



EXPORT CREDIT AGENCIES AND HUMAN RIGHTS

Failure to Protect



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Residents of the rural Francisco Romão settlement in Açailândia, Maranhão, waiting to cross Vale's rail line. Marcelo Cruz, Justiça nos Trilhos, 2011.

Any errors or omissions are the sole responsibility of the authors.

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TABLE OF CONTENTS

Introduction	4
Case Study 1	8
Dredging with Export Credit Insurance from Atradius DSB	
Guaranteeing Profits in Belarus at the Expense of Human Rights.....	12
Case Study 2	13
Hidrosogamoso Dam Project in Colombia: Damned to Development	
Case Study 3	17
Vale and the Expansion of the Carajás Project in the Brazilian Amazon	

INTRODUCTION

Export credit agencies (ECAs) are public entities that provide corporations with government-backed loans, guarantees, credits and insurance to support exports and foreign investments. ECAs are largely focused on facilitating domestic commerce in lesser developed countries and emerging economies, under conditions of significant political and financial risk. ECAs are an important source of finance and insurance for the private sector. These agencies' influence grew significantly in the wake of the global economic crisis, as states expanded their mandates, budgets and borrowing power.

Export credit agencies facilitate exports and investments that are responsible for significant human rights violations. In his 2011 annual report to the General Assembly, Mr. Cephas Lumina, then UN Independent Expert on the effects of foreign debt on the full enjoyment of all human rights, affirmed that:

A significant number of the projects supported by export credit agencies, particularly large dams, oil pipelines, greenhouse gas-emitting coal and nuclear power plants, chemical facilities, mining projects and forestry and plantation schemes, have severe environmental, social and human rights impacts.¹

This publication presents select case studies to demonstrate that Mr. Lumina's assessment remains accurate, despite widespread endorsement of the UN Guiding Principles. The case studies presented in this text feature diverse export credit agencies, a range of private sector actors and varied host states. Yet they all involve significant human rights impacts. Moreover, they

represent an extremely small subset of the many ECA transactions that are associated with human rights violations. This report identifies policy and law reform recommendations that seek to ensure that export credit agencies no longer commit nor are complicit in human rights violations.

INTERNATIONAL LAW

States are responsible under international law for the operations of their export credit agencies, including any 'wrongful acts' that these agencies may commit:

Under the international rules of 'state responsibility,' the acts and omissions of state institutions, such as export credit agencies, are attributable to the state, even in cases where such agencies are separate legal entities. States must ensure that they do not violate their international legal obligations through the operations of their agencies, including in the area of human rights law. This means that the state duty to protect against human rights abuse by third parties extends to the operations of institutions such as export credit agencies. States therefore have international law obligations to ensure that such institutions neither facilitate nor ignore human rights abuses by the corporations whose activities they support.²

Then UN Expert Lumina affirmed that "[w]hen a Government, directly or through its export credit agency, fails to exercise due diligence to protect human rights from the potentially harmful behaviour of non-State actors, it is in breach of its obligations under international human rights law."³

¹ U.N. General Assembly, 66th Session. *Effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights*. 5 August 2011 (A/66/271) at para 3.

² Keenan, K. *Export Credit Agencies and the International Law of Human Rights*. Halifax Initiative: 2008, p. 6 (www.halifaxinitiative.org/updir/ECAs_and_HR_law.pdf).

³ *Supra* note 1 at para 23.

UN GUIDING PRINCIPLES

The Guiding Principles identify the state-business nexus as an area where heightened due diligence is expected. The Principles call on states “to protect against human rights abuses by business enterprises that receive substantial support and services from State agencies such as export credit agencies.” They advise states to “encourage and, where appropriate, require human rights due diligence by government agencies and the business enterprises that receive their support.”

The Guiding Principles also emphasize the importance of transparency and the need for public reporting on how human rights risks are addressed. Finally, the Guiding Principles call on states to ensure the effectiveness of domestic judicial mechanisms, including by reducing barriers that could lead to a denial of access to remedy.

STATE INITIATIVES

Since the endorsement of the Guiding Principles by the UN Human Rights Council in June 2011, states have taken steps at the international, regional and national levels to broach the issue of export credit and human rights. However, these efforts have failed to align ECA operations with either international law or the Guiding Principles.

i) International

Members of the Organisation for Economic Co-operation and Development (OECD) develop shared policy guidance regarding export credit agencies in the form of a non-binding recommendation commonly referred to as the Common Approaches. In June 2012, the Common Approaches were revised and now include a reference to human rights.

As identified by then UN Expert Lumina, the Common Approaches suffer from a number of significant debilities:

- First, they are a non-binding recommendation.
- Second, they contain a derogation clause

(article 13) that allows member export credit agencies, should they so decide, to opt out of applying any standards at all [...]. Third, the Common Approaches currently apply only to officially supported export credits with a repayment term of two years or more.⁴

The Common Approaches are further limited to transactions valued at over 10 million SDR (special drawing rights). Moreover, certain types of projects, such as existing projects, are not subject to classification and review under the Common Approaches. These critical limitations, which were not addressed in the 2012 revision of the Common Approaches, exempt many transactions from an impact assessment.

Amnesty International has expressed concern that the revised recommendation “fails to explicitly require ECAs and their clients to make a clear and unambiguous commitment to respect human rights and establish adequate human rights due diligence processes to this end.”⁵ Amnesty concludes that the Common Approaches lack sufficiently robust standards to ensure that ECA-supported enterprises do not negatively impact on human rights.

The Danish Institute for Human Rights, the French National Consultative Commission on Human Rights and the German Institute for Human Rights have made a series of important recommendations regarding the Common Approaches. They emphasize that ECAs should decline to support private sector initiatives that fail to respect human rights:

To ensure compliance with OECD member states’ existing international human rights obligations, the Common Approaches must provide ECAs with a clear basis for legitimately declining to support a project on the basis of human rights concerns identified in screening, classification, review, monitoring or reporting, and likewise should establish the possibility of conditional approval for project support.⁶

⁴ *Supra* note 1 para 45.

⁵ Amnesty International. Public Statement. *Review of the OECD Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence*. 12 November 2012, p. 2 (www.amnesty.org/en/library/asset/IOR10/001/2012/en/26e27ee3-72c3-48e2-b70a-6690ab434204/ior100012012en.pdf).

⁶ Danish Institute for Human Rights, French National Consultative Commission on Human Rights and German Institute for Human Rights. *Submission to OECD Consultation between Civil Society Organisations (CSOs) and Members of the OECD’s Working Party on Export Credits and Credit Guarantees* (ECG). 19 November 2013, p.5.

On the issue of transparency, the institutions recommend that provisions addressing the exchange and disclosure of information “be aligned with the requirements of the human rights to access to information and to participation.”⁷

With respect to the limited application of the Common Approaches, the national human rights institutions recommend broader coverage:

To ensure OECD Members meet their obligations under international human rights law, where assessment of existing projects indicates actual or potential adverse human rights impacts, the classification and review regime of the Common Approaches should be applied to any applications for support relating to such projects.⁸

The institutions conclude that “further improvements in the regulation of export assistance are critical to the credibility of the Common Approaches, the Working Party, and national export credit agencies.”⁹

ii) European Union

European Union Regulation No. 1233/2011¹⁰ applies the OECD Arrangement on Officially Supported Export Credits to EU member states. Annex I to the regulation establishes transparency and reporting requirements, including the obligation that EU member states submit an annual activity report to the European Commission regarding their export credit practices and policies. The Commission uses these reports to produce an annual review that includes an evaluation regarding ECA compliance with EU objectives and obligations.

Neither member state reports nor the Commission review have thus far provided a meaningful

evaluation of ECA policy and practice in the EU. With respect to human rights due diligence, this is at least partly due to the fact that the Commission’s reporting template simply requires a ‘yes’ or ‘no’ response from member states regarding application of the OECD Common Approaches. The Commission does not require detailed reporting regarding the content of human rights policies or their application in practice. This approach fails to address member states’ compliance with EU objectives and obligations,¹¹ as required by EU Regulation No. 1233/2011. Remarkably, in its latest report, the European Commission concluded that “human rights play an important role in the export credit policies of many member states.” In the absence of any analysis to substantiate this claim, the Commission’s report lacks credibility, as noted by the Committee on International Trade of the European Parliament in its June 2013 report where it stresses that:

The annual reports of the Member States, and the Commission’s evaluation of these reports, do not yet satisfy Parliament’s intention to be able to make an assessment as to whether the Member States’ export credit activities are in compliance with the Union’s foreign policy goals, as enshrined in Articles 3 and 21 TEU, and the [sic] with the regulations in force for treatment of environmental risks in the calculation of ECA premiums.¹²

iii) Domestic

At the domestic level, several ECAs report that they undertake human rights due diligence. However, export credit agencies’ practice in this area is characteristically opaque. Information regarding the vast majority of ECA business remains inaccessible to public scrutiny and therefore to an assessment of human rights considerations.

⁷ *Ibid.* p.6.

⁸ *Ibid.* p.4.

⁹ *Ibid.* p.7.

¹⁰ Regulation 1233/2011 of the European Parliament and of the Council on the application of certain guidelines in the field of officially supported export credits.

¹¹ Such as those described in Articles 3 and 21 of the Treaty of the European Union. Article 3 describes the Union’s objectives and obligations for its relations with the wider world, including the “sustainable development of the earth,” “solidarity and mutual respect among peoples,” and the “eradication of poverty and the protection of human rights.” Article 21 of the Treaty of the European Union requires that the Union’s actions on the international scene be guided by principles that include the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity and respect for international law. Article 21 further requires that the Union define and pursue common policies and actions to consolidate and support the rule of law, human rights and the principles of international law. The Charter of Fundamental Rights of the European Union also provides relevant guidance.

¹² Report on the first annual report from the Commission to the European Parliament on the activities of Member States’ Export Credit Agencies (2012/2320(INI)).

Moreover, states still lack legal or policy guidance at the national level to ensure that export credit agencies observe state human rights obligations. They also lack meaningful avenues, whether judicial or non-judicial, to provide the victims of publicly-financed human rights abuse with remedy.

RECOMMENDATIONS

The following policy and law reform recommendations seek to ensure that export credit agencies neither commit nor are complicit in human rights violations.

States should adopt legal provisions that prohibit export credit agencies from supporting companies whose operations violate human rights. These provisions should explicitly recognize a legally-enforceable duty of care for export credit agencies towards those who are directly affected by the products that they provide. States should also provide meaningful opportunities for those whose human rights are violated by publicly-supported activities to access effective remedies.

States should make these opportunities known to affected individuals and communities.

Export credit agencies should adopt transparent human rights policies that include due diligence processes effective in identifying and mitigating human rights abuse. Export credit agencies should disclose information regarding the content and application of their human rights policies.

Export credit agencies should refrain from investing in financial instruments, such as venture capital funds,¹³ where due diligence is outsourced without proper oversight by the ECA. Export credit agencies should perform their own due diligence and should retain effective control over financing decisions, including through specific human rights clauses in contracts.

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¹³ In 2013, Export Development Canada made investments of between CDN\$150 and \$315 million in venture capital funds. www.edc.ca.

CASE STUDY 1

DREDGING WITH EXPORT CREDIT INSURANCE FROM ATRADIUS DSB



SITUATION IN SUAPE

The name 'Suape' derives from the indigenous Tupi language meaning something like 'winding paths'; everywhere in the Suape region one finds small streams and rivers that wind their way towards the sea. This coastal area in the state of Pernambuco in the northeast of Brazil features tidal flats with mangrove forests, interspersed with white sandy beaches. One finds large patches of protected Atlantic forest, known for its high biodiversity. Protected coral reefs off the coast are a popular spot for divers and snorkelers, while the waves of the Atlantic Ocean attract surfers. The locally born and raised fisherman João Vitor¹

agrees with his colleagues: "until recently, it was really a paradise here."

In the middle of this wonderful environment, the massive seaport of Suape was recently constructed. The local port authority claims a vast area of some 13,500 hectares for the port, which is home to at least 25,000 people. Like João Vitor, for many generations the people in this area have sustained themselves with fisheries, fruit trees and small scale agriculture. More than 120 companies have now established a presence in the area, including those involved in shipbuilding, a container shipment company and the giant oil company Petrobras, which built its massive 'Abreu e Lima' oil refinery

¹ To protect this individual, a fictitious name has been used throughout this report. Additional testimonies of people displaced by the Atradius DSB-supported dredging works of Van Oord can be heard in the film *Tatuoca: a stolen island*, which is available at: <http://vimeo.com/94267230>



LEFT: Van Oord's 'Wavewalker' drilling and blasting platform used to blast the rocky sea bottom. Photo: Both ENDS, 2014. **RIGHT:** Marisqueiras at work in Suape port area, with shipyard in the background. Photo: Both ENDS, 2014.

in the port. Since 1995 the Dutch company Van Oord has undertaken various dredging activities in Suape.² In 2011 and 2012, Van Oord won tenders for two new dredging projects, for which it obtained export credit insurance from the Dutch government via the export credit agency Atradius Dutch State Business (Atradius DSB).

Inside the port, an entry channel and basin were excavated for the new shipyard, Promar S.A. João Vitor says that a large part of the island of Tatuoca was destroyed, depriving at least 48 families of their homes and livelihoods. "Under the threat of violence these people have been forcefully evicted by the militia of the port authority. They received very little financial compensation and their means of survival has been taken away. Paid jobs are scarce." In addition, the access channel from the open sea to the port is in the process of being excavated to a depth of 21 metres in order to accommodate the largest ocean-going ships. "For this project," says João Vitor, "explosives have been used to remove the rocky bottom and reefs off the coast. I have also seen that large quantities of dredged material were dumped in places where this is not allowed. In September 2013 the environmental inspection agency (CPRH) of the state of Pernambuco imposed a hefty fine on the port of Suape for violating environmental agreements related to the project.³ Until recently we did not know that these dredging activities

were carried out by the Dutch company Van Oord. Compared to a few years back, we catch much less fish now."

INCOHERENT POLICY

With regard to human rights, Atradius states that it "recognises that human rights, labour conditions, the environment and the prevention of corruption are part of its corporate strategy, culture and day-to-day policy, and will act accordingly."⁴ However, the export credit agency fails to identify how it ensures that it acts in accordance with human rights standards or precisely what this means for the agency.

Dutch companies that obtain export credit insurance from Atradius DSB on behalf of the Dutch state are expected to take into account corporate social responsibility (CSR) standards.⁵ One of Van Oord's projects, which involved the dredging of a basin for a new shipyard, was classified as one with potentially significant detrimental social and environmental impacts, possibly extending beyond the location of the project (Category A). While such projects require a social and environmental impact assessment, only a supplementary environmental impact assessment was published.⁶ A more elaborate study of the cumulative impacts of this project is said to have been made, but was never disclosed

² <http://www.vanoord.com/activities/development-and-maintenance-port-suape>

³ Auto de infração N.º 00767/2013, data 2-9-2013, CPRH Agência Estadual de Meio Ambiente, Governo de Pernambuco; cf.: <http://forumsuape.ning.com/m/blogpost?id=6612743%3ABlogPost%3A3586>

⁴ Corporate social responsibility, brochure Atradius DSB (at 6): http://www.atradiusdutchstatebusiness.nl/Images/dsben/MVO%20Broch%20Engels_tcm1009-132870.pdf
The full CSR policy of Atradius DSB is only available in Dutch: http://www.atradiusdutchstatebusiness.nl/Images/Beleidsdocument%202012_tcm1008-133093.pdf

⁵ *Ibid.*

⁶ RIMA Complementar, Avaliação de impacto ambiental, Estaleiro Promar SA – Suape: http://www.cprh.pe.gov.br/downloads/RIMA_PROMAR_21_11_10.pdf

to the public. A second Van Oord project, involving dredging works for the access channel to the seaport, was classified as one with potentially substantial detrimental environmental and social impacts, the consequences of which would be limited to the project area (Category B). In such cases, the Dutch company is required to submit a statement about the social and environmental impacts of the project to Atradius DSB. Since nothing has been publicly disclosed in relation to the project, it is impossible to assess whether this requirement has been fulfilled.

In all such cases it is – in line with the OECD guidelines for multinational enterprises and other international standards – a requirement that Atradius DSB ensure that negative social and environmental impacts be mitigated as much as possible. In practice however, Atradius DSB is not able to provide evidence that this actually happened with Suape. Van Oord claimed on its website that an area of some 40 hectares has been reforested to compensate for the deforestation caused by the construction of the shipyard.⁷ However, it has proved impossible to obtain confirmation of this assertion from the port authority of Suape. João Vitor says: “[t]he most immediate impact that we felt from the dredging was that our water wells became salty and sometimes even completely dried up. We were forced to collect water from a hotel on the other side of the river. By felling our fruit trees and by threatening us, Suape hoped that we would leave the area sooner rather than later.”

ATTITUDE OF DUTCH GOVERNMENT

At the beginning of 2013, Both ENDS documented its assessment of the situation in Suape in a report⁸ that it submitted to the Dutch Minister of Finance, who is responsible for the export credit agency, and to the Minister of Foreign Trade and Development Cooperation, who is responsible for the CSR dimension in Atradius DSB’s policy. The dramatic impacts of the dredging activities in Suape were raised, including the loss of livelihoods

for local fishing communities, the destruction of coral reefs and forced evictions. It was noted that these impacts exacerbate other problems related to the industrialization of the area, such as violence, sexual exploitation and the disruption of the social cohesion in the region. It was also reported that local communities were not informed about the potential impacts of the dredging activities nor the Dutch stake in these operations.

In response to this submission, a meeting took place some months later at the Dutch Ministry of Finance. Employees of Atradius DSB and civil servants from the Ministry of Foreign Trade and Development Cooperation were also present. The employees of Atradius DSB and the civil servants responsible for Dutch export credit policies deplored the problems associated with the Suape port. Nevertheless they denied responsibility and insisted that all CSR policy guidelines applicable to export credit insurance had been met. Recommendations to review the screening process for these particular dredging projects and to evaluate the effectiveness of Atradius DSB’s general screening procedures were completely rejected.

MEASURES REQUIRED

The lack of political will to address the incoherence between the CSR policy and the practice involved in the provision of export credit insurance is usually justified with arguments that the Netherlands already performs better than its competitors in this field. The application of stricter CSR regulations would allegedly place Dutch companies in a position of disadvantage. Since ECAs in other countries usually present exactly the same argument, progress in this field remains a challenge.

Meanwhile, the deficient screening of the dredging projects in Suape appears to have generated costly consequences for the Dutch authorities. Van Oord suspended operations for the access channel to the port in 2013 without finishing the project. According to Van Oord, the project required more money than the agreed-upon price. The Brazilian side, however, asserts that Van Oord must finish the

⁷ <http://www.vanoord.com/activities/development-and-maintenance-port-suape> The content of this website was removed by Van Oord as of October 2014.

⁸ Review of dredging activities for entry channel and harbour basin of Promar S.A. shipyard, Suape, Brazil: http://www.bothends.org/uploaded_files/document/130222_Report_Suape.pdf

project for the agreed price. The result is that the Suape seaport is still inaccessible to the large oil tankers that will serve Petrobras' new oil refinery.

In retaliation, the seaport has refused to pay Van Oord a final outstanding instalment of some €40 million.⁹ For this reason, Van Oord has made a claim under the insurance policy it holds with Atradius DSB. As a consequence, the Dutch government has been forced to claim this amount from the Brazilian authorities. This is precisely the mechanism by which export credit debt – which accounts for 80% of all bilateral debt owed by developing countries¹⁰ – comes about. If the debt assumed in this case by the Brazilian government is cancelled, the official development assistance (ODA) budget of the Netherlands government will be reduced by a corresponding amount.

POLICY RECOMMENDATIONS

The Dutch government should:

- commission an independent review of the screening process applied to Van Oord's

applications for export credit insurance for dredging projects in the port of Suape;

- commission an independent evaluation of the effectiveness of the CSR screening policy of the Dutch export credit facility;
- ensure full compensation for all damage caused to locally affected communities by Van Oord's dredging projects; and
- ensure that the cancellation of all export credit debt is financed from the revenues of the export credit facility and that it does not result in a diminishment of the Dutch ODA budget.

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⁹ Het Financieel Dagblad, 7 November 2013: <http://fd.nl/economie-politiek/13544/brazilie-weigert-van-oord-te-betalen>

¹⁰ EURODAD. Exporting goods or exporting debts? Export Credit Agencies and the Roots of Developing Country Debt. December 2011: <http://www.eurodad.org/files/pdf/520a316d192b4.pdf>

GUARANTEEING PROFITS IN BELARUS AT THE EXPENSE OF HUMAN RIGHTS



Publicly-owned Belarusbank enjoys a formal cooperation agreement with eleven export credit agencies from European Union members, in particular: Germany, Italy, Austria, Poland, France, Slovakia, Hungary, Czech Republic, Belgium, Denmark and Slovenia.¹ The bank's website highlights seven projects financed in 2012-2013 with the support of EU export credit agencies.

The Belarusian government has been accused of sustained human rights abuse. The government's human rights record raises serious concerns regarding policy incoherence within the EU in the areas of export credit and human rights, in particular with respect to EU 'external action.'

Human Rights in Belarus

The UN Human Rights Council has monitored Belarus for years, issuing recommendations to the Belarusian government aimed at addressing both systemic and urgent human rights issues.² In July 2012, citing grave human rights violations and the Belarusian government's failure to implement recommendations, the Council established the mandate of the Special Rapporteur on the situation of human rights in Belarus.³

In his first report to the Council in April 2013, the Special Rapporteur documented "systemic and systematic violations of human rights in the country, especially in the areas of due process, fair trial and torture, as well as freedoms of opinion and expression, peaceful assembly and association." He noted that the "limitations imposed on these freedoms were further hampering the free exercise of other civil, cultural, economic, political and social rights."⁴

Later that year, the Special Rapporteur reported that the "rights to vote and to be elected at genuine periodic elections are not guaranteed in Belarus. Belarus today is, and has been since 2004, the only State in Europe with a parliament without an opposition."⁵

In his most recent report, dated August 2014, the Special Rapporteur reiterated "the systematic and systemic nature of human rights violations in Belarus, which has a negative impact on the rights of civil society organizations and human rights defenders to operate freely and without threats, harassment or intimidation. The overall legislative framework and practices of the Belarusian authorities violate, on a regular basis, the relevant provisions of international law."⁶

Belarus and the EU

Although the European Union and Belarus signed a Partnership and Cooperation Agreement (PCA) in 1995, which was intended to govern political and economic relations, the agreement was never ratified by the EU. Furthermore, the EU has excluded Belarus from its European Neighbouring Policy (ENP).

However, despite credible and consistent documentation of severe human rights violations in Belarus, the EU has refrained from adopting economic sanctions and continues to provide Belarus with aid.⁷ The only measure taken by the EU against Belarus was to establish a ban on visas for a number of Belarusian politicians and officials involved in state repression.⁸

Conclusion

The Belarusbank is owned and operated by the Belarusian state. Through their formal association with the bank and their financial support for its activities, EU export credit agencies have shown their disregard for human rights. They have also violated the spirit of EU Regulation No. 1233/2011 regarding ECAs, as well as obligations established under Article 21 of the Treaty on the Functioning of the European Union.

Moreover, the EU members that govern these export credit agencies have failed to fulfil their duty to respect and protect human rights.

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¹ <http://belarusbank.by/en/10529/eca-covered-financing>

² Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Belarus. 10 April 2012. A/HRC/20/8.

³ Human Rights Council Resolution 20/13. 16 July 2012. A/HRC/RES/20/13.

⁴ Report of the Special Rapporteur on the situation of human rights in Belarus. 18 April 2013. A/HRC/23/52.

⁵ Situation of human rights in Belarus. Note by the Secretary-General. 6 August 2013. A/68/276.

⁶ Situation of human rights in Belarus. Note by the Secretary-General. 12 August 2014. A/69/307.

⁷ <http://aei.pitt.edu/7543/1/151.pdf>

⁸ <http://www.globalsecurity.org/military/world/belarus/forrel-eu.htm>

CASE STUDY 2

THE HIDROSOGAMOSO DAM PROJECT IN COLOMBIA: DAMNED TO DEVELOPMENT



BACKGROUND

The Sogamoso River is located in Santander, a region in northern Colombia, 285 km from the capital Bogotá. The Sogamoso is part of a major transregional river system. Its basin is highly biodiverse, supporting pristine mountain forests. Local communities, including the villages of La Playa, Altamira and La Estrella, depend on subsistence fishing and agriculture.

In 2009 life on the Sogamoso changed dramatically when construction began on the Hidrosogamoso dam. When completed in early 2015, the dam will measure 190 m in height, will flood 70 km² and will impact an area of 226 km². The dam is anticipated to produce 820 megawatts,¹ which represents nine percent of the

country's total energy production. Hidrosogamoso is part of a national energy strategy that seeks to meet growing energy demand with new sources of hydroelectric power. The Colombian government is aggressively promoting investment by foreign companies in the mining and oil sectors, which will require additional sources of reliable energy.

ECA FINANCING

Hidrosogamoso is being developed by the Colombian company ISAGEN S.A., which is a public-private enterprise. Several foreign companies and governments are providing the project with equipment, financing and insurance. The consortium ICT II SAS, which consists of Italian company Salini Impregilo and Colombian enterprises Conalvia and Tecnica Vial, was awarded

¹ http://www.agaportal.de/pdf/nachhaltigkeit/eia/eia_kolumbien_wasserkraft.pdf



LEFT: The Sogamoso River valley. Photo: © Vereda Sogamoso, 2011. **RIGHT:** Construction site of the Hidrosogamoso dam. Photo: © Vereda Sogamoso, 2011.

the contract for construction work. The Colombian branch of the German company Siemens constructed the power-houses for the dam and the German affiliate of Austrian company Andritz will source the turbines.² In December 2012 the German government provided Banco Santander with an export credit guarantee of approximately US\$73 million for financing that the latter provided to Andritz.³

HUMAN RIGHTS IMPACTS

The project's Environmental Impact Study estimates that nearly 30,000 people are directly impacted by the dam. Local residents in the Sogamoso River basin first heard about the project when ISAGEN held meetings in the nine municipalities that surround the project. Community consultation (socializaciones) is required under the Colombian constitution. The company reports that it carried out consultations in 128 communities involving 2,100 people, during which it disseminated information about the project's impacts and the company's mitigation plans.⁴

Initially, the local population welcomed the project as a potential source of employment and improved services, including power, health, sewage and education. ISAGEN assured local residents that

life downriver would continue as before due to its robust environmental standards and monitoring practices. However, the population quickly realized that ISAGEN could not keep its promises.

Not only did the company's commitment regarding paid employment fail to fully materialize, local residents have suffered significant economic costs. The local economy in the river basin is based on agriculture, livestock and fishing activity. Local residents depend on their land and soil, and on water and sediment from the Sogamoso River. The dam reservoir alone will destroy 455 km² of land, roughly half of which was used to graze cattle and another third of which was dedicated to agriculture.⁵ In the construction zone, the cultivation of crops has all but ended.

Local fishermen report a dramatic decrease in fish migration downstream, hindering their ability to fish for food and commerce. Nearly the entire community of La Playa used to live from fishing. However, three years into dam construction, full-time fishers no longer exist in the community. Locals blame this decline on water contamination from the construction site and on disruptions to fish reproductive cycles caused by the dam.⁶ Local tourism has also been negatively impacted.

² <http://www.energy.siemens.com/co/pool/co/publicaciones/energia-en-movimiento/mayo-2011/energiaen-movimiento-8-mayo-2011.pdf>

³ http://www.agaportal.de/en/aga/projektinformationen/projektinformation_2012.html

⁴ <http://censat.org/es/noticias/hidrosogamoso-comunidades-pagan-el-alto-precio-de-la-energiahidroelectrica-en-colombia>

⁵ http://www.agaportal.de/pdf/nachhaltigkeit/eia/eia_kolumbien_wasserkraft.pdf

⁶ <http://www.vanguardia.com/economia/local/galeria-263991-denuncian-que-el-rio-sogamoso-se-secotras-llenado-de-hidrosogamoso>



LEFT: Protests of the local population of the Sogamoso River basin. Photo: © Vereda Sogamoso, 2011. **RIGHT:** ISAGEN “consultation” meeting with communities. Photo: © Vereda Sogamoso, 2011.

The company has provided 186 families with compensation.⁷ However, locals argue that this group represents a small subset of those who have lost land, employment and food security as a result of the project. They further argue that the compensation that has been awarded does not correspond to the losses suffered.⁸

Moreover, community resistance to the project has exacted a high cost. Between 2009 and 2013, six community leaders were killed after they participated in protests against the Hidrosogamoso dam. Several others have disappeared. The crimes have not been adequately investigated by the authorities.⁹

LEGAL IRREGULARITIES

The local population began to voice its opposition to the project shortly after it began. With the support of the nationwide ‘Movement of Living Rivers’ (Movimiento Ríos Vivos), local communities organized peaceful demonstrations and blockades. They spread information in news articles, radio podcasts and videos. In March 2011, locals staged a three-day blockade of the construction site, which attracted the attention of regional and national press outlets.¹⁰

Shortly after, the Ministry of Environment and Sustainable Development rejected ISAGEN’s

request to certify the project under the Clean Development Mechanism (CDM) of the Kyoto Protocol, which would have made it eligible for carbon credits. In order to obtain CDM certification, the national government must confirm that a project generates long-term employment or that it alleviates poverty. The Colombian government rejected the project because the company failed to adequately consult with local communities and used local natural resources such as timber and gravel without the necessary permits.¹¹

In September 2014, a community representative sued ISAGEN and the National Authority for Environmental Licensing (ANLA) before the administrative court of Santander. The suit claims that the defendants violated several environmental and social rights guaranteed under the Colombian constitution, such as the right to live in a healthy environment, the right to sustainable development and the right to protection from damage arising from foreseeable natural disasters (the dam is located near a seismic zone).¹² The following month, the Movimiento Ríos Vivos participated in a hearing before the Inter-American Commission on Human Rights on behalf of the communities in the Sogamoso River basin. The hearing concerned displacement caused by mega-projects, including Hidrosogamoso.¹³

⁷ <http://www.semana.com/economia/articulo/isagen-llenado-de-hidrosogamoso-depender-de-el-nino/399142-3>

⁸ <http://www.vanguardia.com/economia/local/264003-comunidad-afectada-por-el-llenado-dehidrosogamoso-pide-indemnizacion>

⁹ Movimiento Social en Defensa del Río Sogamoso y Ríos Vivos Santander. Submisión a la Comisión Inter-Americana de Derechos Humanos. 31/10/2013.

¹⁰ <http://www.vanguardia.com/historico/96623-trabajos-en-hidrosogamoso-pararon-por-bloqueo-de-lacomunidad>

¹¹ In March 2011 the Ministry of the Environment discovered that ISAGEN had been logging trees in the sector of Miramar without a proper licence or the permission of the environmental authorities. See: <http://veredasogamoso.blogspot.de/2011/09/ministerio-de-medio-ambiente-niega.html>

¹² <https://redjusticiaambientalcolombia.files.wordpress.com/2014/10/accion-popular-casohidrosogamoso.pdf>

¹³ <http://defensaterritorios.wordpress.com/2014/11/01/organizaciones-solicitan-que-la-cidh-inste-alestado-colombiano-a-cumplir-obligaciones-internacionales-y-declarar-la-moratoria-de-los-proyectos-minero-energeticos/>

GERMAN MINISTRY DECLARES IGNORANCE

In Germany, decisions regarding the guidelines that are applied to export credit guarantees and ECA financing for significant projects are made by consensus by an interministerial committee consisting of the Ministries of the Economy, which has the lead, and the Ministries of Finance, Foreign Affairs and Economic Cooperation and Development. A private consortium is mandated with the management of export credit guarantees, including project appraisals, among other responsibilities. Applications for ECA coverage are assessed against the OECD Common Approaches.

The Hidrosogamoso dam was classified as a 'Category A' project with potentially high and / or irreversible environmental and social impacts beyond the specific project site. While the German Ministry of the Economy published the project's Environmental Impact Assessment, there is no public information about how the export credit agency assessed project impacts.

In July 2012, three German organizations (CounterCurrent / GegenStroemung, urgewald and Amnesty International Germany) requested copies of documents concerning human rights and the environment that were compiled by the German ECA, Euler Hermes, for the interministerial committee. The documents concerned 31 projects, including Hidrosogamoso. The organizations made their request under the Aarhus Convention / German Law on Environmental Information and the German Freedom of Information Law. They sought information regarding the degree to which the German government assesses potential human rights impacts before granting export credit guarantees. The German government has refused to release relevant documentation and a lawsuit regarding the issue is pending.

German ECA-Watch member CounterCurrent (GegenStroemung) and Movimiento Ríos Vivos raised concerns regarding the project's social and environmental impacts with the German Ministry of the Economy in December 2013. Representatives of the Economics Ministry and Euler Hermes declared that in addition to assessing the Environmental Impact Assessment, they undertook supplemental research, conducted

a field visit and commissioned a consultant in the region to assess project impacts on the local population. The Ministry promised to look into concerns that were raised at the meeting and in subsequent submissions. In September 2014 however, the Ministry informed CounterCurrent (GegenStroemung) that Banco Santander was unaware of the complaints, that ISAGEN denied any wrongdoing and that the German embassy had not found any irregularities. Given the significant media coverage of local protests and demands in regional and national outlets, as well as reports by human rights organizations such as Amnesty International, the German government's failure to recognize the problems associated with the project is both disappointing and troubling.

CONCLUSION

The German government was clearly aware of the potentially severe impacts associated with the Hidrosogamoso project. It classified the project as Category A and undertook supplementary measures including a field trip and the hiring of a consultant. Equally clear however, is the government's failure to recognize real threats to the affected population's human rights and to establish effective measures to safeguard against human rights violations.

The project highlights the need for more robust human rights due diligence by the German government in regard to export credit guarantees. Specifically, the government should:

- commission an independent review of its human rights policies and practices regarding the provision of export credit;
- ensure full compensation for all harm suffered by locally affected communities as a consequence of the construction and operation of the Hidrosogamoso dam; and
- engage with Colombian authorities to insist that the murder and disappearance of community leaders be thoroughly investigated and that criminal proceedings be pursued.

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CASE STUDY 3

VALE AND THE EXPANSION OF THE CARAJÁS PROJECT IN THE BRAZILIAN AMAZON



PROJECT DESCRIPTION

Brazilian company Vale S.A. is among the world's largest mining companies, with operations in thirty-eight countries on five continents. The massive Carajás project in the Brazilian Amazon is Vale's biggest and most important operation. Carajás, which has been in operation for thirty years, includes the world's largest iron ore mine, an 892 km railroad, a port in São Luis and pig iron mills. The Tucuruí hydroelectric complex was built to supply the project with energy.

Vale is currently expanding Carajás to substantially increase its iron production through the 'Ferro Carajás S11D' project. Once operational in 2016, the expanded complex will more than double

production to 230 million tonnes of iron a year.¹ Ferro Carajás S11D involves enhanced mining activity, a new processing plant, an expansion of the port and the laying of a second rail line parallel to the original. The S11D project is the biggest investment in the iron sector, globally. The total cost estimate for the project is US\$19.6 billion.²

PUBLIC FINANCE

In 2014, the Canadian export credit agency, Export Development Canada, announced US\$500 million in financing to Vale for capital expenditures.³ The financing was approved to facilitate the procurement of Canadian goods and services. The National Bank for Economic and Social

¹ Vale. Eficiência da Gestão do Capital. Relatório Anual. 2012.

² <http://www.portosenavios.com.br/geral/19796-ibama-autoriza-maior-projeto-de-mineracao-da-historia-da-vale>

³ <http://www.edc.ca/EN/About-Us/News-Room/News-Releases/Pages/vale.aspx>



LEFT & RIGHT: Protest of quilombola people on rail lines, Itapecuru-Mirim, Maranhão, Brazil. Photo: Marcelo Cruz, Justiça nos Trilhos, 2014

Development (BNDES), a Brazilian public bank, has approved two loans - worth a total of US\$4.5 billion - to Vale for the expansion project.⁴

HUMAN RIGHTS IMPACTS

The Carajás railway, which transports iron ore to the port in São Luis, crosses twenty-seven municipalities in the states of Pará and Maranhão, affecting more than a hundred communities located in its “direct area of influence.”⁵ The residents of these communities include indigenous people, small farmers, Afro-descendant (quilombola) groups and urban dwellers.

Non-governmental organizations⁶ have documented the serious impacts associated with Carajás. The railway lacks basic security infrastructure and as a result, trains frequently hit local residents, often resulting in death or serious injury. Between 2006 and 2013, two local residents were killed or injured on average every three months.⁷ The project is also responsible for the destruction of native forest cover, and for damage to ecosystems and public health caused by air, soil and water contamination. Moreover, the acquisition of large parcels of land by the company

resulted in the expulsion of small-scale farmers and has created obstacles regarding the formal recognition of collective title to communities’ traditional territories.

LEGAL IRREGULARITIES

In 2012 a class action⁸ was launched to challenge the licencing process for the expansion. The suit was initiated by the Maranhão Human Rights Society (SMDH), the Black Cultural Centre of Maranhão (CCN) and the Indigenous Missionary Council (CIMI). It questions the government’s decision to licence the new rail line in discrete pieces. This approach allowed Vale to produce a simplified environmental impact assessment (called a basic environmental plan), thereby avoiding an evaluation of cumulative impacts. It also allowed Vale to dispense with important elements of the standard environmental review process, such as public hearings and community consultations. Vale was exempted from obtaining the free, prior and informed consent of the traditional communities affected by the project.⁹ Consequently, the process for determining mitigation measures and for assessing compensation for damages was also inadequate.

⁴ http://www.bndes.gov.br/SiteBNDES/bndes/bndes_en/Institucional/Press/Noticias/2014/20140415_vale.html | http://www.bndes.gov.br/SiteBNDES/bndes/bndes_en/Institucional/Press/Noticias/2012/20120823_vale.html

⁵ According to the “basic environmental plan” issued by Vale S.A. and Amplo Engenharia de Gestão (Oct. 2011, Volume 4), there are 101 communities located along a strip of territory within 500 km of the rail line.

⁶ In 2011, the International Federation for Human Rights, Justiça Global and Justiça nos Trilhos published a Human Rights Impact Assessment Report that documents the testimonies of affected communities. The report, entitled “How much are human rights worth in the Brazilian mining and steel industry?” is available at: <https://www.fidh.org/en/americas/brazil/9662-how-much-are-human-rights-worth-in-the-brazilian-mining-and-steel-industry>

See also a report issued in 2013 by the Brazilian Platform of Economic, Social, Cultural and Environmental Human Rights (Plataforma DHESCA Brasil). This document, entitled “Mineração e Violação de Direitos: O Projeto Ferro Carajás S11D, da Vale S.A.” is available at: http://dhescbrasil.org.br/index.php?option=com_content&view=category&layout=blog&id=131&Itemid=156

⁷ Agência Nacional de Transportes Terrestres (ANTT). Annual Reports. Available at: http://www.antt.gov.br/index.php/content/view/36438/Relatorios_Anuais.html

⁸ Processo nº. 26295-47.2012.4.01.3700 - 8ª Vara da Justiça Federal no Maranhão.

⁹ Brazil ratified 169 ILO Convention 169 in 2012. This legally-binding treaty addresses the rights of indigenous and tribal peoples.



LEFT: One of the iron mines in Carajás. Photo: Marcelo Cruz, *Justiça nos Trilhos*, 2011. **RIGHT:** Residents of the rural 'Francisco Romão' settlement in Açailândia, Maranhão, waiting to cross the rail line. Photo: Marcelo Cruz, *Justiça nos Trilhos*, 2011.

On July 26, 2012, a federal judge recognized the irregularities in the licensing process and ordered that construction on the rail line be halted until Vale revised its impact studies, carried out public meetings in the twenty-seven municipalities that the railway crosses, and obtained the free, prior and informed consent of affected indigenous and quilombola communities.

Shortly after the court order was issued, BNDES announced its decision to finance the project. The Brazilian government used the announcement to justify its determination that the expansion project is in the public interest. This characterization made way for a court ruling (*suspensão de segurança*) that allowed construction on the railway to proceed, despite the irregularities, in order to avoid any impact on the national economy.^{10,11} The complainants have appealed the decision and the matter will be reviewed shortly by the Superior Court of Justice.

The company's basic environmental plan provides partial and imprecise information regarding the number of families that will need to be relocated to make way for the expansion, as well as the timing and conditions for relocation. According to an administrative procedure¹² initiated by the

Public Defender,¹³ the company plans to displace more than 1000 families. Some of these families have already been forcibly removed. Negotiations regarding their relocation were carried out in secret between Vale and affected individuals, without the supervision of government authorities. Residents lacked access to legal advice.¹⁴

Communities also complain about the lack of infrastructure to facilitate safe passage over the railway. With the second train line in operation, the frequency of passing trains will increase, exposing local residents to even greater risk.

A lawsuit¹⁵ was initiated in 2011 by the Federal Public Ministry¹⁶ to defend the rights of the quilombola communities of Santa Rosa dos Pretos and Monge Belo (Itapecuru-Mirim, Maranhão). In 2012 the suit was dropped and an agreement was signed between the parties, establishing a series of obligations for Vale and three federal government agencies. The company agreed to construct infrastructure to enhance community safety in the area of the railway and to refrain from intervening in the communities' collective land titling process. In successive legal decisions, the most recent of which was issued on September 26, 2014, the court found that neither Vale nor the government

¹⁰ Processo nº. 0056226-40.2012.4.01.0000/MA, Tribunal Regional Federal da 1ª. Região.

¹¹ In Brazil, the *Suspensão de Segurança* (Security Suspension) is a legal artifice dating back to the military dictatorship that allows the suspension of court decisions based on supposed threats to national security and the country's "social and economic order." Increasingly, such suspensions have been applied to decisions that uphold human rights and environmental legislation regarding the licensing of big enterprises such as mines, rail lines and hydroelectric dams.

¹² Processo nº. 2014/012-01196, Defensoria Pública da União no Maranhão, Ofício de Direitos Humanos e Tutela Coletiva.

¹³ The Public Defender is a public institution that provides legal aid.

¹⁴ *Supra* note 13.

¹⁵ Processo nº. 0021337-52.2011.4.01.3700 - 8ª Vara da Justiça Federal no Maranhão.

¹⁶ The Public Ministry is an independent public institution with a constitutional mandate to promote the rule of law and democracy, and to defend inalienable individual rights and all collective rights. (Constituição da República Federativa do Brasil, 1988, artigos 127 a 130).

agencies had fulfilled their obligations to the communities. Also in September, Santa Rosa, Monge Belo and other affected communities in the interior of Maranhão blocked the Carajás railway for five days. The communities protested Vale and the government's failure to fulfill its obligations under the legal agreement.¹⁷

In 2013 a former Vale employee accused the company of illegally spying on a number of actors who are critical of its operations. The whistleblower, who played an important role in the company's security department, released documents revealing that the company took steps to infiltrate social movements that accompany affected communities in the defense of their rights. According to the documents, the company developed complex biographical files from information that was allegedly obtained illegally. The whistleblower accused the company of further illegal acts including the payment of bribes to government officials, influence peddling, tapping telephones and hacking computers.¹⁸ Vale refuted the allegations but publicly acknowledged that it monitors social organizations.¹⁹ In 2014, the International Federation of Human Rights conducted a fact-finding mission to Brazil and urged Brazilian authorities to take measures to prevent Vale from carrying out illegal espionage.²⁰

EXPORT DEVELOPMENT CANADA

The financing provided to Vale by EDC in 2014 is not subject to the OECD Common Approaches. EDC describes the process it uses to assess non-project financing thus:

Our review of corporate loans focuses on the ability of the company to manage its

environmental and social risks. These reviews take into account several factors such as the industry sector being supported, the countries in which the borrower operates, the borrower's environmental and social track record (including compliance with applicable regulations) and the borrower's corporate capacity to manage the environmental and social risks of its operations.²¹

With respect to human rights due diligence for non-project financing, EDC explains:

In 2013, we improved our procedures for human rights risk assessments in [...] lines of business [...] such as insurance, bonding and general corporate loans. This involved bringing greater clarity to our business teams on what factors would trigger the need for a human rights risk assessment for a potential deal.²²

EDC does not disclose further information regarding these assessment processes, nor does it make public its reviews of potential clients. This lack of transparency makes it impossible to critically assess EDC's methodology.

Based on its review of Vale, EDC affirmed that the company "has maintained a solid reputation as a responsible corporate citizen."²³ EDC's due diligence process either failed to register the issues described above or determined that Vale was in compliance with its policies, despite the impacts caused by Carajás. In either case, EDC's due diligence process is clearly inadequate.

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¹⁷ The Brazilian constitution requires that the state guarantee quilombola communities' right to collective property ownership regarding their ancestral territories. The quilombola are Afro-descendants who enjoy the same protections under Brazilian law as indigenous people. The process to recognize their collective land rights permits the intervention of interested parties. The quilombola communities affected by the railway accuse the company of abusing this right to intervene in order to block recognition of their territory and avoid paying them compensation.

¹⁸ <http://business-humanrights.org/en/vale-accused-of-illegal-spying-on-employees-infiltrating-social-environmental-movements>

¹⁹ <http://www.conjur.com.br/2013-abr-23/ministerio-publico-vestiga-acusacao-espionagem-corruptao-vale>

²⁰ <https://www.fidh.org/en/americas/brazil/14695-brazil-vale-and-belo-monte-suspected-of-spying-the-justice-system-must>

²¹ EDC. *Where Opportunity Meets Best Practice. Corporate Social Responsibility Report 2013*, p.17. <http://www19.edc.ca/publications/2014/2013csr/en/index.html?CR-CSR-1A-E#landingpage>

²² *Ibid.* p.14.

²³ *Ibid.* p.17.