



# **TRANSNATIONAL CORPORATIONS ON THE DEFENDANT'S SEAT:**

Human Rights Violations and Possibilities for Accountability

**Terra de Direitos**

Fernando Gallardo Vieira Prioste y Thiago de Azevedo Pinheiro Hoshino

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# ▶ TABLE OF CONTENTS

INTRODUCTION	<b>7</b>
REFERENCE GUIDE	<b>8</b>
TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS: ANTAGONISTIC INTERESTS	<b>11</b>
LEGAL ACTIONS AND TRANSNATIONAL CORPORATIONS	<b>13</b>
THE PURPOSE AND LIMITS OF LITIGATION AGAINST TRANSNATIONALS –BY ALEJANDRO TEITELBAUM	<b>15</b>
SUPPORT FOR LEGAL ACTIONS	<b>18</b>
Relationship between lawyers, social movements, and victims	<b>18</b>
Information about the transnational	<b>20</b>
Types of human rights violations and collective legal action	<b>21</b>
Defining the goals of legal action	<b>21</b>
Possibilities for carrying out and supporting legal action	<b>22</b>
Analysis of the spaces, instruments, and forms of intervention	<b>23</b>
NATIONAL MECHANISMS	<b>25</b>
Alien Tort Claims Act (ATCA) (United States)	<b>26</b>
<b>Case 1:</b> Wiwa v. Royal Dutch Petroleum Company and Shell Transport Ltda.	<b>28</b>
<b>Case 2:</b> Aguinda v. Texaco Inc. and Gabriel Ashanda Jota et al. v. Texaco Inc.	<b>29</b>
Companies Act (United Kingdom)	<b>31</b>

INTERNATIONAL MECHANISMS	<b>34</b>
United Nations (UN)	<b>35</b>
International Labor Organization (ILO)	<b>39</b>
<b>Case 1:</b> Sindiquímica-PR v. Fosfértil/Ultrafértil	<b>42</b>
Organization for Economic Cooperation and Development (OECD)	<b>44</b>
<b>Case 1:</b> Dongria Kondh Community v. Vedanta Alumina Ltda.	<b>46</b>
<b>Case 2:</b> Cave and Sipetrol v. Shell	<b>47</b>
European Union (European Economic and Social Committee)	<b>48</b>
<b>Case 1:</b> Marangopoulos Human Rights Foundation v. Public Energy Company	<b>50</b>
Organization of American States (OAS)	<b>52</b>
<b>Case 1:</b> Mayagna Awas Tingni v. Nicaragua	<b>54</b>
MECHANISMS OF THE FINANCIAL INSTITUTIONS	<b>55</b>
World Bank (International Development Association and World Bank for Reconstruction and Development)	<b>56</b>
<b>Case 1:</b> Parej Oriental Communities v. Coal India Ltda.	<b>58</b>
World Bank (International Finance Corporation and Multilateral Investment Guarantee Agency)	<b>60</b>
<b>Case 1:</b> Rondas Farmers Federation v. Minera Yanacocha S.A.	<b>62</b>
<b>Case 2:</b> Various groups v. André Maggi Participações Ltda.	<b>63</b>
Interamerican Development Bank (IADB)	<b>64</b>
<b>Case 1:</b> Movement of Dam Victims (MAB) v. Tractebel Energy S.A.	<b>66</b>
REFERENCES	<b>68</b>
NOTES	<b>70</b>



# INTRODUCTION

**T**his work was developed given the need to spread the accumulation of knowledge and experience in the area of transnational businesses and its impacts on human rights, while noting possible methods of intervention for holding corporations accountable for their violations.

The guide aims to demonstrate some basic elements of the relation involving human rights, transnational corporations, and litigation. Its goal is to show paths which may be taken by organizations and social movements which seek to take action against human rights violations committed by transnationals.

Therefore, some of the instruments of corporate accountability at the national and international levels are analyzed, which contributes to the systematization of knowledge and experience about the corporate accountability for human rights violations.

This is not intended to be an exhaustive study of the subject or a conclusive evaluation of the instruments and spaces for litigation against transnationals. The idea of producing this material arose from the findings and proposals of various workshops held by Terra de Direitos and the Rosa Luxemburg Stiftung Institute, together with other entities, as well as from participation in international discussion groups, such as the Permanent Peoples' Tribunal.

Thus, this work will help civil society organizations assess, in specific cases, legal actions against transnational corporations.

## REFERENCE GUIDE

**T**he issue of accountability of transnationals for human rights violations, despite being relatively new, is a complex and expansive approach. Similarly, the challenges that arise in improving legal action against transnationals depend on a complex assessment of the political context as well as the creation of new national and International judicial theses.

Thus, covering national and international instruments in a critical and experience-based manner requires the communication of complex, dense material in a simple and clear manner.

To address this need, this paper is organized into two halves. At first, we present general issues which can provide guidance for legal actions against transnationals.

In the chapter “Transnational Corporations and Human Rights: Antagonistic Interests,” we describe the activities of transnationals, their economic objectives, and their human rights violations. We note, then, that the goal of maximum profitability is, by its very nature, contrary to the respect of human rights. Therefore, we emphasize that the solution must derive from the construction of a new mode of production, another socioeconomic model.

In the chapter “Legal Action and Transnational Corporations” we make some general observations regarding the importance of legal action against corporations.

To discuss the limits of legal intervention, we invited Professor Alejandro Teitelbaum to express his views on the Purpose and Limits of Litigation against Transnationals.

Lastly, in the chapter on Support for Legal Actions, we address some issues which we believe are important in evaluating possible legal intervention against transnational corporations. We present information about the basic foundations needed to initiate the creation of legal strategies against transnationals.

The second half of the material specifically addresses the national and international mechanisms which can be used to take legal action against transnationals. We analyze the following mechanisms: ATCA (USA), Companies Law (England), UN, ILO, OECD, OAS, World Bank--Inspection Panel, World Bank--Ombudsman, IADB, European Union.

In each one of these mechanisms, in an instructive way, we present the main issues that should be taken into consideration when litigating human rights cases. The table below indicates what kind of information will be presented in each of the subtopics.

## »» **What it is**

General information about the mechanism which allows for initial consideration about its end goal.

## »» **Scope**

The paper shows the jurisdictional scope of each instrument. That is, we explain which cases can be addressed by which instrument, according to the location in which the violation occurred.

## »» **Litigiousness (the need for lawyers)**

Here there is information regarding whether or not a lawyer is needed in order to take action.

## »» **Legal Framework**

This section refers to the norms (be they proper laws or other instruments) which can be cited in each instrument, and which can serve as a basis for legal action.

## »» **Costs**

This section discusses the expense of resources needed to utilize each instrument, such as attorneys, court costs, evidence-gathering, and others.

## »» **Monitoring**

Here, we discuss ways of tracking the progress of the case within each instrument. We present information regarding how parties can keep track of progress on the case, and what organizations need to do to monitor each case.

## »» **Language of the petition**

We note which official language is used in each instrument.

## »» **Nature of the entities**

This section contains information about the entities before which actions can be taken. Information is provided so that it can be determined whether an entity is private, national, or an international entity. In addition, there are notes regarding the entities' composition (whether they be agents of the state or have civil society participation).

### ▶▶ **Accepted matters**

Legal matters that can be brought up in each instrument; for example, civil rights, human, economic, social, civil, and environmental rights, labor rights, etc.

### ▶▶ **Possible outcomes**

Information concerning the scope, the material, and the possible effects of decisions.

### ▶▶ **Duration**

Whether an action under an instrument is short, medium, or long term.

### ▶▶ **Role of the community**

We take note of possibilities and the ways in which communities, social movements, and victims can intervene directly in the process, whether only attorneys can present the case, etc. That is, the information presented relates to how each instrument may allow for direct community involvement, evaluating how these situations may depend on third parties to monitor the progress of cases.

### ▶▶ **Critical analysis**

Here we evaluate the potential of each instrument against transnationals, given the cases analyzed.

### ▶▶ **Symbolic cases**

Discussion of cases which can serve as a paradigm to better understand an instrument, considering its limitations and possibilities.

# ▶ TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS: ANTAGONISTIC INTERESTS

In this piece, we begin with reflections about our model of society and the possibility of the construction of a different society. We have no doubt that the current model of society generates social exclusion, income concentration and serious environmental harm. This is because capital necessarily raises social, ethical, and human rights issues. In this model, transnational corporations play a key role.

We understand that it is necessary to alter this paradigm by putting the needs of people, of social groups, and of the environment as society's central axis. A society which acts to advance the eradication of poverty, equitable distribution of wealth, and environmental sustainability would need to have respect for human rights as a paradigm. To achieve this goal, society must play a major role in taking action, humanizing itself in the fight for rights, to the same extent that the struggle transforms human rights by making them the fundamental and principal guiding axes of our society.

Transnational corporations, a worldwide phenomenon, have incredible economic power and a great political power structure. Supported by countries and multilateral international organizations in the pursuit of maximizing profits and minimizing losses, they act through physical and moral coercion, co-optation, and inducement. They can be nominated, along with national governments, surely, as the main violators of human rights worldwide, and as true obstacles in the social struggle.

The current economic model is carried out in the interests of the transnationals and the financial system. Likewise, national and international legal systems are set to benefit businesses, not consumers.

Rampant and environmentally unsustainable consumerism is interlaced with the needs of business. This is due to the fact that the satisfaction of personal needs and access to consumer goods are oriented more to making profit than to effectively assessing collective human needs. All this economic, legal, and social construction helps to finance and benefit transnational corporations, which systematically violates human rights around the world.

All this economic, legal, and social construction helps to finance and benefit transnational corporations, which systematically violates human rights around the world.

It is worth emphasizing that, both within national boundaries and in the international arena, laws are much stronger and more applicable when used to protect the economic interests of transnational corporations than to protect human rights. There are few truly effective legal instruments to enforce human rights – primarily economic, social, cultural, and environmental rights – and the instruments for accountability and punishment of businesses for human rights violations are weak.

Transnationals have an abundance of legal frameworks available with which to open up markets, displace peoples from their lands, force access to natural resources, conduct experiments with GMOs, and secure patents on products and natural resources.

This is made apparent by the fact that the international treaties and conventions relative to the protection and guarantee of human rights do not prevail, in practice, over international trade agreements and guidelines. It is a notorious fact that transnational corporations have acted in order to put economic interests before respect for human rights; this is known as the “new Lex Mercatoria,”<sup>1</sup> or the trumping of international commercial law over international human rights law.

A typical (archetypal?) example of this disparity is the World Bank's International Center for the Resolution of Investment Disputes (ICSID), the biggest international arbitration entity in the world, in which companies and states confront each other. Within the Lex Mercatoria spirit, transnationals can use the ICSID to prosecute countries which violate Investment agreements, but countries cannot prosecute businesses. It is an institution without any transparency, because the documents for the cases are not made public. Aside from the Center accepting amicus briefs from human rights organizations, there is no doubt that the entity is politically favorable to private actors, which generally prevail in the ICSID proceedings.

The central issue in the debate about human rights and the activities of transnationals, then, is not restricted only to working towards minimizing the negative impact corporate activities have on human rights. The larger issue is what role transnationals have in our current societal model, and what should change in our society so that respect for human rights can be a platform for the eradication of poverty, the reduction of societal inequalities, and the construction of a new and environmentally sustainable way of life.

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<sup>1</sup> Latin expression meaning literally “merchant law”, it evolved as a system of customs and practices, which was enforced through merchant courts along the main trade routes in medieval Europe. It functioned so for a long time and has been used recently by many authors to describe the current state of the international law of commerce “

# ▶ LEGAL ACTION AND TRANSNATIONAL CORPORATIONS

It is an undisputed fact that transnationals hinder the development of legal frameworks in the human rights arena, by acting to elaborate on procedural rules which make accountability for violations more difficult; by constructing laws which guarantee them economic rights over culture and nature, and which govern land use, among other things. This picture alone is enough to demonstrate that transnationals influence national and international legal frameworks regarding human rights.

These companies also utilize judicial organs such as national judicial branches, national and international arbitration chambers, and institutions such as the World Trade Organization and United Nations Organizations to facilitate and carry out their interests and minimize the importance of human rights.

Thus, we conclude that legal spaces and instruments are used by transnationals and make up its intervention strategy, which creates a true political field of action. We understand that in the struggle against transnationals, legal action (litigation or otherwise) cannot be discarded. However, we do not mean that legal action against transnationals should be used in all cases.

Serious difficulties exist when taking legal action against companies. Some of these obstacles are addressed in this guide. However, it is essential to point out that there have been successful experiences with legal action against the interests of transnationals, which alone shows that these actions can be a barrier to the violation of human rights.

Judicial intervention, by the very nature of human rights defense, should be ethical. The practice itself must be an example of decency, and not tied to naïveté or a lack of strength or courage. It is not possible to really protect human rights unless the action is backed by the same principles it stands for, without belittling the effects of the action.

The preparation work for a complex legal action demands a thorough study of the cases, which already contributes to a reading of the political relationship established between business interests and the facilitation of human rights.

Legal intervention, in this scenario, can occur in two respects: reactive and active.

When corporate activity has already violated human rights or is in imminent danger of doing so, reactive intervention is necessary to stop or minimize the effects of these activities. When reactive legal intervention is not done, there are not legal obstacles put in front of the companies, and the opportunity for political or legal activity is lost, which facilitates the investment of the companies.

It is worth noting that with reactive activities, as a rule, there are few chances to achieve gains which impose large losses on businesses.

Legal action against the interests of transnationals, when well-prepared, can achieve grea-

ter concrete effects in human rights disputes. These actions have greater possibilities for opening spaces for experiments which can be replicated in other cases, to form a political and legal counterweight to corporate interests.

In the same vein, one cannot fail to mention that only social mobilization can advance positive legal results. One cannot guarantee that legal action will bring positive concrete results in all cases, but it is certain that the failure to pursue legal action will certainly not generate gains, and will facilitate even greater corporate activity.

It must also be noted that lawsuits do not meet all the needs in the fight for enforcing rights. Many suits result only in the payment of financial compensation and do not meet other human needs, such as in spiritual, religious, or cultural issues.

Finally, it is worth emphasizing the fact that businesses depend on binding national and international regulations in order to operate. Even though most laws are more favorable to them, there are some laws which can be used against them. Although transnationals have many rules in their favor, the legal system is not completely favorable to them. Social struggles throughout history have utilized their rights which are recognized under law.

In the same way, we cannot understand the Judicial Branch or the international entities and mechanisms as monolithic blocks, which only act in favor of corporations. These spaces are in constant dispute, and within them there are some actors who are not directly compromised by these interests. Some significant victories have been achieved in this sense and point to the possibility of continuing such interventions.

# ▶ THE PURPOSE AND LIMITS OF LITIGATION AGAINST TRANSNATIONALS

By **Alejandro Teitelbaum**

**J**udgments against transnationals are surrounded by problems and obstacles. It requires litigating against companies with enormous economic resources and an army of lawyers who, with all kinds of procedural gimmicks (jurisdictional issues, etc.), make the case drag on for many years, which makes the legal costs very high for the plaintiffs; and, many times, even when the decision is favorable to the victims, the recovery of damages can be difficult, if not impossible.

There is a risk of fostering illusions about the results of a lawsuit, as strong interests almost always prevail among the country's government, the affected group, and the company being sued. We must not forget that, although laws can offer strong support, the courts are also part of the system. Moreover, it is not possible to compare a lawsuit by a group of American citizens against a company in their own country, for example, with environmental contamination or another lawsuit in which the plaintiffs are an indigenous group from the Amazon. They have completely different economic-political interests at stake, in the balance of power, and in the funding available to litigate.

We must guard against the legal industry's practice of reparations, in which some law firms accept "friendly settlements," which take away from the very nature of the legal, economic, political and social finality that the suits against transnationals represent. In addition, they misrepresent the legal scope of the settlements, which they do not hesitate to describe as "historic" when, in reality, they are tiny victories, and the true legal, economic, social and political balance of these settlements is fundamentally negative.

Nevertheless, when there are certain favorable conditions present, lawsuits against transnationals can be brought, taking into account some basic rules.

## ▶ **Choosing jurisdiction**

Nationally, jurisdictional activity can and should be fully exercised in relation to individuals, including transnational corporations, applying national law and relevant international standards in domestic law.

The competent national tribunals for this type of claim can be the location where the damage occurred or the location of the corporate headquarters which caused it, without excluding other possibilities such as where the victims reside, if this is different from where the damage occurred.

**It is very important to consider whether or not legislation and/or jurisprudence of the country which is being considered for litigation allows, and to what extent, the principle of universal jurisdiction. Spain, which broadly recognized this principle, changed its modified its law in 2009 in an extremely restrictive manner.**

Which jurisdiction(s) are appropriate is a complex topic, which should be carefully studied, along with consideration of the legal, economic, and political implications.

### ► **The parties and judge**

The suit should be brought collectively (collective action, popular action, or class action), in the name of the largest possible number of victims and, if feasible, on behalf of different interests. Proceeding in this way serves the purpose of, among other things, providing for the widest possible participation so that, in the event of a negotiation, all victims can be consulted.

To sue in court, a general principal is that the plaintiffs must demonstrate that they are directly affected. This is fundamental to the lawsuit: injury to a subjective right, ie, the plaintiff has personally suffered an injury. This is called “standing to sue.” If several people initiated separate lawsuits, they can ask for their claims to be aggregated since the perpetrator of the damage is the same in all cases.

The principle of active legitimacy was expanded in various countries in order to defend similar interests, such as so-called “class actions,” which defend affected people collectively, and “popular actions.”

In the case of universal rights, the plaintiff (one or many) does not allege a direct injury to his or her individual rights, but rather an injury to an undetermined or indeterminable number of people. Generally the defense of universal rights is used in cases of environmental harm, but this argument is also possible for violations of other fundamental societal rights or of a certain cohesive group. In the so-called class actions, or collective actions, the plaintiffs constitute an identifiable group of people who were directly affected. These cases need not deal with the defense of universal interests.

### ► **Lawsuits against subsidiaries**

When a subsidiary of a transnational corporation is sued, it is of great importance, if we want effective results, to plead joint responsibility of the parent company and, in line with this, to carefully plan for a strategy to protect against the possibility of judges claiming that jurisdiction lies in the country where the company is headquartered.

This means that it is necessary to show that the subsidiary, although it has the appearance of being an autonomous business, is substantially an economic unit with a parent and that the parent must be therefore be jointly responsible.

## ▶ Right to allege in the process

Based on the notion of interdependence, indivisibility and “permeability” of applicable human rights norms, the rights espoused in the lawsuit should include not only the ones which were directly violated, but also a wide spectrum of rights which were indirectly affected, so as to give a more solid legal foundation to the case.

For example, the violation of certain economic, social, and cultural rights can also entail the violation of the right to human dignity, of the right to life, or of the right to avoid cruel and unusual punishment, among others.

▷ **In the case of a settlement, the responsibility of the company should not be the subject of negotiation. Settlements which absolve the company of liability are socially and politically unacceptable.**

## ▶ International Tribunals

The International Court of Justice is only accessible to States, which can file complaints against other States, including for environmental problems, such as the Botnia case (Argentina v. Uruguay) and the Gabčíkovo-Nagymaros case (September 1997 decision).

Before the International Criminal Court (ICC), founded in Rome in 1998, only individuals, not businesses, can be prosecuted, for violations of fundamental human rights. Nor does the ICC Statute address violations of economic, social, and cultural rights.

Nevertheless, some specialists maintain that transnationals could be prosecuted in the ICC as criminal organizations; they maintain this in spite of the French proposal to grant the Court jurisdiction over corporations not having prevailed, despite having the support of other companies and an NGO, the Lelio Basso Foundation.

At the regional level, lawsuits against States (not against private actors) can be brought before the Interamerican Court of Human Rights--passing first through the Interamerican Commission of Human Rights--and before the European Court of Human Rights. These regional tribunals can be used to bring complaints against countries which permit or tolerate activities of transnational corporations which violate human rights.

It is apparent that although there are legal remedies against the human rights violations of transnationals, these resources only indirectly question the roots of the problem and the nature of the dominant economic system, but they can create more or less visible coalitions of various stakeholders, governments, and, often, the courts themselves.

# ► SUPPORT FOR LAWSUITS

**H**ere we present some elements which we consider important in evaluating possible legal actions against transnationals. Thus, the discussion aims to point out elements which may be useful in considering the relevance of a legal action, and to indicate a few points which may guide the preparation for a lawsuit.

Professional competence and commitment to the cause are assumed and are critical in human rights litigation, which has defense of human rights and promotion of social change as a paradigm. Also, legal strategies and lawsuits should not be taken without considering the political context surrounding each case. The legal aspect, as a rule, is only one part of a comprehensive case.

It is clear, then, that legal actions, social actions, and the needs of victims and social movements have different paces, which is why it is necessary, as noted above, to evaluate these differences before turning to legal action. In this sense, legal action can be more effective when used as a means to an end, when it is well-prepared and done in a favorable context. We see that lawsuits will have mitigating effects if they are conducted in preparation for other actions against transnationals.

A methodically and rigorously conducted lawsuit should regulate criticism and instigate sustained action in which the plaintiffs play a key role. The quality of the lawsuit is also fundamental as a way to transform the available legal tools.

## ► **Relationship between lawyers, social movements, and victims**

There are some lawsuits in which the subjects of the suit are indeterminate or, if determinable, are hard to identify. In these cases it can be difficult to establish a clear relationship among lawyers, human rights organizations, and the victims of transnational corporate activity. An example of this kind of case is when air pollution affects a city or region.

There are also lawsuits in which the subjects of the suit are indeterminate or determinable, but difficult to identify individually. We believe that especially in these cases it is interesting to note some assumptions about the relationship between victims, social movements, and the organizations or lawyers who bring the cases.

It is necessary to note that the social movements and victims of corporate activity are the ones who have political control over decision-making in lawsuits against transnational companies. The lawyers or partner organizations are also key players in the suit, with an active

role in the formulation of strategy and conducting the suit, but are tied to the goals of the victims.

It is essential to consider societal knowledge and incorporate it into the lawsuit. This will allow for reflection about a conception of law that is not restricted only to laws, but has support in social relationships. This is because presumably the lawsuits will fully expose the effects of transnational corporations and their human rights violations.

It is also relevant to note that there are organizations and lawyers who only occasionally do human rights litigation, and others who primarily do this kind of work. The time dedicated to human rights litigation does not necessarily signify which organizations or people will have the greatest capacity in each case. However, these differences should be taken into account, along with the goals of the lawsuit and the need for political commitment to the suit.

As a rule, lawsuits present complexities that are difficult for people without legal training to understand. In this sense, it would be interesting if lawyers and partner organizations sought to empower the plaintiffs about the legal instruments which can be utilized. Such empowerment is absolutely necessary for victims and social movements to have clarity in their decision-making, and it is even more effective if it is done continuously and at every stage of the suit. Continuous training will also facilitate the decision-making of victims on issues that arise during the lawsuit, and allowing for continuous strategic evaluations about ongoing actions and their possible effects.

In the same vein, training lawyers and partner organizations regarding the culture, flags of struggle, way of life, and traditions of each group is also important so that they can better understand the aspirations of the victims and what each violated right means to them.

This mutual learning will also help avoid unrealistic expectations for the victims, and contribute to an understanding of the limits of legal action as a solution to the demands of the victims and social movements.

It also shows, in essence, that the community clearly understands the authority that is granted to the lawyers and partner organizations, especially when this is done formally, such as by proxy. One should pay close attention to waiver of rights and release of liability clauses in lawsuits, which are preferred when the community or the victims have to sign settlement or withdrawal agreements along with the lawyers.

There can be challenges in the relationships between lawyers and social movements or direct victims of corporate activity. These differences can be cultural, social, geographic, spiritual, or can be related to the goals of the lawsuit, among other things; they point to the need to reach a minimum level of consensus regarding the suit. In this sense, there must be much attention paid to the relationship between the economic conception of their profession that non-activist lawyers may have, and the struggle for social justice which, as a rule, is the goal of the social movements and victims.

A good understanding among all the partners who will participate in the case is essential so that a clear legal strategy against transnationals can be developed. When the contours of these relationships are clearly delineated from the outset, the parties will have the best chance of establishing goals, dividing tasks, and carrying out the lawsuit.

## ► Information about the company

To begin organizing the lawsuit, relevant information about the company should be gathered. The information gathered will contribute to the legal strategy against the company, in that litigants can better understand the corporation.

The researcher should be guided by epistemological curiosity, and look between the lines for information related to common sense. That is to say, common sense elements should not be neglected, but must be dialectically overcome to foster creative capacity for any kind of actions or interventions.

The data noted in the suggestions below, for the most part, can be reliably obtained on the internet. The instruments that the market makes available to provide corporate transparency, particularly with respect to publicly traded companies, can be quite helpful.

Relevant basic data should be sought, such as the history of the company, the country in which it is headquartered, its main lines of business, suppliers, key operating markets, profile of the average consumer of its products, billing, in addition to more complex data.

There may also be big differences in lawsuits against transnationals according to the legal structure of the parent and its subsidiaries. In order to develop legal strategies it is essential to understand the legal structure of the business and its subsidiaries. State-funded transnational corporations present, for example, legal hooks to focus on the State.

It would be useful to obtain information about the legal structure of the company (whether it is a limited, publicly-traded, or closely-held corporation), the shareholders, the board of directors, and how the relationship between the parent and subsidiaries. Information can be sought regarding the company's relationships with universities (particularly public ones), and the public-private partnerships it funds. This information can guide actions against board members, shareholders, the government, the company's business partners, etc., depending on the structure of the companies.

Likewise, information about internal policies, principles, and regulations the company has adopted can be useful, as well as market-regulated certifications (organic certifications, etc.) and whether or not it claims to be socially responsible.

Finally, we recommend research into the court websites to identify the types of litigation the company is confronting, the reasons it was sued in court, who its lawyers are, and what their legal theories are.

These suggestions for gathering information are not exhaustive, and may not be the best reference depending on the case. They are only intended to stress the importance of doing so.

With these and other information, it is possible to outline a map of the company. This map, along with the information, can point to other intervention strategies that could not be seen before.

Likewise, other areas for action against the company may be found, where they may have been unnoticed before. Investing in challenges to certifications granted to the company and their partnerships with universities can be important to delegitimize the company before society and the judiciary, for example.

## ► Types of human rights violations and collective legal action

The suggestion here is that a study be conducted on the nature of human rights violations typically carried out by the company, as well as the affected public and the geographic reach of the legal action. Such information can contribute to the development of legal strategy and can also pose a challenge to those bringing the lawsuit, due to the difficulty of obtaining the data.

The goal of obtaining this information is to: 1) find out if other human rights lawsuits have been brought against the company; 2) find responses or objections made by the company, to give an indication of its strategy; 3) identify public and private entities which defended the company; 4) identify spaces and instruments that have already been used, to evaluate the potential of a lawsuit; 5) identify possible partners for the lawsuit.

It is generally not easy to obtain this information. Therefore, it is important to develop contacts with social movements and labor unions in the company's area of influence, analyze news, and monitor the company's dealings. It is also relevant to review complaint letters on the internet, which are the result of meetings, forums, and actions, such as the "Peoples' Tribunal."

Mentioning in the lawsuit that the violation is not limited to a specific location or to only one group of people can give the allegations more credibility.

Pursuing alliances with other who have been affected by the company's activities is also fundamental in creating a possible coalition for the lawsuit, and to evaluate any actions--law-related or not--the limits and possibilities of actions that are already being done.

Conducting lawsuits in a coalition within the same country, more than one country, or within one country but on an international level can help increase the impact of the litigation. Similarly, coalition-building for the litigation can allow for coordinated, collective action.

## ► Defining the goals of legal action

A clear definition of what is expected from lawsuits against transnationals is assumed as essential to developing a legal strategy with positive results for human rights defense.

The direct goal of lawsuits may vary between simple financial compensation for material damages to more complex interventions. However, it is not necessarily the lawsuit itself that will have the greatest repercussions for the defense of human rights.

It must be taken into account that lawsuits are immersed in social struggle, so their goals must be evaluated in this context. Thus, when evaluating the goals of lawsuits, not only must the specific results be kept in mind, but also the legal outcome for human rights in general.

It is absolutely necessary to evaluate the possible drawbacks of lawsuits; for example, the prospect of defeat. Defeat is always a possibility when using the legal system. There is no lawsuit that can be brought with certain victory and the perspective of a judicial defeat can con-

solidate a bad precedent for the theme in the respective courts. However, the possibility of defeat should not preclude lawsuits from being brought.

Activities which transform reality--lawsuits or not--necessarily entail risk and open-mindedness. Risk evaluation must be done case by case, along with consideration of the fact that not taking legal intervention means that one of the avenues for fighting transnationals is not being utilized.

The distinction between the goals of a lawsuit and the more general goals of action against transnationals is emphasized when litigation against transnationals settles. It is possible that, with a settlement, the final goal of a lawsuit could be reached (compensation, for example), without achieving the overarching goal (liability of the company for human rights violations). Usually, these settlements are confidential, do not impose liability on the company for human rights violations, and hamper the creation of favorable jurisprudence. We see settlements with transnationals as interfering with other complaints, hindering the holding of companies accountable, and hampering litigation against transnationals.

Carrying out high-impact litigation which allows for coalition-building to create social change demands clarity regarding the possibilities and limits of the legal system, and the interests of the attorneys, supporting organizations and the victims or social movements.

## ► **Ability to implement and support legal action**

To implement lawsuits against transnational corporations, it is important to keep in mind the ability to produce judicially acceptable evidence and the ability to finance the long term costs of legal action.

Transnational companies have large, well-trained, and well-resourced legal teams. The lawyers and organizations that bring suit against transnationals, as a rule, have less capacity to support and fund their actions.

Thus, prior to initiating a lawsuit it is important to evaluate, in keeping with the goals being pursued and the legal instrument being used, the capacity to support the monitoring of the action, and to evaluate its short-term, medium-term, and long-term results. Not all legal actions necessarily take years to obtain the desired result. In certain cases an injunction, although it could be reversed by the company in the future, can achieve the desired result now.

Similarly, it should be noted that when litigating against companies it is very important to have strong evidence, or to be able to produce strong evidence. Evidence is vital given the formality of proving human rights violations in court. Bringing suit without a chance of producing the necessary evidence reinforces the notion that the company did not violate the law, because the violations were not proven in court.

Portraying the legal demand in a scientific manner, when possible, can help in communicating with the media and with sectors of society who lack access to information which demonstrate that transnational corporations violate human rights.

In environmental litigation, for example, expertise is very expensive; sometimes, experts are scarce and are already compromised by corporate interests. Large companies finance the majority of the research in the sectors in which they operate, they have relationships with universities and renowned researchers; this shows the importance of well-articulated proof.

These difficulties, however, are not insurmountable. Evaluation of individual cases shows that it is possible to create alliances with organizations that finance studies, or with governmental agencies that can be research partners, and to enlist the help of scientists committed to the cause of human rights, among other possibilities.

Moreover, the difficulty of obtaining conclusive proof must be accompanied by a reflection on the legal burden of proof. Under Brazilian law for environmental issues, the precautionary principle is used, according to which any demonstration or presumption of environmental harm can impede the activities causing the danger. Thus, in these cases it is possible to use less robust proof, but to suggest the possibility of human rights violations. On the contrary, to overcome the precautionary principle, the company is the one who must fully prove that it will not cause environmental harm.

In the same vein, when it comes to the defense of consumer rights, the Brazilian system imposes a similar burden of proof. Meaning that, considering the enormous power companies have over consumers, the consumer need only allege the facts, and the company must prove that the fact is not true.

## ► **Analysis of the different spaces, instruments, and forms of intervention**

In the implementation of legal actions against transnationals, an analysis of the spaces in which the intervention will be carried out, of the available instruments, and of the possible non-judicial actions is fundamental to achieve its goals.

This guide explains some of the mechanisms that can be used in litigation against transnational corporations. The elements that were discussed above are sufficient to make a preliminary evaluation of each instrument, rejecting those which have a low chance of success and choosing those which can be utilized. However, given the peculiarities of each individual case, it is essential to conduct an in-depth analysis of the potential of each instrument.

In a deeper analysis of each instrument, according to each case, the possible use of critical theory, the jurisprudence of the entity itself, the possibility of reversing contrary decisions and of urging the entity to be more progressive on certain issues (labor, environment, etc) can be evaluated.

This work in each case can also point out the possibilities and limits of liability against the company and directors for the actions of their employees, and the possibility of actions against the state. At times there is real confusion between the interests of the government and of the corporations. Certain mechanisms will only accept lawsuits against the state; in others, however, it is possible to sue the state and the company, only the state, or only the company.

Each entity, whether national or international, will also be more or less influenced by advocacy and lobbying by corporations, as well as social movements and victims. This permeability of external influences on the proceedings and decisions should also guide reflections about legal intervention.

The present study does not provide a step by step guide for legal actions against transnational corporations, since it is not possible to do so in this form; rather, it suggests methods and presents a technical and critical reading about the possibilities of legal intervention.

# **NATIONAL MECHANISMS**

# ▶ ALIEN TORT CLAIMS ACT (ATCA)

## ▶▶ What it is:

The ATCA is a law enacted in the United States of America in 1780, which, to this day, is one of the most often used tools to seek liability of transnational corporations who are headquartered in this country. This law aims to address violations of the “law of nations,” which, as one of the principles and rules of international law, has allowed an extension of its meaning to include protection of human rights. Therefore, it has become an instrument to sue, in federal U.S. courts, government agents as well as, increasingly, private actors for human rights violations occurring in other countries.

## ▶▶ Territorial scope:

In principle, there are no limits with respect to where the violation occurred. Individuals from any country can use the U.S. courts through ATCA, as long as the violating company is headquartered in the U.S. Aside from this, there are three other possibilities involving corporations that are not headquartered in the U.S., but have offices or subsidiaries there: a) the violating subsidiary (which is generally in developing countries) can be sued, when it has any operations or direct connections with the U.S., which can be difficult to prove; b) the North American subsidiary can be sued when it maintains a close relationship with the violating subsidiary; c) the parent company can be sued, despite being outside of the U.S., when it has relevant activities there, such as selling stock in the U.S. or making decisions there (by having a U.S. office, for example).

## ▶▶ Legal framework:

All documents widely recognized by the international community can be considered the “law of nations,” including treaties, conventions, and agreements, among others, particularly those ratified by the U.S. In some cases, customary international law has been accepted as a legal framework.

### ▷ Litigiousness (need for lawyers):

It is necessary to have a lawyer who can practice in the courts of the United States.

### ▷ Cost:

High. It must be considered that, without finding supporters and/or funders of the litigation, bear the court costs, attorney fees, production of evidence, travel, etc., cost can be an obstacle to utilizing this instrument.

### ▷ Language of the complaint:

English.

### ▷ Duration:

Long term.

## »» **Monitoring:**

Since an ATCA suit is a civil suit, there is a need for ongoing monitoring and intervention by the legal representative of the victims, who needs to constantly present allegations to the court, produce evidence, make requests, etc. To do so, it is generally necessary to find partners, such as human rights organizations and law firms, who are willing to streamline the process in the United States, since the costs of retaining a lawyer exclusively are very high.

## »» **Responsible entities:**

Judiciary – Federal Courts.

## »» **Accepted topics:**

Predominately cases related to torture, summary execution, rape, and forced labor, although lawyers are advocating for its expansion. It is often used in conjunction with the Torture Victims Protection Act (TVPA). To date, no cases regarding violations of economic, social, environmental, or cultural rights have been accepted.

## »» **Possible outcomes:**

As a civil procedure, the only possible results stemming from a finding of liability are pecuniary. Financial compensation is often the aim pursued and, despite the value of this, no one will be imprisoned or criminally punished.

## »» **Level of community involvement:**

Medium. With respect to individuals or small groups, there is a great chance of participation in the process, conducting it in accordance with its specific goals and sometimes even appearing in court. When the violations affect entire communities, participation is generally more difficult, and leaders and representatives are more limited; however, there have already been cases where judges themselves went to conduct site visits. The profile of the lawyer or law firm which takes the case will affect the level of community involvement.

## »» **Critical analysis:**

Despite all its potential, ATCA is still a disputed instrument. As noted, there is still no precedent for broader issues of environmental harm, forced displacement, or labor violations, which are perhaps the most common violations.

From the standpoint of extraterritorial liability, other controversial issues arise concerning the application of the principle of forum non conveniens, by which the North American courts lack jurisdiction to adjudicate certain cases (which is currently happening with some indigenous populations in Ecuador), and the manner with which to enforce judgments. Where and how can a judgment issued in the U.S. be enforced against a European parent company?

In the case of transnational corporations, there are very serious questions about the results obtained thus far. In fact, there has still not been a formal ruling, because all the successful cases have ended with agreements between the parties, which usually contain clauses which remove the company of liability and keep the information gathered during litigation confidential. They are, therefore, relative victories, since the financial compensation does not mean the company must remediate the damage, nor is there a guarantee against new violations, or the creation of jurisprudence favoring corporate accountability. However, ATCA cases have been highlighted by the attention they garner, in addition to the bad publicity they bring to transnationals.

## SAMPLE CASES

### CASE 1

## *Wiwa v. Royal Dutch Petroleum Company and Shell Transport Ltda.*<sup>2</sup>

- ▶ **Type of violation:** Complicity in homicides, arbitrary detention, and torture of the political leaders of the Ogoni people; extortion; violent repression of protests against the company's activities.
- ▶ **Place of violation:** Nigeria, Ogoni region
- ▶ **Historical context:** In 1995, activist Ken Saro-Wiwa, along with other members of the Movement for the Survival of the Ogoni People (MOSOP), was summarily executed after promoting campaigns and demonstrations against the environmental damage caused by the oil extraction developments of the Royal Dutch/Shell Company on the traditional lands of this population. Having been illegally detained in 1994, the group was held in incommunicado under military custody and, the following year, tried and sentenced to death by an ad hoc tribunal.<sup>3</sup>

The complaint was brought in 1996 in a New York court by Ken Wiwa, the son of the vic-

2 At the moment, new facts have emerged related to this case, which raised great worries among human rights advocates. On September, 17th, in a verdict upheld by the US Court of Appeals for the Second Circuit in favor of Royal Dutch Shell in case *Kiobel v. Royal Dutch Petroleum* (with almost the same Plaintiffs as *Wiwa v. Royal Dutch Petroleum*) brought as well by families of Nigerian protesters (Ogoni people) who were executed, the court ruled that the Alien Tort Claims Act (ATCA) does not apply to corporations, relieving Shell of liability for alleged complicity in human rights abuses. This has created a terrible precedent in US Jurisprudence and an obstacle for those who seek an increase in corporate accountability worldwide. The decision can be accessed at: [http://www.ca2.uscourts.gov/decisions/isysquery/48f7e66f-3c82-4c5e-98cb-02c3b60274f5/5/doc/06-4800\\_cv\\_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/48f7e66f-3c82-4c5e-98cb-02c3b60274f5/5/hilite/](http://www.ca2.uscourts.gov/decisions/isysquery/48f7e66f-3c82-4c5e-98cb-02c3b60274f5/5/doc/06-4800_cv_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/48f7e66f-3c82-4c5e-98cb-02c3b60274f5/5/hilite/)

3 *Ad hoc* tribunals are judicial bodies specially created for trying certain cases, according to political trends. Because they violate a number of guarantees (such as the principle of a natural judge, of impartiality, of an opportunity to defend oneself, of due process, etc.), including principles established in international law, they are expressly prohibited and legally reprehensible, because they engender arbitrary decisions and pre-fabricated convictions.

tim – who was represented by the Center for Constitutional Rights and EarthRights International – against the company and against Brian Anderson, the former general manager of Shell's Nigerian subsidiary, which was restructured in 1997. The main legal instruments used were the ATCA and the Torture Victims Protection Act (TVPA); Wiwa argued that Royal Dutch/Shell aided the Sani Abacha regime in fabricating false evidence used in the supposed trial of the victims.

In September 1998, Hon. Kimba Wood sided with the defense's argument that the U.S. courts did not have jurisdiction over the case, since the company was headquartered in England, and applied the forum non conveniens principle mentioned above. Nevertheless, two years later, the Court of Appeals reversed the decision, applying a broad interpretation of the principle of universal jurisdiction in the ATCA, and the case proceeded.

Hon. Kimba Wood understood, then, that the facts alleged could constitute crimes against humanity, as defined by the Rome Treaty (1998), and ordered jury selection hearings. They did not happen, however, because the parties reached an out-of-court settlement in June 2009, concluding the process.

- ▶ **Results obtained:** The settlement required the payment of compensation in the amount of \$15.5 million, to be divided among attorneys' fees, the plaintiffs, and a special fund for the Ogoni people. In this agreement, which represents only a tiny sum compared to the profits of Royal Dutch/Shell in Nigeria, the corporation did not acknowledge any responsibility for the violations, and remains officially unpunished.

## SAMPLE CASES

### CASE 2

## *Aguinda v. Texaco Inc. and Gabriel Ashanda Jota et al. v. Texaco Inc.*

- ▶ **Type of violation:** Damage to the environment and to the health of traditional populations.
- ▶ **Place of violation:** Ecuador's eastern region; and Peru, lower Napo River.
- ▶ **Historical context:** From 1964 to 1992, Texaco and the state-run PetroEcuador operations consortium explored oil reserves in the Oriente region of Ecuador, causing environmental devastation to the territories of five indigenous groups: the Siona, the Secoya, the Cofán, the Huaorani, and the Kichwa. The contamination also extended into Peruvian land, affecting the areas of the lower Napo River.

In 1993, over 30,000 indigenous people from 80 communities initiated a class action against the company in federal court in New York, represented by the Amazon Defense Front. The

first judge in the case determined that U.S. courts had jurisdiction, citing to the fact that the extractive techniques used were developed in the U.S. However, changes to jurisdiction rules and the death of the judge resulted, in 2002, in a contrary decision, once again due to the principle of forum non conveniens. It is important to note, however, that in 1998 the Court of Appeals ruled in *Jota v. Texaco* that in order to assert the principle of forum non conveniens, there must be at least two forums available to hear the case and that, therefore, the U.S. courts should accept it, or the corporation should commit itself to recognizing Ecuadorian jurisdiction. This was an important precedent.

As a consequence of the negative decision, in 2003 a suit was filed against Chevron-Texaco in Ecuador (in 2001, the companies had merged). Various experts confirmed contamination in the region with carcinogenic toxins, and doctors identified various related illnesses in the local populations.

Given this case, the corporation has pressured the U.S. to suspend trade agreements with Ecuador, and is currently trying to initiate confidential arbitration proceedings against the country. In addition, it has also used a series of lawsuits to silence supporters of the indigenous cause in the U.S.

- ▶ **Results obtained:** A final decision in the case still remains; current damage estimates exceed \$20 billion.

# ▶ COMPANIES LAW (UNITED KINGDOM)

## ▶▶ What it is:

It is a corporate law, passed in 2006 by the Parliament of the United Kingdom, which revised all the provisions relating to commercial law and business activity in the country. During the legislative process, various human rights groups and environmental activists promoted a campaign in favor of more effective legal standards for transnational corporate accountability. While most of their demands were not met, two clauses in particular did have their support: a) Section No. 172, which requires corporate directors to consider their impacts on the community, the environment, and their workers when they make decisions; b) Section No. 417, which addresses transparency and making company information available. The latter requires all companies with shares in the London Stock Exchange--meaning, the largest English companies--to submit annual reports to their shareholders and public entities about the social and environmental risks of their ventures. The law went into effect in October 2009 and, although it appears to be a possibility for positively impacting human rights, the English courts have not yet had an opportunity to apply it in concrete cases.

### ▶ Litigiousness (need for lawyers):

The administrative process can be used without lawyers. However, for court cases, it is necessary to have a lawyer who can practice in England.

### ▶ Cost:

Low, in administrative procedures. High for litigation.

### ▶ Language of the complaint:

English.

### ▶ Duration:

Impossible to estimate, as there have not been any cases finalized yet.

## ▶▶ Nature of the responsible entities:

From the standpoint legal strategy, the Companies Law may give rise to administrative or strictly judicial procedures. In the first case, the Department of Business, Innovation and Skills (BIS) of the British government is primarily responsible for implementing the new law. It delegates powers to the Companies Investigation Branch (CIB), in which one can bring a complaint for violations of the duties established in the new law. The complaint can even be made online.<sup>4</sup> The CIB is responsible for assessing whether or not it has jurisdiction, then

<sup>4</sup> <http://www.insolvency.gov.uk/complaintformcib.htm>.

proceeds to investigation. Another entity in which one can complain is the Companies House, through a written complaint which includes detailed evidence of the violations.<sup>5</sup> There is also the Financial Reporting Review Panel, part of the Finance Council, which assesses the reports of public companies and large private companies. The Panel can be accessed whenever there are indications that the corporations are omitting relevant information. Finally, there is the possibility of submitting a claim to the Companies Court, which includes the Supreme Court of the United Kingdom, Chancery Division.

### »» **Territorial scope:**

The law applies to corporations with a parent company based in England, whether located within or outside of the country.

### »» **Legal framework:**

The provisions of the Companies Act of 2006, along with the Human Rights act, a law passed by Parliament in 1998, establish the jurisdiction of the English courts to hear cases based on the European Convention of Human Rights.

### »» **Monitoring:**

There is no way to officially monitor these cases, because the information obtained in the investigation procedures are confidential, including with respect to the complainant.

### »» **Accepted topics:**

Violation of environmental rights, damage to local communities, labor issues, access to information, etc.

### »» **Possible outcomes:**

The results will depend on the entity responsible for the proceeding in question. The CIB may remove corporate directors from office, prosecute them criminally, refer the case to other regulatory agencies, or even legally require the dissolution of the company, if the violation is very serious. The Registrar of Companies can cancel the violating company's registration. The FRRP can establish a mediation or negotiation process with the company and issue a public statement about the company's commitment to make reparations. With respect to lawsuits, although there is not yet any jurisprudence on the issue, they could result in indemnity by the company as well as the individual liability of its directors.

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<sup>5</sup> The address to send complaints is: Companies House, Crown Way, Maindy, Cardiff, CF14 3UZ, UK.

## ▶▶ **Level of community involvement:**

Low, given the confidentiality of the procedures.

## ▶▶ **Critical analysis:**

The novelty of this instrument means that it has not been widely used by human rights organizations and civil society in confronting transnational companies. It remains, then, a new horizon to be tested, although some of its limitations can already be noted. First, the term “consider” used in Section 172 is very weak. The focus of the Companies Law still lies in the generation of profits and in benefitting shareholders. Regarding Section 417, the rules for annual reports are very vague, leaving wide discretion to the company and making review difficult.

Aside from the legal aspects, it is necessary to consider the political dynamic involving the large transnational businesses, which lobby politicians and regulatory agencies, which means midsize businesses tend to be the focus of investigations. The difficulty the affected communities face in monitoring and participating in the proceedings is another negative factor making the playing field uneven. The CIB has been active nationwide, especially in cases regarding violations of consumer rights, tax obligations, etc.; however, human rights allegations have not been dealt with. Nevertheless, it does evaluate the applicability of the European Convention in its cases.

Another possible interpretation is that the Companies Law be used in shareholder lawsuits. Since the law requires that shareholders be informed about the environmental risks of the company's undertakings, they can also be held responsible, at least morally, for having approved the assumption of those risks. Therefore, some investors sympathetic to the cause of human rights may be used by society to require changes to business procedures.

Finally, the law can be used as a source of pressure, as it requires companies to speak publicly about the social and environmental risks of their activity. Their statements may be important paradigms with which to concretely evaluate the impacts caused by their activities, as well as a way to access important information for use as evidence in lawsuits and for political strategizing.

# **INTERNATIONAL MECHANISMS**

# ▶ UNITED NATIONS (UN)

## ▶▶ What it is:

Created in the post-war era, the United Nations today is the largest multilateral organization in the world, counting the participation of 192 sovereign states. It was baptized by the UN Charter, an international treaty which sets out rights and duties of the members of the international community. It is comprised of a series of specialized agencies, the main ones being: the General Assembly; the Security Council; the Economic and Social Council; the Trusteeship Council; the International Court of Justice; and the Secretariat. The World Health Organization (WHO), the International Labor Organization (ILO), the International Monetary Fund (IMF), and the World Bank are other examples of entities linked to the UN.

Unlike national legal systems, the UN does not create laws, but rather works within a complex system of treaty law, that is, a system based on agreements, treaties, conventions, charters, protocols, and declarations ratified by the member states. Ratification is an officially important act, because it entails a commitment of the state and its partial submission to UN jurisdiction.

Although the jurisdiction of the UN is limited to its taking action towards member states, in recent years its concern about the human rights impacts of transnational corporations has grown. This led the Subcommittee for the Protection and Promotion of Human Rights to create and adopt, in 2003, a set of Draft Norms for Transnational Corporations and other Businesses, in a first attempt at creating accountability. The draft Standards include non-discrimination, respect for national sovereignty, consumer protection, environmental and labor rights, etc.<sup>6</sup> Bowing to the lobbying efforts of big business, however, the Human Rights Commission rejected the document.

### ▶ Litigiousness (need for lawyers):

No

### ▶ Cost:

Low. Whatever is necessary to submit the complaint via fax, remotely monitor the case, provide new information, etc.

### ▶ Language of the complaint:

Any language.

<sup>6</sup> The rules were consolidated in consultation with NGOs and unions. The draft contained proposed binding rules for businesses while recognizing that States bear primary responsibility for preventing violations. It also established, among other things, that transnationals submit periodic reports to the UN, submit to monitoring, and financially compensate their victims. It also suggested that domestic courts apply criminal punishments for corporate violations.

## »» Nature of the responsible entities:

The UN also has its own human rights system, whose primary responsibility is to oversee the Human Rights Council and the High Commissioner for Human Rights. In addition to these, each treaty has a specific monitoring body, called a Treaty Body. These committees are composed of specialists who are charged with observing and reporting on each country's compliance with the document, and making recommendations when necessary. The Universal Review procedure requires States Parties to submit reports to the respective committee. Some of them accept complaints by individuals or groups whose rights have been violated by the States. Debate currently centers around the necessary broadening of the complaint procedures, without which it is difficult to protect rights. Currently, the functioning committees are:

- ▷ **Human Rights Committee (HRC – monitors the International Covenant on Civil and Political Rights, and its Optional Protocols);**
- ▷ **Committee on Economic, Social, and Cultural Rights (CESCR—monitors the International Covenant on Economic, Social, and Cultural Rights);**
- ▷ **Committee for the Elimination of Racial Discrimination (CERD—monitors the Convention on the Elimination of All Forms of Racial Discrimination);**
- ▷ **Committee for the Elimination of Discrimination against Women (CEDAW—monitors the Convention on the Elimination of All Forms of Discrimination against Women);**
- ▷ **Committee against Torture and the Subcommittee for the Prevention of Torture (CAT—monitors the Convention against Torture and Other Forms of Cruel, Inhumane, and Degrading Punishment, as well as its Optional Protocol);**
- ▷ **Committee on the Rights of the Child (CRC—monitors the Convention on the Rights of the Child);**
- ▷ **Committee for the Protection of Migrant Worker and their Families (CMW—monitors the Convention on the Protection of Migrant Workers and their Families);**
- ▷ **Committee on the Rights of Persons with Disabilities (CRPD—monitors the Convention on the Rights of Persons with Disabilities).**

Of these, only the CESCR, CEDAW, and CRC do not have a mechanism in place to receive complaints from individuals, although they may refer such complaints to other relevant committees. This considerably decreases the participation of civil society in these entities; various

groups are demanding more openness in the UN to discuss this issue.

As for the International Covenant on Economic, Social and Cultural Rights, specifically, there is now the possibility of ratification of an Optional Protocol which will allow for a complaint mechanism through the Committee, through “individual communications.” So far, few countries have signed this Optional Protocol and Brazil was not one of them. It is a political struggle to get countries to sign them, and when they do, they are still not entered into force. In spite of this, the Committee organizes, in each session period, a public meeting with NGOs, where they can verbally expose, with the help of videos and documents, comments on State policies to be evaluated by the Committee.

Finally, there are Special Rapporteurs appointed for specific human rights, like the Special Rapporteur on the Right to Food or the Special Rapporteur on Summary Executions. These individuals make up the “Special Procedures” sector of the Human Rights Council and, among other things, receive individual complaints about violations.

Since 2005, there has also functioned the position of Special Rapporteur on Human Rights and Transnational Corporations. Nevertheless, this post is an exception amongst its peers because it does not have a budget or staff, and its mandate does not include power to receive individual complaints. So far, the Rapporteur's work has consisted in consolidating principles around the issue, and he has adopted an ideological orientation towards a model of "shared responsibility" and "voluntary standards" for companies, or what are known as "soft law" instruments. In practice, this does not signify any advances for the promotion of human rights, which has received criticism from various sectors of civil society worldwide.

### »» **Territorial scope:**

The rights addressed in each treaty can be pursued within the territory of each signatory country.

### »» **Possible outcomes:**

The Committees can demand information from the State about the case and, after its evaluation prepare recommendations for it. Meanwhile, the Special Rapporteurs can send “urgent appeals” to the States and, if considered necessary, conduct investigations in the country. In general, a letter should be sent to the country which, if it is in agreement with the procedure, extends an invitation to visit to the Rapporteur who, after that, writes a final report with its conclusions and recommendations to the State.

### »» **Level of community involvement:**

Medium. Once a complaint is sent, the UN agencies usually request more information from the affected communities or pursue an on-site visit, in which the group participates. In addi-

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7 This expression, which literally means “soft law,” refers to a series of standards and principles prevailing in international law, which are not considered mandatory, due to the lack of punishments for non-compliance and the lack of courts in which to enforce them.

tion, there are some human rights organizations which are frequently consulted in their area of expertise which can facilitate dialogue with the UN.

### »» **Critical analysis:**

The main failure of the UN mechanisms is that they do not apply directly to companies, but rather to States. Despite these limitations, it is possible to indirectly affect transnational corporations, in that they frequently act through contracts, concessions or permits given by national governments, which may have been remiss in their duties of protection or supervision. Likewise, the UN treaties stipulate judicial guarantees, which must be respected by member states in cases of human rights violations on the part of businesses. Corruption and collusion of local public authorities with respect to transnationals remains one of the most common reasons for ignoring these obligations.

# ▶ INTERNATIONAL LABOR ORGANIZATION (ILO)

## ▶▶ What it is:

The International Labor Organization, founded in 1919, became the first UN special agency in 1946. By bringing together workers' associations, employers, and national governments, the ILO is considered to have a tripartite structure and is one of the few legitimate organizations to dialogue directly with companies. Seeking to strengthen workers' rights worldwide, the ILO proposes a vision of "fair globalization," which does not directly oppose the capitalist development model, but rather tries to minimize the damage caused by capitalist expansion. As for its structure, the ILO is divided into: a) the Governing Body, the head entity which meets three times per year in Geneva; b) the International Labor Conference, responsible for the adoption and revision of international labor standards, which meets annually in June; c) the Secretariat of the ILO, which focuses on research activities, administration, and meetings, along with the Commissions and Special Committees. The ILO has regional offices, including one in Brazil, which is a liaison with local civil society.

## ▶▶ Legal framework:

The ILO has a series of Conventions and Declarations which make up its legal framework. Among the most important are the Right to Organize and Collective Bargaining Convention (1949), the Abolition of Forced Labor Convention (1957), Convention No. 169--Indigenous and Tribal Peoples Convention (1989), and the Declaration on Fundamental Principles and Rights at Work (1998). With respect to the issue of transnational companies, specifically, a Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy was approved in 1977, with an Addendum in 2000. This declaration can voluntarily be adopted

### ▶ Litigiousness (need for lawyers):

Lawyers are not necessary. However, intervention can only be conducted through an organization representing workers.

### ▶ Cost:

Low. Complaints can be sent to the regional offices of the ILO, which will forward the documents to the responsible entities. Beyond sending the complaint, other likely costs are the sending of new information required by the ILO, as well as sending updates regarding the implementation of its recommendations.

### ▶ Language of complaint:

The language of the affected workers.

### ▶ Duration:

Medium time frame. In general, the ILO only responds after the regular meetings of each of its bodies, which usually occur mid-year (May or June).

by companies, and it deals with a variety of issues around corporate social responsibility at the workplace. Having been adopted in consultation with governments, workers, and companies, the Declaration remains a source of reference, although the ILO cannot directly enforce its implementation.

### »» **Territorial scope:**

The ILO standards and procedures may be used in any of the 183 member states which have ratified the treaties. One important exception is the Committee on Union Freedom (also called the Committee on Freedom of Association), which has jurisdiction to investigate violations within its area of expertise regardless of the ratification of the standards by the member states.

### »» **Monitoring:**

The ILO informs the national and international entities interested in the progress of the cases. This can be facilitated by contact with its regional and national offices.

### »» **Responsible entities:**

Nearly every one of the labor issues worked on by the ILO has a committee responsible for receiving complaints of violations committed by states, which are submitted by workers. For example, the Committee on Freedom of Association receives and evaluates complaints regarding unionizing issues. As for the Tripartite Declaration, the Commission on Multinational Enterprises, linked to the Governing Body, conducts a research survey every three years, in which it collects information from signatory states, businesses, and workers' associations, then issues its conclusions and recommendations. These recommendations, however, are directed towards the States and thus far have been too general to be able to resolve conflicts. It is worth noting that Committee recommendations are binding on the States; however, Commission recommendations are not.

### »» **Accepted topics:**

The ILO standards cover various topics related to labor, including freedom to unionize, child and slave labor, equal opportunity, social security, migrant workers, hours, safety, indigenous peoples, etc.

### »» **Possible outcomes:**

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### ▶▶ **Level of community involvement:**

Medium. One strategy that can be used to broaden participation is third-party communications from organizations, which are accepted as support for the original complaint.

### ▶▶ **Possibilities for action:**

The Tripartite Declaration has its own procedure for resolving controversies with respect to the meaning of its provisions. "Requests for interpretation" can be sent either by workers' organizations or by employers (acting alone or represented by their governments or international entities) to the International Labor Office, which sends it to the Board of the Commission on Multinational Enterprises. A draft response is prepared which, if approved by the Governing Body, is then published in the Office's Official Bulletin, solidifying the ILO's understanding of the topic.

### ▶▶ **Critical analysis:**

The same difficulties present in other international mechanisms can be seen in the ILO. In fact, its corporate responsibility standards are merely voluntary and, even when adhered to by corporations, there is no way to effectively monitor them.

Nevertheless, the tripartite structure is what differentiates the ILO, and it allows for negotiations among diverse players, to a certain degree. The biggest limitation, however, is that the organization only deals with labor rights and does not cover the whole range of human rights.

Some workers' associations research corporate behavior with respect to human rights. In Brazil, for example, one is the Social Observatory Institute,<sup>8</sup> tied to the Central Workers' Union. One tip is to consult these entities for help in constructing a complete profile of the companies, to outline a legal-political strategy with which to confront them.

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8 Its URL is : <http://www.observatoriosocial.org.br/>

## *Sindiquímica-PR v. Fosfértil/Ultrafértil*

- ▶ **Type of violation:** Violations of labor rights (anti-union practices, arbitrary firings, and unsanitary conditions) and environmental damage.
- ▶ **Location of violation:** Araucária, Paraná State, Brazil.
- ▶ **Historical context:** From 2007 to 2008, the company Fosfértil, whose largest shareholder is the transnational Bunge Ltda., violated a series of labor rights of its employees by promoting anti-union activity. A member of the oligopoly of raw material providers in the fertilizer industry, the company, among other things, prohibited the entry of leaders from the Union of Petrochemical Industry Workers of the State of Paraná (Sindiquímica) and discriminated against workers involved in organizing the Industrial Complex of Araucária. At the end of the year, the conflicts intensified and the most serious event occurred in January 2008, when the 95% of the workers went on strike and the company decided to prohibit the entry and exit of workers, leaving one group imprisoned for 70 hours.

Several administrative and judicial measures were taken by the workers and their union, such as complaints to the Ministry of Labor, and the company was cited for some of the matters. However, this did not stop the company from continuing to violate labor rights, committing another series of irregularities with respect to the safety and health of the working conditions, and in the area of ecological impacts. Most of the actions against the company, however, were unsuccessful at first.

In April of that year, Sindiquímica submitted a complaint about the company's labor violations to the Brazilian office of the ILO. The document was prepared in partnership with human rights organization Terra de Direitos and pointed to, among other things: a) the prohibition of union leaders from entering and speaking with the workers; b) discrimination by the company in its employee assessments, against workers who were union leaders; c) dismissal of employees without cause, based on mere allegations of being sympathetic to the union; d) persecution of union leaders, with practices of harassment; e) coercive and intimidating practices towards workers' demonstrations. The company began a process of further criminalizing union leaders (complaints to the police, etc), with the aim of intimidating them.

The workers argued that these facts constituted serious violations of Articles 8 and 9 of the Federal Constitution of Brazil and related rules in ILO Conventions No. 135, No. 87, and No. 98.

- ▶ **Results obtained:** The case was referred to the ILO's Committee on Freedom of Association, which, after its meeting in Geneva in May 2008, sent a request to the Brazilian government to take a position on the accusations against Fosfértil. In a communication in June 2008, the Central Workers' Union also supported the union's complaint. Pressure from the ILO

on the Brazilian government and the negative publicity generated against the company during the international procedure led the company to sign, in November 2008, Terms of Behavioral Adjustment with the Ministry of Labor. Among other terms in the agreement, Fosfertil agreed to widely publicize workers' protections, abstain from any actions contrary to workers' rights to unionize, and pay a fine of R\$20,000 reais in any cases of non-compliance. Informally, though, the company withdrew all complaints about the workers, rehired the workers it had fired, and compensated those who had already found other jobs. In June 2009, the Committee concluded that the agreement had resolved the dispute, and asked to be kept informed of its progress. Currently, the ILO and Ministry of Labor are monitoring its implementation.

# ▶ ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD)

## ▶▶ What it is:

The OECD is an intergovernmental agency which brings together the 30 most industrialized countries in the world and promotes free-market policies. It is comprised not only of the U.S. but also of most European countries, where most of the large transnational corporations are headquartered. Although it has been invited to participate in a “Program of Enhanced Engagement,” in 2007, Brazil is not yet a member of the organization.

## ▶▶ Legal framework:

The main legal mechanism provided by the OECD against harmful corporate activities is the OECD Guidelines for Multinational Enterprises, adopted in 1976. It is not a law or legal instrument, but rather a collection of voluntary recommendations for businesses in the areas of labor relations, the environment, consumer protections, competition, corruption, etc. To date, all member states of the OECD and some others, including Brazil, have signed the document, whereby they agree to promote the Guidelines in companies within their territory. In 2000, they were revised to include National Contact Points (NCPs), and since 2003 they also apply to investments as well as corporate activities, because the financing of large projects also has a large impact on human rights.

### ▷ Litigiousness (need for lawyers):

No. It is a quasi-contentious mechanism, meaning that it is not a forum for legal action, but rather the OECD's own investigation procedure, without participation by the complainant, and whose results are not binding on businesses.

### ▷ Cost:

Sending a complaint and documentation of the facts are practically the only costs for this procedure.

### ▷ Language of the complaint:

The language of the country in which the National Contact Point is located.

### ▷ Duration:

Medium to long term. The spectrum is, at least in Brazil, quite variable, where there are cases that have been ongoing for eight years. In other countries, such as England, the process is generally much faster.

## »» **Responsible entities:**

The National Contact Points are directly responsible for implementing the Guidelines; they are civil servants in certain government departments--which vary by country--and are in charge of receiving complaints related to violations of the principles found in the OECD Guidelines. Once a country ratifies the OECD Declaration on International Investment, it must establish its NCP. In Brazil, it is in the Ministry of the Fazenda<sup>9</sup>, under the Secretary of International Affairs, although representatives from several other ministries may be involved in the process. Additionally, NGOs and labor unions can be invited to participate in actions undertaken by the NCP. It should be noted that the NCPs do not have jurisdiction to issue a final decision or judgment on the case; they can still conduct investigations in a confidential manner to assess responsibility.

## »» **Territorial Scope:**

The NCPs have national jurisdiction, and in some cases can get involved in violations committed outside their territory by companies who are headquartered in their country. This is generally invoked by the involvement of the NCP in which the violation occurred.

## »» **Possible Outcomes:**

In general, NCPs conduct mediation and negotiation in conflicts, and, when that is not possible, they prepare and publish a report about the case, including recommendations to the governments and businesses involved, ranging from promoting consultative processes with the community to suggesting social projects with the affected populations. Another one that could be explored is informing investors about the conclusions, which could influence the approval or suspension of funding given to the company by international agencies.

## »» **Monitoring:**

There is no need to formally monitor the complaint, although it is recommended that advocates continue to dialogue and put pressure on the responsible entities throughout the case. Aside from this, as mentioned, certain groups can be invited to participate in the process.

## »» **Level of community involvement:**

High. To the extent that lawyers are not needed to initiate the process, NCPs can speak directly with the affected groups or their associations.

## »» **Accepted topics:**

Complaints regarding violations of any of the issues addressed in the Guidelines and in the OECD Declaration on International Investment, if the country has signed them.

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<sup>9</sup> The Ministry responsible for economic and monetary issues.

## »» Critical analysis:

There are several flaws in the process conducted by NCPs. First, their conciliatory nature does not aim to hold the company liable, but rather reach a compromise which, in most cases, does not strengthen human rights. In this sense, the emphasis of the Guidelines, which are based on voluntary adoption of corporate social responsibility, can be interpreted as a strategy to distract from the discussion of creating binding rules for corporations. Consultation processes or social projects implemented in local communities do not necessarily signify respect for the community's interests, but rather remedial measures. Second, the information produced during the process cannot be divulged by the parties involved until the final results, which can be a problem when constructing a political strategy. Finally, the effectiveness of the recommendations is low, although the NCP's final report can be used in other administrative and legal spheres.

### SAMPLE CASES

#### CASE 1

## *Dongria Kondh Community v. Vedanta Aluminum Ltda.*

- ▶ **Type of violation:** Environmental damage, forced displacement, threat to the traditional way of life of indigenous communities.
- ▶ **Location of violation:** Orissa State, Eastern India.
- ▶ **Historical Context:** In March 2003, British transnational Vedanta Aluminum Ltda. asked the Indian Ministry of the Environment and Forestry for an environmental permit to construct an aluminum refinery in the Orissa region of Eastern India. The permit was given in 2003, with the condition that the project not involve any deforestation. Disregarding these terms, however, the company began to mine the Niyamgiri area, traditionally inhabited by the Dongria Kondh people, causing forced displacement and threatening their way of life.

In 2005, the victims went to the Supreme Court to demand revocation of the environmental permit; this resulted in a 2007 court decision ruling that the company, which in the meantime had transferred the project to its subsidiary, Sterlite Ltda., must invest 5% of its profits into the local community and monitor the project through periodic reports. In 2008, the project resumed.

Not satisfied with this outcome, the community, with the help of NGO Survival International, began a complaint process with the British NCP in December of that same year. Its conclusion, in September 2009, was that Vedanta did not comply with several aspects of the OECD Guidelines (Ch. V, II b; Ch. 11, 7, and 2), and violated the rights and liberties of the Dongria Kondh community.

- ▶ Results obtained<sup>10</sup>: The report of the British PCN contains a series of recommendations to the company, principally that it “engage with the community,” respect the outcomes of prior consultations with the community, and create social, environmental, and cultural studies of its undertakings, with the goal of guaranteeing the continuity of the traditional way of life for this group. In addition, both parties were to send information to the NCP regarding implementation of its recommendations. The impact of this complaint led the Human Rights Commission of India to demand that the government of Orissa submit a complete report on the project. This conflict, however, is ongoing in the region.

## SAMPLE CASES

### CASE 2

## *Cave and Sipetrol v. Shell*

- ▶ **Type of violation:** Storage practices and operations which harmed public health, the environment, and employees of the multinational.
- ▶ **Location of violation:** Vila Carioca, São Paulo state, Brazil.
- ▶ **Historical context:** In May 2006, the Green Alternative Collective (CAVE) and the Mineral and Oil Products Workers Union (Sipetrol) brought a complaint to the Brazilian NCP against the activities of Shell Brazil (a Dutch transnational) and Esso Brazilian Petroleum (a subsidiary of U.S. company Exxon, based in Houston). A Technical Report by the São Paulo Secretary of Health concluded the companies' activities to be harmful to public health and to the health of the employees of the “São Paulo Distribution Pole;” the report was accepted by the NCP as “Complaint No. 01-2006,” whose final report was issued later that year.<sup>11</sup>
- ▶ **Results obtained:** In this particular case, some of the controversial issues were already under judicial review, which lead the NCP to seek only to mediate the conflict with respect to the parallel issues, without getting any result. It is worth noting that although only Shell was directly involved in the procedure, being the operator of the distribution pole, the NCP excluded Esso from its evaluation. What was described as the result, however, was the implementation of a series of social projects in order to make the company “socially responsible;” the projects were mostly related to increasing Income, and educational and cultural activities. If we consider that this has been the only process completed by the Brazilian NCP, it represents only very relative success.

<sup>10</sup> New facts have currently changed the conflict's situation. In August, 2010, Minister of Environment, Mr. Jairam Ramesh, after years of critics from religious, governmental and non-governmental organizations, questioned the legality of Vedanta's project and decided to block the construction of the mine in Orissa State. This indicates a change in posture from the Indian State and an important victory for human rights, made possible not only through OECD procedures, but mainly as a result of a global campaign led by Survival International, including more than 10.000 letters of complaint addressed at the Indian Government, acts of support to the community from media personalities and the making of a widespread documentary on the case.

<sup>11</sup> The final report can be accessed online at: [http://www.fazenda.gov.br/sain/pcnmulti/documentos/relatorios/relatorio\\_01.06.asp](http://www.fazenda.gov.br/sain/pcnmulti/documentos/relatorios/relatorio_01.06.asp)

# ▶ EUROPEAN UNION (EUROPEAN ECONOMIC AND SOCIAL COMMITTEE)

## ▶▶ What it is:

The European Union (EU), formerly the European Community, is the economic and political association of 27 European states, based on the Maastricht Treaty, signed in 1992, and the Lisbon Treaty of 2007, which gave it legal personhood. Its main internal entities are the European Parliament, whose representatives are elected by universal suffrage, the Council of the European Union (formerly the Council of Ministers), the legislative body which makes political decision, the Council of Europe, comprised of representatives of the various member states and the European Court of Justice, which seeks to make EU legislation compatible with national laws.

## ▶▶ Legal framework:

The EU has a complex legal system, ranging from economic agreements to human rights treaties. In the latter category, the most important documents are the European Convention on Human Rights (1950), and the European Social Charter which, adopted by the Council of Europe in 1961 and amended in 1996, establishes economic, social, and cultural rights and liberties for the citizens of the member states.

## ▶▶ Responsible entities:

Jurisdiction over the European Convention on Human Rights lies with the European Court of Human Rights, before which only individuals, not groups, can file complaints. Along these lines, only States are considered to be subjects of international law (against whom binding decisions can be issued), which substantially impedes use of this space for litigation against transnationals.

The agency responsible for monitoring the European Social Charter is the European Com-

### ▷ Litigiousness (need for lawyers):

No. The following parties can directly file complaints before the Committee:

- 1) European employers' and workers' organizations;
- 2) NGOs with participatory status in the Council of Europe;
- 3) national employers' and workers' organizations;
- 4) national NGOs (when that country explicitly accepts this).

### ▷ Cost:

Low.

### ▷ Language of complaint:

The language of the organization filing the complaint.

### ▷ Duration:

Medium length.

mittee of Social Rights (ECSR), created in 1957. Originally intended to be a bridge between the EU and civil society, it is comprised of 15 independent members elected by the Council of the EU. These individuals represent different sectors of civil society, divided into “employers,” “workers,” and “diverse interests” (i.e., farmers, consumers, environmentalists, families, NGOs, etc.). In addition to preparing advice for various bodies, it also determines whether the laws and practices of the 43 states which signed and ratified the Charter conform with it.<sup>12</sup> To do so, it follows two different procedures:

- ▷ **Monitoring based on national reports, sent in annually by States (each year they report on one of the four thematic groups of rights), with which the Committee issues “conclusions.” If the State fails to take action to implement these decisions, a group of representatives tied to the Committee of Ministers creates, along organized labor, issue a recommendation requesting that the situation in the State be changed.**
- ▷ **The Optional Protocol of 1995, which entered into force in 1998, allows the Committee to receive collective complaints. NGOs and labor organizations are authorized to file such complaints, which, if they meet the formal requirements, are admitted by the Committee. From there a written process starts, with an exchange of memoranda between the parties and, later, a decision on the merits.**

### »» **Territorial scope:**

The Committee can only assess violations committed within the territory of signatory States.

### »» **Accepted topics:**

The main themes dealt with by the Committee are housing, health, education, labor rights, social movements, and discrimination.

### »» **Possible outcomes:**

After a decision on the merits, the ECSR sends a report to the Council which then issues a resolution. If deemed necessary, it will also recommend specific measures to be adopted by the State.

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<sup>12</sup> To date, some states have signed but not ratified the Charter: Lichtenstein, Montenegro, Monaco, San Marino, and Switzerland.

## »» **Monitoring:**

The decisions at each phase of the process are communicated to the parties; however, the internal procedures of the institution cannot be monitored.

## »» **Level of community involvement:**

Medium. The victims cannot file complaints on their own behalf; they must always do it through NGOs or unions. Nevertheless, during the procedure, the parties are generally asked to provide more information and the Committee can convene a public hearing, if relevant to do so.

## »» **Critical analysis:**

There are a series of difficulties within the EU regarding the issue of transnationals. In recent years some movement has been made to consolidate the standards for these actors, but States are still the only ones who can be held directly responsible. There are work groups and seminars in progress, but the EU has not yet taken a definitive stand on the issue.

In regards to the Social Charter, it does not contain specific provisions for corporations. In a few cases, the Committee has accepted complaints involving private actors, but only when the companies were government-funded. The Committee evaluates the direct responsibilities of States and therefore, to date, does not accept complaints against transnationals.

Finally, it is worth noting that the ECSR is only an advisory body, whose work must be approved and recommended by the EU Council, which greatly reduces its possibilities for action. A political project to change this body could include a broadening of the topics accepted by the Committee, as well as in the actors capable of accountability.

## **SAMPLE CASES**

### **C A S E 1**

## *Marangopoulos Human Rights Foundation v. Public Power Company*

- ▶ **Type of violation:** Environmental pollution, damage to public health, and unsanitary working conditions.
- ▶ **Location of violation:** Kozina-Ptolomaida region and Megalópolis region, Greece.

- ▶ **Historical context:** The Public Power Company was a state company from 1950 until 2001, when part of its stock was sold to a private enterprise. In spite of this, control of the company remained in the hands of the Greek government, which remained the largest shareholder (51.1%). Since its founding, the company operated coal mines, the main raw material used in producing its energy, and was also responsible for its distribution. This technique of energy production, however, was becoming quite outdated, especially given the high level of carbon emissions it created.

The people most affected by the environmental degradation were the communities closed to the mines and the power stations, which repeatedly made complaints to the government without success. Besides the communities, the company's workers suffered demonstrated health problems from excessive exposure to mineral and gaseous debris, which engendered a series of lawsuits nationwide. Residents of Ptolomaida won a lawsuit in the Supreme Administrative Court in 2005, but the state refused to implement the decision, which had suspended its environmental license. In addition, review of the company's projects was weak and the violations continued to occur. The victims blamed Greek energy policy for this.

On April 4th, 2005, due to this series of violations, the Marangopoulos Human Rights Foundation filed a complaint against Greece before the CESR, which was declared admissible in October of the same year. This decision was considered a victory, since the Committee declared it had jurisdiction because "although the State did not act as operator, but simply failed to stop the alleged violations in its capacity as a regulator." However, despite the fact that many of the facts had occurred prior to signing on to the Charter, the complainants successfully argued that it was a continuous violation; that is, they argued that for 40 years the company had been carrying out those kinds of activities and continued to do so after the treaty entered into force.

- ▶ **Results obtained:** On the merits, the Committee found various violations of the Social Charter, in the report that it sent to the Council and the parties. After monitoring the Committee's decision, it was apparent that Greece had not taken any steps to implement it; this led the Council to pass a resolution in January 2008 supporting the victims and which, among other things, suggested financial compensation for the affected workers and increase government oversight of the company.

# ▶ ORGANIZATION OF AMERICAN STATES (OAS)

## ▶▶ What it is:

The Organization of American States (OAS), created in 1948, is the most important intergovernmental body of the Western hemisphere, and has its own system in place to address human rights violations. The Inter-American system consists of the Inter-American Commission on Human Rights (IACHR), and the Inter-American Court of Human Rights, which administer and enforce the American Convention on Human Rights, also known as the San Jose Pact.

## ▶▶ Territorial scope:

It covers all countries in the Americas (North, Central, and South), with Cuba and Honduras being the only exceptions.

## ▶▶ Responsible entities:

The Court, established in 1979, is an international tribunal, meaning it is an autonomous judicial body. As such, it directly accepts complaints only against States, not against private actors. The Commission is a first step that does not issue its own rulings, but rather conducts mediations and writes reports, on which it bases its decision whether or not to refer a case to the Court, which it will do if it seems the case will expand the Court's jurisprudence. The affected groups and individuals, therefore, do not access the Court directly, but send their petitions to the IACHR.

## ▶▶ Legal framework:

The main instrument of the Inter-American system is the Inter-American Convention on

### ▷ Litigiousness (need for lawyers):

The Inter-American Court of Human Rights is a contentious forum involving the Inter-American Commission of Human Rights (IACHR) against States, in which lawyers and human rights organizations can intervene. The Commission itself does not require specialists.

### ▷ Cost:

Medium. Besides the cost of drafting the complaint, it must be remembered that the parties can be called to public hearings at the IACHR's General Secretariat in Washington, or for sessions in the Court, headquartered in San Jose, Costa Rica, which can entail expenses.

### ▷ Language of the complaint:

The language of the petitioner.

### ▷ Duration:

Medium-length.

Human Rights, although that is not the only one.<sup>13</sup> This means that only facts occurring after the country's ratification of the treaty can be assessed. In Brazil, this happened on September 25th, 1992. To utilize the Inter-American system, some formalities must be followed. In addition to proving the violation of provisions of some of the documents, the petition to the IACHR must fulfill a series of admissibility requirements, demonstrating, as a general rule: a) that the Commission has jurisdiction over the subject matter, place, and time; b) exhaustion of domestic remedies, meaning the local judiciary should have already been used, to show that it is insufficient to resolve the conflict; c) that the petition was filed within six months of the final judicial decision in that country; d) absence of other international procedures.

### ▶▶ **Possible outcomes:**

Both the Court and the IACHR use an investigative process and give opportunities for all parties to present their arguments. This means that the State is called in to defend itself against the petitioners' accusations. The IACHR can submit recommendations to the State (such as to speed up resolution of the case in domestic judicial procedures), require "preventative measures" of the violating country, or in urgent cases refer the case to the Court. This gives enforcement power to the decisions, as they are like sentences against the States.

### ▶▶ **Monitoring:**

The internal procedure of each case can be monitored in its successive phases, described above. Reports are available on the Commission's website.<sup>14</sup>

### ▶▶ **Level of community involvement:**

Medium. Although the affected group may be called to give testimony about the violations, much of its relationship with the institution can be conducted through an intermediary, such as a lawyer or group that represents it. Nothing prevents them, however, from initiating negotiations between the group and the violating State.

### ▶▶ **Critical analysis:**

The OAS is an organization of states and, therefore, States are accountable to the body. Nevertheless, corporate actions can be addressed in the statement of facts, especially to explain their ties to governmental agencies. Oftentimes states are accessories to the violations of private actors, either through complicity, or by omitting their duties of supervision and control. Thus, good results have been obtained in the IACHR which indirectly affect businesses. Usually relying on the duty of States to protect their citizens, the IACHR has ordered "precautionary measures," such as the cancellation of contracts and permits given to the mining and logging industries, which has huge impacts for indigenous communities. The Court has shown to be

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<sup>13</sup> The set of legal instruments that make up the Inter-American system can be found at: <http://www.corteidh.or.cr/sistemas.cfm?id=2>

<sup>14</sup> <http://www.cidh.oas.org/comissao.htm>

more resistant to this type of argument, and never refers to companies, but rather uses more cautious terms such as “private groups” and “non-state actors.”

## CASOS EMBLEMÁTICOS

### C A S O 1

## *Mayagna Awas Tingni v. Nicaragua*

- ▶ **Type of violation:** Violation of the right of indigenous communities to their traditional territories, and environmental damage.
- ▶ **Location of violation:** Nicaragua, Atlantic Coast.
- ▶ **Historical context:** In 1995, representatives of the indigenous people Awas Tingni filed a petition in the IACHR alleging that Nicaragua had violated their right to their ancestral lands by granting a permit to the company Sol Del Caribe S.A. (Solcarsa) to exploit approximately 62 thousand hectares of tropical forest. The company built highways and deforested the region, while prohibiting the indigenous from entering. The complaint was part of the group's strategy to gain recognition of their traditional territory.
- ▶ **Results obtained:** In Report No. 27/98 of March 1998, the Commission concluded, after... conducting its investigative procedure, that “the State of Nicaragua is actively responsible for the violations to the right to property, embedded in Art. 21 of the Convention, for having permitted Solcarsa to exploit the region without the consent of the community.” In addition, it sent the case to the Court and recommended that the State “suspend, as quickly as possible, all activities related to logging on communal lands until this conflict is resolved or an agreement is reached.” This decision is important because it recognizes the duty of States to prevent abuses carried out by corporations. In August 2001, the Court ordered Nicaragua to demarcate the disputed lands, thereby preventing harmful actions by “third parties,” and to pay \$80 million in compensation to cover the costs of litigation and carry out community projects.

# **MECHANISMS OF FINANCIAL INSTITUTIONS**

# ▶ WORLD BANK – INTERNATIONAL DEVELOPMENT ASSOCIATION (IDA) AND INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT (IBRD)

## ▶▶ What it is:

Created in 1945 through the Bretton Woods treaty, the World Bank is an institution whose initial objective was to finance the reconstruction of post-war Europe. Today, however, it is comprised of five different entities, purportedly aiming to overcome global poverty and carry out the UN Millennium Development Goals, through loans and financing for infrastructure projects, agriculture, health, etc, in the “third world” countries. In reality, these measures deteriorate the autonomy of the receiving countries, because the receipt of funding comes with a series of conditions imposed by the Bank, such as a reduction in social spending. The IDA and IBRD lend money to governments, although they may carry out the project in partnership with the private sector. Since the Bank's only strategy for reducing poverty is the promotion of economic growth on a capitalist basis, the support it grants to transnational corporations results in the advance of neoliberalism and human rights violations in many places. Nevertheless, it has implemented some reforms aimed at increasing accountability.

- ▷ **Litigiousness (need for lawyers):**  
No. Generally an NGO, representing the affected communities, files the Request for Inspection.
- ▷ **Cost:**  
Only the cost of sending the Request for Inspection, because the investigative process is conducted at the Bank's expense.
- ▷ **Language of the complaint:**  
Any language.
- ▷ **Duration:**  
Medium term. After finishing the inspection, Bank management has six weeks to make a decision on the case. It is worth noting that to guarantee an expedient process, it is best to submit the Request well before the end of the Bank's fiscal year (June).

## »» **Responsible entities:**

The World Bank Inspection Panel (WBIP), the first mechanism of this kind within an international financial institution, is responsible for overseeing projects financed by the IDA and the IBRD, two of the five entities of the World Bank. Comprised of three members who are considered to be “independent,” since they lack an employment relationship with the Bank--although they are appointed by it--the WBIP accepts complaints from civil society in the form of a Request for Inspection. After this, it makes recommendations to the Board (the directors and president), which may or may not approve an investigation of the facts outlined in the Request. With the approval of the Board, the WBIP conducts an inspection which involves on-site visits, community meetings, interviews with government representatives, etc.

## »» **Possible results:**

First, if the Board rejects the investigation, it must generally approve a special “Action Plan” for Bank management to deal with conflicts. Alternatively, if the inspection is carried out and a report issued, the WBIP re-sends the case to the Board, which will decide what measures to take (ranging from compensation to cancellation of the project). The Bank may also decide to suspend the project until the outcome of the investigation.

## »» **Territorial scope:**

The WBIP has jurisdiction to investigate projects financed by the Bank anywhere in the world.

## »» **Legal framework:**

The Bank does not have a document outlining rights. It does have “Economic and Social Policies” related to human rights, although the term 'human rights' does not actually appear in the document. They include provisions against forced relocations, pesticide use, environmental impact assessment and monitoring, etc., which can be found on the World Bank's website ([www.worldbank.org](http://www.worldbank.org)) under the heading Policies and Procedures. A project which violates them must be after the review of the Policies, and the Request for Inspection should indicate which policies were violated and what damages have been suffered by the community.

## »» **Monitoring:**

It is possible to monitor the phases of the investigation process on the WBIP website, under the heading Cases and Reports.<sup>15</sup> Nevertheless, it lacks a certain degree of transparency, because the final report is not made publicly available during the process, and when it is available it is only in English. A useful resource for further information is the Bank Information Center, an NGO which monitors and divulges information about Bank projects and policies.

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<sup>15</sup> Reference missing--just URL?

## ▶▶ Level of community involvement:

Low. The Panel and Bank management are the only ones involved in the investigation.

## ▶▶ Critical analysis:

There are numerous flaws in the procedure developed by the WBIP. First, although it is supposedly “independent,” it still conducts the inspection through the approval of the Board, which also ultimately decides which steps will be taken. If we remember that member-countries have influence in the Bank proportionately to the size of their economy, the most important being the U.S., Japan, Germany, England and France, a more forceful stance is improbable.

Its mandate is also reduced because it can only assess violations to the Bank's internal policies and it does not have jurisdiction to investigate projects financed by other entities within the bank, such as the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA), which has its own complaint mechanism.

In addition, the Requests for Inspection can only be submitted before the release of 95% of the project's funding, which is difficult to gauge, as the financing information is difficult to obtain.

Finally, the written complaint will only be accepted after the affected communities have attempted to discuss the problem with Bank personnel in their country without obtaining the desired result. This obviously makes the process more time consuming.

## SAMPLE CASES

### CASE 1

## *Comunidades de Parej Oriental vs. Coal India Ltda.*

- ▶ **Type of violation:** Involuntary resettlement, environmental damage, violations of the rights of indigenous communities, and degradation of cultural heritage.
- ▶ **Place of violation:** East Parej, India.
- ▶ **Historical context:** The Indian government passed a strategic resolution to continue exploring its coal reserves until at least 2020. Since that decision, the Ministry of Coal has approved a series of projects of Coal India Ltd., the biggest coal company in the world, with capital investments and international partners. The World Bank became the financier of Coal India's Rehabilitation Project, which was aiming to expand 25 of the company's mining centers. The prospects for social and environmental impact of these undertakings were so disastrous that the Bank itself provided funding for a mitigation project. However, the

administration of these funds fell to the company itself, which was unable to remedy the many damages to residents of the Eastern Parej region, who had had a series of rights and guarantees violated, were not consulted about the process, and did not receive reparations. They sought to engage with local Bank staff, without success. Those who were able to remain in the area suffered huge losses and a decrease in the quality of life. With the help of the Chotanagpur Adivasi Sewa Samiti (CASS) organization, in June 2001, they filed a Request for Inspection from the World Bank Inspection Panel. It is interesting to note that, in this case, the victims made a strategic decision not to intervene in the financing of the company, but rather in the “mitigation” project; they demanded better reparations and an effective public consultation process.

- ▶ **Results obtained:** The management approved the investigations, which concluded in November 2002, confirming the violation of the Bank’s operational policies. In its Action Plan, however, the management did not suspend its support to the project, initiating only some reparatory measures such as resettlement of all the displaced, grants for traditional farmers, water quality assurance, consultation procedures and a sort of “survival fund” worth \$300,000 for 121 affected people in the area. These recommendations, however, did not hold the company responsible, only specifically addressing the Indian government. This was regarded as merely a partial victory by the victims.

# ▶ WORLD BANK (INTERNATIONAL FINANCE CORPORATION AND MULTILATERAL INVESTMENT GUARANTEE AGENCY)

## ▶▶ What it is:

The International Finance Corporation (IFC) is a World Bank agency which aims to fund projects and investments specifically in the private sector, aiming at “sustainable growth.” It offers technical support and financing to for-profit national and transnational companies operating in developing countries. Nevertheless, its tie to the World Bank demands that it follow a series of social and environmental indicators when evaluating its projects, which means poverty reduction is one of its strategic objectives. Accordingly, IFC policies require it to perform a “social and environmental review” prior to any undertaking, as well as publish a summary of the analysis prior to approving the funding. However, these policies are not always followed. The review is based only on information furnished by the company, and the publishing of summaries can be arbitrary, so the IFC's relationship with civil society and human rights groups is not the best.

In turn, the Multilateral Investment Guarantee Agency (MIGA) gives a kind of “insurance” to projects considered eligible, which are in areas having “political risks,” such as non-compliance with contracts or social instability caused by conflicts. Any business which operates in a member state of the agency can receive financing. It is interesting to note that MIGA works almost exclusively with transnationals, and is not accustomed to choosing projects of corporations in their countries of origin.

## ▶▶ Responsible entity:

The complaint mechanism responsible for these two sectors of the World Bank is called the Compliance Advisor Ombudsman (CAO). It is considered independent (even though it is supervised by the presidency of the Bank), and its mandate has three main functions: a) to me-

### ▷ Litigiousness (need for lawyers):

No

### ▷ Cost:

Low

### ▷ Language of complaint:

Any language.

### ▷ Duration:

Long-term mechanism. The CAO's process is slow and negotiations between the parties can last for many years until an audit.

diate conflicts; b) to oversee audits carried out by the IFC and MIGA; c) to alert the president and management about relevant social and environmental issues.

The complaint process is simple. The affected group must send a letter to the CAO with the name and place of the project, and a description of its negative impacts. Next, the Advisor seeks to mediate the conflict and, if the parties involved reach an agreement, the CAO will publish it and continue monitoring the situation to guarantee compliance. Civil society cannot directly request an audit of the projects, which can only be done by Bank management or its respective agencies. However, if there is not an agreement between the parties, it will conduct an investigation to evaluate whether or not the IFC and MIGA are complying with their own policies. The results of this process are published and the CAO monitors the response of both agencies.

### ▶▶ **Legal framework:**

The IFC and MIGA have Social and Environmental Performance Standards, which are taken into account in selecting projects. The IFC has a specific Policy on Social and Environmental Sustainability; all these are available for viewing in Portuguese.<sup>16</sup>

### ▶▶ **Accepted topics:**

The Standards include provisions about the environment, economic impacts, involuntary dislocation, indigenous communities, working conditions, cultural heritage, public health, and biodiversity.

### ▶▶ **Territorial scope:**

All countries in which IFC or MIGA-financed projects are located.

### ▶▶ **Possible outcomes:**

Either the CAO's mediation reaches an agreement between the parties or the entity investigates the project and makes non-binding recommendations to the IFC and MIGA.

### ▶▶ **Monitoring:**

After receiving the complaint and translating the documents, the CAO has 15 days to notify the complainants about the manner in which it will work to resolve the case. If applicable, a specialist from the entity will personally contact the group. Ongoing cases can be monitored on the CAO website.<sup>17</sup>

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<sup>16</sup> The Social and Environmental Performance Standards can be viewed at: [http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol\\_PerformanceStandards2006\\_full\\_Portuguese/\\$FILE/IFC+Performance+Standards\\_Portuguese.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full_Portuguese/$FILE/IFC+Performance+Standards_Portuguese.pdf)

<sup>17</sup> <http://www.cao-ombudsman.org/cases/>

## »» Level of community involvements:

Low.

## »» Critical analysis:

It is evident that the CAO has a series of structural flaws. The biggest of these is certainly the low level of effectiveness of its recommendations, which are not binding on Bank management. The small degree of civil society participation in the Auditor's process is also a serious problem, which was apparent in the Amaggi case in Brazil, in which hardly any organizations were consulted. Finally, the focus on mediation does not represent a victory for human rights, since the remedies offered are only palliative, slow, and incomplete.

### SAMPLE CASES

#### CASE 1

## *Federation of Ronda Peasants v. Yanacocha Mine S.A.*

- ▶ **Type of violations:** Environmental contamination by mercury, damage to the health of local populations and socioeconomic impacts.
- ▶ **Place of violations:** Horopampa, Cajamarca Region, Peru.
- ▶ **Historical context:** Yanacocha is the biggest mining complex in South America, and has been extracting gold from the Cajamarca region since 1993 with up to \$60 million in resources from the IFC. Because of its huge environmental risks and its use of chemicals, the project was classified as "Category A" by the corporation, making it high priority. In June 2000, a company truck had an accident and released 151 kg of mercury along 41 kilometers of a highway. A large number of local residents were exposed to it and had medical consequences. That same year, an independent investigation by the CAO found serious defects in the company's waste management, as well as in their emergency procedures. After the mercury spill, conflicts in the area heightened, characterized by a lack of consultation with the affected communities and unfair distribution of financial benefits. In March 2001, the Federation of Rondas Peasants submitted a complaint to the Advisor on behalf of local farmers.
- ▶ **Results obtained:** The CAO assisted in organizing a forum about prevention and conflict resolution between shareholders and communities, called the Roundtable on Dialogue and Consensus, with the participation of more than 50 public and private entities. The Roundtable conducted negotiations, promoted development and training of community leaders and company staff, conducted a water impact study and a participatory water monitoring pro-

gram. After an evaluation of the Roundtable, the CAO closed the case in 2006 and published a series of essays on the venture. It is treated as an agreed-upon joint action, although without proper compensation. Therefore, it is considered a relative victory.

## SAMPLE CASES

### CASE 2

## *Various groups v. André Maggi Participações Ltda.*

- ▶ **Type of violation:** Direct and indirect impacts on deforestation in the Amazon rainforest.
- ▶ **Place of violation:** Mato Grosso state, Brazil.
- ▶ **Historical context:** The André Maggi Participações Ltda. Group received over \$30 million from the IFC to finance projects for the cultivation, supply, and export of soybeans and derivative products. This expansion of its activities had serious impacts on agriculture in the state, causing environmental harm to the Amazon rainforest and other ecosystems. Various civil society groups, concerned about the negative impact of these projects, began a public campaign which included sending a request to the Executive Vice-President of the IFC for the CAO to conduct an audit of the project and review its environmental category. This case is notable because it is the only case in Latin America initiated by the leadership of the IFC, rather than by an external complaint.
- ▶ **Results achieved:** The CAO conducted investigations, reviewed all the loan documents, interviewed representatives of the IFC and the Maggi Company, and conducted an on-site visit. Given these activities, it disagreed with the “level B” categorization of the project, which implied fewer social and environmental impacts than the project actually demonstrated. It further concluded that the IFC failed to adequately ensure the sufficiency of the company's Social and Environmental Management Plan, or to supervise its implementation. It recommended that the IFC publicly disclose a new action plan to remedy these deficiencies. Nevertheless, the IFC's only response was to defend its actions by saying that it had already done much to strengthen Maggi's environmental policies. After this, the CAO ceased to monitor the case.

# ▶ INTERAMERICAN DEVELOPMENT BANK (IADB)

## ▶▶ What it is:

Like other international banks, the IADB was created in 1959, is headquartered in Washington D.C. and lends money to governments for development projects in Latin America and the Caribbean. However, it is not always the State which carries out these projects; they also make concessions to private enterprise. Today it is the main source of multilateral financing on the continent. Like the World Bank, the influence of each country within the institution is proportionate to the financial support it brings. This means that countries like the U.S. have 30% of the votes. The IADB makes a political differentiation between Latin American countries (borrowers) and the rich countries (lenders). Together, the former have 50.02% of votes, more than any rich country alone. Nevertheless, it is not far removed from the structure and limitations of the other international financial institutions.

### ▷ Litigiousness (need for lawyers):

No. If the community cannot submit a Request on its own, it can do so through a local representative with written authorization or, in some cases, through a foreign representative.

### ▷ Cost:

Low.

### ▷ Language of complaint:

Any.

### ▷ Duration:

After the MICI accepts the request, the entity has 120 days to conclude the consultation phase. There is no deadline, however, for concluding the investigation.

## ▶▶ Responsible entities:

The Independent Consultation and Investigation Mechanism (MICI) of the IADB is an entity which receives complaints from individuals and communities affected, or at the risk of being affected, by projects financed by the Bank. It covers the preparation, analysis, and execution phases of projects, in which failures can be identified through a Request for Investigation.

## ▶▶ Territorial scope:

All countries which have projects financed by the Bank.

### »» **Legal framework:**

The Relevant Operational Procedures of the IADB, approved by the Board of Directors of the Bank. Being mere conduct guidelines, the procedures and standards of management are not subject to inspection by the MICI. In addition, the policies in effect at the time the violating project was approved, since they are constantly changed.

### »» **Monitoring:**

All definitive reports produced by the MICI can be sent to the complainants, informing them of the status of the investigations.

### »» **Accepted topics:**

The Bank has policies on the environment, traditional communities, involuntary dislocation, transparency, etc.

### »» **Possible outcomes:**

The MICI process involves two phases: a) the request, in which the entity will guide the case after requesting information as well as seeking an agreed solution between two parties: b) the investigation, in which the ombudsman will assess the necessity of an on-site visit for the case, conducted by an independent panel of five specialists. Each phase concludes with the production of a final report, submitted to Bank management, with recommendations that range from alterations to the project to the suspension of financing. It decides on what measures should be taken and publicizes them. The MICI monitors its implementation, subject to any financial compensation to the victims.

### »» **Level of community involvement:**

Low. The procedure is the conducted solely by the investigators.

### »» **Critical analysis:**

The Mechanism does not establish civil liability (including the obligation to pay compensation or reparations for losses and damages), nor can the findings or proceedings of the MICI be used as legal evidence in any country. Moreover, it has the same disadvantages noted in other investigation mechanisms of the other financial institutions.

## *Movement of Dam Victims (MAB) v. Tractebel Energy S.A.*

- ▶ **Type of violation:** Right to fair compensation for losses (it was found that the majority of people affected were not adequately considered on the registers or in the company's compensation plans. Most of them were farmer-miners whose activities were organized according to seasons); right to access land; right to work; right to income and adequate food; (the plant/mill had a strong impact on the right to access land and on mudslides, with serious socioeconomic consequences); right to housing and access to water (the lack of which caused the involuntary displacement of innumerable people, without compensation); the right to cultural and territorial recognition and the collective ownership of land by indigenous and traditional communities (due to the partial flooding of the land of the indigenous Avá canoeing people, without a prior impact assessment, and due to the forced displacement of the Quilombo community of Limoeiro, whose cemeteries were even flooded); and the right to indigenous and traditional peoples to participate.
- ▶ **Place of violation:** Tocantins River, in the municipalities of Minaçu, Cavalcanti and Colinas do Sul, Goiás State, Brazil.
- ▶ **Historical context:** The Cana Brava Hydroelectric Plant is a public concession obtained by the Southern Energy Company (CEM), a subsidiary of Tractebel Energy S.A., owned by the Suez Energy International group, through an administrative sale in 1998 by ANEEL (National Electric Energy Agency). The cost of the \$426 million project was partially financed by the IADB and by the Brazilian National Development Bank, which lent the concessionaire \$75 million and \$138 million, respectively. The project was carried out between 1998 and 2002, when the hydroelectric dam went into operation, creating conflict during the planning, implementation, and execution of the project, with compensation cases still pending today.

The strategy for confronting the company involved a series of actions, not only legal, but also political. In addition to occupying the Bank headquarters in Brazil three times and having set up a permanent camp next to the dam--direct action which brought visibility and political pressure to the case--the MAB, representing the people impacted by construction of the Cana Brava Plant, submitted a request to the MICI in May and July of 2002, arguing that the Bank had not complied with its energy and resettlement policies, did not supervise the project, and did not adequately respond to the concerns of people impacted by it.

- ▶ **Results achieved:** The IADB conducted three socioeconomic assessments in the region impacted by the plant. One was in 2002; a second, called a "social audit," in 2003, and a third through the MICI, between March and July 2005.

Of the three audits, nothing was released to the public from the first one and, from the

18 Afro-Brazilian rural and traditional peoples.

third, only a short summary of its results was made public; the IADB claimed the rest of the information was confidential.

The second audit acknowledged that “the Bank approved a Resettlement Plan which was substantially incomplete in crucial areas. Specifically, during the design of the Plan, insufficient attention was paid to the poverty analysis and the post-resettlement economic and social viability of the vulnerable affected groups,” which was a violation of Operational Policy No. 710, dealing with involuntary resettlements. 180 people were considered “eligible,”<sup>19</sup> 123 of which had a right to some type of individual compensation and 57 of which for a development fund proposed by the Bank. To fund it the Bank provided, at a loss, \$1,145,000 which, in conjunction with the Brazilian government and the company, will reach \$2,740,800.

Not until 2006, however, did the IADB publish a summary of the MICI's Cana Brava report. To avoid disputes with Tractebel/Suez, the IADB refused to publish the entire report, claiming that its policy on Access to Information allows the Bank to decline to publish “confidential or sensitive” information, or information which could “negatively affect relationships between member states and the Bank or between private sector clients and the Bank.”

Still, in order to not have to follow the IADB's recommendations, Tractebel withdrew its funding in 2005.

With respect to the MICI, the complaint helped initiate a process of raising awareness about the violations against workers and communities impacted by dams nationwide. It resulted in the creation of a special investigative commission, comprising members of the MICI, the executive branch, the justice department, the ministry of the environment, the ministry of mines and energy, and the MAB itself. Among other cases being analyzed is the Cana Brava case. The commission has not yet concluded its work. Moreover, the justice department has established terms of behavioral adjustment in order to mitigate damages.

- ▶ Assessment by those affected: The MAB has a register with 808 families affected (riparian people, landless peasants, fisherman, tenants, merchants, tenant farmer, miners, settlers, teachers of schools that have been closed) who still have not received any type of compensation. Currently, some of these families are camping there in protest--or occupying the area--and organized in groups, but without their rights being recognized.

With respect to the compensation fund, the MAB believes that it is insufficient to resolve the social problems caused by the projects, because it does not resolve the main demand of these families, which is to be able to purchase land to resettle on. To date, the fund is discussing the implementation of “development projects.” It is important to emphasize that “the proposed value of the Fund is around half of the profit obtained by Tractebel with the plant in only the second semester of 2007.”<sup>20</sup>

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19 From an initial total of 800 cases (the MAB submitted an additional 135 cases, but those claims were considered time-barred), 652 were analyzed, and the auditors concluded that: a) 424 could not prove their “eligibility,” b) a group of 48 was identified as having benefitted; c) 180 people were considered “eligible,” 123 of which had the right to some type of individual compensation and 57 for enrollment in a proposed development fund by the financial institution.

20 In the second trimester of 2007, the production of electric energy in the power plants operated by Tractebel Energy was 9.017 GWh; of which the Cana Brava plant produced 364.23 GWh (4.04%) of the total. In the same period, the company reported a net profit of \$229.5 million reais. In proportion to the energy produced, the profit made from the Cana Brava plant in three months was \$9.18 million reais.

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