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Business and Human Rights



The issue of business and human rights is more relevant than ever in intergovernmental and debate forums, both global and regional. Given the increasingly prominent role of corporations in matters of governance, it has become necessary to address their activities from a human rights perspective.

In recent years, this analysis has moved beyond the attribution of responsibility to those States where human rights violations take place to include the corporations involved, as well as the home States of those corporations. In the United Nations, this development began with the 2011 adoption of the Guiding Principles on Business and Human Rights (Guiding Principles)—the implementation of which has been under discussion ever since—as well as the recent proposal by some governments to adopt a legally binding multilateral treaty on the subject. Significant progress has also been made in the Organization of American States (OAS) by both its political and its human rights protection bodies (the Inter-American Commission on Human Rights [IACHR] and the Inter-American Court of Human Rights), but these initiatives need to be expanded and brought into line with the advances made at the UN.

This edition of AportesDPLF addresses the most recent international legal developments on business and human rights, as well as specific cases and proposals for studying the issue in the future. Our magazine addressed this topic for the first time in 2011, and this edition aims to provide an updated overview.

The first section examines the evolution of the issue in international human rights bodies. **Carlos López** discusses the latest UN initiatives and makes recommendations for the content of a future international treaty on business and human rights. For his part, **Amol Mehra** analyzes the benefits of adopting National Action Plans that implement the Guiding Principles. The last article in this section identifies the issue as key for the region and addresses its nascent development within the OAS.

Based on two frameworks—the United Nations and the Inter-American System—the second section considers extraterritorial human rights obligations. Strengthening the obligations of the home States of corporations appears to be essential to this discussion. **ESCR-Net** provides an interesting overview of how United Nations bodies have recognized these obligations through interpretive means. **Daniel Cerqueira**, in his article, proposes the legal bases for an interpretation of human rights obligations that includes extraterritoriality into the Inter-American System.

Foreign investment and its impact on Latin America are addressed in three articles. **Shin Imai** and **Natalie Bolton** examine the extent of Canadian mining investment in Latin America, and demand that measures be taken to prevent its negative effects. **Salvador Herencia** also explores this issue and proposes that Canada must exercise better control of the public funding of Canadian corporations operating in Latin America. Finally, **Paulina Garzón** examines Chinese investment in the region, arguing that it should be subject to appropriate regulation.

In the fourth section, we present four cases in which corporations have directly or indirectly, with or without the support of the State, violated the rights of the affected communities. The case presented by **Jen Moore** deals with Canada's ties to the abusive practices of the Canadian company Blackfire in Mexico. **Alexandra Montgomery** addresses the surveillance practices of Vale Corporation against Brazilian non-governmental organizations. **María José Veramendi** reports on the devastating effects of the pollution caused by the Doe Run Company in the city of La Oroya, Peru, and the ongoing efforts by those affected to obtain justice. Finally, **Manuel Pérez-Rocha** discusses the case of *Pacific Rim v. El Salvador*, and the limitations on the State's ability to restrict the actions of transnational corporations that seek redress through international forums for violation of their rights contained in bilateral or multilateral investment treaties.

Next, the authors examine certain advances and initiatives taken by States. **Paloma Muñoz** presents a complete overview of the contributions of government human rights institutions in some of the region's countries. **Guillermo Rivera** and **Verónica Zubía** respectively present the positions of Colombia and Chile in terms of the progress made in this area. The edition concludes with an article by **Eduardo García**, who, from a private sector perspective, provides an account of the initiatives taken by the Repsol Company in Latin America and the challenges it foresees with respect to new international standards for business and human rights. We invite you to read this edition and share your impressions with us.

Katya Salazar
Executive Director

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Latest Developments in the United Nations and the Organization of American States

Carlos López Amol Mehra Katya Salazar

Business and Human Rights: Working Toward the Development of an International Legal Framework

Carlos López

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An article I wrote with the same title published in the September 2011 edition of *Aportes DPLF* reported that the UN Human Rights Council (UNHRC) in Geneva, on the occasion of the adoption of the Guiding Principles on Business and Human Rights, had chosen not to accept proposals by some countries to start working towards a legally binding instrument. The present article is a sequel to that essay. However, instead of reporting on a negative outcome, this article reports on a positive step, hopefully in the right direction, and the opening of a window of opportunity to build international norms and institutions relating to the responsibilities of business enterprises.²

In June 2014, the same UNHRC that had endorsed the Guiding Principles of June 2011 decided to elaborate a legally binding instrument on transnational corporations and other business enterprises in respect of human rights.² Resolution 26/9 created an Open Ended Inter-governmental Working Group (IGWG) and a process of intergovernmental negotiations in several phases. It initiated, for the first time ever, an intergovernmental process on this issue within the United Nations, leading towards a legally binding instrument in the field.

The Process

The UNHRC's decision was no surprise, but the result of a process that had started several years earlier and had involved governments and civil society actors. The possibility and/or desirability of a future international instrument had already been referred to by the UNHRC in its resolution adopting the *Protect, Respect and Remedy Framework* of June 2008, and again in June 2011, when it adopted the Guiding Principles. Several governments also spoke of the need to work towards legally binding obligations.

In a joint statement during the September 2013 session of the UNHRC, individual States and regional groups representing more than 80 States called for the conclusion of a legally binding instrument “after a careful process of analysis of options,” and committed themselves to work towards that end.³ This was accompanied by strong, collective civil society action in the form of a statement signed by more than 600 organizations and the presence of dozens of NGOs in Geneva.⁴

At the decisive UNHRC session on June 26, 2014, the proposing countries presented a first soft and somewhat diluted draft resolution calling for an “international legally binding framework.” A stronger version of the draft resolution was later tabled with the support of several countries, led by Ecuador and South Africa, and was eventually adopted by majority vote of the UNHRC. During the final days leading up to the vote, the ambiance came to be marked by tension and distrust. In the end, European countries, the United States, and others voted against the resolution, while emerging economies and Southern countries mostly voted in favor, with several of them abstaining.

Content of Treaty/Substantive Issues

Resolution 26/9 creates a process towards a treaty on business and human rights. The first phase of that process will be a general discussion about the scope and content of the treaty. Given the complexity and diversity of issues covered today by the label “business and human rights,” this could be a very difficult undertaking. The success in giving this treaty a clear focus will to some extent determine the shape of the first draft and the pace and outcome of the ensuing negotiations. To this end, we may draw inspiration from existing instruments, notably the Guiding Principles and the Committee on the Rights of the Child's General Comment 16.⁵

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² General Assembly, United Nations. Resolution 26/9 “Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights,” July 14, 2014, A/HRC/RES/26/9.

³ Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights Council, available at <http://business-humanrights.org/media/documents/statement-unhrc-legally-binding.pdf>

⁴ Call for an international legally binding instrument on human rights, transnational corporations and other business enterprises, available at <http://www.treatymovement.com/statement/>

⁵ Committee on the Rights of the Child, General Comment 16 on state obligations regarding the impact of the business sector on children's rights,

One first issue to be tackled, which will hopefully be settled before the start of the first IGWG session, is the scope of application of treaty provisions relating to companies. A footnote in the preamble to Resolution 26/9 defines “other business enterprises” as “all

The new treaty may oblige states to require certain business enterprises to adopt policies and processes to detect, prevent, and/or mitigate and remedy human rights abuses committed in their operations.

business enterprises that have a transnational character in their operational activities, and does not apply to local business registered in terms of relevant domestic law.” This definition is confusing and may squarely defeat the purpose of the whole process. The definition is also contradictory, because it is placed in relation to the work done on this matter by the former Commission on Human Rights and the current UNHRC, both of which, as everyone knows, had exactly the opposite understanding of “other business enterprises.” Luckily, the footnote is in the preamble, which does not have binding force.

With the first session of the IGWG scheduled for July 2015, it is also time now to start elaborating the possible content of the new treaty. The following paragraphs provide a non-exhaustive list of issues that may be considered during the deliberations.⁶

Prevention: Under International Human Rights Law, States have the obligation to protect human rights in relation to violations committed by their own agents, but also by third parties. States may take a wide range of measures to discharge these duties. The new treaty may oblige States to require certain business enterprises to adopt policies and processes to detect, prevent, and/or mitigate and remedy human rights abuses committed in their operations.

Legal Accountability: Provisions on legal responsibility in the treaty may contain obligations for States to enact liability for corporations or legal entities for a series of wrongful acts. Provisions in this regard may draw inspiration from the Optional Protocol to the Convention on the Rights of the Child on the sale of children⁷ and child pornography, or a series of conventions within the Council of Europe. The legal liability

to be enacted will depend on the legal system of each state and could involve criminal, civil, and/or administrative liability in accordance with current international practice. Legal-entity liability should also consider acts of participation and/or complicity or other forms

of accessory liability, and define the distribution of responsibility in the parent–subsidiary relationship.

Remedies: Effective legal remedies and reparation are linked to the legal accountability of corporations. States already have an obligation to provide effective remedies for the violation of rights recognized in national law. However, the specific scope of that obligation and its application to private actors’ abuses needs further elaboration.

Overcoming existing barriers to accessing remedies will require a focus on procedural rules and jurisdiction, but not too much detail should be expected of a general treaty such as this one. Because of the strong transnational nature of big business enterprises, the definition of the scope of jurisdiction of national tribunals needs to be wide. In addition to offences committed on its territory, a State may establish its jurisdiction over offences committed against its nationals; offences committed abroad by a company domiciled in its territory or where it carries out substantial business activities; or offences committed outside State territory with a view to the commission of another serious offence within State territory.

National monitoring mechanisms: Monitoring of national implementation contributes to effective implementation of international obligations at the domestic level. A national mechanism with multi-stakeholder representation may be given the power to monitor and promote the treaty provisions at the national level. This national mechanism may be inspired by the precedents set in the Convention on the Rights of Persons with Disabilities (article 33(2)), and the Optional Protocol to the Convention against Torture (articles 17 to 23).

International monitoring and supervision: A strong international monitoring and supervision system will create strong incentives and enable states to improve their national implementation of the treaty provisions. Its function may be innovative and include possible country visits. The peer review model established under the OECD Anti-Bribery Convention, or the model of the Sub-Committee on Prevention of Torture created under the Optional Protocol to the Convention

UN Doc. CRC/C/GC/16, April 17, 2013.

⁶ See generally, International Commission of Jurists, Needs and Options for a New International Instrument in the Field of Business and Human Rights, Geneva, June 2014, available at http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/NeedsandOptionsinternationalinst_ICJReportFinalecvers.compressed.pdf

⁷ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted under General Assembly resolution A/RES/54/263 of May 25, 2000, entered into force on January 18, 2002.

against Torture, may provide inspiration. Country visits may also be complemented by reports, including recommendations to countries to improve their national implementation.

International judicial cooperation and mutual legal assistance: International cooperation enables the exchange of information, effective investigation, and, when appropriate, prosecution or adjudication of transnational cases or offences. International cooperation will also be needed for the recognition and enforcement of civil orders and/or criminal sentences.

Looking Ahead

In the immediate period, the first session of the IGWG is scheduled to take place in July 2015 (July 6–10). States, including some of those that originally opposed or abstained from the vote on Resolution 26/9, will be preparing their positions, and so will civil society organizations. NGOs with consultative status under the United Nations Economic and Social Council (ECOSOC) rules are allowed to participate as observers with the right to speak. At least two big business associations enjoy ECOSOC status and can also participate with a number of delegates of their choice, if they so wish. Something similar applies to trade unions and federations, several of which hold ECOSOC status.

Resolution 26/9 mandates that the first and second sessions (2015 and 2016) be dedicated to broad discussion of the scope, format, and content of the treaty. It also mandates the chairperson–rapporteur of the IGWG to elaborate a document with draft elements of the treaty. This means that within three years, the IGWG should be starting discussion of the various parts and sections of the new treaty, leaving limited preparation time for many organizations and states that are only now learning the implications of Resolution 26/9.

From the point of view of civil society, informed and constructive participation will be as important as wide participation. Many groups and communities have grievances

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to ventilate at the international level, and the IGWG may provide a forum for them to have a voice. However, this mechanism is designed to elaborate a treaty and not to provide remedies and responses to specific cases. Cases

and situations should be presented, orally and in writing, with a view to illustrating gaps or inefficiencies in the international legal system, which the new treaty should fill.

Some detractors of the treaty have already noted the risks that discussions may fall into the old divide between North and South or developing and developed countries. While the risk of stalemate or diversion always exists, it is already clear that this process is unique and does not necessarily resemble past experiences, successful or failed. This will be the first time that a treaty-making process in relation to business responsibilities will have human rights standards as clear parameters. The efforts that started in 1975—and subsequently faded during the 1980s and 1990s—to establish an International Code on Transnational Corporations through an intergovernmental process, were clearly based on purely development concerns and the rights of states vis-à-vis transnational corporations.⁸ Human rights played little if any role in the discussions. The reflexes of certain developing countries keen to see this treaty-making process respond to concerns and economic interests under the rubric of the right to development risk bringing us back to these old discussions and confrontations. This is something that should be avoided through strong emphasis on a human rights perspective, with the victims and their rights as the center of concerns and debates.

***Editorial Note:** This article was written before the first session of the IGWG, held on July 2015.

⁸ Sauvant, K. (2015). The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned, *Journal of World Investment and Trade* 16: 11–87.

Beyond the Beginning: The Movement for National Action Plans on Business and Human Rights

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In June 2014, the United Nations Human Rights Council approved by consensus a resolution calling on member states to develop National Action Plans (NAPs) to implement the UN Guiding Principles on Business and Human Rights (UNGPs).² The resolution noted the role that NAPs could play in promoting the uptake of UNGPs, particularly in light of weak national legislation, legal and practical barriers to remedy, and governance gaps that leave those aggrieved without effective recourse.³

Some governments, like the United Kingdom, engaged in stakeholder consultations with business and civil society groups, seeking to gain an understanding of the various perspectives on these issues.⁴ Others, like Germany, have entrusted their National Human Rights Institutions (NHRIs) with taking the lead in developing the process for and content of the NAP.⁵ Yet others, including Spain, delegated the NAPs process to leading academics and consultancies.⁶ What is clear is that no one formula emerged for guiding the process and content of NAPs.

To address this situation, a joint project was initiated by the International Corporate Accountability Roundtable (ICAR) and the Danish Institute for Human Rights (DIHR), which sought to develop guidance on the process for and key content of NAPs. The project involved a program of global consultations and sought to capture thinking from a wide variety of stakeholders, including civil society and business. The result was a near 200-page report and shorter guidance document that clarified what NAPs could and should look like.⁷

The United Nations Working Group on Business and Human Rights (UNWG) created a similar guidance report. This document makes recommendations on process and content, and was also the product of consultation with a diverse array of stakeholders.⁸

The energy behind these efforts is indicative of the potential power of the NAPs process. Of the many benefits that could derive from a government engaging in a structured, government-wide effort to understand the various business and human rights issues it can influence and impact, three are perhaps the most promising for improving protection of human rights.

First, the NAPs process has the potential to overcome power and access differentials that often leave those negatively affected by corporate activity unable to claim a seat at the decision-making table. Through broad-based consultation within the territory of the country, and with a key focus on including a wide variety of communities, their representatives, labor unions, and workers' rights organizations, the NAPs process can empower communities to share their perspectives on the impacts of corporate activity on their rights. This issue of consultation is especially important in areas of the world with indigenous populations, who are too often neglected in policy debates. The NAPs process can give a powerful voice to these stakeholders, empowering them to help structure and create solutions that address the impacts that they themselves feel.

Next, the NAPs process can create a government-wide dialogue and has the potential to foster new thinking in branches of government where business and human rights are seen as of little concern, or as immaterial. For too long, the human rights agenda has been relegated to foreign ministries and departments,⁹ with no clear systematic inclusion of those tasked with economic affairs, or even those with a more domestic

¹ The author would like to thank Erica Embree, J.D.-LL.M Candidate, Northwestern University School of Law, for her assistance with this article.

² United Nations Human Rights Council, Resolution 26/22 *Human rights and transnational corporations and other business enterprises*, A/HRC/26/L.1., Geneva, June 27, 2014.

³ Ibid.

⁴ International Corporate Accountability Roundtable and European Coalition for Corporate Justice. (December, 2014). *Assessment of Existing National Action Plans on Business and Human Rights*, Washington DC.

⁵ Ibid.

⁶ International Corporate Accountability Roundtable and Danish Institute for Human Rights. (June, 2014). *National Action Plans on Business and Human Rights: A Toolkit for Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks*, Washington DC.

⁷ Ibid.

⁸ United Nations Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights*, December 2014.

⁹ See, for instance, the US experience, Department of State, Business and Human Rights section, "Business and Human Rights," <http://www.humanrights.gov/dyn/issues/business-and-human-rights.html> and the UK experience, "Promoting Human Rights Internationally," <https://www.gov.uk/government/policies/promoting-human-rights-internationally>.

orientation, such as ministries of the environment or labor. This has created silos of knowledge, experience, and effort. The NAPs process can break these silos if it focuses on addressing and eliminating gaps in coherence, be they between agencies and departments, or within.

NAPs are just a first step. They are the roadmap to guide government action, and they should clearly prioritize the measures that governments will put in place, including regulatory structures where appropriate.

including actual and potential human rights impacts.¹¹ Outside the national context, there are also now serious discussions in Geneva to develop, through an intergovernmental process, a binding treaty on business and human rights.¹² The treaty could improve state practice in the area

Third, the NAPs process can create a forward agenda for human rights promotion and protection. Since the adoption of the UNGPs, governments have been in various phases of hibernation in implementing needed reforms and extending protections.¹⁰ NAPs and the energy behind them have the power to thaw the freeze, and motivate governments to act. By creating public accountability through process benchmarks, and ultimately seeking to deliver clear and concrete action steps, NAPs create a yardstick to measure progress in the implementation of the duty to protect human rights.

But NAPs are not a silver bullet. For all the potential benefits that can be derived from these processes, there are also pitfalls that must be avoided.

First, NAPs are just a first step. They are the roadmap to guide government action, and they should clearly prioritize the measures that governments will put in place, including regulatory structures where appropriate. NAPs must be an engine of action, but should not be viewed as an end in and of themselves.

Similarly, NAPs must be ongoing processes with periodic reviews of achievement. “Perfection” does not exist when it comes to the promotion and protection of human rights. Governments must understand that success comes from changing systems to more rights-oriented ends. This will take time, inclusion of a broad set of stakeholders, and commitment to review and improve on a continuing basis.

Finally, NAPs aren’t the only way to shift the current paradigm towards increased respect for human rights in business. Other options exist. Governments could enact needed reforms without engaging in NAPs processes. Changes could be made, for example, to securities laws, by requiring companies to disclose their human rights policies and practices,

by elaborating the requirements that states impose mandatory human-rights due-diligence obligations on companies, reform criminal codes to create or permit liability of companies for human rights abuses, and extend existing civil and criminal laws to activities of companies abroad,¹³ with many other options in between. These debates could yield a new architecture for business and human rights, one structured around international legal obligations.

The rise of the business and human rights agenda at the international level has clearly fostered a host of policy responses. As noted, NAPs are just one means by which human rights protections can be built and enforced. What’s critical is that stakeholders continue to support and pursue all available avenues, including by pressing governments to enact reforms alongside NAPs processes and participating in intergovernmental discussions. Professor John Ruggie, father of the UNGPs, has stated that the Human Rights Council’s endorsement of the UNGPs was not the end, but the “end of the beginning.”¹⁴ If this is the case, then NAPs must be seen as a way to move beyond the beginning. ■

¹¹ For additional information on possible changes to US securities laws, see International Corporate Accountability Roundtable, “*Knowing and Showing*”: Using U.S. Securities Laws to Compel Human Rights Disclosure, Washington D.C., October 2013, available at <http://accountabilityroundtable.org/wp-content/uploads/2013/10/ICAR-Knowing-and-Showing-Report4.pdf>.

¹² United Nations Human Rights Council, Resolution 26/9 *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., Geneva, June 26, 2014.

¹³ For more information on due diligence and remedies, see Skinner, G, McCorquodale, R. and De Schutter, O. et al. (2013). *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* ICAR, CORE, ECCJ; De Schutter, O., Ramasastry, A., Taylor, M.B, et al. (2012). *Human Rights Due Diligence: The Role of States*. ICAR, ECCJ, CNCA.

¹⁴ John G. Ruggie, Special Representative of the Secretary-General for Business and Human Rights, *Presentation of Report to United Nations Human Rights Council*, Geneva, May 30, 2011, available at <http://business-humanrights.org/sites/default/files/media/documents/ruggie-statement-to-un-human-rights-council-30-may-2011.pdf>

¹⁰ European Coalition for Corporate Justice. *UNGPs: European Civil Society Dialogue on the National Action Plans Project*, October 24, 2013, <http://www.corporatejustice.org/European-Civil-Society-Dialogue-on.html?lang=es>.

Business and Human Rights: A New Challenge for the OAS?

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On January 29th of this year, the Permanent Council of the Organization of American States (OAS) held a special session on the Promotion and Protection of Human Rights in Business. This session was the product of OAS General Assembly Resolution 2840 (XLIV-O/14) of June 2014,¹ which acknowledged the value of the United Nations Guiding Principles on Business and Human Rights and the need to promote this issue in the region.

At this meeting, the chairman of the Inter-American Juridical Committee presented a report on corporate social responsibility in the area of human rights.² Other participants included Alexandra Guáqueta, who was then a member of the United Nations Working Group on Business and Human Rights; Daniel Taillant, Director of the Center for Human Rights and Environment in Argentina; and Eduardo García, Director of Corporate Responsibility for the Multinational Corporation REPSOL, as well as other OAS officials.³

Although for many the topic was new, it was not for the political bodies of the OAS, which had been addressing the issue mainly through General Assembly (GA) resolutions with recommendations to the States and from the perspective of corporate social responsibility. In fact, in numerous resolutions passed over the last decade, the GA has expressed the need for States to continue discussing and analyzing the issue of cor-



porate social responsibility, and recommended that they learn about and exchange experiences and draw on the work done by other actors in the field, such as multilateral organizations, international financial institutions, civil society organizations, and the private sector for information.⁴

In addition to the treatment of this issue by the OAS's political bodies, in recent years the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (Inter-American Court) have developed a body of standards and recommendations for the States on matters in which corporations

play a significant role. Specifically, both bodies have addressed the impact of natural resource extraction on human rights in general and on the rights of indigenous and tribal peoples in particular. Both bodies have done especially important work to give content to the right to prior consultation enjoyed by indigenous and tribal peoples. It is no exaggeration to say that the Inter-American Human Rights System (IAHRS) is the supranational rights system that has produced the most, and the most specific, standards to protect that right.⁵

Some History

During the past decade, private investment in the extraction of natural resources has increased significantly in Latin America. Its positive and negative effects are beyond the scope

¹ OAS. General Assembly, June 4, 2014, available at http://www.oas.org/en/sla/dil/docs/AG-RES_2840_XLIV-O-14.pdf

² OAS. Permanent Council. Second Report. Corporate Social Responsibility in the Area of Human Rights and Environment in the Americas. OEA/Ser.CJI/doc.449/14 rev.1 Q, March 11, 2014, available at http://www.oas.org/en/sla/iajc/docs/CJI-doc_449-14_rev1_en.pdf

³ A similar meeting was held hours earlier, sponsored by a coalition of civil society organizations promoting business and human rights issues. It was also attended by members of the Inter-American Commission on Human Rights and regional civil society representatives.

⁴ For more detailed information about the resolutions passed on this issue, see OAS. Permanent Council. Second Report. Corporate Social Responsibility in the Area of Human Rights and Environment in the Americas. OEA/Ser.CJI/doc.449/14 rev.1 Q, March 11, 2014, available at http://www.oas.org/en/sla/iajc/docs/CJI-doc_449-14_rev1_en.pdf

⁵ See, e.g., IACHR. *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009.

of this article. Nevertheless, one fundamental point bears mentioning: as the region experienced significant economic growth, so social conflicts have also intensified.⁶

A good analysis of this phenomenon can be derived from the data published by the National Ombudsman in Peru

in its monthly report on social conflicts,⁷ which serves as a barometer for the type and number of social and governability conflicts in that country. According to this source, in March 2015 alone, 155 active conflicts, 56 latent conflicts, and 179 collective protest actions were reported. Some 60 to 70 percent of these were socio-environmental conflicts.⁸ The excellent monitoring by the Peruvian Ombudsman provides hard data confirming a reality that has been emerging to varying degree throughout the hemisphere.⁹

This social unrest has come with a new dynamic: it is not merely a matter of States disregarding the rights of citizens, but rather of States allowing third parties (corporations, in many cases foreign) to operate within their borders in disregard of the rights of citizens.

The IACHR's treatment of this subject also gives an indication of the magnitude of the phenomenon. Since 2004, there have been several thematic hearings that have, from different angles, addressed the conflict between the rights of indigenous peoples and the interests of the industries involved in the natural resource extraction.¹⁰ Hearings have been held on, among other issues, *The Situation of Indigenous Peoples in Relation to Extractive Industries* (March 2004); *Human Rights and Global Warming* (March 2007); *Situation of Persons*

To date, the focus and the object of claims within the IAHRs have mainly been the State or States in which these acts take place. Nevertheless, the growing role and strength of corporations demands more creative strategies.

Affected by Extractive Mining and Petroleum Industries in

Ecuador (March 2007); *Right to Consultation of the Indigenous Peoples of the Amazon Region and Implementation of Projects of the Initiative for the Integration of the Regional Infrastructure in South America* (IIRSA) (March

2010); *Human Rights Situation of Persons Affected by Mining in the Americas and the Responsibility of Host States and Home States of Mining Companies* (November 2013); and *Extractive Industries and Human Rights of the Mapuche people in Chile* (March 2015).

Other IACHR activities, such as its thematic and country reports, have also shone a spotlight on this issue. As a complement to the IACHR's important 2009 report entitled *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources*, a new report is expected at the end of 2015 on violations of the human rights of indigenous and Afro-descendant peoples in the context of extractive and tourism-related projects.

Beyond the issues concerning indigenous peoples, the IACHR has addressed the impact of business activities on human rights by bringing attention to other complex situations in its thematic hearings, such as the destruction of Mexico's biocultural heritage through mega-development projects or the potential negative human rights effects of building the transoceanic canal in Nicaragua.¹¹

To date, the focus and the object of claims within the IAHRs have mainly been the State or States in which these acts take place. Nevertheless, the growing role and strength of corporations demands more creative strategies. Current discussions in the United Nations, such as those on national action plans on business and human rights or the possible adoption of a binding treaty to establish obligations for corporations, are significant steps in that direction, but are not the only ones needed.

In that respect, both the IACHR and the Inter-American Court must continue to advance this discussion. The future creation of the special rapporteurship on Economic, Social and Cultural Rights will be a crucial point along this path. We hope

⁶ For more information, see Salazar, K. and Galvis, M.C. (2013). *Derechos Humanos y desarrollo económico: ¿cómo armonizarlos? Anuario de Derechos Humanos*. Santiago: Centro de Derechos Humanos, Facultad de Derecho Universidad de Chile, p. 196.

⁷ To see more on the resolution of social conflicts by Peru's National Ombudsman, available at <http://www.defensoria.gob.pe/temas.php?des=3#r>

⁸ National Ombudsman. *Adjuntía para la Prevención de Conflictos Sociales y la Gobernabilidad*. Reporte de Conflictos Sociales No. 133, Marzo de 2015, available at <http://www.defensoria.gob.pe/modules/Downloads/conflictos/2015/Reporte-Mensual-de-Conflictos-Sociales-N-133-Marzo-2015.pdf>

⁹ See Salazar and Galvis, op.cit., p. 197.

¹⁰ As early as 2004, there was a thematic hearing on the situation of indigenous peoples with regard to extractive industries, and another six hearings have subsequently been held on this topic, available at <http://www.oas.org/es/cidh/audiencias/topicslist.aspx?lang=en&topic=17>

¹¹ IACHR. *Complaints regarding the destruction of Mexico's biocultural heritage due to the construction of mega development projects in Mexico*. Thematic hearing. 153rd session, October 30, 2014; IACHR. *Construction of the transoceanic canal and its impact on human rights in Nicaragua*. Thematic hearing. 154th session, March 16, 2015.

that, within the framework of its mandate, the IAHRs will begin to tackle new issues and challenges—already being discussed in other forums—such as the responsibility of the corporations’ home States.

In particular, the issue of extraterritoriality has a history before the IACHR. At its 149th session (2013), a thematic hearing addressed the human rights of persons affected by mining company activities, and the need to consider the possible responsibility of home States.¹² Later, at the 153rd session (2014), one hearing addressed the responsibility of Canada for human rights violations committed by its mining companies in Latin America, as well as the inadequacy of dealing with this issue through voluntary principles derived from corporate social responsibility policies.¹³ Finally, at the latest session (154th session, in 2015), two hearings again underscored the need to consider the responsibility of corporations’ home States.¹⁴

Final Considerations

As explained above, the OAS has approached this issue at various levels, but not in the coordinated and integrated manner that is needed. Article 36 of the OAS Charter contains a special provision aimed at corporations, and it is essential for the organization to take measures to make this provision effective:

At DPLF and other civil society organizations, we are excited to see that these discussions have finally arrived before the IAHRs. Focusing on this issue and seeking effective ways to enforce the human rights of groups affected by corporations engaged in extracting natural resources is one of the main challenges of the 21st century.

Transnational enterprises and foreign private investment shall be subject to the legislation of the host countries and to the jurisdiction of their competent courts and to the international treaties and agreements to which said countries are parties, and should conform to the development policies of the recipient countries.

This provision shows that a normative framework exists,

and that for it to be effective, more robust and coordinated measures must be taken by OAS bodies. The special session of the Permanent Council in January 2015 was an important step. In addition, we hope that the creation of an Inter-American System for the Prevention of Social Conflicts,¹⁵ announced by recently elected Secretary-General Luis Almagro, will provide the opportunity to utilize and value the standards that have already been developed within the OAS, and that the actions taken will be consistent with what is being done at the inter-American level with respect to human rights. In this regard, it bears stressing that although prevention and dialogue are important, compliance with international human rights standards is as well.

At DPLF and other civil society organizations, we are excited to see that these discussions have finally arrived before the IAHRs. Focusing on this issue and seeking effective ways to enforce the human rights of groups affected by corporations engaged in extracting natural resources is one of the main challenges of the 21st century. We will be paying close attention to the OAS’s next steps in this area. ■

¹² IACHR. *Human Rights Situation of Persons Affected by Mining in the Americas and the Responsibility of Host States and Home States of Mining Companies*. Thematic hearing. 149th session, November 1, 2013.

¹³ IACHR. *Impact of Canadian Mining Companies on Human Rights in Latin America*. Thematic hearing. 153rd session, October 28, 2014.

¹⁴ IACHR. *Business, Human Rights, and Prior Consultation in the Americas*. Thematic hearing. 154th session, March 17, 2015; *Human Rights and Extractive Industries in Latin America*. Thematic hearing. 154th session, March 19, 2015.

¹⁵ On February 19, 2015, Luis Almagro, then a candidate for the position of OAS Secretary-General, held a meeting with representatives of civil society at which he explained his proposal to create an Inter-American System for the Prevention of Social Conflicts. For more background on this event, including the video of the meeting, see http://www.oas.org/es/centro_noticias/comunicado_prensa.asp?sCodigo=C-049/15



Please send comments and possible contributions for this publication to info@dplf.org.

DPLF Participates in the First Session of the IGWG on Transnational Corporations and Other Business Enterprises with Respect to Human Rights

By Katharine Valencia

DPLF Program Officer

In June 2014, the United Nations Human Rights Council approved Resolution 26/9, creating an open-ended intergovernmental working group (IGWG) to “elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”¹ DPLF attended the first session of the IGWG, which took place on July 6-10, 2015 in Geneva. The purpose of this meeting was to discuss the broad themes of a **potential binding treaty on business and human rights** by means of expert panels as well as oral and written interventions by States and civil society.

The first session focused on the relationship between the UN Guiding Principles on Business and Human Rights and a potential binding treaty, as well as the scope of such an instrument. **There was general consensus that the Guiding Principles remain an important source of law** and should continue to be implemented by States. A more contentious issue was the scope of the treaty. The Council debated whether the instrument should apply to transnational corporations (TNCs) as well as local and State-run enterprises. Some civil society actors noted it was essential to address all business enterprises, so that victims of corporate abuse could turn to a legal mechanism for redress regardless of the corporate form. To support their argument, an expert panelist highlighted that TNCs are adept at creating subsidiaries and structuring their operations to avoid legal liability. Thus, if the treaty is to be applied only to TNCs instead of all businesses, it will be easy for the former to avoid accountability. However, most participating States favored focusing exclusively on TNCs, arguing that the nature of such transnational entities often allows them to evade the jurisdiction of domestic courts, which is not the case for other types of businesses.

In contrast to the contentious debate about scope, there was general consensus on the question of which human rights should be encompassed by the treaty. Both civil society actors and State representatives agreed that the treaty should cover all human rights, including economic, social, and cultural rights, rather than just grave human rights abuses or crimes under international law.

DPLF had the opportunity to give an oral presentation on the extraterritorial obligations of States in the context of human rights violations committed by businesses. We discussed the findings from our report on the impact of Canadian mining in Latin America,² noting policies and conditions in home States that

are conducive to negative human rights impacts. These include: home State financial and political support, including by embassies and development agencies, for the TNCs domiciled in its territory, without requiring these corporations to comply with international human rights standards; undue influence by the home State in the domestic legislative processes of the host State; the shielding of home State companies from accountability through free trade agreements; and the persistence of inadequate legal frameworks in home States to prevent and punish human rights violations caused by TNCs abroad. DPLF noted that specific regulation of extraterritorial obligations is required to move forward on these issues. As such, we urged the IGWG to build on the international standards already developed by various thematic rapporteurs and UN committees with regard to these important State responsibilities in relation to TNCs and human rights.

Towards the end of the week there was a debate on the appropriate standard for corporate legal liability. **The discussion addressed whether treaty obligations should apply directly to businesses (not only via States), how to hold businesses accountable, and what standard of proof to apply.** Panelists discussed the variety of options available to treaty drafters, including the imposition of criminal, civil, and/or administrative responsibility for human rights violations by corporations, as well as whether the treaty should impose responsibility on natural persons. Several labor and human rights treaties, in addition to national legislation from specific countries, were raised as points of reference and possible models. Carlos López, expert panelist at the IGWG and a contributor to this edition of *Aportes*, proposed that the treaty require States parties to incorporate into their domestic legislation the criminal responsibility of legal and/or natural persons (depending on the legal system) for grave violations such as slavery, torture, and forced disappearance, when those acts are committed within or outside the territory of the State. Moreover, he noted that the instrument should be clear regarding the State obligation to impose civil and administrative sanctions for the human rights violations covered by other international treaties.

Despite the progress during the first IGWG session, the controversy regarding the scope of the treaty remains, and this could hinder further advances. Additionally, a wider variety of States should become involved in the process to ensure that the initiative can obtain broad support (the majority of State participants at the first session represented developing countries). In this sense, the absence of the United States and Canada, and the departure of the European Union representative on the second day of the IGWG, were notable. To facilitate robust debate, **civil society in all regions of the world should pressure their governments to participate in upcoming IGWG sessions.** Moreover, in the development of the agenda for the second session, and in the intervening consultations, it is fundamental that States take into account the comments of civil society, including their concerns about access to remedy and other rights of victims.

¹ Human Rights Council Resolution 26/9, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, A/HRC/RES/26/9, July 14, 2014.

² Working Group on Mining and Human Rights in Latin America. (2014). *The impact of Canadian Mining in Latin America and Canada's Responsibility*, available at http://dplf.org/sites/default/files/report_canadian_mining_executive_summary.pdf

Extraterritoriality and Human Rights

ESCR-Net
Daniel Cerqueira



Global Economy, Global Rights: UN Treaty Monitoring Bodies Increasingly Interpret Extraterritorial Obligations in Response to Global Business Activities

ESCR-Net

Corporate Accountability Working Group, International Network for Economic, Social and Cultural Rights¹

Various avenues for corporate accountability in the context of transnational corporate activities are developing at the international level. These include increasing implementation of the UN Guiding Principles on Business and Human Rights (Guiding Principles) and initiation of a process for the creation of a legally binding international treaty on corporate accountability. These are complementary processes, and states and human rights advocates should support both the strengthening of the Guiding Principles framework as well as the development of a strong and comprehensive treaty.

Presently, however, these two processes lack the efficacy to curb corporate human rights violations. While the advance towards a legally binding treaty is welcomed and much needed, the treaty is in the very early stages of development and is unlikely to be in effect for some years. For their part, the Guiding Principles do not fully incorporate or apply the current comprehensive body of international law to corporate activity, and furthermore, form a non-binding framework, without provision for stand-alone systems of remedy or accountability.

Fortunately, there are other approaches being used in an effort to strengthen accountability for transnational corporations (TNCs) under the international human rights framework. One such method focuses on states' extraterritorial obligations (ETOs) under international treaties. Advocates are increasingly referring to ETOs to hold states accountable for their failures to regulate corporate activity overseas, and for failure to provide access to justice, including accountability and remedies, in the event of violations connected to such corporate activity. Furthermore, UN mechanisms, including

treaty bodies and special procedures such as special rapporteurs and independent experts appointed by the Human Rights Council, have increasingly applied ETOs in their human rights monitoring and enforcement activities. Several General Comments and General Recommendations—which form an authoritative interpretation by treaty bodies for states to guide how best to implement international covenants and conventions—now contain language related to ETOs.

The recent publication entitled *Global Economy, Global Rights: A practitioners' guide for interpreting human rights obligations in the global economy*² by a group of ESCR-Net members (Center for International Environmental Law (CIEL), Global Initiative for Economic, Social and Cultural Rights (GI-ESCR), Inclusive Development International, and Justiça Global) examines the application of ETOs by UN mechanisms. The publication is designed to support UN special rapporteurs and independent experts in continuing to apply ETO analysis within their respective mandates, while also serving as a useful resource for all human rights practitioners working towards greater application of ETOs.

Extraterritorial Human Rights Obligations

Extraterritorial human rights obligations find their foundation in a number of international documents, such as the United Nations Charter³ and the Universal Declaration of Human Rights.⁴ They are legally codified in several human rights

¹ This piece is based on a publication produced by a group of members in the Corporate Accountability Working Group of the International Network for Economic, Social and Cultural Rights (ESCR-Net) entitled *Global Economy, Global Rights: A practitioners' guide for interpreting human rights obligations in the global economy*. The drafting of this synopsis was led by members of ESCR-Net, principally Bret Thiele of Global Initiative for Economic, Social and Cultural Rights (GI-ESCR), with review and contributions by Alexandra Montgomery (Justiça Global). Susie Talbot, Chris Grove, and Dominic Renfrey of ESCR-Net also contributed to the final compilation.

² ESCR-Net, *Global Economy, Global Rights: A practitioners' guide for interpreting human rights obligations in the global economy*, 2014, available at www.escr-net.org/sites/default/files/e7f67ea7483fd5bad2dd4758b597d8ff/Global%20Economy%20Global%20Rights.pdf

³ Article 56 of the Charter of the United Nations, "All Members pledge themselves to take joint and separate action in cooperation with the Organization..." to achieve purposes set out in article 55 of the Charter. Such purposes include: "...universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

⁴ Article 28 of the Charter of the United Nations reads: "Everyone is entitled to a social and international order in which the rights and freedoms in this Declaration can be fully realised."

treaties, as discussed below.

ETOs relate to three types of state human rights obligations: the obligation to respect human rights (under which the state refrains from violating rights); the obligation to protect human rights (under which the state ensures that non-state actors, including business entities, do not violate human rights), and the obligation to fulfil human rights (under which states adopt a range of measures to increasingly ensure the full enjoyment of human rights).

The obligation to protect human rights has been used most often in the context of corporate accountability, although the obligations to respect and to fulfill are also relevant. For example, the obligation to respect is relevant to state-owned enterprises. Regarding the obligation to fulfill, as business enterprises are legal entities subject to an incorporation and regulation framework managed by the state, states should take constructive steps to apply or amend, as relevant, this overarching framework to ensure that business enterprise activities are in harmony with the state's human rights obligations, including its positive obligations to further human rights. This might entail positive measures regarding public expenditure priorities, the corporate capture of politics and law-making, taxation developments, education initiatives, and so on, to address existing systemic flaws conducive to corporate human rights violations.

The Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights⁵ were adopted in 2011 by leading international human rights experts and provide a concise restatement of existing customary and conventional international law in the area of ETOs. The Principles confirm that

[a]ll States have obligations to respect, protect and fulfill human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially⁶ and that “States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially. The responsibility of States is engaged where such nullification or impairment is a foreseeable result of their conduct. Uncertainty about potential impacts does not constitute justification for such conduct.”⁷

In the event that a state fails to ensure economic, social, and cultural rights in accordance with its ETOs, access to justice, including accountability mechanisms and effective remedies, must be provided.

Principle 8 also recognizes that states' obligations extend to both “the acts and omissions of a State, within or beyond its territory.”⁸

Furthermore, Principle 24 makes clear that the extraterritorial obligation to protect includes the requirement that

[a]ll States must take necessary measures to ensure that non-State actors which they are in a position to regulate, as set out in Principle 25, such as private individuals and organisations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights.⁹

In the event that a state fails to ensure economic, social, and cultural rights in accordance with its ETOs, access to justice, including accountability mechanisms and effective remedies, must be provided according to Principle 37.

UN Treaty Bodies: Application of ETO Analysis in Monitoring and Enforcement

Global Economy, Global Rights documents trends in the ways treaty bodies apply ETOs in their analyses, including detailing grounds upon which states have been held responsible for companies' conduct, the types of companies that trigger ETOs, and the types of recommendations treaty bodies have made to states concerning their ETOs.¹⁰

ETOs related to corporate activities have been applied under the International Covenant on Economic, Social, and Cultural Rights (ICESCR); the International Covenant on Civil and Political Rights (ICCPR); the Convention on the Elimination of All Forms of Discrimination Against Women;

⁵ Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights adopted on September 28, 2011, available at <http://www.etoconsortium.org/en/library/maastricht-principles/>

⁶ Ibid. at Principle 3.

⁷ Ibid. at Principle 13.

⁸ Ibid. at Principle 8.

⁹ Ibid. at Principle 24.

¹⁰ See also, Global Initiative for Economic, Social and Cultural Rights. (2015) *Working Paper – Human Rights Law Sources: UN Pronouncements on Extra-Territorial Obligations*, available at <http://globalinitiative-escr.org/advocacy/extra-territorial-obligations-consortium/>

the International Convention on the Elimination of Racial Discrimination; and the Convention on the Rights of the Child. For instance, in 2014 the Committee on Economic, Social, and Cultural Rights (CESCR), which monitors compliance with the ICESCR, held China to account regarding "...the lack of adequate and effective measures adopted by the State party to ensure that Chinese companies, both State-owned and private, respect economic, social and cultural rights, including when operating abroad."¹¹ Regarding business and economic, social, and cultural rights, the CESCR recommended the establishment of a clear regulatory framework to ensure that corporations' activities promote and do not negatively affect the enjoyment of human rights, and the adoption of appropriate legislative and administrative measures to ensure legal liability of corporations regarding violations of human rights, including abroad.¹² Regarding access to justice, the CESCR also called on China to ensure the availability of an accessible complaint mechanism if violations of economic, social, and cultural rights occur in countries abroad in association with the operations of Chinese companies.¹³

The Human Rights Committee, which monitors compliance with the ICCPR, applied an ETO analysis during the periodic review of Germany in 2012. Similar to its obligations under the ICESCR, under the ICCPR Germany must regulate corporate activities abroad to ensure human rights are not violated, and must provide access to justice, accountability, and remedies in the event of such violations. Specifically, the Committee encouraged Germany "to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encouraged to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad."¹⁴ Further pronouncements have been made in more recent months by other treaty bodies, as outlined again in a recent Working Paper.¹⁵

Conclusion

Global Economy, Global Rights recognizes that

UN treaty bodies have built a rich and solid body of concluding observations and General Comments which serve to articulate the scope of ETO standards and that they have dealt with many key dimensions of ETOs, demonstrating how the obligations to respect, protect and fulfil can be applied extraterritorially. In so doing, UN treaty bodies apply international law in ways that illuminate the contours of States' obligations, as well as articulate how they can regulate corporations, in response to a changing legal and economic global environment.¹⁶

Notwithstanding these successes, more needs to be done. As mentioned above, the relationship between states and corporate activity needs to be a consistent part of ETO and corporate accountability analysis. As the Concluding Observations on China under the ICESCR demonstrate, the use of human rights impact assessments is now recommended for planning corporate activities abroad. It needs to be made clear, however, that such assessments must apply to both negative and positive obligations—to refrain from human rights violations as well as to further the enjoyment of human rights abroad.

Indeed, in its conclusions, *Global Economy, Global Rights* calls for greater clarity regarding what is required of states and corporations to meet not only their obligation of conduct, but also their obligation of result.

Global Economy, Global Rights also calls for more detailed treaty body Concluding Observations that specifically address the issue of states' ETOs, including outlining exactly what is required of states, and draw on useful resources such as the Maastricht Principles.

These UN pronouncements did not come out of a vacuum, but are the result of strong civil society advocacy, including through the parallel reporting process regarding states' compliance with their treaty obligations. Civil society needs to continue submitting information concerning extraterritorial violations and advocating for the reference and clarification of ETOs, so that such obligations are met and become entrenched as a core part of human rights monitoring and enforcement at the international, and ultimately national, levels. By doing so, all of us will move closer to a global economy grounded in global rights. ■

¹¹ Committee on Economic, Social and Cultural Rights, Concluding Observations: China, UN Doc. E/C.12/CHN/CO/2 (May 23, 2014) at para. 13.

¹² *Ibid.* at para. 13(a) and (b).

¹³ *Ibid.* at para. 12.

¹⁴ Human Rights Committee, Concluding Observations: Germany, UN Doc. CCPR/C/DEU/CO/6 (October 31, 2012) at para. 16.

¹⁵ Global Initiative for Economic, Social and Cultural Rights. (2015) *Working Paper—Human Rights Law Sources: UN Pronouncements on Extra-Territorial Obligations*, available at <http://globalinitiative-escr.org/advocacy/extra-territorial-obligations-consortium/>

¹⁶ ESCR-Net. (2014). *Global Economy, Global Rights: A practitioners' guide for interpreting human rights obligations in the global economy*, p. 41.



OAS Permanent Council Holds Special Session on the Promotion and Protection of Human Rights in Business

On January 29, 2015, the Committee on Juridical and Political Affairs of the Permanent Council of the OAS held its **first special session on business and human rights**. This session was convened pursuant to Resolution AG/RES. 2840 (XLIV-O/14), adopted at the previous OAS General Assembly on June 4, 2014.

Various OAS authorities took part in the meeting. Most notably, Fabián Novak, Chair of the **Inter-American Juridical Committee**, presented the Committee's report on the social responsibility of corporations in the area of human rights. In addition, the Commissioner in charge of the **IACHR's Economic, Social, and Cultural Rights Unit**, Paulo Vannuchi, underscored the work the Unit has already done on this issue and the importance of creating the Rapporteurship for Economic, Social, and Cultural Rights.

Alexandra Guáqueta, then a member of the UN Working Group on Business and Human Rights, also took part in the session. She explained the relevance and scope of the United Nations Guiding Principles on Business and Human Rights, and recognized the efforts of the OAS and its member States in addressing this issue. The meeting also included presentations by a representative of civil society (CEDHA) and a corporation (REPSOL), as well as verbal reports by delegations of the member States on the latest legislative advances and public policies related to the issue.

The Attribution of Extraterritorial Liability for the Acts of Private Parties in the Inter-American System: Contributions to the Debate on Corporations and Human Rights

Daniel Cerqueira

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Introduction

In recent decades, supranational human rights bodies have developed a number of standards on the attribution of State responsibility for the acts of private parties. Although most of those standards are related to violations perpetrated by individuals operating as part of a para-State organization (e.g., paramilitary groups), there have been recent developments regarding the conduct of other categories of individuals, including corporations, that benefit from State acts or omissions. In the absence of an international treaty specifically designed to regulate violations committed by corporations, it has been the international human rights bodies that have interpreted the instruments currently in force with respect to the obligations of host States—and, to a lesser extent, of home States—for the activities of corporations.

To date, the most tangible outcome of the discussions in inter-governmental forums on corporations and human rights is the Guiding Principles on Business and Human Rights, adopted by the UN Human Rights Council in 2011. In June 2014, an open-ended working group was created within the Council, the outcome of which is yet to be seen. Its mandate is to draft a binding treaty on “human rights and transnational corporations and other business enterprises.” In spite of these recent developments in UN political bodies, thematic rapporteurships and human rights treaty bodies are the ones that have contributed more to the debate on corporations and human rights. One of the most important aspects of that debate is the extraterritorial liability of the home States of corporations that commit violations, whether directly or through corporate policies that acquiesce in the violations committed by their subsidiaries in third countries.

In contrast to the progress made by the UN Human Rights Council, the debates in the Permanent Council and other political bodies of the Organization of American States (OAS) are still at an early stage. In addition, the bodies of the Inter-American Human Rights System (IAHRS) have not issued specific decisions on the extraterritorial liability for

human rights violations arising from the acts of corporations. Accordingly, this essay seeks to examine the aspects of the normative and jurisprudential framework of the IAHRS that are most relevant to the analysis of the international responsibility of the home States of corporations that commit human rights violations in third countries.

Obligation to Respect and Guarantee Human Rights as it Pertains to Acts of Private Parties Under International Human Rights Law

As a general rule, the provisions of the inter-American instruments regulating the obligations to respect and guarantee¹ human rights are worded similarly to those of other regional systems and the universal system. Like the UN’s Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man does not contain a general clause on the obligation to respect and guarantee rights. Such general clauses emerged as a trend in human rights instruments especially in the 1960s. So, while the International Covenant on Civil and Political Rights (1966) and the American Convention (1969) contain introductory provisions with specific language about those obligations, the first article of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) is much more limited, alluding only to the duty of respect and omitting the word “guarantee.”

Despite the language in the international instruments, the approach of international human rights bodies to State obligations has been based on three main elements: respect, protect, and guarantee. The obligation to respect rights goes back to the liberal constitutionalism of the first half of the 19th century, whereby governments were required to abstain from violating the fundamental freedoms of citizens. Gradually,

¹ For the purposes of this essay, it is not necessary to provide an exhaustive definition of the obligation to guarantee rights. Suffice it to say that it involves the State duty to prevent, investigate, and punish human rights violations, as well as to provide the appropriate reparation mechanisms.

that abstention-based paradigm was supplemented by the obligation to protect and guarantee civil and political rights, as well as economic, social, and cultural rights. The paradigm later expanded to include the State obligation to take positive legislative, judicial, or other measures to give effect to human rights.²

In the constitutional sphere, the doctrine of the *Drittwirkung der Grundrechte* came to support the duty to protect and guarantee fundamental rights, not only in relationships between States and individuals, but also among private parties. Developed in the late 1950s by the German Federal Constitutional Court, the doctrine would influence the judicial branches of various States founded on the constitutional rule of law. In the international sphere, while the European Court of Human Rights (ECHR) tacitly began to assimilate the doctrine of the *Drittwirkung* in the 1980s,³ other supranational bodies would use a very similar rationale decades later.⁴

In the IAHRs, the Inter-American Commission on Human Rights (IACHR) has recognized that the duty to investigate human rights violations by private parties arises from both the American Convention⁵ and the American Declaration.⁶ The *erga omnes* nature of the obligations to protect and guarantee human rights has been reflected in the case law of the Inter-American Court since its earliest decisions,⁷ and has been expanded in the judgement in *Blake v. Guatemala*.⁸ In Advisory Opinion

States parties to the IAHRs are obliged to take positive measures to guarantee human rights, including in relation to their actual or potential violation by private parties.

No. 18/03, on the legal status and rights of migrants,⁹ the Inter-American Court referred expressly to the so-called “horizontal effect of human rights” in evaluating the obligation of States to guarantee the right to equality and non-discrimination in the relationship between employers and migrant workers. It follows that States parties to the IAHRs are obliged to take positive measures to guarantee human rights, including in relation to their actual or potential violation by private parties.¹⁰

Extraterritorial Liability in IAHRs Case Law

Through its essential function of monitoring human rights, the IACHR has made reference since the 1980s to violations by a particular State in the territory of others. In its 1985 *Report on the Situation of Human Rights in Chile*, for example, the IACHR addressed the murder of two high-ranking officials of Salvador Allende’s government by National Intelligence Bureau (*Dirección de Inteligencia Nacional*, DINA) agents in the United States and Argentina.¹¹ Similarly, the IACHR noted the creation by Surinamese State agents of a climate of threats and harassment against Surinamese citizens in the Netherlands.¹²

Within the framework of the petition and case system, there are two scenarios in which the IACHR has addressed State responsibility for acts committed abroad: (1) when the

² An indication of this trend in positive international law can be found in the African Charter on Human and Peoples’ Rights (1980), Article 1 of which specifies that the Member States “shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.”

³ See, e.g., ECHR. *Young, James and Webster v. The United Kingdom*, 13 August 1981; *X and Y v. Netherlands*, 26 March 1985. For a detailed explanation of the doctrine of the *Drittwirkung* and its incorporation into the case law of the ECHR, see Eric Engle, “Third Party Effect of Fundamental Rights (*Drittwirkung*),” *Hanse Law Review* 5, (2009): 165-73, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1481552.

⁴ See, e.g., UN. Human Rights Committee. (1999). *William Eduardo Delgado Páez v. Colombia*, CCPR/C/39/D/195/1985, July 12, para. 5.5 (for failing to meet its obligation to prevent murders in cases where there is sufficient evidence of risk to life); CEDAW. (2005). *Ms. A.T. v. Hungary*, January 26, para. 9.3 (for failing to meet its obligation to guarantee the appropriate structures and legal protection to prevent cases of domestic violence against women).

⁵ IACHR. *Simone André Diniz v. Brazil*. Case No. 12.001. Merits. Report No. 66/06, October 21, 2006, para. 101.

⁶ IACHR. *Jessica Lenahan (González) et al. v. United States*. Case No. 12.626. Merits. Report No. 80/11, July 21, 2011, para. 130 (establishing that the States can be held responsible for violations of their duty to investigate and punish cases of domestic violence under the American Declaration).

⁷ I/A Court H.R. *Case of Velásquez Rodríguez v. Honduras*, July 26, 1988, para. 176.

⁸ I/A Court H.R. *Case of Blake v. Guatemala*, July 2, 1996.

⁹ I/A Court H.R. *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03, September 17, 2003, paras. 140, 147 and 150.

¹⁰ For an analysis of the evolution of the case law of the Inter-American Court with respect to the State obligation to guarantee human rights in relationships among private parties, see Javier Mijangos y González, Indret Revista para el Análisis del Derecho, *The doctrine of the Drittwirkung der Grundrechte in the case law of the Inter-American Court of Human Rights*. Barcelona, January 2008, available at http://www.indret.com/pdf/496_en.pdf.

¹¹ IACHR. Report on the Situation of Human Rights in Chile. Chapter III, The Right to Life, subsection C. Executions Ordered by War-Time Military Courts. OEA/Ser.L/V/II.77, rev.1, May 8, 1985.

¹² IACHR. Second Report on the Situation of Human Rights in Suriname. Chapter V, Freedom of Movement and Residence, subsection E. Special Considerations: Terrorist Attacks on the Surinamese Exile Community, OEA/Ser.L/V/II.66.Doc. 21, rev.1, October 2, 1985.

acts or omissions have an impact outside the territory of the respondent State;¹³ or (2) when the person or alleged violator of an international obligation is under the authority or effective control of the respondent State.¹⁴ Accordingly, the IACHR has established that both the American Declaration¹⁵ and the American Convention¹⁶ have extraterritorial application with respect to acts of military occupation, military action, or detention.

Although the OAS Charter establishes that transnational corporations are subject to the laws and jurisdiction of the courts of the countries in which they operate,¹⁷ no decisions have been issued within the petition and case system in which IAHR bodies have established criteria for attributing State responsibility for the conduct of corporations within the borders of third countries. Under current inter-American standards, the acts of corporations abroad are not considered directly attributable to their State of origin, unless those companies perform government functions with the support and cooperation of the State.¹⁸ In spite of that gap, the standards already developed on the obligation to respect, protect, and guarantee rights in relation to the acts of private parties, in addition to more specific decisions on extraterritorial liability issued by other international legal bodies, make it possible to rule out a merely territorial definition of jurisdiction.

Some international courts have allowed for exceptions to the rule that private entities are distinct from the State in cases where a government establishes a policy of absolute control

There are several precedents in the IAHRs that, although they refer to support for or acquiescence to violations committed within the jurisdiction of the respondent State, could be applied to violations perpetrated in the territory of other countries when the support or acquiescence comes from the respondent State.

over an industry,¹⁹ or when the corporation exercises official powers in conducting the activity for which it has been awarded a concession.²⁰ In addition, there seems to be some leeway in international law for the attribution of responsibility that requires more in-depth analysis of the concepts of: (i) support, acquiescence, or tolerance of the acts of private parties; and (ii) the link between the international violation and the authority of the respondent State.²¹ With respect to the first element, there are several precedents in the IAHRs that, although they refer to support for or acquiescence to violations committed within the jurisdiction of the respondent State,²² could be applied to violations perpetrated in the territory of other countries when the support or acquiescence comes from the respondent State. As for the nexus between the acts of private parties and the home State, the IAHRs could find support in the progress made in the European system, where the ECHR has held that the tolerance by a State's authorities of private conduct that violates the rights of third parties in another country's territory could give rise to responsibility of the home State.²³

¹³ See IACHR. (1998). *Saldaño v. Argentina*. Report No. 38/99, paras. 15-20 (supporting the assertions made in decisions of the European Court and Commission); IACHR. *Franklin Guillermo Aisalla Molina (Ecuador) v. Colombia*. Inter-State Petition PI-02. Report on Admissibility No. 112/10, October 21, 2010 ("the States not only may be held internationally responsible for the acts and omissions imputable to them within their territory ... human rights are inherent in all human beings and are not based on their citizenship or location ... each American State is obligated therefore to respect the rights of all persons within its territory and of those present in the territory of another state but subject to the control of its agents.")

¹⁴ See IACHR. (1998). *Saldaño v. Argentina*. Report No. 38/99, paras. 17-20.

¹⁵ IACHR. *Armando Alejandro Jr., et al. v. Cuba*. Case No. 11.589. Report No. 86/99, September 29, 1999; IACHR. Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba), March 12, 2002.

¹⁶ IACHR. *Franklin Guillermo Aisalla Molina (Ecuador) v. Colombia*. Inter-State Petition PI-02. Report on Admissibility No. 112/10, October 21, 2010.

¹⁷ Article 36 of the OAS Charter establishes that "Transnational enterprises and foreign private investment shall be subject to the legislation of the host countries and to the jurisdiction of their competent courts and to the international treaties and agreements to which said countries are parties, and should conform to the development policies of the recipient countries."

¹⁸ James Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (Cambridge: Cambridge University Press 2002), p. 112.

¹⁹ *Philips Petroleum Co. Iran v. Iran, et al.* Iran-U.S. C.T.R. 1989, paras. 91-100 (explaining that the government of Iran assumed complete control of the petroleum industry, including a policy whereby the National Iranian Oil Company would sign petroleum contracts on the government's behalf).

²⁰ I/A Court H.R. *Case of Ximenes Lopes v. Brazil*. Judgment of July 4, 2006. Series C No. 149.

²¹ IACHR. Report No. 39/00, Case 10.586, et al. *Extrajudicial Executions, Guatemala*, April 13, 2000, para. 586. ("The judiciary proved unwilling and unable to discharge its role in identifying, prosecuting and punishing those responsible. Where such a practice, attributable to the State or with respect to which it acquiesced, can be established, and the particular case can be linked to that practice, that linkage further defines the nature and scope of the claims raised, and aids in establishing the veracity of the facts alleged"); I/A Court H.R. *Case of the Pueblo Bello Massacre v. Colombia*. Judgment of January 31, 2006. Series C No. 140, para. 126.

²² I/A Court H.R. *Case of Ríos, et al. v. Venezuela*, January 28, 2009.

²³ ECHR. *Cyprus v. Turkey*, 10 May, 2001, para. 81.

Final Considerations

Although the international framework for the protection of human rights was designed in a historical context in which corporations did not play a leading role in human rights governance, we can now say that countless human rights violations are committed thanks to the direct acts or omissions of transnational corporations. The possibilities for human rights violations in the corporate sphere are probably more varied and potentially as serious as the ones that tend to be perpetrated by State agents. Under these conditions, international human rights bodies have sought to develop new interpretive guidelines from the instruments currently in force with a view to evaluating new situations in which the role of corporations and their home countries is key in addressing the complexity of the violations committed by corporations.

The way in which IAHR bodies have approached the content of the obligations to protect and guarantee human rights, and certain decisions that acknowledge exceptions to the merely territorial definition of jurisdiction, provide some clear standards that could be used in the analysis of violations committed by corporations that are encouraged by the policies, practices, or omissions of their home countries. But in order for that normative and jurisprudential framework to provide effective responses to the increasingly common phenomenon of violations by transnational corporations, it is crucial for the IACHR to prioritize the processing of individual petitions that allege extraterritorial liability, and to address the issue by means of all the tools at its disposal (protection, promotion, and monitoring). ■

UN Human Rights Council Urges the Creation of a Binding Treaty on Business and Human Rights

On June 25, 2014, the UN Human Rights Council passed Resolution A/HRC/26/L.22/Rev.1 on the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights.

The resolution was proposed by Ecuador and South Africa, and was signed by other countries. Even though the United States and the European Union strongly opposed it, the resolution received favorable votes from 20 member States, while 13 abstained and 14 voted against it.

The resolution creates an inter-governmental working group to draft a legally binding human rights treaty applicable to transnational corporations and other companies, and establishes that its first working session must be held during 2015. That session took place in July of this year.

The adoption of a binding treaty is supported by, among others, the more than 600 non-governmental organizations that make up the Treaty Alliance initiative. For them, a binding treaty would be complementary to the implementation of the Guiding Principles on Business and Human Rights, and would make up for the existing imbalance in international law, given that up to now only corporations have had the ability to sue States internationally,

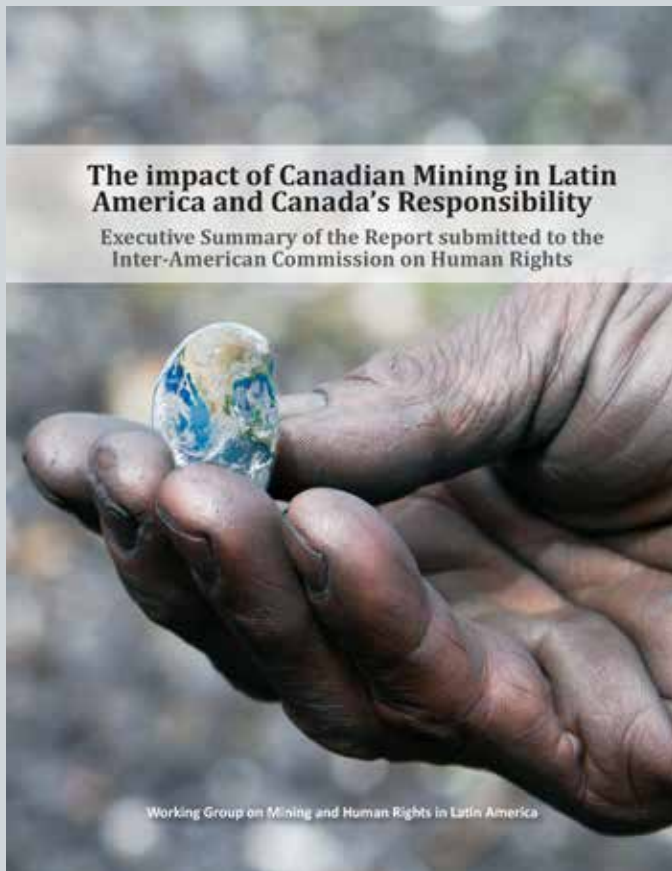


within the framework of bilateral investment treaties or free trade agreements.¹

The next few years will be decisive in the efforts to address the issue of human rights and business, including the adoption of a binding treaty as one possible way to bolster initiatives to hold corporations accountable.

¹ See, <http://www.treatymovement.com/>

DPLF Urges Analysis of the Responsibility of Home States of Extractive Enterprises in Latin America



One of the discussions that DPLF has been fostering in recent years concerns **the responsibility of the home States of corporations**, especially those engaged in the extraction of natural resources in Latin America.

In October 2013, in conjunction with organizations from the region, DPLF requested a hearing before the IACHR on **the impact of natural resource extraction in Latin America and the responsibility of host States and corporations' home States**. Among other recommendations, the petitioners asked the IACHR to examine the effects of extractive industries on human rights, including the responsibility of home States. They also asked the IACHR to urge home States that are OAS members to create and implement effective mechanisms to provide access to justice for victims affected by extractive activities. The press release issued by the IACHR after the hearings identified one of the new issues addressed in the 149th session as: "the human rights effects of mining and the responsibility of the States, not only of the countries where the mines are located but also the countries in which the transnational companies are based."

Subsequently, in April 2014, a report entitled **The Impact of Canadian Mining in Latin America and Canada's**

Responsibility was published. This document was submitted to the Canadian foreign minister and to the Canadian ambassadors in the host countries of the 22 mining projects examined by DPLF and the coalition of organizations involved in the research project (Mexico, Guatemala, Honduras, El Salvador, Colombia, Chile, Argentina, and Peru). As a follow-up, in November 2014 a public hearing was held before the IACHR on **The Impact of Canadian Mining Companies on Human Rights in Latin America**. This hearing was requested by the organizations that comprise the Canadian Network on Corporate Accountability. At it, members of Mining Watch Canada, the Justice and Corporate Accountability Project, and the Halifax Initiative discussed the need for Canada to take specific steps to address the human rights violations stemming from the activities of Canadian companies in Latin America. The petitioners recommended, among other things, the creation of objective, impartial, and effective measures to monitor and investigate allegations of human rights violations by mining companies, and to include international human rights standards in the regulation of the public and private credit and investment agencies that finance extractive activities. The press release issued by the IACHR after these sessions calls upon States to take "measures to prevent the multiple human rights violations that can result from the implementation of development projects, both in countries in which the projects are located as well as in the corporations' home countries, such as Canada."

During the 154th session of the IACHR, this issue was again addressed at the hearing on **Corporations, Human Rights, and Prior Consultation in Latin America**, in which DPLF was a co-petitioner. One of the issues broached was the extraterritorial responsibility of States, and in particular Canada's responsibility arising from the actions of its mining companies in the region. In the press release issued at the end of this session, IACHR stressed that "it is essential that any development project is carried out in keeping with the human rights standards of the inter-American system."

This issue has also been discussed extensively during various consultations organized by the IACHR's Economic, Social and Cultural Rights Unit and at the informal meetings sponsored by the IACHR's Office of the Rapporteur on the Rights of Indigenous Peoples. We anticipate that the next report of this Rapporteurship on **Violations of the Rights of Indigenous Peoples and Persons of African Descent in the Context of Extractive and Tourism Projects** will address this issue and bring the IAHR up to date on the discussion.

An artistic illustration featuring two hands, one from the left and one from the right, reaching towards each other to exchange a white envelope. The background is a textured blue sea with numerous white birds in flight. A green landmass is visible in the upper right corner, and a sandy beach with white clouds is at the bottom. The overall style is painterly and expressive.

Foreign Investment and its Impact in Latin America

Shin Imai and Natalie Bolton

Salvador Herencia Carrasco

Paulina Garzón

The Canadian Government Does Little to Curb Problems with Canadian Mining Companies in Latin America

Shin Imai and Natalie Bolton

Director, Justice and Corporate Accountability Project
Law student, Osgoode Hall Law School

Canada is the most important center in the world for financing the mining industry. From 2008–09, for example, stock exchanges in Canada handled over 70 per cent of the global equity financing for the industry.¹ Canadian extractive companies have an extensive presence in Latin America, but the industry is plagued by allegations of abuses associated with their projects, including concerns related to environmental impacts, displacement of communities, and social unrest. These concerns were raised with the Inter-American Commission on Human Rights (IACHR) in October 2013 by the Working Group on Mining and Human Rights in Latin America, a group that included a number of civil society organizations from Latin America as well as the Due Process of Law Foundation in Washington. The Working Group profiled 22 case studies involving conflicts between communities and Canadian mining companies.²

A year later, in October 2014, 29 Canadian civil society organizations under the umbrella of the Canadian Network on Corporate Accountability (CNCA) appeared at the IACHR to follow up on the issue. The CNCA urged the government of Canada to develop and implement a binding corporate accountability framework to ensure Canadian companies and Canadian state actors—including embassies and the government-controlled corporations that provide financial support to mining companies—remain accountable and respectful of human rights abroad.³

The hearing opened with Jen Moore of MiningWatch Canada describing the relationship of the Canadian embassy to Blackfire Resources, a Canadian company that ran a barite mine in Chiapas, Mexico. The case illustrates much of what is wrong with Canada's approach to Canadian companies abroad: failure to take steps to ensure corporate accountability while pursuing aggressive support for such companies irrespective of their human rights record.⁴ Ms. Moore was followed by Shin Imai of the Justice and Corporate Accountability Project, who criticized Canada's reliance on voluntary corporate standards to guide Canadian company conduct abroad. The third speaker was Matt Eisenbrandt of the Canadian Centre for International Justice, one of the lawyers who is suing Tahoe Resources in Canada on behalf of six Guatemalan *campesinos* shot by Tahoe security guards.

Overarching Context for Action

There are a number of problems plaguing the extractive resource sector. As noted in the report produced by the Working Group on Mining and Human Rights in Latin America, the activities of Canadian mining companies engaged in large-scale extractive projects prompt grave concerns relating to issues of environmental degradation, adverse health implications, forced displacement of communities, economic impacts on local communities, and improper acquisition and expropriation of lands.⁵ These impacts have led to significant community disturbances and social unrest—reactions that are met with an increased police and security presence in the community—and threats of force or violence against individuals who protest the mining operations.⁶ For example, at the El Dorado mining site of the Vancouver-based Pacific Rim Mining company in El Salvador—now owned by the Canadian-Australian company OceanaGold—eight members of the Asociación Amigos de

¹ Natural Resources Canada. (2014, November 18). *Backgrounder, Extractive Industries: The Canadian Advantage at Home and Abroad*, available at http://news.gc.ca/web/article-en.do?nid=905749&_ga=1.69454356.520528376.1413821670

² Working Group on Mining and Human Rights in Latin America. (2014). *The impact of Canadian Mining in Latin America and Canada's Responsibility - Executive Summary*, available at <http://www.dplf.org/en/resources/impact-canadian-mining-latin-america-and-canadas-responsibility-executive-summary>

³ Canadian Network on Corporate Accountability, *Human Rights, Indigenous Rights and Canada's Extra-territorial Responsibility*, 2014, available at http://www.miningwatch.ca/sites/www.miningwatch.ca/files/canada_mining_cidh_oct_28_2014_final.pdf

⁴ This case is described in greater detail in another article in this volume.

⁵ Working Group on Mining and Human Rights in Latin America. (2014). *El impacto de la minería canadiense en América Latina y la responsabilidad de Canadá*.

⁶ *Ibid.*

San Isidro Cabañas who opposed the mining activities on the grounds of human rights violations were killed, while two other protestors were injured.⁷

Despite these concerns, the Canadian government has upheld policies that contribute to—and effectively exacerbate—the adverse impacts of mining activities on communities abroad. The government of Canada uses a policy of “economic diplomacy” to engage diplomatic staff and trade commissioners in advocacy and lobbying efforts for Canadian companies abroad. As in the case of Blackfire Resources, where the Canadian government provided unwavering support for the mining operations despite local resistance, the government provided Excellon Resources—a Toronto-based company operating the La Platosa mine in Ejido La Sierrita, Mexico—considerable support as the company actively sought to avoid remedying human rights complaints against it regarding land use violations and labor rights violations in 2012.⁸ Despite having knowledge of these abuses, the Canadian embassy and trade commissioners still provided strategic information to Excellon regarding conflicts in the local community, and successfully lobbied the Mexican government to evict peaceful protesters from the mining site.

Canada’s Response and the Concerns of the Commissioners

At the October hearing at the IACHR, Canada responded to the submissions of the Canadian petitioners by reiterating that voluntary corporate social responsibility (CSR) standards were sufficient, but admitted that these standards were unenforceable and carried no legal weight: “It remains Canada’s position that the voluntary international CSR guidelines, standards and principles that we officially endorse do not establish a legal basis for punitive measures.”⁹

Following the presentations, commissioners expressed concern at the government’s stance on its regulatory responsibilities for Canadian mining companies abroad.¹⁰

The Canadian government has upheld policies that contribute to—and effectively exacerbate—the adverse impacts of mining activities on communities abroad.

Below, we set out three of the questions posed. While Canada declined to respond to the commissioners at the hearing, we are able to provide the answers to the questions.

First, while Canada stated that it “resolutely” promoted voluntary CSR, Commissioner Rose-Marie Belle Antoine was troubled by the lack of information, and asked, “Do you have a monitoring mechanism ... or is it just a nice policy that you have laid out?”

The answer to this question is quite simple. Neither the industry nor government has any data on the extent of conflicts between Canadian companies and local communities. To fill this void, the McGill Research Group Investigating Canadian Mining in Latin America (MICLA) began a list that shows 85 conflicts involving Canadian mining companies in Latin America and the Caribbean alone.¹¹ Students at Osgoode Hall Law School have begun to do a count and so far have identified approximately 50 deaths and over 300 injuries associated with Canadian projects in Latin America and the Caribbean.

Second, Commission Secretary Emilio Álvarez Icaza pointed out that Canada’s presentation focused on Canadian companies, but did not mention guidelines for Canada’s own involvement in promoting mining. Embassies were part of government, he pointed out, and he wondered whether there were any guidelines for them when faced with allegations of human rights abuses.

The answer to this question is found in our recounting of the Blackfire case: there is no discernable policy on what embassies are supposed to do when they are made aware of human rights abuses, and in fact, there does not seem to be any line that delineates when embassy support is supposed to stop. By way of contrast, officials of United States embassies are guided by an explicit policy for supporting human rights defenders.¹²

⁷ Ibid.

⁸ United Steel Workers and MiningWatch Canada. (February 25, 2015), *Government Documents Reveal Canadian Embassy Backed Mining Abuses in Mexico*, available at <http://www.miningwatch.ca/news/governmentdocuments-reveal-canadian-embassy-backed-mining-abuses-mexico>

⁹ Submissions of Canada to the Thematic Hearing for 153rd Period of Sessions Inter-American Commission on Human Rights, October 28, 2014, Comisión Interamericana de Derechos Humanos, *Canadá: Impacto de empresas mineras canadienses en A. Latina*, video available at <https://www.youtube.com/watch?v=OWYue8FP9ZY>

¹⁰ Ibid.

¹¹ See, <http://micla.ca/>

¹² The US policy states: Because human rights defenders seek to hold their governments accountable to protect universally recognized human rights, defenders are often harassed, detained, interrogated, imprisoned,

Third, commissioners wondered what Canada could do to ensure adherence to the CSR standards. The response to this question can be found in two announcements made by the government of Canada about a month after the hearings. The announcements, taken together, show that Canada has not changed its reliance on voluntary mechanisms, while it has re-emphasized its policies supporting Canadian business interests in Latin America.

The government promised to further the interests of Canadian companies abroad by “eliminating red tape” and conducting greater “economic diplomacy.”

Government of Canada’s “Enhanced” CSR Policy

On November 14, 2014, shortly following the IACHR presentation, the government of Canada released its newly “enhanced” CSR policy entitled *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada’s Extractive Sector Abroad*.¹³ This strategy, a revision of the government’s initial CSR policy launched in 2009, outlines the government’s commitment to encouraging Canadian mining companies to integrate CSR into core company policies and the government’s expectation that companies will respect human rights and abide by all applicable laws abroad. Canada’s self-proclaimed “comprehensive approach to CSR” aims to achieve these objectives by promoting CSR guidance for companies, fostering partnerships between companies and communities, and by encouraging dispute resolution processes. The strategy continues to be enforced on a voluntary basis, but purports to strengthen the process by saying that companies that ignore CSR best practices and that fail to participate in a voluntary resolution process may lose the support of the Canadian embassy and funding from Export Development Canada. While this announcement at least acknowledged existing problems

tortured, and even killed for doing their work. The Department’s objective is to enable human rights defenders to promote and defend human rights without hindrance or undue restriction, and free from fear of retribution against them or their families. The work of these brave individuals and groups is an integral part of a vibrant civil society, and our investment in and support of them is likewise an investment in and support of the rule of law and democracy. See U.S. Department of State. *Diplomacy in Action. U.S. Support for Human Rights Defenders*, available at <http://www.humanrights.gov/wp-content/uploads/2013/03/support-for-human-rights-defenders.pdf>

¹³ Government of Canada. *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada’s Extractive Sector Abroad*, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>

with corporate accountability, it fell far short of meaningful change.¹⁴

On the other hand, the government reaffirmed its aggressive promotion of Canadian mining interests in a press release on the *Canadian Extractive Sector Strategy*. The government promised to further

the interests of Canadian companies abroad by “eliminating red tape” and conducting greater “economic diplomacy.”¹⁵ Forms of economic diplomacy delineated in the strategy include: providing Canadian mining companies with strategic local knowledge; providing companies with direct channels to government officials abroad; issuing letters of support for companies; providing advocacy for companies; and lobbying for reforms to regulatory frameworks in foreign countries to create a more favorable environment for companies in the extractive sector.

The paired announcements show that the Canadian government has not addressed issues that need to be addressed about corporate accountability. A number of United Nations treaty bodies have already said directly to Canada that it needs to take “legislative or administrative measures to prevent acts of transnational corporations registered in Canada” that negatively impact on the rights of people outside Canada.¹⁶ The Canadian Network on Corporate Accountability urged the IACHR to issue a similarly clear statement to Canada. ■



Please send comments and possible contributions for this publication to info@dplf.org.

¹⁴ For critiques of the government announcement, see Canadian Network on Corporate Accountability. (2014, November 14). *Government fails to create an extractive sector ombudsman*, available at <http://www.newswire.ca/en/story/1446859/government-fails-to-create-an-extractive-sector-ombudsman-despite-broad-public-support>; and Mining Watch (2014, November 14). *Government acknowledges power to act, declines to do so*, available at <http://www.miningwatch.ca/news/canada-s-csr-strategy-extractives-20-government-acknowledges-power-act-declines-do-so>

¹⁵ Natural Resources Canada. (2014, November 18). *Backgrounder, Extractive Industries: The Canadian Advantage at Home and Abroad*.

¹⁶ Canada has been criticized by the Special Rapporteur on Toxic Waste (2002), the Committee on the Elimination of Racial Discrimination (2007 and 2012) and the Committee on the Rights of the Child (2012). See Canadian Network on Corporate Accountability, Human Rights, Indigenous Rights and Canada’s Extra-territorial Responsibility, p.11 (2014).

Extractive Industries and the Protection of Human Rights in the Americas: The Need for a System of Responsibility that Includes Home States

Salvador Herencia Carrasco

Director of the Human Rights Clinic of the Human Rights Research and Education Centre, University of Ottawa¹

The Inter-American Commission on Human Rights held hearings in 2013² and 2014³ on the responsibility of the Government of Canada for alleged human rights violations by Canadian-headquartered private natural-resource extraction companies operating in Latin America. The fact that these hearings took place is a reflection of the growing importance that the human rights bodies in the Inter-American System have placed on the impact of extractive industries on human rights in the Americas.

Beyond the Canadian case, it is necessary to determine whether it is generally feasible to establish, under the purview of the American Convention on Human Rights or the American Declaration of the Rights and Duties of Man,⁴ a system of international responsibility applicable to home States. This would entail creating a new set of rules that would apply equally to host States, where there are investment projects that may violate human rights.

Exclusive Responsibility of the Host State, or Potential Development of a System for Home State Responsibility?

The development of extractive industries in Latin America over the past decade has gone hand in hand with increased social

unrest.⁵ For example, the *Map of Mining Conflicts, Projects, and Companies in Latin America* shows 205 conflicts related to mining projects in Latin America.⁶ In the case of Peru, according to the report of the National Ombudsman, in January this year there were 210 social conflicts, 140 of which were socio-environmental in nature.⁷

Although the numbers vary depending on the methodology used, these cases demonstrate that the regulatory attempts by host States, and the number of cases heard and decided by the courts,⁸ have been insufficient to provide comprehensive human rights protection.

The possibility of attributing responsibility to the host State for the activities of private companies operating outside their territory is not a new concern in international law. One of the elements for determining the international responsibility of a State is the leadership and control it may have over an agent.⁹ In the case of private subjects, this rule could even be applicable in holding the State responsible for the extraterritorial activities of private firms. This is consistent with international attempts to regulate the issue, but it requires the identification of a provision

¹ This article is an updated version of one published in the supplement *Jurídica* No. 544 of the *Diario El Peruano* on March 31, 2015. It is based on the Extractive Industries and Human Rights in Latin America research project that the Human Rights Clinic of the University of Ottawa is conducting. The clinic's research team is Stephany Caro Mejia, Mary Amanda Kapron, Brittany Main, Emely Meléndez Rodríguez, Laura Caitlin O'Brien, and Priya Persaud. The opinions expressed in this article are the author's alone, and do not represent the views of any of the above-named institutions. Email: shere045@uottawa.ca

² See, Working Group on Mining and Human Rights in Latin America. (2014). *The Impact of Canadian Mining in Latin America and Canada's Responsibility*. Washington: DPLF.

³ See, Canadian Network on Corporate Accountability. (2014). *Human Rights, Indigenous Rights and Canada's Extraterritorial Obligations: Thematic Hearing for the 153rd Period of Sessions of the Inter-American Commission on Human Rights*. Ottawa: Canadian Network on Corporate Accountability.

⁴ The American Declaration would be applicable to the States in the Organization of American States that have not ratified the American Convention on Human Rights.

⁵ See, Bebbington, A. (2012). *Social conflict, economic development and the extractive industry: Evidence from South America*. New York: Routledge.

⁶ Observatory of Mining Conflicts in Latin America and Latin American Observatory of Environmental Conflicts. *Map of Mining Conflicts, Projects, and Companies in Latin America*, available in Spanish at http://mapa.conflictosmineros.net/ocmal_db/

⁷ Office of the National Ombudsman. (2015). *Reporte Mensual de Conflictos Sociales* No. 131- January 2015. Lima: Office of the Ombudsman of the People, p. 16. In the case of Peru, the National Office of Dialogue and Sustainability of the Office of the Chairman of the Council of Ministers has its own methodology for documenting social conflicts. Its most recent monthly report, *Willaqniki*, reports 41 social conflicts, 27 of which concern mining, hydrocarbons, informal mining, and energy-related matters. See, National Office of Dialogue and Sustainability. (February 2015). *Informe Willaqniki No. 27- Desarrollo Local Sostenible*. Lima: Office of the Chairman of the Council of Ministers, p. 49.

⁸ The cases in which a judgment has been given pertain to the inability or impossibility of the host State to regulate the activities of extractive corporations. The cases concerning indigenous peoples and the lack of prior consultation are the most illustrative. See, Antkowiak, Th. M. (2013). *Rights, Resources and Rhetoric: Indigenous People and the Inter-American Court*. *Journal of International Law*, 35, 113.

⁹ See, Crawford, J. (2013). *State Responsibility: The General Part*. Cambridge: Cambridge University Press.

that obliges the States to take specific steps to supervise the activities of corporations.

Examples of initiatives that specifically regulate these types of obligations are: European Union Regulation No. 44/2001 applicable to civil and commercial matters,¹⁰ the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts,¹¹ and non-governmental proposals such as the Maastricht Principles on Extraterritorial Obligation of States in the area of Economic, Social and Cultural Rights.¹²

In this context, the sustainability of investment projects that include the effective participation of local communities¹³ requires changing the current system of State responsibility to also include the home State. A regulatory framework based on human rights for the development of extractive industries could contribute to the reduction of violence and socio-environmental conflicts in Latin America.¹⁴

Corporate Social Responsibility (CSR) and the Use of Public Funds by Private Corporations Operating in Latin America

However important the role of CSR may be in attempting to improve the way in which companies conduct their business, the framework of self-regulation¹⁵ is insufficient to provide the mechanisms necessary for ensuring that the rights of potentially affected communities are protected.¹⁶

Part of this change would take place by gradually incorporating mechanisms that allow home States to regulate the activities of corporations that operate extraterritorially and may be the subject of complaints about human rights violations.

Let us take the case of ISO 26000.¹⁷ This voluntary quality standard is one of the most comprehensive efforts for the inclusion of best practices in business activities. Nevertheless, ISO 26000 does not provide for a system for monitoring compliance with its standards; rather, it is merely an illustrative guide. Moreover, a study being conducted by the Human Rights Clinic at the University of Ottawa has shown that few extractive corporations operating in Latin America even use this standard. Regardless of the potential advantages and importance of encouraging the use of ISOs, there must be more effective mechanisms to ensure respect for human rights.

Part of this change would take place by gradually incorporating mechanisms that allow home States to regulate the activities of corporations that operate extraterritorially and may be the subject of complaints about human rights violations. If such violations are confirmed, the primary responsibility would lie with host States, but it would be possible to identify measures whereby the responsibility could also be attributed to the home States of those corporations.

One way to accomplish this is to regulate private corporations that receive financing or government loans from development banks or export-promotion agencies. On this point, we return to the Canadian case to demonstrate that some of the principal activities of Canadian firms operating in Latin America are financed by Export Development Canada (EDC).¹⁸

This is in no way to suggest that the above projects have resulted in human rights violations. However, public funds have been allocated to them—should the use of this money not be subject to monitoring or public accountability? Establishing supervisory mechanisms would not affect the nature or

¹⁰ European Union Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Official Journal L 012, 16/01/2001 P.

¹¹ International Law Commission. Draft Articles on the Responsibility of States for Internationally Wrongful Acts. *UNGA Report of the International Law Commission*. UNGA Res 56th Sess. (2001) Supp No. 10 UN Doc A/56/10.

¹² Maastricht Principles on Extraterritorial Obligation of States in the area of Economic, Social and Cultural Rights, available at <http://www.etoconsortium.org/en/library/maastricht-principles/>

¹³ See, United Nations. Special Rapporteur on the rights of indigenous peoples. *The situation of indigenous peoples' rights in Peru with regard to the extractive industries*. A/HRC/27/52/Add.3, May 7, 2014.

¹⁴ See, Huamani Ober, G. et al. (2012). *Hacia una mejor gestión de los conflictos socioambientales en el Perú*. Lima: Consorcio de Investigación Económica y Social; Coumans, C. (2012). Mining and Access to Justice: From Sanction and Remedy to Weak Non-Judicial Grievance Mechanisms. *UBC Law Review*, 652, (45), 3.

¹⁵ See, Nguyen, G., Follesdal, A, and Mestad O. (2011). *Human Rights, Corporate Complicity, and Disinvestment*. Cambridge: Cambridge University Press.

¹⁶ See, Simons, P. (2012). International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights. *Journal of Human Rights and the Environment*, 5, 1.

¹⁷ Additional information on this ISO 26000 is available at <http://www.iso.org/iso/home/standards/iso26000.htm>

¹⁸ Export Development Canada (EDC) is a Crown corporation that provides assistance and financial services to Canadian export companies and investors. For more information, visit the institution's website at <http://www.edc.ca/EN/Pages/default.aspx>. A complete list of projects financed or supported by EDC can be found at <http://www.edc.ca/EN/About-Us/Disclosure/Reporting-on-Transactions/Pages/default.aspx>

Country	Date	Local Subsidiary	Canadian Business/Industry	Financial Support from EDC (in Canadian dollars)
Chile	10/15/2014	Transelec S.A.	Brookfield Asset Management Inc. (real estate, highways, hydroelectric, timber, agriculture lands)	\$25-50 million
Guyana	09/02/2014	AGM Inc.	Guyana Goldfields Inc. (Aurora Gold Project)	\$20-50 million
Colombia	05/07/2014	Pacific Rubiales Energy Corp.	Various Canadian extractive corporations	\$50-100 million
Peru	03/11/2014	Sociedad Minera Cerro Verde S.A.A.	Fluor Canada Ltd. (Cerro Verde production unit expansion project)	\$100-250 million
Chile	07/17/2013	Corporación Nacional Del Cobre de Chile	Various Canadian exporters—extractive—mining	\$250-500 million
Chile	06/25/2013	Celulosa Arauco Y Constitución SA	Various Canadian exporters—resources	\$25-50 million
Mexico	12/14/2012	Minera Frisco, S.A.B. de C.V.	Various Canadian exporters—extractive—mining	\$50-100 million
Argentina	11/07/2012	Pan American Energy LLC, Argentine Branch	Various Canadian exporters—oil and gas	\$15-25 million

constitution of the firm. It would, however, enable the home State, as well as international human rights bodies, to have a specific oversight tool that ultimately helps to ensure that these investment projects respect the rights of the local stakeholders, including communities that could be affected by exploration and extraction activities.

This raises the question of who should regulate the extraterritorial activity of corporations. Australia, Canada and the United Kingdom have attempted to do so, to no avail.¹⁹ Given the conflict of interests, national initiatives will remain mere proposals. In contrast, an international system of host State responsibility could be created under international human rights law to act at least in those cases where the activity in question is publicly financed.

¹⁹ See, Simons, P. and Macklin, A. (2014). *The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage*. New York: Routledge.

Conclusion

This article seeks to demonstrate the need to devise rules that make it possible to regulate or protect persons affected by private corporations operating in their area or territory. The current legal framework centers on the responsibility of the host State, but we should work toward mechanisms that allow the home State to be equally responsible—at least in cases that involve public funding. ■



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China and Latin America: Finance and Challenges

Paulina Garzón

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In March 2014, at the opening session of the National People's Congress, Chinese Prime Minister Li Keqiang said that China would declare war on pollution, which is "nature's red-light warning against inefficient and blind development."¹

The Chinese Dream and Chinese-style Socialism

The new leader of the Communist Party, Xi Jinping, stated that the time had come for China to reclaim its rightful position in the world and to realize the "Chinese dream."² China is achieving both of these things through the "soft power" of financing.

China's economic growth is the product of the opening-up and reform strategy of the Central Committee of the Communist Party that began at the end of the 1970s. In the 1980s, China invited the world to bring in its capital and corporations, and in 2012 it became the number one recipient of foreign direct investment. At the beginning of the 2000s, China embraced the strategy of going global by equipping its corporations financially and technologically to go out and seek natural resources, and by broadening its participation in political, developmental, and cultural spheres.

China is currently the world's second largest economy (after the United States) with an estimated GDP of US \$13.3 trillion in 2013. Even though its economic growth slowed to 7.4 per cent in 2014, China continued to embark on mega projects. Among the most notable in Latin America is the construction of the Brazil-Peru transcontinental railway, agreed to in 2014, to secure a route to the Pacific to facilitate trade with China. Another equally important project is the Nicaragua Canal. Although China has denied any official connection with it, it is widely accepted that the project will not happen without the support of major Chinese state banks.

On the finance front, China has announced the creation of two new mega-banks. In July 2014, China, Brazil, India, Russia,

and South Africa (BRICS) signed an agreement to establish the new BRICS development bank, which will reportedly have initial authorized capital of US \$100 billion and initial subscribed capital of US \$50 billion. Two months later, China signed a memorandum of understanding with 20 Asian countries for the creation of the Asian Infrastructure Investment Bank.

A Quick look at Chinese Finance in the Region

The relevance of traditional financiers such as the World Bank, the International Monetary Fund, and even regional financial institutions such as the Inter-American Development Bank and the Latin American Development Bank has been in decline. In 2014, for the second time (the first was in 2010), Chinese banks have offered more loans to Latin America than the World Bank and the Inter-American Development Bank combined. In 2014, Chinese banks provided some US \$22 billion in financing to the region.³ This shift, especially from the vantage point of structural adjustment, could be considered progress. Indeed, several heads of state have described Chinese investments as a "win-win" strategy, while President Xi Jinping refers to them as "comprehensive strategic partnerships." Venezuela, Argentina, Ecuador, Mexico, Peru, and Brazil all have these types of agreements with China.

Chinese investments and loans to Latin America have been allocated to high social and environmental impact sectors. Direct investments from 2005 to 2013 approached US \$90 billion, mainly geared toward petroleum extraction, mining, and infrastructure construction.⁴ There is more reliable information

¹ *Bloomberg Business*. (March 5, 2014). Li Says China Will Declare War on Pollution as Smog Spreads, available at <http://www.bloomberg.com/news/articles/2014-03-05/china-to-declare-war-on-pollution-as-smog-spreads-across-country>

² *The Economist*. (May 4, 2013). China's future. Xi Jinping and the Chinese dream, available at <http://www.economist.com/news/leaders/21577070-vision-chinas-new-president-should-serve-his-people-not-nationalist-state-xi-jinping>

³ The China-Latin American Database is a collaboration between Boston University's Global Economic Governance Initiative (GEGI) and the Inter-American Dialogue, IAD (2014 update). For more information, see <http://www.bu.edu/pardeeschool/research/gegi/program-area/chinas-global-reach/china-latin-america-database/>

⁴ This is an approximate figure, and the consensus of various authors in light of the limitations on obtaining reliable and public information. See, e.g., Greenovation Hub Finance Newsletter. (October 12, 2014). China's Outward Foreign Direct Investment in 2013, available at <http://www.ghub.org>

on government-to-government loans.⁵ According to data from the Inter-American Dialogue and Boston University's Global Economic Governance Initiative (GEGI), China pledged US \$119 billion in loans to the region from 2005 to 2014, of which US \$56.3 billion has gone to Venezuela and the rest mainly to Argentina, Brazil, and Ecuador.

The Chinese government committed US \$70 billion to Brazil in July 2014, which included a US \$20 billion fund for infrastructure loans in the region.⁶ However, this figure seems modest in comparison to the US \$250 billion that President Xi Jinping offered the Latin American and Caribbean nations at the China-CELAC Forum held in Beijing in January 2015. The presidents closed the forum by stating that South-South cooperation had jumped to the next level.⁷

Venezuela has received more than US \$50 billion in oil-backed loans, which meant—at least until October 2014—that Venezuela has to deliver approximately 600,000 barrels of oil to China every day.⁸ For its part, Ecuador had taken on some US \$10 billion in loans from China by 2014, in exchange for advance petroleum sales that will require it to allocate 90 per cent of its production to these payments until 2019.⁹

In the mining sector, Chinese companies control approximately one-third of the concessions in Peru. Citic Construction Co., Ltd. (CITIC) is responsible for developing the Las Cristinas mine in Venezuela (probably the largest gold mine in the world). In Ecuador, two Chinese firms have the concession for the continent's two most important copper mines, the Mirador and San Carlos Panantza projects.

In the hydroelectric sector, there are contracts with State Grid Corporation of China for the electrical power networks

org/cfc_en/?p=591

⁵ According to IGEC Director Kevin Gallagher, the GEGI and DIA data have been verified on both the lender and borrower sides.

⁶ *Ámbito*. (July 17, 2014). China ofrece fondo de US\$ 20.000 M para el desarrollo a países de la Celac, available at <http://www.ambito.com/noticia.asp?id=750032>

⁷ Ministry of Foreign Affairs of the People's Republic of China.cnc (January 8, 2015). First Ministerial Meeting of China-CELAC Forum Grandly Opens in Beijing. Xi Jinping Attends Opening Ceremony and Delivers Important Speech, Stressing Firm Grasp of New Opportunities in China-CELAC Overall Cooperation to Jointly Write New Chapter of China-CELAC Comprehensive Cooperative Partnership, available at http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1227318.shtml

⁸ Finanzas Digital. Noticias de Economía y Finanzas. (October 13, 2014). Suprimen cupos de envíos mínimos de petróleo del Acuerdo del Fondo Chino-Venezolano, available at <http://www.finanzasdigital.com/2014/10/suprimen-cupos-de-envios-minimos-de-petroleo-del-acuerdo-del-fondo-de-financiamiento-chino-venezolano/>

⁹ Schneyer, J. and Medina Mora Pérez, N. (November 26, 2013). Special Report: How China took control of an OPEC country's oil. *Reuters, Chicago Tribune*, available at <http://www.reuters.com/article/2013/11/26/us-china-ecuador-oil-special-report-idUSBRE9AP0HX20131126>

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of Belo Monte in Brazil and Coca Codo Sinclair in Ecuador. In January 2015, China and Argentina signed agreements for the construction of the Néstor Kirchner and Jorge Cepernic megadams. Concession negotiations with national and international companies -including Chinese- are underway in Colombia, for the construction of several projects such as the Master Plan for the Río Magdalena, whose hydrographic basin covers one-fourth of Colombia's territory.

More recently, China, Brazil and Peru signed a Memorandum of Understanding for the construction of the Brazil-Peru Transcontinental Railway and feasibility studies should be finish by May 2016.

Are there any Rules of the Game for Chinese Banks and Corporations?

Although there is a widely held view that Chinese banks and corporations lack rules, some international experts note that "China, arguably more than any other country, has put a framework in place which sets out priorities and controls relating to foreign outward investment."¹⁰

The most significant social and environmental guidelines for Chinese operations abroad emerged in the mid-2000s, coinciding with the first massive loans to Africa and Latin America. Most of the guidelines are not binding and have no punitive mechanisms. However, there is noticeable, gradual progress in the language and in the development of specific implementation and supervision requirements that go beyond mere declarations of goodwill.

¹⁰ Bernasconi-Osterwalder, N., Johnson, L., and Zhang, J. (eds). (2013). Chinese Outward Investment: An emerging policy framework. A compilation of Primary Sources. Canada: Institute of International Research, p. iv, available at http://www.iisd.org/pdf/2012/chinese_outward_investment.pdf

Indeed, some of these provisions are stricter than the World Bank's standards. For example, the China Development Bank (responsible for about 60 per cent of Chinese loans to Latin America)¹¹ must, in addition to conducting an environmental assessment of the project, evaluate its clients based on the environmental record of the company that will take the loan. Besides, it may use its veto to reject a project for exclusively environmental reasons.¹² The Export-Import Bank of China (the second-most important lender) requires an Environmental and Social Assessment (ESA) at the end of all projects it finances, while the World Bank imposes this requirement only for high-impact projects.

The most important piece of Chinese regulation is the Green Credit Guidelines (2012).¹³ Article 21 of the guidelines refers specifically to the activities of Chinese financial institutions abroad. The guidelines establish that Chinese banks must have an ESA at all stages of the project (design, preparation, construction, completion, operation, and shutdown). This Chinese requirement is apparently more stringent than the domestic provisions of many countries. The guidelines state that the banks must conduct "complete, thorough and detailed" due diligence visits for the environmental and social risk assessment of the loan application, and that the bank must evaluate the implementation of environmental and social measures throughout the project cycle. The guidelines also open up opportunities for community participation, such as the ability to request that an "independent third party" take part in the evaluation of the project's environmental and social impacts.

In October 2014, the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters issued the Guidelines for Social Responsibility in Outbound Mining Investments.¹⁴ These apply to new mining activities (exploration, extraction, and processing, including the construction of infrastructure to support mining activities) carried out by Chinese mining companies partially or totally involved in the project. According to the guidelines, Chinese firms must publicly disclose the payments they make to governments, in keeping with the Extractive Industries Transparency Initiative.¹⁵

¹¹ Inter-American Dialogue Database, available at http://www.thedialogue.org/map_list

¹² Inter-American Dialogue Database.

¹³ For the complete text of the Green Credit Guidelines, see <http://www.cbrc.gov.cn/EngdocView.do?docID=3CE646AB629B46B9B533B1D8D9FF8C4A>

¹⁴ For the complete text of these Guidelines, see, China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters. Guidelines for Social Responsibility in Outbound Mining Investments, p. 26 et seq.

¹⁵ For more information on this initiative, see <https://eiti.org/>

China still has the chance to build a new kind of relationship with Latin America. It is up to China to decide whether the pursuit of the "Chinese dream" will intensify the environmental crisis that threatens the planet or be a source of hope for overcoming it.

They also establish that "due diligence" visits must be conducted to identify, prevent, mitigate, and address the impacts of the project with regard to the human rights of local communities and for respecting the free, informed, and prior consent when an operation might have significant direct effects on the territories of indigenous peoples. In addition, they urge corporations to create a "complaint mechanism," allow for the establishment of "no-go" areas, and refrain from conducting mining activities in legally protected areas.

Nevertheless, the fact that there are regulations for Chinese banks and corporations does not mean that things are done properly. China lacks efficient systems to ensure the implementation of the regulations. Oversight by Chinese state agencies is inadequate, and there is an urgent need for policies and mechanisms that guarantee access to information by the communities affected by Chinese projects.

Conclusion

Although the arrival of Chinese capital has taken civil society and local communities by surprise, Latin America has a dynamic and sophisticated civil society that has vast experience of campaigns aimed at international financial institutions and multinational corporations.

In 2014, various organizations in Latin America began to articulate strategies for action vis-à-vis the new lenders and investors. The rejection of projects operated by Chinese firms has reached government-owned and private newspapers in China; the photographs of the Yasunidos have been exhibited in Beijing universities; and NGOs have begun to demand information and transparency from the Chinese banks. This is only the beginning.

China still has the chance to build a new kind of relationship with Latin America. It is up to China to decide whether the pursuit of the "Chinese dream" will intensify the environmental crisis that threatens the planet or be a source of hope for overcoming it. ■

Business and Human Rights: Case Studies



Jen Moore

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Canadian State Complicity in Mining Abuses: The Case of Blackfire Exploration and the Canadian Embassy

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The Canadian state backs the globalized mining industry in many ways, enabling the operations of Canadian mining companies in Latin America and the Caribbean, while tolerating and contributing to systematic individual and collective rights violations.

Among other things, the Canadian government facilitates loans and insurance through the Export Development Corporation without transparency or legislative provisions regarding human rights; offers an extensive range of diplomatic services to companies regardless of their track record or the potential harms of their projects; and channels Canadian overseas development aid to clean up the image of mining projects and promote mining code reforms that are favorable to corporate interests while at the same time jeopardizing indigenous and collective human rights. Recently, the government spent \$25 million CAD in overseas development aid for three Canadian post-secondary institutions to create the Canadian International Resources Development Institute (CIRDI, originally called the Canadian International Institute for Extractive Industries and Development or CIIEID) with a mandate to serve Canadian foreign policy and industry by influencing policies and institutions that govern the natural commons in other countries.¹ A former Canadian minister of international development told an industry audience that CIRDI would be their “biggest and best ambassador.”²

Perhaps most illustrative of the Canadian state’s one-sided backing for Canadian mining investments abroad is through its on-the-ground representatives in its diplomatic missions. Canadian embassy officials have privileged access to information about what is happening in mining-affected communities and closely monitor relevant policy-making in the countries where

they are stationed. Their behavior poignantly reveals how the Canadian government tolerates and accepts indigenous and human rights violations in order to advance the narrow self-interest of Canadian companies while reinforcing the neoliberal mining model.

Blackfire Exploration and the Canadian Embassy in Mexico

Recently, MiningWatch Canada, United Steelworkers, and Common Frontiers with Otros Mundos-Chiapas and the family of Mariano Abarca from Chicomuselo, Chiapas, Mexico gained important insights into one such example through an access to information request to the then Canadian Department of Foreign Affairs and International Trade (DFAIT, now DFATD). The 960 pages of embassy emails, briefing notes, and media lines obtained 18 months later told a story of the relationship between the Canadian embassy in Mexico and Calgary-based Blackfire Exploration, whose Payback barite mine in Chicomuselo, Chiapas operated for barely two years, from 2008 to 2009. The documents reveal that from before the mine went into operation until it was shuttered on environmental grounds in late 2009, the Canadian embassy in Mexico provided unwavering support to Blackfire, even after the brutal murder of community activist Mariano Abarca and the emergence of compelling evidence of corruption on the part of the local municipal president of Chicomuselo.³

Our joint analysis of these documents illustrates four aspects of the Canadian state’s relationship with the mining company: 1) how the embassy enabled this small, private company to get its mine up and running despite evident seeds of conflict; 2) how the embassy troubleshot conflict for the company; 3) the embassy’s willingness to ignore serious threats to local activists; and 4) its determination to defend company interests even

¹ MiningWatch Canada. (March 4, 2014). *New Federally Funded Academic Institute a Tool to Support Mining Industry*, available at <http://www.miningwatch.ca/news/new-federally-funded-academic-institute-tool-support-mining-industry>

² Mackrael, K. (June 19, 2013). *The Globe and Mail, ‘Huge opportunities’ for Canadian mining industry to work in developing countries*, available at <http://www.theglobeandmail.com/news/politics/huge-opportunities-for-canadian-mining-industry-to-work-in-developing-countries/article12670581/>

³ Common Frontiers, MiningWatch Canada and United Steelworkers. (May 2013). *Corruption, Murder and Canadian Mining in Mexico: The Case of Blackfire Exploration and the Canadian Embassy*, available at <http://www.miningwatch.ca/news/report-reveals-how-canadian-diplomacy-supported-deadly-blackfire-mining-project>

when everything, including all the suspects in Abarca's murder, pointed to the company.

First, government documents reveal how the embassy enabled Blackfire to start up its mine by putting pressure on the state of Chiapas, even though there was no clear community consent for the mine and the company was facing permitting challenges. Between 2007 and 2008, embassy staff made two trips to Chiapas, during which they provided support for the mine. The importance of this lobbying was indicated in an email from a company representative to a political counsellor at the embassy in Mexico City in September 2008: "All of us at Blackfire really appreciate all that the Embassy has done to help pressure the state government to get things going for us. We could not do it without your help."⁴

Second, the embassy was willing to troubleshoot for Blackfire when protests against the mine increased. The embassy was closely monitoring these protests, including being prepared to ignore deadly threats to local activists. In July 2009, local community leader Mariano Abarca traveled with a delegation to Mexico City and spoke with a Canadian embassy official on film. He stated that the company had broken promises, that its mine was causing environmental damage, and that there were armed workers intimidating him and others opposed to the mine. Within a couple of weeks, Mariano Abarca was arrested on the street while he was making preparations for a local meeting of the Mexican Network of Mining-Affected Communities (REMA, from its initials in Spanish) in Chicomuselo. The embassy knew that Abarca had been arrested on the basis of spurious allegations made by the company against him. Despite this, despite Abarca's testimony about armed workers, and despite 1,400 letters to the embassy expressing serious concern about Abarca's life, the embassy's response focused on ensuring the continuity of the company's operation.⁵

Six weeks later, Abarca was murdered, the mine was shut down on environmental grounds, and it came to light that the company had been making direct payments into the personal bank account of the local mayor in order to keep down the protests. Until recently,⁶ the evidence of corruption that emerged

The embassy was willing to troubleshoot for Blackfire when protests against the mine increased. The embassy was closely monitoring these protests, including being prepared to ignore deadly threats to local activists.

at this time was the subject of an ongoing investigation by the Royal Canadian Mounted Police under Canada's Corruption of Foreign Public Officials Act.⁷

Even then, the embassy continued to defend the company interests. To start with, the embassy distanced itself, not so much from the company, but rather from the investigation into the murder, by refusing to meet with affected community groups, and by failing to ensure that Canadian government officials visiting Chiapas at the time called for a full and impartial investigation into Mariano Abarca's murder.

Some two months later, the embassy finally sent a fact-finding delegation to the community to speak with affected groups. The political attaché's report spoke of unfulfilled promises, lack of community support, environmental damage, and corrupt practices and was sent to the highest echelons of the Canadian government. Nonetheless, just five days after the report was circulated, the embassy continued to advise Blackfire about how it could sue the state of Chiapas under the terms of the North American Free Trade Agreement (NAFTA) for closing the mine.⁸

These findings were published in 2013 and, a few months later, Mariano Abarca's brother, Uriel, and one of his sons, José Luis, took the report to the Canadian embassy in Mexico to ask for a response.⁹ What they heard was the standard line the Canadian government repeats over and over again to those who

⁴ Access to information request A-2010-00758/RF1, p. 000185, cited in: Common Frontiers, MiningWatch Canada and United Steelworkers. (May 2013). *Corruption, Murder and Canadian Mining in Mexico: The Case of Blackfire Exploration and the Canadian Embassy*.

⁵ Common Frontiers, MiningWatch Canada and United Steelworkers. (May 2013). *Corruption, Murder and Canadian Mining in Mexico: The Case of Blackfire Exploration and the Canadian Embassy*.

⁶ Mariano Abarca Environmental Foundation, Otros Mundos, A.C. and Mexican Network of Mining-Affected Peoples, Chiapas (REMA Chiapas), "Mexican Network Deplores Conclusion of Canadian Investigation into

Blackfire in Chicomuselo, Chiapas," March 11, 2015, available at <http://www.miningwatch.ca/news/mexican-network-deplores-conclusion-canadian-investigation-blackfire-chicomuselo-chiapas>

⁷ Common Frontiers-Canada, Council of Canadians, MiningWatch Canada, and United Steelworkers (August 29, 2011). *Canadian Civil Society Welcomes RCMP Raid on Blackfire Exploration*, available at <http://www.miningwatch.ca/news/canadian-civil-society-welcomes-rcmp-raid-blackfire-exploration>

⁸ Common Frontiers, MiningWatch Canada and United Steelworkers. (May 2013). *Corruption, Murder and Canadian Mining in Mexico: The Case of Blackfire Exploration and the Canadian Embassy*.

⁹ Moore, J. (September 4, 2013). Canadian Embassy Snubs Family of Slain Mexican Activist, *Americas Program*, available at <http://www.cipamericas.org/archives/10557>

To achieve this, nothing less than a complete about-turn will be needed in Canadian foreign policy and the economic agenda it is designed to promote and protect. To that end, it is vital to continue denouncing the Canadian state's complicity in mining abuses while working alongside those who are defending their land and fighting for self-determination, clean water, and a healthy environment.

question its foreign policy in connection with the Canadian mining industry abroad. The embassy representative told Uriel and José Luis that the Canadian government encourages Canadian companies to respect local laws and maintain high standards of corporate social responsibility. The embassy refused to acknowledge that its active and unquestioning support may have been a disincentive for Blackfire to comply with local and international laws.

When Uriel and José Luis then asked the Canadian embassy not to ignore threats against other community leaders in Mexico who are harassed and criminalized on a regular basis for their efforts to defend their land, water, livelihoods, and environment, the embassy official remarked that this would be tantamount to intervening in Mexican sovereignty. This same official did not think, however, that intervening with the Chiapas state government to put Blackfire's mine into operation was interfering with Mexico's sovereignty.

To complement these findings, MiningWatch Canada compiled a list of some 13 other examples of Canadian embassy interventions on behalf of mining companies mired in conflict.¹⁰ But there are probably many more examples, and there are likely to be many more in the future. This is not least because, since the report about the Canadian embassy in Mexico and Blackfire

Exploration was published, the Canadian government has made it policy to channel 100 per cent of its diplomatic corps to back private interests, something it calls "economic diplomacy." In its 2013 Global Markets Action Plan, the government described economic diplomacy thus: "all diplomatic assets of the Government of Canada will be marshalled on behalf of the private sector in order to achieve the stated objectives within key foreign markets,"¹¹ including countries such as Mexico, Chile, Brazil, Colombia, and Peru. Given the predominance of Canadian foreign investment in the globalized mining sector and the lack of safeguards to ensure that Canadian foreign missions prioritize respect for individual and collective indigenous and human rights, this policy is bound to further bolster support for mining companies while communities and workers face serious continued harm, including running the risk of being demonized, criminalized, threatened, and killed when they assert their rights in defense of their lives, livelihoods, water, and lands.

In conclusion, the Canadian state shares responsibility for the neocolonialism, the conflicts, the abuses, and the impunity that characterize the globalized Canadian mining industry today. For this reason, it was encouraging to hear the Inter American Commission on Human Rights call on Canada at the end of its 2014 fall sessions to not only hold companies accountable for indigenous and human rights violations in connection with their operations abroad, but "to adopt measures to prevent the multiple human rights violations"¹² taking place in connection with their activities. To achieve this, nothing less than a complete about-turn will be needed in Canadian foreign policy and the economic agenda it is designed to promote and protect. To that end, it is vital to continue denouncing the Canadian state's complicity in mining abuses while working alongside those who are defending their land and fighting for self-determination, clean water, and a healthy environment. ■

¹⁰ MiningWatch Canada. (October 8, 2013). *Backgrounder: A Dozen Examples of Canadian Mining Diplomacy*, available at <http://www.miningwatch.ca/article/backgrounder-dozen-examples-canadian-mining-diplomacy>

¹¹ Foreign Affairs, Trade and Development Canada, *Global Markets Action Plan*, available at <http://www.international.gc.ca/global-markets-marches-mondiaux/plan.aspx?lang=eng>

¹² Inter-American Commission on Human Rights (IACHR). (November 7, 2014). *IACHR Wraps Up its 153rd Session*, available at <http://www.oas.org/es/cidh/prensa/Comunicados/2014/131.asp>



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Corporate Espionage as a Strategy to Escape Accountability for Human Rights Violations: The Case of Vale in Brazil

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Social movements and civil society organizations have been facing enhanced techniques of persecution. Among the new threats is illegal espionage, that is, the acquisition of intelligence and data related to the work of civil society activists.

In Brazil, there has been an increasing demand for specialized businesses that gather intelligence and collect data that serve the interests of corporations.

Corporate espionage in Brazil is conducted mainly by private entities with the complicity of state actors. The conjunction of two important factors has allowed this practice to proliferate. The first is the lack of legislation regulating the intelligence sector. The current private security legislation¹ was passed in 1983, during Brazil's last military regime.² The second factor is the connections corporations have with ex-military and intelligence personnel, who provide the data- and intelligence-gathering services.³ Part of the marketing strategy of these companies is advertising their good relationships with public authorities as a means of guaranteeing success in their operations.



Services Offered, Clients, and Purpose

Among the services offered by the corporate espionage industry is electronic surveillance and the collection of personal information.⁴ A large amount of the information obtained by this kind of company violates fundamental rights, such as the right to privacy, honor, and reputation; to participate in government; to associate freely; to a fair trial; and access to justice

(when the espionage targets lawyers and justice officials). Gaining access to most of this information requires judicial authorization. However, the companies that sell these services access this information through long and close relationships with public institutions.⁵ In some cases, agents behave as if they were activists and collect information by infiltrating social organizations.

Transnational corporations are their main clients. The corporations use the information to control social criticism of their business operations. Among those targeted are lawyers and other professionals who file legal suits against corporations to hold them accountable for human rights violations. Acselrad (2014) points out that, during the military dictatorship “the aim was silencing the critics.” However, in the case of corporate private espionage, the aim is to obtain [information] to develop efficient programs of social corporate responsibility, neutralize the criticism and to control territory.”⁶

¹ Law 7.102/83.

² The last civil-military dictatorship in Brazil lasted from 1964 to 1985. Strongly influenced by the National Security Doctrine, this authoritarian regime adopted a security policy based on spying on people and social organizations considered subversive. Under the democratic regime, some important initiatives were undertaken to regulate private intelligence activities, including Bill 2542, proposed to Congress in 2007, but currently archived.

³ Network Inteligência Corporativa (NETWORK IC) evolved out of Network Associated Consultants, founded 18 years ago by former army officer Marcelo Augusto de Moura Romeiro da Roza, who was following trends in the globalized market, available at http://networkic.com.br/qsomos_aempresa.htm

⁴ In 2011, the market for legal and illegal spying was worth Real 1.7 billion, and included a market for databases on several issues relevant to overall business purposes, available in Portuguese at <http://veja.abril.com.br/noticia/brasil/o-mercado-bilionario-da-espionagem-no-brasil>.

⁵ *O Globo*. (November 24, 2011). Agentes da Ditadura criam redes de arapongas, available at <https://online.journalism.utexas.edu/2012/presentations/Doria.pdf>

⁶ Acselrad, H. (May 5, 2014). Confluências autoritárias: Estratégias empresariais e militares de controle territorial, *Le Monde Diplomatique*, available at <http://www.diplomatique.org.br/artigo.php?id=1655>

In 2011, organizations reported on the impacts in two communities affected by Vale's Project Grande Carajás (Amazon region, Brazil). Among the issues reported was the moral and judicial harassment of human rights defenders.

The Vale Case

Vale SA is one of the three largest mining companies in the world. It conducts business in over 35 countries on five continents.⁷ Established as a public company in 1942, it was privatized in 1997. Nowadays, the company is still private but enjoys strong support from public agencies.⁸ Civil society organizations, social movements, and communities in territories affected by mining activities have singled out Vale for violating human rights and damaging the environment. Such claims have been made in several countries where the company operates, including Brazil, Mozambique, Peru, New Caledonia, Indonesia, and Canada.⁹ Consequently, organizations and social movements have decided to act collectively and raise awareness. In 2010 they formed the International Articulation of People Affected by Vale and launched a report detailing conflicts with Vale in eight countries.¹⁰

In 2011, organizations¹¹ reported on the impacts in two communities affected by Vale's Project Grande Carajás

(Amazon region, Brazil). Among the issues reported was the moral and judicial harassment of human rights defenders. In January 2012, Vale was named the worst company in the world in an international campaign mounted by Public Eye Awards, which aims to denounce large companies that violate human rights.¹² Also in 2012, the Articulation released the "Vale Unsustainability Report."¹³ In 2013 a new report¹⁴ documented human rights violations arising from the current expansion of mining activities in Carajás (S11D Project).¹⁵ Finally, the new "Vale Unsustainability Report 2015" was launched last April.¹⁶

The first corporate espionage case in Brazil involving Vale goes back to 2004. In that year, media disclosed the espionage activities carried out by Vale targeting the Gavião Parkatejê indigenous community and the existence of a database with photos of federal prosecutors and the public building where they worked in Marabá, Pará state, Brazil.¹⁷ These activities were understood to be a form of harassment and intimidation to influence the outcome of the judicial dispute between the company and the indigenous community, which was represented by the prosecutors. Vale's security chief¹⁸ confirmed that the company maintained a database with photos of the indigenous community and the federal prosecutors.¹⁹

An ex-employee of Vale, André Luis Costa de Almeida, who was responsible for the management of contracts and corporate intelligence and security in the company from 2004 to 2012, recently brought up Vale's espionage activities with respect to social groups. He said that Vale has a specific department to monitor political, social, and indigenous groups (MPSI). Wrongdoings by this department include infiltrating agents into

⁷ See, Vale <http://www.vale.com/brasil/PT/aboutvale/across-world/Paginas/default.aspx>

⁸ An important block of Vale's shares is owned by the Brazilian Development Bank (BNDES) and by pension funds (such as PREVI) directly associated with state-owned enterprises (such as Banco do Brasil). Vale has also received successive loans worth billions from BNDES and Export Development Canada (EDC).

⁹ The 2012 Unsustainability Report denounces the socio-environmental impacts of Vale operations and the irregularities committed in many countries: from New Caledonia in nickel mining against the indigenous Kanak population over its troubles in Sudbury (Canada) against striking unionized workers to its cruelty in the coal mine of El Hatillo in El Cesar (Colombia) refusing to pay resettlement costs for the displaced population, available at <http://www.ejolt.org/2013/04/the-resistance-against-the-giant-vale-mining-company-is-growing-worldwide/>

¹⁰ See, I Encontro Internacional dos Atingidos pela Vale. Dossiê dos Impactos e Violações da Vale no Mundo, available at <https://atingidospelavale.wordpress.com/2010/04/27/dossie-dos-impactos-e-violacoes-da-vale-no-mundo/>

¹¹ FIDH, Justiça Global, and Justiça nos Trilhos. How much are human rights worth in the Brazilian mining and steel industry?, available at <https://www.fidh.org/International-Federation-for-Human-Rights/americas/brazil/9662-how-much-are-human-rights-worth-in-the-brazilian-mining-and-steel-industry>

¹² See, The Guardian. (January 23, 2012). Public Eye award singles out mining company Vale, Barclays, available at <http://www.theguardian.com/environment/2012/jan/27/public-eye-awards-vale-barclays>

¹³ The report is available in English at https://atingidospelavale.files.wordpress.com/2012/06/relatorio-insustentabilidade-vale-2012_en1.pdf

¹⁴ Faustino C. and Furtado, F. (2013) *Mineração e Violações de Direitos em Carajás: o projeto Ferro S11D, da Vale S.A., Plataforma Brasileira de Direitos Econômicos, Culturais, Sociais e Ambientais (Dhescsa)*, available at http://www.dhescbrasil.org.br/index.php?option=com_content&view=article&id=926:relatorio-confirma-violacoes-direitos-atividades-vale&catid=69:antiga-rok-stories

¹⁵ This is currently Vale's most important project. It also represents the biggest investment in the global iron sector. Estimated project costs total US\$19.6 bn.

¹⁶ Available in Portuguese at <https://atingidospelavale.wordpress.com/2015/04/16/leia-relatorio-de-insustentabilidade-da-vale-2015/>

¹⁷ O Liberal-Belém-PA. (February 13, 2004). *Cazetta: espionagem da Vale foi ato irresponsável, Programa Povos Indígenas no Brasil*, available at <http://pib.socioambiental.org/pt/noticias?id=11071>

¹⁸ Lino Carlos da Fonseca, at Ricardo, B y Ricardo, F. (Eds.). *Povos Indígenas no Brasil 2001-2005*. São Paulo: ISA Instituto Socio Ambiental, p. 538.

¹⁹ O Liberal-Belém-PA. (February 13, 2004). *Cazetta: espionagem da Vale foi ato irresponsável, Programa Povos Indígenas no Brasil*.

social movements, payment of “fees” to public officers to obtain private information, breaching the bank and revenue secrecy of employees and even directors, phone hacking of journalists, and keeping dossiers on activists.²⁰

Almeida gave his testimony to the Attorney General’s Office (Ministério Público Federal), to which he and his representatives presented documents as proof of his allegations. He had obtained these documents during his daily work as an employee of Vale. His duties included participation in meetings, receiving reports on the activities of his department, and authorizing payment of surveillance agents.²¹ As a result of his testimony, official investigations were initiated in five Brazilian states.

In April 2013, Vale issued a letter in response to these allegations, admitting that it had hired licensed employees of the Brazilian Intelligence Agency and had monitored the Landless Worker’s Movement (MST) and the Justiça nos Trilhos Network,²² in order “to avoid accidents in its operations.”²³ The company rejected the accusation that it had acted illegally.²⁴

The practice of espionage and infiltration demonstrates that Vale uses its unfair advantage to crush opposition to its operations, and justifies these actions as a quality control procedure. The company’s advantage comes from its political and economic power and its influence over local authorities in the areas where its projects are developed.

In May 2013, a collective of civil society organizations officially requested Brazilian authorities to investigate the facts. In February 2014, the International Federation for Human Rights conducted a fact-finding mission and interviewed civil servants in four states. To date, none of the organizations have received information on the status or results of these investigations.

The practice of espionage and infiltration demonstrates that Vale uses its unfair advantage to crush opposition to its operations, and justifies these actions as a quality control procedure. The company’s advantage comes from its political and economic power and its influence over local authorities in the areas where its projects are developed. Resort to these techniques disrespects freedom of association and social protest rights and aims to anticipate and counter the techniques, tactics and strategies of those who challenge and criticize the company. Vale’s behavior shows little regard for the law and an unwillingness to engage in dialogue with stakeholders.

Finally, the lack of legislation and the apparent failure by Brazilian judicial institutions to investigate the situation are remarkable. These gaps and shortcomings make social organizations more vulnerable to corporate espionage. They also give an unfair advantage to companies over social organizations that are opposed to their business operations. ■

²⁰ On March 18, 2013, Vale’s ex-employee presented a claim to the Federal Prosecutor’s Office in Rio de Janeiro n. 1.30.001.001889/2013-71 (now under seal). The facts were broken down into nine topics and were supported by evidence of 1) infiltration of agents into social movements and municipalities; 2) payment of bribes to public authorities; 3) internal phone hacking; 4) external phone hacking; 5) computer hacking; 6) breach of bank and tax secrecy; 7) financial support; 8) bribing members of the House of Representatives and 9) compiling a dossier of politicians. The documents supporting the claim were presented to the Human Rights Commission at the Senate level in a public hearing in October 2013.

²¹ Information extracted from Almeida’s allegations to the Federal Prosecutor (Ministério Público Federal). Copies of the documents are in a dossier brought to the Commission on Human Rights and Participative Legislature in the Brazilian Senate. See <http://www12.senado.gov.br/ecidadania/visualizacaoaudiencia?id=841> and http://www.senado.gov.br/noticias/tv/plenarioComissoes2.asp?IND_ACESSO=S&cod_midia=296387&cod_video=295406&pagina=117. See also https://www.youtube.com/watch?v=yDGfxV0_YBc.

²² Justiça nos Trilhos is a coalition of community associations, peasant unions, social movements, human rights NGOs, faith groups, university research groups, and citizens based in the states of Maranhão and Pará. They are concerned about the impacts of the Carajás mining project on the region. The Justiça nos Trilhos legal team has assisted three civil society organizations in a class action against Vale arising from legal irregularities in the environmental licensing process for the expansion of the Carajás project. On July 26, 2012, a federal judge recognized the irregularities and ordered that construction be halted until Vale revised its impact studies, carried out public meetings in the 27 municipalities affected by the project, and obtained the free, prior, and informed consent of affected indigenous and quilombola communities (Processo n.º. 26295-47.2012.4.01.3700 - 8ª Vara da Justiça Federal no Maranhão). This class action puts at risk the most important investment in Vale’s history.

²³ Vale’s press release. Available in Portuguese at <http://s.conjur.com.br/dl/nota-vale.pdf>.

²⁴ Ibid.

DPLF Presents Comparative Study on the Right to Free, Prior, and Informed Consultation and Consent in Latin America



In August 2015, DPLF and Oxfam published a report entitled *Right to Free, Prior, and Informed Consultation and Consent in Latin America: Progress and challenges in its implementation in Bolivia, Brazil, Chile, Colombia, Guatemala, and Peru*, which evaluates how those countries have incorporated this right.

This new publication analyzes the **legal systems and case law of the high courts** from the six countries selected, evaluating whether they are favorable to the right to prior consultation and consent. In addition, it examines the progress and challenges in **implementing that right**, and contains several recommendations to the six States.

The preparation of the report involved more than 80 interviews with organizations representing indigenous peoples, civil society organizations, government institutions, and notable scholars in the countries examined.

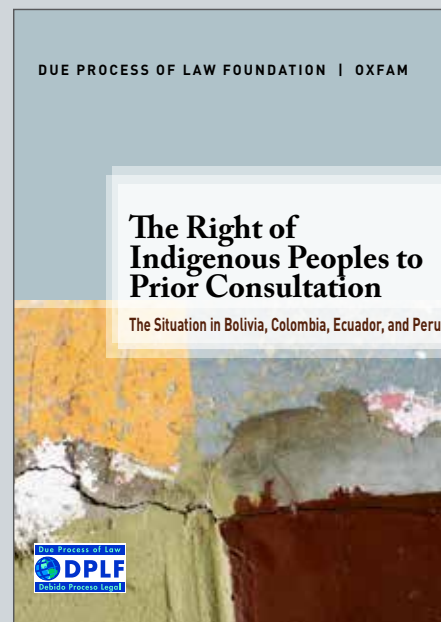
DPLF hopes that the report will contribute to the effective realization of internationally recognized rights of indigenous peoples by helping bridge the significant gaps that exist between legal developments and the current protection afforded to the hemisphere's indigenous peoples.

RELATED PUBLICATIONS

Digesto de jurisprudencia latinoamericana sobre los derechos de los pueblos indígenas a la participación, la consulta previa y la propiedad comunitaria



Available in Spanish only



The Right of Indigenous Peoples to Prior Consultation: The Situation of Bolivia, Colombia, Ecuador and Peru.

La Oroya Is Still Waiting

María José Veramendi Villa

Senior Attorney and Coordinator of the Human Rights and Environment Program,
Interamerican Association for Environmental Defense (AIDA)¹

At the end of 2015, billionaire Ira Rennert, owner of the infamous Renco Group, was found liable by a jury in the U.S. District Court for the Southern District of New York for diverting funds from his company, Magnesium Corp. of America (MagCorp),² in the years before it filed for bankruptcy. The jury ordered Rennert to pay \$16 million in damages to creditors, while the Renco Group was liable for \$101 million.³ According to the complaint, the MagCorp magnesium plant in Utah is one of the largest in the world and one of the state's biggest polluters.

Since 1994, Rennert has also owned the Doe Run Company (DRC), which in turn owns the Herculaneum lead smelter in the state of Missouri. Unfortunately, the Renco Group's networks also extended to Latin America in 1997 with the acquisition of the La Oroya Metallurgical Complex (CMLO) in Peru, which has a long history of pollution problems.

Chronicle of Non-compliance and Damages

La Oroya has some 33,000 residents and is located in the central Andes of Peru 3,750 meters above sea level and 175 kilometers from Lima. Upon entering the city, one is struck by the grayish-white color of the surrounding mountains, a result of the toxic residues that have accumulated there and on the city's ground surfaces.

CMLO consists of three circuits for the processing of lead, zinc, and copper, and a sub-circuit for processing precious



metals.⁴ In 1974, CMLO was nationalized and began to be operated by Empresa Minera del Centro del Perú S.A. (CENTROMIN PERU S.A.), until the Peruvian government privatized it in 1997 and transferred it to Doe Run Peru (DRP).⁵

According to DRP, "the prior owners of the Metallurgical Complex, including the Peruvian State between 1974 and 1997, followed insufficient environmental policies, resulting

in the accumulation of severe environmental liabilities in detriment of the people of La Oroya."⁶ However, when DRP purchased CMLO it assumed certain obligations under the Environmental Remediation and Management Program (PAMA) drafted in 1996 by CENTROMIN. The PAMA included plans for effluents, emissions, and residues generated by: (a) the company's smelting and refining facilities, (b) the company's service and housing facilities, and (c) the zinc ferrite deposits existing at the time the transfer contract was signed.⁷ Even so, according to DRP, "the Peruvian State retained responsibility for all health issues of third parties including but not limited to the residents of La Oroya (...)."⁸

DRP's operations in La Oroya have been characterized by the permissiveness of the State. The complex has operated with impunity while the health of the local population has been

¹ The opinions expressed herein are the author's and do not necessarily reflect the position of AIDA.

² For more information on Magnesium Corp. of America, see, The Renco Group, Inc. <http://www.rencogroup.net/usmagnesium.php>

³ Kary, T. and Larson, E. (February 27, 2015). Billionaire Rennert Found Liable in MagCorp Looting Lawsuit. *Bloomberg Business*, available at <http://www.bloomberg.com/news/articles/2015-02-27/billionaire-rennert-found-liable-in-magcorp-looting-lawsuit>

⁴ Doe Run Peru. *Description*, available at <http://www.doerun.com.pe/content/pagina.php?piD=184> The complex transforms mineral ore into different metals including copper, zinc, silver, lead, indium, bismuth, gold, selenium, tellurium and antimony and other byproducts.

⁵ Doe Run Peru. *History of the Company*, available at <http://www.doerun.com.pe/content/pagina.php?piD=764&pCambioIdioma=1>

⁶ Doe Run Peru. *Development of La Oroya*, available at <http://www.doerun.com.pe/content/pagina.php?piD=763>

⁷ Notary Public Anibal Corvetto Romero. *Testimonio de la Escritura Pública del Contrato de transferencia de acciones, aumento del capital social y suscripción de acciones de la Empresa Metalúrgica La Oroya S.A., "Metaloroya S.A."* [Certified copy of the notarial instrument recording the contract for the transfer of shares, capital increase, and subscription of shares in Empresa Metalúrgica La Oroya S.A., "Metaloroya S.A."]

⁸ Doe Run Peru. *Development of La Oroya*.

DRP's operations in La Oroya have been characterized by the permissiveness of by the State. The complex has operated with impunity while the health of the local population has been progressively deteriorating.

progressively deteriorating.

The PAMA has been subject to numerous amendments⁹ and two extensions, one granted in 2006¹⁰ and the other in September 2009.¹¹ The requests for extension alleged exceptional economic and financial conditions that supposedly prevented the company from building a sulfuric acid plant and modifying the copper circuit. The Peruvian Congress authorized both extensions. The final—and fortunately unsuccessful—attempt to obtain an extension was at the beginning of 2012, with a proposed legislation,¹² which was shelved by congress.

While all of this was happening, the inhabitants of La Oroya were suffering harm to their health. Some were aware of the cause, others not. Juana,¹³ one of the victims in the case of La Oroya before the Inter-American Commission on Human Rights (IACHR) and a beneficiary of the precautionary measures granted in that case, states that it was not until 2003 that she began to become aware of the pollution. At that point, she began to make a connection between her sister's asthma and her own respiratory problems and the city's pollution.¹⁴

The air quality has had, and continues to have, serious effects on the health of the population, with children being the most vulnerable. Studies conducted by the Bureau of Environmental Health (DIGESA) in 1999 and 2005 yielded worrisome data: only a very low percentage of children examined (0.9% and

0.1%, respectively) had blood lead levels under 10 µg/dl.¹⁵ The World Health Organization has determined that “there is no known level of lead exposure that is considered safe.”¹⁶

In 2009, CMLO suspended its operations due to a serious financial crisis that led it to declare bankruptcy. In 2009 and 2010, the company's employees organized strikes, road blocks, and other measures to pressure the government to extend the deadline for PAMA compliance. During the years in which the plant was closed, epidemiological studies showed a decrease in the population's blood lead levels.

CMLO partially resumed operations in 2012, and is currently in the operational liquidation phase: in other words, operations will not cease until it is sold. Nevertheless, in May 2014, the complex had to suspend operations due to the lack of mineral concentrates needed for processing and the firm's resulting financial troubles.

Justice?

After a group of individuals organized in 2002 to sue the State based on harm to their health, on May 12, 2006 the Constitutional Court ruled in favor of the victims and ordered the Ministry of Health and the Bureau of Environmental Health (DIGESA), to within 30 days, to: (i) implement an emergency system to provide health care services to persons suffering from lead contamination, (ii) take all actions to improve air quality, (iii) declare a State of Alert in the city of La Oroya, and (iv) establish environmental and epidemiological surveillance programs in the area.¹⁷

Because the State failed to comply with the judgment and the health of the affected persons continued to deteriorate, a petition was filed with the IACHR and precautionary measures were requested. On August 31, 2007, the Commission asked the Peruvian State to take the pertinent measures to conduct a specialized medical evaluation of 65 inhabitants of the city of La Oroya and to provide specialized medical treatment.¹⁸

⁹ Directorial Resolutions of the Ministry of Energy and Mines (MINEM) R.D. 178-99-EM/DGM, October 19, 1999; R.D. 133-2001-EM-DGAA, April 10, 2001; R.D. 028-2002-EM-DGAA, January 25, 2002; MINEM, Ministerial Resolution No. 257-2006-MEM/DM, 29 de Mayo 2006.

¹⁰ Ministerial Resolution No. 257-2006-MEM/DM, available at http://intranet2.minem.gob.pe/web/archivos/dgaam/estudios/oroya/rm257_MEM_DM.pdf

¹¹ Law 29410, available at <http://www.minem.gob.pe/minem/archivos/file/Mineria/legislacion/2009/setiembre/LEY%2029410.pdf>

¹² Legislative Bill 636/2011-C, available at http://www.actualidadambiental.pe/wp-content/uploads/2012/02/Proyecto-de-Ley-636_Para-reanudar-actividades-de-La-Oroya.pdf

¹³ The names of the victims have been kept confidential for security reasons.

¹⁴ Author's interview with Juana, victim in the case of La Oroya before the Inter-American Commission on Human Rights, December 15, 2013.

¹⁵ See, Cederstav, A.K. and Barandiarán G. A. (2002). *La Oroya No Espera*. Perú: Sociedad Peruana de Derecho Ambiental y AIDA, p. 29, available at <http://www.aida-americas.org/sites/default/files/La%20Oroya%20No%20Espera.pdf>; Gesta Zonal del Aire de La Oroya. Plan de Acción para la Mejora de la Calidad de Aire en la Cuenca Atmosférica de La Oroya, p. 44, available at <http://bibliotecavirtual.minam.gob.pe/biam/bitstream/handle/minam/677/BIV000072.pdf?sequence=1&isAllowed=yo> <http://cdam.minam.gob.pe:8080/bitstream/123456789/172/1/CDAM0000072.pdf>

¹⁶ World Health Organization. (October 2014). Lead Poisoning and Health. *Fact Sheet No. 379*, available at <http://www.who.int/mediacentre/factsheets/fs379/en/>

¹⁷ Constitutional Court, Case File No. 2002-2006-PC/TC.

¹⁸ IACHR. 2007 Annual Report. Chapter III. The Petition and Case System.

Juana states that she was pleased to receive word that the precautionary measure had been granted, “but as the months and the years went by, there were no answers.”¹⁹ At the present time—seven years after the granting of the precautionary measures were granted—there has been some progress in the medical care of the beneficiaries, but they have yet to receive the comprehensive and specialized services they require.

On August 5, 2009, the IACHR issued a report on the admissibility of the case, and determined that the facts alleged, such as adverse health effects and the delay in compliance with the decision of the Constitutional Court, can constitute human rights violations. The Commission has not yet rendered a final decision in the case.

A Never-ending Legal Maze

Renco has used other legal actions as a strategy to evade its responsibilities in Peru. In April 2011, the Renco Group, on its own behalf and on behalf of DRP, initiated international arbitration proceedings against the Peruvian State under the Rules of the United Nations Commission on International Trade Law (UNCITRAL), alleging indirect expropriation, based on the FTA between the United States of America and Peru.²⁰ Renco is seeking \$800 million from Peru because it required the corporation to comply with the PAMA without considering the necessary deadline extensions requested, and because the corporation had to invest more money than anticipated in additional necessary projects, given the environmental conditions in La Oroya.

The arbitration is being used by the corporation as a tactic to suspend the civil case against Renco in a Missouri court (where DRC has its corporate headquarters). This lawsuit was filed by families from La Oroya alleging harm to the health of children poisoned by substances emitted by the La Oroya complex.

In Peru, in August 2014, Superior Court of Justice of Lima ruled in the State’s favor in a lawsuit brought by Doe Run in an attempt to avoid paying \$163 million for failure to comply with

In the meantime, La Oroya wants health, jobs, and clean air. The victims, who have waited so long for justice, hope that the State will safeguard their rights by enforcing the environmental laws. They also hope for a decision from the IACHR acknowledging that the State withheld information from them about their health and failed to exercise oversight over a company that has done so much harm to them.

its obligations under the PAMA.²¹ Fortunately, the strategy of evading responsibility was unsuccessful in this case.

In the meantime, La Oroya wants health, jobs, and clean air. The victims, who have waited so long for justice, hope that the State will safeguard their rights by enforcing the environmental laws. They also hope for a decision from the IACHR acknowledging that the State withheld information from them about their health and failed to exercise oversight over a company that has done so much harm to them. ■

***Editorial Note:** After this article was written, on July 10, 2015, the Ministry of Energy and Mining (MEM) approved the Corrective Environmental Management Instrument (Instrumento de Gestión Ambiental Correctivo- IGAC) for the DRP. This instrument gives the company 14 years (until 2029) to adjust its policy to the SO₂ air quality standard. The justification for the extension is that it would facilitate the sale of the complex. Nevertheless, the IGAC does not take into account the impact that the extension will have on the health of the population.

C. Petitions and cases before the Inter-American Commission on Human Rights. 1. Precautionary measures granted or extended by the IACHR in 2007. Peru. *Community of La Oroya*, available at <http://www.cidh.org/medidas/2007.eng.htm>

¹⁹ Interview with Juana.

²⁰ Warren, B. (April 16, 2012). Pay the polluter \$800 million! Trade deal injustice for the children of La Oroya. *Friends of the Earth*, available at <http://www.foe.org/news/archives/2012-04-pay-the-polluter-800-million-trade-deal-injustice-fo>. Indirect expropriation is the “set of measures a government can take that would affect the investor’s expected future earnings.” De Echave, J. *El Capítulo de Inversiones, el TLC*, available at http://www.redge.org.pe/sites/default/files/el_capitulo_inversiones_TLC.pdf

²¹ *El Comercio*. (August 1, 2014). Corte Superior ordenó a Doe Run el pago de US\$163 mlls. al Perú, available at <http://elcomercio.pe/economia/peru/corte-superior-ordeno-doe-run-que-pague-us163-mlls-al-peru-noticia-1746958>

DPLF Takes Part in Two Hearings Related to Business and Human Rights during IACHR's 154th Session

During the 154th session of the IACHR, DPLF participated in two public hearings related to business and human rights.

On March 17, 2015, a public hearing was held on **Corporations, Human Rights, and Prior Consultation in the Americas**, requested jointly by DPLF and other organizations from the region. At the hearing, the IACHR was informed that the States of the region mistakenly considered that implementing the right to consultation has been achieved merely through the enactment of laws recognizing this right, and that States have underestimated the practical difficulties of making the right accessible and enforceable.



From left to right: Daniel Cerqueira (DPLF); Mateo Morales (Consejo Pueblo Maya, Guatemala); Patricia Tobón Yagari (Organización Nacional Indígena de Colombia).

On March 19, a hearing was held on **Human Rights and Extractive Industries in Latin America**, which was requested by the Latin American Bishops' Council (*Consejo Episcopal Latinoamericano*, **CELAM**), the Latin American and Caribbean Secretariat of Caritas (**SELACC**), the Latin American and Caribbean Confederation of Religious Men and Women (*Confederación Latinoamericana*

y Caribeña de Religiosos y Religiosas, **CLAR**), the Amazon Commission of the National Bishops Conference of Brazil (*Comisión Amazónica de la Conferencia Nacional de Obispos de Brasil*, **CNBB**), and the Pan-Amazonian Ecclesiastic Network (*Red Eclesial Pan Amazónica*, **REPAM**). Representatives of these bodies presented the Catholic Church's position on the violation of the human rights of the indigenous peoples and rural communities affected by extractive industries in Latin America. The organizations submitted a report to the IACHR highlighting as common practices the criminalization of human rights defenders, as well as the serious harm to the health, safety, and lives of indigenous and rural communities. The report also emphasizes that the home States of corporations that invest in extractive industries should assume part of the responsibility for the actions or omissions of those corporations. DPLF provided technical support in the preparation of this report and the organization of the hearing.



Photos: Daniel Cima

From left to right: David Lovatón (DPLF-PUCP); Mauricio López (Red Eclesial Pan Amazónica); Richard Coll (United States Conference of Catholic Bishops).

DPLF Files *Amicus Curiae* in the Case Concerning Bagua, Peru

In September 2014, DPLF, the Research Center on Law, Justice and Society (*Centro de Estudios de Derecho, Justicia y Sociedad, Dejusticia*) and the Human Rights Center of the Catholic University of Ecuador (Centro de Derechos Humanos de la Pontificia Universidad Católica de Ecuador) filed an *amicus curiae* with the Transitional Criminal Chamber of Bagua, Peru (*Sala Penal Liquidadora Transitoria de Bagua*) in one of the country's most significant trials in recent years.

The brief highlights several irregularities in the criminal proceedings against 52 defendants for acts of violence that took place on June 5, 2009 on a stretch of highway known as "Curva del Diablo" near the city of Bagua. In this case, 52 individuals (23 of whom belong to the Awajún-Wampis indigenous peoples) have been charged with various crimes against the Peruvian State and the 11 members of the National Police of Peru who died on that date.

Based on the examination of the case file, information in the public

domain, and the observation of hearings before the Transitional Criminal Chamber of Bagua in July and August 2014, it was possible to verify that the National Police, the Office of the Public Prosecutor, and judicial authorities acted in a manner inconsistent with the jurisprudence of the Inter-American System and other supranational human rights bodies. DPLF believes that the *amicus curiae* presents an opportunity for those facts to be weighed by the court when a judgment is rendered.

DPLF maintains that the absence of judicial guarantees in the criminal case with respect to the investigation of those acts of violence could not only jeopardize the fundamental rights of the 52 defendants, but also frustrate the expectations of justice, truth, and reparation of the relatives of the police officers who died. In this respect, DPLF called upon the Peruvian State to properly establish the facts of the case with strict adherence to international human rights standards.

DPLF and Partner Organizations Convene Meeting with the IACHR's Rapporteur on the Rights of Indigenous Peoples and Afro-Descendants



On July 30, 2015, indigenous leaders, persons of African descent, and human rights organizations from nine Latin American countries (Bolivia, Chile, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Panama, and Peru) met in Panama to report to **Rose-Marie Belle Antoine, President of the IACHR and Rapporteur on the Rights of Indigenous Peoples and Persons of African Descent**, on human rights violations committed by industries in the extractive and tourism sectors.

This information will be used in drafting **IACHR's report on violations of the human rights of indigenous peoples and Afro-descendants in the context of extractive and tourism projects**. During this meeting, participants also presented specific cases to the Rapporteur where investment projects have negatively affected the rights of the peoples represented at the meeting. At a press conference, the participating organizations spoke out against the criminalization of protests and environmental defense activities, as well as the insufficient use of the right of consultation.¹ In addition, they agreed on the need to denounce the activities of corporations in their home countries, in order for them to be held accountable for acts that violate the human rights of indigenous peoples and Afro-descendants in Latin America.

The fourth meeting of partner organizations working on the right to prior consultation in the region was held the following day. The organizations in attendance evaluated the main barriers to compliance with the right to prior, free, and informed consultation and consent in Latin America. The three earlier meetings were held



Photos: Marcela Alcántara

in Chicago (April 2014), Lima (September 2014), and Washington DC (March 2015). At the end of the March meeting, a press release was issued² stressing that the States have not brought their laws into line with international human rights law standards on prior consultation, nor have their institutions implemented the timely procedures required for the adequate implementation of this right, among other matters.

¹ See [in Spanish only], <http://www.dplf.org/es/news/reunion-en-panama-con-lideresindigenas-y-afrodescendientes>

² See, <http://www.dplf.org/en/news/press-release-human-rights-organizations-issue-statement-implementation-right-prior-free-and>

The Case of Pacific Rim v. El Salvador: An Example of How Corporations that Harm the Environment Become Victims

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In addition to failing to comply with environmental requirements and defying laws, Pacific Rim caused ecological harm, economic losses, social unrest, and corruption with its exploration activities. In other words, it assaulted the country and therefore should be sued. But no—the company sued the State. The roles are reversed: the perpetrator (Pacific Rim)



sued the victim (El Salvador). This lawsuit provides another example that illustrates what Uruguayan writer Eduardo Galeano called an “upside-down world.”¹

In 2004, the Canadian mining company Pacific Rim applied for a gold mining permit in El Salvador. Pacific Rim (now controlled by the Canadian-Australian firm Oceana Gold) attempted to assure the government of then-President Antonio Saca that its mining activity would be environmentally responsible. Nevertheless, the government rejected this proposal because about 90 per cent of the surface water in El Salvador was polluted and, according to experts, gold mining would cause major harm to the Lempa River, an essential water source for more than six million Salvadorans.² In May 2007, the ministers of the environment and the economy announced to the mining companies the immediate implementation of an indefinite moratorium on the processing of environmental permits related to metal mining activities. President Saca instituted the moratorium in 2008, and the successive administrations of the Farabundo Martí National Liberation Front (2009 and 2014) have maintained it. The moratorium also enjoys broad public

support, as a recent poll shows 77 per cent of Salvadorans believe mining should be permanently prohibited in their country³

Even though no mining contract was ever signed, Pacific Rim filed a complaint in 2009 seeking US \$77 million before the International Centre for Settlement of Investment Disputes (ICSID), an arbitration tribunal of the

World Bank headquartered in Washington DC, which has been criticized for its lack of transparency.⁴ The case was brought invoking the violation of the investment protection rules of the Dominican Republic-Central America Free Trade Agreement with the United States (DR-CAFTA). However, Pacific Rim was unable to prove that its subsidiary in the state of Nevada had significant activity in the United States. This meant that ICSID lacked jurisdiction over the case, because Pacific Rim was headquartered in Canada, which is not a party to the treaty.⁵

But the case was also brought alleging the violation of El Salvador’s 1999 Investment Law.⁶ As some studies suggest, this law was promoted by the World Bank as part of the package

¹ Morales, Vidalina. (October 17, 2009). Acceptance speech on behalf of the National Roundtable against Metal Mining for the Letelier-Moffitt Human Right Award in Washington DC.

² Moran, R. (2005). *Technical Review of the El Dorado Mine Project Environmental Impact Assessment (EIA), El Salvador*, available at http://www.votb.org/elsalvador/Reports/Technical_Review_El_Dorado_EIA.pdf

³ Joakin Salazar (July 17, 2015). IUDOP: 77% of the Salvadorean population asks for metal mining to be prohibited. *Stopesmining International Allies Against Mining in El Salvador*, available at http://www.stopesmining.org/j25/index.php?option=com_content&view=article&id=367:iudop-77-of-the-salvadorean-population-asks-for-metal-mining-to-be-prohibited&catid=88&Itemid=437

⁴ Boeglin, N. (December 2013). ICSID and Latin America: Criticism, withdrawal and the search for alternatives. *Bretton Woods Project*, available at <http://www.brettonwoodsproject.org/wp-content/uploads/2013/12/At-Issue-ICSID.pdf>

⁵ Broad, R. et. al. (March 14, 2014). Debunking Eight Falsehoods by Pacific Rim/Oceana Gold in El Salvador. *Institute for Policy Studies*, available at http://www.ips-dc.org/debunking_eight_falsehoods_by_pacific_rim_mining/

⁶ Investment Law of El Salvador [*Ley de Inversiones de El Salvador*], 1999, Article 15 (prior to amendment), available at http://www.oas.org/juridico/spanish/mesicic3_slv_inversiones.pdf

of structural adjustment policies imposed on the country.⁷ Under Article 15 of this law, foreign corporations were allowed to bring El Salvador directly before ICSID for the violation of investment laws, without having to exhaust domestic judicial remedies. Subsequent amendments have made it more difficult to avoid the national courts of El Salvador, but they could not be considered retroactively and therefore Pacific Rim's complaint is still pending and is set to be adjudicated sometime this year.⁸ In the meantime, Pacific Rim has raised its demand for compensation to US \$301 million.

Proponents of international arbitration consider it to be impartial and objective, but the case of Pacific Rim v. El Salvador demonstrates that corporations increasingly use the controversial investor—State dispute settlement (ISDS) rules of bilateral investment treaties and free trade agreements to elude national justice systems and, in particular, the regulations that the States deem to be in the public interest.⁹

Foreign investors can sue States for the alleged violation of a number of investment rules that protect them, including the legal concept of *indirect expropriation*. On these grounds, investors can seek compensation for the decrease in their expected earnings resulting from the entry into force of regulations in the public interest. Another negative aspect is that governments cannot sue corporations in these tribunals, and the communities affected by foreign investors cannot participate in the process. In addition, investors can block the disclosure of information on such cases (including their very existence), and therefore the list of existing investor-State cases is limited to “known cases.”¹⁰

At just one of the several international arbitration tribunals that handle such “investor-state” cases (the only tribunal that publishes a list of cases), private investors filed 91 claims related

Proponents of international arbitration consider it to be impartial and objective, but the case of Pacific Rim v. El Salvador demonstrates that corporations increasingly use the controversial investor—State dispute settlement (ISDS) rules of bilateral investment treaties and free trade agreements to elude national justice system.

to oil, mining, and gas disputes in the past decade.¹¹ These cases, filed with the ICSID, amount to more than three times the cases registered in the previous decade and well more than double the number in the three prior decades combined.

The trend of using investor-state lawsuits as a means of prevailing in resource rights fights is most evident in Latin America. As of March 4, 2015, there were a total of 1997 pending ICSID cases. Of these, 56 (28 per cent) are related to oil, mining, or gas. Countries of the Latin America and Caribbean region are the target of 26 (46 per cent) of the pending extractives cases. Venezuela faces the largest number – 8 – followed by Argentina, with 7.¹²

This system threatens to be extended through new inter-regional treaties: the Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP). Nevertheless, the inclusion of investor-State rules in these agreements is viewed with distrust by civil society and members of parliament in many countries.

Investor-State rules already exist in more than 3,000 bilateral investment treaties and trade agreements, including the multilateral North American Free Trade Agreement (NAFTA).¹³ Mexico and Canada have each lost five cases under NAFTA, paying hundreds of millions of dollars to US firms.¹⁴ In the largest award to date, ICSID ordered Ecuador to pay more than US\$1.7 billion to Occidental Petroleum of the United States in 2012 for the termination of a contract.¹⁵ In October

⁷ With regard to the influence of the World Bank and the IMF on the structural adjustment policies implemented in El Salvador in the early 1990s, see, Ochoa, M.E., Dada Hutt, O., and Montecinos, M. (December 2000). *El impacto de los programas de ajuste estructural y estabilización económica en El Salvador*, available at http://www.saprin.org/elsalvador/research/els_cover_index.html and García Sánchez, F.M., Reyes Núñez, N.Y., and Velásquez Leiva, M.D. (2010). *Evaluación de políticas de inserción laboral y su impacto en los jóvenes*. Costa Rica: UCA, Trabajo de Graduación Preparado para la Facultad de Ciencias Económicas y Sociales, available at http://www.uca.edu.sv/deptos/economia/media/archivo/b02a67_evaluaciondepoliticadeseinsercionlaboralsuimpactoenlosjovenes.pdf

⁸ Regarding the reform implemented, see, *La Prensa Gráfica*. (August 19, 2013). The amendment to the Investment Law is available at <http://www.laprensagrafica.com/la-reforma-a-la-ley-de-inversiones>

⁹ Pérez Rocha, M. (December 3, 2014). When Corporations Sue Governments. *New York Times*.

¹⁰ See, list of cases before ICSID at <https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx>

¹¹ See, ICSID website, at <https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx>

¹² Data from the Institute for Policy Studies research on the ICSID.

¹³ For more information, see the website of the United Nations Conference on Trade and Development at <http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20%28IIA%29/International-Investment-Agreements-%28IIAs%29.aspx>

¹⁴ Pérez Rocha, M. (January 14, 2014). Stewart Trew, NAFTA at 20: A Model for Corporate Rule. *Foreign Policy in Focus*, available at <http://connection.ebscohost.com/c/articles/93685004/nafta-20-model-corporate-rule>

¹⁵ Tai Heng, Ch. (December 12, 2012). ICSID's Largest Award in History: An

2013, Venezuela was ordered to pay US \$1.6 billion to Exxon as compensation for the nationalization of petroleum projects.¹⁶

The investor-State system has been taken advantage of most of all by corporations from the largest, most economically powerful nations. According to the United Nations Conference on Trade and Development (UNCTAD), 75 per cent of the claimants in these types of lawsuits are from the US or the European Union.¹⁷

Nevertheless, as countries all over the world face international arbitration lawsuits, opposition to this system is increasing. Thanks to enormous pressure from non-governmental and civil society organizations, members of parliament and officials from Germany, France, and the European Commission are making it clear that moving forward with a TTIP without investor-State rules is advisable, because national remedies and legal systems are sufficiently robust.¹⁸ The concerns in Europe are not unfounded. In 2012, the Swedish energy company Vattenfall filed a complaint against Germany before ICSID for its decision to abandon nuclear power and close certain plants, and although the figures have not been made public, it is known that the claim against Berlin is for billions of dollars.¹⁹ The amendment of a single set of rules can unleash a wave of litigation. For example, changes in energy policies resulted in seven lawsuits in the Czech Republic in 2013, and six in Spain.²⁰

Investor-State dispute settlement rules should not be extended through new treaties. They are an attack on national sovereignty and the ability to regulate in the interest of public welfare, as well as on the public purse of every country. For El Salvador, a loss of US \$301 million—slightly less than 2 per cent of its GDP—would significantly diminish the funds available for budget items like healthcare and education. Even if Pacific Rim loses its lawsuit, as many of us hope, the arbitration has already cost El Salvador some

US\$13 million to date—a sum equal to the country's environmental and natural resource investment budget.²¹

Venezuela,²² Ecuador,²³ and Bolivia²⁴ have officially denounced the ICSID Convention, and countries such as South Africa²⁵ and Indonesia²⁶ are terminating their bilateral investment treaties. El Salvador and other Central American countries, including Costa Rica, which is also the subject of a multi-million dollar lawsuit by another Canadian mining company,²⁷ Infinito Gold, should think about withdrawing from ICSID and eliminating investor-State provisions in their future treaties, even though they fear cuts in financial assistance from the US or international financial institutions. The reason is simple: the investor-State dispute settlement mechanism is like playing soccer on one half of the field: corporations have the freedom to attack, while the countries can merely defend themselves and the best a government can do is reach the end of the game with no goals scored.

The case of Pacific Rim v. El Salvador demonstrates that foreign investors should not be granted privileges to the detriment of the national or global good. It also illustrates the need for a binding treaty on transnational corporations that guarantees effective remedies for victims of human rights violations and addresses the imbalance in the international legal order, given the excessive rights granted to corporations under free trade and investment treaties.²⁸ ■

Overview of Occidental Petroleum Corporation v. the Republic of Ecuador. *Kluwer Arbitration Blog*, available at <http://kluwerarbitrationblog.com/blog/2012/12/19/icsids-largest-award-in-history-an-overview-of-occidental-petroleum-corporation-v-the-republic-of-ecuador/>

¹⁶ See, Ulmes, A. and Pons, C. (October 9, 2014). Venezuela ordered to pay Exxon \$1.6 billion for nationalization. *Reuters*, available at <http://www.reuters.com/article/2014/10/09/us-venezuela-exxon-idUSKCN0HY20720141009>

¹⁷ See UNCTAD information at <http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=718>

¹⁸ See, Euractiv. (January 15, 2015). France and Germany form front against ISDS, available at <http://www.euractiv.com/sections/trade-society/france-and-germany-form-united-front-against-isds-311267>

¹⁹ World Nuclear News. (October 16, 2014). Vattenfall sues Germany over phase-out policy, available at <http://www.world-nuclear-news.org/C-Vattenfall-sues-Germany-over-phase-out-policy-16101401.html>

²⁰ See, UNCTAD. (2014). Recent Developments in Investor-state Dispute Settlement (ISDS). *Issues Note*, 1, p.3, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf

²¹ For details on the Salvadoran national budget, see [http://www.mh.gob.sv/portal/page/portal/PMH/Institucion/Ministro_de_Hacienda/Presentaciones/Presup_Proy_2015_\(26-09-2014\)_2\).pdf](http://www.mh.gob.sv/portal/page/portal/PMH/Institucion/Ministro_de_Hacienda/Presentaciones/Presup_Proy_2015_(26-09-2014)_2).pdf)

²² Ripinski, S. (April 13, 2012). Venezuela withdrawal from ICSID: What does it and what does it not achieve? *Investment treaty news*, available at <http://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/>

²³ Puentes. (July 14, 2009). Ecuador finiquita convenio con el CIADI. *International Center for Trade and Sustainable Development*, available at <http://www.ictsd.org/bridges-news/puentes/news/ecuador-finiquita-convenio-con-el-ciadi>

²⁴ Puentes. (March 1, 2008). Bolivia se margina del CIADI. *International Center for Trade and Sustainable Development*, available at <http://www.ictsd.org/bridges-news/puentes/news/bolivia-se-margina-del-ciadi>

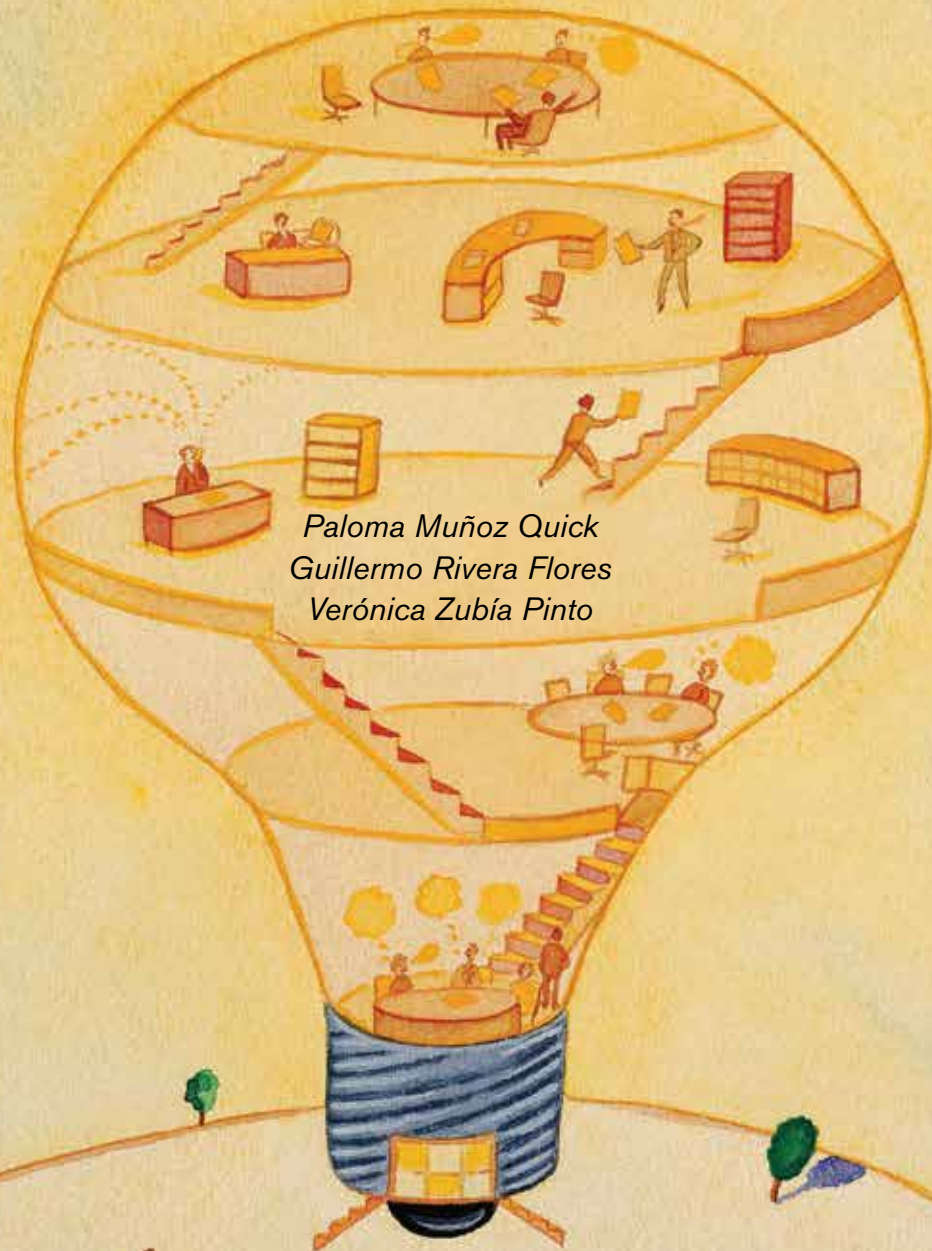
²⁵ Hunter, R. (2013). South Africa terminates bilateral investment treaties with Germany, Netherlands and Switzerland. *International Arbitration and Investment Law*, available at <http://www.rh-arbitration.com/south-africa-terminates-bilateral-investment-treaties-with-germany-netherlands-and-switzerland/>

²⁶ Trakman, L. and Sharma, K. (August 21, 2014). Indonesia's termination of the Netherlands-Indonesia BIT: Broader Implications in the Asia Pacific? *Kluwer Arbitration Blog*, available at <http://kluwerarbitrationblog.com/blog/2014/08/21/indonesias-termination-of-the-netherlands-indonesia-bit-broader-implications-in-the-asia-pacific/>

²⁷ Mining Watch Canada. (November 21, 2013). Message to Canada's Infinito Gold: Drop your outrageous billion-dollar lawsuit against Costa Rica!, available at <http://www.miningwatch.ca/node/7199>

²⁸ See more about this initiative here <https://www.tni.org/en/collection/binding-treaty-tncs>

Public Sector Initiatives on Business and Human Rights



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Beyond the Roadmap: The Role of National Human Rights Institutions in Implementing the UN Guiding Principles

Paloma Muñoz Quick

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Foreign investment and business have been an important underlying force in economic development in the Americas, yet many business activities have negatively impacted the entire spectrum of human rights, leading to protests, conflict, and violence on both sides. Environmental and land rights defenders in Brazil, Colombia, Guatemala, Mexico, Honduras, and Peru who challenge the economic and political interests of government and companies are especially vulnerable to threats and lethal violence.¹ Whether through inadequate consultation when purchasing land, the use of abusive private security forces, or unjust revenue-sharing arrangements, extractive sector companies, in particular, have had widespread human rights impacts, especially in relation to the health and livelihood of nearby communities.² Such conflict with communities comes with serious costs, not only for governments and communities, but also for extractive sector companies and the broader society.³

Human rights have traditionally been the responsibility of states, but in recent years the international community has given consideration to the scope of the human rights responsibilities of businesses and explored ways for corporate actors to be held accountable for the impact of their activities.



In June 2011, the UN Guiding Principles on Business and Human Rights were unanimously adopted by the UN Human Rights Council, making them the authoritative global framework for business and human rights matters, and providing a common normative platform for action. This “do-no-harm” framework rests on three pillars:

- Duty of States to protect against human rights abuses by companies at home and abroad
- Corporate responsibility to respect human rights through due diligence to avoid negative impacts, and
- Right of victims to access remedy.

Since then, in June 2014, the Organization of American States (OAS) has taken up the Guiding Principles through a resolution, which calls on States to, “continue promoting the application of the United Nations guiding principles on business and human rights.”⁴

Although important for addressing the human rights impacts of business, the effectiveness of these measures lies in implementing the architecture laid out in the Guiding Principles in diverse local contexts throughout the Americas. The Guiding Principles are just that—principles. They give national governments a roadmap with which to navigate the complex terrain of corporate responsibility and accountability.

Getting Beyond the Roadmap

If the UN is the brain behind the global human rights system, the place where human rights were born and the Guiding Principles developed, and regional human rights bodies are the

¹ Front Line Defenders. (2014). 2015 *Annual Report*, 2014, p. 5, available at https://www.frontlinedefenders.org/files/annual_report_2014_final_revised.pdf

² Collins, B. and Fleischman, L. (2013). *Human Rights and Social Conflict in the Oil, Gas, and Mining Industries: Policy Recommendations for National Human Rights Institutions*. Oxfam America Research Backgrounder, available at <http://www.oxfamamerica.org/publications/national-HR-institutions-and-extractiveindustries>.

³ Reese, C. and M Franks, D. (2011). The costs of conflict with local communities in the extractive industry. SRMining, 8, available at http://shiftproject.org/sites/default/files/Davis%20&%20Franks_Costs%20of%20Conflict_SRM.pdf

⁴ Organization of American States (OAS), *Resolution on the promotion and protection of human rights in business*, June 2014, available at <http://business-humanrights.org/en/doc-draft-resolution-promotion-and-protection-of-human-rights-in-business>

heart through which international standards are interpreted and translated into regional realities, it is National Human Rights Institutions (NHRIs) that are the veins of the global human rights order, responsible for disseminating and ensuring the uptake of human rights standards at the local level. Thus, NHRIs play a critical role in making the Guiding Principles a reality and in addressing the human rights impacts of business on the ground.

In 1993, the UN General Assembly adopted the so-called Paris Principles, which define the structure and responsibilities of NHRIs. The Paris Principles task NHRIs with implementing international human rights norms at the national level.⁵

The important role of NHRIs in the field was first recognized in 2009 by the International Coordination Committee of National Human Rights Institutions (ICC), which established the Working Group on Business and Human Rights as the first thematic working group of the ICC. The aim of the Working Group is to promote capacity building, strategic collaboration, and advocacy and outreach by NHRIs in the area of business and human rights.⁶

In 2010, the Edinburgh Declaration was adopted at the 10th International Conference of the ICC. It considers ways in which NHRIs can engage with business and human rights issues by promoting greater protection against business-related human rights abuses, greater business accountability and respect for human rights, access to justice, and the establishment of multi-stakeholder approaches.⁷

In 2011, the Americas Network of NHRIs hosted a regional seminar in Guatemala on business and human rights, where a declaration and action plan was adopted whereby NHRIs committed themselves to work on business and human rights capacity-building within their domestic jurisdictions and to strengthening legal frameworks on business and human rights.

The UN also recognized the role NHRIs have to play through the 2011 UN Human Rights Council's endorsement of the Guiding Principles. Under the State duty to protect through regulatory and policy functions:

NHRIs play a critical role in making the Guiding Principles a reality and in addressing the human rights impacts of business on the ground.

National human rights institutions that comply with the Paris Principles have an important role to play in helping States identify whether relevant laws are aligned with their human rights obligations and are being effectively enforced, and in providing guidance on human rights also to business enterprises and other non-State actors.⁸

In relation to the corporate responsibility to respect, companies are advised to consult externally with credible, independent experts, including national human rights institutions,⁹ in order to understand the local context, in the process of complying with international human rights standards. Under the access to remedy pillar, NHRIs are included as one of the state-based grievance mechanisms that are administered by an independent body,¹⁰ and are described as having a key role in providing non-judicial grievance mechanisms.¹¹

At the inter-American level, the OAS Resolution on human rights and business also calls on the NHRIs of OAS member States to foster constructive dialogue among business, government, and civil society and other social stakeholders in implementing the Guiding Principles.

From Pillars to Practice

In reality, NHRIs are already engaging collectively and individually with the human rights impacts of businesses. At the global level, the ICC Working Group has helped to draft the ICC Business and Human Rights Guidebook for NHRIs, among other actions.¹²

Nationally, NHRIs in the Americas have taken steps to promote business and human rights, particularly in the

⁵ Collins, B. and Fleischman, L. (2013). *Human Rights and Social Conflict in the Oil, Gas, and Mining Industries: Policy Recommendations for National Human Rights Institutions*. Oxfam America Research Backgrounder.

⁶ Gotzmann N. and Methven O'Brien, C. (2013). *ICC HRB Guidebook for NHRIs*. International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights, p. 20, available at http://www.humanrights.dk/files/media/dokumenter/udgivelseser/bhr_guidebook_for_nhris_2013_eng.pdf

⁷ International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights, The Edinburgh Declaration, 2010, available at http://www.ohchr.org/Documents/AboutUs/NHRI/Edinburgh_Declaration_en.pdf

⁸ UN. Human Rights Council. (2011). *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, resolution 17/4 of 16 June 2011, Guiding Principle 3, available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

⁹ Ibid., Guiding Principle 23.

¹⁰ Ibid., Guiding Principle 25.

¹¹ Ibid., Guiding Principle 27.

¹² Gotzmann N. and Methven O'Brien, C. (2013). *ICC HRB Guidebook for NHRIs*. International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights, p. 20.

extractive sector. These actions, although not directly aimed at implementing the Guiding Principles, are clear examples of the Guiding Principles in action.

Under the State duty to protect, for example, the National Ombudsman in Peru, the country's NHRI, presented an extraordinary report to Congress in 2007 entitled "Socio-environmental conflicts due to extractive activities in Peru." This report also included recommendations aimed at extractive companies and civil society on how to improve relations and avoid escalating violence. The recommendations to companies focused on compliance with social and environmental obligations in national law and those detailed in company environmental policies. The recommendations to government focused on reform and strengthening of environmental governance through the creation of an environmental authority, independent of other state agencies, as well as the establishment of a formal complaints mechanism easily accessible to civil society. For civil society, the NHRI recommended the promotion of dialogue and responsible participation in the avoidance and management of environmental and social conflicts.¹³

Regarding the corporate responsibility to respect human rights, Chile's NHRI is collaborating with the Danish Institute for Human Rights in the production of a Human Rights and Business Country Guide. The country guide provides country-specific guidance to help companies respect human rights and contribute to development. It covers a range of topics including labor-related issues such as occupational health and safety, trade unions, and child labor, and community-related issues such as security, resettlement, indigenous peoples, environmental impacts, and revenue transparency. Chile's country guide in

particular includes a section on extractive industries, providing an overview of the main issues to be addressed by companies operating in the sector.

Finally, under access to remedy, Venezuela's NHRI has taken at least three cases to court relating to human rights abuses by companies in different sectors, resulting in effective remedies and generating important judicial precedents on the issue of business and human rights.¹⁴

While these examples show that NHRIs are working to address the impacts of business in the Americas, more remains to be done to achieve the vision laid out in the Guiding Principles. NHRIs must first take ownership of the Guiding Principles and then adapt them to local needs and realities. This can be done in a number of ways, including encouraging governments to develop national action plans on business and human rights and later participating in the drafting and implementation of these plans. NHRIs should also engage in dialogue with companies on the Guiding Principles, training them to address their human rights impacts. Likewise, NHRIs should develop guidance for companies on operational-level grievance mechanisms appropriate to the local context.

The more NHRIs engage proactively with the Guiding Principles and other stakeholders concerned with ensuring business respect for human rights, the more workers, local communities, human rights defenders, and governments will benefit, as will the global community as a result of the greater stability in natural resource extraction. ■

¹³ Ibid., p. 58.

¹⁴ Red INDH del Continente Americano. *Experiencia de la Defensoría del Pueblo de la República Bolivariana de Venezuela en Materia de Empresas y Derechos Económicos y Sociales*, available at <http://www.rindhca.org.ve/red/index.php/programa-de-trabajo/ejes-tematicos/grupo-de-trabajo-del-cic-empresas-y-derechos-humanos/1384>



Please send comments and possible contributions for this publication to info@dplf.org.

Colombia

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The relationship between business and human rights activities is a matter of great importance to the government of Colombia. Therefore, the Public Policy Guidelines on Business and Human Rights were published in July 2014, with a special chapter on Comprehensive Human Rights Policy, which was crafted through dialogue among the State, civil society, and business corporations during 2012 and 2013.

Bearing in mind the progress, and challenges that still arise, in the implementation of international standards on corporations and human rights, in 2015 Colombia set the ambitious goal of having a national action plan on business and human rights consistent with the United Nations Guiding Principles on the issue.

For this task, government entities pledged at the beginning of the year to contribute to the development of the national action plan on business and human rights as a public policy instrument that facilitates inter-institutional coordination on this issue, with a strong national emphasis.

In this respect, the role of the State consists of promoting, advocating, and generating discussion to devise a participatory plan that takes account of the interests of all parties and builds consensus for the implementation of these international standards in Colombia. Accordingly, dialogues were initiated with civil society and corporations, and are expected to take place frequently.

In addition, the national action plan seeks to join together the existing multi-actor initiatives such as the Colombia Guides, the Ethical Commitment by Swiss Companies in Colombia, and the Mining and Energy Committee, in order to strengthen these dialogues and achieve better adherence to the technical documents and recommendations issued by those initiatives. The aim is to broaden knowledge of the different guidelines on the subject, thereby obtaining greater respect for human rights from corporations.

It is worth noting that the Colombian government has not and will not be alone on this path. Fortunately, it has benefitted from the staunch efforts of the international community, which has publicized best practices and lessons learned from different countries in the drafting of national action plans and in the implementation of national guidelines in domestic policies. This has created a more robust and comprehensive process that has made it possible to place this issue at the top of the government's agenda.

For these reasons, Colombia has become a point of reference in Latin America in human rights work as it relates to business corporations. This development can be used to approach the issue in the other countries of the region in order to protect, respect, and remedy these human rights violations, as provided in the Guiding Principles. ■

Chile

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Chile has expressed its commitment to the United Nations Guiding Principles on Business and Human Rights, which it recognizes as an important tool that provides direction for corporations and States to prevent and remedy the impacts of business on human rights. This commitment has been reflected in Chile's ongoing support for the issue at the United Nations and in the regional efforts it has spearheaded at the Organization of American States, where it organized a special session on the issue in January of this year.

In line with this commitment, and following the suggestion of the UN Working Group on Human Rights and Transnational Corporations and Other Business Enterprises, the Chilean government is developing a National Action Plan on Human Rights and Business, in the firm belief that this is the most effective way to implement the

Guiding Principles.

In leading the process for the development of that plan, the Ministry of Foreign Affairs has strengthened its institutional culture, creating the Business and Human Rights Unit within the Bureau of Human Rights, which will be responsible for coordinating different aspects of the plan's development, as well as monitoring the plan and contributing to the issue at the inter-American and global levels.

As a first step in the development of the plan, an assessment will be conducted to identify the current situation in Chile with regard to the impact of business on human rights, best practices, and the gaps that allow for these impacts to arise. This will make it easier to pinpoint the areas that require legislative or public policy reforms or the creation of incentives for corporations to prevent those adverse impacts. It is anticipated that this study will be conducted by outside experts, through interviews with the different actors involved, using the methodology recently devised by the Danish Institute for Human Rights (DIHR) and the International Corporate Accountability Roundtable (ICAR).

In addition to this initial evaluation, another key aspect of this process for the development of a National Action Plan is the active

participation of all the stakeholders. This is essential, as it allows for all of the perspectives from the different sectors that will be affected by the outcome of the plan to be heard, and it also lends legitimacy to the process. The development of a National Action Plan provides a unique opportunity for dialogue among different actors. As such, efforts will be made to ensure that the process is open, inclusive, and transparent.

In order for those actors to be able to participate effectively in this undertaking, it will be necessary to build capacities and create forums for exchange. The Ministry of Foreign Affairs organized a high-level national seminar, held in April 2015, as a first step in opening a debate on the issue. The objective of the event was to deepen knowledge of the Guiding Principles and other relevant instruments, and to announce the steps that will be taken for its implementation in the national sphere.

A workshop was held in the days prior to the seminar under the auspices of the Danish Institute for Human Rights in cooperation with the Ministry of Foreign Affairs to foster the capacities of

the different actors who will take part in the development of the National Plan.

For these purposes, and in addition to the guidance provided by the Institute, our country has requested technical assistance from the Inter-American Commission on Human Rights.

There is no single prescription for the creation of a National Action Plan, but we do believe that there are certain fundamental aspects that must be taken into account when planning this project, such as: training, assessment of the current situation, and dialogue with the different stakeholders involved. The process is therefore being planned on these bases. Another issue we believe to be critical is maintaining the conversation between States working on the issue in order to have an ongoing exchange of lessons learned, experiences—both positive and negative—and future projects.

Finally, we must bear in mind that the development of a National Action Plan on Human Rights and Corporations is only the first step in the continuous work of improvement on this important issue. ■

In Chile, UDP to Conduct Initial Baseline Study of Business and Human Rights in Latin America

Judith Schönsteiner

Director of the Human Rights Center at Diego Portales University

In 2015, Chile will become the first Latin American country in which a baseline study of business and human rights will be conducted. This will be done under the auspices of the Human Rights Center at Diego Portales University (UPD). This study on the human rights obligations of the Chilean State in the regulation of economic activities will serve—together with a number of consultations with stakeholders to be convened by the government in 2016—as input for the design of a National Action Plan. Based on the pertinent resolutions of the United Nations Human Rights Council and the General Assembly of the OAS, the Chilean Ministry of Foreign Affairs and Ministry of the Economy undertook to promote a public policy to implement the UN Guiding Principles on Business and Human Rights. The first steps in the process will be the study, commissioned by the Danish Institute of Human Rights (DIHR), and the publication of a Country Guide (written by the National Human Rights Institute) to orient business leaders in the design of policies on business and human rights.

Considering that the Guiding Principles do not reflect all of Chile's obligations with respect to the issue, the baseline study will apply a regionalization method that will take account of the standards of the IASHR. Accordingly, the matrix for the study, initially prepared by DIHR and ICAR, will be complemented by the UPD Human Rights Center. Two workshops, one with an attorney from the IACHR, have already allowed the Chilean team to discuss the relevant challenges.

The project receives funding and technical support from DIHR, and expects to present its results in January 2016 on the website of the UDP Human Rights Center.

Private Sector Initiatives on Business and Human Rights

Eduardo García



Corporations and Human Rights: The Perspective of an Extractive Sector Company

Eduardo García

Director of Corporate Responsibility, Repsol

Repsol is an oil and gas company headquartered in Spain and with operations in more than 30 countries. It has in recent years undertaken numerous initiatives to promote standards of respect for human rights.

The company is a member of the United Nations Global Compact,¹ the Extractive Industries Transparency Initiative,² and the Voluntary Principles on Security and Human Rights.³ In 2008, it became the first private oil and gas company operating in Latin America with an indigenous peoples policy that is committed to respecting the rights protected under ILO Convention 169.

In 2013, Repsol decided to adopt the UN Guiding Principles on Business and Human Rights as part of its corporate policy. The company supports the Guiding Principles for three reasons:

- They establish the same rules of the game for all companies, without distinction;
- They decrease uncertainty with respect to proper corporate conduct, as well as the reasonableness of stakeholder expectations, and
- The flexible nature of the Guiding Principles enables us to adapt flexibly, and, therefore, to use efficiency criteria. This makes it possible to obtain positive changes for stakeholders without sacrificing jobs and competitiveness.

A study by the International Chamber of Commerce⁴ notes that the companies that are performing due diligence with respect to human rights are still in a minority. On the other hand, it is encouraging that the Guiding Principles are in third place among topics of interest to corporations, after corporate governance and business ethics.⁵ The concept of global corporate

social responsibility seems to have led toward a human rights concept, and it is currently on par with the environment among the issues on corporate agendas.

What do we need in order to expedite the implementation of the Guiding Principles?

The UN Working Group on Business and Human Rights maintains that governments must design and implement “public policy strategies specifically designed to protect against human rights abuse by business enterprises.”⁶ These are what are called National Action Plans on business and human rights.

Corporations, through their international associations,⁷ have expressed their agreement with the idea that National Action Plans can be a powerful and practical way for States to effectively implement the Guiding Principles. However, the corporations maintain that an impact assessment should be performed for each measure contained in the plans, in order to prevent unintended consequences. They ask for account to be taken of the fact that the vast majority of corporations are small and medium-sized enterprises. In addition, they assert that guidance and training should be offered, and that a single government focal point should be established to handle all matters concerning the National Action Plans. Finally, the corporations ask, above all, to be consulted and to have their opinion considered in the drafting of the National Action Plans.

Repsol hopes to see a good number of National Action Plans with effective and efficient measures in coming years. For its part, the company has already put the Guiding Principles in

Respect of Human Rights Between 2009 and 2012. In Márquez Carrasco, C. (ed.). *Spain and the Implementation of the United Nations Guiding Principles on Business and Human Rights*. Barcelona: Huygens.

¹ For more information on the United Nations Global Compact, see <https://www.unglobalcompact.org/>

² For more information on the Extractive Industries Transparency Initiative, see <https://eiti.org/files/document/sourcebookmarch05.pdf>

³ For more information on the Voluntary Principles on Security and Human Rights, see <http://www.voluntaryprinciples.org/>

⁴ ICC. (December 2, 2012). Report of pilot business survey on implementation of the corporate responsibility to respect Human Rights, available at <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/Report-of-pilot-business-survey-on-implementation-of-the-corporate-responsibility-to-respect-Human-Rights/>

⁵ Benseddik, F. et al. (2014). What Measures are Listed Companies Taking to Protect, Respect and Promote Human Rights? A Comparative Analysis of European, North-American and Asia-Pacific Corporate Strategies for the

⁶ UN Working Group on Business and Human Rights. Guidance on National Action Plans on Business and Human Rights. Version 1.0 I December 2014, available at http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf

⁷ IOE. (August 27, 2014). IOE input to the open consultation on substantive elements to be included in guidance on national action plans (NAPS) to implement the UN guiding principles on business and human rights, available at http://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/business_and_human_rights/EN/_2014-08-28__G-608_IOE_Input_to_NAPs_Consultation_Process__final_.pdf; and ICC. (December 3, 2014). ICC represents international business at 3rd UN Forum on Business and Human Rights, available at <http://www.iccwbo.org/News/Articles/2014/ICC-represents-international-business-at-3rd-UN-Forum-on-Business-and-Human-Rights/>

place in the three elements of human rights due diligence.

First, with respect to harm prevention assessments, we are using tools similar to the ones that have been used for years to prevent environmental impacts. Sufficient methodology has been developed in our sector to address this challenge. Human rights impact studies have been conducted by engaging in dialogue with stakeholders on the ground, at times under quite arduous conditions. In spite of the difficulties, we have managed to complete some studies in Latin America and we believe the results are very useful.

Another fundamental element of due diligence is reparation when prevention fails. The mechanisms of reparation that we have in use, although at the demonstration phase, are for the moment showing us that the vast majority of complaints from individuals or groups in local communities can be investigated and redressed within a very short period of time. Complaints that would require undertaking more complex procedures within the company (involving and coordinating different units) such as, for example, the case of a contractor that pays its employees poorly, are currently very few in number. In any event, it is still too soon to be able to analyze these mechanisms in depth: we expect to have more relevant data in the coming years.

A third element of due diligence is the dissemination of information that allows the company and stakeholders to evaluate progress. With respect to human rights reporting, we currently use the indicators of the Global Reporting Initiative,⁸ but we are paying close attention to the development of the Human Rights Reporting and Assurance Frameworks Initiative (RAFI), which will be the first comprehensive guide focused on what corporations report about how we meet our responsibility to respect human rights in accordance with the Guiding Principles.⁹ RAFI is expected to be available by the end of this year.

In addition, we have identified some challenges and lessons learned after more than two years of implementing the Guiding Principles. An initial problem is the need to define the limits of certain human rights in the context of business operations, especially when the rights of some interested parties conflict with the rights of others. The limits to human rights in the context of State activities are becoming more clearly defined thanks to years of jurisprudence, but that is not the case with human rights in the context of corporate operations, where there are areas of uncertainty.

Another significant difficulty has to do with the supply chain, where we face basic problems such as those that arise from the informal economy or the potential shortcomings of the institutions responsible for inspecting the projects and the collective bargaining mechanisms of the workers.

There are also substantial challenges in the relationship between corporations and security forces. This has led to the Voluntary Principles on Security and Human Rights¹⁰ initiative, which is especially important for those companies that manage facilities considered by governments to be strategic. In this context, success in preventing the risk of human rights impacts is very much related to the governments' willingness to engage in dialogue about such risks.

With respect to the rights of indigenous peoples, greater consistency is needed in the interpretation of the right to prior, free, and informed consultation by States, indigenous peoples, civil society, and corporations, in order to reduce the uncertainty, which remains very high.

Another difficulty lies in the position of some stakeholders in their approach to dialogue with corporations about human rights. At times, there is a mentality of *negotiation* rather than *cooperation* to keep people from being adversely affected. In this respect, no economic agreement can by itself be a guarantee of protection against human rights impacts: on the contrary, in some cases it can exacerbate the risks.

There are also challenges in some of the legal systems, where certain statements by a company in a dialogue with stakeholders can be used against the company in legal proceedings. This does not preclude the ability to engage in dialogue with stakeholders, but it does limit it.

Finally, perhaps the main obstacle we have dealt with in advancing the implementation of the Guiding Principles is the lack of technical capacity on the part of all relevant actors, including the corporations. Understanding the legal and non-legal implications of the Guiding Principles in depth, throughout the entire organization, is a task that requires time and resources.

Governments, corporations, and civil society share the desire for corporations to be better equipped to fulfill their roles without jeopardizing the existing level of human rights enjoyment. With the strong multi-stakeholder consensus on the Guiding Principles, we have a great opportunity, and a great responsibility, to do so. ■

⁸ For more information on Global Reporting Initiative, see <https://www.globalreporting.org/>

⁹ For more information on RAFI, see <http://www.shiftproject.org/project/human-rights-reporting-and-assurance-frameworks-initiative-rafi>

¹⁰ For more information on the Voluntary Principles on Security and Human Rights, see <http://www.international-alert.org/resources/publications/voluntary-principles-security-and-human-rights-performance-indicators>

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