total has done little to politically lobby the regime to change, and had little influence to stop the government crackdown in 2007.[63] Furthermore, companies could do little to help expedite the flow of aid into Burma after Cyclone Nargis.

5.4 Should Companies Invest in Burma?

The case made by Total, and to a lesser extent Chevron, has merit. Total has done a better job of protecting rights and promoting development than any other company operating in Burma, and even if the net effect of their presence in the country does not quite balance out against the negative consequences of supporting the military junta, it is true that their position would immediately be occupied by another company if they were to leave.

Burma's neighbors, especially India, China and Thailand, are increasing their share of investments in the Burmese oil and gas sector. State-owned enterprises and private firms alike have pursued economic goals in Burma with little regard for human rights. The departure of firms like Total, which have recognized the issue, would give more influence to firms that would make much less of an effort.

On the other hand, there is no excuse for complicity with human rights abuses – this would fall into the category of what International Alert has called "show-stoppers." If the army is being used to secure pipelines, this poses huge problems for the oil companies. The Burmese military has

60 Doe v. Unocal, 2002 WL 31063976 (9th Cir. 2002) "I. Factual and Procedural Background, D. Proceeding Below."
61 Earth Rights International, "The Human Cost of Energy," pp.30-31.
62 Human Rights Watch, "Burma: Foreign Oil and Gas Investors Shore Up Junta."
63 Ibid.

proven time and time again that it does not respect human rights. Furthermore, there is evidence to suggest that at least some members of the armed forces are forcibly conscripted. This means that *any* use of the military – even if they were to be acting in accordance with accepted human-rights norms – might constitute benefiting from the use of forced labor. This presents a problem which is most likely insurmountable, and might land Total or Chevron in court in their home countries or in the US under the Alien Tort Claims Act – again.

Total's impact in the Yadana region is especially large. Reports commissioned by Total and carried out by the Collaborative for Development Assistance indicate that the pipeline region is much better off than the other areas in the same region. It reports improvements in terms of social development and claims that the human rights abuses that occur in surrounding areas – like forced labor and forced conscription – do not occur in the pipeline region.[64] Even if this were true, and there is some evidence it is not, it presents a problem.

The Yadana region is not an appropriate environment for international investment because any undertakings will necessitate some degree of cooperation with the Burmese military, which cannot be reasonably trusted to respect rights. Since it is not possible to avoid areas where these conditions are present in Burma, the only option is to change them. This puts firms in a position that they should not be in. If Total is to guarantee that no abuses occur at the hands soldiers on account of their operations, they must ensure that the Burmese army stays out of the area. While Total does provide its own security, there is evidence that military battalions are assigned to protect the pipeline.[65] If the partners of the Yadana project were to somehow strike an agreement requiring the military, which freely patrols the country, to intentionally avoid the pipeline area, this would involve negotiating with the government to change military policy. Even though such change would benefit those in the pipeline area, it is simply the type of leverage that companies should not use.

Conducting human rights training programs for soldiers assigned to the area as Premier did in 2002 and 2003, similarly crosses boundaries that firms should not cross. As private, profit-driven entities, companies should not train armies. This is a task reserved for states and NGOs.

While paying taxes to the SPDC and signing production sharing agreements with MOGE are legal in the absences of sanctions, it is clear that both Total and Chevron feel that they must demonstrate that they are giving back to the communities in order to fend of criticism from NGOs and activists that may hurt their reputation at home. While the development programs initiated directly by Total and Chevron or in partnership with NGOs have certainly made a measurable difference in the lives of average Burmese living in the area, this too presents a problem.

Funding community projects in areas such as health care and micro-finance fit into an accepted framework of Corporate Social Responsibility. If firms donate to hospitals in developed countries

64 *See* Anderson and Gansosn and Totals website: Total website: "The allegations and Total's response," http://burma.total.com/en/controverse/p_4_1.htm

65 Earth Rights International, "The Human Cost of Energy," pp.30-31.

this is uncontroversial. Similarly, firms in the developing world might give money to NGOs that in turn work to better the community, and this is a productive and positive practice. However, the situation in Burma is a bit different. The programs that are funded in the Yadana pipeline corridor create somewhat of a bubble, and the benefits of these projects are not felt outside of it. While Total has, to its credit, tried to design programs that will have a long-term effect, the huge gap between this area rest of the region has a potentially destabilizing effect.

Company sponsored development projects are ideally carried out in cooperation with multiple stakeholders, including the government and civil society. In the case of Burma, the government is not interested and represses civil society to the degree that it cannot work freely openly. This gives Total and Chevron far too much influence over the projects in which they are involved, and therefore over the people in the region that such projects affect.

Total in particular has made what amounts substantial effort at constructive engagement in Burma. However, it is not possible to operate in Burma without a real risk that their activities will lead to human rights abuse. The degree of involvement with the military that would be necessary to prevent this would entangle Total with the Burmese government to an inappropriate degree. The level of involvement in development projects that the company seems to feel is necessary to justify its presence similarly puts Total in a position it should not be in as a private company.

In the broader context of constructive engagement and the role of firms in human rights and conflict, the experiences of oil and gas companies in Burma demonstrate that there are some limits to these strategies. Ethically, firms can only go so far without overstepping their proper role. There are also limits as to how far firms can go in eliminating the risk that their actions will aid or abet human rights abuses. In these cases, there is no other option but to walk away.

Conclusion

Transnational corporations have taken on new roles in order to avoid contributing to human rights abuse and conflict and to promote development in areas in which they operate. This is the result of several factors. In the past decade, there have been numerous economic studies linking economic activity, particularly in relation to natural resources, with to violent conflict. Likewise, transnational corporations have been implicated in human rights abuse in several incidents, and some of these have led to legal action.

The possibility that corporations will be held accountable for complicity in human rights violations is real. Companies have faced civil litigation in both Europe and in the United States, where the Alien Tort Claims Act allows firms to be held accountable under international law regardless of their nationality and regardless of where the illegal actions took place.[1] This US law, originally enacted to fight piracy, has emerged as one of the most powerful tools in holding firms legally accountable for their actions.

As plans for the proposed UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights were rejected, there is no binding international human rights code of conduct for businesses. There are, however, several non-binding codes. These include the OECD Guidelines for Multinational Enterprises, the Voluntary Principles on Human Rights and Security, the ILO Tripartite Declaration and the UN Global Compact. While these instruments do not carry any penalties, they are useful in a couple of ways. Firstly, if a firm already has a strong foundation of corporate social responsibility, these guides offer advice in implementing these policies. Additionally, they increase the incentive for firms to act responsibility; by demonstrating that compliance with one or more of the aforementioned codes, a firm can enhance its public image. Lastly, while these codes are not binding law, the can be considered "soft law" in that they are generally followed and create standard practices. Compliance with these standards may have legal meaning in some instances, and the guides might be used to interpret how existing law, both international and domestic, is applied. At some point, it is is possible that particular elements of these codes will become legally binding as part of international customary law.[2]

Unfortunately, many of the world's least-developed countries have few options for raising the capital that is necessary for development. This often means that exploiting natural resources,

1 *See* Davis, Jeffrey "Human Rights in US Courts: Alien Tort Claims Act Litigation after *Sosa v. Alvarez-Machain," Human Rights Law Review,"* July 2007.

2 *See* Kinley, David and Chambers, Rachel, "The UN Human Rights Norms for Corporations: The Private Implications for Public International Law," *Human Rights Law Review,* 6:3, 2006.

particularly in extraction industries, is the only viable option. Ideally, the exploitation and sale of mineral resources and petroleum could be used to build infrastructure and promote policies conducive to development. However, there are two caveats to this: mining and drilling projects often require the participation of TNCs in order to provide know-how and funding, and natural-resource wealth can lead to increase the risk of conflict or case an already repressive government to act even more brutally.[3]

In order to reap the benefits of resource production without the negative side-effects, a number of measures can be implemented by host governments and firms. For example, the Extractive Industries Transparency Initiative encourages governments of resource-exporting countries to take certain steps in order to ensure that increased government revenues from mining and petroleum projects are properly handled and do not lead to increased graft or instability.

Firms have a role as well. While there are occasional opportunities for corporations to profit at the expense of human rights, conflict, repression and violence are usually bad for business. In addition to following laws and guidelines, companies might take further action, unilaterally or in cooperation with governments and civil society, to improve the conditions in the host country. This can involve running or funding programs that prevent human rights abuse or contribute to programs that improve conditions in the community.

This thesis identified two goals that TNCs might have in instituting training or development programs: to avoid complicity in abuses, for example by training soldiers assigned to secure company facilities, and social projects that can justify a company's presence in a country in terms of the net effect it has on the well-being of the population. There is often overlap between these two categories. Such programs could involve human rights-sensitivity training for employees or contractors, funding judicial training programs with a focus on human rights, or funding health care or education facilities.

A multi-stakeholder approach that involves civil society and governments as well as private companies is the most productive approach. However, there are governments are unwilling or unable work effectively and in good faith to promote development and prevent human rights abuses from occurring. In such cases, firms might argue that their approach amounts to “constructive engagement” with the host country's ruling regime. In other words, even though a company might be helping an undemocratic government to persist, perhaps financing repressive actions and indirectly contributing to human rights abuses, the firm's presence nonetheless has a positive effect by virtue of its human rights-sensitive policies. Essential to this argument is the assumption that the the company would be hastily replaced if it were to withdraw, most likely by a competitor less

3 Richard Snyder suggests that natural resources are more likely to lead to conflict and instability when production mostly private, while public control of production decreases the chances of instability but can lead to repression and brutality on the part of the government: Snyder, Richard “Does Lootable Wealth Bread Disorder?: a political economy of extraction framework,” *Comparative Political Studies,* Vol.39, 2006.

concerned with these adverse effects.

Awareness of community and human rights issues in making investments is something to be unequivocally welcomed. Moreover, the constructive engagement justification has merit, although within certain limits. Firstly, firms should not make investments if any significant risk exists that those those investments will lead directly to human rights abuses. In this case, claiming that a company has done everything possible to mitigate these risks is not sufficient. This is based on both legal and ethical standards. As court cases in the United States and Europe have demonstrated, companies can be held accountable for complicity in acts that are illegal under international human rights law. Standard practices described in voluntary agreements and corporate codes reinforce this notion.

Secondly, a firm's role in preventing human rights abuse or in promoting development must be confined to what is appropriate for a private entity. While cooperation with civil society and governments in funding, and in some cases implementing, social development and training projects is something to be encouraged, private companies should not take on the responsibilities of government or civil society. If eliminating risk or making a positive difference to offset the potential side-effects of an investment require of firm to operate in a sphere that is traditionally reserved for governments or civil society, the firm has gone to far and should thus walk away from the project.

This limitation is harder to quantify. However, there is a wide range of support for this notion from academics, NGOs and international organizations.[4] Firms too should be wary of getting too involved, as this brings with it a much greater level of responsibility.

The oil and gas industry in Burma demonstrates these limitations. The truly abysmal human-rights situation in the country presents a myriad of risks for transnational corporations that choose to invest there. Oil companies have faced litigation in the US, France and Belgium over events occurred in connection with their activities in the country. Both to justify their continued presence and to prevent abuses from occurring, some of the most ambitious corporate run programs have been implemented there, including Premier Oil's training of soldiers and police and Total's community health projects.

Past experience and the current trend in Burma's economy makes it clear that foreign companies less sensitive to human rights and social issues would promptly replace any company that withdrew. Most notably Total justified staying on these grounds, arguing that its policy constitutes constructive engagement with the ruling junta.

While this may be true, and while companies such as Total and Chevron have funded relatively

4 For example, Special Representative to the UN Secretary-General, John Ruggie has cautioned against holding firms responsible for everything over which they have some leverage, in that it is not desirable for firms to engage too closely with governments – even if it is to promote respect for human rights. See Chapter 4 at note 14. *Also see* Ottaway, Marina "Reluctant Missionaries," *Foreign Policy,* July/August 2001, for a more extreme version of this argument.

ambitious community development programs, they should nonetheless withdraw, based on the previously stated limitations. NGOs such as Earth Rights International have put forth evidence that the companies may in fact benefit from forced labor and that abuse continues to occur in connection with the companies' operations.[5] Additionally, the development programs give the companies too large a role in issues that should be the providence of governments and civil society. Even though much good has come from funding health clinics and microfinance schemes, the programs create a discrepancy between the areas surrounding gas pipelines and the rest of the country, which may at some point cause instability. Furthermore, these "pipeline communities" depend too much on the companies like Total for their safety and well-being. While this may have short-term benefits for those living in the area, it is an inappropriate role for a private entity to assume.

5 Earth Rights International, "China in Burma: the increasing involvement of Chinese multinational corporations in Burma's hydropower, oil and natural gas and mining sectors (2008 updated version)," September 2008, http://www.earthrights.org/content/view/573/41/.

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