

Response

Matthew Smith & Naing Htoo, *Energy Security: Security for Whom?*

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I. INTRODUCTION

Conducting resource extraction in failed states, conflict zones, and countries with poor human rights records (collectively, “regions of concern”) raises a number of profound moral and ethical concerns. Not only might human rights abuses be committed in the resource recovery process (such as by the displacement of local populations or the use of forced labor), but royalty payments by extractive industry corporations might also bankroll oppressive governments and their military machines.

In their article, Matthew F. Smith and Naing Htoo¹ document the many abuses committed by the military juntas that have ruled Burma since 1962—both in their efforts to cling to power, as well as in exploiting the country’s significant hydrocarbon reserves. Energy royalties contributed at least U.S. \$ 1 billion to the junta’s coffers in 2006;² and incidents of forced labor and forced migration along the route of the *Yadana* gas pipeline are well documented.³ Similar dilemmas confront energy companies doing

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1. Matthew F. Smith & Naing Htoo, *Energy Security: Security For Whom? Hydrocarbons and Human Rights in Military-Ruled Burma*, 11 YALE HUM. RTS. & DEV. L.J. 217 (2008).

2. Hum. Rts. Watch, *Burma: Targeted Sanctions Needed on Petroleum Industry* (Nov. 19, 2007), http://hrw.org/english/docs/2007/11/16/burma17356_txt.htm.

3. Smith & Htoo, *supra* note 1.

business in Sudan, where royalty payments are widely suspected of fueling the atrocities in Darfur.⁴

This paper will offer some practical ideas on how best to address the human rights dilemmas arising from energy exploration in regions of concern, with a specific focus on Burma and Sudan. Starting from the premise that energy exploration in regions of concern is inevitable, I reject the pullout strategy championed by many human rights advocates as ineffective. Instead, I argue that getting industry to take corporate social responsibility (CSR) seriously offers the best prospects for improvement.

In the long run, this entails convincing energy companies from the developing world, particularly from China, to start respecting human rights in their overseas operations. This may sound like a tall order when many such countries do not respect human rights at home, but there are some reasons for optimism.

In the short run, however, the best available solution is to encourage Western energy companies that have embraced the CSR agenda to *invest in*, rather than *pull out from*, energy projects in regions of concern. This suggestion may strike many in the human rights community as heretical, but I argue that it is the only viable option in the difficult current geopolitical context.

II. THE GEOPOLITICS OF ENERGY

For better or worse, energy exploration in regions of concern will continue for the foreseeable future, given the growing demand for oil at the same time as supply is peaking.

Between 1996 and 2006, global oil consumption rose seventeen percent, from 71.5 to 83.7 million barrels per day.⁵ Some thirty-eight percent of this increase is attributable to China and India.⁶ Meanwhile on the supply side, we can see some of the implications of the controversial “peak oil” hypothesis, which theorizes that more hydrocarbons have been pumped out of the ground than still remain.⁷ Not only has the price of oil surged from U.S. \$ 12 a barrel in 1998 to over U.S. \$ 140 today, but the rate of discovery has also slowed considerably.⁸ And of those large fields that

4. INT'L CRISIS GROUP, GETTING THE U.N. INTO DARFUR, AFRICA BRIEFING NO. 43 (2006), available at <http://www.crisisgroup.org/home/index.cfm?id=4442>.

5. BP PLC, BP STATISTICAL REVIEW OF WORLD ENERGY 2007 11 (2007), available at <http://www.bp.com/multipleimagesection.do?categoryId=9017892&contentId=7033503>.

6. *Id.*

7. See, e.g., DAVID L. GOODSTEIN, OUT OF GAS: THE END OF THE AGE OF OIL (2004).

8. Global proved oil reserves grew by 1.4% per annum between 1996 and 2006, compared to 1.8% per annum in the previous decade. Even more striking is that proved oil reserves fell for the first time in 2006, albeit modestly, from 1209.5 to 1208.2 billion barrels. See BP PLC, Statistical Overview of World Energy 2007 Historical Data Tables (June 2007), http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/reports_and_publications/statistical_energy_review_2007/STAGING/local_assets/downloads/spreadsheet

remain highly productive, almost all are located in member states of the Organization of Petroleum Exporting Countries (OPEC) where “National Oil Companies” (NOCs) control most production.⁹

With large fields outside the OPEC countries mostly in decline,¹⁰ non-OPEC energy companies are being forced to drill in increasingly inhospitable environments—both in terms of geology and political geography. Thus we see Chevron exploring for oil five miles beneath the Gulf of Mexico,¹¹ Shell investing nearly U.S. \$ 13 billion in the Canadian tar sands,¹² and, of course, Chevron and Total operating in pariah states like Burma.

The problems of surging demand and shrinking supply are felt even more acutely by developing countries that are latecomers to the international energy game. Given the importance of oil to their economic development, China and India have been busy creating state-owned energy companies to “lock up” any available energy supplies.¹³ Lacking the technology of the Western-based “supermajors”¹⁴ to exploit reserves located in difficult geological conditions, the path of least resistance for the newcomers is to exploit conventional oil reserves in regions of concern. Thus, it is no surprise that Chinese and Indian companies are among the leading investors in both the Burmese and Sudanese oil patches.¹⁵

III. THE TROUBLE WITH PULLING OUT

The recent rush of energy sector investment raises serious questions about the *effects* and the *effectiveness* of the divestment campaigns that have

s/statistical_review_full_report_workbook_2007.xls (providing the raw data for these author-derived figures).

9. See generally VALÉRIE MARCEL, *OIL TITANS: NATIONAL OIL COMPANIES IN THE MIDDLE EAST* (2006).

10. Between 1996 and 2006, proved oil reserves in OECD countries fell from 112.9 to 79.8 billion barrels, while reserves in OPEC countries rose from 802.8 to 905.5 billion barrels. BP PLC, *supra* note 5, at 6.

11. Amanda Griscorn Little, *Pumped Up: Chevron Drills Down 30,000 Feet to Tap Oil-Rich Gulf of Mexico*, WIRED, Aug. 21, 2007, http://www.wired.com/cars/energy/magazine/15-09/mf_jackrig.

12. Sonja Franklin, *Shell Says Oil Sands Expansion Would Remain Viable With \$30 Oil*, BLOOMBERG, Oct. 19, 2006, <http://www.bloomberg.com/apps/news?pid=20601082&sid=aFZdV07RRIOc&refer=canada>.

13. Robert B. Zoellick, Deputy Secretary of State, Remarks to National Committee on U.S.-China Relations: Whither China: From Membership to Responsibility? (Sept. 21, 2005) (transcript available at <http://www.state.gov/s/d/former/zoellick/rem/53682.htm>).

14. “Supermajor” is a term used to describe the six largest Western-based oil producers, namely: Chevron, ConocoPhillips, ExxonMobil from the United States; Total from France; BP from the UK; and the Anglo-Dutch Shell Group.

15. Of the twenty-six oil companies doing business in Burma, nationals of China, India, and Burma have ownership ties to five companies each. HUM. RTS. WATCH, *BURMA: FOREIGN OIL AND GAS INVESTORS SHORE UP JUNTA* tbl. 3 (Nov. 16, 2007), http://hrw.org/campaigns/burma/drilling/Burma_table3_companies.pdf.

been the main response of the international human rights community to abuses occurring in regions of concern. All divestment campaigns use the same means, though different campaigns vary in their ends. The common means is to put pressure on companies operating in regions of concern by encouraging investors to sell their shares. The ends are either to force the company to pull out (divestment *simpliciter*), or to push it to improve its human rights record (targeted divestment).

This paper takes issue with the first tactic, which must be judged a failure. Despite the best efforts of divestment campaigners, Sudan's oil output has risen from 5,000 to 397,000 barrels per day between 1996 and 2006,¹⁶ and we can only assume that royalty payments to Khartoum have grown even more with the rise in oil prices.

In an era of surging demand, tight supply, and high prices, it would be remarkable for an energy company to walk away from such an energy bonanza. And yet one did: Canada's Talisman Energy left the Sudan in 2003 after a high-profile divestment campaign. Far from bringing Khartoum to its knees, however, Talisman's pullout simply resulted in India's ONGC Videsh buying Talisman's stake. Such reinvestment by companies buying up the assets of others leaving over human rights concern can hardly be described as a positive development.

Other than the reinvestment problem, divestment also leads to the withdrawal of Western expatriate employees who can observe the human rights situation on the ground. Just as Talisman employees were a significant source of information on conditions in southern Sudan,¹⁷ so too are Chevron and Total employees in Burma. It is interesting to note that Smith and Htoo rely on data generated by Total regarding the number of people displaced by the *Yadana* pipeline.¹⁸ No such information ever comes out of non-Western companies operating in these regions.¹⁹

IV. ONE CHEER FOR WESTERN INVESTMENT

Voltaire's quip that "the perfect is the enemy of the good" is never more true than when the evils we wish to avoid are grave, such as the abuse of fundamental human rights. It is in this spirit that the international human rights community should raise one cheer for *investment* by Western companies in regions of concern. While they are hardly angels, there are four reasons why such investment is preferable to divestment *simpliciter*.

16. BP PLC, *supra* note 5, at 8.

17. Talisman's 2002 CSR report discusses the company's role in assisting U.S. peace envoy John Danforth during the process that led to the signing of the 2002 Machakos Peace Protocol ending the civil war in southern Sudan. See TALISMAN ENERGY, 2002 CORPORATE RESPONSIBILITY REPORT 9 (2002).

18. Smith & Htoo, *supra* note 1, at 226, n. 41.

19. Of the twenty-six energy companies identified by Human Rights Watch as doing business in Burma, only the websites of Chevron and Total make any reference to the human rights situation in that country.

A. Stakeholders in Human Rights

Western companies are far more sensitive to human rights concerns than their counterparts based elsewhere, as they have powerful stakeholders at home that care about their human rights practices abroad. We have already seen how the expatriate employees of Western oil companies in Burma and Sudan do more for human rights than their non-Western counterparts. More significantly, however, Western energy companies – especially those that are vertically integrated – can be targeted by boycotts at home when they abuse human rights abroad. Indeed, the CSR movement gained prominence in the 1990s when consumers stopped spending at a company's downstream retail operations to punish it for its upstream human rights abuses. The 1995 boycott against Shell following Nigeria's execution of the Ogoni leader Ken Saro-Wiwa is a leading example of this phenomenon.

The risk of *consumer* or *investor* boycotts means that even hard-nosed shareholders must be sensitive to the human rights practices of companies in their portfolio, given that bad press about human rights can depress share prices.²⁰ Thus, targeted divestment campaigns, which pressure companies to behave in a socially responsible manner, are a much more effective means of promoting human rights on the ground than divestment *simpliciter* campaigns, which simply lead to the reinvestment problem. To be sure, the stakeholder pressure mechanism isn't perfect, otherwise there wouldn't be allegations of abuses surrounding Chevron and Total's operations in Burma. But there are other virtues to consider.

B. Human Rights Transparency

Compared to their non-Western counterparts, Western companies are much more *transparent* in disclosing information about the human rights consequences of their operations. It is no coincidence that, of all the energy companies operating in Burma, only Chevron and Total address human rights concerns on their websites and in their annual corporate reporting.²¹ One might be tempted to dismiss such efforts as self-serving public relations material, but that is too glib. At the very least, the publication of such material shows that Western companies are sufficiently concerned about human rights to say something about the issue – in contrast to the silence emanating from non-Western companies.

20. Although Talisman's CEO cited the discount on its share price as a rationale for withdrawing from Sudan, the evidence of a statistical correlation between share prices and human rights practices is weak at best. See TALISMAN ENERGY, *supra* note 17, at 3; *The Next Question: Does CSR Work?* ECONOMIST, Jan. 19, 2008, special report, at 8, 10.

21. See *supra* text accompanying note 19.

C. Financial Transparency

Though they are far from squeaky clean, two recent developments have made Western energy companies considerably less corrupt than their non-Western peers. The first is the adoption of the Anti-Bribery Convention by the OECD in 1998,²² which requires signatories to adopt laws akin to the U.S. Foreign Corrupt Practices Act²³ criminalizing the bribing of foreign officials. The second is the launch of the Extractive Industries Transparency Initiative (EITI) in 2002, whose goal is to make public all payments made by extractive sector companies to host country governments. To be sure, EITI implementation requires host government participation and neither Burma nor Sudan show any promising signs, but at least the six Western supermajors have endorsed the EITI principles,²⁴ which is more than can be said of most non-American and non-European energy companies.²⁵

D. Extraterritorial Law

Just as the supermajors are susceptible to home country penalties for corruption abroad, they are also subject to extraterritorial laws on human rights. The most famous such law is the U.S. Alien Tort Claim Act (ATCA) under which Unocal, Chevron's predecessor-in-interest in Burma, was sued for abuses relating to the Yadana pipeline.²⁶ That this lawsuit was ultimately settled²⁷ shows how bargaining in the shadow of extraterritorial law can act as a check on the human rights practices of Western companies operating abroad.

V. NURTURING RESPONSIBLE CORPORATE STAKEHOLDERS

These Western virtues notwithstanding, oil companies from China, India, and other developing countries are not likely to leave regions of concern such as Burma and Sudan anytime soon, for all the reasons described in Part II above. Accordingly, the ultimate solution for mitigating the human rights consequences of energy extraction in regions

22. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. No. 105-43.

23. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1-78ff (2000).

24. Extractive Industries Transparency Initiative, Supporters-Companies (Oct. 21, 2007), <http://eitransparency.org/node/218>.

25. The two non-American and non-European energy companies that support EITI are Mexico's Pemex and Brazil's Petrobras, neither of which has significant operations outside its home country. *See id.*

26. *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd*, *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *vacated*, *Doe I v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005).

27. *Doe v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005).

of concern is to make non-Western companies behave in a socially responsible manner.

This, of course, will be no mean feat—for the opposite of the reasons why Western companies have become sensitive to human rights concerns in the last decade. The basic problem is that most non-Western companies do not hail from societies with strong human rights cultures, where multiple stakeholders work to ensure that they behave ethically while doing business abroad. Thus, it is not very likely that governments such as China and Malaysia, which are not exactly champions of human rights protection at home, will pass extraterritorial legislation similar to the Alien Tort Claims Act. Substantially the same analysis applies to human rights and financial transparency measures: one can hardly expect countries to take up the cause of good governance abroad when their own houses are in disarray.

Nor can much be expected of civil society within these countries in terms of generating demand for socially responsible corporate behavior abroad. For starters, in authoritarian countries like China, the freedom of speech required to sustain a dialogue on human rights simply does not exist. And even in democracies such as India, the overwhelming preoccupation with economic development means that human rights concerns will play second fiddle to the gargantuan task of alleviating poverty.

Yet another problem is that, to the extent that social responsibility is based on a firm's calculation of its enlightened economic self-interest, the business case for respecting human rights is not obvious to companies headquartered in non-Western countries. To the extent that non-Western energy companies are monopolists at home, consumers can't vote with their feet as they did during the Shell boycott. Nor is there much of a possibility for shareholder activism when most such companies are majority or entirely state-owned.

The extra-territorial application of U.S. law might once have served as a check against abusive behavior, but an unintended consequence of the post-Enron corporate governance reforms has been to drive many non-Western companies beyond Uncle Sam's writ. The onerous financial reporting requirements imposed by the Sarbanes-Oxley Act have led many developing-world companies to float their shares in London or Hong Kong, rather than in New York.²⁸ As a result, U.S. courts have lost an important jurisdictional hook over foreign companies,²⁹ which is

28. In 2006, the New York Stock Exchange was relegated to third place in Initial Public Offering (IPO) activity, behind the Hong Kong and London bourses. ERNST & YOUNG, GLOBALIZATION: GLOBAL IPO TRENDS REPORT 2007 5, 13 (2007).

29. The Second Circuit has ruled that listing on a U.S. stock exchange does not constitute sufficient contacts to establish personal jurisdiction over a foreign corporation for an ATCA suit. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 97-8 (2d Cir. 2000).

problematic given that many non-Western energy companies don't otherwise have contacts with this country.³⁰

Finally, we must also contend with the fact that many developing countries see their energy companies as foreign policy instruments in an incipient 21st century great power competition.³¹ This is especially true of China's "go out" strategy of using no-strings-attached resource deals as the first step in cultivating political and economic ties to draw a country into Beijing's sphere of influence.³² This dynamic is plain to see in Burma, where Chinese and Indian companies act as proxies for their governments in trying to prevent this strategic state from tilting too far to one side.³³

Judging from recent news reports, China seems to be winning this beauty contest. Not only are the two countries cooperating on the construction of Chinese naval bases on the Bay of Bengal³⁴ and an oil pipeline linking this coast to China's Hunan province,³⁵ but hundreds of thousands of Chinese businesspeople have flooded into Burma in recent years, where they play a dominant role in the country's economy.³⁶

These developments pose risks to China's bottom line in Burma that may well make it worth its while to start taking human rights seriously. The relevant risk is of backlash—both against China's economic interests and the Chinese themselves.

History provides plenty of examples of backlashes against foreign resource extraction companies that are seen as too cozy with illegitimate governments. When political change comes to Burma—and it is a question of when, not if—the Chinese may well find themselves in the same position as the Western oil companies that were driven out of Iran following the Islamic Revolution of 1979.³⁷ As for ethnic backlash, Amy Chua contends that "[t]he situation developing in Burma today is dangerously similar to the one that sent up much of Jakarta in flames" in 1998, when the

30. For example, the China National Petroleum Company (CNPC) is listed on the NYSE but does not conduct any other business in the U.S., while India's ONGC Videsh neither trades on the NYSE nor does any business in this country.

31. See, e.g., Parag Khanna, *Waving Goodbye to Hegemony*, N.Y. TIMES, Jan. 27, 2008, available at <http://www.nytimes.com/2008/01/27/magazine/27world-t.html>.

32. See generally PETER C. EVANS & ERICA S. DOWNS, BROOKINGS INST. POLICY BRIEF NO. 154, UNTANGLING CHINA'S QUEST FOR OIL THROUGH STATE-BACKED FINANCIAL DEALS 2006, available at http://www.brookings.edu/~media/Files/rc/papers/2006/05china_evans/pb154.pdf.

33. Democratic India's cozy relationship with the Burmese junta draws particular ire from human rights activists. See, e.g., Meenakshi Ganguly, *India and Burma: Time to Choose*, OPENDEMOCRACY, Jan. 14, 2008, http://www.opendemocracy.net/article/conflicts/india_burma-time_to_choose.

34. Geoffrey York, *The Junta's Enablers*, GLOBE & MAIL (Toronto), Oct. 6, 2007, at A22.

35. *China and Myanmar*, ECONOMIST, Feb. 9, 2008, at 45.

36. Mark Landler, *For Many Burmese, China is an Unwanted Ally*, N.Y. TIMES, Dec. 30, 2001, at A1.

37. See MARCEL, *supra* note 9, at 25, 30, 33-4.

prosperous ethnic Chinese minority became the scapegoat of choice for Indonesians ruined by the Asian financial crisis.³⁸

Given these risks, Chinese energy companies doing business in Burma, which are overwhelmingly creatures of the Chinese state, are well advised to improve their human rights records. There are encouraging early signs that some Chinese companies are starting to embrace the ethos of corporate responsibility. In 2006, the China National Petroleum Company (CNPC) issued its first-ever social responsibility report.³⁹ The report was prepared to the international standards devised by the Global Reporting Initiative (GRI) and the International Petroleum Industry Environmental Conservation Association (IPIECA). The GRI requires companies to report on nine human rights indicators, while the IPIECA demands seven. CNPC only chose to report on two indicators (relating to forced labor and the training of security personnel), but it is surely an encouraging sign that a company owned by the Chinese government is now openly discussing at least some aspects of its human rights practices.⁴⁰

VI. CONCLUSION

To some, the pragmatic approach this paper advocates to deal with the human rights dilemmas posed by resource extraction in regions of concern may seem unappealing, for it lacks the expressive moral force of shunning those who do not respect human rights. There may well be times and places where such a dramatic response is appropriate, but my hope is that this paper will lead us to weigh the costs of that our moralism will impose upon those we seek to help.

38. AMY CHUA, *WORLD ON FIRE* 47 (2003).

39. CHINA NATIONAL PETROLEUM CORPORATION, 2006 CORPORATE SOCIAL RESPONSIBILITY REPORT 2006, available at http://www.cnpc.com.cn/Resource/eng/img/SocialResponsibilityReport/csr_report_2006.pdf.

40. *Id.* at 39, 65-66.

