

PEOPLES RIGHTS CONFRONTING CORPORATE POWER IN LATIN AMERICA



Amigos de
la Tierra
América Latina
y el Caribe

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mobilize resist transform



**economic
justice
resisting
neoliberalism**

Bento Rodrigues, Mariana municipality (MG), after the sludge flooding from the Fundão dam.

Photo: Guilherme Weimann/Dam Affected Peoples Movement (MAB)



Friends of the Earth International is the world's largest grassroots environmental network with 75 member groups and over two million members and supporters around the world.

Amigos de la Tierra América Latina y Caribe (ATALC) unites the organization-members of the Friends of the Earth Federation (FoEI) in 13 countries of Latin America and Caribbean.

Our regional and international positions are informed and strengthened by our work with communities and by our alliances with Indigenous Peoples, peasants and women movements, trade unions, human rights groups and others.

OUR VISION:

Is of a peaceful and sustainable world based on societies living in harmony with nature. We envision a society of interdependent people living in dignity, wholeness and fulfilment in which equity and human and peoples' rights are realised. This will be a society built upon peoples' sovereignty and participation. It will be founded on social, economic, gender and environmental justice and be free from all forms of domination and exploitation, such as neoliberalism, corporate globalization, neo-colonialism and militarism.

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1 INTRODUCTION

Petitions to control the power exerted by transnational companies at global level are not new. This was the focus of Salvador Allende's speech before the United Nations (UN) General Assembly in 1972, less than a year before his death on September 11, 1973, when a military coup d'Etat gave way to Pinochet's dictatorship, with Milton Friedman as economic affairs adviser. This was the cradle of neoliberalism in Latin America.

Since 2014, we have once again a process in the UN for the development, by its member states, of an international legally binding treaty on transnational corporations and other business enterprises with respect to Human Rights. Currently, this negotiation process is taking place in the context of a new ultra-neoliberal offensive against peoples in our America; of escalation of violence against territory and life defenders; of greater concentration of power in the hands of transnational capital that is allowed to violate human rights and commit environmental crimes around the world; and the advance of an architecture of impunity that builds walls to protect the profits and interests of transnational companies, through "free" trade agreements and investment protection treaties that threaten peoples' rights and sovereignty as well as public interest policies from the States.

This publication includes cases of systemic and systematic violation of human rights, environmental rights and the rights of affected peoples in eight countries of the region. These are struggles described by members of Friends of the Earth Latin America and the Caribbean, which include denunciations, lessons learnt from resistance struggles and concrete proposals to further develop international Human Rights law, from the bottom up, and to dismantle corporate power. With these proposals, we will mobilize from the local and national level to the international level, following the negotiations of a new binding treaty, which start this year of 2017 with a draft text on the table, in the sphere of an Open-ended Intergovernmental Working Group in the United Nations Human Rights Council.

2 BRAZIL - AN ENDLESS CRIME: BHP BILLITON AND VALE'S SLUDGE STILL BLEEDING

Arthur Viana
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Half past four. The kettle on the stove screams with hot water for my coffee. It's too late: it's now boiling; at some point it always boils. I open the window and I see the sludge.

Almost two years after the largest environmental crime in the history of Brazil, trials are suspended and Samarco, a joint-venture of BHP Billiton and Vale, is planning to resume activities.

The story of the collapse of the Fundão dam, in Bento Rodrigues town, Mariana municipality, in the Brazilian state of Minas Gerais, didn't start here or now. For the sludge to come, the dam had to collapse, and a dam doesn't collapse that easily, or at least it shouldn't. This, the Fundão dam, operated by Samarco SA, collapsed on November 5th, 2015, becoming one of the largest socio-environmental crimes in the history of humanity, the largest in Brazil and the most important one related to mining in the world.

Looking out the window, this is what I see, and please try to picture it: 62 million cubic meters of sludge with mining waste, the amount that flowed out from Samarco's collapsed deposits according to estimations, towards me, towards my house, my animals, my city. I must say it scares me. Better to run, but where to?

First, it is necessary to identify the actors in this story. When we say Samarco SA we are actually speaking of BHP Billiton, an Anglo-Australian company and Vale SA, a Brazilian company privatized during Fernando Henrique Cardoso's administration in 1997². These companies share Samarco's assets through a joint-venture, 50% each.

The Anglo-Australian giant landed in Brazil in 1984³ and in addition to operating through Samarco, it also has operations in the aluminum sector, with shares amounting to 14.8% control of the bauxite mining company MRN (Mineração Rio do Norte)⁴ and shares in Alumar company (Consórcio de Alumínio do Maranhão)⁵. According to a 2017 ranking by PwC consulting, BHP Billiton is the largest mining company in the world and Vale is the fifth⁶. In 2014, a year before the dam collapsed, BHP Billiton's turnover amounted to \$13.8 billion US dollars (only in the first semester of the year⁷); and Vale's amounted to almost \$1 billion Brazilian reais, with a 729% increase in relation to 2013⁸. Yet, despite their sizes and profits, they failed in what was crucial and exposed their crimes: they didn't listen to Joaquim. Let me explain myself:

This is the year 2014, and the Fundão dam is still there, covering all waste sludge that would be spilled on the cities and would

end up destroying the basin of an entire river. The death of Rio Doce, back then, was not even imaginable. During an inspection of Samarco's facilities (remember: BHP Billiton and Vale), engineer Joaquim Pimenta de Ávila - who, as a matter of fact, was the one who planned the dam years before and was now offering consultancy services-- detected cracks, real openings in the works that modified the left lateral wall of Fundão dam⁹.

In compliance with his task at hand, Joaquim referred to this in his report. Despite this, the warning was not a cause for much concern among the company's directors, who a year later, now in 2015, the year the dam collapsed, did not inform the new consultancy firm, VogBR, about the fact that cracks had been detected on the dam the previous year. Samarco (BHP Billiton and Vale) considered this information was dispensable¹⁰.

It was no coincidence, then, that it was precisely this sector of the dam that broke up on November 5th. It took approximately ten minutes after the collapse for the waste to arrive to Bento Rodrigues municipality¹¹. With no sirens ringing to warn the population during situations of emergency, not even the kindness of a forewarning was respected and the city was taken by surprise¹².

If I had known back then, I wouldn't have waited for the coffee. I would have said, listen to Joaquim. But I doubt that CEOs, the important men in suits, hear any other voices beyond that of investors; if they ignored the engineer's voice, they will certainly not listen to the voices of the people affected by their mistakes.

Even before Joaquim's warning, other concerns and alerts were ignored as well: in 2009, RTI company developed an action plan for emergency cases, but the plan was never adopted because it implied excessive costs¹³. The year before, in 2008, the net revenue accumulated by Samarco was more than \$4 billion reais¹⁴.

Warnings had been issued, indeed, but they were systematically silenced by BHP and Vale¹⁵. After the fact (because the required inspection that could have avoided the crime was not conducted beforehand), the Public Ministry released internal Samarco documents, showing that the risks were known by the company's high executives: on April 2015, they talked about the possibility of up to 20 deaths, serious environmental damage and the suspension of business activities for up to two years in case the dam collapsed¹⁶.



Girl in Mariana (MG) during water distribution. Many communities continue to have their rights violated every day, with restricted access to drinking water.

Photo: Leandro Taques/Movimento dos Atingidos por Barragem (MAB)

The risk was known. And the predictions weren't so wrong: the collapse of Fundão killed 19 people and spread mining waste mud down 663 kilometers of rivers, resulting in the destruction of 1469 hectares of vegetation, including Permanent Conservation Areas¹⁷. This was no surprise, not an unexpected event, and it is frightening that they are trying to categorize this as an accident, when it was clearly a stinking crime.

The advance of the sludge into the Rio Doce basin killed 11 tons of fish¹⁸. The Brazilian Environment and Renewable Natural Resources Institute (IBAMA) estimates that out of over 80 species that were characterized as native before the crime, 11 were considered endangered and 12 barely existed in the affected region¹⁹.

The water polluted by the mining waste affected the "Central Atlantic Forest Corridor", a conservation area for various fauna and flora species stretching through Bahia, Espírito Santo and part of Minas Gerais states²⁰. Moreover, the Rio Doce water basin covers 230 municipalities in Minas Gerais and Espírito Santo states, many of which supply their populations - 3.5 million people in total - with drinking water taken from the river²¹.

Access to water, a fundamental human right, was violated by the reckless and criminal actions of BHP Billiton and Vale. Furthermore, thousands of fisherfolk lost their livelihoods: 1249 fisherfolk were registered in the region, and one can imagine that the number is even higher if those that were not registered are added²².

The Comboios Biological Reserve, in the northern part of Espírito Santo state and 500 kilometers away from Bento Rodrigues, was also affected by the sludge. Comboios is the only regular spawning site of the leatherback turtle in the Brazilian coast²³. The assumption is that the Abrolhos National Park, an island ranked as one of the most environmentally diverse in the Atlantic Ocean, was also affected²⁴. The scale of the destruction caused by Samarco was huge, beyond what is measurable, and the damage will be felt for many years on. Nothing could be saved in the path of the sludge, except the companies, which still haven't paid for their crimes.

Life and the planet endured a deadly attack, and unfortunately, it was not the first time: BHP Billiton has many deaths on its record. In 1979, the explosion of a coal mine killed 14 people; in 1986, in a similar case, 12 people died; in 1994, 11 people died²⁵. In 2015, a BHP book registered the death of 180 steel workers from the company between 1926 and 1964²⁶. These only includes the death toll in Australia, where by the way, people are questioning a project taken over by BHP in 2005, claiming that it generates radioactive waste and uses excessive amounts of water. That project is the Olympic Dam mining center, with copper, gold and silver deposits, and possibly the largest uranium deposit in the world according to its extension²⁷.

But the damage caused by the company is not only felt in Australia: in Chile, there are denunciations of copper waste spills²⁸; IndoMet, the coal extraction project in Indonesian forest ecosystems (considered "the worst of the worst"), from which BHP is

trying to evade its responsibility²⁹, can lead the world to an irreversible environmental crisis³⁰.

Many of their crimes remain unpunished because they take place every day, without being tragedies of global dimension. An example of this is the "Carajás Corridor", a 900 kilometers railroad operated by Vale that runs through Brazil between the Para and Maranhao States, invading in its path several agricultural, indigenous, quilombola communities and urban peripheries³¹: Due to complete negligence, since simple caution signals and measures could avoid accidents, there is an average of 2 deaths every three months caused by the passing of the train, without counting the death toll of animals.

Of all their crimes, there is one that stands out: a BHP Billiton mine in Papua New Guinea released, over a decade, millions of tons of waste from copper exploitation in the Ok Tedi and Fly river basins³². This affected 50 thousand people, and its impacts have been felt by 120 traditional peasants and fisherfolk communities in the region. After the scandal was made public, the company abandoned the business: it wasn't good for its image to be associated to the deliberate destruction of nature. Well, BHP is now adopting the same attitude in relation to the crime at the Fundão dam: it is hiding behind Vale, which in turn is hiding behind Samarco, which in turn is hiding behind Fundação Renova, which claims to be completely independent from all of them.

In addition to the deaths and destruction of an entire ecosystem, the actions of mining companies also destroyed livelihoods. Fisherfolk communities lost their fish. The sea of mud buried hectares and hectares of productive lands, rendering agriculture impossible. Communities that were used to go to the market only to buy maybe a package of salt, because they obtained everything

else from their own lands, are now uprooted from their historical and cultural references, and pushed to refuges, to urban life, towards abandonment. Because if men and women in the region were unattended before the collapse, there is no reason to believe they will be taken care of now. Also, some things cannot be remedied: how do you measure the damage caused by a death?

The Krenak people, a traditional indigenous community along Rio Doce, was also irreparably affected and witnessed the profane violation of their sacred waters³³. The white man knows how to destroy nature. Along the same lines, he is unable to understand that he does not have the power to bring it back to life: his money and carbon credits are absolutely ineffective, given the goals they have embedded in their souls. Rio Doce is dead. The CEOs murdered it.

By the way, the attack against Rio Doce is also a case of environmental racism: 84.5% of the people killed by the collapse of the dam were black³⁴. With money, companies try to silence the pain of those affected. But not so much: effective remediation actions are permanently postponed, with judicial delays and trials that come and go and come back again. Most families are still living in temporary housing. New locations are being considered, but none of them are suitable for the lifestyle the population used to have³⁵. In the end, among the choices offered, they have nothing else but to choose the "least worst" option³⁶. After receiving "emergency aid" there is no definition about final compensation sums³⁷. Of the 68 fines imposed to Samarco, only one of them was partially paid (the first in 59 installments). This represents 1 per cent of the total, which amounts to \$552 million reais³⁸.

In March 2016, the federal government, the states of Minas Gerais and Espirito Santo and the guilty companies -BHP Billi-



Indigenous person observes the trail of destruction in Gualaxo do Norte River, a tributary of Rio Doce, the first water spring affected by the Samarco sludge.

Photo: Lidyane Ponciano/Sind-Ute Mg/CUT-MG

ton, Vale and Samarco- signed the Terms of Transaction and Conduct Adjustment (TTAC)³⁹. Based on these terms, the so-called "acordão" (big agreement), mitigation measures were defined and three months later Fundação Renova was created, through which the companies themselves would manage the compensation programs of the damage caused by the crimes of which they themselves are responsible. Unbelievable if it wasn't tragic. This episode could also be titled "The fantastic case of criminals defining and managing their own sentences".

This "agreement" cannot even be considered, since the most essential piece in the story has not been involved in its design: the people affected by the sludge from the companies' profiteering and the State's collusion did not have their voices heard when deciding about how to remediate the damage caused by the companies⁴⁰. It is a fact that the entire planet suffered with the biggest socio environmental crime in the history of Brazil. However, a few people were left without a home, without an income, without any goods, nothing. Maybe it would be interesting to listen to them before signing any agreement. With the absence of the people affected, the Federal Public Ministry (FPM) -which was also left out of the negotiations for the "agreement- had no choice but to reject the terms, and refused to ratify it⁴¹.

The fine according to the TTAC 'agreement' amounted to \$20 billion reais. Does it seem a lot? In May this year, the Public Ministry finally acted more resolutely: it sued the three companies for \$155 billion reais, something considered enough for the "comprehensive restoration" of nature and the people affected (as if this was possible)⁴². Two days after the MPF legal action, a judge at the Federal Regional Tribunal (TRF) ratified the "agreement", which was still in dispute, and gave way to an "atypical" situation from the procedural point of view⁴³. That is why the ratification was immediately reversed by the TRF itself⁴⁴.

Despite this, in the meantime of all the swaying and judicial maneuvers, this is the agreement the companies are following, on the sidelines of law. Fundação Renova acts as if it was the solution to the problem, ignoring being itself --due to the fact that is managed by Samarco-- the cause of the damage that it is supposedly trying to remediate.⁴⁵

On top of this situation where solutions are not given, except for those proposed by the perpetrators of the crime, the criminal actions filed before the legal system against the companies and their leaders were suspended in August this year⁴⁶. The defendant's defense argues the use of illegal evidence during the trial.

The judicial coming and going and the silencing of people affected is a proof of the difficulty of national institutions, the federal and state governments, public bodies, the Judiciary (let alone companies) in finding solutions for the largest socio-environmental crime in the history of Brazil, even though the country holds one of the most advanced laws in relation to environmental crimes, which establishes direct obligations and sanctions to companies. Palliative care is not enough.

Fundação Renova, managed by those who murdered a river and 19 people, will never have the authority to repair the damage that was caused by itself. In fact, Renova's program Chair, Galib Chaim, had a long professional trajectory in Vale, where he

was executive director of capital projects until July of this year⁴⁷. Wilson Brumer, chair of the Board of Trustees of the Foundation, had been executive president of Vale and of BHP Billiton⁴⁸. They only had to change their business cards, but they are still on the same side.

More important than war itself is to know who is on your side of the trench. Adding to Hemingway's famous phrase, I would say that it is even more important to know who is on the other side. And we do know. But how to face transnational corporations that concentrate profits that run higher than the GDP of many countries? How to combat their development logics that put profits above any human rights or environmental concerns? And what legal instruments can we use to face companies so powerful whose operations and violations know no borders and are many times associated among them, like the case of BHP Billiton and Vale?

Here lies the importance of a treaty that holds companies accountable for the crimes committed internationally. If cases were analyzed on a one-by-one basis, the problems caused by these companies could seem a local or national matter. But their actions are very similar in many countries and thus what is local becomes global; and therefore, the solution should have the same scope.

Today, the difficulty to obtain a sentence against the companies with headquarters outside the territories where they act and violate rights is huge. But even greater is the difficulty to make convictions effective in countries where the company operates and concentrates huge political and economic power, in an asymmetric way in relation to the States and in a brutal way in terms of affected communities.

Under the protection of a binding treaty related to human rights that subverts the logic imposed by capital over what is human and that establishes legal instruments for implementation, such as an International Tribunal on Human Rights and Transnational Corporations, the struggle and resistance on the territory can be connected at international level, overcoming borders and joining forces when confronting big transnational corporations.

At the end of the day, there isn't a clearer and more systematic pattern in terms of the actions of these huge corporations around the globe, and especially in the South, than the human and socio-environmental rights violations committed by them everywhere they act. In the same way, they are ensured impunity: Samarco, the holder of many corporate social responsibility awards, is trying to resume its activities soon, without many obstacles, and its new environmental license requests are already underway⁴⁹.

Life that goes on, while others' can't go on, simply because there is no way for them to go on. Whether because there are no more fish, or fishing nets; or no more land, unless you own it; whether because the livelihoods of affected people were destroyed, together with their memories and traditions, or just because, when the coffee water boiled, I opened the window and the sludge came in.



A year after the collapse of the dam, houses from different communities still show signs of the crime. A large house on the Rio do Carmo, part of Rio Doce, in Barra Longa municipality, Minas Gerais, November 2016.

Photo: Douglas Freitas/Amigos da Terra Brasil.

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3 MEXICO - CANADIAN MINING COMPANY BLACKFIRE AGAINST TERRITORY AND LIFE DEFENDERS IN CHIAPAS

Gustavo Castro Soto
Otros Mundos, A.C. / Friends of the Earth Mexico

According to the Canadian Natural Resources Department (NR-CAN), 52% of mining companies in the world are listed on the Canadian stock exchange. Mexico is second in the world in terms of Canadian mining assets outside of Canada. In 2015, 11.3% or \$19.4 billion Canadian dollars of Canadian mining assets outside Canada were in Mexico in the hands of 125 mining companies, only surpassed by the US with 14.5%.⁵⁰ According to Mexico's Economy Secretariat, until 2013, Canadian mining companies represented 69% of foreign mining companies operating in Mexico.⁵¹

In Chiapas State there are 99 mining concessions -to different companies, among them Canadian;- active in 16 municipalities covering one million hectares (25% of the territorial surface of the State).⁵² From 2007 to 2010, mining company Blackfire Exploration, based in Calgary, Canada⁵³, and its subsidiary Blackfire Exploration Mexico SRL, operated in Chicomuselo municipality, mining for barite in the Payback/La Revancha mine, which is located in Grecia communal land, Chicomuselo municipality. To arrive to the Grecia communal land and the mine it is necessary to go through the Nueva Morelia communal land. Approximately 40 thousand people live in Chicomuselo municipality and 90% of the population live under poverty conditions with subsistence agriculture and cattle farming activities.

Environmental leader and local coordinator of the Mexican Network of People Affected by Mining (REMA), Mariano Abarca Roblero, was criminalized and then murdered on November 27, 2009, because of his activities against the negative effects of the Payback/La Revancha mine, owned by Canadian company Blackfire Exploration. Abarca was renowned for his work in defense of land, the right to a healthy environment and against the negative effects of the mine and the systematic human rights violations. He received repeated threats and physical attacks from people linked to the company. He filed legal complaints for this, but these failed nor concluded in punishment for those responsible. However, criminal accusations against Mariano Abarca filed by Blackfire with support from the Canadian Embassy did succeed, and with a rare diligence, for far-fetched crimes, usually used to counter the activity of human rights defenders, such as criminal association, organized crime and attacks against the State, among others, which justified his arrest, imprisonment and subsequent release. The impunity of those who threatened and attacked his physical integrity and the fact that he was detained by the State strengthen the claims that his murder responded to a decision made by the company leaders in collusion with govern-

ment authorities of Chiapas State, which in turn was pressured by the Canadian Embassy in favor of the company's interests.

Before the mining operations began in Grecia and Nueva Morelia communal lands,⁵⁴ both the government and the company violated the right to prior consultation: the government granted mining concession permits without consulting the population, and the company failed to inform them. The company also violated the rights of the inhabitants of Grecia, renting communal lands without the due agrarian processes and without the consent of the entire population, since the effects of mining activities affect all inhabitants and not just the owners of the lands. Therefore, the Mexican State has violated articles 1.1 (Obligation to respect human rights), 4 (Right to life), 5 (Right to humane treatment), 7 (Right to personal liberty), 8 (Right to a fair trial), 15 (Right of assembly) and 25 (Right to judicial protection) enshrined in the American Convention on Human Rights.⁵⁵

Blackfire used different tactics to ensure its investments and impunity for the murder and corruption. The Mexican government guaranteed by law the use of land for mining exploitation as the wherever there were concessions. Owing to this, environmental authorities and other federal and state governmental bodies would facilitate mining investments. The Canadian company managed to obtain political favors from the Chiapas government as well as from the municipal director of Chicomuselo, who received money in his personal account to ensure the project and control opposition. This corruption lawsuit was brought before Canadian authorities, which was dismissed after a few years.

Blackfire executives divided the community. They granted money to communal authorities for them to convince the community and accept the mining project. They also obtained the support of local economic sectors which would benefit from those investments such as taxi and hotel owners, workers, transport companies, all of whom echoed the harassment and discourse of the company against the people opposing it. On the other hand, the Canadian company hired local staff within their ranks. The person in charge of Blackfire public relations had weapons with which he harassed and threatened the people opposing the project.

The workers of the Canadian mining company not only threatened Mariano Abarca, but tried to corrupt him, they harassed him and even beat him. The Canadian company invented charges against him, related to criminal conduct and attempts against the Peace and Integrity of the State, for which Abarca was imprisoned and then released, thanks to pressure exerted at national and



Blackfire facilities in Chicomuselo in Chiapas.

Photo: Otros Mundos/Friends of the Earth Mexico

international level led by Otros Mundos AC / Friends of the Earth. Mariano Abarca denounced for the Canadian Embassy in Mexico City that Blackfire was harassing him and threatening him, so the Embassy would be to blame if anything happened to him. And then he was murdered. The Canadian Embassy itself assisted and advised the company to enable its mining project and the impunity of its actions.⁵⁶

The Mexican government has given all its political and legal support to mining investments, despite the systemic violation against human rights and even other irreversible environmental liabilities. After the murder of Abarca Roblero, the government hindered investigations and did not advance on them. The criminal investigation was not carried out with due diligence, since the facts were not duly explained and the responsibilities of those who acted as direct and indirect perpetrators of the crime were not determined. To this date, the previous findings have returned to the Public Ministry to continue with the criminal investigation.

Mariano Abarca Roblero's murder gave rise to the initiation of a ministerial investigation, number 051/FS10/2009, whereby several people declared as witnesses, among them Mario López Zúnun and José Mariano Abarca Montejo, who stated they saw who was running from the crime scene with a weapon, Jorge Carlos Sepúlveda Calvo, former contractor of Blackfire corporation. Nevertheless, the criminal investigation did not go deep enough to clear up the events; the Public Ministry induced the witnesses to blame one person, saying that other people, who had not agreed to provide testimony, saw that the perpetrator of the gunshots was Sepúlveda Carlos. Additionally, the Public Ministry did not pursue anything else, which would have been important to establish the responsibility, such as identifying the weapon used,

the trajectory of gun shots, the probable height of the perpetrator with reference to the location of the gun shots in Abarca Roblero and Velazquez Rodríguez bodies. The inquest didn't broaden the investigation to interrogate other people who could provide testimonial information about events before and after the crime.

Criminal case 11/2010 at the First Criminal Court based in Cintalapa, Chiapas, includes the facts about the events related to the crime, but lacks information that shows that a line of investigation was developed and exhausted with reference to the probable participation of Blackfire Exploration Mexico executives in the events, even though what happened before the crime renders their involvement highly likely. Their testimonies were not heard at any point, just like the testimony of the deputy Secretary of Government who had voiced life threats against Abarca Roblero.

In 2010, Caralampio López Vázquez and Jorge Carlos Sepúlveda Calvo were arrested. Caralampio López Vázquez and Ricardo Antonio Coutiño Velasco were also detained. Caralampio López Vázquez was an "employee" of the company (Blackfire's human resources and security manager, in addition to translator and driver for a Blackfire executive). Ricardo Antonio Coutiño worked as a "contractor" and owned a truck that he drove for Blackfire. They have all been released now. However, the government used the murder to persecute other political enemies.

By taking Mariano Abarca Roblero's life, the Public Ministry agent started, ex officio, the prior inquiry in January 2010. The judge at the First Criminal Court based in Cintalapa municipality, Chiapas, opened criminal records thus launching criminal proceedings. In June 2013, there was a judgment of acquittal in favor of the only person accused of the crime, Jorge Carlos Sepúlveda Calvo,

former contractor of Blackfire Exploration. In May 2015, the Regional Criminal Tribunal for Area 1 of the Supreme Court of Chiapas State, when solving the appeal filed against the acquittal, confirmed it without any other legal recourse against it. However, the Public Ministry did not follow up the investigation.

In July 2016, the wife of Mariano Abarca Roblero requested to be informed of said investigation, but she hasn't had a reply until this very day. In March 2017, she requested an inquiry and a subpoena on Horacio Culebro Borrayas, Nemesio Ponce Sánchez and Julio César Velázquez Calderón, for them to expand on their declarations. In April, she appeared before the Special Prosecution Office for Homicide Crimes to ratify her request. However, since Mariano Abarca Roblero was murdered and since the only person prosecuted was acquitted, there hasn't been any additional investigation.

The Mexican State failed in its obligation –under American Convention on Human Rights-- to protect the life of Mariano Abarca Roblero, giving priority to corporate interests and responding to the requests by the Canadian Embassy. It also failed to prevent that his life was taken away from him and to ensure his rights, despite knowing he was in danger. The Inter-American Court on Human Rights (the Court or the Inter-American Court) has emphasized clearly that States are obliged to respect the right to life.

The Inter-American Court has established that the State is responsible even when the individual perpetrator is not identified. In order to establish that there has been a violation of the rights enshrined in the convention it is not necessary to determine, as is the case with the domestic criminal law, the responsibility of the perpetrators or their intention, and it is also not necessary to identify individually the perpetrators accused of the violation events.⁵⁷ It is enough to prove that there has been support or tolerance by public authorities in the infringement of the rights embodied in the Convention,⁵⁸ or omissions that enabled these violations to take place.⁵⁹

There are elements to suspect the State is directly responsible for the actions of its agents when murdering the victim; however, even supposing that those who perpetrated the crime were individuals linked to the mining company, the Mexican State's responsibility remains, due to the support and tolerance for the actions that involved impunity with reference to the denunciations by Abarca Roblero and the unjustified arrest suffered three months before the crime. For the Inter-American Court, "It is enough to prove that there has been support or tolerance by public authorities in the infringement of the rights embodied in the Convention, or omissions that enabled these violations to take place".⁶⁰

However, criminal responsibilities have not been established against the corporate intellectual perpetrators who violate human rights beyond their borders. There are also legal obstacles to identify national workers as employees of transnational corporations.

Not even the administrative case against Blackfire on corruption was successful in Canada - a tax, political and impunity haven for mining transnational corporations in the world. This impunity is

strengthened with Free Trade Agreements that enable this impunity by forcing countries to modify laws and other tariff measures, otherwise risking economic lawsuits against them that are so huge that they become unsustainable for governments.

The close link between the interests of States and corporations, the interests of million-dollar investments at stake, prevents us from accessing full justice. Therefore, a Binding Treaty is urgently necessary, to hold transnational corporations accountable for so many human rights violations and irreversible effects on the environment.

50. Natural Resources Department of Canada (NRCAN), "Canadian Mining Assets (CMA) by Country and Region, 2014 and 2015," January 25, 2017; <http://www.nrcan.gc.ca/mining-materials/publications/15406>

51. Additional and detailed information can be found in the report: "Corruption, Murder and Canadian Mining in Mexico: The case of Blackfire Exploration and the Canadian Embassy". Available at: https://miningwatch.ca/sites/default/files/blackfire_embassy_report-web.pdf

52. Gustavo Castro Soto, Otros Mundos, A.C., "El Escaramujo No. 49: La Minería en Chiapas 2015," January 7th, 2015; http://www.otrosmundoschiapas.org/docs/escaramujo/escaramujo949_mineria_chiapas_2015.pdf

53. According to a search conducted on October 25, 2016 by Monarch Registries in Alberta province, Canada, at the Companies Registry of Alberta, Blackfire Exploration Ltd. continues active as a company based in Calgary. Its registered office is 4150, 825-8 Avenue SW, Calgary, Alberta, T2P2T3 and its record office is the same. Directors continue to be Emiliano Canales Ávila, William Brent Willis, Craig Willis, and Bradley Craig Willis.

54. United Steelworkers, Fronteras Comunes and Alerta Minera Canadá, "Report from the March 20-27, 2010 fact-finding delegation to Chiapas, Mexico, to investigate the assassination of Mariano Abarca Roblero and the activities of Blackfire Exploration Ltd." (April 21, 2010), page 6-7, online http://miningwatch.ca/sites/default/files/Chiapas_delegation_report_web.pdf.

55. Part of this document is a summary of the murder case of Mariano Abarca Roblero submitted before the Inter-American Commission on Human Rights (IAHRC) on June 26, 2017, by José Luis Abarca Roblero as representative of the Mariano Abarca Environmental Foundation (FAMA, AC); Gustavo Castro on behalf of Otros Mundos, AC; Jen Moore, on behalf of MiningWatch, Canada; Carlos Gustavo Lozano Guerrero on behalf of the Mexican Network of People Affected by Mining (REMA); and lawyer Miguel Angel de los Santos on behalf of the Human Rights Center of the Law School of Universidad Autónoma de Chiapas (UNACH).

56. According to documents obtained under the Canadian Transparency Law, through the former Department of Foreign Affairs and International Trade, the Canadian embassy workers in Mexico, among them the embassy's political adviser, Douglas Challborn, traveled to Chiapas to meet with the workers of Blackfire Exploration, with state authorities and non-governmental organizations from November 29th to December 1st, 2007. At the time of the visit, the mine had not reached any agreement with the local communities and it had not started its operations. Request to access information to the Department of Foreign Affairs and International Trade of Canada, A-2010-00758/RF1, p. 000157-000159. https://www.scribd.com/document/329929184/Documents-pertaining-to-Blackfire-Exploration-and-the-Canadian-Embassy-in-Mexico-April-2012?secret_password=Y-jr04QATXUmviinRzaAG

57. Cfr. Case 19 Traders. Sentence dated July 5th, 2004. Series C No. 109, par. 141; Case Maritza Urrutia. Sentence dated November 27, 2003 Series C No. 103, par. 41, and Case "Niños de la Calle" (Villagrán Morales and others). Sentence dated November 19, 1999 Series C No. 63, par. 75.

58. Cfr. Case 19 Traders, above note 190, par. 141; Case Juan Humberto Sánchez, above note 184, par. 44, and Case Cantos. Sentence dated November 28, 2002 Series C No. 97, par. 28.

59. IAHRC Case "Mapiripán Massacre" Vs. Colombia. Fund, Remediation and Costs. Sentence dated Thursday, September 15, 2005 Series C NO. 134. Par. 110

60. *Ibidem*, Par. 110



Mariano Abarca at anti-mining meeting at the municipality of Chicomuselo in Chiapas.

Photo: Otros Mundos/Friends of the Earth Mexico

4 HONDURAS - THE CASE OF AGUA ZARCA: FMO (NETHERLANDS), FINNFUND (FINLAND) AND THE CENTRAL AMERICAN BANK FOR ECONOMIC INTEGRATION (CABEI) VS. COPINH

Martha Alejandra Canales Silva and Mario Ernesto Zavala Garay
 Movimiento Madre Tierra / Friends of the Earth Honduras

In Honduras, there are plans for the State to invest \$88 billion Lempiras (4 billion dollars) for the execution of metal, non-metal and hydrocarbon extraction projects in the next 10 years. So far it is estimated that there are 155 exploitation concessions granted, covering a third of the Honduran territory, amounting to 35,000 square kilometers - an area that is larger than the whole of El Salvador.

The Agua Zarca hydroelectric project is in San Francisco de Ojuera municipality, to the North-West of Honduras. The project was established without consulting the population of Rio Blanco, on the Gualcarque River - a Lenca community which was not consulted, clearly in violation of ILO's Convention 169 - as a colonialist project with the purported idea of promoting "clean energy". In Honduras, since the 2009 coup d'Etat, approximately 200 hydroelectric and mining concessions have been granted, protected under the General Water Law of 2009. After the June 2009 coup d'Etat, the government's trend to abandon all legal bans on project concessions, such as the one in Agua Zarca, was strengthened.

The Honduran company Desarrollos Energéticos SA de CV (DESA), has been planning to build the Agua Zarca dam on the Gualcarque River, bordering the wildlife reserve Montaña Verde, since 2009, with an energy production capacity of 21.3 MW. "For the construction and installation of the project, in 2012, the Central American Bank for Economic Integration (CABEI) granted DESA a loan for \$24.4 to \$25 million dollars" and so far, it has earned \$381 million dollars, meaning that it increased its original social capital by 15 times, one of the reasons why the MACCIH is investigating this company⁶¹.

DESA was created amid a critical context for the country, a coup d'Etat, after which a de facto administration was established, led by Roberto Micheletti, who during his term in office passed detrimental laws such as "Decree 233 which repeals all previous decrees that banned hydroelectric projects in protected areas"⁶².

We could add that DESA, being the holder of the concession, started to subcontract other companies, such as SINOHYDRO, a Chinese company, to start implementing the project. This company is very well known world over for several denunciations, in Africa due to the bad construction quality of dams, in Bolivia due to the mistreatment of workers⁶³, and it was also accused by the population in the area as the one to blame for the irreversible pollution of the Macal River that holds the Chalillo dam in Belize.

However, "in response to the increasing conflict (on the Gualcarque River) SINOHYDRO terminates its contract one year later (in 2010) and withdraws". DESA then hired Voith Hydro Holding GmbH & Co. KG, from Germany, to build the turbines .

What happens with DESA and the hydroelectric phenomenon in Honduras is not a coincidence—it is part of the ongoing implementation of the "Latin American interconnected system which in Honduras expresses itself as the Central American Electrical Interconnection System (SIEPAC), which was completed in 2014 after a \$505 million dollars investment. SIEPAC is particularly relevant for the development of private hydroelectric dams in Honduras because it connects the National Electricity Company's (ENEE) grid to a regional infrastructure, and most private hydroelectric projects in Honduras have a private-public agreement (PPA) with ENEE, including projects that have not yet been developed, such as Cuyamel II by CONERSA. This interconnection system will be connected with Mexico to the North and with Panama to the South for them to be the alternative suppliers of electricity to the US and Canada whenever they face electricity deficits in the near future, when fossil fuels become scarce".

Unlike other hydroelectric projects in the country that were implemented with low, or even nonexistent resistance, Agua Zarca has been hindered by persistent opposition by the Lenca indigenous people in the municipality, with the support of the Civic Council of Popular and Indigenous Organizations of Honduras (COPINH) that Bertha Cáceres used to lead. From the outset of the struggle, the members of COPINH traveled to the communities as part of the campaign against Agua Zarca, because, as stated by the Lenca neighbors of San Francisco, the dam would affect the river's ecosystem, which they claim is part of their ancestral territory.

Years later under this same context and after failed criminalization attempts, Bertha Cáceres was murdered in the middle of a conflict over the construction of the Agua Zarca dam in the West of Honduras. Through COPINH (the Civic Council of Popular and Indigenous Organizations of Honduras), the activist had led the protests of local communities against the project.

So far, eight people have been arrested for their potential involvement in the crime, among them (former) military officers and employees of DESA, the company in charge of developing the project. Recently, the person who supposedly shot Gustavo Castro Soto, the only witness of the murder and member of Otros Mundos Chiapas / Friends of the Earth Mexico was also detained.



Gualcarque River.

Photo: Edgardo Mattioli/Real World Radio

After the assassination of Cáceres and strong pressure both by the victim's family and civil society organizations and the international community, important financiers suspended their involvement and the Agua Zarca project was left in a limbo. Among them, we find FMO development bank (The Netherlands) and Finnfund (Finland) and the Central American Bank for Economic Integration (CABIE).

The murder of Cáceres also led German company Voith Hydro to suspend the supply of turbines for the Agua Zarca project. Nevertheless, non-governmental organizations such as Oxfam Germany and the German NGO GegenStrömung ("Against the tide"), maintain their accusations against Voith Hydro and German multinational company Siemens for being co-responsible for Cáceres' death. Siemens is a minority owner of Voith Hydro.

The Honduran State's behavior and actions have been mostly to ensure impunity. Only 4 per cent of homicides are solved. In 2014, there were 3 forensics for every 100.000 inhabitants, and the processes assisted by public lawyers amounted only to 32 per cent, because the number of public lawyers for every 100.000 inhabitants is also 3⁶⁶. In any case, according to reports by CONADEH, the degree of impunity is a structural problem peaking at 90% in Honduras⁶⁷, in addition to Honduras being the fourth country with most killings of environmental activists in Latin America⁶⁸.

In the case of the defense of the Gualcarque River, the State has acted in collusion with DESA and with all hydroelectric companies scattered throughout the country. This manifests itself in police and military officers protecting the "property" and installations of DESA, and also in the excessive use of force, with live bullet shots, as shown in multiple videos by COPINH⁶⁹, in addition to judicial persecution and criminalization --taking into account that Aureliano Molina, Tomás García, Berta Cáceres and other community leaders have all been required by the police--, but also due to its ineffectiveness and the prevailing impunity for the rest of the murders of COPINH leaders, including Paula (2013)⁷⁰, Tomás García (2013)⁷¹, Juan Galindo (2014)⁷² Moisés Durón Sánchez (2015)⁷³, Berta Cáceres (2016).

State support to all hydroelectric projects becomes explicit in the statement published in relation to another current conflict between the Pajuiles community in Atlántida, and HIDROCEP. On August 17, 2017 "the government restates how important it is for the Honduran State to ensure that economic development and renewable energy production projects are carried out", thus showing their affiliation in this type of conflicts.

In Honduras, the struggle of our comrades in the Civic Council of Popular and Indigenous Organizations (COPINH) for the defense of the Gualcarque River is still alive, since the deadly Agua Zarca project has not yet been permanently suspended.

On July 6 this year, Desarrollos Energéticos SA (DESA) corporation, owner of Agua Zarca, announced in a press release "their decision to suspend the project".

But far from recognizing the multiple human rights violations generated by the project and its responsibility in the murder of the coordinator of COPINH, Berta Cáceres, on March 2nd, 2016, the company portrayed its decision as a "gesture of good will that will contribute to reducing tensions and facilitate a solution on the future of this clean and renewable energy initiative".

The company writes that "we feel proud for the important benefits generated and the contribution that this project could continue to bring for the development of Honduras and its communities". "Agua Zarca will never impose a project upon any community", they added, explaining that the project is suspended with the intention to open a "voluntary, transparent dialogue, free from external influence" with the communities that would be affected by the project. This ignores the criminalization and violence processes that have been implemented against COPINH members and does not consider that Sergio Rodríguez, former Technical and Environmental Manager of DESA and Douglas Bustillo, former Security Director of DESA are both among the people accused for the murder of Berta Cáceres.



Berta Cáceres Lives.

Image: www.radiocomunitarias.info

At the same time, the two European development banks that funded Agua Zarca, FinnFund (Finland) and FMO (the Netherlands) announced that they are officially withdrawing from the project, over a year after having expressed this intention. "Their exit responds to the denunciations and the relentless struggle by COPINH against banks' funding for projects that openly violate the rights of Lenca communities and that are imposed and developed through the murder of leaders such as Berta Cáceres and Tomás García", wrote COPINH in response to the announcement. However, the organization denounced that "FMO and FinnFund have ignored COPINH's recommendations regarding a responsible exit", since they did not recognize their own role, and DESA's role, in the murder of Berta Cáceres and the other human rights violations perpetrated against the members of COPINH throughout their struggle for the defense of the Gualcarque River.

Companies are often responsible for human rights violations in countries such as Honduras, where the structure of power is favored by the State, where rules are weakened to the benefit of big capital. The crimes perpetrated by said companies are left unpunished due to gaps in international law, the absence or weakness of national policies or the corruption of the judicial system, where, as in the case of Honduras, links can be drawn between representatives of the State institutions and transnational companies. We urgently need an instrument that reigns in the architecture of impunity behind the crimes committed by companies, which currently allows them - as in the Agua Zarca case - to continue operating, even when there are pending processes that have not been dismissed and an increasing wave of criminalization against environmental defenders and social organizations.

61. La Prensa news article (July 13, 2017, 01:01 pm), MACCIH anuncia líneas de investigación por caso DESA, La Prensa [website] accessed on: <http://www.laprensa.hn/honduras/973636-410/acusan-a-exalcalde-por-autorizar-proyecto-de-agua-zarca>
62. Environmental Justice Atlas (April 1st, 2013) Agua Zarca Honduras Hydroelectric Project, [Website] accessed here: <https://ejatlas.org/conflict/proyecto-hidroelectrico-agua-zarca-honduras>
63. El Deber news article (January 10, 2017) Créditos para Sinohydro pese a denuncias [website] accessed here: <https://www.eldeber.com.bo/bolivia/Creditos-para-Sinohydro-pese-a-denuncias--20170110-0104.html>
64. Environmental Justice Atlas (April 1st, 2013) Agua Zarca Honduras Hydroelectric Project, [Website] accessed here: <https://ejatlas.org/conflict/proyecto-hidroelectrico-agua-zarca-honduras>
65. CEHRODEC (May 2017) Report by the Observatory of Natural Resources and Human Rights 2016, [PDF] Accessed here http://cafodca.org/uploads/documentos/Libro_Informe_de_L_Observatorio.pdf Pages 5-6
66. La Prensa News Article (December 21, 2014) Honduras: 90% de los delitos quedan en la impunidad, La Prensa [website] accessed here: <http://www.laprensa.hn/honduras/778877-410/honduras-90-de-los-delitos-quedan-en-la-impunidad>
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70. <https://copinhonduras.blogspot.com/2014/07/cuentan-los-pueblos-que-viven-por-el.html>
71. <http://www.soawlatina.org/reportajefotos.htm>
72. <https://www.copinh.org/article/copinh-asesinan-a-juan-galindo-luchador-por-las-tie/>
73. <https://nicaraguaymasespanol.blogspot.com/2015/05/honuras-asesinan-lider-comunitario-del.html>

5 URUGUAY - PHILLIP MORRIS LAWSUIT AGAINST URUGUAY

Alberto Villarreal
REDES / Friends of the Earth Uruguay⁷⁴

Phillip Morris (PMI), the biggest tobacco company in the world, with administrative headquarters in Lausanne, Switzerland (although originally a US transnational corporation) deployed an offensive tactic against public health policies that different countries - among them Uruguay- passed and implemented in compliance of their obligations under the only binding multilateral convention related to the protection of health in the framework of the World Health Organization (WHO), the Framework Convention on Tobacco Control (FCTC).

The tobacco company filed a complaint at the International Centre for Settlement of Investment Disputes (ICSID) that operates under the World Bank sphere, challenging measures and laws adopted by the Uruguayan government to protect its citizens against the proven health risks entailed by the consumption of tobacco products, arguing noncompliance with the Bilateral Investment Protection and Promotion Agreement signed between Switzerland and Uruguay in 1988 (and ratified in 1991). ICSID is one of the main fora for resolution of investor-State disputes, its decisions cannot be appealed and it has been included in many free trade and investment agreements, offering companies a way to coerce States and thereby allowing corporations to impose their interests on them. When companies file a lawsuit against the State under Free Trade Agreements (FTAs) or Bilateral Investment Treaties (BITs), an ad hoc tribunal is established, made up by three arbitrators chosen from a select group of international arbitration companies, and who sometimes act as judges and others as lawyers of TNCs, and even some have been members of the Boards of large transnational companies, therefore biased and acting under conflict of interests⁷⁵.

The rules and proceedings for the protection of foreign investments included in BITs and in the investment chapters of FTAs are a powerful weapon used by transnational corporations to make their pursuit of profit prevail over and at the cost of peoples' rights. Both BITs and FTAs are the result of a neoliberal economic doctrine imposed against the popular will in the last decades of the past century, which has caused multiple crisis that have affected and still affect the immense majorities, while benefiting a few who concentrate more and more resources.

Under the previous administration (2005-2010) of current Uruguayan president, Dr. Tabaré Vázquez, the first left-wing government of the country passed a series of unprecedented measures to protect the health of citizens and combat the scourge of tobacco use, in compliance with the commitments it made when

ratifying the WHO's FCTC, adopted in 2003 and in force since February 27, 2005.

Uruguay was back then the first Latin American country that banned tobacco ads on the media and smoking in public and work places (March 2006), and imposed higher taxes on the sales of these products. It also established very strict rules for the commercialization of tobacco products that became law in March 2008, including mandatory health warnings and deterrent photos that must cover 80% of cigarette packs, tobacco packs and advertisement in sales points, and the prohibition to sell more than one product per trademark (for instance, only one type of Marlboro) to avoid the sale and deceitful advertisement of "light" varieties and other supposedly less damaging tobacco products.

This last set of commercialization rules were the specific target of PMI's lawsuit, which demanded the Uruguayan government compensation for damages, in addition to requesting their annulment. PMI argued that the above-mentioned rules implemented by the Uruguayan government violated four of its obligations under the BIT between Switzerland and Uruguay:

1. Do not hinder the management, use, enjoyment, growth or sale of investments through "unjustified" or "discriminatory" measures (Article 3 (1));
2. Provide "fair and equitable treatment" to the plaintiff's investments (Article 3 (2));
3. Abstain from expropriation actions, except if they serve a public end and the corresponding compensation is paid (Article 5 (1)); and
4. Respect its investments obligations, and specifically, its commitments under the WTO's TRIPS agreement (Trade Related Aspects of Intellectual Property Rights) and the Paris Convention for the Protection of Industrial Property (in its Article 11).

In short, the company argued that the measures adopted by the Uruguayan government represented a discriminatory, unfair and unequal treatment and that they were equivalent to an expropriation of their intellectual property without due compensation.

In their defense, and objecting ICSID's jurisdiction over the case, Uruguay argued very reasonably and convincingly in its written submissions and presumably during the oral hearing (to which the interested public seldom has access), that:



Tabaré Vázquez, Uruguayan president and promoter of anti-tobacco policy in the country since 2006.

Photo: Uruguayan Presidency

a. Public health measures are explicitly protected against lawsuits by "Swiss" investors according to the BIT terms between Switzerland and Uruguay (Article 2).

b. PMI should have pursued first an amicable settlement (for 6 months), and in case of not obtaining one, it should have resorted to Uruguayan national courts with its demands (for 12 months), before resorting to the international arbitration system at ICSID, terms and processes that were not complied with.

c. PMI's business in Uruguay cannot be considered an investment, since according to Article 27 of the ICSID Convention, in order to be considered as an investment, such needs to contribute to the development of the receiving country, and Uruguay argued in its defense that PMI's businesses in the country represented a threat to its development that had already costed the government \$783 million dollars between 2004 and 2009 as part of the health costs associated to tobacco use, which kills five thousand people per year in Uruguay, over a total 500,000 smokers, half of which will die of cancer according to estimations.

d. The provisions on the "most favored nation" treatment included in the clauses on "fair and equitable treatment" of the BIT between Switzerland and Uruguay are not applicable to dispute settlement. This is in relation to point 2 in PMI's lawsuit, that stated that in other BITs Uruguay does not demand what has been pointed out here in point b. of the Uruguayan defense team, and allows investors to take their demands directly to arbitration

in international tribunals, and therefore, according to the most favored nation and fair and equitable treatment provisions in the BIT between Switzerland and Uruguay, Uruguay would be forced to provide these same conditions to Swiss investors.

This lawsuit was not an isolated case, but a strategy orchestrated by the largest tobacco company in the world with the aim to intimidate the countries that try to protect the health of their population and comply with international obligations in the framework of the WHO's FCTC, and ultimately to weaken this unique multilateral treaty on health protection.

But the Phillip Morris lawsuit against Uruguay was identified at international level as one of the most arbitrary and unreasonable lawsuits, and thus it contributed with the discussion at global level about the excesses of the investor-State dispute settlement mechanisms enabled by these treaties, and about the thriving and immoral industry of law firms and lawyers who obtain profits from this system and promote and benefit from the multiplication of lawsuits filed by investors against States.

Uruguay also had the powerful support of the World Health Organization and the Pan American Health Organization, who presented themselves as "amicus curiae" in defense of Uruguay, when most of the times it is non-governmental organizations that present themselves as "amicus curiae" and are generally rejected by arbitration tribunals.

VII. LAUDO

590. Por los motivos esgrimidos supra, el Tribunal decide lo siguiente:



Design: Nicolás Medina, REDES - Friends of the Earth Uruguay.

It is not bold at all to presume that it was partly thanks to all these circumstances that the ICSID arbitration tribunal acquitted Uruguay from any responsibility in the case, to save their reputation and the reputation of the international investment protection regime as a whole.

Despite and beyond the ruling in favor of Uruguay in this particular case, there is no doubt that the investor-State dispute settlement system through international arbitration is an instrument that confers extraordinary powers to investors and transnational companies by considering them equals to States before the law, when they indeed only care about their profit interests, while States care (or should care) for the general interest and the common good, and in this case in particular, for the right to health of Uruguay's population.

Meanwhile, the arbitrators of the ad hoc tribunal that is established when one TNC files a lawsuit against a State, are paid on an hourly basis for their services, and therefore the proliferation of cases benefits them. Thus, international arbitration tribunals have become a lethal weapon against democracy and sovereignty, and more and more governments understand today that it is necessary to review, reform or even eliminate this biased system of conflict resolution and the BITs that promote and sustain it.

In addition, the FCTC is not the only public interest multilateral treaty whose national compliance laws have been challenged by investors and transnational companies. Given the ambiguity of BITs and investment chapters included in FTAs, and the structural vices and the huge discretion within arbitration tribunals to interpret them, it is not far-fetched to say that all multilateral treaties of public interest, on environment, human rights and others,

are threatened by this unfair system of international arbitration, inasmuch the national laws enforced to comply with them can be the target of lawsuits by transnational corporations and investors that are considered equal to States thanks to this investor-State dispute settlement system.

Transnational companies such as PMI have deployed all their power to obtain a wide range of rights and a system to protect their interests that has come to fruition through BITs and the investment chapters in FTAs. The resulting regime enables transnational companies to file lawsuits against States before international arbitration tribunals, while States or communities don't have a protection system that allows them to seek justice before an international court, when their rights are violated by TNCs. In the case of PMI, neither the Uruguayan State whose ability to define, decide and implement public policies was questioned, nor the victims of deceitful advertisement and the sale of tobacco products that are detrimental to health, had a legal system and an international court that allowed them to sue the company for its actions that violate human rights.

BITs, together with FTAs, are part of the architecture of impunity that on the one hand protects transnational corporations so that they do not have to take responsibility for their human rights violations, and on the other hand provides them with all kinds of privileges and even the power to challenge public policies and sue States when they consider that their profits are being affected or expropriated.

Therefore, it is key that all countries of the South, following Ecuador's example, conduct a thorough audit of their BITs that allows them to assess, among other things, the impacts of the clauses that restrict the public policy space of States and how and in what way they have threatened regulations designed in the interest of the public and human and environmental rights. In addition, just like Ecuador, it is key that Third World countries denounce these agreements and refuse to accept the continuity of the investor-State dispute settlement system.

In addition to denouncing the BITs and the investor-State dispute settlement system, Third World countries like Uruguay, should actively participate in the negotiations and promote a binding Treaty in the framework of the UN on transnational corporations and human rights to put an end once and for all to the impunity of TNCs, and seek justice for the affected people and communities.

Said treaty should:

- reaffirm the hierarchical supremacy of international human rights laws (including the human right to health) above commercial and investment laws.

- force States to refuse accepting human rights issues being decided in international investment and commercial arbitration tribunals

- establish an international court on TNCs and Human Rights where people and communities affected by TNCs and their activities can sue TNCs and obtain justice.

74. Modified version of an article written by Alberto Villarreal titled "Philip Morris lawsuit against Uruguay", published in America Latina en Movimiento, ALAI, in May 2013.

75. Olivet C and Eberhardt P (2012), "Cuando la injusticia es negocio, Cómo las firmas de abogados, árbitros y financiadores alimentan el auge del arbitraje de inversiones", CEO and TNI, pg. 8

6 ARGENTINA - THE ICSID AND WATER IN ARGENTINA: IMPACTS ON HUMAN RIGHTS AND CONSTITUTIONAL RIGHTS

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In 2006, after 13 years of privatization, the Argentinian State recovered its largest drinking water and sanitation company, known today as Aguas y Saneamiento SA (AySA). It had been the largest sanitation system granted in concession in the world, with six million users.

The water company was of meaningful relevance since its foundation in 1912, when it was created with a public health goal in mind: to stop the yellow fever epidemics that hit Buenos Aires city since late 1800s. Obras Sanitarias de la Nación centralized as a State-owned company the services for the entire country until 1980, when the management of the service was given to the Provincial governments, while the company kept the service supply for the capital city and its metropolitan area. In the 90s, the economy of Argentina was transnationalized through the massive entry of capital that was granted public utilities concessions, among them water and sanitation in several cities, including Buenos Aires city and its metropolitan area, and in other provinces such as Santa Fe, Mendoza, Tucumán and Córdoba. In 1993, then president C. Menem issued a decree to privatize Obras Sanitarias de la Nación as a whole. All rights were transferred to Aguas Argentinas SA corporation for 30 years. However, the liabilities and debts of the company were not transferred to the privatized corporation but were instead left to the State to deal with. The majority partners in this new corporation were Suez Lyonnaise des Eaux-Dumez and the national group Soldati⁷⁶.

After privatization, the utility was known for the negligent operation of the service, which caused a water imbalance and the rise of the water tables, which in turn contributed to the pollution of the Puelche Aquifer that supplies those users without a running water connection in many areas of Buenos Aires Province. However, under this system the privatized utility supplied degraded drinking water (due to excess chlorine, cloudiness, etc.), using Río de la Plata as the source for water and at the same time as sewerage end-disposal, generating health risks. It was also responsible for failing to build essential works such as the fourth maximum sewer and the effluents treatment plant in Berazategui city. The area assigned was covered according to the payment capacity of users, thus generating the exclusion of large scores of population and low water pressure in other places.

Shareholders in the corporation obtained extraordinary profits while raising tariffs by up to 475%, although it continued generating financial debt.

In March 2006, then president N. Kirchner revoked through an executive decree the concession held by Suez Lyonnaise des

Eaux Dumez multinational corporation and the Soldati group (national) together with Aguas de Barcelona, Anglian Water and Compagnie Générale des Eaux, in addition to two more nationals: Meller and Banco Galicia. The new AySA (Aguas y Saneamiento SA) corporation was created, with 90% of shares owned by the State as non-transferable, while the remaining 10% was assigned to the water sector workers.

While the recovery of the privatized utility in the Argentinian case was not featured by large street confrontations as in the case of Bolivia, it was the result of citizens mobilizations and years of denunciations for lack of compliance, which many times violated basic human rights.

Because of its disagreements with the State, Suez filed a complaint at ICISID for \$1.3 billion dollars. ICISID is a World Bank tribunal, where conflicts between companies and States are resolved. It was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, (the ICISID Convention). The ICISID Convention is a multilateral treaty established by World Bank executives to comply with the Bank's objective of promoting international investments⁷⁷. The World Bank aimed at improving the atmosphere of mutual trust between investors and the receiving States and thus promote industrialized country investments in developing countries. Argentina accepted its jurisdiction under the C. Menem administration as an international insertion strategy, thus giving away legal sovereignty to international tribunals.

Investment agreements are a powerful tool in the hands of corporations that allow them to challenge legislation and measures adopted by States regarding extremely important aspects such as regulations aiming to protect workers' rights, public health, and in this case, the environment and the supply of services. Foreign investors thus obtain more legal protection and privileges than nationals and other social actors.

To the same extent it opened itself to foreign capital, Argentina received the largest number of international arbitration claims in the years following the 2001 crisis and its related measures, such as the freezing of tariffs and the depreciation of the Argentinian Peso in 2002. *Up to now, the country has faced 59 claims, most of them at ICISID. This makes it the country with the most claims in the international arbitration system.* Investor-State claims have risen in the past two decades, from a total of three known cases under treaties in 1995, to 767 known cases today⁷⁸.



Children playing with water at Conurbano bonaerense.

Photo: Friends of the Earth Argentina

In 2010, four years after the recovery of the privatized utility and 5 days after the UN declared "safe and clean drinking water and sanitation a human right essential to the full enjoyment of life and all other human rights", the International Center for Settlement of Investment Disputes (ICISD) ruled against Argentina⁷⁹.

This ruling was made effective in 2015⁸⁰, when ICISID sentenced Argentina to pay \$405 million dollars to Suez for having canceled the agreement in 2006. Even though Argentina requested the ruling to be rendered null, this request was rejected in May this year⁸¹, thus confirming the sentence to pay said amount to the three plaintiffs: the French group Suez, the Vivendi holding from France and Spanish corporation Aguas de Barcelona.

Representatives of the current administration have not questioned this fact, although the payments determined by the ICISID are not mandatory. Under the new neoliberal wave in the country, these situations would be frequent, generating public expenses which would be completely counterproductive to the times of crises we are experiencing. Ever since the new administration took office in 2015, there have been numerous propositions for Free Trade Agreement negotiations and attempts to conclude pending negotiations such as the Association Agreement with the European Union. In addition, M. Macri's administration committed to honor the ICISID arbitration awards still pending of payment⁸². Everything indicates that during this administration, transnational links with the State will be deepened or resumed, as pointed out by the officials that resumed dialogue with Suez prior to the ICISID ruling against Argentina⁸³. In addition, similar mechanisms to those already seen in the 90s are resurfacing, such as tariffs hikes, which in the case of water, amounted last year to a 375% increase that is most damaging for the poorest people and community spaces such as pensioners centers and neighborhood clubs, which see their activities at risk since it is impossible for them to continue paying these rates. To solve this critical situation, the State has opened a registry for "social rates" that is stacked with bureaucratic requirements and is therefore scarcely implemented⁸⁴.

Our country's problems with water multinationals are not only related to Suez: in 2013, a lawsuit by five other companies was settled, with the purpose of unblocking foreign investment and in the framework of the negotiation with vulture funds. Corporations benefiting from that settlement included Asurix and Vivendi (with Aguas del Anconquija, from Tucumán). The companies received National State bonds as payment. In addition, there is a pending case against the country, initiated in Buenos Aires following the decision by then governor of the province, F. Solá, who revoked the water delivery concession held by Aguas del Gran Buenos Aires, and a lawsuit filed at ICISID as well for \$40 million dollars, by the French corporation Sauri that exploited the water delivery service in Mendoza, which is awaiting a direct negotiation with Argentina⁸⁵.

This shows the extensive legal activity and the high expenses incurred by the Argentinian State for having accepted ICISID's jurisdiction and having signed numerous BITs (Bilateral Investment Treaties). Under these arbitration procedures, States always lose huge amounts of money paying private firms of lawyers and expenses associated with the cases. Even though the ruling may be favorable, they still must disburse absurd sums of money at the cost of other expenses in the country. According to the OECD (the Organization for Economic Cooperation and Development), legal costs average \$8 million dollars per case⁸⁶. That means that the expenses for Argentina's 59 cases add up roughly to \$472 million dollars on average. The claims as such mount up to skyrocketing sums that turn them into new sources of foreign debt.

In addition, the ICISID arbitration system is questioned for several reasons. The disputes are decided by a tribunal made up of three arbitrators who come from the private sector and incur in clear conflict of interests with their activities. Unlike judges, there are no guarantees of independence or impartiality, they do not have certainty in their positions, they are allowed to have other paid jobs, they can still practice law in parallel and they don't have a fixed salary⁸⁷. They are paid fees for each case in excess of \$3000 dollars per day. Arbitrators have vested interests to please in-

vestors and are plagued with conflicts of interest that put their impartiality into question.

Today, almost 10 years after the recovery of the privatized utility back to the hands of the State, Argentina is still litigating cases related to water at ICSID. Of the 59 cases filed, 9 correspond to water claims⁸⁸. Of these 9 cases, 5 have had rulings against our national interests, thus turning Argentina into a “serial payer” of claims in this sector, related to nothing less than a commons that is indispensable for life. Today, 10 years after its recovery, the privatized company continues generating losses and harm to the country.

In this context, we consider it crucial to support the development of an international legally binding instrument on transnational corporations (TNCs) and human rights⁸⁹.

This instrument should reassert the obligation of TNCs to respect Human Rights over their profits, including among these rights, the right to water.

The instrument should also reaffirm the State obligation to protect Human Rights against violations perpetrated by TNCs, such as the case of the recovery of AySa in the hands of the State, which cannot be understood as an attack on transnational corporations, but as a sovereign decision in defense of public health and the environment. We must not allow water speculation and the privatization of commons. States should ensure that TNCs in their territories respect Human Rights, including environmental regulations.

The power of TNCs undermines sovereignty and casts a shadow of doubt on the role of the public sector and its undisputable link with the inalienable rights of the population. This case clearly shows that international investor-State arbitration tribunals allow TNCs to coerce public policies. Instead of promoting investments for Southern countries’ “development”, arbitration ensures profits for transnational corporations at the expense of vulnerable countries. It is necessary to reaffirm the unquestionable hierarchical supremacy of international laws on Human Rights.

Water is a commons whose value exceeds economic approaches. Water is indispensable for life and that is why it is a fundamental human right. It was so recognized by the UN on July 28, 2010. This right has no price and does not generate profits, that is why it cannot be governed by the rules of globalization. The struggle for access to drinking water is also a struggle for fundamental Human Rights. In Argentina, the right to water is not enshrined in the Constitution, however, Article 41 of our National Constitution establishes that “all inhabitants shall enjoy the right to a healthy and balanced environment that is suitable for human development and for productive activities to meet present needs without compromising the needs of future generations; and they

have the obligation to preserve it”. All this entails an inextricable obligation by the State to protect water basins and secure access to safe drinking water in sufficient quantities and good quality for all the country’s inhabitants.

Our water company has expanded its networks and continues addressing challenges. One of them is to reach 100% sanitation and drinking water coverage within the concession area by 2018, in a sustainable way and through the promotion of social inclusion. Water traders discuss the “profitability” of the company, obscuring the analysis with threats of economic valuation without considering the social and environmental variables associated to public health⁹⁰. The company faces new challenges currently, including advancing towards economic self-sufficiency and avoiding funding from International Financial Institutions (IFIs); allowing access by users to public information, in full compliance of decree 1172/2004 on access to public information; as well as promoting citizens participation in ways that are in line with the experience accumulated in the years following the 2001 crisis, when social struggles have been deeply involved in defending the public sphere.

Nation States should recover the ability to legislate in defense and for the protection of their populations, territories and commons, regulating foreign investments through public policies that respect human rights.

This requires dismantling the architecture of impunity that allows TNCs to obtain more power and privileges than citizens. It requires our country to withdraw from ICSID, after having experienced the serious damage it has caused to our heritage. To achieve this, it is also necessary to implement more creative forms of democracy, with mechanisms for direct participation in the control of public services and the enforcement of environmental laws.

Water should be exempted from all existing and future international and bilateral free trade and investment agreements. It is necessary to keep drinking water as a public commons, avoiding conflating the public sphere with governmental spaces, given that even though water delivery services are provided by State entities, its use is a construction that is built in the democratic political space where all actors in society participate. Therefore, we state:

*The struggle for access to safe drinking water is also a struggle for fundamental Human Rights.

*Water and air belong to the Earth and to all species, and nobody has the right to take over or take advantage of them at the expense of others.

*The governments of the world should protect water in their territories and declare it a Commons.



Water and Sustainability Campaign.

Photo: Friends of the Earth Argentina

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7 EL SALVADOR - THE SALVADORAN PEOPLE DEFEAT TRANSNATIONAL MINING COMPANY

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CESTA / Friends of the Earth El Salvador

Oceana Gold corporation has assets in the Phillipines, New Zealand and the US. It operates the Didipio Gold and Copper Mine located in Luzon Island, the Phillipines. In New Zealand's North island it operates the Waihi gold mine, and it operates the largest gold mine of the country in the South Island, in Macraes Gold-field, which includes a series of open pit mines and the Frasers underground mine. In the US, it is currently building the Haile gold mine, a high-level asset located in South Carolina along the Carolina terrane.

The presence of this corporation in El Salvador dates to 1993 when studies to reopen El Dorado mine in San Isidro Cabañas were conducted, under an exploration concession granted to Canadian Pacific Rim Mining Corp. In 2002, the company found approximately 1.2 million gold ounces of high purity gold and over 7.5 million ounces of silver in underground deposits in the Northern area of the country. In addition, it found 558 thousand ounces of gold and 1.2 million ounces of silver of lower quality. In 2004, Pacific Rim requested from the Salvadoran State permission to exploit these precious metals, but the authorization was denied following findings that indicated a lack of compliance with the observations made by the Environment Ministry to the Environmental Impact Assessment study.

In response to this negative reply, Pacific Rim filed a complaint against the Salvadoran State at the International Center for Settlement of Investment Disputes (ICSID). The claimed damages added up to \$77 million dollars in compensation for the company's investment during the exploration stage. The claimed sum was subsequently elevated to \$301 million dollars and thereafter lowered to \$250 million. Pacific Rim declared bankruptcy in 2013 and sold its shares to Australian transnational corporation Oceana Gold for \$10.2 million dollars, who proceeded diligently with the claim.

Pacific Rim's litigation process at ICSID against the Salvadoran State took place in two stages: in the first lawsuit filed in 2009, the company resorted to the Free Trade Agreement between the US, Central America and Dominican Republic (CAFTA-DR), and in June 2012, the tribunal dismissed the claims since this was a Canadian company. In the second stage, they filed a complaint in March 2013 under the national investment law of El Salvador.

Because of the strong opposition and protests carried out by social movements and organizations, the Salvadoran government submitted in late 2012 a bill titled "Special Law for the Suspension of Administrative Proceedings Related to Metal Mining Ex-

ploration and Exploitation Projects". This instrument allows to suspend mining exploration and exploitation in the country.

After a seven-year long arbitration, on October 14, 2016, ICSID ruled in favor of the Salvadoran state. The verdict established that the mining company should compensate the Salvadoran government with \$8 million dollars to cover the legal costs of the trial, although the amount spent was actually \$13 million dollars --a sum of money that could have been used for education, health, public security, food production, and other urgent needs of this country's population.

However, Oceana Gold continues operating till this very day in the area of San Isidro, Cabañas under three names: Oceana Gold as the commercial identity of the Canadian-Australian corporation, its subsidiary Minerale Torogoz, and Fundación El Dorado, an entity with a social mission, through which Oceana Gold continues operating in the communities.

The United Nations has declared El Salvador as the country with the least water availability in the entire continent, and the Environment and Natural Resources Ministry states that over 90% of superficial waters are seriously polluted and only 10% are suitable for purification by conventional means.

Mining around the world has been known to use large amounts of water to operate. It also uses materials that cause negative impacts on the air; it erodes soils; and there is forest loss, reduction and pollution of rivers, groundwater reserves and diseases, among other consequences. Therefore, the water crisis in the Salvadoran territory would have been more serious if the gold and silver exploitation project of Pacific Rim had gone forward. These were the arguments used by social and environmental movements and organizations during the campaigns against the company.

Leaders and residents opposing El Dorado mine were threatened and intimidated. As a result of the process, two people were injured and eight were murdered.⁹¹ In October 2013, Alejandro Guevara Velasco, a member of Asociación Ambiental La Maraña, was attacked with a firearm though the bullets did not hit him. In June 2011, Juan Francisco Durán Ayala was murdered, and Marcelo Rivera Moreno of Asociación Amigos de San Isidro Cabañas (ASIC) was found dead in June 2009 with signs of having been tortured; Ramiro Rivera Gómez, Vice-president of the Comité Ambiental de Cabañas (CAC) was murdered in December 2009 together with Felicita Echeverría, a 57 years old resident in Trinidad Canton, and a 13 year old girl was injured; Dora Alicia Sorto,



El Salvador Parliament at the decision for the approval of atin-mining law.

Photo: CESTA/ Friends of the Earth El Salvador

a member of CAC, was murdered in December 2009 and her two-year old son was injured. Father Luis Quintanilla, a Catholic priest in Cabañas was repeatedly threatened and survived two attacks in 2009; members of Radio Victoria were threatened and pressured. In this case, the IACHR adopted precautionary measures and urged the Salvadoran state to protect the life and integrity of the Radio workers. Horacio Menjívar Sánchez and his wife Esperanza Velasco de Menjívar were murdered in 2008. They were the parents of one of the people indicted for the murder of Ramiro Rivera Gómez.

Despite this high death toll and the social conflicts generated, the continuous work of social movements and organizations in Cabañas and at national level included: workshops, demonstrations, rallies, lobby work with political actors and decision makers in the government, media campaigns, and forums with mining experts. During exchange tours, the participants visited mining projects in Honduras and Guatemala. In Guatemala, the Marlín mine uses 6 million liters of water per day. The communities living near the mine reported that 40 communal wells went dry during the eight years of operation. In Valle de Siria, Honduras, the San Martín mine has dried up 19 of the 23 original rivers in the area after nine years of operation. Learning about the reality and human rights violations in neighboring countries was an important way of generating information and awareness in the Salvadoran people to oppose mining activities and continue struggling.

The National Roundtable against Metal Mining and the Movement of Victims and People Affected by Climate Change and Corporations, MOVIAC, which gathers grassroots groups at national level, submitted proposals and bills to the Legislative Assembly to ban metal mining in El Salvador.

In recent years, sectors such as Universidad Centroamericana José Simeón Cañas UCA and relevant Catholic Church authorities joined the struggle, and their contributions were essential in the national discussion about mining. We also had the international solidarity of institutions and organizations such as Friends of the

Earth International, denouncing Pacific Rim / Oceana Gold as a company that violates Human Rights and highlighting the importance to create a legally binding instrument to regulate and punish illegal actions perpetrated by transnational corporations. All these efforts resulted in the Legislative Assembly passing a law on March 29, 2017, banning metal mining in El Salvador.

Much in the same way as most corporations, the transnational mining company started its operations promising jobs and social development in the area. It established a prototype in its facilities to explain the responsible and high standard operation of its mines, it organized tours with students and community leaders to show its safety.

It dispensed perks and benefits to public and private institutions and Community Development Associations - ADESCOS - (giving them school supplies, sport equipment, paint, hiring companies to provide medical attention and medicines, covering the cost of buses to field trips, etc.). The company demanded the beneficiaries to sign lists of attendance that were thereafter presented as people in favor of mining.

It supported the municipal electoral campaigns of Mayors akin to mining, who then served as their allies to facilitate the expansion of the company. This generated a score of supporters among people who saw that the company was meeting needs that other institutions could not attend. Nevertheless, what is most regretful of its actions was the divide it instilled in communities, between the supporters and those who rejected mining, creating mistrust, fights and conflicts even among members of the same families and communities, including homicides.

The country's big mainstream media have been important allies for the company. For instance, when ICSID ruled in favor of El Salvador, they did not cover this news accordingly to its significance, denying the importance and relevance of the subject. The same happened with the passing of the law against metal mining. On the contrary, when the bill advanced in the Legislative Assembly,



Women demand the law to prohibit metal mining in El Salvador.

Photo: CESTA/ Friends of the Earth El Salvador

Oceana Gold started to publish statements in the most important newspapers, using entire pages in color.

The advocacy work by the company with MPs, bringing their “experts to submit evidence that mining does not affect human health” was not well received in Parliament.

The process of struggle against Pacific Rim / Oceana Gold spanned the mandates of three Salvadoran presidents. Elías Antonio Saca of the ARENA party (2004-2009), ordered not to grant exploitation permits to the mining company almost at the end of his mandate.

The legal complaint at ICSID was filed during the administration of Mauricio Funes, of FMLN party (2009-2014). Ever since his electoral campaign, Funes was firmly and publicly committed to not supporting metal mining. Current president, also from the FMLN party, Salvador Sánchez Cerén (2014-2019) made the same pledge during his electoral campaign and publicly stated being against mining. Both presidents kept their word, but despite this,

some government officials approached the mining company and held lengthy dialogues with the corporation.

In the case of El Salvador, the Legislative Assembly is renewed every three years and MPs rotate. The membership of the Environment and Climate Change Commission, the space where the law was discussed, changed several times and the new members were not familiarized with the subject. This required a lot of dedication and continuous work by social movements and organizations to raise awareness on the issue with the new MPs.

Among the relevant activities that certainly led legislators to pass a law against metal mining was the visit of the Nueva Vizcaya province governor from the Philippines, Carlos Padilla, to speak about the negative effects caused by Oceana Gold mining corporation in that Asian country.

We celebrate the legal victory of El Salvador against Pacific Rim / Oceana Gold. However, the company has announced it will continue operating in Cabañas focusing on other activities. This is

a matter of great concern, given the company’s track record of community division and the risk of conflicts and violence that already happened in previous years.

Therefore, social organizations are demanding the Governance Minister and the Director of the Non-Profit Associations and Foundations Registry to suspend the operations of Fundación El Dorado in Cabañas department and to ban its continued presence in the country.

They also demand true justice from the General Prosecutor’s Office to clear up the different murders against environmental activists in Cabañas department and to deepen on the investigations to find the intellectual and actual perpetrators of those homicides.

The passing of the law banning metal mining in El Salvador sets an important precedent for countries that are facing the attacks of transnational corporations that insist on their right to exploit natural resources despite the social and environmental impacts they generate.

Investment treaties allow companies to operate without restrictions and give them the right to submit claims at ICISID. They are even allowed to lie, as in the case of Pacific Rim / Oceana Gold. Given that it is a Canadian company, it could not resort to CAFTA-DR; however, they opened a PO Box in Nevada to have a legal address in the US, and with this they managed to sue the State for indirect expropriation and loss of profit, which are offenses recognized under this treaty.

When met with a NO against their projects, the companies activate mechanisms oriented to pressure governments. El Salvador has faced four claims at ISCID, with investors invoking the national Investments Law, as in the case of Inceysa Vallisoletana, S.L., Commerce Group, Pacific Rim/Oceana Gold and lastly ENEL.

On the other hand, the signing of “Bilateral Investment Treaties” (BITs) violates the sovereignty of our peoples, since their goal is the reciprocal promotion, but also protection of investments. El Salvador has signed 24 BITs, meaning that each party to the treaty shall protect at any cost the investments of the other party in the agreement.

Therein lies the importance of having a binding treaty to put an end to the impunity of human rights violations perpetrated by transnational corporations.

On this regard, we consider the proposal to have an⁹² international tribunal in charge of accepting, investigating and judging denunciations submitted against TNCs, International Financial-Economic Institutions and also States, whenever they fail to comply with their obligations or are accused of complicity with TNCs that violate human rights, is fully appropriate. This would allow the recognition of the civil and criminal responsibility of companies involved in cases of international economic, industrial and environmental crimes.

This international tribunal should be organized and operated autonomously and independently from the executive bodies of the United Nations and the respective States. Its sentences and penalties should be executive and their compliance mandatory.

91. <https://ghrcusa.files.wordpress.com/2014/05/informe-completo-sobre-minera-canadiense.pdf>

92. http://www.stopcorporateimpunity.org/wp-content/uploads/2016/10/SIX-points_ESP.pdf

8 COSTA RICA - PINEAPPLE MONOCULTURE PLANTATIONS: A HISTORY OF IRRESPONSIBILITY IN THE MOST POISONED COUNTRY IN THE WORLD

Mariana Porras
COECO Ceiba / Friends of the Earth Costa Rica

Costa Rica ranks currently as the world's major pineapple exporter. Fresh pineapple, processed juice and cut pineapple are traded in big markets such as the US and Europe; according to the agricultural census, the area planted with pineapples grew by almost 1500% between 1984 and 2014.⁹³

Two US based multinational companies, Del Monte and Dole, dominate global pineapple trade, and three quarters of the pineapple found on European shelves now come from Costa Rica⁹⁴. It is estimated that Costa Rican pineapple production is 75.8% in the hands of four companies and only 20% is in the hands of 1191 small farmers, who in turn sell their pineapples to these large companies for export.

Companies such as Dole, Chiquita or Del Monte that benefit from the juicy pineapple business are the same ones that featured the banana boom that caused environmental impacts and affected the health of workers without these companies taking on any responsibility. This took place not only in Costa Rica, but in other Latin American countries where these companies own plantations.

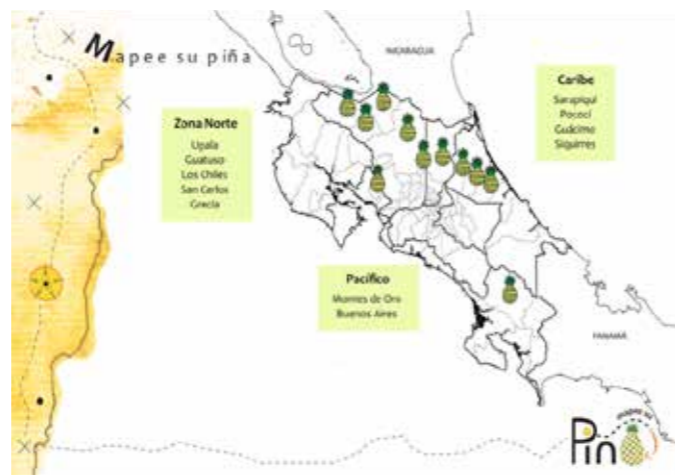
The steep increase in the area grown with pineapple monoculture plantations has been the highest in the country in the past 20 years. Data from the Foreign Affairs Promotion Office of Costa Rica (PROCOMER) reveal a 300% hike in pineapple exports from 2002 to 2012, reaching 1,876,000 tons. In hard currency terms, PROCOMER data shows that \$121 million dollars-worth of pineapples were exported in 2000 while in 2012 this figure increased to \$791 million dollars, featuring an increase of over 650%⁹⁵. Despite such exports growth, this activity does not pay national or municipal taxes, and it does not pay either tariffs on raw materials, while receiving export incentives. With this tax waivers, it is impossible to improve the socio-economic conditions of the territories where these monoculture plantations are located.

Currently, pineapple is planted in the Pacific (Montes de Oro, Buenos Aires), the Northern Area (Upala, Guatuso, Los Chiles, San Carlos y Grecia) and the Caribbean (Sarapiquí, Pococí, Guacimo, Siquirres), but the recent announcement at the beginning of the year of inroads into the Chinese market⁹⁶ represents a real threat of expansion of the crop to other areas in the country. These communities are located in the most vulnerable regions of the country, so pineapple companies portray themselves as drivers of development by providing jobs, donating minimal funds to fix some school or communal space or even promising to fix roads and highways. These purported "benefits" are part of a strategy that many companies, not only the pineapple sector, adopt to have a good image. None of these "benefits" can compensate the impacts generated by this activity, or even less be considered as part of a plan to mitigate, reduce or eliminate these impacts.

The development of this agribusiness has entailed socio-envi-

ronmental conflicts in the areas of the country where it has a dominating presence, which have had to face impacts such as:

- The loss of 5.568,98 hectares of forests due to the expansion of pineapple plantations between 2000 and 2015⁹⁷, according to a report on "Monitoring Land Use Change within Production Landscapes" (Mocupp). According to the study, the area planted with pineapple reached 58,000 hectares, a figure five times bigger than the 11,000 hectares recorded in 2000, and significantly more than the 37,000 hectares registered in the agricultural census of 2014. This 20,000-hectare differential is a testimony of the lack of control and State planning around this crop;
- elimination of traditional agricultural practices and with it, reduced cultivation of essential crops for the food sovereignty of communities; the 2014 agricultural census indicated that since 1984, maize crops have decreased by 73%, beans by 52% and rice by 32%, all of which are grains that are basic for our nutrition, while the area planted with export products such as pineapples increased considerably;
- land concentration in the hands of large corporations such as Del Monte and Chiquita Brand;
- pests that affect cattle and people, such as the biting fly (*Stomoxys calcitrans*);
- soil shifting and pollution of creeks, rivers and water sources for communities;
- increased sedimentation in rivers, lagoons and wetlands as a result of erosion, intensive land use and the complete removal of the plant cover before and during its cultivation;
- encroachment into wild protected areas such as the wetlands in the Northern area; specifically, the case of Caño Negro, a Ramsar



Source: Project map your pineapple, Kioskos Socioambientales, Costa Rica. University.



Fumigation on the pineapple plantations in Costa Rica.

site that is being transformed into a huge reservoir for toxic water and soil, polluted with agrochemicals from pineapple crops;

- in terms of labor, the working day established by law is not respected. Workers are exposed to solar radiation, working conditions are not respected and payments of social benefits are evaded through subcontracting; there is persecution and even threats to the life of those who try to organize themselves through a trade union. In addition, companies take advantage of irregular immigrants to pay them less, avoid providing them with insurance benefits and disregard all their rights, thus increasing their own profits. In 2017, the campaign "Union freedom of association in private companies" was launched with the purpose of denouncing all these violations⁹⁸;
- a collateral damage of the pineapple industry that has a negative impact on forests is that part of the wood sourced in the country is used to produce the platforms where pineapples are placed for export;
- indebtedness of small land owners dedicated to pineapple production without harvest insurance and with high risk of losing their houses and lands;
- intensive use of agrochemicals such as bromacil, tradimefon, diuron and other 20 dangerous agrototoxics in the pineapple plantations, generating huge water pollution problems for human and animal consumption in communities including El Cairo, La Francia and Milano in Guapiles and Siquirres in the Caribbean, as well as Veracruz⁹⁹ in the Northern Area, among others. As a result, the State and the population are forced to invest to obtain water to meet their daily needs. Acueductos y Alcantarillados de Costa Rica (AyA) has invested thousands of dollars to bring drinking water to affected communities.¹⁰⁰

In October 2010, a public-private initiative was launched, promoted by Laura Chinchilla Miranda's administration in alliance with agroindustrial sectors, in response to all the denunciations regarding the impacts of the expansion of pineapple crops.

The National Platform for Responsible Pineapple Production and Trade (PNP) is led by the country's vice-presidency, involving different institutions including the Ministries of Health, Agriculture and Livestock, Environment, the National Technical Environmental Secretariat, the Agricultural Technology Transfer and Innovation Institute, public and private universities, private companies, the Rainforest Alliance certification body, Del Monte corporation, BANACOL and the National Chamber of Pineapple Exporters and

Producers, with the support of the United Nations Development Program (UNDP). The main source of funding for this initiative is ICCO from the Netherlands.

Neither civil society, nor the environmental sector, or small farmers are represented in this space; organizations such as the National Front of Sectors Affected by Pineapple Production (FRENASAPP) highlight the "scarce or inexistent neutrality and the clear positioning in favor of the business sector by this space".

Xinia Briceño, a member of the Aqueducts and Sewers Systems Administrative Association (ASADA) in Milano de Siquirres community and also a member of the National Front of Sectors Affected by Pineapple Production (FRENASAPP) referred to the Platform as "greenwashing". She underscores that "they continue polluting water sources, logging trees, destroying everything in their path, without the commitment to mitigate this damage".

What is the background of this initiative? What is hidden behind the lack of concrete solutions? asks Xinia in relation to the PNP, and she herself answers her questions: "the economic power of transnational corporations and the lack of involvement by the government in defending the affected communities is the bottom line on this issue.

People are not dying here like they die in Syria, on a daily basis; they are killing us slowly, with chemicals, they are causing hereditary conditions, miscarriages and cancer".

Through PNP, the aim is for the pineapple sector to take on commitments to ensure the fulfillment of its legal obligations with regards both to environmental and social issues¹⁰¹. In other words, to make sure it operates with the required environmental permits, without polluting water, not planting in areas that are not suitable for cultivation and establishing protection areas in those unsuitable areas for cultivation, not using banned inputs, taking care of underground and superficial water sources, among others. To that end, as can be read in the notes of the work carried out by this platform, they seek to find incentives "to do things the right way". That is, if they are paid, they can comply with the law and incidentally, present themselves as environmentally responsible. The pineapple industry sees "there are clear opportunities for producers in terms of generating actions such as carbon neutral, conservation projects, biological corridors, best practices in terms of the holistic management of plantations"¹⁰².

There are previous experiences at international level that show that the purpose of this type of initiatives is to greenwash polluting activities in production. This way, standard compliance with the laws is portrayed as an innovative solution: a standard legal obligation for any individual or legal person in the country is presented to the public as a compromise by the actor carrying out the illegal action, leaving the impression that the sector is environmentally aware and responsible.

Cultivation moratoria, a communal struggle

Communities, however, are not just waiting idly, but continue their struggle in defense of the territory and for their rights to a better-quality life. The modalities of struggle have been many, including denunciations, writs of protection, road blockades and demonstrations, among others.

They have also promoted municipal moratoria as those proposed by communities in Guácimo and Pococí in the Caribbean and Los Chiles in the Northern Area, in the pursuit of solutions to this environmental problem: municipal moratoria on pineapple expansion are a step forward involving important levels of participa-



Picture by FRENASAPP.

tion and advocacy by citizens that want to see cultivation plans being developed, due controls being implemented, studies showing that the current activities don't cause impacts on the environment, on communities and health, and ensuring that companies respect environmental, health, social and labor laws of the country, all before any new permits for plantations are granted

The autonomy of communities and their self-determination is key to build a country where social justice and environmental equilibrium prevail. However, pineapple businesses have submitted writs of protection against the proposed moratoria on pineapple expansion, nullifying them at the expense of the right to participation.

Everything seems to indicate that the governmental will continue supporting this industry, despite the numerous impacts and traps presented as solutions such as the PNP. As the president of CANAPEP said, "if the market wants more pineapple, we will grow more pineapple"⁹³. And thanks to PNP, this pineapple will always be green and fair.

Importance of the binding treaty for the struggle against pineapple expansion: the country clearly lacks sufficient national jurisdiction to claim damages for water pollution, deforestation or the violation of labor rights by pineapple companies. Rather, the State and communities have had to bear with the costs, for instance, in the case of contamination of water sources or health care.

To avoid this from happening again and to seek justice for these human and environmental rights violations, we believe that a binding treaty on transnational corporations and human rights would be a huge contribution to this struggle, since:

- it would reaffirm the hierarchical supremacy of international human rights laws (including the human right to health) over commercial and investment laws,

- it would recognize the legitimacy and moral authority of peoples and communities as key protagonists who oppose these situations, creating regulations and rules that strengthen the supremacy of human rights,

- a legal tool would allow to broaden the scope of responsibility

according to the type of relationship between the parent company and the different subsidiaries,

- it would establish an international court on transnational corporations (TNCs) and human rights where the people affected by TNCs can sue TNCs and seek justice.

On the other side, communities and organizations will continue struggling for a moratorium on the cultivation of monoculture plantations in the country, strengthening the organizational management of communities which have faced and are facing the impacts of these monoculture plantations, joining and also managing agricultural experiences that allow for food production for local and national consumption, thus recovering food sovereignty and aiming to restore forests and biodiversity based on community experiences.

93. <http://www.inec.go.cr/agropecuaria/area-y-produccion-agricola>

94. Bitter fruit: The truth about supermarket pineapple. The Guardian.

95. Vásquez, J.P. (2013, 8 de Junio). Costa Rica es mayor exportador de piña fresca del mundo. La Prensa Libre. Sección de Economía.

96. Existe un gran potencial para vender más piña en China. <https://www.larepublica.net/noticia/existe-un-gran-potencial-para-vender-mas-pina-en-china>

97. Miles de hectáreas de ecosistemas arrasados en Costa Rica por industria de la piña. http://www.feconcr.org/index.php?option=com_content&task=view&id=2614&Itemid

98. Por la libertad sindical de la empresa privada <https://www.facebook.com/libertadsindicalcr/?fref=ts>

99. AyA detecta herbicida en seis nacientes de poblado en San Carlos. http://www.nacion.com/m/nacional/salud-publica/AyA-herbicida-nacientes-San-Carlos_0_1555444534.html

100. For a deeper analysis on the reality of pineapple monoculture plantations see: <http://coecoceiba.org/wp-content/subidas/2010/03/pub11.pdf>

101. PNUD; ICCO et al. (2013) Plan de Acción de Producción y Comercio Responsable de Piña en Costa Rica: 2013-2017. Recuperado de: www.pnp.cr

102. COECOCEIBA (2012, June). Editorial article: Otro Ejemplo de la Economía Verde: La Falacia de la Piña "Responsable". Accessed here: <http://coecoceiba.org/otro-ejemplo-de-la-economia-verde-la-falacia-de-la-pina-responsable/>

103. Vindas, L. (2012, September 27). Entrevista con Abel Chaves, presidente de la Cámara Nacional de Productores y Exportadores de Piña (Canapep) "Si el mercado está pidiendo más piña, pues sembramos más piña". Accessed here: www.elfinanciero.cr

9 GUATEMALA - THE RESISTANCE OF THE IXQUISIS COMMUNITY INSAN MATEO IXTATÁN, HUEHUETENANGO, AGAINST PDHSA'S HYDROELECTRIC PROJECTS POJOM I, POJOM II AND SAN ANDRES

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Promoción y Desarrollo Hídrico SA (PDHSA) corporation introduced itself in 2010 to communities of the Ixquisis micro-region in San Mateo Ixtatán, Huehuetenango, informing them that it would establish three hydroelectric projects: Pojom I, Pojom II and San Andrés. The company responsible for the construction works would be SolelBoneh Ltd. Electricity generation/production by these hydroelectric companies was granted in concession to subsidiaries: Generadora San Mateo corporation, and Generadora San Andrés corporation, respectively.

PDHSA was registered in the Market Registry in December 2007. The headquarters on record are in Office 1101 of the West Tower of Centro Corporativo Muxbal, next to the offices of companies Generadora San Mateo (GSM), Generadora del Río (GR) and Generadora San Andrés (GSA).¹⁰⁴

These projects were established in the Pojom Basin encompassing the Pojom, Negro, Primavera Yalhuitz, Varsovia, Tercer Arroyo and Palmira rivers. The company that aims to install these projects is funded by international financial institutions such as the Inter-American Investment Corporation (IIC), a financial body of the Inter-American Development Bank (IADB), as well as the Central American Bank for Economic Integration CABEL.

Ixquisis is a micro-region in San Mateo Ixtatán municipality that includes the Yulchen Frontera, Bella Linda, Ixquisis, Pojom, El Platanar and Nuevo San Mateo communities, plus San Francisco, Varsovia/Primavera, Concepción and El Rincón small villages. The municipality is part of the Huehuetenango department, located to the North-West of Guatemala, in Central America.

San Mateo Ixtatán is composed of 59 villages and 7 communities, and 29 of these villages do not have access to electricity to this date. On May 21, 2009, a community consultation was carried out with the inhabitants of the 59 villages and 7 communities, organized by the San Mateo Ixtatán municipality. This consultation was held on a Thursday, and 25,646 people participated, with overwhelming results: 99% of the population rejected extractive, mining and hydroelectric projects in this municipality.

Despite this, the Guatemalan State authorized the construction of hydroelectric projects Pojom I, Pojom II and San Andrés in the Ixquisis micro-region. The company entered the micro-region and started building Pojom I through deceit, lies and misinformation. A few months after the community consultation, foreign people arrived to one of the villages pretending to be delegates of the national electrification company Electrificación Nacional, and through one of the chairs of the Regional Ixquisis Committee and regional representative at the Municipal Development Council (COMUDE), they informed communities that they had several

projects in mind and offered communities projects that would bring many benefits and development for the village. They mainly mentioned an electricity project.

This information caused confusion among the villagers in the area. These communities wanted electricity, and for this reason they had submitted a few months before a request to the National Electricity Institute (INDE) in the capital city. Part of the information distributed in the communities was that the request had been approved, but that the entity in charge of distributing electricity at national level did not have the capacity to extend its coverage, and therefore they were going to build hydroelectric dams in the region to bring power to all communities. They were told that the hydroelectric project would be donated by the European Union and that it would be donated entirely to communities for everyone's benefit and that it was the right time to take advantage of water resources. They were not told that hydroelectric dams would be privately constructed, managed and owned.

Throughout the process divisions have been generated within the community: a group in favor of the project and a group that does not want the project. The actions of the group that is not in favor of the project, developed in accordance to the results of the community consultation, determined that by late 2010, the company suspended its activities in Pojom I project, but then they moved on to build projects Pojom II and San Andrés.

The population has been demanding the observance of their community consultation and the suspension of hydroelectric projects. In its bid for projects to be built at any cost, the company has developed a series of strategies to impose its projects: Misinformation, cooptation of municipal mayors and community leaders linked in the past with the militarization of the country (civil self-defense patrolling and military commissioners), hiring private security companies, coercing State structures to their benefit, and intimidations, threats and even deaths. In 2016 there were reports of: 4 illegal detentions by the Army and the National Civil Police force PNC, 12 cases of libel, 4 physical attacks, 11 shotgun attacks, 11 control/surveillance measures, 18 cases of harassment, 4 threats, 7 death threats, 2 deaths and 2 cases of private property destruction and violation, for a total of 75 incidents reported by human rights defenders in the Ixquisis micro-region. From January to May 2017, there were 54 incidents. In addition, the company has negotiated with 55 people to buy lands for the construction of the hydroelectric project in the Pojom II and San Andrés phases. Only one of the municipal mayors, who was in office from 2012 to 2015, respected the community consultation that was held in good faith on May 21, 2009 in San Mateo Ixtatán and the decision of the communities to reject



Ixquis valley view from Pojom village, San Mateo Ixtatán, Huehuetenango, to the dam, water course deviation and PDH S.A facilities. Photo: CEIBA/Friends of the Earth Guatemala

PDHSA hydroelectric projects.

There have also been incidents against the company, and the company has immediately blamed the population and the leaders who oppose hydroelectric dams: machinery set on fire and the emergence of a supposed guerrilla group called Peasant Armed Forces (FAC).

Allies of PDHSA corporation include: Its funders, among them Corporación Energía y Renovación Holding SA (ERH), based in Panama, and the Inter-American Investment Corporation / Inter-American Development Bank. In terms of information management and conflict analysis in the area: Peace, Development and Culture Consortium (Masank'ulal, Chi el lehehoq, Kob'eyb'al), consisting of the following companies - Acuerdos y Soluciones, S.A. (AYSSA) and Fundación Tecnológica para el Desarrollo de Guatemala (FUNTEDEGUA).

To secure the safety of their assets they hired Servicios de Seguridad Comercial e Industrial (SERSECO); a private security company founded in 1999 by Colonel Gustavo Adolfo Padilla Morales and/or Gustavo Adolfo Müller.

For construction works: they hired company SolelBoneh International Ltd. an Israeli company in charge of building infrastructure works for the hydroelectric network of Pojom I, Pojom II and San Andrés. The companies that own the hydroelectric dams are:

Generadora San Mateo, S.A., registered in the Market Registry in November 2010, with Carlos Eduardo Rodas Marzano as shareholder with 50% of shares, and Otto Manfredo Armas Oliveros with the remaining 50% of shares: Owner of the Pojom II project. Generadora del Río, S.A, registered in the Market Registry in November 2010. With Carlos Eduardo Rodas Marzano as shareholder with 50% of shares, and Otto Manfredo Armas Oliveros with the remaining 50% of shares: Owner of the Pojom I project. Generadora San Andrés, registered in the Market Registry in October 2011. With Carlos Eduardo Rodas Marzano as shareholder

with 99% of shares, and Andrés Rodas Godoy with 1% of shares: Owner of the San Andrés hydroelectric project. At local level, the company has built alliances with two municipal mayors. On July 25, 2011, the municipal Mayor granted GSA SA the permit to build the "Yalwitz" hydroelectric project. In the past year, the municipal Mayor has tried to convince the inhabitants of communities to accept the project, in addition to accepting and collaborating with other projects of the company. In addition, 12 community leaders, several of whom were part of old paramilitary structures such as the "Civil Self-Defense Patrolling" (PAC) or "Military Commissioners", are promoting the supposed benefits of the project among communities.

The actions by the State can be summarized in the following way: Ministry of Energy and Mines (MEM): It did not organize a consultation once it had received the investment request. Ministry of Environment and Natural Resources (MARN): it authorized Environmental Impact Assessment Studies (EIA) without carrying out community consultations first. The minister back then was linked to the company that carried out the Environmental Impact Assessment of the project, whose owner is her husband. Supreme Court of Justice (SCJ): just as in other cases, it has not enforced compliance with Convention 169. Governance Ministry (MINGOB): reactivated Substation 43-73 of the National Civil Police force (PNC), assigning a 45-strong permanent unit to it, and during critical moments it used the Huehuetenango police station to intimidate the population. The Departmental Government: has supported and argued in favor of the company. The Defense Ministry (MINDEF), supported the projects with the installation of a military unit in the Ixquis micro-region, assigning 70 officers: 68 soldiers and two experts, to safeguard the investments of PDHSA and its subsidiaries. Erick Villatoro Letona, a PDH assistant in Huehuetenango, has also stood in favor of the company's activities. The president of the Republic has expressed his enmity with the municipal mayor who had respected the community consultation (2012-2015). On July 17, 2014,



Visit of the Environmental Commission of National Congress of Guatemala, on april 2016, to the Ixquis communities.

Photo: CEIBA/Friends of the Earth Guatemala

the President denounced him during an event held in Ixquis, for opposing "development" brought by the government together with PDHSA to the municipality. The President was accompanied by Governance Minister Mauricio López Bonilla, the Energy and Mines Minister, Erick Archila Dehesa, a PDHSA executive and an employee of said company. The brother of said employee was an MP candidate to the National Congress in 2011 and was member of the Presidential Commission for the Police Reform in 2012.

As a result of the socio environmental problems generated in the Ixquis region, many denunciations have been made by the population at national and international level against the violation of their human and collective rights. The judicial persecution by the company and State actors against the people who are defending their territory and water has generated an atmosphere of fear and insecurity, and that is why it is more and more important to make these regional problems visible, and that social and human rights organizations continue their solidarity actions and monitor the situation to ensure the life of the communities of the region.

Considering what has been happening in Ixquis and for the binding treaty on TNCs and human rights to be truly useful and consider the decisions of the indigenous peoples, we request it includes:

1. That TNCs comply with the laws of the country and the international treaties and conventions related to indigenous peoples to which the country where the project is located is a party of. To that end, it should establish an international tribunal on transnational corporations and human rights that complements universal, regional and national mechanisms, to ensure that affected people and communities have access to independent international legal spaces to seek justice for civil, political, social,

economic, cultural and environmental rights violations.

2. That TNCs respect the sense of belonging and the right to land of indigenous peoples, and beyond the property titles they can show, they should respect the decisions of the people in relation to the projects that they want to implement.
3. That no project promoted by TNCs, with funds or support from IFIs, the UN or other international bodies, could enter a territory where there are indigenous peoples, without first carrying out a community consultation in good faith and other requirements and instruments required by the community. And in case the project is approved by the community, the company should be forced to compensate or remediate the economic, social, cultural and environmental damage caused by the funded project.
4. Respect for the results of consultations carried out previously in the country regarding the imposition of projects of any kind.
5. Ensure the prior, informed consultation in good faith, along with the right to freedom of expression and expression of thought. That is, nobody can be persecuted for expressing his/her opinions in any kind of consultation.

104. Investigation by the Center of Independent Media. 2014
 105. El Observador. 2017. San Mateo Ixtatán: entre el embate del capital nacional y transnacional, y la restauración de las estructuras paramilitares contrainsurgentes: el caso del proyecto hidroeléctrico de la empresa Promoción de Desarrollo Hídrico Sociedad Anónima (PDH, S.A). Special Report No 10. 85 p.
 106. San Mateo Ixtatán: Pojom, La Historia De Una Agresión – Tercera Entrega <https://comunitariapress.wordpress.com/2016/06/28/pojom-la-historia-de-una-agresion-la-llegada-de-la-empresa-enganando-y-falseando/> <https://comunitariapress.wordpress.com/2016/05/12/pojom-la-historia-de-una-agresion-la-consulta-comunitaria/>

10 CONCLUSION AND RECOMMENDATIONS

The cases presented in this report reflect the daily struggle of Latin American peoples against the systemic and systematic violation of their collective rights and environmental effects by transnational corporations. The impacts - environmental crimes, social and environmental conflicts, impacts on nature, and effects on the bodies of men and women, are many times committed by the companies themselves or by the companies and the funders of projects, associated in their global value chains, in a context of impunity strengthened by the asymmetries of the power relations between States-corporations vs. communities and public interest.

These are not the only cases or the last battles, but they can mean life or death for social activists and defenders in each national context. These are also struggles that become stronger when added to many others around the world, that seek environmental and social justice and the unity of peoples for the defense of territories and life, of human dignity to supersede the capitalist system.

As final recommendations, based on territorial struggles and the demands of the people affected by the operations of transnational corporations in their countries, the proposals defended here and presented as a contribution to the binding treaty on transnational corporations and other business enterprises with reference to human rights are the following:

The Treaty should:

- hold corporations accountable for the crimes committed by their actions outside the country of origin and the sphere of its national laws, whether global impact actions, transnational actions or similar actions that are committed in the local sphere in more than one country;
- establish sanctions and create instruments to implement sentences against the companies with parent companies outside the territory where they act and where they violate rights, making sentences effective in the country where the company operates;
- overcome the impunity resulting from the concentration of political and economic power, the asymmetry in relation to States and the violence exerted against affected communities, as well as the close link between the interests of States and corporations that prevent affected communities from accessing full justice;
- establish legal enforcement instruments, such as an International Tribunal on Human Rights and Transnational

Corporations, where communities and people affected by companies and their transnational activities can sue transnational corporations and seek justice, in a way that legal cases, struggles and resistance in the territories can be linked at international level, overcoming borders and joining forces when facing corporate power;

- The International Tribunal should be in charge of accepting, investigating and judging all claims submitted against transnational corporations, international economic-financial institutions and also States, whenever they fail to comply with their obligations or if they are accused of complicity with TNCs that violate human rights, recognizing the civil and criminal responsibility of these companies for international economic, industrial and environmental crimes;
- The international tribunal should be organized and operated autonomously and independently from the executive bodies of the United Nations and the respective States, and its sentences and penalties should be executive and their compliance mandatory;
- The Tribunal should complement other universal, regional and national mechanisms, ensuring that affected people and communities have access to an international legal space that is independent, to seek justice for civil, political, social, economic, cultural and environmental rights violations.

- hold transnational corporations accountable for human rights violations and irreversible impacts on the environment, especially in countries where the State favors the existing power structure and where rules are weakened to benefit big business;
- overcome the impunity of crimes perpetrated by said companies, due to gaps in international law, the absence or weakness of national policies or the corruption of the judicial system, where links can be drawn between representatives of the State institutions and transnational companies.
- prevent that companies that are declared guilty - whether for environmental crimes, human rights violations or the criminalization of defenders, environmental activists and social organizations - continue operating, even when there are pending processes that have not been dismissed or completely cleared up;
- reaffirm the hierarchical supremacy of international human rights laws (including the human right to health and water) over commercial and investment laws;

- force States to refuse accepting human rights issues being decided in international investment and commercial arbitration tribunals;

- reassert the obligation of transnational corporations to respect Human Rights over their profits, including the human right to water;

- reaffirm the State obligations to protect Human Rights against violations perpetrated by transnational corporations, and in the case of the recovery of privatized public companies to the hands of the State, they cannot be understood as an attack on transnational corporations, but as a sovereign decision in defense of public health and the environment.

The states in the South should:

- audit their investment protection agreements in a way that allows to assess, among other things, the impacts of the clauses that restrict the public policy space of States and how and in what way they have threatened regulations designed in the interest of the public and human and environmental rights; they should refuse to accept the continuity of the investor-State dispute settlement system;

- actively participate in the negotiations and promote a binding Treaty to end once and for all with every form of impunity by transnational corporations and seek justice for the affected peoples and communities;

- ensure that transnational corporations that are based in or operate in their territory respect human rights, including environmental regulations and the role of the public sector and its undisputable link with the inalienable rights of the population;

- reaffirm the unquestionable supremacy of international laws on human rights over international investor-State arbitration tribunals that allow transnational corporations to coerce public policies;

- recover the ability to legislate in defense and protection of their populations, territories and commons, regulating foreign investments through public policies that respect human rights;

- dismantle the architecture of impunity that allows transnational corporations to obtain more power and privileges than citizens; leave the International Centre for Settlement of Investment Disputes -ICSID;

- recognize that the passing of the law banning metal mining in El Salvador sets an important precedent for countries that are facing the attacks of transnational corporations that insist on their right to exploit the environmental heritage despite the social and environmental conflicts they generate;

- in cases where there is a lack of sufficient national jurisdiction to claim damages for water pollution, deforestation or the violation of labor rights by transnational corporations, shed light on and create ways to prevent the State and communities from having to bear the costs of transnational operations;

- recognize the legitimacy and moral authority of peoples and communities as key protagonists who oppose these situations, creating regulations and rules that strengthen the supremacy of human rights;

- force transnational corporations to comply with the laws of the country and the international treaties and conventions related to indigenous peoples to which the country where the project is located is a party of;

- respect the sense of belonging and the right to land of indigenous people, and beyond the property titles they can show, they should respect the decisions of the people in relation to the projects that they want to implement.

- ensure that no project promoted by transnational corporations, with funds or support from IFIs, the UN or other international bodies can enter a territory where there are indigenous peoples, without first carrying out a community consultation in good faith and other requirements and instruments, and if the project is approved by the community, the company should be forced to compensate or remedy for the economic, social, cultural and environmental damage caused by the project funded;

- respect the results of consultations carried out previously in the country regarding the imposition of projects of any kind;

- ensure through prior and informed consultation carried out in good faith the right to freedom of expression and expression of thought, so that nobody is persecuted for expressing their opinions in any kind of consultation.

We will defend these proposals both inside and outside the United Nations spaces as Friends of the Earth Latin America and the Caribbean, and we will mobilize for States to defend them as an expression of the demands of the peoples and nature, giving priority to the rights we have conquered from the bottom up and based on the historical struggles of our people, over the profits of corporations.

On the other side, together with communities, organizations and social movements, we will continue fighting for moratoria and for the freedom of our territories from the expansion of agribusiness, extractivism, privatization, commodification and financialization of nature, strengthening the territorial management of communities who have faced and continue to face the arbitrariness of transnational companies on a daily basis. We will join and strengthen community experiences and the building of public policies that allow for the recovery of food sovereignty, the restoration of biodiversity, the recovery of public services as a guarantee of the rights of men and women. We will work relentlessly for the promotion of economic, social, environmental and gender justice, building sustainable societies where the economic system serves the needs of the people, rather than those of economic globalization at the service of transnational companies and corporate capital.

PEOPLES RIGHTS CONFRONTING CORPORATE POWER IN LATIN AMERICA



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the Earth
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la Tierra
América Latina
y el Caribe



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