

Powering Conflict ?

**An analysis of Business and
Human Rights Responsibilities
in the Salween Basin**

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Front cover photo: The Salween River on the Thai-Myanmar border. On the Thai side is the Salween wildlife sanctuary, on the Myanmar side is the Salween Peace Park. Photo: International Rivers
Back cover photo: Karen ethnic villagers and allies from Thailand and Myanmar gather to pray for the free-flowing river on International Day of Action for Rivers. Photo: International Rivers
Table of Contents photo: The Salween River on the Thai-Myanmar border. Photo: Sophia Harris

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Introduction

Myanmar's economy has developed rapidly since the end of military rule in 2010. The energy sector has been an important part of this development. Over the past decade, businesses have proposed large hydropower projects across the country to generate energy for Myanmar and for export to neighboring countries. These projects include large hydropower dams on the Salween River.

The Salween River¹ begins in China and flows through Myanmar and Thailand. A cascade of five large hydropower dam projects is proposed for the Salween mainstream. These dams are located in several of Myanmar's "ethnic states", which are home to indigenous groups—referred to as "ethnic nationalities". The Salween mainstream dams are the Mong Ton, Kunlong, and Naung Pha dams in Shan state, Hatgyi dam in Kayin state and Ywathit dam in Kayah state. Other hydropower dams are also proposed for construction on tributaries within the Salween basin.

Each of these states has experienced decades of conflict between the Myanmar Government (and its armed forces) and various ethnic armed organizations, which want greater independence and autonomy. Local communities have suffered human rights abuses as a result of the conflict. These areas remain vulnerable to outbreaks of fighting and are considered "conflict-affected areas". Extraction of and control over natural resources, including hydropower development, has been closely linked to these conflicts over decades. The Salween dams are controversial and are opposed by local communities due to their

A religious rite to pray for the bounties of the Salween River

Photo: Sophia Harris

¹ The Salween River is known as the Thanlwin in Myanmar and the Nu River or Nujiang in China.

extensive environmental impacts, displacement of local people, and association with human rights abuses and lack of local control over natural resources and decision-making.

The International Finance Corporation (IFC) began a Strategic Environment Assessment of Hydropower in Myanmar in 2016, anticipating growth in the hydropower sector. It released its final report in December 2018, which examines the impacts of hydropower development, including the relationship between hydropower and conflict. Overall, the assessment recommends that the mainstems of five major rivers in Myanmar, including the Salween, be reserved as free-flowing rivers on environmental sustainability grounds.²

This report examines the responsibilities of Salween business stakeholders under international and national business and human rights frameworks, with specific reference to human rights and conflict. The businesses involved in developing the Salween dams are primarily from China, Thailand, and Myanmar. They include state-owned enterprises (SOEs) and publicly listed and privately held companies. In the report, the business enterprises involved in the Salween dams, together with the investors providing financing for the projects, are collectively referred to as "Salween business stakeholders".

This report finds that business and human rights and investment standards—when properly applied by companies and investors—impose significant constraints on hydropower construction in conflict-

affected areas, such as the Salween basin, to stop human rights violations from occurring. Therefore, the continued involvement of Salween business stakeholders in proposed dams in the Salween basin raises questions about their compliance with international and national obligations and creates significant potential legal, financial, and reputational risks. These risks are explored in this report, together with recommended actions and ways forward for business stakeholders, governments and project-affected people.

This report finds that business and human rights and investment standards —when properly applied by companies and investors —impose significant constraints on hydropower construction in conflict-affected areas, such as the Salween basin, to stop human rights violations from occurring."

² IFC, Strategic Environmental Assessment of the Myanmar Hydropower Sector, Final Report, International Finance Corporation, 2018, p. 81. <http://www.ifc.org/wps/wcm/connect/industry_ext_content/ifc_external_corporate_site/hydro+advisory/resources/sea+of+the+hydropower+sector+in+myanmar+resources+page>.



Conflict and human rights in the Salween Basin

Myanmar's transition towards democracy over the past 10 years has been inconsistent across the country and remains fragile. While the human rights situation has improved, severe abuses continue. These are more acute in some areas, including Shan and Rakhine states. A 2018 United Nations Human Rights Council Resolution on Myanmar states that there are grounds to investigate senior officials in the Myanmar armed forces for involvement in genocide in Rakhine state and for crimes against humanity and war crimes in Kachin, Rakhine, and Shan states.³ The human rights situation across Myanmar continues to receive international attention and hydropower development in areas with a history of ethnic conflict and human rights abuses will be closely scrutinized.

The Salween River on the Thai-Myanmar border. On the Thai side is the Salween wildlife sanctuary, and on the Myanmar side is the Salween Peace Park.
Photo: International Rivers

³ United Nations Human Rights Council, Resolution 39/2 Situation of human rights of Rohingya Muslims and other minorities in Myanmar, 27 September 2018, A/HRC/RES/39/2. <<http://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/293/69/PDF/G1829369.pdf?OpenElement>>.

Ceasefires between the Myanmar armed forces and ethnic armed organizations have been ongoing for over 25 years. The 21st Century Panglong Conference peace process began in 2016. Despite recent progress, Myanmar cannot be described as “post-conflict” as the country fits within the generally agreed definition of a conflict-affected environment or area. Conflict-affected areas include those that have a high risk of violent conflict breaking out; are in the midst of violent conflict; or have recently emerged from it, including countries classified as post-conflict.⁴ Conflict-affected areas can be identified by the presence of armed conflict, widespread violence or other risks of harm to people. These may consist of wars of liberation, or insurgencies or civil wars. Conflict-affected areas are often characterized by widespread human rights abuses and violations of national or international law.⁵ Businesses operating in these contexts may inflict further harm to civilians who have already suffered abuses.

The role of the Myanmar armed forces (Tatmadaw) in hydropower construction is an important component of a business and human rights assessment of Salween business stakeholders. The armed forces (including the Tatmadaw-controlled Border Guard Forces) generally provide security at dam sites. Several of the Salween dams are in territories under mixed administration of Union of Myanmar Government forces, armed

forces and ethnic armed organizations that hold conflicting views on the Salween dams.⁶ Reports show that Border Guard Forces have also been involved in securing dam sites by facilitating clearance and access to construction areas.

The following sections summarize the overall findings on conflict detailed in the Strategic Environmental Assessment of the Myanmar Hydropower Sector, as well as the status of conflict in areas of the Salween basin.

Scale and nature of the conflict


Strategic Environmental Assessment – overall findings

The International Finance Corporation’s (IFC) Strategic Environment Assessment of the Hydropower Sector in Myanmar (the ‘SEA’) includes several baseline assessments, including one for peace and conflict, which analyzes conflict between state and non-state armed groups in each sub-basin area. Communities and civil society groups have criticized the SEA as they consider that its consultation processes were inadequate and its analysis of conflict limited.⁷ Despite these drawbacks, the SEA’s findings are significant as it is the only national study looking specifically at hydropower and conflict.

The SEA’s assessment of “conflict vulnerability” found that 33% of all sub-basins across Myanmar had conflict vulnerability ratings of “high”. Sub-basins in Shan state (North) mostly rated as “high” or “very high” vulnerability for conflict due to the presence of multiple armed groups and high levels of conflict and population displacement between 2012 and 2016.⁸ Sub-basins in Shan state (South and East) and Kayin state are rated as “medium” or “high” due to the presence of multiple armed groups, high historical conflict, and high historical displacement, even though many of these areas are currently under ceasefires.

According to the SEA’s final assessment report, the “Thanlwin [Salween] (especially)...returned the highest conflict vulnerability ratings.” It notes that developing proposed projects in areas associated with armed conflict “exposes developers to unacceptable risks and can entrench existing divides between affected communities and the Myanmar Army or EAOs [ethnic armed organizations].”⁹ The report also states “the Thanlwin basin has historical patterns of contested governance, human rights abuses, and armed conflict. BAU [business-as-usual] development has high potential to aggravate grievances and conflict, particularly the mainstream HPPs [hydropower plant projects] with substantial impacts on natural resources.”¹⁰

Overall, the assessment recommends that the Salween mainstream be maintained and largely reserved as a free-flowing river on environmental sustainability grounds.¹¹ If the Myanmar Government accepts the International Finance Corporation assessment recommendations, the Kunlong, Naung Pha, Mong Ton (Tasang), Ywathit, and Hatgyi dams will be cancelled.



The Thanlwin basin has historical patterns of contested governance, human rights abuses, and armed conflict. BAU [business-as-usual] development has high potential to aggravate grievances and conflict, particularly the mainstream HPPs [hydropower plant projects] with substantial impacts on natural resources.

⁴ M Van Dorp, *Multinationals and Conflict: International principles and guidelines for corporate responsibility in conflict affected areas*, SOMO, Amsterdam, 2014, p.12. <<http://www.somo.nl/wp-content/uploads/2014/12/Multinationals-and-Conflict-1.pdf>>.

⁵ Organisation for Economic Cooperation and Development (OECD), *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition*, OECD Publishing, 2016, p.13. <<http://www.oecd.org/corporate/oecd-due-diligence-guidance-for-responsible-supply-chains-of-minerals-from-conflict-affected-and-high-risk-areas-9789264252479-en.htm>>.

⁶ Burma Environmental Working Group, *Resource Federalism: A roadmap for decentralised governance of Burma’s natural heritage*, BEWG, 2017 <<http://www.burmalibrary.org/sites/burmalibrary.org/files/obl/docs23/BEWG-2017-ResourceFederalism-en-red.pdf>>.

⁷ International Rivers, *Strategic Environmental Assessment of the Myanmar Hydropower Sector: Discussion Brief*, July 2019. <<http://www.internationalrivers.org/resources/reports-and-publications/strategic-environmental-assessment-of-the-myanmar-hydropower-sector-discussion-brief/>>.

⁸ International Finance Corporation, *Strategic Environmental Assessment of the Myanmar Hydropower Sector, Final Report*, IFC, 2018, pp. 73–74. <https://www.ifc.org/wps/wcm/connect/f21c2b10-57b5-4412-8de9-61eb9d2265a0/SEA_Final_Report_English_web.pdf?MOD=AJPERES&CVID=mslr9yx>.

⁹ Ibid, pp. 73–74.

¹⁰ Ibid, p. 39.

¹¹ Ibid, p. 50.



1

Shan state – Several ethnic armed organizations in Shan state have signed bilateral ceasefires and the 2015 Nationwide Ceasefire Agreement. However, violent clashes continue due to the presence of armed forces in parts of the state. Civil society organizations have described the Nam Teng Basin (one of the Salween's four main tributaries joining from the west) as a "contested war zone." Despite the ceasefire, the Myanmar armed forces continue to "commit violations against local civilians with impunity."¹²

In late 2018, civil society organizations reported that the area surrounding the Mong Ton dam was being increasingly militarized, with government forces building a "line of defence for investments" and strategic roads linking military operations centers to the Salween River.¹³ The Naung Pha dam area is located near the territories of several Shan and Kachin ethnic armed organizations that are not signatories to the Nationwide Ceasefire Agreement. Civil society organizations have reported that Myanmar armed forces and their militias carried out offensives against these groups to seize control of areas and local natural resources.¹⁴ Intense conflict around the Kunlong dam has persisted since 2015 as the Myanmar National Democratic Alliance Army has tried to reoccupy the area after being ousted from it by the Myanmar Army in 2009.¹⁵

The threat of civilian displacement looms large over Shan state, in part due to the forcible relocation of nearly 50,000 people between 1996 and 1998 to make way for earlier plans for the Mong Ton dam.¹⁶ Many of these areas also suffer the legacy of human rights abuses linked to conflict. For example, civil society organizations reported 300 cases of rape by the Myanmar armed forces within 50km of the Mong Ton site between 1996 and 2001.¹⁷ Overall, the SEA notes the situation in northern Shan state remains precarious with respect to ceasefire agreements and the enormous humanitarian assistance that is needed for displaced persons when conflict breaks out.

2

Kayin state – In Kayin state, the build-up and fortification of Myanmar armed forces along access roads to the Hatgyi dam site area has fueled armed conflict and heightened political and military tensions between Karen ethnic armed organizations and the Tatmadaw and Tatmadaw-aligned Border Guard Forces. For example, when Myanmar armed forces have sent more troops to the dam area, the Karen National Liberation Army has responded by sending more of its troops.¹⁸ Karen groups and the Karen National Union have continued to warn that this militarization near dam projects goes against bilateral and multilateral ceasefire agreements, endangers Karen people's lives, and risks the country sliding back into civil war.¹⁹

The former Special Rapporteur on the situation of human rights in Myanmar, Ms Yanghee Lee, has also highlighted the impacts of large-scale hydropower projects on the rights of people and communities, and what this means for conflict and the peace process, noting the link between the development of the Hatgyi dam and armed clashes.²⁰ The IFC's SEA notes that "military confrontations have occurred close to the proposed Hatgyi hydropower project several times in 2014, 2015, and 2016," typically involving offensives by the Myanmar armed forces and the Democratic Karen Benevolent Army (which signed the Nationwide Ceasefire Agreement in 2015).²¹ These outbreaks of conflict forced civilians to flee the dam areas, and—as noted by the assessment—have fueled community perception that "these offensives are designed to clear EAOs [ethnic armed organizations] and local residents for road access and eventual construction of the hydropower dam."²²

3

Kayah state – The fragile peace in Kayah state was seen in the outbreak of violence between the Myanmar armed forces and the Karenni army in late 2018. This conflict breached a bilateral ceasefire agreement and was the first violence seen in over six years.²³ The IFC's community consultation about Ywathit dam, conducted as part of the SEA process, found concerns that the dam would "displace entire ethnic groups" and "submerge important historic and cultural assets."²⁴ Some observations suggest that Karenni people deeply resent the community consultations and the dam industry due to the legacy of the Lawpita hydropower plant built with Japanese assistance in the 1960s.²⁵

4

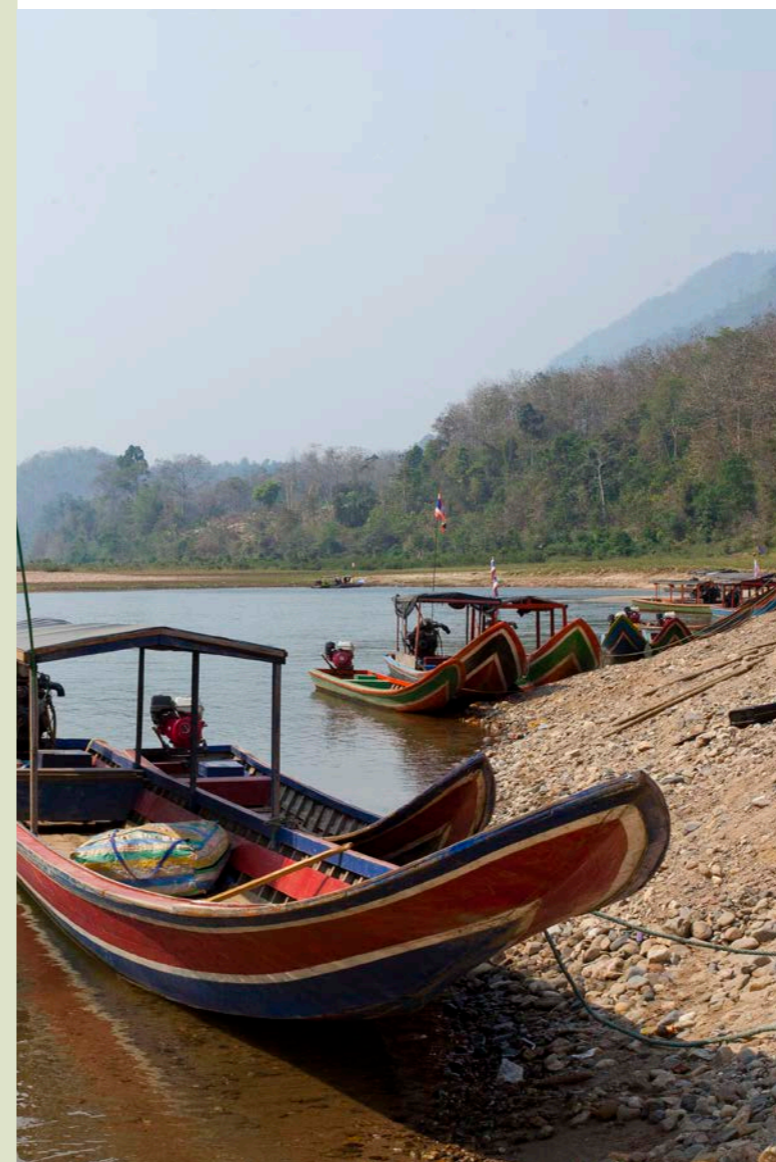
Mon state – In Mon state, following years of political deadlock and negotiations, the New Mon State Party re-entered into a ceasefire agreement at state level in January 2012 and signed the National Ceasefire Agreement in February 2018 with the newly elected National League for Democracy Government under the chairmanship of Daw Aung San Suu Kyi. While Mon state is not currently experiencing active conflict, a key concern, as for other ethnic states, is centralized decision-making power and distribution of profits from natural resource extraction and development projects by the central government and foreign investors, with little regard for impacts on local populations.²⁶ This includes the extension of centralized political control and influence over minority areas. Moreover, Mon state is situated in the Salween Delta. A primary concern is the extensive downstream impacts of the proposed Salween dams on the ecological, social, and economic systems in the delta, together with the absence of any consultation or public participation in decision-making on the projects. Populations in Mon state face numerous human rights threats from the downstream impacts of dams on critical food and livelihoods sources, transportation, trade, and social economy.



A Mon family catches fish in the Salween River at Paung Township, Mon State
Photo: Mi Ah Chai

Footnotes from previous page

- ¹² Shan Human Rights Foundation, From scorched earth to parched earth, 2018, p. 7. <<http://www.shanhumanrights.org/eng/index.php/shrf-archives/shrf-english-newsletter/362-from-scorched-earth-to-parched-earth>>.
- ¹³ Shan Human Rights Foundation, Burma Army drones and new strategic road instil fear among IDPs on Shan-Thai border [News update], October 4, 2018. <<http://www.shanhumanrights.org/eng/index.php/358-burma-army-drones-and-new-strategic-road-instil-fear-among-idps-on-shan-thai-border>>.
- ¹⁴ Shan Human Rights Foundation, Northern, southern and eastern Shan State Farmers oppose the planned Naung Pha and other hydropower projects on Salween River [News update], 24 December 2017. <<http://www.shanhumanrights.org/eng/index.php/340-northern-southern-and-eastern-shan-state-farmers-oppose-the-planned-naung-pha-and-other-hydropower-projects-on-salween-river>>.
- ¹⁵ IFC, Baseline Assessment Report: Peace and Conflict, Strategic Environmental Assessment of the Hydropower Sector in Myanmar, International Finance Corporation, 2017, p. 27. <http://www.ifc.org/wps/wcm/connect/50ddd06b-ee5c-4457-a717-a1cd0f9c73df/Chapter+8_SEA_Baseline+Assessment_Peace+and+Conflict+SEA+Baseline+Assessment.pdf?MOD=AJPERES&CVID=maaQGJY> .
- ¹⁶ Shan Human Rights Foundation, Burma Army drones and new strategic road instil fear among IDPs on Shan-Thai border [News update], 4 October 2018. <<https://www.shanhumanrights.org/eng/index.php/358-burma-army-drones-and-new-strategic-road-instil-fear-among-idps-on-shan-thai-border>>.
- ¹⁷ Shan Sapawa Environmental Organization, Warning Signs: An update on plans to dam the Salween in Burma's Shan State, Shan Sapawa Environmental Organization, 2006. <<http://burmariversnetwork.org/images/stories/publications/english/warningsign.pdf>> .
- ¹⁸ Karen Environmental and Social Action Network (KESAN), Dam investment projects put peace at risk [News update], 14 March 2012. <<http://kesan.asia/dam-investment-projects-put-peace-at-risk/>>.
- ¹⁹ Karen Rivers Watch, Conflict – The Real Motivations behind Renewed War, September, 2016. <<http://www.burmapartnership.org/wp-content/uploads/2016/09/7056-karen-state-september-2016-conflict-the-real-motivations-behind-renewed-war.pdf>>.
- ²⁰ Y Lee, Report of the Special Rapporteur on the situation of human rights in Myanmar (A/HRC/40/68) Advanced Unedited Version, 5 March 2019. <<https://reliefweb.int/report/myanmar/report-special-rapporteur-situation-human-rights-myanmar-ahrc4068-advance-unedited>>.
- ²¹ International Finance Corporation, Baseline Assessment Report: Peace and Conflict, Strategic Environmental Assessment of the Hydropower Sector in Myanmar, IFC, 2017, p. 27.
- ²² Ibid, p. 29.
- ²³ R Gerin, 'Karenni Army Clashes With Myanmar Forces in Kayah State, Breaking Bilateral Cease-fire', Radio Free Asia, 22 October 2018. <<http://www.rfa.org/english/news/myanmar/karenni-army-clashed-with-myanmar-forces-in-kayah-state-10222018161042.html>>.
- ²⁴ International Finance Corporation, Baseline Assessment Report: Peace and Conflict, Strategic Environmental Assessment of the Hydropower Sector in Myanmar, IFC, 2017, p. 27.
- ²⁵ T Kramer, O Russell & M Smith, From War to Peace in Kayah (Karenni) State: A Land at the Crossroads in Myanmar, Transnational Institute (TNI), 2018, <https://www.tni.org/files/publication-downloads/tni-2018_karenni_eng_web_def.pdf>.
- ²⁶ Populations in Mon state have faced significant land and natural resource conflicts and human rights abuses from infrastructure and energy projects, such as the Yadana and Yetagun natural gas pipelines and the Italian-Thai Development (ITD) oil and gas pipeline and railway.



The Moei River is a major tributary of the Salween
Photo: Sophia Harris

Human rights impacts

A range of protected rights may be affected by the Salween dams that apply to all or most stages of a dam project. Some of these rights are outlined in Table 1 below.

Assessment of the human rights impacts of Salween dam projects must consider:

- Both actual and potential impacts;
- Documented evidence relating to
 - the impacts of previous hydropower development in ethnic states
 - works that have already occurred or are underway
 - similar natural resource extraction projects in ethnic areas;
- United Nations Human Rights Council resolutions relating to Myanmar, which provide country-wide context regarding respect for human rights, as well as findings on human rights abuses and risks in specific areas.²⁷

The right to own, use and develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use.
– Article 26(2) UNDRIP

²⁷ See United Nations Human Rights Council, Resolution 40/L.19 on the situation of human rights in Myanmar, A/HRC/40/L.19, 19 March 2019. <<http://undocs.org/A/HRC/40/L.19>>.

Table 1: Human rights impacts of Salween dams

Protected right & instrument	Description	How this applies to Salween dams
Right to life <i>Article 6 International Covenant on Civil and Political Rights (ICCPR), Article 3 Universal Declaration of Human Rights (UDHR)</i>	The right not to be deprived of life, the right to have one's life protected, and the right to reasonable protection from threats to one's life.	Violations of the right to life have historically been caused by conflicts arising from military campaigns to gain control over ethnic areas and forced relocations. For example, relocations carried out in the late 1990s in for the Mong Ton dam led to 319 civilians being killed in massacres or extrajudicial killings in Kunhing township alone. ²⁸
Right to self determination <i>Article 1 ICCPR, Article 1 International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 3 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)</i>	Self-determination is a collective right, available both to peoples as well as individuals, to pursue their own economic, social, and cultural development and to freely dispose of their natural wealth and resources. It is central to UNDRIP's affirmation of indigenous people's rights to traditional lands, environment, and health.	This right applies to the ethnic and indigenous populations affected by Salween dams. Practical realization of this right allows indigenous groups to be involved in managing their own areas and resources. Several of the political groups representing their indigenous constituents have expressed vocal opposition to dams and concern about the lack of political dialogue on natural resource issues that includes their voices, including at sessions of the 21st Century Panglong Conference. ²⁹
Right to own, use and develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use <i>Article 26(2) UNDRIP</i>	This right forms part of UNDRIP's broad recognition of land and resource rights. Acknowledges traditional ownership and the fundamental importance of land and natural resources to indigenous peoples.	Contrary to central government laws, large areas of land are in reality controlled by ethnic armed organizations and associated governments using alternate tenure systems. ³⁰ Some traditional land use has already been disrupted by the Salween dams. The Mong Ton dam is expected to submerge land in eight townships of Shan state, and directly impact tens of thousands of people. Myanmar armed forces have already occupied traditionally prosperous agricultural villages (growing rice paddy and soybean crops in fertile valley areas) in townships upstream of the dam site. Many of these communities were forcibly resettled to new villages located near military centers and are unable to claim lands and livelihood. ³¹

²⁸ Burma Environmental Working Group, 2017, p. 46.

²⁹ Ibid, p. 7.

³⁰ Ibid, p. 36.

³¹ Ibid, p. 50.

Protected right & instrument	Description	How this applies to Salween dams
Right to Free Prior and Informed Consent , <i>Article 10 UNDRIP</i>	This right is entwined with the right to self-determination. It states that indigenous peoples shall not be forcibly removed from their lands or territories, and that no relocation shall take place without their "free, prior and informed consent" and after agreement on just and fair compensation and, where possible, with the option of return.	There is evidence that decision-makers have not adequately consulted with dam-affected ethnic and indigenous communities and that free, prior and informed consent has not been obtained. A 2015 petition opposing the Mong Ton dam was signed by over 23,000 community members, and in 2016 more than 25 Shan community groups called for the Salween dams to be cancelled, stating the "unilateral decision to go ahead with the Salween dams before political dialogue about federalism has even begun, is depriving ethnic communities of their right to decide about natural resources in their areas." ³²
Rights to information, meaningful consultation and participation in decision-making <i>Article 19 UDHR, Articles 19 & 25, ICCPR</i>	<p>These rights are derived from the principle that all persons are entitled to seek and obtain information and participate in the decisions of their government.</p> <p>The importance of procedural rights has been emphasized by the UN Special Rapporteur on Human Rights and the Environment, who stated that the rights to information and participation are "both rights in themselves and essential tools for the exercise of other rights, such as the right to life, the right to the highest attainable standard of health, the right to adequate housing and others."³³</p>	<p>Decision-making on Salween dams has proceeded with little transparency or access to information, and without meaningful opportunities for consultation and input by affected communities. The Environmental Impact Assessment process for the Mong Ton (Tasang) dam, conducted by Australian consultancy firm Snowy Mountains Electricity Corporation in 2014–2015, was strongly critiqued by local communities and civil society groups, including claims that affected villages were excluded from meetings, and that meetings served as a means to promote the project rather than gather input and concerns.³⁴</p> <p>Despite disclosure requirements under Myanmar's Environmental Impact Assessment law, none of the project Environmental Impact Assessments for Salween dams have been released to the public.</p>

³² Ibid, p. 6.

³³ J Knox, Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, United Nations Human Rights Council, 30 December 2013, UN Doc. A/HRC/25/53.

³⁴ M Inkey, 'Burmese villagers say they are being misled on Tasang dam project', Asian Correspondent, 12 June 2015.



International Day of Action for Rivers, Salween River
 Photo: Sophia Harris

Protected right & instrument	Description	How this applies to Salween dams
Right to an adequate standard of living <i>Article 25 UDHR,</i> <i>Article 11 ICESCR</i>	Includes the right to adequate food (which has been interpreted to mean the availability of sufficient food), water, and housing and to the continuous improvement of living conditions.	Violations of this right may be seen in dam-affected communities that have natural resource management systems in place and rely on fishing, harvesting aquatic resources and farmland as a source of livelihood. This includes populations downstream of dam projects that experience significant impacts and loss of food and livelihoods sources, often without recognition or redress. Some civilians are forced to leave their homes near dam sites due to violence or land confiscation. Myanmar's legal framework for land does not provide restitution for confiscated lands, meaning that many Internally Displaced Persons and refugees may face having no permanent homes and are relocated to areas with poor quality arable land for household use. ³⁵

³⁵ Ibid, p.6.

Fisherman booths at the banks
 of the Salween River
 at Bulu Island, Mon State
 Photo: Mi Ah Chai



Karen ethnic villagers and allies
from Thailand and Myanmar
gathered to pray for the free-flowing
Salween River on the International Day
of Action for Rivers
Photo: International Rivers

Business and human rights standards that apply to the Salween Basin

The three types of actors involved in Salween dam
projects— business stakeholders, the Myanmar
Government and the home states of Salween dam
investors—are subject to a range of obligations under
international and national frameworks.



Salween business stakeholder obligations

Salween business stakeholders have many obligations under leading international business and human rights frameworks, as summarized in table 2 below.

Table 2: Key instruments that apply to Salween business stakeholders

Instrument	Description	Relevance to conflict-affected areas
UN Guiding Principles on Business and Human Rights (UNGPs)	<p>Leading global framework for business and human rights, based on three pillars: “Protect, Respect, Remedy”:</p> <p>1. States must protect against human rights abuse by third parties in their jurisdiction, including by business enterprises.</p> <p>2. Business enterprises must respect “internationally recognized human rights” (Universal Declaration of Human Rights, ICCPR, ICESCR).</p> <p>3. States must take steps to ensure those affected by business-related violations have access to effective remedy.</p>	<p>UNGP 14: Businesses of any size operating in conflict areas must give systemized and regular attention to risks that are more likely to arise in conflict such as security, ethnic discrimination and the right to life.³⁶</p> <p>UNGPs 17–21: Due diligence should include:</p> <p>1. Assessing actual and potential human rights impacts;</p> <p>2. Integrating and acting upon the findings;</p> <p>3. Tracking the effectiveness of responses;</p> <p>4. Communicating on how impacts are addressed.³⁷</p> <p>UNGP 21: Businesses operating in contexts that pose risks of severe human rights impacts should formalize their reporting structures and include detail on how impacts are being addressed.³⁸ Such contexts include conflict-affected areas, as outlined in UNGP 7. Credibility of reporting can be strengthened through independent verification.</p> <p>UNGP 23: Businesses must “treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.” The UNGP commentary notes that some operating environments such as conflict-affected areas may increase the risks of abuses, and that businesses must ensure “that they do not exacerbate the situation.”³⁹</p>

³⁶ United Nations Office of the High Commissioner for Human Rights (OHCHR), United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, United Nations, 2011. <http://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_eN.pdf>. See also M Van Dorp, 2014. <<http://www.somo.nl/wp-content/uploads/2014/12/Multinationals-and-Conflict-1.pdf>>.

³⁷ United Nations Office of the High Commissioner for Human Rights (OHCHR), Working Group on Business and Human Rights, Corporate human rights due diligence – Background note elaborating on key aspects, Companion note I to the Working Group’s 2018 report to the General Assembly (A/73/163), United Nations, 2018, p.2, <<http://www.ohchr.org/Documents/Issues/Business/Session18/CompanionNote1DiligenceReport.pdf>>.

³⁸ Ibid, p. 4.

³⁹ Guiding Principles on Business and Human Rights, 2011, p. 26.

Instrument	Description	Relevance to conflict-affected areas
UN Working Group on the issue of human rights and transnational corporations and other business enterprises ⁴⁰	A thematic report by the UN Working Group elaborating on human rights responsibilities of States and business enterprises in conflict settings: ‘Business, human rights and conflict-affected regions: towards heightened action.’	<p>This report and framework notes that the most egregious business-related human rights abuses often take place in conflict affected areas. The report outlines practical measures that States and business enterprises should take to prevent and address business-related human rights abuse in conflict and post-conflict contexts, focusing on heightened human rights due diligence and access to remedy.</p> <p>The report emphasizes the application of a gender lens to business activities in conflict affected settings, because of the additional risks and vulnerability to human rights abuses faced by women and children in situations of conflict and post-conflict.</p>
United Nations Global Compact	<p>Voluntary initiative based on company commitments to adhere to and implement sustainability principles.</p> <p>Encompasses 10 principles derived from the Universal Declaration of Human Rights, the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption.</p>	<p>Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights.</p> <p>Principle 2: Businesses should make sure that they are not complicit in human rights abuses.⁴¹</p>

⁴⁰ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises Business, human rights and conflict-affected regions: towards heightened action, United Nations General Assembly A/75/212, 21 July 2020. <<http://undocs.org/en/A/75/212>>

⁴¹ United Nations Global Compact, ‘The Ten Principles of the UN Global Compact’: <<http://www.unglobalcompact.org/what-is-gc/mission/principles>>.

Instrument	Description	Relevance to conflict-affected areas
United Nations Principles for Responsible Investment (UNPRI)	Developed by a group of international institutional investors, the UNPRI sits alongside the UN Global Compact. Principles help investors to better incorporate Environmental, Social and Governance (ESG) issues into investment practices. The UNPRI states that ESG issues impact investment portfolios over time, so they must be incorporated for investors to meet their fiduciary responsibilities.	<p>Principle 1: Investors will “incorporate ESG issues into investment analysis and decision-making processes” by establishing infrastructure (policy statements, tools, metrics, internal management capacity, training) to ensure that ESG issue incorporation can be effectively carried out.</p> <p>Principle 2: Signatories will be “active owners and incorporate ESG issues into our ownership policies and practices” achieved through active ownership policies, engaging with companies on ESG issues, exercising voting rights and filing shareholder resolutions consistent on ESG considerations.</p> <p>Principle 3: Signatories must “seek appropriate disclosure on ESG issues” by the entities they invest in through reporting on ESG issues in annual reports, supplying information on compliance with international standards, supporting shareholder resolutions promoting ESG disclosure.</p>
Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises	Guidelines that apply to governments and multinational enterprises in all 36 OECD countries and 12 non-OECD countries that have agreed to adhere to them. The guidelines reference the UN Guiding Principles and are legally binding on governments but non-binding on multinational enterprises. However, complaints relating to breaches of the guidelines can be made to National Contact Points, which are created by all adhering states.	<p>Chapter IV Human Rights, [5]: “Enterprises should...carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.” This means that when operating in conflict-affected areas, extra measures must be taken to ensure proper due diligence (in line with UNGPs 17 and 18).</p> <p>Chapter IV “Commentary on Human Rights” [40]: “in situations of armed conflict, enterprises should respect the standards of international humanitarian law, which can help enterprises avoid the risks of causing or contributing to adverse impacts when operating in such difficult environments.”</p>
International Finance Corporation (IFC) Performance Standards	Environmental and social performance standards that apply to IFC clients (companies that have secured IFC financing for a project). The eight performance standards establish responsibilities that clients must meet “throughout the life of an investment.”	<p>Performance Standard 4 Objectives: “To anticipate and avoid adverse impacts on the health and safety of the Affected Community...” “To ensure that the safeguarding of personnel and property is carried out in accordance with relevant human rights principles ...”</p> <p>Performance Standard 7 Objectives: “To ensure the FPIC [free, prior and informed consent] of the Affected Communities of Indigenous Peoples ...”</p>

Businesses must observe the UN Guiding Principles

The **United Nations Guiding Principles on Business and Human Rights** (the UN Guiding Principles) are seen as the internationally authoritative source in establishing how companies and financial actors should understand their human rights obligations. A 2019 Human Rights Council resolution on the situation of human rights in Myanmar urged “all business enterprises [operating in Myanmar], including transnational corporations and domestic enterprises, to respect human rights in accordance with the Guiding Principles on Business and Human Rights.”⁴² The UN Guiding Principles do not ban companies from operating in conflict-affected areas, but do “raise a very prominent red flag” by directing them to treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue.⁴³

Businesses must conduct due diligence

Business enterprises must conduct “due diligence” to comply with the UN Guiding Principles. Due diligence is both a standard and a process. It requires that the business takes steps to identify, stop or reduce human rights impacts against local people and remedy those that have already occurred. This process must be ongoing, proactive and reactive so that companies can ensure that they respect human rights and do not contribute to conflict.⁴⁴ Doing due diligence as part of an ongoing process is important in conflict-affected areas like Myanmar where the transition to democracy and the peace process have just begun and outbreak of conflict is unpredictable.



An area known as the ‘Thousand Islands’ on the Pang River, a tributary of the Salween in Shan State, Myanmar. The area will be inundated if the Mong Ton dam is built.
Photo: International Rivers

⁴² United Nations Human Rights Council, Resolution, A/HRC/40/L.19, 2019, p.14.

⁴³ M Camilleri, Miners, guns and lawyers: Tracing corporate liability for breaches of human rights by mining companies in conflict-affected areas, October 2015, Business and Human Rights Resource Centre, <http://media.business-humanrights.org/media/documents/files/documents/Mark_Camilleri_Oct2015.pdf>.

⁴⁴ Organisation for Economic Co-operation and Development, 2016. <<http://www.oecd-ilibrary.org/docserver/9789264252479-en.pdf?expires=1596036831&id=id&accname=guest&checksum=6A674073EF00FA8A4952A5520366E12B>>.



Internally displaced persons in Myanmar's ethnic states along the Salween River have been affected by militarization and human rights violations.
Photo: International Rivers

It is not clear that any of the Salween business stakeholders have done due diligence according to UN Guiding Principles 17–21. Close attention should be paid to how Salween business stakeholders are assessing and reducing the human rights impacts of the Myanmar armed forces, which generally provide security at dam sites, and are therefore linked to Salween business stakeholders through their operations, products or services. Companies do not have to comprehensively assess the general human rights record of the Myanmar armed forces, but must assess the risk that abuses may occur as a result of their presence at and near dam sites. Relevant factors in this assessment include:

- General stability and rule of law in the area, including the presence of ethnic armed organizations, the existence of a ceasefire agreement with ethnic armed organizations,

and whether current or previous ceasefire agreements have been adhered to;

- Attitudes towards the government or armed forces, including if there are active political movements in ethnic states for greater autonomy and political devolution;
- Attitudes of local representatives and the local community towards current peace processes;
- Any current or likely tensions among communities, including consideration of any community support or opposition to dam development or campaigning by local groups against the dam;
- The training and skills of the Myanmar armed forces to handle security assignments at hydropower sites in line with human rights, which must be assessed with reference to their human rights record.⁴⁵

This assessment is consistent with the extractive industry's **Voluntary Principles on Security and Human Rights** (the Voluntary Principles). The Voluntary Principles are instructive because they underline that security risks, potential violence and human rights records are key factors for a risk assessment analysis of a project where public security forces are involved. Myanmar is also one of three countries selected for an “In-country Implementation Pilot Group” to be set up to promote better uptake and use of the Voluntary Principles.⁴⁶

The SEA summarizes several key issues relevant to a due diligence process for the Salween dams.⁴⁷ However, this is not a substitute for due diligence and business stakeholders must conduct their own localized assessment of conflict and human rights impacts. Localized conflict and human rights assessments can be incorporated into other company processes such as social or environmental impact assessments but these should include human rights conventions and instruments as a reference point.⁴⁸ For example, environmental impact assessments have already been done for several Salween dams but they may not be rights-compliant and aligned with the UN Guiding Principles’ “Protect, Respect, Remedy” framework.

Businesses must address or avoid human rights violations

Once a business has identified human rights impacts, it must strategically respond to these impacts as part of its due diligence process. Where actual or potential human rights violations are found, appropriate company strategies may include to:

- renegotiate projects to incorporate existing ethnic land and natural resource administrative structures;
- disengage from the project for a time while continuing work on reducing risks—for example, until agreement on the dam project is included in peace agreements with representative groups;
- permanently suspend involvement in the project if the business has failed to reduce risks or it is unfeasible to do so;
- immediately suspend involvement if the project is worsening conflict or inflicting human rights abuses.

According to evidence from civil society organizations and local communities, Salween business stakeholders have failed to adequately consult with them as required by the UN Guiding Principles. Guiding Principle 18 requires “meaningful consultation with potentially affected groups...as appropriate to the size of the business enterprise and the nature and context of the operation.”

⁴⁶ ACAS (Asia Conflict and Security) Consulting Ltd., Voluntary Principles on Security and Human Rights (VPSHR) Mapping: Myanmar, Final Report, 28 March 2018. <<http://www.myanmar-responsiblebusiness.org/pdf/2018-05-20-VPI-Myanmar-Final-Report.pdf>>.

⁴⁷ The SEA final report recommends that conflict sensitivity guidelines for hydropower projects should be developed and detailed conflict assessments be conducted as part of the pre-feasibility or feasibility studies for hydropower projects facing conflict risks. See IFC, 2018, pp. 5–6.

⁴⁸ Guiding Principles on Business and Human Rights, 2011, p. 20.

⁴⁵ M Van Dorp, 2014, p. 30.

Dam projects must also follow the **United Nations Declaration on the Rights of Indigenous Peoples**, which states that no forcible land removals or relocations can take place without the free, prior and informed consent of indigenous peoples. For example, local communities and civil society groups boycotted and picketed consultations held as part of the Environmental Impact Assessment (EIA) process for the Mong Ton dam. Therefore, community engagement in these meetings was limited and constrained, did not constitute “meaningful consultation with potentially affected groups” and did not release Salween business stakeholders involved in the project from their obligations under the UN Guiding Principles.

Compliance with UN Guiding Principle 18 is especially important where there is vocal community opposition to a project, as seen in regular protests and petitions opposing the Salween dams. Civil society organizations have stated that frustration among dam-affected communities has been worsened by company and government actions. For example, hydropower contracts have been signed without any public input and have not been disclosed to the public. Some locals have not been aware of dam development plans until surveys or construction has already started.⁴⁹

UN Guiding Principle 23 makes clear that where the risk of gross human rights abuses increases in conflict-affected areas, business adherence to human rights is a matter of law not choice. The UN Guiding Principles expect that businesses “treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate” and ensure that they “do not exacerbate the situation.”

The outbreak of conflict in several Salween dam areas due to preparatory works shows how high risk these projects are. The presence of violence so early in project development suggests that Salween business stakeholders may not be treating the risks with the level of seriousness mandated by the UN Guiding Principles.

Myanmar’s obligations

Myanmar has ratified several international human rights instruments, including the:

- **International Covenant on Economic, Social and Cultural Rights;**
- **Convention on the Elimination of All Forms of Discrimination Against Women;**
- **Convention on the Rights of the Child.**

Many other treaty rights form part of general and customary international law, and therefore apply in Myanmar.

Myanmar’s human rights obligations are further clarified through other sources, including the **UN Guiding Principles**, as well as authoritative commentary by treaty bodies and jurisprudence by courts.⁵⁰ They include a duty to take human rights obligations into account when entering into agreements with other states, international organizations or companies.⁵¹

Myanmar’s laws also enshrine several important human rights principles and procedural rights. This includes legal frameworks for environmental impact assessment, land acquisition and resettlement, and investment.



The Moei River is a major tributary of the Salween that flows from Thailand
Photo: International Rivers

The Environmental Impact Assessment (EIA) system is set out in the **2015 EIA Procedure**⁵² under the 2012 Environmental Conservation Law. Under the EIA Procedure, projects must undertake an EIA where they are likely to cause adverse impacts, which is defined broadly to include environmental, social, socio-economic, health, cultural, community health and safety impacts.⁵³ Projects requiring an EIA must also develop an Environmental Management Plan to avoid, address, and reduce impacts.

The Ministry of Natural Resources and Environmental Conservation holds exclusive authority to approve, conditionally approve or reject an EIA and the accompanying Environmental Management Plan. If the ministry approves these,

it will issue an Environmental Conservation Certificate, which is needed before final project permissions can be given. While the EIA Procedure does not directly address human rights concerns, the procedure still offers an important way within national law to assess and address potential impacts on human rights.

The EIA Procedure’s binding requirements include information disclosure and public participation throughout the EIA process. However, several supporting guidelines for the procedure are yet to be completed, including the guidelines on public participation in the EIA process and guidelines on EIA for hydropower. In practice, this has made appropriate, quality and timely public participation challenging.⁵⁴

⁴⁹ Burma Environmental Working Group, 2017, p. 44.

⁵⁰ S Bain, Special Economic Zones in Myanmar and the State Duty to Protect Human Rights, International Commission of Jurists (ICJ), 2017, pp. 5–6.

⁵¹ International Commission of Jurists (ICJ), Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997, Art. 15(j).

⁵² Myanmar Environmental Impact Assessment Procedure, Republic of the Union of Myanmar (MOECF Notification 616 of 29 December 2015).

⁵³ Ibid, Art 2(g).

⁵⁴ S Bain, 2017, p. 36.



Karen ethnic villagers and allies from Thailand and Myanmar gather to pray for the free-flowing river on the International Day of Action for Rivers
Photo: International Rivers

The EIA Procedure also orders that projects involving involuntary resettlement, or which may have adverse impacts on indigenous peoples, follow international standards on involuntary resettlement and indigenous peoples, including the **safeguard policies of the World Bank Group and Asian Development Bank**.⁵⁵

Myanmar's legal framework relating to land is complex and spread across several laws and regulations. On August 19, 2019, the Union Parliament enacted the **Land Acquisition, Resettlement and Rehabilitation Law**,⁵⁶ replacing

the colonial-era Land Acquisition Act (1894). This is the primary law that applies to compulsory acquisition of land by the state for development projects. The law includes relatively clear procedural safeguards for resettlement and compensation. The **National Land Use Policy**, adopted in 2016, affirms the need for participatory, transparent and accountable land use and governance processes. It commits the Myanmar Government to reforming the country's land laws in line with international human rights standards and in consultation with civil society.⁵⁷

⁵⁵ Myanmar EIA Procedure, 2015, Art. 7.

⁵⁶ Land Acquisition, Resettlement and Rehabilitation Law, Republic of the Union of Myanmar, (Pyidaungsu Hluttaw Law No. 24/2019).

⁵⁷ National Land Use Policy, Republic of the Union of Myanmar, January 2016, Article 8.

The **Myanmar Investment Rules 2017**, issued by the Ministry of Planning and Finance under the Myanmar Investment Law 2016, requires the Myanmar Investment Commission in assessing proposals to consider whether investors have shown a commitment to responsible and sustainable investment, and compliance with environmental conservation policies and human rights.⁵⁸ The Investment Rules also directly link approval of the investment by the Myanmar Investment Commission to the investor showing full compliance with the EIA Procedures.⁵⁹

Obligations of investor home states

Chinese and Thai companies are key investors in the Salween dams. Thailand and China are party to several international human rights treaties. Both China and Thailand have ratified the:

- **International Covenant on Economic, Social and Cultural Rights;**
- **Convention on the Elimination of All Forms of Discrimination Against Women;**
- **Convention on the Rights of the Child.**

Thailand has ratified, and China has signed, the **International Covenant on Civil and Political Rights**. The practical application of international standards to Thai and Chinese business enterprises differs in each country.

Thailand

The Electricity Generating Authority of Thailand (EGAT), a state-owned enterprise, is involved in the Mong Ton and Hatgyi dams through a wholly owned subsidiary, EGAT International. EGAT's operations in Myanmar may be reviewed by the National Human Rights Commission of Thailand, which has the ability to hear complaints against Thai companies operating in foreign jurisdictions.

Investigation of the impacts of Thai businesses abroad is likely to increase with the adoption of Thailand's **National Action Plan on Business and Human Rights** in 2019⁶⁰, which includes extraterritorial human rights obligations with respect to Thai outbound investments. The Thai Government has made clear that its companies operating abroad are expected to follow international standards, including with respect to human rights. This was established by two cabinet resolutions in 2016 and 2017, which recognize the state's extraterritorial obligations regarding the human rights impacts of Thai company operations and investments abroad and the need to ensure compliance with the **UN Guiding Principles**. Also, in 2018, the Thai Government instructed the country's 55 state-owned enterprises to show leadership in aligning their practices with the UN Guiding Principles.⁶¹

⁵⁸ Myanmar Investment Rules 2017, Art. 64 (d).

⁵⁹ Ibid, Art. 190.

⁶⁰ Thailand's First Action Plan on Business and Human Rights 2019-2022: <<http://globalnaps.org/wp-content/uploads/2017/11/nap-thailand-en.pdf>>.

⁶¹ United Nations Office of the High Commissioner for Human Rights (OHCHR), Working Group on Business and Human Rights, Statement at the end of visit to Thailand by the United Nations Working Group on Business and Human Rights, OHCHR, 2018. <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22915&LangID=>>>.

China

For Chinese Salween business stakeholders, domestic standards relating to corporate social responsibility are often considered more relevant in practical terms than international standards. Several of the Chinese business stakeholders are Chinese state-owned enterprises directly under the central government (China Three Gorges Project Corporation and China Southern Power Grid) and are therefore subject to China's State-owned Assets Supervision and Administration Commission of the State Council (SASAC), which oversees centrally controlled state-owned enterprises. Several measures and guidelines issued by this council are potentially relevant to the responsibilities of Salween business stakeholders. For example, the **Measures for the Supervision and Administration of Overseas Investment by Central Enterprises** (SASAC [2017] #35) call on centrally controlled state-owned enterprises to comply with the laws and regulations, business rules and cultural practices of the countries in which they invest and operate.

The council's **Guidelines to the State-owned Enterprises Directly Under the Central Government on Fulfilling Corporate Social Responsibilities** represent China's first written commitment to corporate social responsibility. The guidelines are not rights-based, but they encourage state-owned enterprises with resources to actively implement

corporate social responsibility in their projects; provide detailed corporate social responsibility reporting; and outline the systems and mechanisms for fulfilling corporate social responsibility in their projects and the communication and dialogue mechanisms in place for stakeholders.

The council guidelines also require state-owned enterprises to ensure they comply with host country laws and legal frameworks, which includes the human rights commitments of the countries in which they invest. Other Chinese standards for outbound investments, including the **Guidelines for Environmental Protection in Foreign Investment and Cooperation (2013)** and more recently the **Guidance on Promoting Green Belt and Road (2017)**, similarly call on Chinese companies to comply with local laws and legal frameworks in investment host states.

In addition, some Chinese companies are starting to voluntarily adopt international standards to guide their internal policies. For example, China EXIM Bank uses an internal environmental and social risk review process based on the **International Finance Corporation Performance Standards**.⁶² The State Grid Corporation of China includes the **International Organization for Standardisation's ISO 26000:2010 Guidance on Social Responsibility** in its corporate social responsibility performance guide.⁶³

There are also some positive signs that China is willing to address obligations to uphold rights in Chinese overseas investments. The Chinese Government has voted in favor of a UN Human Rights Council resolution on elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights. In its explanation before the vote, the Chinese Government noted that it supported efforts by the

international community to promote respect by business, in particular transnational corporations, for human rights.⁶⁴ China also stated that it was in favor of "dialogue and cooperation to improve and develop the UN Guiding Principles, to ensure actual effects."⁶⁵ In March 2019, China formally accepted several recommendations relating to addressing human rights violations occurring in foreign extractive and infrastructure projects as part of its Universal Periodic Review session at the United Nations Human Rights Council.⁶⁶

⁶⁴ United Nations Human Rights Council, Resolution on the Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, A/HRC/26/L.22/Rev.1, 26 June 2014.

⁶⁵ Office of the High Commissioner for Human Rights, 'Human Rights Council Establishes Working Group to Elaborate an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises', 26 June 2014, see: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14785&LangID=E#sthash.jm6Jcyp5.dpuf

⁶⁶ F Koop & R Soutar, 'China acknowledges Latin American human rights pleas', *Diálogo Chino*, 29 March 2019. <<http://dialogochino.net/25431-china-acknowledges-latin-american-human-rights-pleas/>>.

A community-owned plantation on the banks of the Salween River, at Magyi Island, Paung Township, Mon State
Photo: Mi Ah Chai



⁶² International Finance Corporation, IFC's role in China's Financial Sector Transformation, International Finance Corporation, 2012. <<http://documents1.worldbank.org/curated/en/225981468263351007/pdf/835100WP0v10IF00Box382079B00PUBLIC0.pdf>>.

⁶³ State Grid Corporation of China, 2017 Corporate Social Responsibility Report, State Grid Corporation of China, 2018. <<http://www.sgcc.com.cn/html/files/2018-08/29/20180829165036376453337.pdf>>.



Remedying violations

The UN Guiding Principles require that those who have been affected by human rights violations have access to remedy. This is primarily a duty of states, that must ensure remedy can be pursued through administrative, legislative or other appropriate means. However, businesses also have responsibilities to remedy violations. Where they have caused or contributed to adverse impacts, a business must “provide for or cooperate in their remediation through legitimate processes” (UN Guiding Principle 22).

In the host state—Myanmar

Myanmar has implemented several laws that impose stricter rules on foreign investment. These include the mandatory **EIA Procedure 2015**. Existing Salween dam EIAs were mostly completed before 2015 and were not prepared to meet the requirements of the new EIA system. The new system requires that the project report on negative social impacts and relevant legal frameworks including international Conventions, treaties and agreements. Under Article 8 of the revised EIA Procedure, pre-existing projects may still need to undertake an EIA to get the necessary approval from the Myanmar Investment Commission. A reexamination of the human rights impacts of the Salween dams under these new stricter requirements could produce different determinations on their viability and approval.

The **Investment Rules** also instruct the Myanmar Investment Commission to consider whether investors have shown a commitment to responsible investment. In considering the good character and reputation of the investor, the commission may study whether the investor or any associate with an interest in the investment broke the law in Myanmar or any other jurisdiction. The rules mention environmental, labor, tax, bribery and corruption, and human rights law. The Investment Law and Investment Rules also empower the commission to establish and manage a grievance mechanism to resolve and address disputes.⁶⁷

The **Myanmar National Human Rights Commission** is another state-based mechanism through which remedies can be pursued in the host state. Most cases brought before this commission involve property disputes, including land confiscations.⁶⁸

In investor home states

Investigations and lawsuits regarding foreign investments are increasing in various jurisdictions, including in Southeast Asia. In Thailand, for example, the National Human Rights Commission of Thailand's investigations into violations stemming from Thai-business projects have included the Xayaburi dam and Hongsa power station in Laos and the Khon Kaen Sugar (KSL) plantation in Cambodia. A recent lawsuit in Thailand's civil court against a Thai sugar company accused of land-grabbing and human rights violations in Cambodia highlights potential for cases involving extraterritorial breaches of law and human rights obligations.⁶⁹

Through voluntary codes

Companies can voluntarily sign up to many business and human rights initiatives. These tend to have minimal screening and monitoring checks on company compliance and lack specific mechanisms to enforce standards.

The **UN Global Compact** is the world's largest voluntary corporate sustainability code, with more than 13,500 participants in over 170 countries. Salween business stakeholders China Southern Power Grid and Shwe Taung Group are listed as signatories. Signatories are expected to follow the Ten Principles and their Implementation Guidelines. UN Global Compact principles relevant to the Salween dams are Principle 1—"businesses should support and respect the protection of internationally proclaimed human rights" and Principle 2—"businesses should make sure that they are not complicit in human rights abuses."

While voluntary codes such as the UN Global Compact lack enforcement mechanisms, companies that fail to comply still face legal risks and consequences. For example, contracts between a company and private parties can incorporate the fact that the company is signatory to the UN Global Compact and holds itself out to be signatory to its principles. More generally, taking part in a voluntary code can be seen as establishing the level of conduct expected of the signatory company. By joining the code, the company accepts to incorporate its principles.⁷⁰

In the case of *Choc v Hudbay*, a Canadian company Hudbay Minerals Inc. was sued for negligently failing to prevent human rights abuses arising from security for a project in Guatemala. The case considered Hudbay's public statement that it adhered to the UN Guiding Principles and Voluntary Principles on Security and Human Rights. The Court noted that "[Hudbay] made public representations concerning its relationship with local communities and its commitment to respect human rights, which would have led to expectations on the part of the plaintiffs."⁷¹

Therefore, Salween business stakeholders' participation in sustainability or human rights initiatives may be highly relevant to the dam projects and could be used in legal matters. More generally, voluntary codes provide a lens to examine business stakeholders' conduct and representations of their conduct.

⁶⁷ Myanmar Investment Law, art. 25(n) and art. 82(k) 2016, Myanmar Investment Rules 2017.

⁶⁸ Organisation for Economic Co-operation and Development, Background Note: Myanmar Responsible Business Conduct and the OECD Guidelines for Multinational Enterprises, OECD, 2014, p. 7. <<http://www.oecd.org/daf/inv/mne/2014-Myanmar-Responsible-Investment-Conference-Background-Note.pdf>>.

⁶⁹ R Chandran, 'Cambodian farmers battle in landmark lawsuit against Thai sugar firm,' Reuters, 12 June 2019. <<http://uk.reuters.com/article/us-cambodia-landrights-court/cambodian-farmers-battle-in-landmark-lawsuit-against-thai-sugar-firm-idUSKCN1TD00P>>.

⁷⁰ M Camilleri, 2015, p.17.

⁷¹ *Choc v Hudbay Minerals Inc*, 2013, ONSC 1414, [69].

A community group prepares
to return home after catching fish
at Bulu Island, Mon State
Photo: Mi Ah Chai

Principles that apply to project finance

Several business and human rights frameworks focus on the role of business enterprises that provide financing for projects. These frameworks aim to help investors identify and avoid risks in the companies or company projects they invest in.



A remote village on the Salween
Photo: Sophia Harris

The leading general framework is the **UN Principles for Responsible Investment**. These principles are based on the understanding that environmental, social and governance issues impact investment portfolios over time and must be incorporated by investors in order for their obligations to be met. Responsible investing requires investors to be “active owners” that engage with the companies they invest in about environmental, social and governance issues in their business operations. For example, Salween project investors practicing “responsible investment” must engage with Salween project development companies about environmental, social and governance issues and risks associated with the dams.

Other frameworks for specific types of financial actors are also used widely, including the International Finance Corporation Performance Standards, which apply to projects funded by the corporation. Several of the world’s largest private and commercial banks use the Equator Principles, which reference the International Finance Corporation Performance Standards.

The **UN Principles for Responsible Investment** and **UN Global Compact Guidance on Responsible Business in Conflict-Affected and High-Risk Areas** show how Salween project investors should seek disclosure from project development companies. They should seek information about how their core business relates to conflict dynamics and how the company is ensuring it does no harm. Key questions that investors

must ask to comply with Principle 2 of the UN Principles of Responsible Investment⁷² include:

- Have the Salween dams companies carried out UN Guiding Principles due diligence processes—if so, how effectively has this been done?
- Do the companies have policies on operating in conflict-affected areas and how to minimize negative risks and impacts?
- Was a specific “conflict risk and impact assessment” carried out before investing and starting operations (in addition to any other human rights, environmental and social impact assessment processes)?
- Is the company monitoring the operating environment on a regular and ongoing basis to ensure its information on political and security risks is up to date and reliable? Who are the local organizations they are working with, and what is their relevant local expertise and skills?

As well as seeking information on key areas from companies directly, investors can also consult OECD guidance for institutional investors, which clarifies the rights of civil society organizations to engage with the shareholders of companies under the OECD Guidelines for Multinational Enterprises. The OECD Guidance also states that investors can get involved in cases regarding breaches of the OECD Guidelines for Multinational Enterprises lodged with a National Contact Point, and that National Contact Point statements and recommendations can be used by investors in

their engagement with companies.⁷³ While not directly related to the hydropower sector, the OECD has also published guidance on due diligence for responsible sourcing of minerals from conflict-affected and high-risk areas’.⁷⁴

Investment risks

An investment analysis of the Salween dams incorporating environmental, social and governance issues is likely to identify significant legal, financial and reputational risks that investors must consider in order to meet their duties. An overview of these risks is outlined below:

Legal risks

Responsible investment requires that investors seek out company reporting on their compliance with international standards. If a company fails to conduct UN Guiding Principles due diligence, it may be considered that it has failed to meet international standards. This scenario has the potential to expose Salween business stakeholders to liability for social damage caused by the dams. These legal risks are heightened when the business operation is in a conflict-affected area, as shown by the outbreak of conflict during preparatory works at the Hatgyi, Kunlong and Mong Ton dams.

Project investors and developers considered to have contributed to actual human rights abuses may be liable for remediation. They may face formal complaints or litigation within Myanmar or in foreign jurisdictions.

⁷² United National Principles for Responsible Investment, 2010. <<http://www.unpri.org/pri/what-are-the-principles-for-responsible-investment>>

⁷³ Organisation for Economic Co-operation and Development, Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises, OECD, 2017. <<http://mne-guidelines.oecd.org/RBC-for-Institutional-Investors.pdf>>.

⁷⁴ OECD, 2016.

Financial risks

Several Salween dam projects have been on hold for almost a decade with preliminary construction works suspended due to conflict. They are likely to face continued setbacks and delays due to the outbreak of conflicts and uncertainty about how the government will respond to the International Finance Corporation's Strategic Environment Assessment recommendation that the Salween mainstream be preserved from hydropower development. These factors raise questions about the viability of the projects and their suitability for financing. Questions about community consultations and whether free, prior and informed consent has been obtained may lead to significant financial costs. These costs could stem from disputes, disruption to production, and management time dealing with the problems. Other long-term risks may include litigation costs and ongoing compensation costs relating to evictions and resettlement.

Reputational risks

Salween business stakeholders face reputational risks as a consequence of sustained, high-profile community opposition to the Salween dams across ethnic states. These risks will increase if the projects proceed and lead to the breakdown of ceasefires, with conflict between armed forces and ethnic armed organizations starting again. In these circumstances, scrutiny of businesses' adherence to the UN Guiding Principles, UN Principles of Responsible Investment and all voluntary codes is likely to intensify.

Organized community opposition to the dams has been amplified due to inadequate consultation with affected groups by Salween business stakeholders and the Myanmar Government. A failure to adequately consult the community contributes to the perception that social impacts of the dams have been disregarded. The broader human rights context in Myanmar will also likely result in all foreign business activity in the country being closely analyzed by the international community. This may lead to contentious projects and their investors and developers being investigated and reported on by media outlets.

The Moei River is a major tributary of the Salween that flows from Thailand
Photo: International Rivers





**Recommendations:
taking action
to protect
human rights**

Internally displaced persons
in Myanmar's ethnic states
along the Salween River
have been affected
by militarization and
human rights violations.
Photo: International Rivers

Business stakeholders

Salween business stakeholders should:

- Suspend their involvement in Salween dams given the UN Guiding Principles state that businesses operating in conflict-affected areas should not “exacerbate the situation.” Projects should not go ahead unless they can show they comply with the UN Guiding Principles.
- Review company processes for community consultation and consultations undertaken thus far with groups potentially affected by the Salween dams to determine whether they adhere to UN Guiding Principles due diligence and the standard of free, prior and informed consent.
- Recognize dam-affected communities practicing customary land tenure systems or with existing natural resource structures and take steps to ensure their land rights under the UN Declaration on the Rights of Indigenous Peoples are upheld.

Investors

Investors in the Salween dams should:

- Engage with Salween investee companies on the project’s social and human rights impacts, making clear to them that they risk divestment should their policies and operational strategies fail to comply with the UN Guiding Principles. Investors should seek information on a) company policies on operating in conflict-affected areas and/or Myanmar and how these policies comply with the UN Guiding Principles; and b) company strategy for minimizing risk and reducing human rights impacts.
- Divest from projects that do not comply with the UN Guiding Principles and other human rights frameworks.

Project-affected communities

Project-affected communities can:

- Explore litigation against Salween business stakeholders that have signed up to the UN Global Compact and other business and human rights initiatives, where there is evidence of actual human rights violations and where the business has promoted that it complies with the initiative.

Governments

- The Government of Myanmar should consider formally adopting the Strategic Environment Assessment recommendation to reserve the Salween mainstream from hydropower development and cancel proposed dams on the Salween mainstream, which will avoid investment-driven exacerbation of conflict and human rights violations.
- The Government of Myanmar should direct the Ministry of Natural Resources and Environmental Conservation to require all Salween dam Environment Impact Assessments to be revised and resubmitted according to the new EIA system, until which project approval from the Myanmar Investment Commission should be withheld.

- As part of its commitment to business and human rights, the Government of Thailand should follow up its instruction to state-owned enterprises to align their practices with the UN Guiding Principles, together with concrete guidance and performance indicators.
- The central government of the People’s Republic of China should strengthen guidance and implementation of standards for social and environmental accountability of Chinese companies in their outbound investments, in line with international standards. Current guidance and standards should be strengthened by, among other things a) putting in place a common framework of social and environmental performance indicators that state-owned enterprises must report against and b) setting up a grievance mechanism to enable monitoring and compliance.

Appendix

List of instruments and frameworks referenced in this report

- China's Guidance on Promoting a Green Belt and Road: <http://eng.yidaiyilu.gov.cn/zchj/qwfb/12479.htm>
- China's SASAC Guidelines to the State-owned Enterprises Directly Under the Central Government on Fulfilling Corporate Social Responsibilities: http://en.sasac.gov.cn/2011/12/06/c_313.htm
- China's SASAC Measures for the Supervision and Administration of Overseas Investments by Central Enterprises: <http://en.hxlawyer.com/news/32.html>
- Convention on the Elimination of All Forms of Discrimination Against Women: <https://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>
- Convention on the Rights of the Child: <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>
- Equator Principles: <http://equator-principles.com/about/>
- International Covenant on Civil and Political Rights (ICCPR): <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>
- International Covenant on Economic, Social and Cultural Rights (ICESCR): <http://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>
- International Finance Corporation (IFC) Environmental and Social Performance Standards: http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards
- ISO 26000:2010 Guidance on Social Responsibility.
- OECD Guidelines for Multinational Enterprises: <http://mneguidelines.oecd.org/mneguidelines/>
- OECD Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises: <http://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>
- Thailand's National Action Plan on Business and Human Rights: <http://globalnaps.org/wp-content/uploads/2017/11/nap-thailand-en.pdf>
- Universal Declaration of Human Rights (UDHR): <http://www.un.org/en/universal-declaration-human-rights/>
- United Nations Global Compact: <http://www.unglobalcompact.org/what-is-gc/mission/principles>
- United Nations Global Compact Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: <http://www.unglobalcompact.org/library/281>
- United Nations Guiding Principles on Business and Human Rights (UNGPs): http://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf
- United Nations Principles for Responsible Investment (UNPRI): <http://www.unpri.org/pri/what-are-the-principles-for-responsible-investment>
- United Nations Working Group on Business and Human Rights, Business, human rights and conflict-affected regions: towards heightened action: <<http://undocs.org/en/A/75/212>>
- Universal Declaration on the Rights of Indigenous Peoples (UNDRIP): <http://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>
- Voluntary Principles on Security and Human Rights: <http://www.voluntaryprinciples.org/the-principles/>

