



**Inter-American Commission on Human Rights
154 Period of Sessions**

**Thematic Hearing:
Corporations, Human Rights and Prior Consultation in the Americas**

**Topic:
Extraterritoriality and Responsibility of Home States in the Protection of Human
Rights for the Activities of Extractive Industries in Latin America**

**Presentation:
Human Rights I of the Human Rights Research and Education Centre, University of
Ottawa**

Washington, D.C., 17 March 2015

Good afternoon,

For the Human Rights Clinic of the Human Rights Research and Education Centre of the University of Ottawa, it is an honor to appear before the Inter-American Commission on Human Rights (IACHR) and to participate in the thematic hearing "*Corporations, Human Rights and Prior Consultation in the Americas*". Our request for a hearing was submitted jointly with DPLF, with the purpose of presenting a report on the extraterritorial obligations of Home States regarding the activities of extractive corporations and its impact on human rights.

In previous sessions, the IACHR has held hearing on the role of the Government of Canada supporting activities of Canadian mining companies operating in Latin America and their alleged responsibility for breaching human rights. Our objective today is to identify the minimum conditions that would allow the Commission to accept cases against Home States for the responsibility of private corporations operating outside their borders. In our view, the current framework to address these cases is insufficient and the concept of "territory" cannot continue to be used as a barrier or excuse to avoid protection, affecting the rights of victims to prompt and effective administrative or judicial remedy.

The protection of human rights is based on an obligation of due diligence. On the basis of the principles cooperation, jurisdiction and the nexus between the State and its nationals (be they national persons or legal persons), a concrete obligation for their extraterritorial activities can be imposed.



The *Ruggie Principles* (on Business and Human Rights) are important because they establish the framework which will be developed by international organizations and States in the short and medium term. The official commentary on these Principles states that currently there is no international obligation on Home States to regulate the extraterritorial activities of private companies. This is true. But this is largely due to the fact that all efforts to internally create legislation on these activities have been rejected or archived by National Parliaments.

This has resulted in international human rights organizations, such as the United Nations Committee for Economic, Social and Cultural Rights; the Committee on the Rights of the Child or the Committee on the Elimination of All Forms of Discrimination against Women, being the ones which have been adopting guidelines calling on Home states to regulate the extraterritorial activities of private entities in order to effectively protect human rights.

On this point, I would like to return to the case of Canada. Canada is the Home state and headquarters of approximately $\frac{3}{4}$ of extractive companies operating in Latin America. As stated before, the IACHR has held hearings on the regulatory framework and government policies and how they affect human rights. However, I would like to draw your attention to the role that development banks or public credit agencies play in this area.

Export and Development Canada, EDC, is a Canadian crown corporation that contributes to the development and financing of private companies in various economic sectors. In the last year alone, EDC has granted CAD \$8.400 millions in insurance and financing for projects in Latin America. In regards to extractive projects, EDC has funded initiatives ranging from CAD \$230- \$500 millions in Colombia in the last three years; from CAD \$1,000- \$2.500 millions in Chile in the last two years, and from CAD \$1,250- \$2,000 million in Brazil over the past three years, to give some examples.

The concern that we have is that, after these public funds are allocated, there are no effective control mechanisms and oversight or accountability. Environmental Impact or Social Impact Assessments are requirements prior to the signing of the contracts but there is no obligation to undertake Human Rights Impact Assessments. While these assessments may share characteristics and a common purpose, the criteria and risks that are to be mitigated are different.

This leads to an unequal situation. In the case of the Host states of the investment projects, affected parties have access to Constitutional writs and other administrative or judicial remedies, with the limitations and shortcomings proper of the Judiciary Systems in the Americas. However, in the case of Home states, which in these cases enable the favorable financial conditions for the development of these projects, there are no effective



remedies available. In the Canadian case, all that exists is a meditation recourse in which the company's participation is not mandatory and compliance with any agreement depends exclusively on the will of the parties, since there are no mechanisms to enforce compliance.

In no way would we like to suggest that all of these projects create negative effects for human rights but some of these initiatives include the exploitation of oil fields in naturally protected areas or the expansion of mining projects, affecting the territory of local communities or Indigenous Peoples. With this in mind, we want to acknowledge that this problem is not exclusive to Canada as the recent creation of development banks throughout Latin America will face the same problem.

If the protection of human rights is to be truly universal and a responsibility of all States, it is necessary to adopt concrete mechanisms that, at a minimum, permit the establishment of the extraterritorial responsibility of the Home States when they have financed or financially supported these private activities.

This rule has been accepted by the World Trade Organization (WTO) in a controversy between the United States and Canada related to the commercialization of milk products in 2003. In this case, the panel determined that, independent of the acts by private actors, the international obligation corresponds to the Canada and to determine if it has adopted the appropriate measures to respect the treaty (of the WTO).

This form of responsibility, known as indirect liability, is applicable in situations in which the State has not supervised or adopted measures to regulate private activities in violation of the dispositions of a treaty. This form of international liability is in accordance with the *Draft Articles on Responsibility of States for Internationally Wrongful Acts of the Commission of International Law* of the United Nations.

To conclude, we respectfully ask the IACHR to develop standards for the acceptance of complaints for the alleged responsibility of Home States regarding the extraterritorial activities of the companies established under its jurisdiction, at the very least, for when there is public financing.

We are aware that the obligation to address these activities resides principally on States. But as we have sustained previously, legislative efforts in Canada, Australia, and Great Britain have been archived in their respective Parliaments. Therefore, the role that an international organization in creating a framework is paramount, triggering the adoption of national initiatives. In this case, the experience of the United Nations Convention against Transnational Organized Crime is an example of the possible impact an international instrument can have in the implementation of national measures.



In the case of the IACHR, we believe that *American Convention of Human Rights*, the *Charter of Organization of American States* and the *Declaration on the Rights and Duties of Man* provide the general framework to adopt such practice within the Inter-American Human Rights System.

We consider that the joint protection and shared responsibility for the protection of human rights by the Home State and the Host State will allow us to ensure the sustainability of these investment projects.

Thank you very much.

Washington, D.C., 17 March 2015