

# Net Risk to Human Rights: The CNOOC grab for Nexen and its potential impact on human rights

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## INTRODUCTION

On July 23, 2012, China National Offshore Oil Corporation (CNOOC) announced its \$15.1 billion bid to purchase Canadian oil and gas company, Nexen Inc. following a two month negotiation between the two companies. On August 29, 2012, Canadian Industry Minister Christian Paradis confirmed that CNOOC had filed an “application for review” of the proposed acquisition. The review process has now been extended twice and the next announced decision date is December 10 which is also International Human Rights Day.

Since CNOOC announced its bid at least 42 Tibetans have self-immolated in Tibet bringing the total since 2011 to 90, twenty-eight this November alone.<sup>1</sup> Their demands are simple; freedom and the return of the Dalai Lama to Tibet. The self-immolations have inspired a new wave of protests across Tibet and Chinese security forces are cracking down, in some cases by opening fire on demonstrators. At least five Tibetans have been killed and several more injured.

The Canada Tibet Committee has joined Tibetans and their supporters around the world in calling upon world governments to establish a multilateral forum through which new diplomatic actions for Tibet can be implemented. As we make this appeal, the Government of Canada is considering the CNOOC bid to purchase Nexen.

## CANADIAN CONTEXT

- Canada’s human rights obligations

The Government of Canada is party to the United Nations’ core human rights treaties which are binding legal obligations. These include the two essential agreements, the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights*. Many of the rights included in the two covenants are entrenched in the Canadian Charter of Rights and Freedoms, while others are protected under provincial guarantees.

Canada’s obligations under the United Nations Charter include a commitment to promote “universal respect for and observance of human rights” and a pledge “to take joint and separate

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<sup>1</sup> The cases are documented at <http://standupfortibet.org/learn-more/>

action in co-operation with the Organization” to achieve that end.<sup>2</sup> The Charter clarifies that “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”<sup>3</sup>

- The Investment Canada Act

A key mechanism by which the Government of Canada can ensure that large size foreign takeovers are good for Canada and for Canadians, is the formal review process contained with the *Investment Canada Act* (the Act). Under the Act, the government is required to review foreign takeover bids above C\$330 million in value.

The objective of the review process is to assess whether or not the investment – in this case investment by CNOOC - will provide a “net benefit” to Canada. Although there is no established criteria related to what constitutes net benefit, it is generally assumed to include such things as the company’s commitment to maintain key operations in Canada, carry out research in Canada, share new technology with Canada, hire locally and other similar criteria.<sup>4</sup> In the case of state-owned enterprises (SOEs), the government will also assess the company’s commercial orientation to ensure its policies are adequately market-driven. Importantly, this does not require that the SOE itself be market-driven, but only that its Canadian operation will be. Moreover, there does not appear to be any consideration of the investor’s human rights record in the approval process.

Under section 20 of the Act pertaining specifically to SOEs, the government must determine whether or not the investor “adheres to Canadian standards of corporate governance including, for example, commitments to transparency and disclosure, independent members of the board of directors, independent audit committees and equitable treatment of shareholders”.<sup>5</sup> Although not explicit in the Act, the Government of Canada has agreed in other fora that good corporate governance includes respect for human rights.<sup>6</sup>

Already potential conflicts with article 20 have raised concerns. In an opinion piece published for the Asia Pacific Foundation on October 1, 2012, Professor Pitman Potter of the University of British Columbia argues that a prevailing concern for Canada should be the role of the Communist Party of China in CNOOC governance structures. Potter says, “The Chinese Constitution affirms the leadership of the CPC in China’s socialist modernization, in effect granting the Party leadership authority over all aspects of China’s governance, including legal,

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<sup>2</sup> UN Charter, Articles 55 and 56

<sup>3</sup> UN Charter, Article 103

<sup>4</sup> The precise meaning of “net benefit” is unclear. Prime Minister Harper has commented that the Nexen decision will be accompanied by clarifications about its definition and scope.

<sup>5</sup> <http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html#p2>

<sup>6</sup> For example, in 2011 the Government endorsed the UN Guiding Principles on Business and Human Rights.

commercial, and development policies and practice.”<sup>7</sup> The suggestion here seems to be that a CNOOC-owned Nexen would always and necessarily act in the best interests of the Chinese Communist Party.

The application review may also, at the government’s discretion, include a national security assessment. Previous similar applications from Chinese SOEs, however, did not trigger such a review (example: China Investment Corporation investment in Teck Resources in 2009) indicating that foreign investment in the natural resource sector has not been considered – on its own - a threat to security. There has been only scant indication that additional factors might set a different precedent (example: on October 20, the federal government refused a multi-billion-dollar bid by Malaysia's state-owned company Petronas to take over Calgary’s Progress Energy Resources Corp. declaring that the deal held no “net benefit” for Canada).

On September 20, 2012, the Canadian Security and Intelligence Service (CSIS) tabled its annual report 2010-2011 in parliament.<sup>8</sup> The report expresses concern that “when companies with links to foreign intelligence agencies or hostile governments try to acquire control over strategic sectors of the Canadian economy, it can represent a threat to security interests.” The report – which is generally understood to refer to China - adds that increased economic influence encourages clandestine influence on Canadian public policy and facilitates attempts to “spy on and intimidate diaspora groups in Canada”. Nevertheless, the deadline for a security review of the CNOOC purchase bid has passed without any investigation being launched.

- The new kid in town – the Canada China FIPA

If the takeover is approved it will be the biggest ever takeover of a Canadian company by a state-owned entity. The takeover bid comes on the heels of a new investment treaty signed between Canada and China on September 9, 2012 and currently tabled in the House of Commons. The *Canada China Foreign Investment Protection Agreement* (FIPA) is designed to facilitate investment between the two countries by protecting investors from perceived discriminatory treatment (most-favoured nation and national treatment) and expropriation. Significantly, the FIPA is tabled for final approval in parliament at the same time as the Government is considering its approval of the Nexen takeover bid. The FIPA cannot come into effect until both parties ratify and therefore until the Government of China completes a similar domestic ratification process, presumably underway right now.

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<sup>7</sup> <http://www.asiapacific.ca/editorials/canada-asia-viewpoints/editorials/state-enterprise-investment-canada>.

The CPC Constitution requires Party members to “adhere to the principle that the interests of the Party and the people stand above everything else (Article 3),” and provides that “Individual Party members are subordinate to the Party organization” (Article 10).

<sup>8</sup> [http://www.csis-scrc.gc.ca/pblctns/nnlrprt/2010-2011/rprt2010-2011-eng\\_final.asp](http://www.csis-scrc.gc.ca/pblctns/nnlrprt/2010-2011/rprt2010-2011-eng_final.asp)

Much has been written about the human rights implications of bilateral investment treaties such as Canada's FIPA.<sup>9</sup> A primary concern is that such treaties, which are legally binding on the signatories, do nothing to protect the human rights of non-parties to the agreement – in other words individuals and communities directly or indirectly affected by the investment. Essentially they raise the rights of investors over human rights. Moreover, the arbitration processes that consider investment treaty disputes go directly to international arbitration, bypassing domestic legal systems, and they are highly secretive. Such disputes can potentially result in substantial financial penalties against the hosting government. Put another way, the Government of Canada could, in theory, be liable for the payment of multi-million dollar penalties to CNOOC (ie. to the Government of China) should this deal be approved.

### WHAT ABOUT HUMAN RIGHTS?

In 1997, Nexen led a number of Canadian companies in the drafting of an *International Code of Ethics for Canadian Business*. The code was the first of its kind in Canada and its drafters were subsequently invited to participate in the design of the UN Global Compact, a voluntary but influential body that now includes among its membership many of the world's largest corporations with stated commitments to corporate social responsibility and human rights.

In a letter to Minister Paradis, dated August 16, 2012, the Canadian Coalition on China highlighted Nexen's leadership role in matters related to social responsibility and human rights.<sup>10</sup> The letter noted that Nexen is also one of the first Canadian companies to adopt a human rights policy in 2001 and that it has been a leader not only in the UN Global Compact but also in consultations leading to the adoption of UN Guiding Principles on Business and Human Rights.<sup>11</sup>

On September 20, 2012, 99% of Nexen's common shareholders and 87% of preferred shareholders approved the takeover bid from CNOOC. Shareholders' overwhelming support of the deal was likely in response to Nexen's declining stock price and resulting firing of its CEO. Moreover, shareholders were reassured by CNOOC's commitment to list on the Toronto Stock Exchange and to keep all of the current management team, employees, and the head office in Calgary. Nexen's interim President and CEO Kevin Reinhart argued that should the CNOOC bid be approved, it would not change the company's commitment to ethical behaviour. He said, "This transaction will in no way close the book on Nexen or our way of doing business."<sup>12</sup>

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<sup>9</sup> See for example, *Human Rights and Bilateral Investment Treaties: Mapping the role of human rights law within investor-state arbitration*, Luke Peterson, Rights & Democracy, 2009.

[http://publications.gc.ca/collections/collection\\_2012/dd-rd/E84-36-2009-eng.pdf](http://publications.gc.ca/collections/collection_2012/dd-rd/E84-36-2009-eng.pdf)

<sup>10</sup> The Canadian Coalition on China includes diaspora, labour, faith, and human rights organizations.

<sup>11</sup> The letter is found at [http://www.tibet.ca/en/newsroom/news\\_releases/314](http://www.tibet.ca/en/newsroom/news_releases/314)

<sup>12</sup> MacLean's Magazine, September 20, 2012

- CNOOC's record in Tibet

In contrast to Nexen's leadership in the area of human rights, CNOOC has been implicated in the controversial displacement of Tibetan nomadic communities in central Tibet. Although CNOOC is an offshore company, it carries out "development" activities in various parts of China, and its website describes numerous development assistance projects in Nagchu Prefecture of Tibet since 2002 including providing "intellectual aid", building roads, and providing assistance for the "settlement of herdsmen families".<sup>13</sup>

Nagchu Prefecture is populated largely by nomadic communities that have, for thousands of years, traveled across the high plateau with their herds of yak and sheep. China's "Western Development Strategy" launched in 1999 included an objective to settle nomads and other rural communities in what many have viewed as a massive land grab primarily for commercial purposes including mining. In 2010 it was reported that between 50 and 80 per cent of the 2.25 million nomads on the Tibetan plateau were being progressively relocated.<sup>14</sup> Coincidentally, Nagchu was also one of two locations for the Canadian International Development Organization's (CIDA) first project in Tibetan areas. The "Basic Human Needs" project was implemented between 2000-2004 in partnership with the Chinese central government and it provided agricultural support and training in animal husbandry for nomadic or pastoral families who had been displaced from their traditional migratory routes and resettled in the area.

Nagchu town is also key supply stop along the Gormo-Lhasa railroad. In interviews conducted in Nagchu by Rights & Democracy in 2006, representatives of nomadic communities reported that traditional migratory routes had been bisected by the railway and they had been lured by the offer of financial assistance and economic opportunity to resettle in newly constructed towns. In exchange they were required to sell their herds and abandon their traditional way of life. Several interviewees reported that they had not fully understood what they had agreed to, and had not been given complete information by officials they dealt with.<sup>15</sup>

The displacement of Tibetan nomads was criticized in a 2012 report presented to the UN's Human Rights Council by the Special Rapporteur on the Right to Food, Olivier De Schutter who argued that its effect was to marginalize Tibetans by removing their economic independence.

"In the resettlement villages, job opportunities have not materialized on the necessary scale, or have been filled by new migrant labourers moving in, while social assistance allowances are

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<sup>13</sup> [http://en.cnooc.com.cn/data/html/english/channel\\_154.html](http://en.cnooc.com.cn/data/html/english/channel_154.html), captured September 28, 2012.

<sup>14</sup> *Report of the Special Rapporteur on the right to food, Mission to China*, Olivier De Schutter, A/HRC/19/59/, Add.1, para 35, [http://www.srfood.org/images/stories/pdf/officialreports/20120306\\_china\\_en.pdf](http://www.srfood.org/images/stories/pdf/officialreports/20120306_china_en.pdf)

<sup>15</sup> Author's interviews in Nagchu, March 2006 as documented in *Human Rights Impact Assessment for Foreign Investment Projects – Tibet: Tracking dissent on the high plateau*, Rights & Democracy, 2007 found at [http://publications.gc.ca/collections/collection\\_2007/dd-rd/E84-21-2007E.pdf](http://publications.gc.ca/collections/collection_2007/dd-rd/E84-21-2007E.pdf)

insufficient to make up for the increase in the cost of living that followed resettlement near urban centres.”<sup>16</sup>

The implication of CNOOC, however small, in the displacement of Tibetan nomadic communities represents both a lack of corporate ethics and a breach of state obligations (China) to respect, protect and fulfill human rights. Should the CNOOC bid be approved, Canada may also incur responsibilities. In 2012, the UN Food and Agriculture Organization (FAO) adopted, by consensus, guidelines on the responsible governance of land tenure. Both Canada and China were party to the consensus which includes specific attention to conflict situations. According to the guidelines, in the case of conflict arising from displacement, all parties are urged to “guarantee” that tenure rights are respected (25.4).<sup>17</sup>

- Other potential human rights implications

The CNOOC takeover of Nexen could have indirect human rights implications for both Canadians and non-Canadians working in Canada. Media reports have documented an influx of Chinese temporary workers flooding Chinese-owned mine sites in northern Canada. Although it has been difficult to monitor their experience here in Canada, poor working conditions and labour rights violations in China’s mining sector have been well documented.<sup>18</sup> According to the United Steelworkers of Western Canada, the Chinese workers in Canada typically receive significantly less salary than Canadians and have fewer rights.<sup>19</sup> While the Government of Canada will not be able, because of the FIPA, to impose performance standards on investors from China, it nevertheless still has human rights obligations to ensure that no workers in Canada are treated in a discriminatory fashion and that foreign investment practice does not, in fact, unfairly deny the right to work to Canadians.

Should, as CSIS has cautioned, an increased Chinese presence in Canada threaten the security of Canadians, there is reason to believe that the CNOOC deal could impinge on the rights to privacy and freedom of expression and opinion of human rights defenders and diaspora groups in this country. In a 2009 University of Toronto study entitled *Tracking GhostNet*, it was revealed that electronic surveillance originating from China resulted in the detention of a Tibetan human rights activist at the Nepal-Tibet border.<sup>20</sup>

If the Nexen takeover is approved by the Government of Canada, and CNOOC does in fact operate as a Canadian corporation listed on the Toronto Stock Exchange, then the Government of

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<sup>16</sup> DeSchutter, para

<sup>17</sup> *Voluntary Guidelines on the Responsible Governance of the Tenure of Land, Fisheries, and Forests in the Context of National Food Security*, UN-FAO, 2012, <http://www.fao.org/docrep/016/i2801e/i2801e.pdf>

<sup>18</sup> Many such cases are documented by the Hong Kong-based NGO, China Labour Bulletin, [www.clb.org.hk](http://www.clb.org.hk)

<sup>19</sup> Chinese miners face frosty reception in northern Canada, South China Morning Post, October 19, 2012.

<http://www.scmp.com/news/world/article/1064358/chinese-miners-face-frosty-reception-northern-canada>

<sup>20</sup> <http://www.theglobeandmail.com/technology/meet-the-canadians-who-busted-ghostnet/article1214210/?page=all>.

The full report titled “Tracking GhostNet” is available at <http://www.f-secure.com/weblog/archives/00001637.html>



Canada could also incur extraterritorial human rights obligations with respect to the company's offshore projects.<sup>21</sup> Beyond questionable practice in Tibet, CNOOC has already been accused of human rights violations in Burma according to Earthrights International. In a 2008 report, Earthrights reported that CNOOC's operations deprived villagers of their means of subsistence and resulted in arbitrary arrests and confiscation of their land.<sup>22</sup>

The Burma example is a worrisome indicator for communities in conflict countries where Nexen operates particularly Nigeria, Yemen and Colombia where human rights violations are rampant and often linked to oil and gas extraction. Yet in its response to a 2005 report of the Standing Committee on Foreign Affairs and International Trade on the issue of mining in developing countries, the Government of Canada acknowledged the difficulty in imposing human rights standards on companies registered in Canada but headquartered in other countries.<sup>23</sup> In the case of CNOOC, the government cannot argue that it doesn't know either about China's poor human rights record, or about the difficulty in preventing the negative impacts that might result if the Nexen deal is approved.

- Human rights violations in the pipeline

There is no doubt that China's involvement in Canada's energy sector is part of its own domestic energy security strategy. However, moving oil from Alberta to Asia will be dependent on the northern gateway pipeline. We can anticipate that once CNOOC is listed as a Canadian company, its lobbying on behalf of the gateway will be significant. In essence, the Government of China will have additional leverage to bolster domestic support for the pipeline and counter voices of dissent coming from other sectors of the Canadian population.

There is some history of pipeline cooperation between Canada and China. In 1997, CIDA provided C\$7.55 million of Canadian taxpayer money to the China National Petroleum Corporation (CNPC) specifically for construction of the 4200 km. Xinjiang pipeline that several non-governmental organizations were protesting at the time.<sup>24</sup> The CNPC is now registered in Canada with offices in Calgary.

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<sup>21</sup> Extraterritorial obligations are explained in the Maastricht Principles, found at <http://www.maastrichtuniversity.nl/web/show/id=596286/langid=42>

<sup>22</sup> *China In Burma: The Increasing Investment Of Chinese Multinational Corporations In Burma's Hydropower, Oil And Natural Gas, And Mining Sectors*, 2008  
<http://www.earthrights.org/sites/default/files/publications/China-in-Burma-update-2008-English.pdf>

<sup>23</sup> "Finally, while the Government of Canada can influence companies that are headquartered in Canada and where officers are subject to domestic law, it has few mechanisms at its disposal with which to influence companies that are headquartered abroad and managed by non-residents but incorporated in Canada or listed on a Canadian stock exchange."

<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2030362&Language=E&Mode=1&Parl=38&Ses=1>

<sup>24</sup> CTC press release, June 12, 2000

## CONCLUSION

The CNOOC/Nexen case will be viewed as the forerunner in a new wave of Chinese investment in Canada following adoption of the FIPA with its range of legal protections for Chinese investors. Unlike the CNOOC/Nexen case, much of this new investment in Canada will avoid public scrutiny being under the financial threshold that triggers a government review process. The FIPA will, of course, also facilitate Canadian investment in China and some of this could presumably be in Tibet. Each case will present its own human rights challenges.

The Canada Tibet Committee is therefore gravely concerned that the Government of Canada has not found it necessary to carry out a human rights impact assessment of the CNOOC takeover bid. The recently leaked media report that Canada's new foreign policy will delink any attempt to protect human rights through economic pressure – particularly in China - flies in the face of Canada's human rights commitments.<sup>25</sup>

In particular, the Canada Tibet Committee regrets that the Government of Canada has not responded to concerns about CNOOC's involvement in the displacement of nomadic communities on the Tibetan plateau which is a human rights violation. Similarly in light of the escalation of self-immolations in Tibet and the related crackdown by Chinese authorities, it is disappointing that Canada appears to have missed an important leverage opportunity to press China to invite human rights monitors to visit the region, as requested on November 2, 2012 by Navi Pillay, the High Commissioner for Human Rights.<sup>26</sup>

## RECOMMENDATIONS

1. Any proposed changes to the Investment Canada Act, its review process, or clarification of the definition of “net benefit” should include attention to Canada's human rights commitments including by requiring human rights impact assessments in specific cases.
2. The Government of Canada should carry out a human rights impact assessment and public consultation in Canada before rendering a decision with respect to the application for approval by CNOOC to purchase Nexen.
3. The Government of Canada should, for example through CIDA programming, seek to restore access to grasslands and traditional forms of livelihoods for nomadic communities in Tibet in accordance with their cultural identity and tenure rights.

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<sup>25</sup> ..."drops any pretense of using trade deals to pressure countries such as China on human rights and other matters of democratic principle."

<http://www.cbc.ca/news/canada/story/2012/11/19/pol-foreign-policy-.html>

<sup>26</sup> <http://www.un.org/apps/news/story.asp?NewsID=43399&Cr=China&Cr1#.ULtpAKM8LQg>



4. The government of Canada should take specific steps to ensure that increased presence of the Chinese state in Canada's economy does not facilitate spying on or intimidation of Tibetan diaspora communities and Chinese human rights activists in Canada.
5. The Government of Canada should take the lead in creating an international contact group to address the self-immolation crisis in Tibet.
6. In considering its decision, the Government of Canada should require that CNOOC directors and senior management disclose their party affiliation and affirm that party interests will not be criteria for company decisions.

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