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Aportes **DPLF**

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Business and Human Rights: A Complex Relationship



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Business and Human Rights: *A Complex Relationship*

Dear colleagues,

In early September 2011, Peru enacted the “Law on the Right of Indigenous or Orinary Peoples to Prior Consultation Recognized in Convention 169 of the International Labour Organization (ILO).” At the domestic level, this law affirms the right of indigenous peoples to be consulted before the enactment of legislative or administrative measures that could affect their collective rights. It is an enormous step forward on the (still long) road to achieving full respect for the rights of indigenous peoples on the continent, as envisaged in international treaties binding on Peru and most of the countries in the region.

The role of states in fulfilling their legal obligations toward indigenous peoples, however, is just one part of the problem, or rather, one part of the solution to the problem. Another aspect, which is highly controversial, has to do with the rights and duties of private corporations. Just as states have the power to promote and facilitate national and foreign private investment in the area of natural resource extraction, corporations—both national and transnational—have the right to pursue such investments within the framework of respect for domestic and international law. But this right goes hand in hand with obligations, and this is where the applicable international law framework remains weak. It has yet to set out legal obligations that would make it possible to adjudicate responsibilities for potential human rights abuses in territories where infrastructure projects or natural resource exploitation are taking place.

This is no mere theoretical issue, but has very practical ramifications. The region is rife with social conflicts associated with natural resource extraction. Many projects have been blocked or suspended, while others have had to close down entirely as a result of community protests or legal injunctions. This has had a detrimental effect on operations already underway. Surely many of these problems could have been averted if states and corporations had only understood and respected the applicable international legal framework.

This issue of *Aportes* offers an overview of scenarios in which the legal obligations and responsibilities of national and transnational corporations are playing out in the arena of natural resource exploitation in indigenous territories. This is not just a social problem on our continent, but also a legal issue that must be addressed using all available legal instruments. We hope that the contributions in this journal will be useful to those wishing to learn more about these instruments. As always, we look forward to your feedback.

Human Rights and Extractive Industries in Latin America

Keith Slack

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Natural resource extraction is playing an increasingly critical role in the economies of many Latin American countries. Minerals exports have contributed to high growth rates in Peru and Chile, while revenues from oil have enabled the governments of Venezuela and Brazil to project themselves onto the global stage. Countries that have not previously had significant minerals sectors, such as Argentina, Guatemala, Honduras, and El Salvador, are now of interest to transnational corporations seeking to take advantage of high gold and oil prices and strong demand from China for minerals. Over the next nine years, mining investment in Latin America is expected to reach \$200 billion, the highest level of investment in a single sector in the history of the region.¹

This increase in extractive activity has come at a significant cost to human rights. From Mexico to Chile, oil and mining projects have contributed to human rights violations in communities where they operate. These violations range from failure to adequately consult with affected populations all the way to torture and extrajudicial execution. The abuses have in turn engendered broad social protest and resistance that at times has turned violent and destructive. Given the likelihood that Latin America's economic dependence on resource extraction will intensify in the near future, there is an urgent need for governments, corporations, and civil society to devise durable solutions to the human rights problems associated with this sector.²

Weak oversight, scant accountability

The underlying problem is twofold: weak oversight of oil and mining operations by national governments, and limited or no

accountability for human rights violations related to these operations. In most countries in the region, oil and mining projects operate in remote areas where there is little state presence or capacity to ensure that corporations respect basic human rights standards. On the contrary, public security forces, along with private security squads hired by the mining companies to protect their installations, have been used to break up protests. These forces have been implicated in human rights abuses in a number of situations, most notably in Peru, where in 2009 police units violently suppressed a protest by indigenous people against legislative decrees that would have opened up additional areas of the Amazon for oil, mining, and other activities. The clash left 33 people dead and dozens injured. Earlier that year, British mining company Monterrico Metals was formally charged in a British court with complicity in the torture of dozens of protestors at the company's mine site in northern Peru following a protest in 2005.³

The inability of local government bodies to oversee extractive operations often means that companies and local communities are left on their own to interact with one another. In many cases, this has meant that company-community relations begin with a violation of the communities' rights to be adequately consulted and informed about the potential impacts of a project. This is particularly problematic in indigenous communities, which have an internationally recognized right to adequate consultation before development activities take place on their traditional lands (this right is established by Convention 169 of the International Labour Organization and other instruments). When communities do not believe they were properly consulted, their relationships with companies can quickly spiral downward into protest and conflict.

¹ Victor Henriquez, "Investment in Latin America to Total US\$200bn This Decade—Cesco," *Business News Americas*, September 28, 2010. The estimate comes from the Center for Copper and Mining Studies (CESCO), in Santiago, Chile.

² Kevin P. Gallagher and Roberto Porzecanski discuss Latin America's increasing dependence on resource extraction in *The Dragon in the Room: China and the Future of Latin American Industrialization* (Palo Alto, CA: Stanford University Press, 2010), p. 139.

³ See "British High Court Freezes Mine Company Assets," Oxfam America, November 11, 2009, <http://www.oxfamamerica.org/articles/british-high-court-freezes-mine-company-assets>; "Oxfam Calls for End to Violence in the Peruvian Amazon," Oxfam America, June 15, 2009, <http://www.oxfamamerica.org/press/pressreleases/oxfam-calls-for-an-end-to-violence-in-the-peruvian-amazon>.

Governments' inability or unwillingness to hold corporations accountable for the human rights violations they engender contributes to the cycle of conflict and opposition that characterizes the extractive sector across the region. Perhaps the most egregious recent example is the Peruvian government's failure to hold anyone accountable for the torture of campesino protestors at the Monterrico project in 2005.

Governmental human rights bodies, such as the *defensorías del pueblo* and *procuradurías de los derechos humanos*, have done important work in monitoring and investigating human rights problems related to resource extraction. Peru's Defensoría del Pueblo publishes a monthly summary of social conflicts, the majority of which are related to extractive industries.⁴ But these institutions often lack the funds, personnel, and expertise to adequately address the human rights problems stemming from resource extraction. This problem is likely to intensify as new areas are opened to extraction across the region and corporate actors increase in number and become more diverse. These corporations now include "junior" companies with little capacity or inclination to address human rights issues, as well as Chinese companies that see human rights as outside their realm of interest.

Corporations also lack effective mechanisms for identifying and addressing human rights problems. While nearly all companies have personnel charged with promoting "corporate social responsibility," and some even have dedicated human rights specialists on staff, local communities often complain that such personnel do not have real access to remedies for human rights violations that may occur. Although some companies are beginning to implement formalized grievance resolution processes, it is difficult to see how such mechanisms can be effective if they are housed completely inside the companies against which human rights violations are alleged.

Strengthen government role, respect prior consent

There are some specific steps that governments, corporations, and communities can take to reduce resource-related human rights violations in the region:

Strengthen government capacity. Communities in extraction areas do not trust governments to look out for their interests or

⁴ Reportes de Conflictos Sociales, <http://www.defensoria.gob.pe/conflictos-sociales/>.

to address human rights violations when they occur. Perhaps the most urgently needed reform is to boost government oversight of extraction operations from the beginning to ensure that companies carry out proper consultation processes before launching a project. Governmental human rights bodies, such as the *defensorías del pueblo*, should receive special training in resource-related human rights issues and should develop specific units assigned to monitor extractive projects and intervene where necessary to address human rights problems. By the same token, governments must hold corporations accountable for violating human rights. This includes imposing meaningful fines when necessary, ordering additional consultation processes if initial processes are found to be inadequate, and incarcerating individuals found guilty of human rights violations.

Respect the right of prior consent. Communities must be allowed to decide for themselves whether or not they wish to accept the presence of an oil or mining project. The right of "free, prior, and informed consent" (FPIC) is increasingly recognized within international law. It is time to move past debates over whether enforcing FPIC is tantamount to giving one individual veto power over a multimillion-dollar investment. At root, respecting FPIC means treating local communities as equal partners with governments and companies. It also means taking communities' concerns seriously, particularly on human rights issues. If consent is obtained at the outset, it is more likely that the most egregious human rights abuses can be avoided. If a community formally accepts a project, it is less likely to protest the project or take other actions that could result in human rights violations. It is also more likely to work with the company in a cooperative way to address grievances before they become serious problems.

It is important to note that the concept of "consent" can be applied at a broader, national level. Costa Rica, for example, has recently reaffirmed a ban on open-pit mining. El Salvador is considering a similar measure. Such actions should be seen as legitimate steps taken by governments to protect human rights and the environment in their countries. Companies should refrain from filing lawsuits, as is happening now in the case of El Salvador, against governments for taking such measures.

Broaden and deepen the dialogue on human rights standards in the extractive sectors

There is currently no global framework for addressing human rights violations in the resource extraction sector. The "Protect,

Respect, and Remedy” guidelines developed by John Ruggie, UN special representative on business and human rights, represent a potentially important contribution to filling this void. The Voluntary Principles on Security and Human Rights, a multi-stakeholder initiative in which extractive firms commit to respect a set of human rights principles in their security operations, also provide a basis for discussing these issues. Nongovernmental organizations and forward-thinking governments and corporations should work together to use these initiatives to raise the profile of human rights problems in the extractive sector in Latin America and push for them to be addressed by corporations and governments. If such efforts are to be successful, however, they

must be broadened to include junior and Chinese companies. Both sets of actors will be increasingly active in the region, and both present important challenges with regard to furthering respect for human rights in the extractive sector.

The implementation of these suggested actions will not be easy. Powerful political forces retain a vested interest in the status quo and will not necessarily be eager to level the playing field between companies and communities. Nevertheless, making progress in these three key areas will be critical for ensuring the long-term viability of the extractive sector and protecting human rights in the region. ■

Activities

Thematic hearing before the Inter-American Commission on Human Rights on the right to prior, free, and informed consultation of indigenous peoples in the Andean region

The Due Process of Law Foundation (DPLF) and a number of organizations from Bolivia, Colombia, Ecuador, and Peru participated in a thematic hearing on the right of indigenous peoples in the Andean region to prior, free, and informed consultation. The hearing was held on March 29, 2011, during the 141st regular session of the Inter-American Commission on Human Rights (IACHR). It was the result of a joint effort involving DPLF, Oxfam, and a number of Latin American organizations: Fundación Construir, in Bolivia; Centro de Estudios de Derecho, Justicia y Sociedad (Dejusticia), in Colombia; Organización Nacional Indígena de Colombia (ONIC); Conferencia Nacional de Organizaciones Afrocolombianas (CNOA), in Colombia; Centro sobre Derecho y Sociedad (CIDES), in Ecuador; and the Instituto de Defensa Legal (IDL) and National Human Rights Coordinator, both in Peru. Although the IACHR had previously granted several thematic hearings on extractive industries or infrastructure projects in Latin America and on the right to prior consultation in specific countries, this marked the first time that a region-wide hearing was held at the request of prominent organizations involved in the issue. After expressing their interest and concern, the commissioners present at the hearing affirmed their openness to an ongoing dialogue with civil society aimed at making progress in several specific areas, including (a) cases in

which prior consultation is insufficient and consent is required, (b) the advisability of drafting a model law on prior consultation, and (c) the need to identify and share best practices in this area.



Participants in IACHR hearing on right to prior, free, and informed consultation. From left: Fr. Emigdio Cuesta, CNOA, Colombia; Javier Alexander Sánchez of the Sikuni indigenous people, councilor for territory, natural resources, and biodiversity, ONIC, Colombia; Hernán Coronado, National Human Rights Coordinator, Peru; Jaime Vintimilla, director, CIDES, Ecuador; Katya Salazar, executive director, DPLF; Ramiro Orías, director, Fundación Construir, Bolivia; and César Rodríguez Garavito, founding member, Dejusticia, Colombia.

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

Carlos López Hurtado

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The issue of whether companies in general (including multinational corporations and businesses of any kind) have human rights obligations under international law is the source of considerable controversy in the international community, and the jury is still out. The current debate taking place within the United Nations (UN) is by no means the first time that body has taken up matters of corporate social responsibility and/or human rights obligations, especially as they pertain to multinational corporations. Indeed, these discussions were already taking place in the 1970s, spurred by developing countries concerned about the impact of multinational investments on their development potential.

The first movement toward the establishment of international standards for businesses took place in the 1970s as well. Following its establishment in 1973, the UN Commission on Transnational Corporations prepared a Draft United Nations Code of Conduct on Transnational Corporations, which became the first failed attempt to establish social and environmental guidelines for such corporations.¹ In 1976, the Organisation for Economic Co-operation and Development (OECD) adopted the Guidelines for Multinational Enterprises; and the following year, the International Labour Organization (ILO) adopted the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.² The latter addressed, for the first time and in an explicit manner, subjects related to the labor rights included in the universal catalogue of human rights.

¹ UN Commission on Transnational Corporations, *Draft United Nations Code of Conduct for Transnational Corporations*, E/C.10/1982/6, 1983.

² International Labour Organization, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 1977, http://ilo-mirror.library.cornell.edu/public/english/standards/norm/whatare/lessfrml/dec_mne.htm.

A second movement to establish or clarify the human rights responsibilities of corporations emerged in the early 2000s in the context of the UN Secretary-General's 1999 proposal for a Global Compact. Like its predecessors, however, this initiative merely recommended standards for corporations. It was the work of the UN Sub-Commission on the Promotion and Protection of Human Rights that marked the transition toward a discussion of binding standards. From 1997 to 2003, the Sub-Commission's independent experts embarked on a series of consultations and studies and ultimately drafted what would become the Norms on the Responsibilities of Transnational Corporations and other Businesses with Regard to Human Rights.³

The norms developed by the Sub-Commission included the following points: (a) corporations have responsibilities under international human rights law that are universally applicable and cover a broad spectrum of rights; (b) governments must take action to protect people from abuses perpetrated by corporations; and (c) an international system should be set up to monitor compliance with these norms by corporations.

The vast majority of corporations and governments opposed the adoption of the draft norms, mainly because they assigned international legal responsibilities to corporations. The UN Commission on Human Rights (which later became the UN Human Rights Council) therefore decided to appoint an independent expert to study the matter, clarify which standards were applicable to corporations, and issue the relevant recom-

³ UN Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, E/CN.4/Sub.2/2003/12/Rev.2, 2003, <http://www.unhcr.ch/huridocda/huridoca.nsf/%28Symbol%29/E.CN.4.Sub.2.2003.12.Rev.2.En>.

mentations.⁴ In 2005, John Ruggie—a Harvard University professor of political science and an advisor to Kofi Annan on the development of the Global Compact and the Millennium Goals—was appointed “special representative of the secretary-general on human rights and transnational corporations and other business enterprises.” In 2008 the Human Rights Council extended his mandate for an additional three years; the mandate expired in June 2011 with the submission of his final report.

The conceptual and political framework presented by John Ruggie

At the beginning of his mandate, Professor Ruggie discarded the Sub-Commission’s draft norms, which he considered too controversial, as the basis for his work, and decided instead to start from scratch. At the close of his first term in 2008, he submitted a report to the Human Rights Council titled *Protect, Respect, and Remedy: A Framework for Business and Human Rights*, which sets out the conceptual and political reasoning that would inform the United Nations approach to this issue.⁵ The report begins by pointing out the gaps in world governance that create a permissive environment for abuses by transnational corporations:

The root cause of the business and human rights predicament today lies in the governance gaps created by globalization—between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.

It is a matter, therefore, of finding a way to reduce or offset the governance gaps created by globalization. These gaps are evident, for example, in the fact that while the rights of companies and investors have expanded over the past generation (2,500 bilateral treaties are currently in place to protect investments), states have less capacity than ever to protect human rights through legislation or regulation. The legal framework applicable to corporations has remained

essentially the same for centuries: due to the separation of juridical entities, parent companies cannot be held liable for acts or offenses committed by their business subsidiaries or partners, even when they participated in them. States frequently lack the capacity or the will to enforce existing laws, or they may exempt multinationals from labor or fiscal obligations in order to attract investment and promote exports.

What are the components of this conceptual and political framework? According to Professor Ruggie’s report:

- States have the **legal duty to protect against human rights abuses by nonstate actors**, including businesses, through appropriate policies, regulations, and enforcement systems.
- Corporations have the **(social) responsibility to respect all human rights**, which includes not abusing the human rights of others.
- There is a need to provide victims with **greater access to effective remedies** to protect their rights.

The UN Human Rights Council welcomed the proposals set out in the 2008 Ruggie report and extended his mandate for three more years to operationalize the proposed conceptual framework. Human rights groups also lent their support to this effort in hopes that it would lead to concrete, effective action.

States’ obligation to protect against human rights abuses by nonstate actors

The state’s obligation to protect against human rights violations by nonstate as well as state actors is anchored in international law.⁶ In relation to acts or events that are attributed to private actors rather than to the state, the latter has a “due diligence” obligation to prevent violations or respond appropriately when they occur.⁷

Much has been written about state obligations and efforts to monitor state compliance, and a host of universal and regional

⁴ Office of the High Commissioner for Human Rights, *Human Rights and Transnational Corporations and Other Business Enterprises*, E/CN.4/RES/2005/69, April 2005, http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-69.doc.

⁵ Human Rights Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, A/HRC/8/5, April 7, 2008, http://www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/29Apr08_7_Report_of_SRSG_to_HRC.pdf.

⁶ See Committee on Economic, Social and Cultural Rights, General Comment no. 18, E/C.12/GC/18, November 24, 2005; Human Rights Committee, General Comment no. 31, HRI/GEN/1/Rev. 7, March 29, 2004; Committee on the Elimination of Discrimination against Women, General Recommendation no. 19, HRI/GEN/1/Rev. 7, 1992.

⁷ Inter-American Court of Human Rights, *Case of Velásquez Rodríguez v. Honduras*. Judgment of July 29, 1998, Series C, no. 4, paras. 166–174.

protection mechanisms have been established for this purpose.⁸ They include the UN Human Rights Council, which has established special rapporteurships to monitor and follow up on situations at the national level that concern the protection of rights where nonstate actors are involved. Some of the relevant mechanisms that have the authority to examine and report on situations relating to corporate abuses are as follows:

- Special rapporteur on the right to food
- Special rapporteur on adequate housing
- Special rapporteur on the rights of indigenous peoples
- Independent expert on minorities
- Special rapporteur on toxic waste
- Working group on the use of mercenaries (which has prepared a draft international convention on private military and security companies).⁹

The Human Rights Council currently has a mechanism in place for examining the human rights situation in every country. Known as the Universal Periodic Review, it has raised and debated issues having to do with corporations and state protection against the abuses they may commit.

Moreover, the bodies created to monitor compliance with human rights treaties are devoting more attention than ever to verifying and recommending that states comply with their duty to protect civil, political, social, and economic rights against wrongdoing by nonstate actors. Human rights monitoring bodies within the UN system include:

- The Human Rights Committee, which monitors compliance with the International Covenant on Civil and Political Rights and its optional protocols
- The Committee on Economic, Social and Cultural Rights, which monitors compliance with the International Covenant on Economic, Social and Cultural Rights
- The Committee on the Elimination of Racial Discrimination, which monitors compliance with the convention of the same name

- The Committee on the Elimination of Discrimination against Women, which monitors the convention of the same name
- The Committee against Torture and the Sub-committee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which monitors the convention of the same name
- The Committee on the Rights of the Child, which monitors the convention of the same name
- The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, which monitors the convention of the same name
- The Committee on the Rights of Persons with Disabilities, which monitors the convention of the same name

Each of these treaties has a system for receiving complaints against states lodged by individuals and/or groups. A new optional protocol of the International Covenant on Economic, Social and Cultural Rights (ICESCR) that allows for individual complaints is not yet in force, and a similar optional protocol is currently being drafted for the Convention on the Rights of the Child. The Committee that monitors the ICESCR recently adopted a declaration on the obligations of states parties in relation to the business sector and economic, social, and cultural rights.¹⁰

The ILO also has several mechanisms to administer relevant international treaties. They include the Right to Organise and Collective Bargaining Convention (1949); the Abolition of Forced Labour Convention (1957); Convention 169, the Indigenous and Tribal Peoples Convention (1989); and the Declaration on Fundamental Principles and Rights at Work (1998), although the latter is not a treaty. The ILO's monitoring and compliance system includes an independent committee for each treaty (as in the case of human rights), as well as the Committee on Freedom of Association, which has jurisdiction over all ILO member countries. The recommendations issued by ILO committees are mandatory.

Apart from the UN and ILO mechanisms, certain ad hoc mechanisms have been used to challenge development or

⁸ The United Nations mechanisms are listed on the website of the Office of the High Commissioner for Human Rights at <http://www.ohchr.org>.

⁹ Office of the High Commissioner for Human Rights, *Report of the Working Group on the Use of Mercenaries*, ONU A/HRC/15/25, July 5, 2010.

¹⁰ UN Economic and Social Council, Committee on Economic, Social and Cultural Rights, "Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights," E/C.12/2011/1, May 2011.

investment projects funded by international banks or financial institutions. One of these is the World Bank Inspection Panel, which oversees projects funded by the Bank's financial institutions based on its internal social and economic policy criteria. The panel may conduct on-site inspections and report to the Bank's board of governors.¹¹

The responsibility of corporations to respect all rights

The international community has focused mainly on defining the human rights norms applicable to corporations, including multinationals. In his 2008 report, Ruggie defines the responsibility to respect the entire spectrum of rights that could be affected by corporate activities or operations as a social, rather than legal, responsibility. Basically, it is a duty to abstain: to cause no harm and to refrain from contributing to the harm that others might cause.

In June 2011, Ruggie sent the Human Rights Council his final report, the centerpiece of which is entitled "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework."¹² The standards he proposes are voluntary or recommended, not legal in nature. Even so, Ruggie's Guiding Principles unquestionably will have a powerful influence on the conduct of corporations, many of which have already expressed support for the project. Several points in the Guiding Principles are of note:

- While the Guiding Principles basically hold that companies should refrain from acts that could infringe on human rights, they also require action to avoid harm. The duty to take action may be more compelling in certain contexts, for example, when social services or state-owned enterprises are involved.
- Corporate responsibility is defined using international human rights and labor rights instruments as a yardstick.

- Responsibility is associated with direct actions by corporations, as well as with the indirect impacts of their contribution to or participation in abuses committed by others (whether states, other corporations, or armed groups). In this regard, the concept of "corporate complicity" developed by an expert panel of the International Commission of Jurists offers needed clarification on the normative aspects of the element of complicity.¹³
- There is a need for guidance on due diligence processes in the area of human rights, including impact and risk assessments, integration of findings into corporate policy, continuous monitoring, and reporting of findings.
- When national legislation is weak or nonexistent or is not enforced by the authorities, or in situations of armed conflict, corporations must adhere to international standards to the extent possible.

After considering Professor Ruggie's report, the Human Rights Council adopted a resolution endorsing the Guiding Principles and establishing a working group to promote their implementation, among other tasks. A forum on business and human rights was also set up to coordinate debate and dialogue on this issue. Despite proposals from civil society and from countries such as Ecuador, South Africa, and Egypt, the Council chose not to commence work on a binding legal instrument at this time.¹⁴

Professor Ruggie's proposals have also influenced the process of updating the OECD Guidelines for Multinational Enterprises.¹⁵ In June 2010, the member states of the OECD decided to include an additional chapter on human rights in the new guidelines, which are the only international instrument directed exclusively at corporations. These guidelines also include a system of National Contact Points as a promotion and follow-up mechanism, albeit one that is extremely weak and mainly confined to dispute mediation and conciliation. The updated OECD guidelines state that corporations must respect human rights, avoid contributing to violations perpetrated by third parties, undertake internal processes of due diligence, and establish reparations mechanisms.

¹¹ These and other mechanisms are described in publications such as Terra de Direitos, *Transnational Corporations on the Defendant's Seat* (Curitiba, Brazil, 2010); International Federation for Human Rights, *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms* (Paris, 2010); and Association Sherpa, *Les entreprises transnationales et leur responsabilité sociale* (Paris, 2010).

¹² UN Doc. A/HRC/17/31, <http://www.business-humanrights.org/Special-RepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples>.

¹³ International Commission of Jurists, Expert Legal Panel on Corporate Complicity in International Crimes, *Corporate Complicity and Legal Accountability*, 2008, http://www.icj.org/IMG/Volume_1.pdf.

¹⁴ Human Rights Council, "Human Rights and Transnational Corporations and other Business Enterprises," provisional document A/HRC/17/L.17/Rev.1, June 15, 2011, orally revised.

¹⁵ The relevant documents are available on the OECD website at <http://www.oecd.org>.

Legal accountability of corporations and companies

No discussion of corporate human rights accountability would be complete without a reference to the current debate over whether international law is directly applicable to corporations. Although Ruggie appears to have discarded this notion, it remains a matter of ongoing debate in the judicial branch, particularly in the courts of the United States and of African countries.

Discussions of the legal accountability of corporations tend to hone in on the United States jurisdiction. This is because of the vast number of cases against multinational corporations pending before US courts, whose procedural regulations generally are more favorable for pursuing such actions. Moreover, the United States has a unique law on the books dating back to 1789, namely the Alien Tort Statute (ATS).¹⁶ Under this law, non-US citizens (foreigners) can file civil suits in US courts for human rights violations, even if the harm was caused outside of the United States. Since 1995, this law has consistently been interpreted as applicable to nonstate agents, in other words, to private agents accused of serious violations of the laws of nations or of international customary law.¹⁷

¹⁶ 28 U.S.C. § 1350, Judiciary Act 1789. For the background to this law, also known as the Alien Tort Claims Act, see Supreme Court of Justice of the United States, *Sosa v. Alvarez-Machain*, 542 U.S. 692 734-37 (2004).

¹⁷ See *Kadic v. Karadzic*, 70 F. 3d 232, 236-37 (2nd Circuit, 1995).

Since 2000, numerous suits have been brought against corporations such as Shell, Chevron/Texaco, Coca Cola, Chiquita, and Talisman Energy. Over 40 of these cases are still in progress, and their outcomes are uncertain. The main premise for the application of international law (including international human rights law) to corporations recently suffered a serious setback with the decision handed down by the US Court of Appeals for the Second Circuit in New York in the case of *Kiobel v. Royal Dutch Petroleum*. In this case, the Ogoni indigenous people of Nigeria accused Shell of complicity in serious human rights abuses in that country. In February 2011, in denying a petition for rehearing, the Court of Appeals decided by majority vote that international customary law cannot be applied to businesses and therefore these companies/corporations cannot be sued under the ATS. Not all US jurisdictions are taking the same approach to this issue, however. In May 2011, the Seventh Circuit Court in Illinois declined to follow the *Kiobel* precedent, ruling in *Flomo v. Firestone* that corporations can indeed be held legally liable for human rights violations. The plaintiffs in the *Kiobel* case have appealed to the Supreme Court and that is where the matter ultimately will be resolved, at least in the United States jurisdiction.

To conclude, the legal accountability of corporations under international law remains an open question. Despite the setbacks and the progress made, the debate continues in jurisdictions around the world. ■

Activities

Presentation of report titled *The Right of Indigenous Peoples to Prior Consultation: The Situation in Bolivia, Colombia, Ecuador, and Peru, in Washington, D.C.*

In a public event in Washington, DC, on March 30, 2011, DPLF presented a report commissioned by Oxfam, *The Right of Indigenous Peoples to Prior Consultation: The Situation in Bolivia, Colombia, Ecuador, and Peru*. The speakers, in addition to DPLF executive director Katya Salazar, included Ramiro Orías, director of Fundación Construir, in Bolivia; César Rodríguez Garavito, founding member of the Centro de Estudios de Derecho, Justicia y Sociedad (Dejusticia), in Colombia; Jaime Vintimilla, director of the Centro sobre Derechos y Sociedad (CIDES), in Ecuador; and Javier La Rosa of the Instituto de Defensa Legal (IDL), in Peru. Katya Salazar began by describing some of the issues common to the four countries, and the rest of the panelists highlighted specific issues concerning prior consultation in each country. The purpose



Presentation of the report: *The Right of Indigenous Peoples to Prior Consultation: The Situation in Bolivia, Colombia, Ecuador, and Peru*, in Washington, DC, March 30, 2011.

of the event was to share the report's findings and conclusions with members of human rights organizations, academics, individuals from the Organization of American States (OAS) diplomatic missions, journalists, students, and the general public.

The Obligation of States to Prevent International Law Violations by Private Actors

María Clara Galvis

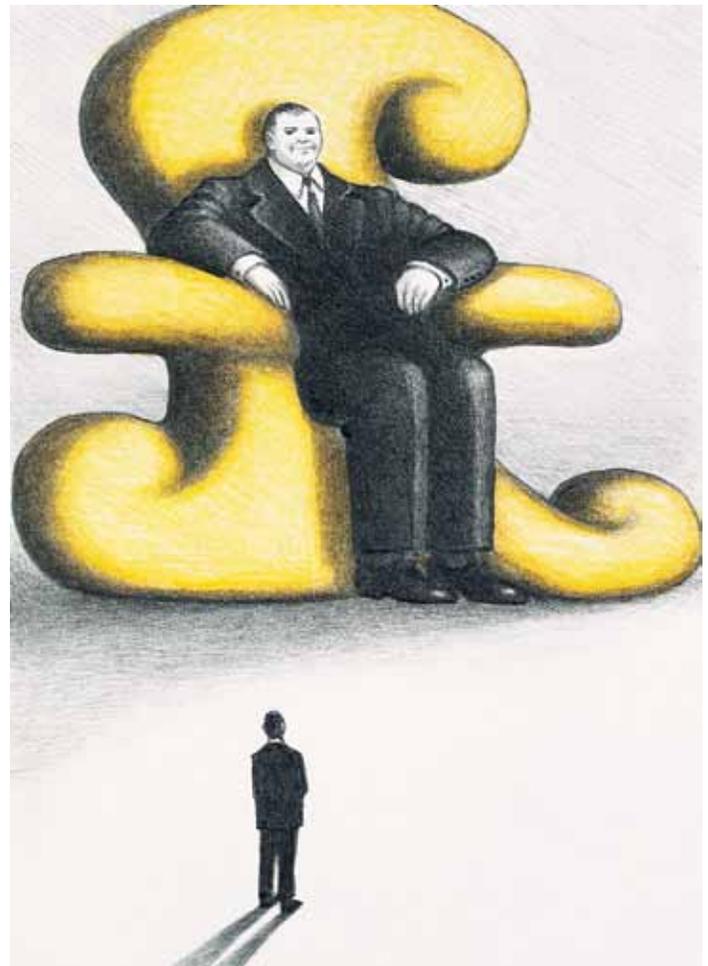
María Clara Galvis is an attorney and professor of international human rights and humanitarian law at Sergio Arboleda and Santo Tomás Universities in Colombia and a senior legal advisor to DPLF.

Much remains to be done in the area of appropriately regulating the legal liability of private corporations under international law. Currently, public international law consists mainly of “soft law” norms that do not have the rank or binding force of an international treaty. Some examples are the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework; the Organisation for International Co-operation and Development (OECD) Guidelines for Multi-national Enterprises; and the United Nations Global Compact. Under existing conventional and customary public international law, then, private corporations are not passive subjects of legal liability.¹

Existing norms impose no legal obligations on private companies, nor do they include mechanisms, organs, or procedures for establishing corporate liability derived from ignorance of the law. The type of responsibility they envisage is political rather than legal in nature. For example, neither the United Nations special representative on business and human rights, nor the OECD member states, nor, for that matter, the UN secretary-general who promoted the Global Compact is equipped with tools to establish the legal liability of private corporations for violations of the aforementioned principles and guidelines.

In light of the scant possibilities available under public international law, those affected by the activities of private corporations have turned to domestic courts to assert these firms’ international liability for human rights violations. They have

¹ In this regard, see the articles by Lina Céspedes-Báez, “Human Rights and Liability of Private Corporations: Much Work to Be Done,” and Carlos López Hurtado, “Business and Human Rights: Toward the Development of an International Law Framework,” in this journal.



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availed themselves of traditional public and private legal actions, invoking criminal, civil, commercial, labor, environmental, administrative, and occasionally constitutional law.

International human rights systems, which are set up to establish the responsibility of states, also have not proven to

be an ideal venue for airing claims concerning the liability of private corporations. Nonetheless, the inter-American system has developed some jurisprudence that can be useful in inducing states to answer for the actions of corporations when the latter have been shown to violate conventional human rights. This article offers a few reflections in this regard.

As illustrated in the examples given below, a state may be held liable under inter-American law for the actions of private companies operating within its territory based on the jurisprudence relating to due diligence, the liability of private actors, state obligations, and the rights of indigenous peoples.

With respect to due diligence, the Inter-American Court of Human Rights established in 1988 that “an illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention” (case of *Velásquez Rodríguez v. Honduras*). In light of this decision, it is possible to argue that the state’s ignorance of its obligation to prevent unlawful behaviors by private actors gives rise to its legal liability.

The Inter-American Court of Human Rights went on to establish the liability of states for the behavior of private actors in two types of cases: violence attributed to paramilitary groups, and sexual violence imputed to private actors. With respect to the first, inter-American jurisprudence derived from several cases from Colombia has established that states have the positive obligation to take measures to protect human rights in relations between private actors (cases of *Mapiripán v. Colombia* and *Pueblo Bello v. Colombia*). In relation to the second category, a state may be held liable for failing to investigate the conduct of a private actor (cases of *María Da Penha v. Brazil*² and *Campo Algodonero v. Mexico*), and for failing to fulfill its duty to protect when it was aware of a pattern of gender violence (case of *Campo Algodonero v. Mexico*).

The Inter-American Court has pointed out that with respect to private actors, the obligation of states to prevent and protect must be associated with (a) knowledge of a “real and imminent

risk” to a particular individual or group of individuals, and (b) reasonable possibilities of preventing or avoiding that risk. The obligation to prevent and protect continues for as long as the risk is present. It is clear from the jurisprudence cited here that the existence of a pattern of gender violence, or of a clear risk of rights violations by a group of private actors (e.g., paramilitaries), imposes special obligations on states to prevent and protect for as long as those circumstances persist.

In the same vein, the social conflicts frequently triggered by the activities of private companies involved in investment projects or natural resource extraction give rise to the obligation of the states involved to prevent and protect in relation to the rights that are endangered by such activities. The Inter-American Court’s position is therefore applicable to private corporate actors. Although the latter’s purpose may be lawful (in contrast to the illegality of paramilitary or sexual violence), such a distinction is irrelevant to this analysis insofar as the special duties to prevent and protect arise from the situation of risk or the pattern of human rights violations, rather than from the legality or illegality of the behavior that leads to the pattern of violations or endangers conventional rights.

The Inter-American Court’s reasoning in cases involving paramilitaries³ is equally applicable to circumstances that pose a risk to health, personal integrity, human dignity, or property when these risks are due, for example, to water and environmental pollution resulting from natural resource extraction projects undertaken without prior consultation with indigenous peoples and/or without having carried out environmental impact assessments. These types of situations also give rise to the state’s special duties to prevent and protect. The question, then, is exactly what these duties entail as far as private corporations are concerned.

In responding to this question, it is important to recall that inter-American jurisprudence on the rights of indigenous peoples has indicated that states must consult actively with these peoples in relation to any development, investment, exploration, or extraction plan being considered in their territories and must carry out prior environmental and social impact assessments. In terms of reparations, the Court has also ordered states to adopt specific measures to determine and demarcate property lines and grant property titles; to refrain from

² The Inter-American Commission on Human Rights decided this case, identified as number 12.051, in a report on the merits published in April 2001.

³ In this regard, see Inter-American Court of Human Rights, cases of *Mapiripán*, *Pueblo Bello*, *Ituango Massacres*, *La Rochela Massacre*, and *Valle Jaramillo*, all from Colombia.

engaging in any actions that would enable state agents or third parties to affect these territories without the consent of the peoples involved; and to review previously granted concessions in light of inter-American jurisprudence to determine whether they should be modified.

The measures taken pursuant to the duty to prevent will depend on the rights that require protection. Such measures may be legal, political, administrative, or cultural in nature. They should be designed to guarantee the right in question and to ensure that any violations that occur are handled as offenses so that the perpetrator is punished and compelled to make reparations for the harm done.

Recommended measures

In light of the foregoing, states should take the following measures, among others, as part of their due diligence to prevent human rights violations by private corporations and the risks associated with those violations:

- Establish an appropriate domestic body of laws to protect land, territorial, and natural resource rights, and ensure that these laws are properly enforced.
- Ensure that prior consultations geared toward obtaining consent are carried out.
- Ensure that prior technical, independent environmental impact studies are carried out.
- Require private corporations to provide impact and risk management plans.
- Ensure that government institutions, including an ombudsperson's office and similar entities, are in place and able to provide early warning in specific risk situations.
- Design and implement programs to ensure that civil servants are effectively trained in the state's duties and responsibilities vis-à-vis private corporations.
- Ensure that corporations are informed of and understand both their rights and their responsibilities with respect to human rights, as well as the obligations of states under international human rights law.

- Ensure that the internal legal systems of private corporations include human rights matters.
- Undertake processes to determine and demarcate property lines and title lands, recognizing ancestral property.
- Review any concessions granted without prior consultation or prior environmental impact studies and make any necessary modifications.
- Ensure that a domestic regulatory system is in place to govern mining, oil, and forest extraction, and that it ensures respect for private law and for the state's international human rights commitments.

International law continues to move in the direction of defining the conventional legal obligations of private corporations and creating international bodies empowered to directly take up allegations of human rights violations caused by their activities. Even as these advances are being consolidated, however, states can be held liable for allowing corporations to engage in behaviors that violate international human rights law and for failing to ensure that such behaviors are appropriately punished in their territory.

Those wishing to bring cases before the inter-American human rights system asserting the responsibility of a state for the actions of private corporations in its territory can base their petitions on the content of the state's obligation to prevent and protect. They may invoke existing jurisprudence on due diligence, the state's responsibility for acts by private actors, the contents of the obligation to prevent and protect in regard to the activities of other categories of private actors, and the rights of indigenous peoples.

Inter-American jurisprudence must further elaborate the specific obligations of states with respect to private corporations and must activate its various mechanisms to regulate a sphere that still lacks a human rights perspective. The link between the corporate world and human rights is forged in part by states complying with their obligations in relation to private corporations. ■



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

Human Rights and Liability of Private Corporations: Much Work to Be Done

Lina M. Céspedes-Báez

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Last year, the US Court of Appeals for the Second Circuit handed down a ruling that called into question the progress made over the past 20 years with respect to the liability of private corporations for violations of international human rights law. The September 17, 2010, ruling in *Kiobel v. Royal Dutch Petroleum* held that private corporations cannot be considered subject to international passive liability for failure to observe *jus cogens* norms in the area of human rights, due to the lack of applicable international practice.¹ The Court therefore concluded that the suit brought under the Alien Tort Statute (ATS, also known as the Alien Tort Claims Act) was without merit insofar as the statute applies only to violations of the *law of nations*, understood as the set of international law norms that are *specific, universal, and obligatory*.

In order to grasp the significance of the Court's position and the apprehension it has generated in the human rights community, it is useful to consider the current role of the ATS. Under the statute, which dates back to the end of the eighteenth century, a foreigner may file suit in United States courts claiming civil liability for violations of international law. Despite its potential, the ATS was used for the first time only in 1980, in the landmark case of *Filártiga v. Peña-Irala*. Since *Filártiga*, it has become the strategy par excellence used to try foreigners for human rights violations and a key tool in pressuring multinational corporations to observe good corporate practices. Following the 2004 ruling in *Sosa v. Alvarez-Machain*, in which the US Supreme Court held that natural and legal persons, as well as states, could be held liable for human rights violations, some multinationals, such as Unocal, chose to pursue out-of-court settlements rather than invest enormous sums of money in litigation and face the prospect

of liability and public censure.² It should be noted, however, that the *Sosa* ruling did not relate directly to private corporations. This nuance permitted an interpretation such as the one offered by the Second Circuit Court in *Kiobel*, which is based expressly on the existing gap in United States and international jurisprudence, among other arguments.

The relationship between private corporations and human rights is found only in soft law, highlighting the gravity of the decision in *Kiobel*. The OECD Guidelines for Multinational Enterprises, the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and the United Nations Global Compact are not binding, and thus their observance is mainly contingent on the goodwill of corporations.³ There is no compulsory aspect to these standards, much less an international jurisdiction in which to air and redress cases of this type. In practice, therefore, it has been up to domestic law to establish the international liability of private corporations. This situation inevitably presents conflicts of interest, as efforts to attract investment are pitted against the protection of people's rights, especially in developing countries rich in natural resources.

² On the Unocal case, see Natalia Dimitrieva, "The Accountability of Multinational Corporations for Human Rights Violations: A Comparative Analysis of Legal Redress under the US Alien Tort Claims Act," master's thesis, University of Gothenburg, 2009, http://gupea.ub.gu.se/bitstream/2077/22060/1/gupea_2077_22060_1.pdf.

³ At the end of May 2011, the United Nations special representative on business and human rights, John Ruggie, submitted to the UN the first universal guiding principles that corporations should follow in order to avoid engaging in human rights violations. A delegation of countries is spearheading an initiative in the Human Rights Council for the adoption of the guiding principles. Despite the tremendous progress this effort represents, it is not a treaty, and adoption of the principles by the United Nations ultimately will accord them the status of soft law. On the positive side, the principles document will provide states with more detailed guidance should they decide to enact or amend legislation on this issue, and it also may be used as a document of reference in court interpretations. As past experience has shown, there are cases such as that of Colombia, where the Deng Principles became obligatory following a ruling by the Constitutional Court (T-025/04 and follow-up records).

¹ The ruling is available at http://www.ca2.uscourts.gov/decisions/isysquery/6af680f7-684f-4470-8c6a-15870801f72f/5/doc/06-4800-cv_opn.pdf.

In light of the above, the Second Circuit Court was correct in stating that no corporation has ever been convicted in the international sphere for a human rights violation, and therefore there is no international law or custom that sets out a procedure for determining such international liability. It is not correct, however, to conclude that in the absence of an international jurisdiction and remedy, private corporations have no obligation to adhere to international human rights standards or that modern law should not offer a solution in these situations. Moreover, it appears that the judges who wrote the majority opinion failed to take into account the complementary and exceptional nature of international law proceedings: that is, its jurisdictional organs and remedies are only activated when the domestic jurisdiction has failed for some reason, such as excessive delays, an inability or unwillingness to undertake the proceeding, or the lack of effective remedies.

It is a shame that the Court, in its deliberations, did not avail itself of one of the most common ways of establishing international custom: a review of the domestic legislation of other states. This resource, which has been widely used in matters involving

international criminal liability since the Nuremberg Trials, makes it possible to track legal trends in the international community. A study such as this would have required the judges to undertake a more judicious reading of international law in order to buttress their conclusion, since today no one disputes that modern law regards private corporations as active and passive subjects of civil liability. It would have been a different story had the ATS taken up the criminal liability of private corporations, in which case it could be argued that changes in national law have been sluggish and erratic and the praxis is far from being *specific, universal, and obligatory*.

Despite all of the controversy and interpretations, *Kiobel* highlights the urgency of establishing international legal standards for private corporations to ensure that remedies are available when states fail to take the relevant actions or provide proper redress. It is already clear that codes of conduct and voluntary compliance with human rights standards on the part of private corporations have not produced the promised results, nor even those that were cautiously predicted. ■

Activities

Seminar on indigenous policy and the right of indigenous peoples in Chile to prior consultation

DPLF, in conjunction with the Centro de Estudios Regionales (CEDER) of Universidad de los Lagos and the Instituto de Cultura, Ciencia y Tecnología Mapuche Williche, organized an “International Scientific Seminar: Evaluation and Perspectives of Indigenous Policy in Chile.” Held April 15, 2011, on the campus of Universidad de los Lagos in Osorno, Chile, the event included presentations by indigenous leaders, human rights attorneys, anthropologists, current and former public officials, and a representative of the Subregional Office of the International Labour Organization (ILO) in Santiago de Chile. The seminar offered tools for a critical examination of indigenous policy in Chile over the past 20 years from the standpoint of the Mapuche people. It also provided an opportunity to examine specific problems in Chilean law that directly affect the Mapuche, such as anti-terrorism legislation and military justice, and to reflect critically on government programs and indigenous public policy under the last Concertación government. Participants also examined the scope of ILO Convention 169 in Chile and the evolution of indigenous peoples’ rights to participation and consultation within

the framework of the ILO and the inter-American human rights system. María Clara Galvis sat on one of the panels on behalf of DPLF and invited the participants to consider other instruments in addition to ILO Convention 169, such as the American Convention on Human Rights and, especially, the jurisprudence of the Inter-American Court of Human Rights, which has upheld the rights of indigenous peoples to their ancestral lands and natural resources and to participate in the decisions that affect them.



Participants in a panel on *ILO Convention 169 in Latin America and Chile*. From left: Marcial Colin Lincolao, Mapuche leader; María Clara Galvis, DPLF; Jorge Contesse Singh, Human Rights Center of Universidad Diego Portales; and Kirsten-María Schapira-Felderhoff, senior specialist in international labor standards and labor relations of the Subregional Office of the ILO in Santiago de Chile.

Corporations Should Be Held Liable for Human Rights Violations

Cesar Chelala and Alejandro M. Garro

Cesar Chelala is co-winner of the Overseas Press Club of America award for “Missing or Dead in Argentina: The Desperate Search for Thousands of Abducted Victims,” which was a cover story in the *New York Times Magazine*.

Alejandro M. Garro teaches comparative law at Columbia Law School and sits on the advisory boards of the Due Process of Law Foundation as well as Human Rights Watch/Americas and the Center for Justice and International Law.



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Several nongovernmental organizations have filed an amicus brief urging the United States Supreme Court to review an appeals court ruling that corporations, under international law, cannot be held liable for damages due to serious human rights violations. The Supreme Court should accept the case and hold that, if supported by the evidence, civil damages is an available remedy against corporations for aiding and abetting international wrongs.

The case is *Kiobel v. Royal Dutch Petroleum*, a lawsuit filed in 2002 by members of the Ogoni community in Nigeria over human rights violations that took place in the 1990s. The Ogoni are approximately half a million people who live in a region of 650 square kilometers in Rivers State. Traditionally, they made their living by fishing and as subsistence farmers, a way of life threatened when Shell discovered oil in 1958.

The environmental effects of oil exploitation in Ogoni territory have been dire. Major oil spills have caused serious damage to the ground and jeopardized the livelihood of the Ogoni people. Gas flares produce constant noise near Ogoni villages. Polluted air from the flairs produces acid rain and causes respiratory problems in the surrounding communities. These damages are underscored in the lyrics of an Ogoni song:

The flames of Shell are flames of Hell,
We bask below their light,
Nought for us to serve the blight,
Of cursed neglect and cursed Shell.

In 1998, a United Nations rapporteur accused both the Nigerian government and Shell of abusing human rights and failing to protect the environment in the Ogoni region. However, both Shell and the Nigerian government have been unresponsive.

The survivors of serious human rights violations resorted to the Alien Tort Statute (ATS) as a way to seek civil compensation in US courts. The ATS allows non-US citizens to bring civil suits in US federal courts for wrongful acts that are in violation of international law, regardless of the country where the wrong was perpetrated or the harm was suffered. Whereas

criminal liability of legal entities remains a controversial issue under international law, corporate civil liability for egregious wrongs is a widely accepted principle of international law.

In September 2010, a split panel decision of the US Court of Appeals for the Second Circuit held that the ATS does not apply to corporations but only to individuals. As indicated by the Center for Constitutional Rights (CCR) in New York, this view is at odds with previous decisions of other federal courts, such as recent rulings by the Seventh and District of Columbia circuit courts of appeals, holding that corporations can be held liable under the ATS. As recalled by the CCR, the majority of a panel in the District of Columbia case held that corporations (in this case ExxonMobil, for its operations in Indonesia) are

not immune “for torts based on heinous conduct allegedly committed by its agents in violation of the law of nations.” As stated by Katherine Gallagher, a senior staff attorney at the CCR, “The Second Circuit’s decision undermines fundamental concepts of accountability and leaves victims of the most serious human rights violations without a remedy.”

Making corporations immune from suits resulting from human rights violations will only ensure that these violations continue to occur, unimpeded by any legal constraint. The Supreme Court should take *Kiobel*, making it possible, in cases where the evidence supports such a finding, to hold corporations liable for damages under international law. ■

Actividades

Thematic hearing before the Inter-American Commission on Human Rights on the criminalization and restriction of activities of human rights defenders in South America

The IACHR held a public hearing on the situation of human rights defenders in South America on March 25, 2011, at its 141st regular session. Several organizations from the region had joined DPLF in requesting the hearing, including the Fundación de Acompañamiento Social de la Iglesia Anglicana del Norte de Argentina (Argentina); Fundación Construir, in Bolivia; Sociedade Paraense de Defesa dos Direitos Humanos (SDDH), in Brazil; Movimento dos Atingidos por Barragens, in Brazil; Corporación Colectivo de Abogados “José Alvear Restrepo” and Corporación Colectivo de Abogados “Luis Carlos Pérez,” both in Colombia; Corporación Compromiso, in Colombia; Comité de Solidaridad con los Presos Políticos, in Colombia; Acción Ecológica, in Ecuador; Centro sobre Derecho y Sociedad (CIDES), in Ecuador; Iniciativa Amotocodie, in Paraguay; Instituto de Defensa Legal, in Peru; and Diakonia, in Germany. The hearing was intended to inform the IACHR about the various restrictions that are being imposed on the activities of civil society in these countries. DPLF is currently preparing a report based on the questions and comments offered by the commissioners, to be titled *Restrictions on the Work of NGOs and Other Civil Society Stakeholders and Criminalization of Human Rights Defenders: The Panorama in South America*.



Participants in IACHR hearing on human rights defenders, from left: Angelita Baeyens, attorney of the IACHR Executive Secretariat, and commissioners José de Jesús Orozco Henríquez and María Silvia Guillén.



Hearing participants, from left: Ireneo Téllez, Paraguay; Benno Glaser, Paraguay; Gloria Chicaiza, Ecuador; Emilie Joly, DPLF; Agustín Jiménez, Colombia; and Marco Apolo Santana, Brazil.

Human Rights and Transnational Business: Are Canada's Courts Up to the Task?

Véronique Lebuis

Véronique Lebuis, an attorney, is legal coordinator for Lawyers Without Borders Canada. LWBC intern André Muneza and volunteers Elisabeth Patterson, Farouk El-Hosseny, and Geneviève King-Ruel collaborated on this article.

We can no longer turn a blind eye to the fact that many Canadian companies risk being implicated in incidents abroad, ranging from ethical and environmental malfeasance to human rights abuses.¹

In the Canadian context, the liability of transnational businesses whose activities have an impact on sustainable development remains ambiguous. This is so despite the availability of a series of legal remedies, still underutilized by the courts, along with a growing assortment of norms and mechanisms of a non-legal nature. As globalization advances, there is a gradual international tendency toward widening the recognition of principles that contribute to a stronger business ethic, but this movement stops short of clearly defining the obligations of corporations.²

This essay offers a glimpse of the complex relationship that is taking shape in the Canadian legal sphere between human rights and the business activities of transnational companies.



¹ Canadian Centre for the Study of Resource Conflict, *Corporate Social Responsibility: Movements and Footprints of Canadian Mining and Exploration Firms in the Developing World*, October 2009, p. 1. For examples of Canadian companies involved in incidents, see International Labour Organization, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, February 2010, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_123424.pdf (on Guatemala, see p. 767, and on the Montana mining company, see p. 770). Also see Inter-American Commission on Human Rights, PM 260-07, "Communities of the Maya People (Sipakepense and Mam) of Sipacapa and San Miguel Ixtahuacán municipalities in the Department of San Marcos, Guatemala," <http://www.cidh.oas.org/medidas/2010.eng.htm>.

² See the Web portal on the work of the United Nations special representative on business & human rights, John Ruggie, at <http://www.business-humanrights.org/SpecialRepPortal/Home>.

The Canadian legal context

Canadian law provides various recourses which allow courts to rule on alleged offenses or wrongdoing by Canadian enterprises in the course of their activities overseas. The courts, however, remain reluctant to exercise their jurisdiction in this regard. In fact, to date no Canadian court has agreed to take up a case involving a Canadian company's operations abroad, with the exception of one recent case.³

Canadian law recognizes the criminal liability of enterprises in their capacity as legal entities. While there is a general presumption that laws do not apply beyond national borders (principle of territoriality),⁴ Canadian courts may, in exceptional circumstances, exercise jurisdiction over acts committed extraterritorially. This is the case when sufficient elements of the crime are linked to Canada, thereby creating a "real and substantial connection" between the extraterritorial offense and the state of jurisdiction. This "real and substantial connection" gives competence to the Canadian courts to prosecute,⁵ which means that a parent company may be held liable for the actions of its affiliates abroad.⁶ The *Cambior* case illustrates the fact that the courts may also hold a parent company liable for negligence if the company was aware, or should have been aware, that the activities of its affiliates would result in harm.⁷

Moreover, a company may be prosecuted for three categories of offenses under the Corruption of Foreign Public Officials Act⁸: bribery of a foreign public official, laundering of property or proceeds from a criminal offense, and possession

of said property or proceeds.⁹ Conspiracy, attempt or accessory, or planning or inducement related to the commission of an offense may also be subject to prosecution.

Similarly, a company may incur civil liability under provincial laws for acts committed abroad. Civil suits offer certain advantages: they require a lesser burden of proof than that required under criminal law (federal jurisdiction), they may be brought by victims, and they envisage the right to reparations for damages in cases where guilt has been established.

While a number of motions for leave to file suit before the courts of Quebec and Ontario have been submitted,¹⁰ not a single one was admitted until April 27, 2011. On that date the Superior Court of Quebec agreed to hear a class action motion seeking to establish the civil liability of the Canadian company Anvil Mining Ltd., for alleged human rights violations that occurred in the Democratic Republic of Congo in 2004. The petition was lodged by the Canadian Association against Impunity (CAAI), a group of Congolese citizens affected by the events at issue in the case, following a Congolese military trial that exposed the failures of that country's domestic justice system.¹¹ The Court of Quebec stated that "if the tribunal were to reject the action [. . .], the victims would have no other possible way to obtain civil justice."¹²

³ See the recent decision to dismiss from the Court of Appeal for Ontario in *Piedra v. Copper Mesa Mining Corporation*, [2011] ONCA 191, <http://www.ontariocourts.on.ca/decisions/2011/2011ONCA0191.pdf>.

⁴ Criminal Code, L.R.C. 1985, ch. C-46, art. 6(2).

⁵ See, in this regard, *Libman v. The Queen*, [1985] 2 R.C.S. 178, 72, which enshrines the principle of extraterritoriality. See also *Kazemi (Estate of) v. Islamic Republic of Iran*, [2011] Q.J. 412 (S.C.).

⁶ A relevant decision will be that of the Superior Court of Justice of Ontario in the matter of *Choc v. HudBay Minerals Inc.*, concerning the operational decisions made by Canadian executives that might have had an impact on the course of events leading up to a murder. An application for leave to pursue the case is still pending before the Superior Court of Ontario (court file number CV-10411159). An overview is available at <http://www.chocversushudbay.com/>.

⁷ *Recherches Internationales Quebec v. Cambior Inc.*, [1998] Q.J. No. 2554. (C.S.). In this case, the Superior Court of Quebec concluded that it could exercise its jurisdiction over the matter, notwithstanding the extraterritorial character of the alleged crimes. It nonetheless declined its jurisdiction, arguing that the Guyanese courts were in a better position to hear the case and could provide fair judicial procedures.

⁸ CL (Canadian Law) 1998, c. 34.

⁹ Export Development Canada (EDC), incidentally, warns its clients about the legal repercussions of acts of corruption; see the EDC website at http://www.edc.ca/english/social_csr.htm.

¹⁰ See, for example: *Recherches Internationales Quebec v. Cambior Inc.* [1998], Q.J. No. 2554 (C.S.); *Choc v. HudBay* (court file number CV-10411159, before the Superior Court of Ontario); *Bil'in (Village Council) et al. v. Green Park International, Inc. et al.*, 2010 QCCA 1455 (application for leave to appeal rejected by the Supreme Court on March 4, 2011); *Piedra v. Copper Mesa Mining Corporation*, 2010 ONSC 2421; *Piedra v. Copper Mesa Mining Corporation*, 2011 ONCA 191.

¹¹ In this regard, see United Nations, "High Commissioner for Human Rights Concerned at Kilwa Military Trial in the Democratic Republic of the Congo," press release, July 4, 2007, <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/9828B052BBC32B08C125730E004019C4?opendocument>. Also see UN High Commissioner for Human Rights, *Democratic Republic of the Congo, 1993–2003: Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003*, August 2010, p. 410, http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf. The report cites the case as an example of the shortcomings of the justice system in the Democratic Republic of Congo.

¹² *Association canadienne contre l'impunité (A.C.C.I.) c. Anvil Mining Limited*, 2011 QCCS 1966, para. 39. Author's translation.

The principle of *forum non conveniens*

Even if they consider themselves competent to take up an extraterritorial offense, the courts may refuse to exercise jurisdiction over a matter if they believe a more appropriate venue is available. Canadian courts frequently apply the principle of *forum non conveniens*,¹³ which has the effect of leaving unresolved the matter of the liability of Canadian enterprises for alleged human rights abuses overseas.¹⁴

Many factors are considered in evaluating the most appropriate jurisdiction, including the accessibility of evidence connected to the offense, the possibility of pursuing investigations, the cost of extraterritorial proceedings, and the victims' country of residence.¹⁵

The application of the principle of *forum non conveniens* is not immutable. An application for leave to sue HudBay Minerals Inc., submitted in November 2010,¹⁶ could, for example, set an important precedent if the plaintiffs succeed in persuading the court that there is cause of action and that the Guatemalan courts are incapable of providing an effective remedy in a context of generalized impunity, which is estimated at 98 percent in Guatemala.¹⁷

Even if they are not granted, the number of applications recently filed before the courts is gradually contributing to a higher degree of scrutiny of transnational business activities. Copper Mesa Mining, for example, was the subject of a suit for its alleged involvement in violations of the land, environmental, and human rights of people affected by its mining operations in Ecuador. The suit also named the Toronto Stock Exchange (TSX) for its alleged failure to act with due diligence

when it listed Copper Mesa shares on the exchange despite the risks posed by making funds available for the activities of that company. The action ultimately was dismissed by the trial court, and later on appeal, after the judge held that there was no cause of action against either Copper Mesa or the TSX.¹⁸ Nonetheless, the judge's conclusions in this case¹⁹ send a positive signal that under Canadian law, the judicial system should be available to victims who claim to have suffered harm as a result of human rights violations directly or indirectly committed by companies overseas.

It is also conceivable that international law tools not yet applicable to enterprises could contribute to legal progress in this sphere. According to the International Federation for Human Rights (IFHR), Article 25(3)(c) of the Rome Statute of the International Criminal Court (ICC)²⁰ could apply to businesses that play a role in the commission of crimes under the ICC's jurisdiction.²¹ Since the Court may only try individuals under the Statute, however, corporate entities currently fall outside its jurisdiction. As the IFHR points out, however, it might still be possible to establish a company's complicity with the individuals implicated in the commission of international crimes under 25(3)(c).²²

The Canadian legislature's intention in adopting the Crimes against Humanity and War Crimes Act²³ was to bring Canadian law into harmony with the principles of the Rome Statute, thereby making it possible to assert Canadian criminal jurisdiction over such crimes. At first glance, the language of the law seems to apply exclusively to individuals,²⁴ which is consistent with the general application of international criminal law. It will be interesting to follow the debate as to whether Canada could potentially prosecute a company or its execu-

¹³ Codified in Quebec law, in Article 3135 of the Quebec Civil Code, Q.L. 1991, c. 64.

¹⁴ On March 3, 2011, the Supreme Court of Canada rejected the appeal of residents of a Palestinian village who claimed that a Quebec-based company had begun residential construction in territory occupied by Israel after 1967, in violation of Article 49(6) of *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Times of War* of August 12, 1949. This case would have given the court an unprecedented opportunity to pronounce on the application of Canadian law to Canadian companies alleged to have committed offenses abroad. *Bil'in (Village Council) et al. v. Green Park International inc., et al.*, 2010 QCCA 1455 (application for leave to appeal rejected by the Supreme Court, record of March 4, 2011).

¹⁵ *Recherches Internationales Quebec v. Cambior Inc.*, [1998] Q.J. No. 2554 (C.S.).

¹⁶ Court file number CV-10-411159, before the Superior Court of Ontario.

¹⁷ See, in this regard, the Guatemala page on the website of the Canadian International Development Agency, <http://www.acdi-cida.gc.ca/guatemala-f>.

¹⁸ See *Piedra v. Copper Mesa Mining Corporation*, 2011 ONCA 191, in which the court found that neither the company nor the Toronto Stock Exchange had legal responsibilities toward the plaintiffs in this matter.

¹⁹ The judge concluded that "the threats and assaults alleged by the plaintiffs are serious wrongs. Nothing in these reasons should be taken as undermining the plaintiffs' rights to seek appropriate redress for those wrongs, assuming that they are proven." *Ibid.*, para. 99.

²⁰ *Rome Statute of the International Criminal Court*, A/CONF 183/9, July 17, 1998, amended, entry into force July 1, 2002, <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC-7CF02886/283503/RomeStatutEng1.pdf>.

²¹ International Federation of Human Rights (FIDH), *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms*, 2010, p. 268ff.

²² *Ibid.*, p. 275.

²³ Crimes against Humanity and War Crimes Act, C.L. 2000, c.24

²⁴ For example, the only penalties envisaged under the law are prison terms, which can only be applied to individuals.

tives for such crimes (or for accessory, conspiracy, attempt, or inducement to commit them²⁵) under this law, when they are committed beyond the country's borders.²⁶

Similarly, it is not out of the question that this same law might be applicable to environmental offenses if they are judged to be of sufficient magnitude to be considered crimes against humanity, war crimes, or genocide.²⁷ The Canadian Environmental Protection Act (CEPA)²⁸ envisages two other types of offenses in this category: offenses under the CEPA and more "conventional" crimes under the provisions of the Criminal Code.²⁹

Corporate social responsibility

Parallel to the legal avenues discussed, a broad assortment of voluntary practices intended to boost the legitimacy of business activities and to secure investments is emerging. While an in-depth discussion of developments in the realm of "corporate social responsibility" (CSR) in Canada is beyond the scope of this article, the issue cannot be dissociated from the evolution of the relevant legal remedies. While it does not hold companies to account, the concept of CSR is transforming business ethics.

From this standpoint, the evolving standards are prompting many companies, in a show of good faith, to adopt codes of conduct or voluntary standards in the form of ethical codes that go beyond their recognized legal obligations.³⁰ At the same time, companies are subject to mechanisms of a non-legal

nature designed to encourage good practices with respect to human rights, the environment, and sustainable development.³¹

Recently inserted in the free trade agreements between Canada and various Latin American countries,³² the framework established for new bilateral investment treaties is intended to articulate a more consistent response to future disputes that might arise in regard to the activities of Canadian companies abroad and, in particular, to the failure to respect CSR principles.

Finally, shareholder engagement (or activism) is growing in response to recommendations set out by the National Roundtables on Corporate Social Responsibility and the Canadian Extractive Industry in Developing Countries, which called for investors to become more involved.³³ This is becoming a significant form of pressure on Canadian companies, encouraging them to modify their practices.³⁴

In sum, when it comes to complaints against transnational companies, access to justice in Canadian courts is by no means guaranteed. But the unprecedented number of suits filed against Canadian companies has already had an impact, increasing

²⁵ Crimes against Humanity and War Crimes Act, C.L. 2000, c.24, Articles 4, 1.1 and 6, 1.1.

²⁶ FIDH, *Corporate Accountability for Human Rights Abuses*, 2010, p. 350. See also "Canada's Engagement in the Americas" (in French), eDiscussion Policy Position Paper, University of Quebec at Montreal, December 11, 2008, on the website of Foreign Affairs and International Trade Canada, <http://www.international.gc.ca/cip-pic/discussions/americas-ameriques/policy-politiques/uqam.aspx>.

²⁷ A. M. Manirabona, "La responsabilité pénale des sociétés canadiennes pour les crimes contre l'environnement survenus à l'étranger," doctoral dissertation, School of Law, University of Montreal, August 2009, p. 273-74.

²⁸ Canadian Environmental Protection Act, C.L. 1999, c.33.

²⁹ Criminal Code, L.R.C. 1985, ch. C-46, art. 8.

³⁰ Examples include the AA1000 Framework, the Global Reporting Initiative, ISO 14001, and the Progressive Aboriginal Relations program. See "Non-governmental CSR-Related Codes and Standards Initiatives" on the Industry Canada website, <http://www.ic.gc.ca/eic/site/csr-rse.nsf/eng/rs00144.html>.

³¹ The mechanisms included for the purposes of this article are the OECD Guidelines for Multinational Enterprises, which are to be implemented by Canada's National Contact Point (<http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/index.aspx?lang=eng>); the Export Development Canada oversight mechanisms (http://www.edc.ca/english/social_csr.htm); and a new process developed by the Office of the Extractive Sector CSR Counsellor (see "Building the Canadian Advantage: A Corporate Social Responsibility Strategy for the Canadian International Extractive Sector," Foreign Affairs and International Trade Canada, March 2009, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/csr-strategy-rse-strategie.aspx>).

³² The agreements between Canada and Peru, Canada and Colombia, and Canada and Panama are available on the website of the Department of Foreign Affairs and International Trade Canada under "Negotiations and Agreements," <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng&view=d>. See the following articles in particular: Canada-Colombia Art. 816 (TBI), Canada-Peru Art. 810 (TBI), and Canada-Panama Art. 9.17 (TBI).

³³ National Roundtables on Corporate Social Responsibility and the Canadian Extractive Industry in Developing Countries, *Report of the Advisory Group* (in French), March 29, 2007, <http://halifaxinitiative.org/updir/Rapportdugroupeconsultatif-mars2007.pdf>.

³⁴ See, in this regard, the discussions between Bâtirente and Talisman Energy company. Bâtirente, "Talisman Energy Recognizes the Principles of Free, Prior and Informed Consent" (in French), January 26, 2011, <http://batirente.qc.ca/en/all-news/81>. See also the Talisman policy that came out of those discussions: Global Community Relations Policy, <http://www.talisman-energy.com/search.html?search=policy+on+community+relations>.

scrutiny of the conduct of companies doing business in other countries. Together with the advent of innovative voluntary mechanisms, which have also encouraged civil society stakeholders to monitor the impact of transnational activities, these suits serve as an incentive to companies to prevent harm, as much for their own sake as for that of the affected populations.

John Ruggie, United Nations special representative on business and human rights, was asked to develop a set of guiding principles in order to move beyond what has become a deeply divisive doctrinal debate over the human rights responsibilities of companies. According to Ruggie, while the UN Guiding Principles on Business and Human Rights are intended to be universally applicable, the means for implementing the principles “will reflect the fact that we live in a world of 192

United Nations Member States, 80,000 transnational enterprises, ten times as many subsidiaries and countless millions of national firms, most of which are small and medium-sized enterprises.³⁵”

As when an ocean liner changes course with effort from each member of the crew, all these initiatives can help international and transnational law evolve in the direction of restoring a balance between human rights and economic power. ■

³⁵ Special Representative of the Secretary-General for Business and Human Rights, “SRSG Submits Final Draft of Guiding Principles on Business & Human Rights,” press release, March 7, 2011, <http://www.business-humanrights.org/media/documents/ruggie/announcement-of-final-draft-guiding-principles-submitted-ruggie-7-mar-2011.pdf>.

Activities

International seminar on prior consultation and corporate responsibility

DPLF, the Instituto de Defensa Legal (IDL), and the Red de Antropología Jurídica de Cusco (REDAJUC) held an international seminar titled “The Rights of Indigenous Peoples and Social Conflict: From the Right to Prior Consultation to Corporate Responsibility” on November 11–12, 2010, in Cusco, Peru. The seminar brought together civil society organizations, experts, and academics to discuss and share information and strategies relating to the main problems that organizations in the region face with regard to natural resource extraction. Attended by over 40 people representing organizations from Cusco, Lima, and Puno, the event honed in on two issues: (a) the right of indigenous peoples to prior consultation, and (b) the liability of corporations for human rights violations related to the extractive industries.

Carlos López of the International Commission of Jurists began the first part by describing the international legal framework for promoting corporate responsibility and accountability. In a second and very well received presentation, Javier Caravedo of ProDiálogo discussed conflict prevention and resolution with an emphasis on conflicts between businesses and indigenous peoples. As the conclusion of the first part, DPLF representative María Clara Galvis offered an innovative presentation on the main challenges facing the inter-American system in regard to human rights abuses committed by private actors. The second half of the seminar focused on the right of indigenous peoples to prior consultation. Presentations of comparative experiences from Colom-

bia, Bolivia, and Peru were followed by an informative discussion of how to exercise this right in practice through advocacy and strategic constitutional litigation. César Rodríguez of Dejusticia in Colombia and Mirna Cuentas of the German Cooperation Agency in Bolivia gave detailed presentations on the situation in their respective countries. Hernán Coronado of the Centro Amazónico de Antropología y Aplicación Práctica (CAAAP), Javier Jahncke of Fundación Ecuémica Para el Desarrollo y la Paz (Fedepaz), and Juan Carlos Ruiz of IDL then described the situation in Peru and led a discussion of the tasks ahead in that country.



Participants in the international seminar on prior consultation and corporate responsibility. From left: Irene Ramos, DAR; María Clara Galvis, DPLF; Javier La Rosa, IDL; Javier Caravedo, ProDiálogo; and Javier Jahncke, Fedepaz.

Strategic Human Rights Litigation: Can It Be Used Effectively against Transnational Corporations?

Claudia Müller-Hoff, LL.M.

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Transnational corporations are often praised for bringing needed investment and technology to the global South. It is increasingly recognized, however, that the operations of these firms can also have negative impacts on human rights, especially access to land; rights to food, water, health care, and housing; cultural rights; and labor rights. Furthermore, those who undertake the difficult task of defending the human rights violated by corporations often find their civil and political rights threatened.

Unlike states, the classical perpetrators of human rights violations, corporations are not directly bound by international human rights treaties. This does not mean, however, that they are not obliged to respect those rights. The international duty of states to protect human rights includes their obligation to regulate the behavior of nonstate actors accordingly. The extent to which such regulations are effective in guaranteeing human rights must be determined in practice, so that weaknesses can be identified and improvements made.

This is why the European Center for Constitutional and Human Rights (ECCHR) supports and conducts strategic human rights litigation aimed at improving social and legal conditions as part of broader strategies to defend human rights.¹ With respect to transnational corporations, the ECCHR pursues *transnational* strategic litigation. That is, the challenge to corporate human rights violations in a developing country (the “host country”) is brought back home, to come before the courts of the company’s country of origin (or “home country”).



What makes a case strategic?

Strategic litigation aims to establish precedents that will produce impacts beyond the individual case. Strategic cases, therefore, are those where typical or notorious human rights violations are involved and where the availability of evidence or possibilities for research are favorable, so that what is contested is not the factual circumstances but their legal status as human rights violations.

Ultimately, though, it is not objective factors that make a case strategic, but how it is handled. The central ingredients, as in any other human rights defense project, are organizational strength and clarity about objectives. A strategic litigation case may generate strong resistance from the company in the form of attempts at co-optation or persuasion or more aggressive

¹ More information about the ECCHR is available at <http://www.ecchr.eu>.

counter-strategies. To resist such pressures, it is important to have a strong and reliable group or community that has built mutual trust and solidarity, possesses diverse capacities and resources to put toward the common effort, has a clear sense of mission, and can sustain a struggle over several years. Potential security risks should not be dealt with individually—as threats are intended to produce isolation—but should be confronted collectively. Where monetary factors come into play, a typical strategy of companies is to start out-of-court negotiations about compensation with families or victims individually; this can lead to conflicts, envy, and mistrust within the group of those affected and will eventually endanger the human rights defense project if those involved do not insist on collective solutions.

Human rights litigation is most commonly practiced as litigation against states. There are, of course, structural differences between states and companies, and these have important implications for strategic litigation in the national as well as transnational (i.e., home state) sphere.

What are the options?

Legal responsibility of private corporations for human rights violations remains an underdeveloped field. Standard remedies available for violations by companies cover human rights only indirectly and often insufficiently. For example, tort law does not provide remedies for a broad range of economic, social, and cultural rights violations. In strategic litigation, therefore, we must be creative and consider all possible mechanisms, choosing wisely between them in light of their implications and possible outcomes. Among the options:

- Civil tort claims can seek compensation or injunctions aimed at limiting further damage.
- Criminal complaints, which may not offer compensation, may result instead in authoritative judgments and the penalization of illegal behavior.²
- Commercial claims against false advertising might be appropriate when a company does not comply with its stated corporate commitments to social responsibility.
- Claims based on national labor or environmental legislation are generally possible only in the host country, where the alleged violations occurred; home countries usually do not offer extraterritorial jurisdiction for such claims.

² More and more jurisdictions (most recently, Spain) now recognize the criminal liability of legal persons.

- A number of “soft law” mechanisms exist, some of which might also be considered emerging law, that is, legal standards in the making. An example is the Organization for Economic Co-operation and Development’s (OECD) Guidelines for Multinational Enterprises, which contain standards for good-practice behavior with respect to human and labor rights, the environment, transparency and anti-corruption, and so on. A growing number of governments, extending beyond the membership of the OECD, have recognized these standards and have made commitments to “encourage the widest possible observance of the Guidelines.”³
- Internal complaint mechanisms of the international financial institutions, such as the World Bank Group or the European Investment Bank, can be used to investigate corporate behavior and assess its human rights impacts when a corporate project or its host government has received funding from these institutions.

The corporate veil doctrine

Another difference between litigation against corporations and litigation against states is related to the doctrine of the “corporate veil.” The law often treats the various subsidiaries and satellites of an enterprise as legally separate and unrelated corporations, even when the company is an integrated structure in economic and operational terms. This makes it difficult to bring claims against the parent company, even though it bears overall responsibility and has the power to produce systematic changes in the operations of its dependent entities. With rare exceptions, a parent company will not be held legally responsible for the actions of its subsidiary or satellite, but only for its own actions and omissions carried out through its directors or executives. This implies the need for meticulous research into the working relationships, decision-making processes, and supervisory procedures among all companies involved, in order to understand whether and how the parent company may have had concrete influence on the specific operations that caused a human rights violation. Merely holding a majority of shares may not be sufficient, as shareholders would not normally have influence, beyond the annual shareholders’ meetings, on the day-to-day business of a company.

In cases where a human rights violation is notorious and repeated over a long period of time, and has been denounced in a timely manner to the parent company or publicly in the home

³ OECD Guidelines for Multinational Enterprises, Section I: Concepts and Principles, para 5.

country, it will be easier to argue for legal responsibility. In the case of a human rights violation that happened only once and was unforeseen by the parent company, so that its directors could not have intervened to prevent the violation, making a case for legal responsibility would be more difficult.

Beyond legal questions

The possible legal outcome, however, should not be the only consideration in deciding on strategic litigation. Such proceedings are always a challenge to the status quo of legal interpretation. They also tend to be very complex, and the possibility of legally losing the case must always be included among strategic considerations. But losing in court does not always mean failing in the defense of human rights, as even a lost case can have positive impacts. It can gain public attention and stimulate debate about a specific human rights issue. It can lead to revision of laws that do not adequately address human rights violations. It can encourage other affected groups to learn from the experience and to build a “better” case that might then succeed. Or it may serve simply to exhaust remedies as a precondition for an appeal.

It is also important to take into account practical aspects such as financial costs and risks. For example, criminal proceedings tend to be less costly than civil ones. The applicable standards of proof or the burden of proof must be considered; when proof is unavailable, a proceeding that aims at clarification of facts rather than a conviction might be more promising.

Of crucial importance is the selection of cooperating lawyers in both the host country and the home country of the company concerned. In too many cases we have seen an unmerited confidence that “international” lawyers from Europe or North America can resolve the case quickly and in the best interests of those who are affected. In fact, transnational corporation cases are complex. There are language and cultural barriers. Proceedings can take several years to resolve, and financial rewards are uncertain. Hence, it is important

to find lawyers who not only are experts in the field but who support their clients’ strategic aims and are prepared to study the case in its wider context and learn about the social struggles of those affected.

Clients should insist on being regularly updated and should actively involve themselves in all major decisions during the course of the proceedings. This requires provision for translations and basic legal training. It is a good idea to search for alternative funding, as lawyers have to cover their costs and expenses and this has often led cases to a premature conclusion through “amicable” pecuniary settlements, without obtaining a court decision. Such settlements may be viewed as successful where they fulfill the original interests of the affected. However, they are not necessarily strategic successes if the aim is to improve social and legal conditions in order to bring about greater respect for human rights and social justice.⁴

Conclusion

Transnational human rights litigation against corporations should not automatically be ruled out as too costly or too difficult. But neither should it be assumed that justice always works better in Europe or North America. Instead, it is imperative to take a case-by-case approach that carefully considers the legal conditions, factual bases, and research possibilities, as well as organizational capacities, clarity of objectives, strategic planning and fundraising, risks and costs, and the building of networks. Such a project requires an intense investment of time and resources. This can be justified if we understand strategic human rights litigation not only as important for the case at hand but also as a way of promoting change in judicial systems to make them more effective in the protection of human rights. ■

⁴ A document for guidance on building relationships with lawyers was developed at an international seminar, “TNCs and Human Rights: Litigation from the Victims’ Perspectives,” held in Suesca, Colombia, in November 2009. See “Lineas de Acción para los Abogados y Comunidades en la Lucha Contra la Impunidad Frente a Empresas Transnacionales.” An English version is in process; a digital copy can be obtained by e-mailing the author at mueller-hoff@ecchr.eu.



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



Review Process of the Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor¹

Accessible, Effective, Independent, Transparent, Responsive, Predictable

About the Office

As part of the Government of Canada's *Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector*, the Office of the Extractive Sector CSR Counsellor was established in October of 2009. The CSR strategy is designed to help Canadian mining, oil and gas companies meet their social and environmental responsibilities when operating abroad. The Office is funded by Canadian taxpayers and is subject to Canadian law and Canadian legislation.

The mandate of the CSR Counsellor is to review the CSR practices of Canadian extractive sector companies operating outside Canada, and to advise stakeholders on the implementation of the endorsed performance guidelines. The review process for the OECD Guidelines remains with the Canadian National Contact Point.

The endorsed performance standards:

- International Finance Corporation's Performance Standards
- Voluntary Principles on Security and Human Rights
- Global Reporting Initiative
- OECD Guidelines for Multinational Enterprises

The Office will advance the CSR performance of Canadian mining, oil and gas companies through the enhanced use of the endorsed CSR performance guidelines. The Office will conduct reviews, provide advice to stakeholders on the endorsed standards, and facilitate interactions between stakeholders on these standards.

What is the Review Process?

The Office acts as an impartial advisor and facilitator, an honest broker that brings parties together to help address problems and disputes. This approach is based on the view that a credible, impartial and transparent process can help identify workable solutions to disputes. In order to effectively build space for dialogue, the process is not adjudicative or investigative.

The overall objective of the process is the promotion of constructive dialogue and creative problem-solving.

There exist other CSR-related review mechanisms. The Office does not presume to be the answer to every problem in every circumstance. Our value proposition is a voluntary, low-cost, easy-to-access process designed to create space and incentives for dialogue and conflict resolution.

The Review Process of this Office is governed by a set of rules of procedure. The rules outline some of the basic elements of the mechanism and give you guidance on what to expect.

The review mandate is applicable to any Canadian mining, oil or gas company – public or private – in its operations outside Canada.

Is the Review Process right for me?

The Review Process is a dispute resolution mechanism – the objective is to foster dialogue and to create constructive paths

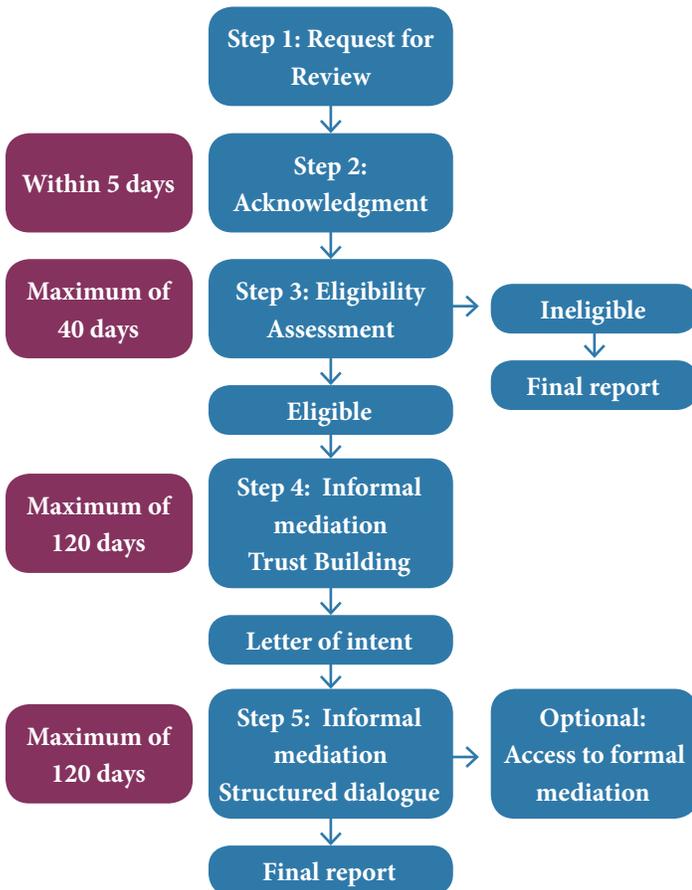
¹ Source: http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/Info_brochure%20Spanish%20final.pdf

forward for all parties. There is a high degree of flexibility in the process for parties to seek ways and means to resolve their dispute constructively. But we know that predictability of the steps in the process is important for participants. Those steps are detailed in the Rules of Procedure and summarized below.

When you submit a Request for Review, you have to be willing to enter into constructive dialogue with the Office and with the other party.

This is a voluntary process – participants can withdraw at any time, although the CSR Counsellor will work with the parties to try and avoid this situation.

Review Process



Who can submit a Request for Review?

You may submit a Request for Review if:

- You are an individual, group or community AND
- You reasonably believe that have been or may be adversely

affected by the activities of a Canadian extractive sector company AND

- You believe that the activities of the Canadian company are inconsistent with the endorsed performance guidelines OR
- You are a Canadian extractive sector company AND
- You believe that you are the subject of unfounded allegations concerning your conduct abroad in relation to the endorsed performance guidelines AND
- You can identify a suitable responding party

What is excluded from the Review Process?

This Review Process does not apply to all situations. Not all applications or requests will be accepted. Before you begin your submission, confirm the following:

- The activities you are concerned about took place after 19 October 2009
- You have made an effort to resolve the situation
- You have not previously submitted a Request for Review on this issue. If you have, you will need to provide new information for consideration.
- You are not submitting your Request for Review anonymously (we can keep your name confidential)
- Your Request for Review is related to one of the endorsed performance guidelines
- Your Request for Review does not relate solely to the OECD Guidelines for Multinational Enterprises (if it does, we will send it the National Contact Point in Canada)
- Your concerns fall within the mandate of the CSR Counsellor (for instance, the company must be Canadian)

How do I begin a Request for Review?

Requests for Review must be made in writing and submitted to the Office via electronic or regular mail, or by fax:

The Extractive Sector CSR
 Counsellor Government of Canada
 1 Front Street West, Suite 5110
 Toronto, Ontario M5J 2X5
 CANADA
 Tel.: +14169732064 / Fax: +14169732104
 E-mail: csr-counsellor@international.gc.ca



The submission must be in one of Canada's official languages, English and French.

We will keep information about your identity confidential, if requested. Normally, we will share your identity with the responding party.

What information do I need to provide?

You are required to provide certain information to the Office in your Request for Review. You are required to complete the Office's Cover Form and submit it with your written submission.

Include only publicly available information in your Request for Review. Do not include any confidential information.

The Office will not publish potentially libellous or defamatory statements. Requesters are liable for statements made in Requests for Review; therefore, you are expected to use respectful and temperate language.

Information you must provide in your Request for Review

- The Office's Cover Form
- Your name, organization and contact information
- Whether you want your identity to be kept confidential (we will not post it on our website or in any public communications)
- Proof of authorization for any aid or assistance being provided
- The name and contact information of any individual or organization providing aid or assistance
- Relevant background information and documents
- To the best of your ability, the endorsed CSR standards at issue. You are not required to cite specific clauses.
- The name of the other party
- A description of previous efforts made to resolve the issue
- Confirmation that you have read the rules of procedure
- Your desired outcome from the Review Process

What happens after I submit a Request for Review?

The Office will register your Request for Review, meaning we will open an internal file and assign a file number. We will acknowledge receipt of your submission within five (5) business days. At the same time, we will advise the responding party that we have received a Request pertaining to them. We will also update our website registry. We will not publish the original Request for Review.

Not every Request for Review will be found eligible for this Review Process.

How will the Office determine whether my Request for Review is eligible?

The Office is funded by Canadian taxpayers. It is designed to provide a useful mechanism for constructive problem-solving. Some screening is therefore done to make sure this Office is the best place for resolving your Request for Review.

We will assess your Request for Review based on the following questions:

- Did the activity you are concerned about take place after 19 October 2009?
- Did you take action within a reasonable period of time after you found out about the issue?
- Is the activity in question more than trivial in nature?
- Are you willing to enter into constructive dialogue with the responding party?
- Have you made some effort to engage the responding party, or have you tried a local grievance mechanism, with a view to resolving the dispute?
- Is your Request for Review based on more than media reports or unverified third party information?

What can I expect after I submit?

You will hear back from us within five business days telling you we have received your Request.

You will hear back from us within 40 business days about the eligibility of your Request.

You and the responding party will both be notified of the results in writing.

What happens if my Request for Review is found ineligible?

If your Request for Review is found ineligible, you will be notified of the result and provided with written reasons why we cannot accept your Request for Review. At this time, we will close your file and update the website registry.

What happens if my Request for Review is found eligible?

If your Request for Review is eligible, you must understand that the Review Process has only just begun and that it could take months for appropriate solutions to unfold.

You will be guided through an informal mediation process overseen by the CSR Counsellor, who has discretion in promoting creative and innovative solutions to resolve the dispute. You will likely be asked to engage in conversation with the responding party. The process is voluntary, and parties may exit it at any time.

If the dialogue advances, you will be asked to work on a letter of intent with the responding party, and to sign this letter. Up until that point, no confidential information is to be shared. In this letter of intent, you are providing your formal consent to carry on with the Review Process. This would typically be done within 120 business days after your Request for Review was found eligible.

In some cases, the involvement of a third party independent mediator may go a long way in helping parties resolve a dispute. If determined to be appropriate, the CSR Counsellor will work with the parties to ensure that a suitable external mediator is found. The Office does not conduct formal mediation.

For a variety of reasons, including the withdrawal of one of the parties, the Review Process could be terminated prior to completion.

In addition to periodic status updates, the CSR Counsellor will issue a final report at the completion of a review. You will be informed of this report and of the results of the Review Process before any information is made public.

How will the Office treat confidential information?

The Office is part of the Government of Canada, and we are subject to the laws of Canada. These laws include the *Access to Information Act* and the *Privacy Act*.

To protect the confidentiality of your information, we require that you only share publicly available information during the early stages of the Review Process. If the dialogue advances to further stages, it may be helpful for participants to share confidential information with one another and the Office. This will be discussed further with you before any confidential information is shared.

For more information on how the laws of Canada regarding information might affect you, please refer to the Office's *Guidance Note No. 1: Transparency and Confidentiality*, available on our website. ■

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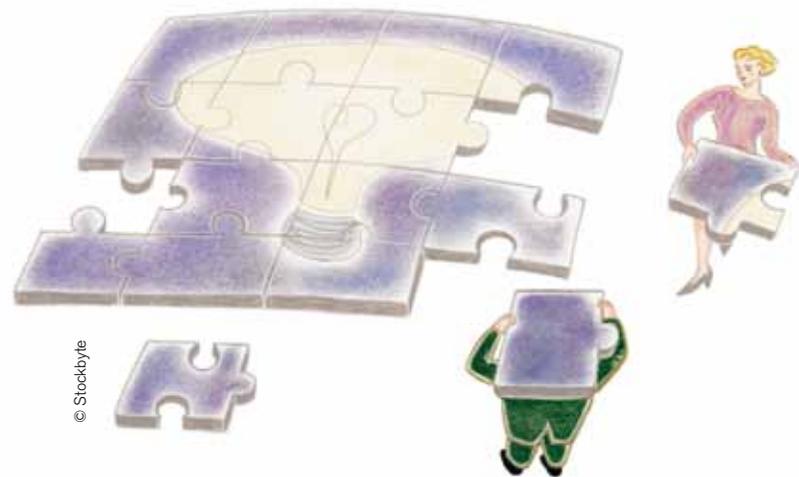
Review Process of the Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor

As of August 2011, DPLF has observed, there was only one case under review at the Office of the Extractive Sector CSR Counsellor. The defendant is Excellon Resources Inc., a Canadian company which operates a mining project in the state of Durango in northern Mexico. The request for review was presented on April 8, 2011, by three parties: (a) Excellon workers: Jorge Luis Mora, secretary general, Section 309 executive committee, National Union of Mine and Metal Workers, representing workers at the La Platosa mine site; (b) the National Union of Mine and Metal Workers of the Mexican Republic; and (c) Proyecto de Derechos Económicos, Sociales y Culturales (ProDESC), a nongovernmental organization. The counselor, Marketa D. Evans, has been in direct contact with both parties, having carried out two field visits: one in May to Mexico City, and the other, in July, to the La Platosa community, which included a visit to the mine. Counselor Evans has yet to define the next steps in this process.

The OECD Guidelines for Multinational Enterprises: Is There Hope in the Review Process?

Victor H. Ricco

Victor H. Ricco, an attorney, is former environmental secretary of Córdoba, Argentina. He is currently a member of the Coordination Committee of OECD Watch as an advisor from the Center for Human Rights and the Environment (CEDHA) and coordinator of its Human Rights, Business, and Sustainable Development Program.



The Guidelines are recommendations from governments to MNEs. They were signed by the 34 member states of the OECD as well as Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru, and Romania. They set out voluntary principles and standards for responsible business conduct in areas such as information disclosure, employment and labor relations, the environment, combating bribery, consumer interests, science and technology, competition, and taxation. The Guidelines also establish National Contact Points (NCPs) as a mechanism for dissemination of the standards, and for promoting compliance. Each state that adheres to the Guidelines has an NCP, usually made up of one or more government representatives, which receives complaints against MNEs relating to possible breaches of the Guidelines. A look at the case record, however, shows that the NCPs rarely have contributed to the resolution of specific conflicts.

The Organisation for Economic Co-operation and Development (OECD) is an intergovernmental organization based in Paris. More than three decades ago the OECD developed a set of specific recommendations known as the OECD Guidelines for Multinational Enterprises. The Guidelines were reviewed and updated in 2000. Ten years later, the unavoidable question is whether this normative instrument has been useful in preventing irresponsible behavior on the part of multinational enterprises (MNEs). The answer, unfortunately and inexcusably, is that the Guidelines have not lived up to their potential.

The OECD launched a second review of the Guidelines in May 2010, creating another opportunity to strengthen the tools for the promotion of responsible business practices among MNEs. This process concluded on May 25, 2011. The OECD now has a new set of standards in place for MNEs—in other words, new Guidelines.¹

OECD Watch is an international network of nongovernmental organizations that promote corporate responsibility.² Part of its mission is to monitor the production or review of instruments intended to promote such responsibility. OECD Watch has spent 10 years monitoring the application and effectiveness of the MNE Guidelines and has published a study on the cases brought by nongovernmental organizations against MNEs for alleged breaches of the Guidelines.³ Nongovernmental organizations have lodged a total of 96 complaints over the past decade (through June 2010). The most frequent allegations concern environmental damage, employment issues and labor relations, and human rights abuses in developing countries. These abuses often occur along the supply chains of major multinational corporations.

² See the OECD Watch website at <http://www.oecdwatch.org>.

³ OECD Watch, *10 Years On: Assessing the Contribution of the OECD Guidelines for Multinational Enterprises to Responsible Business Conduct*, June 2010, http://oecdwatch.org/publications-en/Publication_3550.

¹ The text of the new Guidelines is available on the OECD website at <http://www.oecd.org/dataoecd/43/29/48004323.pdf>.

The OECD study shows that most of the National Contact Points have failed to promote the Guidelines or raise public awareness about the importance of adhering to them. Only five of the 96 cases presented by nongovernmental organizations around the world over the past 10 years have resulted in genuine changes in corporate behavior. The following are among the few cases that can be considered successful in fostering real change in corporate conduct:

- The Australian case against GSL Electronics, in which, pursuant to an agreement facilitated by the NCP, the company improved its human rights performance in relation to detention centers for immigrant children in Australia.
- The German case against Bayer Corporation, in which the company admitted its liability for the use of child labor in its cottonseed supply chain and agreed to take steps to improve the situation.
- The Argentine case against the travel company Accor Services, which pledged funds to help improve its performance with regard to transparency and other issues potentially linked to bribery and corruption.

While adherence to the Guidelines is voluntary for MNEs, the standards derive legitimacy from having been established through consensus and supported by the OECD member states. Communities affected by irresponsible corporate activity need to be able to regard the Guidelines and the NCPs as effective in providing a nonjudicial conflict resolution mechanism when they consider which avenue to take in search of solutions.

The review process carried out in 2010–11 was limited and incomplete, although it did result in the addition of certain necessary new elements.⁴ Indeed, it can be argued that the OECD wasted an opportunity to more effectively promote responsible business conduct and the successful implementation of the Guidelines. The process was rushed relative to the magnitude of the task, and because of that, several chapters were not given an exhaustive review. OECD Watch has issued a statement on the review process and its outcomes.⁵ It describes the specific progress made in relation to standards for respon-

⁴ The process was limited because not all of the chapters of the Guidelines were subject to an extensive and exhaustive review, and the time frame for responses was very short. It was incomplete because it did not entirely cover the stipulations approved by the terms of reference for the review.

⁵ OECD Watch, *OECD Watch Statement on the Update of the OECD Guidelines for Multinational Enterprises*, May 2011, http://oecdwatch.org/publications-en/Publication_3675.

sible business conduct, sets out missed opportunities to provide more guidance in vital areas of corporate responsibility, and examines the role of the NCPs as the entities charged with mediating alleged cases of violations of the Guidelines. Aspects of this critique are described in more detail below.

Positive aspects of the review

The review process led to a number of significant advances in the areas of human rights, due diligence, and supply chain responsibility.

As far as human rights, the Guidelines are generally aligned with the standards proposed by the United Nations special representative on business and human rights, John Ruggie, in the UN Guiding Principles on Business and Human Rights and the “Protect, Respect and Remedy” framework, which were submitted to the UN Human Rights Council in 2008 and adopted unanimously.⁶ The new chapter on human rights in the Guidelines specifically recommends adopting human rights policies that include procedures for acting with due diligence and preventing abuses in the course of business activities.

In the area of due diligence, the new text of the Guidelines requires companies to take measures to avoid causing or contributing to negative impacts on people, communities, and the environment. This makes it incumbent on companies to significantly step up their efforts to evaluate the current and potential negative impact of their operations, and to take preventive action.

In the area of supply chain responsibility, MNEs must study the actual and potential impacts not only of their own activities, but also of the activities of their suppliers and other companies with which they do business. This becomes even more relevant in view of the growing trend among multinational enterprises to contract out their production processes in developing countries. Their responsibility now extends beyond the gates of their own factories, and they can no longer turn a blind eye to irresponsible conduct on the part of their suppliers and other business partners.

⁶ The Guiding Principles and other documents prepared by the special representative are available on the website of the Business & Human Rights Resource Centre at <http://www.business-humanrights.org/SpecialRepPortal/Home>.

Missed opportunities in the review process

It is particularly disappointing that no agreement was reached on reinforcing procedures for implementation of the Guidelines. Since there are no sanctions or consequences of any kind when the Guidelines are breached, enterprises have little or no incentive to comply with them. Corporations that act irresponsibly will be able to engage in abusive conduct with complete impunity.

Also unfortunate was the failure to establish that the National Contact Points, which are responsible for responding to complaints, must determine and explicitly state whether or not a company has breached the Guidelines. Indeed, the NCPs have no specific mandate to follow up on the agreements made or on a complaint filed. This undermines the credibility of the Guidelines as an effective instrument and a valid alternative available to communities adversely affected by the irresponsible conduct of companies.

Another missed opportunity is the failure to require MNEs to obtain the free, prior, and informed consent of the communities that will be affected by their activities. Since this important recommendation was not included, it is therefore up to each NCP to decide what constitutes adequate consultation with communities that will be, or already have been, affected by such activities.

The lack of a directive on redress in cases where the Guidelines are breached is also extremely disappointing.

While the Guidelines do include an application mechanism designed to mediate in cases of alleged breach, little has been done to promote its effective implementation. Its potential impact on the promotion of responsible business conduct is completely contingent on the integrity and commitment of the NCP in each country and the country's willingness to ensure that enterprises are held accountable for their irresponsible behavior.

The Guidelines are a unique combination of standards that are internationally recognized by the OECD member states and have the potential to contribute significantly to the promotion of responsible business conduct. That said, they will only be successful, legitimate, and trusted if the NCPs demonstrate a firm commitment to use all of the tools at their disposal to creatively promote responsible business practice.

For this reason, until the next opportunity for review comes around, OECD Watch urges all OECD member states and adherents to redouble their efforts, demonstrate their commitment to conflict resolution, and help ensure effective redress for those affected by irresponsible business activities. ■

Activities



Presentation in Lima of report on the right of indigenous peoples to prior consultation

Oxfam sponsored an event in Lima on July 6, 2011, to present the report *The Right of Indigenous Peoples to Prior Consultation: The Situation in Bolivia, Colombia, Ecuador, and Peru*, commissioned by Oxfam and prepared by DPLF. The event was attended by representatives of human rights organizations, donor agencies, and mining and oil companies. In an opening speech on behalf of DPLF, María Clara Galvis discussed the international standards applicable to the four countries and the main normative and practical barriers to observance of the right to prior consultation in each country. Iván Bascopé of the Centro de Estudios Jurídicos e Investigación Social (CEJIS) then described the Bolivian experience with specific consultation processes, and finally César Gamboa of Derecho, Ambiente y Recursos Naturales (DAR) discussed the Peruvian situation. The three presentations were followed by an interesting question and answer session.

Guatemalan Mine Controversy Reveals Shortcomings of Canadian NCP

Kristen Genovese

Kristen Genovese is a senior lawyer at the Center for International Environmental Law.



Communities affected by the activities of mining companies in Latin America have few options for recourse at the international level. They can submit a petition to the Inter-American Commission on Human Rights, but that only addresses the conduct of governments—not private firms—and the process can take years. If the mining company receives funding from the International Finance Corporation or the Inter-American Development Bank, communities can submit complaints to the independent recourse mechanisms of those agencies, called, respectively, the Compliance Advisor/Ombudsman and the Independent Consultation and Investigation Mechanism. Otherwise, the only available mechanism is the National Contact Point (NCP) in the country where the mining company is headquartered. However, for the many communities affected by mining companies headquartered in Canada, recent experience shows that the Canadian NCP offers no remedy at all.

The Organisation for Economic Co-operation and Development (OECD) promotes voluntary standards for corporations in its Guidelines for Multinational Enterprises (MNE Guidelines).⁷ These cover a number of areas: employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation. To promote observance of the Guidelines, OECD member states are required to establish a government office called the National Contact Point. Among other functions, an NCP receives complaints from people who believe they have been harmed by the activities of a corporation headquartered in the NCP's country. If the NCP finds that the complaint warrants further investigation, it will offer to facilitate a dialogue between the community and the corporation. If the parties decline the offer or if the dialogue fails, the NCP issues a final statement, with recommendations as appropriate, on the implementation of the Guidelines.

Guatemalan highland communities challenge Marlin mine

On December 9, 2009, two representatives from FREDEMI, a coalition of local groups in San Miguel Ixtahuacán, Guatemala, made their way through a blizzard in Ottawa to present the Canadian NCP with a complaint regarding the operations of the Marlin mine owned by Vancouver-based Goldcorp. Developed initially with a loan from the World Bank Group, the open pit and underground mine, one of Goldcorp's most profitable gold mines, has been a source of tension in the indigenous communities of San Miguel and Sipacapa in the Western highlands of Guatemala since before it began operations six years ago.

⁷ The OECD published an updated version of the Guidelines on May 25, 2011.

The complaint asserted that that Goldcorp's operations at the Marlin are out of compliance with paragraph 2 of the General Policies set forth in the MNE Guidelines, which states that enterprises should "respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments." Specifically, the complaint alleged, the operations at the Marlin mine are not consistent with the Government of Guatemala's international obligations to respect the rights of the indigenous community to free, prior, and informed consent; collective property; health; and water.

Investigations carried out by international institutions and scientific bodies subsequently confirmed the issues that FREDEMI had raised in its complaint. In March 2010, the Committee of Experts of the International Labour Organization (ILO) recommended that the government of Guatemala suspend operations at the Marlin mine until the consultations and studies required under ILO Convention 169 on Indigenous and Tribal Peoples could be conducted. In May 2010, the Inter-American Commission on Human Rights issued precautionary measures in favor of the communities of San Miguel and Sipacapa, recommending that the government of Guatemala suspend operations at the mine until the Commission could consider the merits of the petition.

Meanwhile, a human rights impact assessment was commissioned by Goldcorp and conducted by On Common Ground, a Canadian consulting firm. This assessment found widespread human rights violations at the mine, and it recommended that the company halt "all land acquisition, exploration activities, mine expansion projects, or conversion of exploration to exploitation licenses, pending effective State involvement in consultation with local communities."⁸ In addition, studies conducted by E-Tech International, Physicians for Human Rights and the University of Michigan, and the University of Ghent have shown that there is cause for concern regarding the health impacts of the mine. Despite these and other findings and recommendations, the mine continues operating as of spring 2011.

⁸ *Human Rights Assessment of Goldcorp's Marlin Mine*, commissioned on behalf of Goldcorp by the Steering Committee for Human Rights Impact Assessment of the Marlin Mine and prepared by On Common Ground Consultants, Vancouver, BC, Canada. The report is available at <http://www.hria-guatemala.com>.

Canadian NCP lacks accessibility, follow-through

John Ruggie, the United Nations special representative on business and human rights, has called for grievance mechanisms to become more easily available to those whose human rights have been violated. He has identified five principles that underlie effective grievance mechanisms: legitimacy, accessibility, predictability, equitability, rights-compatibility, and transparency. National Contact Points vary in the extent to which they embody these principles. The NCPs of the United Kingdom and the Netherlands have been recognized as representing best practice among NCPs: they include nongovernmental representatives in their governance structures, undertake fact-finding missions to countries where complaints arise, and prepare robust final statements that evaluate the implementation of the MNE Guidelines.

The Canadian NCP, on the other hand, has not upheld these principles. It has not even taken the essential first step toward ensuring accessibility, that is, to communicate with and understand the complainant. Throughout the process surrounding the Marlin mine, FREDEMI has had to specifically request that the NCP provide a Spanish translation of its English-language communications. When the NCP asked the parties to review the draft Final Statement, it refused to provide a Spanish translation of the entire document, giving an unfair advantage to Goldcorp, which could review and comment on the statement in its entirety. An affected community should not have to bear the cost of translating an NCP's documents in order to participate in the process. The NCP has also refused FREDEMI's invitation to visit San Miguel.

The NCP has interpreted its mandate as limited to facilitating dialogue, in effect ignoring half of its mandate. In its complaint and in subsequent communications, FREDEMI consistently maintained that it did not want to enter into a dialogue with the company. Dialogue is not always an appropriate mechanism for resolving disputes, especially where, as the NCP concedes here, the parties have irreconcilable positions. FREDEMI wants the Government of Guatemala to implement the precautionary measures and suspend operations at the mine; Goldcorp will not suspend or close its mine unless it is ordered by the Guatemalan government to do so. It is unclear what dialogue would accomplish under these circumstances. Nonetheless, the NCP has insisted that there is nothing more it can do. NCP closed the case on May 5, 2011, without having addressed FREDEMI's concerns about the implementation of the MNE Guidelines. This does not serve either party, nor does it fulfill the intent of the OECD members in establishing the Guidelines. ■

The Inter-American Development Bank's Independent Consultation and Investigation Mechanism

Fátima Andrada Pasmor

Fátima Andrada Pasmor, an attorney, is a legal operations analyst for the Independent Consultation and Investigation Mechanism of the Inter-American Development Bank.



The Inter-American Development Bank (IDB) is one of the primary funding sources for development projects in Latin America and the Caribbean. As such, it requires instruments to ensure accountability and initiate complaints procedures concerning its projects. With this in mind, a new verification instrument, the Independent Consultation and Investigation Mechanism (ICIM), was introduced in February 2010. It serves as a critical access point for individuals and communities that might be affected by IDB-funded projects.¹

The new instrument expands and improves upon a more limited mechanism in existence since the early 1990s. In 1994, the board of governors of the IDB decided to institute an oversight

¹ For more information on the ICIM, visit <http://www.iadb.org/en/mici/independent-consultation-and-investigation-mechanism-mici,1752.html>.

function independent of the Bank's administration to investigate complaints by affected parties claiming that the IDB had failed to correctly apply its own operational policies. Accordingly, that year the Bank's executive director established the Independent Investigation Mechanism (IIM), predecessor to the ICIM, to take up complaints lodged by communities or groups claiming to have been adversely affected by Bank operations conducted in contravention of its own operational policies.

The lessons gleaned from several years of IIM operations pointed to the need to strengthen the mechanism, make it more accessible to communities and individuals, and install a dispute resolution office. The ICIM was created in response to the Bank's desire to improve the transparency and effectiveness of its management, ensure accountability for its undertakings, find solutions to problems associated with the projects it funds, and monitor compliance with its policies.

A two-phase system for requests

The Policy Establishing the Independent Consultation and Investigation Mechanism (ICIM Policy) was adopted on February 17, 2010. The ICIM became operational in September of that year, following the appointment of a project ombudsperson.

The ICIM's mandate entails the application of six operational policies:

- Disclosure of information
- Environmental and safeguards compliance
- Disaster risk management
- Involuntary resettlement
- Women in development
- Indigenous people

Beginning in 2014, three years after the establishment of the ICIM, the process will become more comprehensive. All IDB operational policies may then be subject to a proceeding before the ICIM.²

The policy establishes a two-phase system for processing requests or complaints: a “consultation phase” under the purview of the project ombudsperson, and a “compliance review phase” conducted by a panel of five independent experts, one of whom serves as the chairperson.

The consultation phase focuses on resolving disputes and is completely voluntary.³ Any party, except the project ombudsperson, can opt out of any part of a consultation phase process at any time, thereby concluding the process.⁴ This phase has the advantage of employing flexible methods to establish a dialogue, potentially leading to a consensus agreement. There are no legal formalities attached to efforts to solve the problem, since the intention is to simplify the interaction between those who consider themselves affected parties and the Bank.⁵

The consultation phase includes the following steps: (a) eligibility determination, (b) assessment, (c) dialogue and search for solutions, and (d) agreement. In the event that an agreement is reached, a file will be opened for follow-up.

The compliance review phase, which is investigatory in nature, is designed to verify whether there was actual harm, identify those responsible, and take steps toward mitigation. It is intended to examine whether or not the Bank has complied with its own operational policies, and if not, to verify any harm this may have caused. This phase has the same minimum prerequisites as those established for the consultation phase, with the distinction that it is no longer voluntary in nature.

This phase includes the following steps: (a) eligibility review, (b) preliminary investigation, (c) compliance review, and (d) preparation and distribution of a report on the findings.

² See section 26 of the ICIM Policy. The policy is available at <http://idb-docs.iadb.org/wsdocs/getdocument.aspx?docnum=35074768>.

³ ICIM Policy, section 47: “Voluntary nature. Any party, except the Project Ombudsperson, can opt out of any part of the Consultation Phase process at any time, in which case the Consultation Phase shall be deemed concluded . . .”

⁴ *Ibid.*

⁵ The purpose of the consultation phase is set out in section 38 of the ICIM Policy: “to provide an opportunity, applying consensual and flexible approaches, to address the concerns of a party that believes it has been or could reasonably be expected to be directly, materially adversely affected by the failure of the IDB to follow its Relevant Operational Policies in a Bank-Financed Operation.”

Section 40 of the ICIM Policy sets out the requirements for determining the eligibility of the request:

- The names and contact information for the requestor or his or her representative are available; in the latter case there must be proof of authorization;
- The IDB-financed operation(s) at issue has been identified;
- The requester resides in the country where the relevant Bank-financed operation is or will be implemented;
- The requester has reasonably asserted that it has been or could be directly, materially adversely affected by an action or omission of the Bank in violation of a relevant operational policy in a Bank-financed operation, and has described in at least general terms the direct and material harm caused or likely to be caused by said operation;
- The parties are amenable to a consultation phase exercise and believe that this phase could contribute to addressing a concern or resolving a dispute or is likely to have a positive result;
- The requester has taken steps to bring the issue to the attention of management.

Section 40 further states that none of the exclusions set forth in section 37 may apply to the request.⁶ These exclusions apply to the eligibility determination for the consultation phase as well as for the compliance review phase.

⁶ ICIM Policy, section 37: “Exclusions. Neither the Consultation Phase nor the Compliance Review Phase will be applied to:

- a. actions that are the responsibility of parties other than the Bank, such as a borrower/recipient, technical cooperation beneficiary, or executing agency, and that do not involve any action or omission on the part of the Bank;
- b. Requests related exclusively to the laws, policies or regulations of the host country(ies), borrower/recipient or the executing agency;
- c. actions or activities that do not relate to a Bank-Financed Operation or that are not subject to the Bank’s Relevant Operational Policies;
- d. procurement decisions or processes (in which case the Executive Secretary shall redirect the Request to the appropriate office within the Bank);
- e. a particular matter or matters that have already been reviewed pursuant to the Mechanism, or its predecessor, unless justified by new evidence or circumstances not available at the time of the initial Request;
- f. requests dealing with a Bank-Financed Operation that are filed after twenty-four (24) months of the last disbursement;
- g. ethics or fraud questions, specific actions of Bank employees, non-operational matters such as internal finance or administration, allegations of corrupt practices, or other matters subject to review by other bodies established by the Bank (in which case the Executive Secretary shall redirect the Request to the appropriate office within the Bank);
- h. any Request that on its face (i) is without substance, or (ii) has been submitted to gain a competitive business advantage;
- i. Requests that raise issues under arbitral or judicial review by national, supranational or similar bodies.”

Concluding reflections

The ICIM is governed by the principles of independence, impartiality, and impact. It is independent because it operates autonomously from the Bank's management and reports only to the board of executive directors. Impartiality is ensured by the neutrality of the ombudsperson and panel members. Impact is important because the ICIM seeks to reinforce the Bank's role in making the implementation of its development projects in Latin America and the Caribbean more effective.

The IDB is committed to supporting the ICIM at the highest levels, with an appropriate staff and budget. Improving and expanding upon the previous mechanism, it has adopted a

modern instrument for dealing with complaint resolution, one aimed at identifying alternative solutions that facilitate constructive dialogue among the parties. In the process, the Bank has situated itself at the forefront of multilateral organizations in the quest to enhance the accountability and transparency of development projects.

The success or failure of mechanisms such as the ICIM, while mainly contingent on the institutions that adopt them, also depends on the groups or individuals who use them. Robust and responsible use helps strengthen such mechanisms from the outside. We hope that civil society will lend its support to the work of the ICIM and point out areas where the Bank must do better. ■

Legislative News

Peru Enacts Legislation Mandating Prior Consultation with Indigenous and Orinary Peoples

Timetable for the prior consultation law:

- On August 31, 2011, the Peruvian Congress unanimously approved the "Law on the Right of Indigenous and Orinary Peoples to Prior Consultation Recognized in Convention 169 of the International Labour Organization (ILO)."
- On September 6, 2011, Peruvian President Ollanta Humala Tasso signed the prior consultation legislation into law.
- On September 7, 2011, the official text of Law 29785 was published in the official gazette, *El Peruano*.
- Law 29785 will enter into force 90 days after its publication in the official gazette.

What does the prior consultation law do?

- It develops the principles, characteristics, and requirements of the right to prior consultation enshrined in ILO Convention 169.
- It conceives of the right to prior consultation as a process aimed at reaching an agreement between the state and indigenous peoples.
- It establishes the stages in the consultation process.
- It points out that the language of the law must be interpreted in light of the obligations set out in ILO Convention 169.
- It requires the authorities to identify legislative or administrative measures that could directly affect indigenous peoples.
- It establishes the legal and administrative enforceability of the agreements reached between the state and indigenous peoples as a result of the consultation process.

- It creates an official database of indigenous and orinary peoples, which will include information on the ethnic, linguistic, geographic, cultural, and organizational characteristics of indigenous peoples and their representative institutions.

Why is Law 29785 important?

- By approving and enacting the prior consultation law, the Peruvian parliament and executive branch have finally incorporated ILO Convention 169 into domestic law, a task that had been pending since 1995, when the Convention entered into force in Peru.
- A majority of indigenous peoples, human rights organizations, and experts in the field support the law.
- The law is the culmination of a significant process of democratic dialogue and debate between government authorities and indigenous peoples.

The law challenges the Peruvian state and society to:

- Engage in genuine intercultural dialogue.
- Establish a relationship between the state and indigenous peoples that is inclusive, free of discrimination, and respects the rights of indigenous peoples.
- Refrain from imposing on indigenous peoples the economic development model espoused by national and transnational corporations.
- Use international law and jurisprudence to fill any gaps in the law.

The World Bank Group's Opportunity to Advance Indigenous Peoples' Rights

Kirk Herbertson

Kirk Herbertson is an associate at the World Resources Institute. He wrote this article in his personal capacity, and the views expressed here do not necessarily reflect those of the World Resources Institute.

The global struggle for indigenous peoples' rights gained momentum after the UN General Assembly adopted the 2007 Declaration on the Rights of Indigenous Peoples. All of the major governments of the world have expressed their support for the declaration. While there is consensus on the importance of indigenous peoples' rights at a rhetorical level, fierce debate continues on the details. Most prominent is the debate over "free, prior, and informed consent" (FPIC). What does this mean, and how is it implemented? Very few governments or companies have experience in implementing FPIC, and they are looking for leaders to guide them on the next steps.

This article examines the role that the World Bank Group¹ may play in FPIC debates over the next few years. In May 2011, the International Finance Corporation (IFC)—the arm of the World Bank Group that lends to companies—adopted a new policy that requires borrowers to obtain FPIC from indigenous peoples who would be affected by the investment. Meanwhile, the World Bank—the arm of the World Bank Group that lends to governments—is exploring the possibility of adopting an FPIC policy. Depending on its decisions in 2011–12, the World Bank Group could either provide leadership that advances indigenous peoples' rights, or it could undermine the progress made so far.

What is FPIC?

Many indigenous peoples have lived on the same land for hundreds or even thousands of years, and they rely on their land for livelihood and self-identity. According to the UN Declaration

on the Rights of Indigenous Peoples, these communities therefore "have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired."² In order to respect this right, there is increasing recognition that projects potentially affecting indigenous peoples cannot go forward without their free, prior, and informed consent.

FPIC is a collective expression of support for a proposed project by potentially affected communities, reached through an independent and self-determined decision-making process and in accordance with their cultural traditions, customs, and practices. Such consent does not necessarily require support from every individual, as long as the people make their decision through a process that they consider to be legitimate. The principle implies that, whatever the form of consent, it must be free of coercion; obtained prior to the commencement of project activities; and informed through access to all the information necessary to make the decision, including knowledge of legal rights and the implications of the project.³

FPIC is valuable for indigenous peoples, but it also helps project developers. By seeking the consent of affected people, a project developer can reduce risks of conflict, delays, and damage to reputation.⁴ This, in turn, can lower the costs of a development project.

¹ The World Bank Group consists of (a) the International Bank for Reconstruction and Development and (b) the International Development Association, which lend to governments and are known collectively as the World Bank; (c) the International Finance Corporation, which lends to private companies; (d) the Multilateral Investment Guarantee Agency; and (e) the International Center for Settlement of Investment Disputes.

² UN Declaration on the Rights of Indigenous Peoples, Article 26(2).

³ World Resources Institute, *Breaking Ground: Engaging Communities in Extractive and Infrastructure Projects*, 2009, <http://www.wri.org/publication/breaking-ground-engaging-communities>.

⁴ World Resources Institute, *Development Without Conflict: The Business Case for Community Consent*, 2007, <http://www.wri.org/publication/development-without-conflict>.

The World Bank's old approach to FPIC

While the World Bank Group contributes only a small percentage of total investments in developing countries, its influence is impressive. The World Bank and IFC have a large, well-trained staff that can provide technical expertise that individual governments and companies lack. As a result, it is often cheaper and easier for others to follow the standards that the World Bank Group sets, rather than to develop their own. In some cases, the Bank and IFC have helped promote global respect for human rights and the environment, but in other cases their leadership has encouraged harmful practices.

The World Bank first came under public pressure to adopt an FPIC policy in the early 2000s. In 2001, World Bank president James Wolfensohn called for an independent review of the Bank's extractive industries portfolio. The final report in 2004 recommended, among other reforms, that the Bank incorporate FPIC into its policies. However, the Bank's board of directors expressed concern that this policy would give individuals veto power over projects that are in the broad public interest. In response, the World Bank's legal department created an alternative standard of "free, prior, and informed consultation" with affected communities, leading to "broad community support."⁵ This two-part standard became part of the World Bank's indigenous peoples policy in 2005 and the IFC's social and environmental policy in 2006. Commercial banks and extractive companies subsequently incorporated the first part of the standard, "free, prior, and informed consultation," into their own policies.

FPIC and the private sector

Since that time, acceptance of the FPIC principle has grown, at least in the private sector. As indigenous peoples have organized to demand greater respect for their rights, the consequences of violating these rights have also increased. Companies that fail to respect basic human rights have found themselves embroiled in conflict and litigation, often leading to increased costs and delays, reduced corporate value, and damage to their public image.⁶ Many mining companies, such as Rio Tinto and De Beers, have begun to negotiate agreements with indigenous peoples. Oil and

gas companies have also started to respond.⁷ In 2010, for example, Canadian company Talisman Energy adopted a corporate FPIC policy.⁸ Such policies tend to note that the primary duty to respect indigenous peoples' rights lies with the government, but that companies also have a responsibility to respect human rights that exists independently of government obligations.⁹

Between 2009 and 2011, amid growing acceptance of FPIC and indigenous peoples' rights, the IFC updated its influential "Performance Standards." Since 2006, these standards have required IFC clients to meet a certain level of environmental and social performance as a condition of IFC financing. The standards cover a range of issues, including indigenous peoples' rights. Throughout the 2009–11 review process, indigenous leaders actively pressed for inclusion of FPIC. For example, James Anaya, UN special rapporteur on the rights of indigenous peoples, played a central role in advising IFC staff. These staff members, to their credit, conducted thorough research and numerous consultations in an effort to better understand the issue. In May 2011, the World Bank Group board of directors approved an updated version of the Performance Standards, which requires clients to obtain FPIC.

According to the policy, businesses seeking financing from IFC would have to obtain FPIC from indigenous communities under certain circumstances, namely:

- When IFC investments impact lands and resources under traditional ownership or customary use
- When investments result in resettlement of indigenous peoples from lands under traditional ownership or customary use
- When projects intend to use cultural resources, such as knowledge or practices, for commercial purposes

To obtain FPIC, the client company must first agree with indigenous groups on a mutually acceptable process of information sharing, consultation, and negotiation. FPIC

⁷ Amy K. Lehr and Gare A. Smith, *Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges* (Washington, DC: Foley Hoag, 2010), http://www.foleyhoag.com/NewsCenter/Publications/eBooks/Implementing_Informed_Consent_Policy.aspx.

⁸ Talisman Energy, "Global Community Relations Policy," 2010, <http://www.talisman-energy.com/upload/editor/File/10417493%20-%20GLOBAL%20COMMUNITY%20RELATIONS%20POLICY%20-%20DECEMBER%209%202010%20-%201%20-%20TLMPRD.pdf>.

⁹ This principle is articulated in the UN Guiding Principles on Business and Human Rights, developed by John Ruggie, the UN special representative on business and human rights.

⁵ World Bank Group General Counsel, "Legal Note on Free Prior and Informed Consultation," August 2, 2004.

⁶ See, for example, World Resources Institute, *Development Without Conflict*.

would then be reached through good-faith negotiations and result in a mutually acceptable agreement between the company and indigenous peoples on such issues as design, implementation, and impacts of the proposed project. The client would need to ensure that these requirements are met, even in cases where governments take primary responsibility for the process. The IFC would check and publicly disclose evidence that negotiations took place in good faith and that FPIC with communities had been reached.

The policy is not perfect. The IFC does not require the client to maintain the consent of people to the client's activities over time. Indigenous peoples and nongovernmental organizations have argued that companies need to ensure that they have consent from communities over the life of the projects, which can continue for years or even decades and can have unpredictable impacts. By implication, the IFC policy does not provide an opportunity for communities to withhold consent, for instance, if terms of agreements are not honored.

Nevertheless, the influence of this new policy could be far-reaching. The Performance Standards are used outside the IFC: more than 68 commercial banks (grouped in the Equator Principles Association) as well as export credit agencies and numerous multinational companies have adopted the standards into their own policies. The IFC also provides advisory services to help companies and banks implement the standards. If the IFC dedicates resources to help banks and companies implement FPIC, it could potentially accelerate global acceptance. As manuals, case studies, and technical expertise emerge, companies might become more willing to seek FPIC of indigenous peoples, even where they are not legally obligated to do so.

FPIC and the public sector

While the business sector's ability to innovate and take risks led IFC and others to adopt FPIC policies, governments have been slower to respond. Some countries such as the Philippines have already adopted national FPIC laws for indigenous peoples, but many other governments do not even recognize the fundamental rights of indigenous peoples. Many argue that FPIC only applies to indigenous peoples in Latin America, and that "everyone" is indigenous in Africa. Some governments have struggled with their historical legacy of taking lands from indigenous peoples without consent and are unwilling to reopen these disputes. When the US government affirmed the UN

Declaration on the Rights of Indigenous Peoples in December 2010, for example, it did so with a caveat. The US government redefined FPIC as "a process for meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken."¹⁰

These complicated dynamics will affect the extent to which the governments that sit on the World Bank's board support or oppose an FPIC policy. The Bank is currently updating its environmental and social safeguards.¹¹ Like the IFC's performance standards, the purpose of these safeguards is to prevent World Bank investments from causing environmental and social harm. World Bank staff who are leading the update have publicly acknowledged that they will need to consider FPIC as part of the review.

However, numerous obstacles remain. Some of the governments that sit on the World Bank's board of directors may label FPIC as an infringement of national sovereignty. Finance ministries tend to represent their governments on the Bank's board of directors, and their staff often lack expertise in human rights issues. The IFC was able to convince the board of the value of an FPIC policy by demonstrating that its five years of leadership on environmental and social sustainability had expanded its business and contributed to record-level lending.¹² In contrast, World Bank management is cautious about supporting indigenous peoples' rights. Last year, the Bank refused civil society requests to disclose a review of its indigenous peoples policy. There are concerns that World Bank management may seek to appease indigenous leaders by

¹⁰ "Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples," December 2010, <http://www.state.gov/documents/organization/153223.pdf>. There are several concerns with this definition. "Meaningful consultation" does not necessarily guarantee consent. Furthermore, successful consultation with tribal leaders depends on the legitimacy of the tribal leaders selected, and many tribes have multiple spiritual, political, and administrative leaders. Tribes may also have subgroups with varying interests. As a result, if an external government or company identifies purported "tribal leaders" with whom it wishes to consult, these individuals may not necessarily be seen as broadly legitimate.

¹¹ See World Resources Institute, "World Bank vs. World Bank: Protecting Safeguards in a 'Modern' International Institution," May 16, 2011. See also World Bank, "Updating and Consolidation of the Environmental and Social Safeguard Policies," <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0,,contentMDK:22849125~pagePK:64168445~piPK:64168309~theSitePK:584435,00.html>.

¹² World Resources Institute, *Breaking Ground*.

referring to “free, prior, and informed consent” in a new policy that nonetheless uses the US government’s more limited, alternative definition of “meaningful consultation.”

Next steps

Currently, the World Bank Group’s stance on FPIC is inconsistent, with different approaches in its private sector arm (the IFC) and its public sector arm (the World Bank). At the IFC, indigenous peoples’ movements successfully demanded a voice and put forth a consistent set of demands. They also had several champions within IFC who were willing to navigate the complex political dynamics of the World Bank Group to explore the feasibility of adopting an FPIC policy. The same conditions

do not exist at the World Bank, where government-to-government politics are complex and indigenous leaders will not find as many supportive staff. Fortunately, the UN Declaration on the Rights of Indigenous Peoples provides a credible, unifying platform on which indigenous peoples can demand reforms. Indigenous peoples movements will need to present a clear and consistent set of expectations to the World Bank. They will need to share best practices on FPIC and commend companies and governments that are moving in the right direction. Ultimately, indigenous leaders must demonstrate that FPIC is not just a rhetorical term: it can be implemented in practice, and it must be implemented in order to fully respect indigenous peoples’ rights. ■

Jurisprudence

The Colombian Constitutional Court has ruled that in certain circumstances, prior consultation is insufficient and projects must obtain free, prior, and informed consent from the affected communities

Since 1992, the Colombian Constitutional Court has taken the position that prior consultation is a basic right of the country’s various ethnic groups (including indigenous, Afro-Colombian, Raizal, Palenquero, and Gitano peoples and communities). Before 2009, the Court had repeatedly ordered the suspension of projects and works that had the potential to affect, or had already affected, the territories of ethnic communities in the absence of guarantees of the right to prior consultation.

In a landmark judgment in October 2009, the Constitutional Court’s Seventh Review Chamber for *Tutelas* ordered the suspension of “exploration and exploitation that is taking place or is to take place” in relation to the Mandé Norte concession for the mining of copper, gold, molybdenum, and other minerals. For the first time, the Court took the view that prior consultation is not sufficient in some cases and that free, prior, and informed consent must also be obtained from the communities that would be affected by the project. In keeping with inter-American jurisprudence and the declarations of the United Nations special rapporteur on the rights of indigenous peoples, the Court pointed out that

when it comes to large-scale development or investment plans whose main impact will be within the territory of Afro-descendant and indigenous peoples, the State has the duty not only to consult those communities, but also to obtain

their free, prior, and informed consent, according to their customs and traditions. Should exploration and exploitation plans and investments be implemented in their territory, these populations may undergo profound social and economic changes such as the loss of their traditional lands, displacement, migration, depletion of natural resources necessary for their physical and cultural survival, and destruction and contamination of the traditional environment, among other consequences. In such cases, therefore, the decisions of the community should be considered binding due to the severe degree to which they stand to be affected. (Judgment T-769/09, Main Judge: Nilson Pinilla)

In its more recent Judgment T-129/11, the Court reiterated that free, prior, and informed consent is mandatory and ordered the suspension of construction operations on a road that would cross an indigenous reservation. The Court further ordered the Ministry of the Interior and Justice to initiate the prior consultation process within 48 hours “with a view to seeking the prior, free, and informed consent of the community and weighing the real alternatives for modifying the road’s route in keeping with the options set out in the report of the Office of the People’s Defender [...] and any others that the community and the process might identify” (third operative paragraph).

Business & Human Rights Resource Centre: Tracking the Human Rights Impacts of Corporations around the World

Mauricio Lazala

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Over the past decade, the volume of reports and press coverage on the topic of business and human rights has increased exponentially. Civil society organizations, United Nations agencies, governments, the media, academics, and corporations themselves have produced research on alleged human rights abuses by private corporations, as well as on positive initiatives. By compiling much of this literature in a single hub, BHRRC has made it more accessible. Thousands of reports and other publications are now freely available through BHRRC's extensive online library.¹

BHRRC is currently the main international source of information on business and human rights. The website (<http://www.business-humanrights.org>), which receives 1.5 million visits per month, covers the activities of over 5,100 individual corporations in over 180 countries, and more than 150 topics. It is updated daily with reports and news items in English, Spanish, and French on subjects such as discrimination, environmental contamination, poverty and development, labor rights, access to medication, health, trade, conflict areas, socially responsible investment, and child labor.

BHRRC invites companies to respond publicly to allegations of abuses in order to induce them to heed the concerns of civil society and let them know that the international community is paying attention to the impacts of their operations at the local level. As of June 2011, the organization had received over 900 responses from companies around the world. This is a means to increase accountability, given the lack of an international grievance procedure for alleged corporate abuses. It also ensures

¹ In some instances, the reports that we link to are hosted by newspapers or other websites that require a subscription or fee to see the whole report. However, our users at the very least can see a summary of these reports for free on our website.



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Founded in 2002, the Business & Human Rights Resource Centre (BHRRC) is an independent nongovernmental organization whose primary purpose is to encourage corporations to respect human rights. Toward this end, the organization works to enhance the transparency and accountability of corporate activities and their impacts on human rights, both positive and negative. BHRRC facilitates public debate on corporate social responsibility and offers a wide array of freely accessible information to corporations, civil society organizations, and others.

that BHRRC's coverage is balanced and includes all points of view.²

Following his appointment in 2005 as the United Nations special representative on business and human rights, Professor John Ruggie requested that BHRRC publish all of the materials produced under his mandate. In response, BHRRC created a Web portal to facilitate communication and serve as a clearinghouse for materials related to his mandate (<http://www.business-humanrights.org/SpecialRepPortal/Home>).³

The BHRRC website also includes six additional portals:

- *Getting Started* provides an introduction to the field of business and human rights that covers over 25 specific subject areas (<http://www.business-humanrights.org/GettingStartedPortal/Home>).
- *Corporate Legal Accountability* profiles lawsuits against companies throughout the world for human rights violations (<http://www.business-humanrights.org/LegalPortal/Home>).
- *Tools & Guidance* offers practical advice to help companies put human rights observance into practice (<http://www.business-humanrights.org/ToolsGuidancePortal/Home>).
- *Business, Conflict & Peace* features positive and negative news stories on the activities of corporations in conflict and postconflict areas and provides practical assistance and information on the main initiatives in this field (<http://www.business-humanrights.org/ConflictPeacePortal/Home>).
- *Business & Children*, newly launched in June 2011, provides information on the many ways that companies have an impact on children's rights (<http://www.business-humanrights.org/ChildrenPortal/Home>).
- *Human Rights Impacts of Oil Pollution* provides information on oil pollution on the US Gulf Coast and in Ecuador and Nigeria (<http://www.business-humanrights.org/Documents/Oilpollution>).

² A table of the corporate responses received by BHRRC since 2005 can be found on the organization's website at <http://www.business-humanrights.org/Documents/Update-Charts>.

³ The mandate of the special representative expired in July 2011. To continue his work, the UN Human Rights Council has called for the establishment of a new working group with five representatives from the different world regions. The call for candidates closed on 31 July.

BHRRC's work in Latin America

It is widely accepted today that respect for human rights, besides being an obligation of states, is also a duty of nonstate actors such as private corporations. Indeed, the latter have a significant impact on the entire spectrum of human rights.⁴ Nowhere is this more the case than in Latin America. This is confirmed by a small sampling of the news links on our website:

- In 2007, the Brazilian authorities freed more than 1,000 people working in slavlike conditions on the ranch of the largest fuel alcohol manufacturer in Pará.⁵
- In 2008, in response to a complaint by an NGO, an Argentine public prosecutor brought charges against members of the police force and the owners of certain textile plants and brand names for complicity in workplace abuses against Bolivian immigrant workers.⁶
- In 2010, a Colombian human rights prosecutor ordered the arrest of 22 executives, owners, and employees of nine palm oil companies for alleged complicity in the displacement of thousands of families from their ancestral lands.⁷
- In June 2010, 73 workers died in an explosion in the San Fernando coal mine in northwestern Colombia.⁸ Just a few months later, 33 miners were famously rescued from the San José gold and copper mine in Chile; the mine, owned by the San Esteban company, had a history of occupational safety violations.⁹ Meanwhile, the bodies of 65 miners who perished in an explosion in the Pasta de Conchos coal mine in Mexico in 2008 have yet to be recovered.¹⁰

⁴ See Andrew Clapham, *The Human Rights Obligations of Non-State Actors* (New York: Oxford University Press, 2006), synopsis at <http://www.reports-and-materials.org/Clapham-synopsis-The-Human-Rights-Obligations-of-Non-State-Actors.doc>. Clapham is professor of public international law at the Graduate Institute of International Studies, Geneva.

⁵ "Liberan a millar de trabajadores de hacienda cañera en Brasil," *Vanguardia*, July 3, 2007, <http://www.business-humanrights.org/Links/Repository/554934>.

⁶ "Revocan sobreseimiento en causa por reducción a servidumbre," *Momrandu.com*, September 23, 2008, <http://www.business-humanrights.org/Links/Repository/602241>.

⁷ "Empresarios de la palma, a la cárcel por los desplazamientos en Urabá," *El Tiempo*, May 19, 2010, <http://www.business-humanrights.org/Links/Repository/1000964>.

⁸ "73 Killed in Coal Mine Blast, Colombian Authorities Say," *Latin American Herald Tribune*, June 24, 2010, <http://www.business-humanrights.org/Links/Repository/1001445>.

⁹ "Chile Mine Rescue 'to Cost \$20m,'" *BBC News*, October 14, 2010, <http://www.business-humanrights.org/Links/Repository/1002808>.

¹⁰ "Desaconseja STPS rescatar los restos de los 63 mineros," *La Crónica de Hoy*, February 20, 2008, <http://www.business-humanrights.org/Links/Repository/685637>.

- Texaco Petroleum operated in Ecuador from 1964 to 1992, working in partnership with the state oil company, Petroecuador. Decades of oil exploitation in eastern Ecuador produced extensive oil contamination of water and land. Chevron (which now owns Texaco) faces a multibillion-dollar civil class action lawsuit brought by 30,000 inhabitants of the northeastern Ecuadorian Amazon. BHRRC has created a new page on its website with links to reports on the human rights impact of oil pollution in Ecuador.¹¹

BHRRC has also published information on cases in which companies have had a positive impact on human rights in Latin America:

- In Argentina, a beer factory, Cervecería Quilmes, launched a public awareness campaign on workplace safety in all of their plants and distribution centers.¹²
- For the last three years (2009–11), more than nine companies have been awarded the “Undertaking peace: The business initiative” prize in Colombia. The purpose of the prize is to enhance the potential of large, medium, small, and micro enterprises for generating and contributing to peace building in Colombia.¹³
- In Honduras, as part of an agreement between Nike and the Central General de Trabajadores, a labor confederation, the company will allocate \$1.5 million to compensate workers who were abruptly fired by two subcontractors. The agreement was reached in the wake of protests and boycotts in US universities where the products are sold.¹⁴

Another positive step is the opening, in Bogotá in 2009, of the Regional Center for Support of the Global Compact in Latin America and the Caribbean. The United Nations Global

Compact is a voluntary ethical commitment. It currently has more than 6,000 active corporate associates who pledge to respect 10 principles of conduct in the areas of human rights, labor rights, the environment, and anti-corruption efforts. Many other Latin American countries have national Global Compact networks.

BHRRC has participated in UN special representative John Ruggie’s consultations in Latin America and has trained Peruvian attorneys in the use of tools in the field of business and human rights. It has conducted press interviews and attended conferences in Colombia, Argentina, Mexico, and elsewhere. It has also obtained responses from dozens of companies facing allegations of abuse in the region, which has bolstered transparency and focused an international spotlight on complaints lodged by local NGOs. BHRRC staff have published articles and contributed to Spanish-language publications on business and human rights.¹⁵ Finally, BHRRC recently named its first researcher and representative for Latin America, Amanda Romero Medina, who is based in Bogotá.¹⁶

Contemporary corporate social responsibility is inextricably linked with human rights. Corporate social responsibility programs that fail to include human rights—which unfortunately remain all too common in Latin America—will be rejected by public opinion as an obsolete brand of philanthropy. At the same time, an enormous gap remains between the rhetoric and actual practice. Many companies that adhere to human rights standards in countries of the global North disregard these obligations when operating in countries with weak regulatory systems. The same is true of local companies operating in countries of the global South.

While much progress has been made in the field of business and human rights in recent years, the sheer volume of allegations of abuse received by BHRRC on a weekly basis leaves no doubt that much remains to be done. ■

¹¹ <http://www.business-humanrights.org/Documents/Oilpollution/Ecuador>.

¹² “Lanzan campaña sobre seguridad en todas sus plantas,” *ComunicaR-SE*, April 2008, <http://www.business-humanrights.org/Links/Repository/647365>.

¹³ “El premio Emprender Paz 2011 ya tiene finalistas,” *Emprender Paz: La apuesta empresarial*, July 7, 2011, <http://www.business-humanrights.org/Links/Repository/1007253>; “The Prizes of the Second Annual Undertaking Peace,” *Andean Development Corporation*, October 14, 2009, <http://www.business-humanrights.org/Links/Repository/680079>.

¹⁴ “NIKE, Inc. and Central General de Trabajadores de Honduras (CGT) Statement,” Nike press release on Corporate Social Responsibility Newswire, July 26, 2010, <http://www.business-humanrights.org/Links/Repository/1001884>.

¹⁵ For example, see “Derechos Humanos: Las empresas también tienen responsabilidades,” *Revista Debates IESA* (Instituto de Estudios Superiores de Administración), 2009, <http://www.business-humanrights.org/Links/Repository/1000251>; and Mauricio Lazala, “Iniciativas generales y sistemas de fiscalización en el campo de empresas y derechos humanos,” 2007, <http://www.business-humanrights.org/Links/Repository/726955>.

¹⁶ See announcement of the appointment at <http://www.business-humanrights.org/media/documents/anuncio-amanda-romero.pdf>.

An \$18 Billion Decision against Chevron: What Does It Mean?

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This article appeared in slightly different form on Oxfam America's Politics of Poverty blog at <http://politicsofpoverty.oxfamamerica.org/index.php/2011/03/07/8-billion-decision-against-chevron-what-does-it-mean/>.

It's a contemporary story of David and Goliath. Facing off in the Ecuadorian Amazon are a group of poor, marginalized communities and one of the most powerful corporations in the world, the energy giant Chevron. Those communities just won a remarkable, record-breaking \$18 billion decision against the company.¹ But the case is far from over. In the words of its former general counsel, Charles James, Chevron will continue to "fight until hell freezes over, and then skate on the ice."²

I made my first trip to the region in 1993 as part of a ragtag team of lawyers searching for potential plaintiffs for this quixotic case against the company then known as Texaco (Chevron acquired Texaco in 2001). At the time, Texaco had just departed Ecuador, leaving over 900 open waste pits scattered through the jungle. The company had also dumped an estimated 18.5 billion gallons of toxic waste into surrounding rivers and streams over a 25-year period.³ Texaco, with annual earnings three times the gross domestic product of Ecuador, had been given free rein to open up the Amazon, and had made no efforts to protect the environment or population.

We had no trouble finding potential plaintiffs. An estimated 30,000 people were affected by Texaco's operations.⁴ They



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included several indigenous groups, including one group, the Tetete, who essentially disappeared.⁵ People were surrounded by waste and contamination, which was openly seeping into their only sources of water. When the company finished operations it simply walked away.

Amid the legal wrangling, there should be little doubt about Texaco's (and now Chevron's) culpability. Yes, the Ecuadorian state oil company has since done additional damage to that area, and yes, under pressure, Chevron/Texaco came back and did superficial remedial work, mainly by filling some of the pits with dirt. But neither fact absolves the company of moral responsibility for the extensive environmental damage and harm inflicted on communities.

Corporate impunity

Legal liability is a different matter. Chevron/Texaco has gone to extraordinary lengths to fight the charges, and the initial suit has spawned litigation across a dozen courts.⁶ Despite the

⁵ *Ibid.*

⁶ Business and Human Rights Resource Centre, "Case Profile: Texaco/ Chevron Lawsuits (re Ecuador)," June 2, 2011, <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/>

¹ Chris Hufstader, "Case against Chevron: Is It Really about Money?" *First Person* (blog), Oxfam America, February 17, 2011, <http://blogs.oxfamamerica.org/index.php/2011/02/17/case-against-chevron-is-it-really-about-money/>.

² Andrew Woods, Charles James: Chevron's In-House Karl Rove?" *Huffington Post*, November 20, 2008, http://www.huffingtonpost.com/andrew-woods/charles-james-chevrans-in_b_145036.html.

³ Amazon Defense Coalition, "Trial History Fact Sheet," July 30, 2008, <http://www.texacotoxico.org/eng/node/144>.

⁴ *Ibid.*

heartening decision by the Ecuadorian judge, legal processes are still underway, and the plaintiffs ultimately may not prevail.

The case reflects a broader pattern of corporate impunity. As companies seek resources and markets in ever more remote corners of the world, they turn to ruthless and destructive measures. Local governments and courts—overburdened, under-resourced, often corrupt, with limited jurisdiction—pose little threat. This case is an anomaly in how much legal attention it has received; only a tiny sliver of the other 80,000 multinational corporations operating around the world can expect to face serious legal challenges for environmental damage. Some high-profile and well-founded efforts to bring these cases to the United States under the Alien Tort Statute have yet to yield a single final legal victory.

That's not to dismiss the importance of litigation. Even a losing case can do much good, but it has to be part of a broader strategy. The lawsuit against Texaco bolstered nascent local organizing by providing a focus; it injected critical energy and attention that helped mobilize communities, nongovernmental organizations, and social movements (indigenous, environmental, religious).⁷ They formed a network around the case, the Amazon Defense Front, which continues to be a major local and national actor on oil issues.⁸ With media attention, government ministers and congressional representatives were moved to visit the area and passed new laws and policies to govern the oil industry. The case put other companies on notice, and it became common to hear oil representatives defend themselves by declaring "We aren't Texaco." When the case was moved from a US court to Ecuador, it forced constructive reforms in the national judicial system and the local courts to meet the unprecedented demands of a class action toxic tort case.

The lawsuit against Chevron in Ecuador has caused the company serious financial and operational risks.⁹ At the trial, Chevron admitted that the company could suffer irrepara-

ble injury to its reputation and its business relationships.¹⁰ However, these risks have not been disclosed in public filings or in statements to shareholders.

Importance of working with local communities

Working with grassroots communities and social movements does not come easy to litigators. It complicates and politicizes cases and increases the demand on litigators' time and resources. But the alternative—sidelining these communities and movements in the litigation process—risks doing damage to environmental or human rights causes. Cases can provoke and mobilize, but they can just as easily sap critical energy and initiative from local actors by shifting the focus to lawyers and distant courtrooms. The rare legal victories won't get to the roots of the problem. Dealing with corporate perfidy in a place like Ecuador requires long-term engagement by local actors; the utility of litigation should be measured against that broader aim.

In that vein, the Chevron/Texaco case prompts one additional reflection: the need for systemic approaches. While Texaco built the roads, dug the wells, and dumped the wastes, there were many enablers: a compliant Ecuadorian government, weak regulators, a failing judiciary, a complicit state oil company, and pressure from the US government and international financial institutions allowed it to happen. A sustainable solution to destruction of the Amazon requires attention to all of these actors as part of a larger system. That underscores the importance of strengthening local civil society actors, building alliances and leverage at the international level, and using new communications tools to connect efforts. It also calls for new legal instruments capable of covering all relevant actors across national boundaries, along the lines of the UN Framework on Business and Human Rights, developed by UN special representative John Ruggie, and the recently passed Dodd-Frank financial reform legislation.¹¹ ■

LawsuitsSelectedcases/TexacoChevronlawsuitsreEcuador?sort_on=sortable_title&batch_size=10&batch_start=3.

⁷ William Langwiesche, "Jungle Law," *Vanity Fair*, May 2007, <http://www.vanityfair.com/politics/features/2007/05/texaco200705?currentPage=1>.

⁸ More information on the Amazon Defense Front is available at <http://www.texacotoxico.org/eng>.

⁹ Simon Billenness and Sanford Lewis, "New Report: Chevron Ecuador Risk Analysis," *ChevronToxico: The Campaign for Justice in Ecuador*, May 2011, <http://chevrontoxico.com/news-and-multimedia/2011/0511-chevron-ecuador-risk-analysis-report.html>.

¹⁰ Simon Billenness and Sanford Lewis, *An Analysis of the Financial and Operational Risks to Chevron Corporation from Aguinda v. Chevron-Texaco*, independent report commissioned by Amazon Watch and Rainforest Action Network, May 11, 2011, http://chevrontoxico.com/assets/docs/Chevron-Ecuador_Risk_Analysis_Report_May2011.pdf.

¹¹ On the Ruggie framework, see Chris Jochnick and Nina Rabaeus, "Business and Human Rights Revitalized: A New UN Framework Meets Texaco in the Amazon," *Suffolk Transnational Law Review*, Symposium 33:3, http://www.law/suffolk.edu/highlights/stuorgs/transnat/documents/Jochnick-Rabaeus_3rdround_leadarticle2.pdf. On the Dodd-Frank bill, see Ian Gary, "Victory Is in the Details: A Regulatory Battle Heats Up between Transparency Activists and Big Oil," *Politics of Poverty* (blog), Oxfam America, February 22, 2011, <http://politicsofpoverty.oxfamamerica.org/index.php/2011/02/22/victory-is-in-the-details/>.

Resisting Mining Operations in El Salvador: Challenges and Lessons Learned

Alejandro Labrador

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The campaign to oppose metal mining operations in El Salvador is an emerging success story for the defense of human rights and the environment, as well as an experiment in local self-management aimed at catalyzing local development potential.

El Salvador's Mesa Nacional Frente a la Minería Metálica, or National Roundtable against Metal Mining, is engaged in a struggle to halt the advance of one of the most polluting

and destructive of all industries: metal mining. It has won several awards, including the 2011 Goldman Environmental Prize and the 2009 Letelier-Moffitt Human Rights Award from the Institute for Policy Studies. Its platform of social demands comes from the areas of El Salvador affected by the influx of companies engaged in mining exploration projects. These demands highlight the importance of identifying the environmental, human, institutional, political, and economic potential of local communities when confronting the insatiable demands of transnational companies in the context of a globalized world.

The National Roundtable draws on the experience and empirical knowledge of the populations affected by mining exploration and acid drainage, first and foremost, as well as on specialized studies in the areas of hydrology, chemicals, heavy metals, and soils. Substantial progress has been made in using reliable scientific information to demonstrate that metal mining is not viable in El Salvador. Crossing political-administrative and geographic borders, the Roundtable has worked to strengthen the public's understanding of and resistance to the propaganda of the mining companies, including their offers of "assistance" to communities.

The National Roundtable's strategies include the sharing of knowledge and experiences through visits, forums, and workshops, as well as mass communication campaigns conducted through community radio stations. These have contributed to El Salvador's distinction as the only country on the continent to have successfully halted the advance of metal mining projects. In a 2008 survey by the Public Opinion Institute of the Universidad Centroamericana "José Simeón Cañas" (UCA), 62.5 percent of those surveyed in 24 municipalities where a mining exploration license had been granted stated that the country is not suitable for mining and rejected the onset of mining projects on their lands. This

suggests that the objectives of the struggle against transnational mining projects have achieved broad legitimacy at the local level.

Despite widespread awareness of the threat posed by industrial metals extraction, and the organizational capacity that has developed, critical challenges remain. From the standpoint of the National Roundtable, it is becoming increasingly difficult to develop the response capacity that these new circumstances demand. The main obstacle is found in the structure and composition of the Salvadoran state.

The State regards the violent deaths of four environmentalists since 2009 as isolated cases. The alleged masterminds do not even appear in the official investigations, and the inquiries underway have discarded theories that community members regard as valid. Systematic persecution and threats persist against human rights defenders. The staff of Radio Victoria, a community radio station in Cabañas department, and especially Father Luis Quintanilla, a Catholic priest who works with the station, have received serious threats against their lives and families. The threats jeopardize the work of the radio station, a community project that speaks out against attacks on people's social, political, and environmental rights. Threats against members of the National Roundtable have continued as well, with total impunity, as appeals to the attorney general of the Republic continue to fall on deaf ears. Environmental and human rights defenders confirm that once again, access to justice is being systematically blocked.

Draft legislation prohibiting metal mining in El Salvador has been submitted to the legislative assembly, but the bill remains filed away. The technical and scientific information that was compiled to support the legislation has yet to be debated in depth. This bill is supported by organizations belonging to the National Roundtable and has even been taken up by congressional deputies and representatives from other branches of government. Regrettably, the special interests for whom mining is economically and politically profitable continue to prevail

over the needs of the populations directly affected by mining and over the interests of 4 million Salvadorans who would be affected in the medium term by mining operations.

A lawsuit brought by the Canadian mining company Pacific Rim under the free trade agreement with the United States is still pending, and the company's demand for US\$100 million in damages pertaining to its investments in El Salvador continues to pose a threat to the country's finances. Mining opponents are convinced that this is nothing more than an extortion attempt—a case of the victimizer suing the victims.

The challenges thus are becoming increasingly complex. At the same time, building on the organizing experience it has acquired and on its continuous evaluation and reworking of tactics and strategies, the National Roundtable has been able to take on new leadership roles and conquer new frontiers. It has launched an information and awareness campaign against cross-border mining, along with regional efforts to combat the scourge of transnational companies throughout Central America. The National Roundtable has participated in numerous conferences in the region sponsored by organizations and coalitions from different countries that are also working actively against mining.

These new opposition forums are a clear example of the opportunities that emerge when those who share environmental awareness join forces to confront threats against the region as a whole. The experience of anti-mining efforts in El Salvador shows that when a local area organizes and proactively mobilizes the resources it needs to respond to threats to human rights and well-being, synergies emerge at several levels. The National Roundtable against Metal Mining is an example of a local effort that has overcome many barriers to forge regional and international cooperation around a pivotal environmental issue. Because our struggle against metal mining is just and legitimate, we can assert, now more than ever, that we are not the only ones, and we are not alone. ■



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

Human Rights Abuses by Corporations: The Case of Río Blanco Copper in Peru

Javier Jahncke

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The Río Blanco Copper SA mining company, formerly Minera Majaz SA, was originally established with British capital. Its parent company, Monterrico Metals, was sold to Chinese interests in 2008, and the Zijin consortium became the principal shareholder. The company intends to extract copper and molybdenum in concession areas that span approximately 29,000 hectares in northern Peru.

The human rights abuses of Minera Majaz and its successor, Río Blanco Copper, fall into two categories: usurpation of communal lands and torture of residents. The company first gained government permission to operate on the lands under false pretenses. Its operations triggered an immediate backlash from the peasant communities that own these lands, and the

ensuing conflict in August 2005 left seven people dead. Peruvian courts have investigated and/or prosecuted more than 700 people, including local leaders and community members, government authorities, and technical advisors. But as of mid-2011, the mining project is going forward.

The crime of usurpation of communal lands

In 2003 the General Directorate of Mining Environmental Affairs (DGAAM) under the Ministry of Energy and Mines (MINEM) approved an environmental assessment conducted by Minera Majaz, a British holding at the time, for the exploration phase of the Río Blanco mining project.

This project occupies 6,432 hectares in Huancabamba and Ayabaca provinces in the Piura region of northern Peru. The concessions awarded to the mining company are located in territories belonging to the Segunda and Cajas peasant communities in Huancabamba and the Yanta community in Ayabaca. The Peruvian state has recognized these communities as indigenous peoples, and their property and legal corporate status are duly registered. The company later requested and received additional mining concessions, bringing the total to nearly 29,000 hectares, in what is slated to become a future “mining district.”

According to the Peasant Communities Law and the Land Law, the disposal of peasant and indigenous lands in Peru must be approved by a community assembly with a two-thirds majority vote of eligible members registered in the communal roster. The company never fulfilled this requirement. Instead, it submitted the signatures of a group of individuals, and DGAAM-MINEM granted authorization based on these signatures. However, it turned out that the signers had given permission some time ago to a different company, Minera Coripacha SA, which had conducted exploration and prospecting in the area and subsequently terminated its operations.

After receiving a request to intervene, the People's Ombudsman issued a report in November 2006 which found that Minera Majaz did not have "authorization for the surface use of the owner's lands," and that its operations were therefore illegal. It recommended that the Ministry of Energy and Mines establish an internal office responsible for verifying the validity of such authorizations in the future in order to avert potential conflicts.

The matter was also taken to the congressional Committee on Andean, Amazonian, and Afro-Peruvian Peoples, Environment and Ecology, which formed a subcommittee to investigate the activities of Minera Majaz. The committee issued a report in 2009 concluding that the mining company's operations on lands belonging to the peasant communities were illegal.

Human rights work carried out by the Ecumenical Foundation for Development and Peace (FEDEPAZ), particularly during the decades of political violence and dictatorship in Peru, facilitated partnerships with international organizations such as the London-based Peru Support Group. The London group promoted the establishment of an interdisciplinary delegation to look into the case of Minera Majaz. The delegation traveled to Peru and visited the mining camp. In its report, "Mining and Development in Peru with Special Reference to the Rio Blanco Project, Piura," the delegation arrived at the same conclusion concerning the mining company's illegal presence on communal lands.

Armed with this information, the peasant communities approached the Public Ministry to lodge a formal complaint against shareholders and officers of Minera Majaz (now Rio Blanco Copper SA) for the crime of usurpation of lands. Ayabaca prosecutor Manuel Sosaya initially filed a formal complaint with the courts. After engaging in legal sophistries and filing seven *habeas corpus* petitions against the prosecutor, however, the company succeeded in having the case returned to the Office of the Attorney General. As of mid-2011, it remains under investigation. The goal of the peasant communities is to exhaust all available domestic remedies to obtain a favorable ruling. If that does not happen, the matter will be brought before the inter-American system for the protection of human rights.

The aforementioned reports by government agencies and international organizations also documented the severe environmental impact that the project, and a future mining district, could have. The affected peasant communities used this information to challenge the mining company's attempt to

extend the environmental authorization period, which expired in November 2006.

The company also had to desist from its requests to DGAAM-MINEM, the administrative division responsible for approving environmental assessment studies. Otherwise, it ran the risk of a rejection based on challenges to the environmental assessment submitted by the Front for the Sustainable Development of the Northern Border of Peru, comprising provincial and municipal governments, civil society organizations, and a technical team. To date, the company has been unable to obtain further authorizations from MINEM.

The crime of torture

On July 29, 2005, residents of the Yanta, Segunda, and Cajas peasant communities in the Piura region, and the San Ignacio and Jaén in the Cajamarca region, participated in a peaceful march to protest the unlawful occupation of communal lands by the Río Blanco mining project. The communities planned to march to the Henry's Hill mining camp to express their rejection of the mining project on their lands and to request that the national authorities establish a high-level national commission to facilitate dialogue and a peaceful solution to the matter.

Before they reached the mining camp, however, National Police officers blocked their way and attempted to disperse them using weapons and tear gas. This repressive police action left community leader Melanio García dead of a bullet wound and several others injured, some of them critically. One demonstrator was left permanently disabled. As people ran in every direction to escape the bullets and tear gas, the police captured 28 of the demonstrators, 26 men and two women. They were taken to a facility owned by the mining company, where they were held for four days in inhuman conditions.

All of the detainees were tortured in the mining camp. Prosecutor Félix Toledo Leiva visited the site on August 2, yet did nothing to remedy the situation or protect the victims. The 28 detainees reported that they were beaten, kicked, blindfolded, and subjected to verbal abuse. They also stated that plastic bags filled with a chemical powder from the tear gas canisters were placed over them, covering half their bodies, which caused vision damage and skin burns. All of them were moved around the mining camp by force of kicks. On August 4 they were taken by helicopter to Jaén, held there from 7:00 a.m. until 11:00 p.m., and then transferred by bus to Piura. There their statements were taken and they were released.

FEDEPAZ has filed a criminal complaint against the police officers who participated in the operation and their commanders, the criminal pathologists who examined the victims and reported that there were no signs of torture, security personnel from the mining company and its security contractor (Forza), and the prosecutor who was aware of the torture and failed to report it.

A preliminary investigation was opened on November 27, 2009, against eight National Police officers whom the victims identified as their torturers. Nearly all of the victims have provided statements, as have two of the accused. Those who have not yet provided statements are expected to do so in the near future. FEDEPAZ successfully filed a motion (*queja de derecho*) to have the police commanders, doctors, and company security personnel, who initially had been left out, included in the investigation.

The Public Ministry's superior internal oversight body (Órgano Superior de Control Interno) ruled in March 2010 that the complaint against former prosecutor Félix Toledo Leiva for the crime of omission—in this case, failing to file a complaint in relation to the torture he allegedly witnessed—was well founded. On June 3, 2010, it forwarded the case file to the office of the Attorney General of the Nation, asking him to press charges against the former prosecutor who ignored the torture.

Working in conjunction with Peru's National Human Rights Coordinator, FEDEPAZ was able to secure expert medical and psychological reports on the torture victims. With the support of the U.S.-based Environmental Defender Law Center, it contacted the British firm Leigh Day & Co., which has filed suit before the High Court of the United Kingdom to rule on the liability of Monterrico Metals, the British parent company of Río Blanco Copper, for damages relating to the torture of the 28 peasants in 2005 in the mining camp owned by its subsidiary.

As a precautionary measure, the High Court froze the equivalent of US\$7 million to safeguard the victims' rights. Among other things, this measure prevented the Chinese mining company Zijin from closing down its London subsidiary, Monterrico Metals. As of June 2011, the evidentiary stage of the proceeding has concluded, and the court is expected to decide in the coming months whether it will take up the case.

In addition to its role in these two cases, concerning usurpation of lands and torture, FEDEPAZ is supporting other cases related to the Río Blanco mining project in the peasant communities of Segunda, Cajas, and Yanta in the Piura region. Members of FEDEPAZ have been accused of terrorism and have received death threats because of their involvement in these cases. ■

Amicus curiae

DPLF Submits *Amicus Curiae* to Peruvian Judge in Angostura Dam Case

DPLF submitted an *amicus curiae* brief in April 2011 to the Consolidated Court (Juzgado Mixto) of Espinar Province in Cusco Region, Peru, in support of the *amparo* action brought by peasant communities from that province. The communities had requested the judge to grant protection for their fundamental right to prior consultation, which had been disregarded by the authorities responsible for approving construction of the Angostura dam.

The main water resource for the dam construction process is the Apurímac River. Diversion of the river will cause a 12 million cubic meter water shortage during the dry season, affecting 13 peasant communities located in the project's direct area of influence in Espinar Province. Given the impact that damming, regulating, and diverting the Apurímac River would have on the affected peasant communities, they should have been consulted about the project and their consent should have been obtained prior to its approval.

The *amicus* brief provides the judge with comparable cases from other countries such as Colombia, where the Constitutional Court has ordered the suspension of gold exploration and extraction projects pending completion of environmental impact studies and an adequate consultation process with the indigenous communities that would be affected.

DPLF urged the judge of the Consolidated Court of Espinar to uphold the right of the peasant communities of Espinar to prior consultation and to free, prior, and informed consent. It further requested the judge to order the national authorities and the regional governments of Arequipa and Cusco, acting within their respective jurisdictions, to immediately suspend all activities related to the Angostura Dam construction project until such time as a prior consultation has been carried out with the 13 peasant communities of Espinar and their free, prior, and informed consent has been obtained.

New Publications from DPLF



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

Prepared by the Due Process of Law Foundation (DPLF) at Oxfam's request, this report provides a methodical overview of the international law framework for the right to prior, free, and informed consultation applicable in each of the four Andean countries included in the study. It goes on to describe the legal and practical situation of the rights of indigenous peoples exposed to natural resource exploitation in their territories. In a context of growing social conflict throughout Latin America, the study identifies the obstacles to ensuring full respect for the right to prior consultation in the four countries and offers recommendations for the principal stakeholders: states, businesses, indigenous peoples, civil society, and international and donor agencies.

The executive summary of the report is available in Spanish and English. The



first part of the summary is an overview of international regulations governing the right to prior, free, and informed consultation. The second part synthesizes the study of the legal and de facto situation in the four Andean countries. It outlines the progress as well as the setbacks in the constitutional and legal sphere, and offers specific examples of good and poor practices in each of the countries. The executive summary concludes by summing up the recommendations for stakeholders.

Aportes 14: The Right of Indigenous Peoples to Prior, Free, and Informed Consultation

The preceding issue of *Aportes*, published in 2010, examined the issue of prior, free, and informed consultation of indigenous peoples, starting from the conviction that the social conflicts sweeping Latin America today must be addressed from the standpoint of human rights, and specifically the rights of indigenous peoples. While the causes of



these conflicts vary, they frequently occur when natural resources are exploited in indigenous territories without regard for the international legal framework of politically and legally demandable obligations and guidelines. The articles from our contributors depict a situation in which the right to prior, free, and informed consultation in Latin America is gaining strength in the legal realm but is still largely ignored in practice. DPLF is working to ensure that this right is implemented on the ground and does not remain a mere theoretical advance, albeit an important one.

Manual para defender los derechos de los pueblos indígenas (Manual for the Defense of Indigenous Rights)

This Spanish-language handbook is designed as a practical aid to be used by individuals, indigenous peoples, and organizations working to protect and advocate for indigenous rights. It outlines the core rights of indigenous peoples

enshrined in international instruments, describes the universal and inter-American systems for the protection of human rights, and explains the operations of official bodies of both systems. In light of the myriad conflicts in the region associated with natural resource extraction in areas inhabited by indigenous peoples, this manual can serve as a guide for the affected groups as well as for government officials. For information on obtaining the manual, contact Stephanie Luckam at DPLF (sluckam@dplf.org).

Other publications of interest

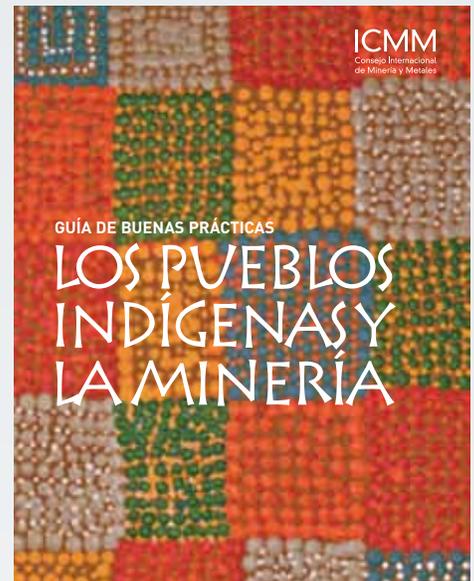
Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*



After extensive consultation and analysis, the United Nations special representative on business and human rights, John Ruggie, presented his final report: *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. Three years ago, Ruggie's "protect, respect and remedy" framework was presented for the consideration of the public and private sectors and the United Nations Human Rights Council. It has been criticized for its lack of robust tools that would make it possible to prosecute human rights cases involving corporations. Nonetheless, on June 16, 2011, the Human Rights Council decided to support the principles. While the proposal could be improved, the Council's endorsement represents important progress in the recognition of human rights abuses committed by transnational corporations and reflects the urgent need to address this issue at the international level. The Ruggie report is available at http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf.

Good Practice Guide: Indigenous Peoples and Mining

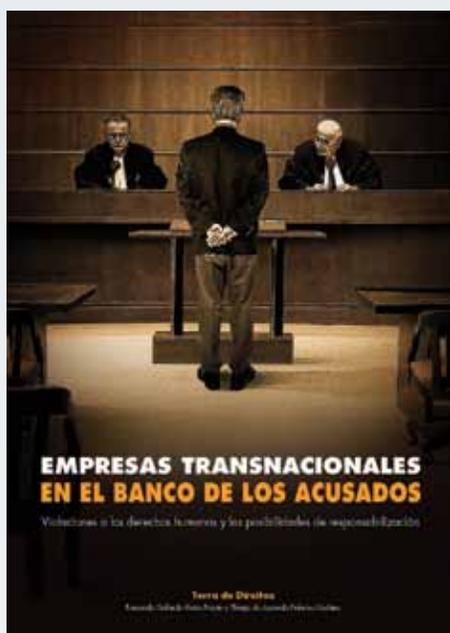
Developed by the International Council on Mining and Metals (ICMM), this guide offers a road map for initiating and pursuing collaborative processes between mining companies and indigenous peoples through respectful dialogue and exchange. The guide is the result of several years of effort that included the establishment of international working groups and numerous consultations. It proposes a set of essential requirements for achieving genuine collaboration with a view toward building more constructive relationships between indigenous peoples and mining companies. Significantly, these



requirements include the participation of indigenous peoples in exploration and the adoption of agreements containing financial packages in which indigenous people are included in the distribution of royalties. The relevance and utility of the guide will be reviewed as it is put into practice by indigenous peoples and mining companies. It is available at <http://www.icmm.com/page/56424/mining-companies-must-collaborate-with-indigenous-communities>.

Transnational Corporations on the Defendant's Seat: Human Rights Violations and Possibilities for Accountability

This report of the Brazilian organization Terra de Direitos, written by Fernando Gallardo Vieira Prioste and Thiago de Azevedo Pinheiro Hoshino, takes a critical look at the issue of holding transnational corporations accountable for human rights violations. It examines several of the aspects associated with prosecuting human rights cases involving transnational corporations and offers a critique of mechanisms such as the Alien Tort Claims Act (United States),



the Companies Act (United Kingdom), the Guidelines of the Organisation for Economic Co-operation and Development (OECD), the Inspection Panel of the World Bank Group, the Independent Consultation and Investigation Mechanism of the Inter-American Development Bank, and mechanisms available through the United Nations, Organization of American States, International Labour Organization, and European Union. The report is available at <http://terradedireitos.org.br/wp-content/uploads/2011/08/Transnacional-em-ingl%C3%AAs.pdf>.

Empresas transnacionales en Latinoamérica: ¿Un peligro para los derechos humanos? Amenazas para los derechos humanos originadas por las empresas y cuestiones de responsabilidad jurídica (*Transnational Corporations in Latin America: A Danger to Human Rights? Corporate Threats to Human Rights and Legal Liability*)



This report is the result of joint project carried out by Misereor, Bread for the World, and the European Center for Constitutional and Human Rights. It

presents discussions and conclusions from a seminar that Misereor and Bread for the World held with organizations they support and with the collaboration of the European Center. The report presents the findings of a case study of human rights violations committed by European corporations operating in Latin America, and it describes the legal remedies available under domestic, international, and transnational law to which those affected by human rights abuses might have recourse. The study underscores the weaknesses of the “risk management” and “corporate social responsibility” approaches that businesses have used up to now and offers useful suggestions for moving forward. The report also describes in detail the difficulties associated with attempts to establish the civil responsibility of the parent company, outlines litigation options available under European and German law for seeking compensation, identifies barriers to establishing the liability of transnational corporations for human rights abuses from the European perspective, and offers clear proposals for action and implementation. The report was published in German in June 2011 and is also available in Spanish at http://www.justiciaviva.org.pe/webpanel/doc_int/doc07072011-155825.pdf.



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The Due Process of Law Foundation (DPLF), a nonprofit, nongovernmental organization based in Washington, DC, was founded in 1996 by Thomas Buergenthal, former judge of the International Court of Justice and of the Inter-American Court on Human Rights, and his colleagues from the United Nations Truth Commission for El Salvador. DPLF works to strengthen the rule of law and promote respect for human rights in Latin America through strategic alliances, research, outreach, and advocacy. Our vision is a Latin America in which civil society, using national and international legal instruments, participates fully in consolidation of the rule of law, and in which judicial institutions are independent, transparent, accessible, and able to fulfill their role in strengthening democracy.



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