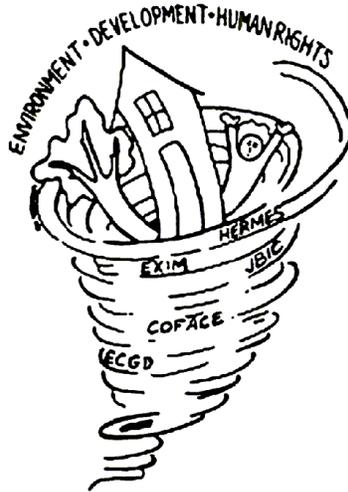


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# Linking Investment and Human Rights: the case of export credit agencies

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**REPORT OF AN NGO STRATEGY SESSION  
LONDON, ENGLAND, DECEMBER 6-7, 2002**

Organized by the NGO Working Group on the EDC, a Working Group of the Halifax Initiative Coalition (Canada), FERN (Belgium), Cornerhouse (UK), CRBM (ITALY) and The Kurdish Human Rights Project (UK)

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***The seminar is dedicated to the memory of Kimy Pernia Domico, a leader of the Embera-Katio people in Colombia, who was killed for his resistance to an export credit financed project.***

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## 1. Introduction

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Export credit agencies (ECAs) are one of the central government vehicles for promoting increased trade and investment. Recently, they have come under increasing scrutiny by civil society and policy-makers due to their support for investments that have had negative environmental, social and human rights impacts. Whereas efforts have been made internationally to develop policies to address the environmental impacts and, to a lesser extent, the social impacts of ECA-backed investments, human rights impacts have been largely outside reform discourse of ECAs. In addition, the particular impact of investment in areas of conflict has also largely been ignored.

Four non-governmental organizations, CRBM, Cornerhouse, Fern and the Kurdish Human Rights Project, collaborated with the NGO Working Group on the EDC, a working group of the Halifax Initiative, to host a conference, *Linking Human Rights and Investment: the case of export credit agencies*. The conference took place in London, England, December 6-7. This seminar immediately followed an international strategy session on the Baku-Tsibli-Ceyhan

pipeline project, which gathered together a number of people active in national and multilateral efforts to reform export credit agencies.

The specific objectives of the seminar were to:

- introduce NGOs to existing work in the areas of human rights and peace and conflict assessment and to facilitate discussion on their appropriateness for ECAs;
- present different existing human rights accountability mechanisms to foster discussion on their applicability to ECAs;
- debate the different key components of a human rights impact assessment (HRIA);
- determine the most appropriate fora for pressing ECAs to adopt a HRIA; and
- identify strategies to link ECAs to human rights.

## 2. Human rights and peace and conflict impact assessments

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*This panel presented existing impact assessments that address human rights. The first speaker introduced a framework used to understand impacts from a gender analysis. The second speaker shared a framework that was developed with industry that seeks to understand the rights of those parties affected by a project, as well as the risks of a project. The third speaker gave an overview of an existing human rights impact assessment tool in use by industry. The last speaker briefed participants on the negative impacts that corporate activity can have in situations that could lead to or exacerbate conflict.*

### **Eugenia McGill, Women's Edge, on gender analysis**

Eugenia McGill provided an overview of a framework developed for Women's EDGE, that assesses the gendered impacts of trade and investment agreements.

The framework includes economic, social and legal/regulatory analysis. It uses a gender lens that is informed by gender and development (GAD) thinking (the social construction of gender), feminist economics, and more critical third world and gender perspectives on law and international treaties. The framework can be used to analyze a number of trade-related issues for different situations, including:

- the impact of trade and investment on particular sectors (such as agriculture and clothing manufacture), and the liberalization of public services (for example, in health, education, and water supply);
- specific government policies with regard to trade and investment (providing incentives to investors to establish factories in export processing zones); and
- particular bilateral or regional agreements or proposals.

Such analysis is relevant to ECAs, despite their project focus, because any analysis or assessment must take into account the regulatory environment that is in place in a country, including policies and laws relating to foreign investment.

The framework suggests disaggregating social groups in a particular country to identify the sub-groups most likely to be affected. This situational analysis highlights the intersections

of difference among these groups (for example, between migrant women, indigenous subsistence farmers, and women working in maquiladoras). Women and men could be further distinguished on the basis of age, race or ethnicity, class, household status, migration status, the economic sector in which they are working, and the geographic area where they live. More specifically, from a gender perspective, this means considering women in their roles as workers, producers, caregivers and consumers of goods and services, doing paid and unpaid work, and in both the formal and informal sector.

The framework considers how women and men could be differently affected by trade or investment through impacts on the prices of goods and services, employment (including availability and conditions), wages, consumption patterns, access to public goods and services, specific laws and regulations, and other trends (such as increased migration).

The legal/regulatory framework considers the following:

- gender biases in the text of a trade or investment agreement;
- gendered impacts in the implementation of trade and investment regulations;
- adverse effects on laws protecting women, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), ILO conventions (including the core conventions), national constitutions, and national and local laws and regulations (including affirmative action, fair wage, maternity leave, and food and drug safety laws); and

- gaps in laws (for example labour and land laws) that might be exacerbated by new trade and investment regulations.

It also considers how to fix agreements under consideration to mitigate their negative gendered impacts.

Monitoring the impact of trade/investment policies and agreements can be conducted through compiling and analyzing various types of data disaggregated by gender, including the United Nations Development Programme's (UNDP) Human Development Report, and using a number of key questions and indicators that highlight the impacts of the agreements.

Ms. McGill suggested that ECAs should be required to assess the impacts of the projects they support, particularly as these institutions are often engaged in large scale infrastructure projects which can have a big impact on the amount of expendable government revenue or can involve privatization of public entities. Impacts on social expenditures and access to public goods and services are relevant human rights indicators for any framework considering the human rights impact of ECAs. Large scale projects also have broad implications for a wide range of laws and regulations, such as labour regulation, the environment, and health and safety. These in turn can have a significant impact on respect for human rights.

Overall, Ms. McGill emphasized the fact that the gendered nature of the framework highlights the need for any analysis, be it on trade and investment or ECAs, to look at both the care economy and the market economy. That is, it needs to consider activities in the household, the community, and the informal and formal sectors. Secondly, it is important to keep in mind how labour markets, and access to productive sources, are influenced by gender and other categories of difference.

Ms. McGill noted two limitations in the Women's EDGE framework: it lacks a participatory approach; and the tools need to be refined and adapted in practice as they have not been put into practice yet.

***Joji Carino, Tebtebba Foundation, on rights and risks assessments***

Joji Carino made particular reference to Chapter

7 of "Dams and Development - The Report of the World Commission on Dams". The Commission was composed of governments, industry, academics, and social movements. The report, consequently, was the product of a process of negotiation that sought to commit governments and industry to the most progressive dimensions of their frameworks while pushing the human rights framework of the social movements.

Under this negotiation, the different parties agreed to a "rights and risk" framework that reflected the varying focus of their different concerns. Governments, for example, have international obligations under increasingly robust frameworks of sustainability and human rights, through the right to development, environmental agreements, and human rights treaties. Alternatively, industry speaks in the financial and economic language of risk management considering the economic and political risks engendered by projects with huge cost and time overruns, and operating in conflict areas. Managers and academics are concerned with how to operationalize risk analysis. On the other hand, the social movements wanted to get away from the inadequacies of a cost benefit analysis, the bottom lines of economic returns, and the trade-offs that are often made between rights and economic development.

This debate around rights and risk is reflected most clearly in the discourse around stakeholders. Those representing civil society wanted to get beyond the language of stakeholders. They asserted their place as rights holders, and as core, affected and interested parties. They highlighted the fact that in any type of project, there are people with clearly defined usufruct, property and customary rights that entitle them to a place in the process as core decision makers. Equally, any intervention brings with it risks, and those groups that are likely to shoulder or bear such risks whether as investors in the project or as a consequence of the risks imposed on them and their livelihoods by the project should also be involved in the decision-making process. It is not just money that is at risk, but other human entitlements and human rights. While governments and developers work with this notion of risk, they need to broaden its meaning to encompass the involuntary risks associated with human rights violations and loss of livelihoods. Banks, for example, want to put

risks to livelihoods and involuntary displacement in the language of economic analysis, and are reluctant to acknowledge these as human rights abuses.

The “rights and risk “ framework, therefore, represents a tool for helping the various parties affected by a project to determine who should be involved in the decision-making process. It is not unusual for parties materially affected to actually come forward and to identify themselves. It also highlights the type of decision-making process that should be followed, one that requires negotiation and agreement among the different parties at each stage of the project cycle in order to guarantee broad social acceptance. Without such acceptance, the project can not proceed. Such a robust procedure ensures that those with rights will not be relegated to mere consultation, and places people back at the center of their own development.

At its core, this process seeks to respond to the questions - who should participate in decision making? what type of a decision making process should be followed? and what criteria can be applied to assess the process and its outcomes? All of these questions, and the framework itself, carry a number of direct applications for ECAs.

### ***Margaret Jungk, Danish Centre for Human Rights, on human rights assessments***

The origins of the Human Rights and Business project arose when Danish companies were involved in a number of controversial and high profile projects, that made them realize they needed to take human rights issues into account. This would require a tool for doing so. The establishment of the Business project consequently brought together business, through the Confederation of Danish Industries, human rights, through the Danish Centre for Human Rights, and investment, through the Industrialization Fund for Developing Countries (IFU).

At the heart of trying to operationalize such a tool, lie three issues. The first of these issues is scope. What human rights fall within the scope or sphere of companies' responsibilities? And what human rights obligations should one expect of companies? Second comes the issue

of premise. How should we identify the duties of companies, and their limitations, to respect human rights? The third issue relates to application. How can we make human rights operational in the company setting? For example, can human rights be applied by engineers, economists and other company people without any specialist training? Equally, how can we apply human rights standards to a variety of company types, sizes and areas of operation?

Ms. Jungk emphasized that the Centre and the Danish business community reached satisfactory agreements on the three issues, and as a result were able to develop an effective human rights tool. However, the agreements were made in a Danish context, and as such, might not offer the best solution for other national human rights efforts. But at least, the Danish experience can be used as a guide for others.

To determine what human rights fall within the scope of companies (issue 1), the Centre went to all the companies that had human rights policies in place to ask them how they identified these rights. The companies had four answers:

1. Some were using the ILO standards, but there was little sense that human rights went beyond protecting their own employees;
2. Other companies had their human rights policy correspond to the national laws of where they were operating, but these standards were apt to fall short in countries that had no standards;
3. A third group of companies had developed a system of business ethics relative to customers and employees, but such systems often lacked depth and were a bit haphazard;
4. Finally, some companies had developed a stakeholder methodology, in which the companies surveyed shareholders, employees, consumers, and people outside the company to determine what human rights were affected, and what duties the companies had. This, however, suffered from the fact that different audiences had very different expectations of the rights they should be able to enjoy. For example, a

Danish company might encounter a high degree of demands in a country such as Sweden, but much lower demands in places such as Sri Lanka.

Given the responses, the Centre decided that there was no real system in place that could satisfactorily set a national standard. The Centre therefore developed a fifth system, rooted in international human rights law.

To do so, the Centre started with a whole broad array of international human rights law and standards, of different breadths, weights and degrees of accountability. These laws were written for the state, and the state has the responsibility of transforming them into national legislation. The tendency, however, is for this process to break down in practice, as it is dependent on the will and capacity of the state. Consequently, since there is no enforcement mechanism, when the state fails, nothing usually happens. However, companies taking part in the research agreed that they were not going to be complicit in this failure. So all the tools that were developed then became an exercise in making international human rights law more readily accessible to the businesses.

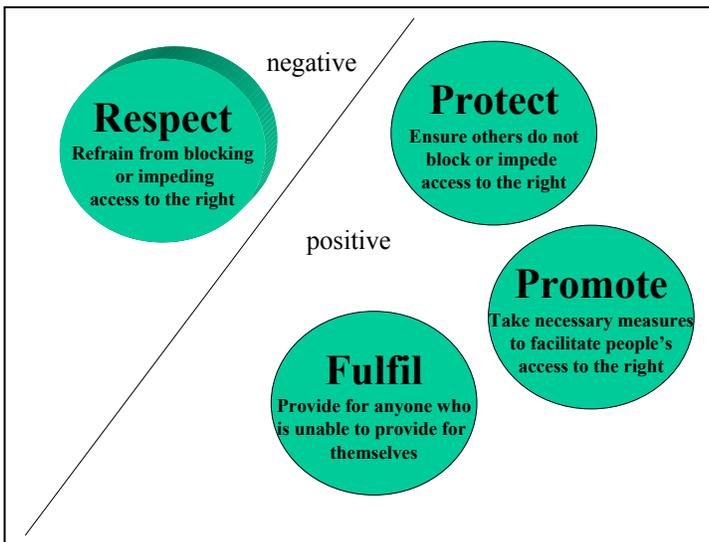
As far as the second issue – premise – is concerned, this dealt with the issue of identifying companies' responsibilities. This meant translating, for example, the right to adequate housing into a company's respective duties. If you take any provision, the duty holder's responsibilities correspond to duties to respect (refrain from blocking or impeding

access to a right), protect (ensure others do not block or impeded access to the right), promote (take necessary measures to facilitate people's access to the right) and fulfill (provide for anyone who is unable to provide for themselves) an individual's rights. The negative interpretation of human rights law relates to refraining from undertaking a course of action – that is, respecting people's rights. The positive interpretation corresponds to proactively undertaking a course of action – that is promoting, protecting, and fulfilling rights. The Centre took every relevant provision, and developed a series of guiding questions and indicators that enabled companies to ensure that they were respecting various human rights. The project also sought to encourage Danish companies to take action in the positive realm too, offering suggestions for the protection, promotion and fulfillment of human rights through various business activities.

On the question of a companies' obligations to shareholders -that is, to make a profit- Ms Jungk maintained that these obligations should not affect a company's basic duties to 'respect' human rights, but should nonetheless be balanced against any promotional human rights activities that the company chooses to undertake. On the question of stakeholders, and the widespread practice of stakeholder analysis to define companies' obligations to human rights, Margaret drew attention to certain dangers. Stakeholders often expect more of companies, due to their sheer size and wealth, and demand that these economic entities undertake the traditional government obligations

of protecting, promoting and fulfilling rights. At the same time, other basic duties to 'respect' rights often go undetected, due to the complexity of the issue, or the fact that the stakeholders are not in a position to speak up and claim the rights for themselves (i.e. migrant workers or illegal immigrants).

As far as the issue of application is concerned, Margaret highlighted how the Centre operationalized human rights in a company setting. For it to work, companies would need a sense of ownership of the tool. The tool also needed to correspond to expectations of how much time and money companies would be prepared to devote to using such a tool, with 20 hours per year a realistic estimate. It also needed to be user-



friendly and simple. The result was the human rights compliance assessment (HRCA).

To develop the HRCA, the Centre, took all human rights and disaggregated them into their negative duties and rewrote them. The Centre then worked with ten companies to develop concrete indicators to help companies determine where they were most likely to violate the various rights. In addition, the rights were linked to the structure of company practice (public utilities and services, employment, land purchases/usage, research and development, company products and marketing, and operations). On-line this appears as a checklist of questions for people from each department to answer. Employees can also delete or add indicators to tailor the assessment to the company's specific requirements. Then once the responses are recorded, they are regenerated in a sheet of green (compliance), yellow (needs some changes) and red (non-compliance) responses. Where the response is red, the intention is to follow up with companies to see that they are taking a directive course of action. A few red lights are expected in even the best of companies. The intention is not to reject a particular company when the response is red, but rather to engage in a dialogue so as to ensure that a reasonable course of corrective action is pursued. The Centre is continuing to consult with businesses, NGOs and government to gain acceptance and feedback for the tool.

The EDC, Canada's ECA, has expressed interest in learning more about this tool.

### ***Nick Killick, International Alert, on Conflict risk and impact assessments***

Nick Killick spoke about an emerging methodology for conflict risk and impact assessments (CRIA) developed through field programmes in Central, West Africa, Sri Lanka and the Caucasus. The CRIA came about as an effort to explore the constructive role the private sector could play in mitigating conflict, with a particular focus on extractive industries and businesses. It offered a way for companies to analyze the potential risks their operations added to conflicts in a region. It takes a broad approach, highlighting a varying degree of responsibility, direct and indirect roles, and with no limits on a company's involvement.

In developing the CRIA, International Alert

started with peace and conflict impact assessments (PCIA). PCIA's serve as planning and management tools that were developed for a number of reasons, including to:

- identify the root causes of conflict, and conversely understand what realistic opportunities for peace to exist;
- identify local peace-building capacities to ensure that responses strengthen and support them;
- assess and mitigate the potential negative consequences of development in conflict or conflict-prone regions; and finally,
- identify positive opportunities for assisting in peace-building objectives through project-related activities.

The CRIA has also attempted to build on a number of weaknesses inherent in current corporate risk assessments and environmental and social impact assessments (ESIA). For example, such assessments are not done early enough, but rather only when financial commitment materializes. They are also not broad enough, focusing narrowly on political risk, just as their environmental and social counterparts do. They are also not continuous enough, but conducted over a fixed time period rather than as part of the whole continuous process. They are not sufficiently process-oriented, but are conducted for the sake of securing funding, rather than for their own sake. Equally, they are not mainstreamed enough, with companies doing more in one country than another. And finally, they are not participatory enough.

For its part, the CRIA combines work on PCIA's with existing corporate risk assessments and ESIA's. It promotes the idea that companies have a potential to contribute to peacebuilding and conflict-sensitive development, but have not done so to date because they are unaware of the impact of their operations. They do not properly understand the environment in which they are investing, and have not been able to develop effective mitigation strategies or address the root causes of the conflict. With the CRIA, companies are trying to generate a much clearer assessment of the environment before the investment takes place, to determine the impact of the investment, and to look at it as a

process of developing relationships.

While the CRIA is still an evolving methodology, its three core components focus on the project cycle, conflict indicators, and stakeholder analysis. In terms of project cycle, the CRIA analyzes the type of assessment mining companies do within their project cycle. The assessment is often a cost-benefit analysis balancing financial profit with a consideration of the political and social risks.

To inform this analysis of the project cycle, the CRIA uses a number of indicators. Conflict factors highlight potential sites of conflict in the areas of governance (e.g., poor governance, corruption or repressive regimes), economics (e.g., competition over natural resources, resource scarcity, under development), socio-cultural issues (e.g., ethnic division, ideological struggles, and land disputes) and security (e.g., environmental degradation, militarized society, repressive security forces). A number of indicators help companies and the CRIA identify these threats, such as widespread human rights violations, weak electoral systems, widespread poverty, exclusion of social groups, ethnic discrimination, poor relations with indigenous groups, availability of small arms, and widespread use of security firms. These in turn highlight a number of implications for corporate operations, such as a lack of transparency, poor business practices, unpredictable investment, high financial risks, antagonism towards western companies, and security risks for staff. These implications help companies make more informed decisions, and pursue a more proactive approach in helping to promote democratic accountability, transparency, multi-stakeholder dialogues and amend security guidelines.

The CRIA also involves a stakeholder analysis engaging the broad array of people affected by the project. This will include government (e.g., officials, policymakers, parliamentarians), business (e.g., other companies, contractors and suppliers), civil society (e.g., NGOs, media, and religious groups) and the international community (e.g., embassies, the World Bank Groups, UN missions, and international NGOs). The CRIA places involvement, and not just consultation, as a fundamental element of its methodology. It engages stakeholders in the decision making and implementation of the process, and throughout the cycle. It considers

the role and agenda of each of the stakeholders, their influence and interest, their capacity, and their relationships with each other and perceptions of one another. From this analysis, the CRIA helps draw out an assessment of the risk and opportunities, the potential for partnerships and the opportunities for capacity building. It considers not just the issues, but also the stakeholders and different conflict actors that help generate a more detailed picture of the conflict and risk.

Mr. Killick emphasized the fact that the methodology is still under development, and when completed it will be generic, but adaptable to the individual situations of countries. In the mean time, International Alert are struggling to address a number of issues, including many of the practicalities related to putting this assessment into operation. This includes such problems as how you deal with an assessment that does not just create yes/no responses, and who should conduct the assessment so as to overcome power differentials between participants and assessor. Further research also needs to be conducted on existing company practices, the CRIA itself needs to be tested in West Africa and the Southern Caucasus, and then it still requires another six months to put it in place.

As far as adoption is concerned, Mr. Killick stressed that he wants company people to use it themselves in order to generate company ownership of the tool. From this perspective, he is very interested in ECAs and the World Bank as there would be a much higher take up rate if CRIA becomes an essential requirement of their work. He also raised the questions of how to coordinate all of these tools, so that ECAs are not overwhelmed with a whole host of different assessments tools.

## **Discussion**

### ***How does the Danish human rights model incorporate direct and indirect negative human rights duties into its framework?***

[Indirect duties occur when, for example, the revenues might be used to violate human rights or support human rights regimes; direct duties, when the company may initiate or undertake a violation, for example, the government might forcibly clear the land for its use, or might encourage the use of forced labour.] In fact, the Centre has found it difficult to integrate indirect

duties into company practice. For this, however, they have used a decision mapping methodology to ensure that due diligence has been observed, and that the company has gone through enough checks to see that they are clear of any direct or indirect violations. The mapping process, for example, determines a company's proximity between its operations and human rights violations. Some of these assessments are then reviewed by the Danish Centre, but they are not generally intended for public review due to the sensitive nature of the subject.

Ms. Carino gave an example of an attempt to incorporate indirect negative impacts in the case of the San Roque dam in the Philippines, where communities, government officials and some Senators are re-examining a number of purchase agreements, to lay down some provisions or benchmarks that are not acceptable on various types of contracts because of their human rights impacts

Another question focused on the type of enforcement and negotiation mechanisms the Danish model offered. In this case, IFU and the Confederation of Danish Industries do take into account the human rights records of the companies they work with. The Centre is also trying to take informal 'enforcement' a step further, by working with Princeton University to set up a Complaints Commission for Danish companies whose practices are in conflict with human rights.

***How does the Danish model deal with governments scaling down their national laws, when the basis of the model is the law?***

While this is true, it does not matter as the basis of the model is international, not national, law. Companies can also be held to account through the dual obligations of both the investor and investee country. Nevertheless, many companies do still adopt different standards in different countries, and when it comes to international law, countries are unlikely to observe the softer areas of rights. One participant, however, felt that it is always worth testing different laws and getting different national, regional and international interpretations of the treaties by filing cases with the human rights treaty bodies at international and regional levels. These different processes can help establish more case law and the actual

obligations of governments and corporations.

***Has a company ever gone in and negotiated a totally different legal framework for itself?***

These are called host government agreements (HGAs), and the Bako-Tsibli-Ceyhan pipeline is a case in which the government negotiated such agreements with a company. In this example, although the agreements constituted a private contract, they were part of an intergovernmental agreement and had the status of an international treaty. They had been ratified by the respective governments of Georgia, Azerbaijan and Turkey – although few parliamentarians actually knew about them. These HGAs exempt the BP-led consortium seeking to build the pipeline from any obligation under local law, except for the constitutions of these countries, which conflict with the terms of the HGA/Intern-governmental agreement. In addition, within the agreement, there are often stabilization agreements, meaning that if, for example, Turkey signs up to some agreement in the future that brings in new standards or laws that BP deems stricter than those prevailing in the industry internationally, then the host governments must compensate BP for implementing them. But BP has not specified which international environmental and social standards the HGA refers to – indeed, there do not appear to be any for pipelines. The net effect of the HGA is that the governments have effectively abrogated their executive and legislative powers to protect their citizens from potential environmental damage and associated health and safety hazards or to improve the regulatory regime should changes in the understanding of the risks require it.

This initiated a discussion among a number of participants around the loss of human rights standards to trade agreements. One participant observed that host-government agreements highlight the conflicting relationship between the progressive liberalization of trade versus progressive realization of rights. This can have a potentially detrimental impact on human rights if countries agree to these host-government agreements in advance of legislation that promotes human rights. Someone further argued that the trade agreements enacted now impose a reduction of standards in all countries. This eliminates the possibility of proposing alternatives to the standards that are emanating from these trade agreements. In fact, this human rights debate is key to the campaign

against the Free Trade Area of the Americas (FTAA), and of subsuming trade agreements to human rights standards.

Someone else noted that there was no inclusion of human rights in the World Summit on Sustainable Development. Trade institutions now have the power to override national and international laws, which creates a type of institutional schizophrenia. For example, if governments agree to a proposal on investment, a company in Italy could invest in Ecuador. The Ecuadorian government may then demand higher human rights legislation, and the Italian company could go through the WTO dispute mechanism to override this. This denies the people in Ecuador any remedies for going to the national court. It creates a jurisprudence dispute between the two courts in Ecuador and Italy that is ultimately put to the WTO. The lack of consistency between newly signed trade agreements, and unreformed national laws, is creating a vacuum of national legislation. Someone further added that the European Commission has adopted sustainability impact assessments for its trade agreements and policies to make sure that these are not inconsistent with policies on sustainable development. But there still needs to be a better mechanism for resolving these inconsistencies and potential for conflict. Nor is this just a legal issue, but it is also a political struggle.

***What made Danish companies consent to go ahead with these issues? If the HRCA does not disclose information to the public, then there is no public pressure. So what makes them responsible, and what elements can be borrowed from this to inform future ECA work? How, for example, do Danish***

***companies see this affecting their competitive advantage, or do they see this in itself as an advantage?***

The sense was that Danish companies are not special in this regard, but that this model offers them a clear delineation of their responsibilities, and concrete ways of assessing them. Nor do they feel they are being put at a competitive disadvantage in doing so. Rather, they are responding to the expectations of the Danish people and pressure from journalists.

***Has the Danish fund ever brought the mechanism to the attention of international finance bodies?***

The World Bank was engaged in the consultation process. The Danish Centre is pursuing a route to slowly introduce it to other IFU sister organizations.

***With respect to the notion of rights holders, in some local situations, the people do not have a strong sense of their rights. Moreover, companies may place them under pressure to ignore their rights. Alternatively, a lack of democratic openness may make it difficult for them to be aware of their rights and assert them. How can methodologies bear this in mind?***

It was felt that this required identifying where a local capacity exists for promoting rights. That even in repressive situations, there are human rights bodies, and communities have a strong sense of whether they are being fairly treated or not. However, as an approach, in countries that do not allow the participation of rights holders, then this is a good indicator that one probably should not invest there.

### 3. Business, Human Rights and International Legal Accountability

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#### **Sumi Dhanarajan, Oxfam GB, on 'Beyond Voluntarism'**

It is no longer viable to concern ourselves only with the impact of governmental activities when one of the biggest engines of development in today's world is the private sector. Our goal, then, is to ensure that this engine generates advantages for, rather than harm to those, who are vulnerable to exploitation or have been marginalized from reaping the benefits of the current economic order.

#### **The link between poverty and FDI**

Conscious of the fact that foreign direct investment (FDI) has by far overtaken overseas development aid as a source of revenue for many developing countries, we have paid particular attention to its net impact. Such investment has the potential to alleviate poverty by generating income, transferring skills and technology and creating jobs and where the quality of investment is good and governments has effectively managed it, that potential has been reached. In many cases however, FDI has been more of an impediment to development efforts. For example, where foreign investors have sought to increase tax concessions to the point where governments have had to compensate revenue losses by cutting back on financing health and education services; or where global supply chains have encouraged the weakening of labour standards; or where the privatization of basic services has further polarized societies around their ability to pay.

#### **FDI in resource extraction and its impact on human rights**

Resource extraction attracts more than its fair share of bad quality investment. Whilst often accompanied by windfall revenues and foreign exchange gains, the tarnished side of the coin reveals land displacement, environmental destruction, severe health risks, damage to livelihoods, threats to the life and security of individuals and their communities, and violent conflict.

There are also longer-term costs for national economies. This sector is vulnerable to price instability. Where there are slumps, government

revenues get depleted in making up for the shortfall. Where there are booms, governments borrow excessively against the collateral on international markets. For example, Ecuador used the oil boom in the 1970s to borrow heavily. Today, its national debt exceeds \$16bn and over one-third of government revenue is allocated to servicing this debt. Consequentially, revenue is drawn away from public services, like health and education. Further, the susceptibility to corruption plays its part in weakening governance at all levels which, amongst other things, undermines a government's ability and will to prioritize the protection and promotion of human rights.

Where extraction takes place in the face of a civil war, the tendency of human rights abuses are heightened greatly. These manifest in the form of life and security risks where parties fight over control of resources in the immediate vicinity, as well as long-term impact that revenues from extractive resources have in prolonging the conflict.

#### **"Beyond Voluntarism" report – Analysis and Conclusions**

It is clear that much more needs to be done to address the impact of foreign direct investment upon human rights. We are able to link private sector activities to human rights breaches and can identify the various perpetrators whether they are acting on their own or in concert with government institutions. What has *not* been achieved, however, are effective mechanisms for preventing and redressing human rights abuses.

The analysis and conclusions of this report were guided by the following beliefs:

- The voluntary, self-regulatory approach towards ensuring companies respect and promote human rights is limited;
- The law is a much better tool for preventing and redressing corporate abuses of human rights;
- International law carries the distinct advantage of being a universal benchmark

and that it also addresses the transnational nature of corporate activity;

- Any effective international legal mechanism must create binding obligations both upon States as well as upon companies; and
- The law can only be effective so long as there is access to justice.

The application of international law to the activities of private actors is a relatively new development. Many lawyers and governments will still argue that only the State can be the subject of international law. Consequentially, with regards to international human rights law, only the State can be held accountable as protector or perpetrator. But key judgments both in national and regional human rights courts have however recognized that in many instances the private actor can act in a manner that attracts liability under human rights law.

The report reaches four main conclusions:

1. States are obligated to protect human rights and that this duty extends to preventing companies from abusing rights and to providing redress for victims where abuse occurs. This duty is breached where a State does not take reasonable or serious steps to prevent or respond to an abuse. Such steps involve (a) having the requisite legislation; (b) investigating allegations; and (c) providing remedies.
2. It is possible to impose international legal obligations directly on companies because: (a) a number of key international human rights instruments impose duties upon all actors – both public and private – to respect human rights. These include the Universal Declaration on Human Rights, the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), the International Convention on Civil and Political Rights (ICCPR), the International Convention on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC); (b) although not directly binding upon companies, the OECD guidelines and the ILO Declaration expect the State to monitor the operations of companies against international human rights legal standards; and (c) other initiatives like

environmental and social impact assessments required by IFIs and ECAs also refer to these standards. All these amount to 'soft law'.

3. Although international law can be found to apply to the activities of companies and that obligations definitely exist for States and can exist for companies, enforcement is presently ad hoc. For example, the Alien Torts Claims Act is a useful tool but there are numerous hurdles to jump before it comes into its own. The OECD Guidelines might place expectations upon States to regulate corporate behaviour, but when it comes to the crunch, there are no real investigative nor punitive procedures. There is a need to create international legal instruments that directly address the issue in a comprehensive manner.
4. Although ad hoc, those suffering from human rights abuse as a result of corporate activity should continue to use existing procedures, along with activists, in order to strengthen the jurisprudence and thereby consolidate the call for new measures.

One further issue covered by the report – building upon the work of Clapham and Jerbi<sup>1</sup> for the High Commissioner of Human Rights – was an effort to flesh out when a company could be found to be complicit in human rights violations with the State or its agents. The four situations are:

- When a company actively assists in the violation. For example, where it promotes or assists the forced relocation of communities or the arbitrary detention or killing of protestors by providing ammunition or paramilitary back-up;
- When a company is in a joint venture with the State and knew or could reasonably foresee that the government was likely to commit abuses in carrying out the agreement – the abuses that took place in the building of the Yadana oil pipeline in Burma is an example of this.

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<sup>1</sup> Clapham, A. and S. Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses' Complicity, New York, March 2001 [Available on-line at <http://www.business-humanrights.org/Clapham-Jerbi-paper.htm>] (15/12/02)

- When the company benefits from the opportunities or environment created by human rights violations even if it does not positively assist or cause the perpetrator to commit the violations; and possibly
- When the company is silent or inactive in the face of the human rights violations.

So where do we go from here?

As mentioned earlier, it is important that as activists we continue to use any existing legal mechanisms to bring companies to account for human rights abuses. Whenever we do, we must refer to international human rights norms in order to uphold the notion that they apply to corporate behaviour. It is equally important to challenge governments where they do not abide by their duty to protect individuals and communities from harm.

As for further developing international law, there are a few initiatives on the horizon. Hopefully by next summer, the UN Sub-Commission for the Protection and Promotion of Human Rights will finally adopt the norms of responsibility of TNCs and other business enterprises with regards to human rights. The norms offer a definitive interpretation of how human rights standards – civil, political, economic, social and cultural – apply to business activity. They also outline certain procedures for ensuring accountability. Although the norms will only have the status of soft law for the time being, it is a strong first step towards a UN-based international legal enforcement mechanism which will bind both State and company.

The second initiative to watch is the Framework for Corporate Accountability that was put forward at the WSSD in Johannesburg this year by the NGO group. This proposes an international convention which would bind the State to establish environmental and human rights standards for corporate activities, impose various duties upon companies to report against environmental and social standards, conduct impact assessments to ensure environmental and social impacts are factors in corporate decision-making, and provide sanctions for recalcitrants.

To finish, Ms. Dhanarajan made mention of a topic that had informed earlier discussions around the first panel. She highlighted the

importance of enforceable international law to hold corporations to account in the run-up to the next round of WTO talks. If the EU gets its way, this round is likely to include negotiations on a multilateral framework for investment designed to remove restrictions on the free-flow of FDI and to provide stringent investor protection. Such an Agreement will seriously curb governments' ability to regulate corporate behaviour in accordance with human rights standards or to take measures to promote human rights and development. As it is, under the current WTO agreements, corporations have ample investor rights within TRIPS, GATS and TRIMS. What is lacking, are any provisions that define corporate responsibilities. And until this is addressed, all efforts must be made to halt such an agreement from coming to fruition.

## Discussion

***Under what conditions can companies speak out on human rights violations, and do you think companies can be human rights defenders? For example, in China, should a company speak out to promote freedom of association?***

For crimes against humanity and abuses of human rights that are *jus cogens*, there is definitely an obligation upon all actors to speak up, including private sector actors. With other human rights abuses, where the abuse is gross, flagrant and systematic, there is equally an obligation to raise concerns. In fact the Universal Declaration of Human Rights (UDHR) places an obligation upon all actors to protect, promote and respect human rights. In the case of China, where a company knows that its operations are within the context of an abuse and where it may be seen to be benefiting from such abuse, then it must also address its concerns to the State. She noted however that this flags other concerns, as expecting companies to exert that kind of political influence upon the State, may itself be open to abuse.

In this regard, the framework convention drafted at the World Summit on Sustainable Development would help address the lack of will of states to hold companies accountable. The case law on the application of international law to private actors is also developing. It is important to encourage the courts at the national and regional level to continue to

expand the jurisprudence. The Inter-American Human Rights Commission has been at the fore of linking human rights abuses to the environment and considering the role of corporations in abuses.

***What has the Beyond Volunteerism report concluded about the OECD guidelines?***

Ms. Dhanarajan mentioned that there have been some successful use of the guidelines in labour cases, and labour organizations are most active on this. This may be because there is a whole chapter within the Guidelines devoted to labour whereas human rights is referred to in one line. This said, Ms. Jungk briefly interjected that there is a lot packed into that one line. Nevertheless, the effectiveness of the Guidelines hinges upon their use and the strength and will of the National Contact Point (NCPs) in dealing with complaints and promoting the guidelines. There is at the moment, no consistency in how NCPs approach the guidelines. Questions can take anywhere from 2 weeks to a year to be addressed. Equally, the NCP sits only as an arbiter, with no obligation to investigate a complaint proactively.

***In reference to voluntary business codes of conduct, what purpose does another set of non-binding guidelines serve? Are they not just being developed by companies to serve as a public relations tool?***

In response, Ms. Dhanarajan referred to the recent case of Nike vs. Kasky in the US. In this case, the circuit court held that Nike's social report amounted to commercial speech and therefore did not have the protection of the first amendment. As a result, Kasky was successful in claiming that the social report was false advertisement. Ironically, this may have a detrimental impact, as such a ruling may discourage companies from reporting on their environmental/social conduct or from publishing codes of conduct. Someone from the floor said that, while this was true, the ruling will at least allow one to determine which companies are genuinely committed to meeting such codes. They added that if a company has no intent of meeting a code, then they should not subscribe to one. Ms. Dhanarajan agreed, but also said that there are a number of instances where a company may have every intent of ensuring it meets its code, and demonstrates that it is taking action to do so, but may still be unable to ensure that abuses are not taking place somewhere along its supply chain. This said,

the most important assessment to make is whether a company is demonstrating due diligence in meeting its obligations.

***How can governments and companies be held more accountable to their human rights obligations?***

Ms. Dhanarajan suggested that this required a mixed approach – one that has both public law and company law elements. International law needs to place clear obligations upon States to ensure that the human rights of individuals and communities are not abused by corporate activity. States should be expected to specifically report on how they meet these obligations through their period reports under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Through company law, governments can introduce duties upon companies to ensure that they consider the social and environmental impact of their operations and that these determine their investment and operation decisions. Companies can also be expected to be transparent and to report on their impact. A Bill to that effect was mooted in Australia, and France has legislation towards this end. Some people suggested holding governments to their human rights obligations through their procurement rules. Such a law exists in Norway and was considered in Switzerland. On this question, the European Commission, in its White Paper on Corporate Social Responsibility, has said that it would consider introducing such regulations into its own procurement.

***Should civil society exert its energy in ensuring the enforcement of existing standards or pushing for increased standards?***

Ms. Dhanarajan replied that both efforts were necessary.

***How could companies be punished for violations (through blacklisting or being denied access to export credits)? How, also, do we gauge the response between individual incidences where certain rights are abused, and more systematic violations?***

Ms. Dhanarajan responded that companies should review the situation to determine whether the violation was a random act or whether it was as a direct result of its operations. This said, this should not provide an excuse for companies to dismiss all outbreaks

simply as sporadic. There are means by which this can be assessed and it is important to assess whether or not the abuse could have been avoided had the company been duly

diligent in its monitoring of its operations. In such instances, someone suggested using a human rights ombudsman.

## 4. Human rights accountability mechanisms

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*This panel provided an overview of current efforts to hold the private sector accountable to international human rights laws and standards. The first speaker promoted the OECD Guidelines, noting that they are not voluntary as described earlier in the day. The second speaker described the Alien Torts Act in the United States, highlighting the challenges of applying this Act to ECAs. The third speaker discussed efforts in Latin America, emphasizing the need to engage the grassroots and international civil society in accountability efforts. The last speaker discussed different accountability mechanisms explored in the Ilisu Dam campaign, such as filing a challenge under the UK Human Rights Act*

### **Roy Jones, OECD's Trade Union Advisory Committee (TUAC), on the OECD Guidelines for Multinational Enterprises**

To begin, Roy Jones highlighted the origin of the latest review of the OECD Guidelines. It arose from the ashes of the Multilateral Agreement on Investment as an effort by OECD governments to pull back some lost credibility. It was innovative in that groups such as TUAC, participating NGOs, and business representatives saw draft text, often before the governments, and were hence able to engage critically with governments in their consultations with them.

The original Guidelines were the OECD response to the high-profile abuses of multinational enterprises in developing countries: for example the role of ITT in the Chilean coup d'état. They were a useful tool of corporate social responsibility up until the mid 1980s, but fell into disuse as governments' attention turned to investment promotion, rather than holding them accountable for their actions. The review in 2000 offered a way to resurrect the Guidelines. For example, they now have global applicability, and include all core ILO labour standards. Moreover, TNCs are expected to respect all human rights obligations consistent with the host government's applications. The instrument has also been extended into the supply chain. The other big element of the review is the wholly new implementation process.

TUAC, has played a key role both to promote and implement the guidelines. They have secured financial support for a project post to manage Guidelines related work; produced a multi-language Users Guide to the Guidelines; and run seminars on the instrument across the

developed and developing world. In addition TUAC is moving to a more targeted approach based on bringing cases. They also work extensively with NGOs keen to use the Guidelines.

In addition, any government that signs up to the OECD Guidelines (currently all 30 OECD governments and six major non-Member governments) is legally obliged to set up a National Contact Point (NCP). These vary from single agencies to the much better multi-agency initiatives. There are now several tripartite NCPs, or multi-agency contacts with a consultative process. Some quadri-partite mechanisms even include NGOs. These NCPs have themselves translated the Guidelines into 16 languages and offer some degree of visibility, accessibility and transparency. When a problem arises with a TNC, the onus is on the National Contact Point to act. They have a range of options at their disposal, including acting as a forum for discussion, conciliation, and mediation. When a complaint is received, they have to make an initial assessment, and they are duty bound to report to the complainants about whether they will proceed with a case. If the case goes ahead the NCP can then try and mediate the problem, consulting with trade unions, NGOs, business, and governments in third countries. Often this process can lead to an outcome. For example, Siemens and Bosch refused to recognize Czech trade unions. The unions took the issue to the Czech government, who then brought the management and unions together and negotiated an agreement. On the other hand, if the problems are not resolved, the government has a responsibility to make recommendations. That said, success is very dependent on political will. So far, the trade unions have raised

23 cases, mostly around labour issues, and NGOs have raised 12 cases. TUAC is proposing to create a registry of cases. While a lot of the information still remains confidential, and the government is not supportive of such an initiative, it will at least allow people to know what is going on where.

The outcomes of the Guidelines have been mixed. As to their legal status, the Guidelines are soft, not hard law, but importantly they are not voluntary. They apply to all TNCs who cannot pick and choose what parts of the instrument applies to them. They are not therefore optional. Nevertheless, responsibility for their implementation ultimately lies with governments and hence depends on political will. Therefore, while mostly centre-left governments see them as useful, the US government is a major stumbling block. To date only the Dutch have tried linking the Guidelines to public subsidies, including those for its ECAs, as a form of conditionality. Parliament requested the Economics Ministry to come up with a series of measures around Corporate Social Responsibility, including accountability on public subsidies. The Economics Ministry drafted recommendations stating that investors who receive subsidies are expected to sign on to the Guidelines, and agree that they will abide by them. The government, however, do not monitor companies' compliance with the instrument, and so it is likely that many companies breach them. Berghard Ilge, from a Dutch NGO, also said that the Ministry has since softened its language around this. But, regardless, Mr. Jones still felt that the guidelines represented a promising campaign tool.

For example, Pascal Lamy at the European Commission has stressed the importance of the Guidelines, and Commission staff have stated their intention to be more proactive in promoting the instrument, and to find ways in which to link EU corporate funding capacities to the Guidelines. The idea of an EU NCPO is under discussion. The Commission is also exploring ways to assist developing country governments to adhere to the Guidelines.

Mr. Jones finished by saying that the guidelines are not the full answer to the problem of corporate accountability, but outside of a binding agreement, they cover the areas we want covered, and are the best thing available. Still governments have the ultimate

responsibility for implementing them, and will only move when there is enough pressure.

### **Charles Abrahams, Abrahams Kiewitz, on 'the US alien torts law'**

Charles Abrahams started by saying that his talk would explore the extent to which alien torts claims can be used as a possible mechanism for potentially holding ECAs accountable. He argued that while it provides great opportunities, and has contributed tremendously to developing norms of customary international law, as a heavily contested and uncertain area of law, it should be used with great caution as a potential mechanism for attaching liability to ECAs.

The alien torts act is a 200 year old statute that the US forgot about. It was established during the slave trade, and was reborn in 1979 with a case against a Paraguayan that found that a state official who commits official torture, can be held liable against violating customary international law. This opened the floodgates for a number of subsequent suits. In particular, in the 1993 Kadic v Karadzic case, the court went beyond talking about state officials, to apply it to officials not attached to any particular state, in this case, with respect to genocide and crimes of war. In 1996, and the case against Unocal, the basis was firmly established for TNCs.

The apartheid lawsuit comes against this background. In South Africa, between 1975 and 1989, German exports to South Africa increased from 3.4 billion to 6.1 deutschmark. In this time, German export credits increased from 2.4 billion to 7.4 billion. These credits were used by seven German corporations, supplying capital goods to state corporations, ESCOM and SASOL. ESCOM was the most important public corporation involved in building the nuclear power plant in South Africa. SASOL was seized with developing the apartheid regime's independent oil supply. What we have learnt is how ECAs facilitated the supply of capital goods to South Africa to build and establish these strategic and military corporations. To what extent, then, can you hold ECAs liable? While the role of ECAs and banks was highly immoral, from a legal point of view, it seems very difficult to make any links without facing an enormous amount of legal hurdles.

The apartheid lawsuit has targeted 21 TNCs, 6 industries, and 7 countries who have aided and

abetted the apartheid regime. The fact that the General Assembly has declared apartheid a crime against humanity, and that there is jus cogens and norms, is insufficient. Regardless of this, and whether the corporations had business dealings, the case had to establish the firms' intent to aid the apartheid regime to commit crimes such as torture, extra-judicial killings, and arbitrarily long detentions. It did this by saying that Barclays Bank purchased a substantial amount of defense bonds (10 million rand) that provided the government with sufficient capital to reorganize itself and get capital to further the repression in South Africa. They also filed a suit against Rheinmetal, a large German military corporation, that violated the arms embargo. This causal link between the aiding and abetting has to be clear cut like this, and here highlights a case of secondary liability to the law of nations, which has links in international law through the Nuremberg trials. Now for ECAs, this secondary link becomes even more remote: it is an agency that provides a kind of guarantee to an exporter of capital goods, and the corporation might in turn use this capital to strengthen the military regime, and thereby violate certain fundamental laws. But the link is tenuous. With violations of environmental laws and other soft law, the links are even more strained.

Mr. Abrahams concluded by saying that alien torts is a novel tool, but the person who is charged must also be located in the US. The case of *Owens vs. Royal Dutch Shell* demonstrated this through the question of whether Shell had a presence in the US. Therefore, given the number of hurdles, it might be best to look at local remedies in the host countries, rather than relying on the Alien Torts Act.

***Patricio Pazmiño, El Centro de Derechos Economicos y Sociales (CDES), on 'debt and its implications on human rights, illegitimate debts, debt relief, and citizen audits'***

Patricio Pazmiño explored the issues of rights violations in the context of economic, social and cultural rights, and its connections to holding ECAs accountable.

After 20 years of structural programmes in Latin America, there is strong support for civil and

political rights in Latin America, especially after the experience of military regimes and dictatorships. Yet while there have been advances in civil and political rights, there have also been increasing disparities between rich and poor, and a higher incidences of poverty. This has meant that until recently economic, social, and cultural rights are seen in a very secondary light. For example, it is much easier to mobilize a population around issues like torture, than to elicit the same response when rights violations are phrased in terms of women and children dying of poverty. Poverty is somehow seen as something natural.

Nevertheless, it is important to keep this framework in mind when we think of accountability mechanisms for ECAs. They are functioning in a context of twenty years of weak political systems, parties with no credibility, corruption, injustice, and judges and legal systems that are linked to elite power structures. In Latin America, TNC presence has been completely unrestricted. Ethical codes of conduct are non-existent due to corporate pressure on national governments to restrict standards. This has meant that extractive industries in particular have imposed detrimental impacts on the local environment. For example, in Ecuador, the government collected taxes from a US company, but the local US trade commissioner pressured the courts to reverse the ruling, forcing the Ecuadorian government to give back the money. This concession is now a condition of the trade process that is currently under way.

So what are the mechanisms that organizations have been developing to hold companies and IFIs accountable? We have an Inter-American system, with a court and a commission. However, it is principally interested in civil and political rights, with economic, social, cultural and environmental rights low on the court and commission's agenda. This means that within the legal context, such public concerns as health, education, and social security are not seen as rights, but as needs to be satisfied progressively over a lifetime. This is a key weakness of the Inter-American system.

CDES is currently engaged in a three year legal suit against the Ecuadorian government asking them to accept health care as a public right. The case has not yet been accepted by the court, but there are a number of other organizations

also trying to lobby the government to raise the profile of the case. Although the themes of structural adjustment, debt, ECAs are far from the agenda of many organizations, relative to say health care, Mr. Pazmiño argued that these issues are all linked, and it is therefore key to promote broader economic, social and cultural rights within NGO networks, civil society and government to raise their profile. This also requires political, grassroots mobilization to support these campaigns. With this in mind, groups in Colombia, Brazil, and Ecuador have used legal mechanisms to further this agenda within the context of national legislative frameworks. Results have been mixed. These groups developed legal cases against the IMF, and complaints against the Letter of Intent, but the courts rejected them. Alternatively, indigenous groups have had victories against oil companies, and one case was brought before the ILO, but the company has not changed its activities. This shows the high level of institutional weakness and barriers in countries where the legal mechanisms simply do not work.

This said, our experience has shown that to hold TNCs accountable through international channels still requires a combination of three things to be successful.

1. Make use of the national legal resources that are already available;
2. Link the proposal and legal initiatives to broader social mobilization of indigenous groups, labour unions, and social movements; and
3. Build strong alliances with Northern counterparts, social movements and NGOs.

In Ecuador, we have formed strong alliances with social movements such as CONAIE, the indigenous movement, because they can bring political pressure to bear. CDES has developed a code of conduct with indigenous groups, in which we tried to develop the technical guidelines under which they would negotiate possible exploration for oil.

We have worked on a Norwegian ECA case around the sale of four cargo ships to Ecuador, promoting this in 24 ECA countries, and working with the Norwegian NGO, SLUG, to generate more information, political support in the

Norwegian government, and detailed information that we would not be able to get otherwise without their support. This united both legal and political forces through a series of mechanisms.

Mr. Pazmiño concluded by underscoring the importance of working with North-South networks, making a continental social alliance, using the Inter-American platform for development, and raising awareness through public education.

### ***Nick Hildyard, Cornerhouse, on 'the Ilisu Dam'***

Nick Hildyard started by providing a backdrop to the case of the Ilisu Dam in Turkey. A number of ECAs, including US Ex-Im, and the Swiss, German, British and Austrian ECAs, were involved in funding it. Because South East Turkey is a region where there are tremendous human rights abuses, and torture is almost state practice, the plan to build a dam raised a lot of public concern. At the time, there was little in the way of an ECA campaign, and this was really the first case. The dam would have evicted 35,000 Kurds, and prevented another 35,000 from settling there as they had already been moved because of the war between the PKK and the Turks. The companies involved had commissioned an EIA, but none of it was released. Equally, the resettlement scheme was insufficient.

The first NGOs to get involved were the Swiss, and other groups followed. The campaign began with lobbying politicians, issuing press articles, and mobilizing people. This put pressure on the governments in conjunction with ECAs to set full conditions for a resettlement plan, to water quality, and cultural heritage. So in this case, the project proceeded, but under certain conditions. Since they were also able to monitor these conditions to ensure that they were met, this case offers a good precedent. However, at this point and from a legal point of view, not one of the ECAs involved had any standards that could be tested in the courts. For example, the Export Credit Act (for Britain's ECGD) says nothing about environment, and only mandates the Secretary of State to promote exports. But as the case evolved, through public pressure, ECGD adopted a set of business principles, albeit very vague.

Two legal challenges emerged in the campaign. The first, through Friends of the Earth, argued that because the UK government gave this credit, and because it would effect the downstream flow of the Tigris and the livelihoods of the Syrian people, the UK government were obliged to ensure that they had not breached the Convention of the Protection and Use of Transboundary Watercourses and International Lakes. Although Turkey is not party to that convention, it has achieved enough status that the UK would be breaking the law. The second challenge fell under the Human Rights Act which was introduced in October 2000. The first part of this challenge used the judicial review mechanism to determine whether a decision was legal or unreasonable (an administrative law attack). The second part, related to the Human Rights Act and the duties of public officials not to undertake an action that brings about an abuse, even extraterritorial. In this case, the project breached article 8, which states that resettlement is a violation of the right to family life. It also infringed a protocol through which you must be informed of the risks you may be exposed to from the environment. This violation was clear for a number of reasons:

1. the consultation for the dam project was undertaken by a Turkish travel agency;
2. they conducted a socio-economic survey that made it impossible to reject the project;
3. the answers were completed in pencil, and later filled in with ink;
4. a vast majority of those interviewed spoke only Kurdish, not Turkish.

Then, once the legal opinions were published, this put even greater pressure on the companies and governments to act.

Once you have the legal opinion, you need to answer a number of questions, such as do we have any standing? Can you take the case? Can you find victims that will give a testimony in court? Is there a case? What are all the implications of this?

Fiona Darroch added to Nick's presentation by highlighting a number of challenges to this process. For example, she was sent on a fact

finding mission to find people who would come to court. They knew that they could withhold the names of the people in court, but still the price for doing this, would be that any witness's life would cease in Turkey. Your enthusiasm for the case therefore can not subsume your respect for the individuals ultimate choice. It is also difficult, she added, because you need a "victim" who can show you that their rights are at risk of being violated, in a way that is disproportionate to what is protected in law. This is difficult. Fundamental to the case is also who decides to take it.

Nick finished by saying that the Human Rights Act might also be used for other initiatives. While the World Bank has clauses to exempt them from this, the Executive Director of any of the EU countries, although paid by the Bank, acts as public authority for their government. It therefore might be possible to mount a challenge. There are, however, a number of hurdles to this including the fact that no formal votes are taken, making it hard to establish which way an ED voted. The UK Secretary of State could also get out of it through an Order in Council that would exempt them from a decision. You are also only able to make a challenge under the Human Rights Act when the body you are challenging is acting in its public capacity. Clearly, innovative, and not academic lawyers, are key. Nick also highlighted the need for absolute buy-in by those affected. He also warned that there is a real danger for campaign groups to start substituting the law for lobbying and campaigning. Still, legal opinions can form an effective part of campaign strategy, without even going to court, as the law builds or demolishes reputations.

### **Discussion**

The majority of the discussion focused on the legal avenues that a number of the presentations had highlighted, with some initial clarifications.

#### ***Who are the plaintiffs of the various cases?***

In the apartheid case, the plaintiff is an NGO representing 32,000 victims, who are cited in the case both as an association and individually. In the Inter-American court, petitions and complaints must now be submitted by individuals, although initially they were received by indigenous groups. This, it was felt, is a step

back as it has huge implications for economic, social and environmental rights. For example, CDES has filed a petition for 14,000 workers. Documenting a case for one specific victim in the area of soft law is much harder. Injunctions are also now possible in Ecuador, but they are limited.

***What is the applicability of laws to ECAs? How can they be held liable for the impacts of their investment in companies that transfer arms and that have explicit exemptions from host country laws?***

The sense was that the degree of liability varies. The links are much clearer when it is a case of support for arms transfer than a project that might violate environmental laws. To establish the link, it is a question of whether the particular transfer will or has the potential to violate the norms of nations, and whether this is being done in the clear knowledge of the ECA. To use a concrete example, in the case of arms transfers, establishing intent would focus on the extent to which a corporation facilitated the transfer of arms for the purpose of facilitating genocide. When it comes to environmental effects, it becomes difficult as you need to develop links to norms that have already been recognized. This means being quite selective in your choice of cases.

***What was the precedent established by the Nuremburg trials in regards to secondary liability? Did it not establish that humanitarian law applies to individuals, rather than human rights law applies to states?***

While this is true, it was pointed out that secondary liability in fact stemmed from the 1700s, when the US Congress enacted a law around the slave trade. This said that those people who fit a ship for the use of carrying slaves, would be liable to a fine, and even those

that aided and abetted them would be equally liable. Close to the 1800s, the death penalty was imposed on the perpetrator, the aider and abettor. Equally, in the case of Unocal, we might look to the international jurisprudence that has been established at the Rwandan and Yugoslav tribunals. Given the positive contribution of such creative legislation, one participant suggested that, given the example of the British Human Rights Act and the Ilisu dam, it would be worth considering how the EU Human Rights Act has been legislated nationally.

As far as the case of suing the Executive Directors of the World Bank is concerned, the issue is still being explored. It was not, however, a case of bringing the Bank to court as the Bank has no legally binding standards, but rather to establish a mechanism that would force the UK ED to take into account the UK Human Rights Act when making decisions at the Bank. While it was clear that there was need for some further exploration, the first hurdle would be getting hold of evidence, especially given that the minutes at the Bank are never made available and at the IMF they are only made available to the public after five years. It was suggested that it might be more effective to exert pressure on all of the EU Executive Directors by using the EU human rights framework.

Some focus also fell on the legal provisions that companies are now establishing to avoid legal petitions and a Unocal type law suit. For example, in the case of the BTC pipeline, the companies involved there have rewritten the laws on security giving them impunity from the laws of the state. This raised some discussion about how to hold companies accountable given this situation. In legal terms, companies registered in England can be sued under the UK Human Rights Act.

## 5. Strategic Directions and Conclusions

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*Day two of the workshop sought to translate much of the discussion from the previous day into strategies for action. It started off by considering what a human rights assessment would look like.*

### **A human rights assessment for ECAs**

#### ***Integrate or separate?***

Initially, the discussion drew out some lessons learned from the experience of environmental impact assessments (EIAs), and focused on how a human rights impact assessment (HRIA) would differ from current EIAs, and whether it should be incorporated into EIAs or kept separate.

There was general agreement that HRIAs stood on firmer ground given the existence of international legal frameworks that could be applied to ECA projects. There is, for instance, a whole body of legal norms that bind governments. The existence of such norms opens up the possibility of developing effective tools for monitoring compliance and ensuring greater accountability. This requires looking at incentive structures and monitoring organizations with teeth. It also requires further research to explore the links between these international norms and ECAs, and the development of further resources on this issue.

One participant noted that ECAs are very focused on environmental issues, and have very little experience on social issues and rights. Rather, therefore, than developing something new – especially since we may not be the best suited to developing such a mechanism – it might be better to work with existing frameworks and determine how to enhance monitoring, compliance and community involvement in those mechanisms.

Other participants noted that if an HRIA was developed as a separate tool, there was some concern at the process through which this would be developed, and that the end result might be as shallow as the current application of EIAs by ECAs.

This engendered some discussion around how to make assessments in general better and more effective tools. For an ECA HRIA,

community engagement, compliance and monitoring all emerged as key components, as many EIAs had failed because none of these aspects were taken into account at the initial stage. As with EIAs, it was also felt that the disclosure of information and public mobilization were also key.

#### ***Human rights as a process***

Discussion around developing a separate or integrated assessment tool merged into talks about the process of putting rights on the ECA agenda. This had two sides: an upfront evaluation to make sure that ECA policies were in-keeping with human rights norms (to be used for public information and mobilization), and then the development of monitoring and accountability mechanisms. This would require both integrating human rights into current frameworks, but also improving those tools.

Any assessment process would have to take into account the varied situations in different countries. For example, the experience with EIAs have taught us that some countries treat these as a simple formality, while others are now seeing the importance of EIAs, and how they can be integrated into projects.

Some participants also highlighted the importance of involving the core human rights community. For example, Human Rights Watch has started to delve into different rights assessments, structures and forums for how to press the issue of rights and investment forward, especially given the inability of various international institutions to take up this issue. For example, the World Bank has constantly dodged the issue of rights, only taking it up in terms of its experience with indigenous peoples and resettlement. As an economic institution, it has pleaded that rights are too political. However, over the past two years, there is some agreement that the Bank does have to integrate human rights concerns into its policies. There are a series of dialogues now at both the World Bank and the International Finance Corporation,

with the latter probably emerging more quickly. ECAs, however, cannot dodge rights in the same way as the Bank or the Fund.

### ***Rights and responsibilities***

There was some discussion about the mechanics of implementing human rights onto the ECA agenda. At the heart of this process is the question of establishing various responsibilities so that any reference to human rights is not purely rhetorical. It also requires developing appropriate mechanisms for determining whether export credits are legal, whether they are promoting development and whether they fall within the legal framework of international human rights law. It also requires a mechanism for intervening in projects and disciplining companies that do not respect such law. This raised a number of questions that helped focused the discussion, including:

1. Who are we thinking a HRIA would apply to? For example, ECAs, companies, subcontractors, countries?
2. What kind of rights are we referring to? For example, negative, positive, civil and political?
3. Where would such an assessment fit in the project cycle and what kind of assessment would this entail for screening and monitoring projects?
4. Who would do it? What kind of evaluation would there be? International or local communities?
5. Who develops the mitigation process and the remedies? Is this part of the assessment or separate?

In terms of who an HRIA would apply to, it was felt that it would be much easier to target ECAs and companies. This was because ECAs form part of the government, and represent a structure that can be targeted. Before, it had been much harder to target companies as there was not a framework for thinking about how to make them more socially responsible. The Danish Centre's framework however is a good one for thinking about corporate responsibility, especially since its foundation is in the law.

It was felt it would be much harder to target and exclude countries, with the exception of clear-

cut cases such as Burma or Colombia. The European Bank for Reconstruction and Development (EBRD) has started to categorize countries in the past 10 years, and they have excluded Uzbekistan and Turkmenistan as a result. They rely on OECD evaluations, the UN human rights reports, and Council of Europe human rights assessments. This mechanism is quite specific to the EBRD as it relies on the lack of political power and voice Eastern Europe has on the board. Blacklisting countries also does not work because the other development banks are fighting amongst themselves to give money to countries, and so there will always be someone willing to fund a country. It was generally concluded that it was inappropriate for groups in the north, be it ECAs or civil society, to determine whether countries should be off-cover. This should be determined by local groups in the affected countries.

In the debate around whether to target countries, companies or ECAs, one participant suggested that it is logical to remain project-focused for any assessment. This gives you a tool to talk about, and is easier for mobilizing grassroots support. But this might form part of a multi-tiered approach in which you focus initially on the country, and then more in-depth on a project. This corroborated an earlier idea that incorporating rights into the ECA agenda should start by highlighting a number of case studies and making a call for an independent review.

### ***Rationale***

Once it was decided who to target, there was some discussion around the rationale behind such a process. Would it be to encourage ECAs to pay attention to these issues? Would it be develop a mechanism to determine whether an ECA would fund a project? Would it be to develop a mechanism for blacklisting companies? Some participants suggested that the goal should be to develop a process that either ensures human rights are protected, which might mean non-funding of a project. However, groups such as the World Bank see funding as a means of helping to make certain rights realizable, such as education. There is a chance that ECAs will simply do the same.

Others argued that in the case of human rights, it was difficult to have such clear-cut cases of to fund or not to fund. Unlike EIAs, rights assessments would be much less scientific. For example, you can identify potential risks to

human rights now, but not guarantee whether these rights will be abused or respected in the future. Equally, some rights may be disregarded at the expense of others. Indigenous rights, for example, are not incorporated into current social impact assessments. One participant argued that certain violations are actually easy to predict, for example, when a company is planning to buy land to which others have no rights. This flagged the importance of auditing projects for their compliance with human rights norms.

Another participant agreed with the importance of a human rights audit, but suggested that it was equally important to use the tool as a mechanism for broadening discussion about human rights within companies, and for encouraging them to think about their legal obligations and responsibilities. Many companies still are not familiar with the language of human rights. They associate this with issues of torture and civil and political rights, but do not consider other issues like social and cultural rights. In this light, the Danish model seemed a good starting point for engaging corporations. Nevertheless, it would need to be made more participatory, accountable, and transparent.

### ***Monitoring mechanism***

Discussion turned to different existing and potential mechanisms for monitoring compliance with international legal norms, which are currently seen as inefficient. While some ECAs claim to be monitoring environmental impact, it was felt that there needed to be some sort of a scheme to support independent local monitoring. The company sheets developed by the Danish Centre could for example be shared with local NGOs, but it is unlikely that many companies would be willing to share this information, or engage with local NGOs. Someone else suggested a human rights ombudsman, although they flagged the difficulty of finding someone the government would agree to. Someone else suggested moving beyond an inspection panel or an ombudsman to a focus on sectors. This could take existing human rights frameworks and national laws, and hold companies accountable that way. Another participant argued that there did not need to be different types of monitoring. There would be a tool in place, and companies would be obliged to submit to the monitoring regardless, perhaps through self-monitoring. If the companies fell

short in their monitoring obligations, then there would be a standard against which to hold the companies accountable.

There was broad consensus that the monitoring question was critical, that we should learn from existing structures, and move towards developing a resource that would enable local communities. Such mechanisms must be transparent and public.

### ***A human rights assessment for ECAs***

Although it needs further elaboration, a human rights assessment would entail: 1.) ascertaining the situation on the ground; 2.) making an assessment of the project, including local participation and consultation that would promote a positive impact on the communities in which ECAs and companies are working; 3.) monitoring by the local community with transparency in the assessment process, disclosure and then further self-monitoring. Further down the line, there would be an independent inspection panel, ombudsman, human rights rapporteur or sector-specific monitoring to ensure future compliance.

It was agreed that these were all important, however discussion throughout acknowledged that there was no perfect framework, and that in some places it would work better than others. Nevertheless, one participant argued that the human rights assessment mechanism should be driven by the goals of advancing greater accountability (linked to laws and enforcement mechanisms), and the organizational capabilities that help build the ECA campaign.

### ***Advocating for human rights assessments***

The second morning session echoed some of the issues from the earlier session, but focused more specifically on strategies for promoting human rights issues, fora in which this can be achieved, and the means of doing so at both an international and national level. It also raised some of the challenges in getting human rights onto ECA agenda.

In terms of strategies for promoting human rights within ECA policy, one participant noted that there continue to be opportunities in campaigning on specific projects, and to mobilizing for legislative change on a country specific basis.

There was also a suggestion of a focus on issues, for example, by promoting human rights within ECAs through calling for resettlement and indigenous policies as per those of the Bank. In the US, there was some effort to incorporate the recommendations from the World Commission on Dams, but this was shut down by business. However, some ECAs, for example EDC, might argue that issues such as resettlement are already incorporated into their environmental impact assessment. Calling for Bank policies on resettlement and indigenous peoples was seen to be a dangerous strategy, as it is piecemeal and the Bank's policies are being downgraded.

The importance of making links with the human rights community was stressed. One participant suggested forging stronger links between environmental and human rights groups and developing a common (and separate) language. This view, however, was received somewhat reluctantly. Some participants said that such groups and such language already existed, while others argued that such a fusion was not necessary, nor necessarily desirable. However, the closest nexus for this seemed to be in the area of economic, social and cultural rights, which promoted the right to a healthy environment. As a mobilizing tool, the human rights framework around the right to promote the environment can be effective.

Someone also noted the opportunities around mobilizing multilateral institutions around human rights. For example, the G8 language had been good for forcing dialogue on the environment and ECAs. Could the same be done for rights? While there was some positive reaction to this suggestion, it was noted that not all countries are in the G8, and that the OECD or UN might be a better fora for pursuing this strategy. Equally there would be significant challenges to mobilizing the United States around rights issues in the G8, as George Bush holds a very narrow view of rights. It was suggested that given this, perhaps the US could be brought on board by incorporating rights through some of the language around security. Or alternatively, it might focus on how ECAs are aggravating local security. A number of people, however, were hesitant about these suggestions. One participant, for example, said that notions of environmental security have been used to mobilize increased military expenditure. Respect for human rights is a means of

enhancing security, but security as a means have been used to undermine human rights. It was also noted that many ECAs already take security into account when doing their risk assessments.

The importance of mobilizing the public through an information campaign and collaborating with regional networks to develop a strong alliance for any campaign was raised several times. How could other groups be involved in the discussion? For example, one participant underscored how their local partners in Peru were unaware of ECAs, what they were and how to access them. It was suggested that local groups could be involved in monitoring and ensuring transparency.

### ***National Strategies***

The focus of the discussion then fell on strategies that have been pursued in individual countries to put human rights on the map. In the UK, ECGD themselves have raised the question of human rights in their own business rules, but have no standards in place. The campaign has also used legal opinions to highlight a particular export credit and to determine whether it is in compliance with the Human Rights Act. They have also started to do some work on a compliance plan, using a flow chart similar to the type developed for the World Commission on Dams. Thirdly, the campaign has tried to work on issues where human rights are most obvious to the public, and determine how ECAs can be tied into that. This includes working with asylum groups and looking at Britain's role in creating refugees.

The Finnish ECA Group is organizing a seminar in February or March on ECAs and Human Rights. This has a specific focus on environmental democracy, and looking at land rights and user rights, and the ability of stakeholders to influence outcomes in their own environment. It has, however, been difficult to demonstrate to environmental groups why ECAs are important.

In Denmark, the Danish Centre is going to start making links to the Danish ECA. They are also thinking of taking the Danish model to national human rights institutes. These are accredited under the UN, are independent, and so can watch over the government, and could potentially monitor the activities of corporations. This offers a good possibility of getting an

immediate redress of human rights violations.

In Switzerland, the International Rivers Network has taken a project-based approach, looking at the Three Gorges dam. It is now in its sixth year of construction, and through submergence, will cause over 1.5 million people to be resettled from their land. Farming is under a lot of pressure, and dam-related jobs are no more. There are no rehabilitation measures. There is immense corruption, local protest, and repression. This might be a good case to take up at the OECD, UN Human Rights Commission, to hold national ECAs that are funding the project accountable for what has gone on. The argument is that if you, as a country, are serious about your human rights obligations, then you have to get the project suspended, and redress these problems.

In Germany, the campaign has been working with Amnesty International on arms exports, trying to promote greater transparency. The German ECA, however, keeps deferring to business confidentiality. Equally, while the government conducts a human rights assessment on countries, this is not made available to the public.

In the Netherlands, good governance and policy coherence are two big issues. One ministry is not supposed to undermine the work of another ministry. This is an administrative, rather than legal or political issue, but the campaign is nevertheless pursuing it as a venue for getting at ECAs.

In Canada, EDC has recently established a Compliance Officer position, based on the Compliance Advisory Ombudsman. Human rights fall within the Compliance Officer's mandate, although like other ECAs, human rights are largely incorporated into EDC based on political risk assessments. The Compliance Officer is accountable to and reports out through the Board of Directors, and through the annual report. They accept complaints from any group on projects and investigate them to determine whether EDC has complied with its own policies. However, since EDC policies are currently inadequate and far from meeting World Bank or Ex-Im standards, the position is largely redundant. Possibility to do an audit on outstanding debts. EDC has said that they are hoping to have a human rights policy adopted by June 2003.

At Amnesty, they are working on the draft norms for Trans National Companies and Business Enterprises. They are pressing to get this to become a declaration, and in July there will be a vote on this at the UN Sub-Commission on Human Rights. This will then be a concrete tool for NGOs to use. However, in order to pass, this requires much stronger mobilization by the NGO community and lobbying at the UN.

### ***Room for rights?***

Following these reports, one participant raised some concern that since so much energy has been lost on the ECA and environment front, how feasible it would be to now add human rights to the agenda? Would this energize the campaign or would something get lost in the process? Would it not make more sense to establish stronger links with human rights groups rather than trying to forge new political space for this within the ECA campaign? Other participants, however, argued that human rights were already on the ECA agenda. The ECA campaign already encompasses debt, human rights and environment as is evident in the Jakarta Declaration. Groups such as the Halifax Initiative, for example, have included human rights, social justice, environment and development groups from the outset. In fact, one participant highlighted the dangers of pigeon-holing groups and issues into artificial categories of human rights, environment and development. The common thread throughout is the search for human dignity, and this is the essence of defending human rights. It therefore does not help to consider the ECA campaign outside of one community or another, as they are each integral to one another. While this was clear to all, it nevertheless emerged from the discussions that building a broad constituency, and creating new political space for these issues within the ECA campaign, represented a significant challenge for some US ECA campaigners. For example, it appears that with the EX-Im amendment to the human rights office, Human Rights Watch chose to work alone rather than liaise with US ECA campaigners.

Building on the challenges that US groups faced, one participant suggested developing a report around which to mobilize and educate the public, spread the message, create alliances, use at the G8. Such a report could develop a conceptual framework for an assessment, highlight the important components of such an

assessment, and illustrate the importance of an HRIA through a number of case studies. This report could be presented at the UN Sub-Commission on Human Rights in March.

### ***Holding ECAs accountable to Human Rights Standards***

The purpose of the afternoon session was to look at how to hold ECAs accountable, and further explore the various strategies that can be pursued.

### ***Campaigning***

Nick Hildyard highlighted some of the problems typical of campaigning. He highlighted the tendency, as a campaigner and activist, of engaging in dialogues with institutions, MPs, policy makers, and bureaucrats, rather than with the local solidarity group that is working on these issues. This means that most of the material developed in a campaign is for policy makers, rather than the general public. Equally, policy makers want to engage in a dialogue with campaigners before the latter go to the public. This, however, preempts effective public campaigns, as it allows policy makers to prepare responses to the problems campaigners have raised, just as campaigners present these problems to the public. This does not necessarily mean that groups should stop consulting with these staff people, but it does frame how we go to the public.

This means that in our approach, rather than deciding how we can educate the public around a certain issue, we should establish the issues around which the public are mobilizing, and relate these to the sort of work that we are doing. In essence, how can the work we are doing complement issues around which people are already mobilizing. This helps generate public interest and a public discourse around these issues.

Cornerhouse have been doing a lot of work with trade unions. This has entailed not just meeting with them, but determining the projects and issues around which different unions are already involved, and over time, establishing common interests and a common language. This means that in five or ten years, when people come to a campaign, then the unions are as much a first port of call as anyone else. Different audiences require different approaches. On refugee issues, Cornerhouse

has been working with the Kurds. This has required a lot of time to understand the problems of racism, drugs, gangs, and asylum, among other things. And rather than working explicitly on the Ilisu dam in Turkey, Cornerhouse has engaged with the Kurds on broader structural issues, such as exploring the links between British government policy and to the question of asylum-seekers and refugees in England. This has helped create a common platform that Cornerhouse can share with them. But this approach has moved beyond simply educating groups, to determining how they themselves perceive the issue, and making links to existing political struggles.

The downside of this is the amount of work involved, while the upside is the excitement generated, and the creativity required, in working with new people on new angles of a problem. This requires specific approaches towards specific groups.

### ***The Case of Ex-Im and its Human Rights Assessment***

Aaron Goldzimer spoke briefly about Human Rights Watch's attempt to get a human rights mechanism in place at Ex-Im. This came out of a specific case involving Enron in India which the US supported. It turned out later that there were a massive number of human rights abuses associated with the project, and HRW wrote a large report on the violations. Out of this report came a proposal to have a human rights office attached to Ex-Im, and the report illustrated examples of how this could work. Nevertheless, there was still some disagreement over structure of such a mechanism, and whether it would be part of Ex-Im, or outside it.

In April 2002, US Member of Congress, Jan Schakowsky, submitted a Congressional bill proposing the creation of an Office of Human Rights Assessment within the Ex-Im Bank. This office would serve an advisory function, to identify and address potential human rights concerns for projects under consideration by Ex-Im. Assessments would be based on standards set by the International Labour Organization, international human rights and humanitarian law, and a number of rights indicators. It would cover labour rights, displacement of indigenous populations, social unrest, local government's freedom of speech record, treatment of ethnic minorities, religious freedoms, and women's rights. It would *not*,

however, have the authority to cancel a specific project.

Such a mechanism was deemed necessary, because according to Human Rights Watch, Ex-Im's current human rights review was only implemented for transactions "over \$10 million to determine if it may give rise to human rights concerns".<sup>2</sup> One participant added that these 'concerns' also reflected less an interest in promoting or protecting human rights, than determining whether or not a project conflicted with broader US interests. The review also lacked any provisions for stakeholder dialogue.

The bill to establish the HR office was defeated in Congress by one vote. Congress, however, recommended that detailed information of the potential impact on human rights of proposed Ex-Im Bank projects be made available.

Some discussion followed around why Human Rights Watch had decided not to consult with other groups on this initiative, as it was felt by some that a broader sign-on might have helped push the bill through. Someone suggested approaching HRW to find out more about the background of this initiative and why they chose the particular strategy they did.

#### ***The role of audits on illegitimate debt***

Patricio Pazmiño talked about the work that has started in Ecuador linking softer issues such as economic, social and cultural rights to harder, structural issues like national budgets, debt, and structural adjustment programs. He has found a nexus between the two by looking at how economic crisis affects the daily lives, experiences and rights of people. This, of course, is much easier to see through examples, and the events in Argentina made the links between debt, development and human rights more immediately apparent. In Ecuador, CDES has looked at the specific case of Ecuador's debt to Norway, and the impact this was having on people's daily lives. And this new take has helped open the door to official organizations, and community based organizations.

In Latin America and the Caribbean, sensitizing

people to these issues and connections entails pursuing a broad array of activities, including publications, training and consciousness raising. To achieve these ends, CDES takes a two pronged approach: it promotes issues and builds capacity among community-based organizations through, for example, seminars and workshops; and it conducts advocacy campaigns and legal work around economic, social and cultural rights within the UN system and with governments through its regional networks.

At the national level, CDES works with the congress to control and develop new legislation, and to make the national budget a participatory process. Although once seen as a purely technical issue, it is now engaging over 400 organizations from civil society, and has opened up a new space for political pressure. This has occurred through the Institute for Ethical Tribunals, an initiative started by Bertrand Russell to promote public protest against the war. These Tribunals have now been adapted to promote various themes, including external debt, SAPs, and privatization, and to promote public discussion of these themes. They are now taking place in Brazil, Ecuador, Peru and Argentina. The Tribunals have a judge and jury consisting of high profile public figures – lawyers, journalists, church groups.

Mr. Pazmiño went on to describe how a week ago they had had such a tribunal in Norway with regard to Ecuador's debt to Norway over a credit they had been given for the purchase of four container ships in the 1970s. Over 15 years and after seven agreements through the Paris Club, Ecuador's debt rose from an initial amount of US\$13.6 million to a total of US\$50 million, even though during that time Ecuador paid US\$14million. Furthermore, the location and use of these ships is currently unknown, but the interest on the loan continues to mature over the years. Through these agreements, far from reducing the debt, renegotiated debt repayments significantly increased the value of the original debt – money that could be better used elsewhere, for example, on health care and education.

This issue had a major impact in Norway, as few people were aware of this issue, and people realized that Norway's ECA had violated internal laws. At the Tribunal, a minister from the High Court was the judge. To represent the accused,

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<sup>2</sup> Human Rights Watch (2002) "Discussion Points on the Need for a Human Rights Assessment Office Within the Export Import Bank in the United States", correspondence by fax with HRW.

CDES invited World Bank and IMF representatives, but no one came. People from the national lawyers guild, nevertheless acted as public defenders for the Bank and represented their interests. The tribunal heard the arguments and evidence, and made recommendations to Norwegian society and the government of Norway. Due to public pressure, the Norwegian government opened up negotiations with Ecuador on this, and put pressure on the Norwegian ECA, GIEK, to take these recommendations into account. It also had a big impact in Ecuador. There, the Commission for the Civil Control of Corruption, a legal body independent from Congress and the President and elected by civil society, found both a technical and legal justification for deeming the debt to Norway illegitimate, and asked for the cancellation of this debt. The next step in this campaign is to promote the cancellation of the debt, and establish a similar mechanism for other countries to assess whether debts are legitimate and illegitimate. Norway and Ecuador have been discussing a debt swap, and more countries are starting to look into this, with Peru expected to take the next step.

However, the campaign also needs to determine what will now be done with these illegitimate debts. For Mr. Pazmiño it is the responsibility of the creditors, however, there is no insurance on the use or return of the money. The IMF and World Bank also say they will not get involved. The campaign, therefore, is now putting pressure on the new government of Ecuador, which includes an indigenous party, to put this question on the table. It is likely that they will appoint a public auditor for the government to renegotiate with the creditors.

This is a specific campaign that has allowed CDES to make the links between abstract concepts, such as debt, and apply it to the daily lives of the people of Ecuador.

While a number of participants enthusiastically highlighted other similar tribunals that had taken place at the World Social Forum in Brazil, and in Europe, participants raised some concerns about the impact of such an initiative on local grassroots movement. Handing over a case to a group of lawyers may disempower local communities who have little understanding of international legal processes. The participant wondered how CDES could link this into the

work of local grassroots who are mobilizing around the issue.

Mr. Pazmiño referred to one case in the Amazon in which Harvard University and CDES were working with indigenous communities to document a series of violations of their rights. To do so, CDES mobilized the local communities, turning residents into monitors for assessing the impact of the oil on their locale. The monitors were given a methodology and material for doing so, and this formed an important first line of defense for the Amazon. In the initial phase of the investigation, in fact, there was a great deal of impetus around the issue, because people's outrage was finally being acknowledged and communities began organizing themselves. Local radio and church groups were involved, and this completely debunked the myth of oil as the saviour of Ecuador. This evidence was then used to file a case against Texaco, placing direct responsibility on Texaco for using measures that minimize the effects of the waste on the local environment, for contaminating local water, for making appropriate reparations and compensation. The case has just been sent back to Ecuador by a New York court, and Ecuador has one year now to resolve it. Of note, is the fact that as the law suit became more technical, there was less of focus on the community, and the lawyers started using members of the community instrumentally. This lead groups to search for ways of keeping local organizations engaged. The fact that the case has been sent back to Ecuador, will undoubtedly be good for remobilizing the communities, even if the law suit seems less certain.

In another case with oil companies in the south, CDES has worked to support local groups to promote their environmental and human rights, through both the local courts, and the national constitutional court. The first case was against ARDCO, who when they lost the case, left the country; however, they have now handed over their concession to another company.

These two cases highlight both the possibilities and limits for making human rights claims. For example, while Presidents of countries can now be held to account, ECAs and IFIs still have a great deal of impunity with regard to the actions they take. Mr. Pazmiño finished by saying there needs to be more research on how issues, such

as illegitimate debt and export credits to repressive governments, can lead to crimes against humanity. Another participant added that there needs to be further dialogue around the question of unproductive debt (illegitimate), and we need to think more about how these debts become illegitimate.

A number of participants agreed with this proposition, but indicated the difficulties they had encountered in getting information on external debt, and tracking what projects are connected to specific loans. Getting information from ECAs was recognized as an ongoing impediment to such research. While Mr. Pazmiño confessed that access to such information is equally challenging in Ecuador, but that a group in Norway had been able to research the information, and had contacted CDES about this. It represented an excellent way in which North and South were able to collaborate.

In fact, Mr. Pazmiño indicated that other countries were starting to look into this. However, one participant added that the question of the 'illegitimacy of debt' has already

been taken up by the IMF through debt audits. On December 18<sup>th</sup>, the IMF looked at a proposal for a debt mechanism for its April meetings. This would be a sort of arbitration process. The Halifax Initiative has started preparing a chart that compares what the IMF is proposing, versus the process that took place in countries like Argentina.

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Participants ended the two day seminar by discussing the next steps in a campaign to link ECAs and human rights, analyzing where opportunities lay, and agreeing on areas in which they could work jointly and share information. It was broadly agreed that any further work on ECAs and human rights would require research that mapped what work groups were currently doing on human rights and investment, research on human rights case studies, and further exploration of a number of issues raised at the meeting. The specific work plan developed is available to participants of the meeting.

## Appendices

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### Agenda

#### Seminar on “Linking Human Rights and Investment”

December 6<sup>th</sup> and 7<sup>th</sup>, London, England

#### Friday, December 6<sup>th</sup>

QUAKER INTERNATIONAL CENTRE, MARGARET FELL ROOM, 1 BYNG PLACE, LONDON

*Organized by the NGO Working Group on the EDC, FERN, Cornerhouse, CRBM and Kurdish Human Rights Project*

**9:00 - 9:30**            **Introductions, review of objectives of seminar**

**9:30 - 12:00**        **Human rights and peace and conflict impact assessments**  
Panel and discussion

*This panel will present various existing human rights assessment methodologies to facilitate discussion on their appropriateness for export credit agencies.*

**Eugenia McGill**, consultant with Women’s EDGE, on ‘Gender assessments and trade’;

**Joji Carino**, ex Commissioner of the World Commission on Dams, on the ‘Rights and Risks Framework’;

**Margaret Jungk**, Danish Centre for Human Rights, on ‘Business and Human Rights assessments’;

**Nick Killick**, International Alert, on ‘Conflict Risk Assessments’.

**12:00 - 1:00**        **Keynote speaker and discussion:**

**Sumi Dhanarajan**, Business Standards Adviser, Oxfam UK, to speak on ‘Beyond Voluntarism: human rights and the developing international legal obligations of companies’.

**13:00 – 14:00**        **Lunch**

**14:00 17:00**        **Human rights accountability mechanisms**  
Panel and discussion

*This panel will present different existing Human Rights Accountability Mechanisms to foster discussion on applicability to ECAs.*

**Roy Jones**, OECD’s Trade Union Advisory Committee, on ‘The OECD Guidelines for Multinational Enterprises’;

**Kerim Yildiz**, Kurdish Human Rights Project, on the ‘European Court of Human Rights’;

**Patricio Pazmiño**, Center for Economic and Social Rights, on ‘debt and its implications on human rights, illegitimate debts, debt relief, and citizen audits’

**Charles Abrahams**, Abrahams Kiewitz, South Africa, on ‘alien torts and the class action suit against US companies’

**Saturday, December 7, 2002**

QUAKER INTERNATIONAL CENTRE, WILLIAM PENN ROOM, 1 BYNG PLACE, LONDON

**9:30 - 11:00      A human rights assessment for ECAs?**

Participants will discuss positive and negative aspects of human rights assessments, and answer the question, 'If ECAs were to require a human rights assessment what would that assessment look like?'

**11:00 – 12:30      Advocating for human rights assessments**

Participants will discuss the merit of various fora and strategies for pursuing requirements for ECAs to adopt a human rights assessment process. Possible fora : World Bank, OECD, UN Sub Commission, G8, ILO, nationally.

**12:30 13:30      Lunch**

**13:30 15:30      Holding ECAs accountable for rights violations – advocacy strategies**

The role of audits regarding illegitimate debt – Patricio Pazmiño  
The role for lawsuits – Charles Abraham  
Public education – Nick Hildyard  
The case of Ex Im – Aaron Goldzimmer

**15:30 16:30      Next steps in a campaign to link ECAs and human rights – mapping existing work and planning the future.**

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## Speakers' list

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