

# Human rights law and mining

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# Summary

- **For business and its advisers: no longer sufficient to follow (or know) the domestic law of the country in which you operate.**
- International human rights standards:
  - impose obligations on the nation state (incl. CADH, ILO169); but
  - also apply to business, regardless of what national law says; and
  - also apply to supply chain partners (eg. financiers, legal advisers).
- Businesses are required to:
  - have a policy about human rights,
  - conduct due diligence to know whether your operations impact any HR; and
  - address/remediate any human rights impacts identified.
- These structures are being implemented through various means, which apply to Chile, Chilean companies, and operations in Chile.

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# 1. Business & human rights: introduction

- Human rights have traditionally been part of international law: commitments agreed between states about their obligations to citizens.
- The structures have struggled to address human rights impacts by non-state parties.
- If a mine's operation impacts on a person's human rights, who is responsible for that and what should be done in response?

## 2. Relevant issues

- Potential rights/impacts could occur in many areas of mining operation

Internal issues (eg. workplace)	External issues (eg. relations with others)
<ul style="list-style-type: none"><li>• Right to equal pay for equal work</li><li>• Right to organize and participate in collective bargaining</li><li>• Right to equality at work</li><li>• Right to non-discrimination</li><li>• Right to just and favourable remuneration</li><li>• Abolition of slavery and forced labour</li><li>• Abolition of child labour</li><li>• Right to rest and leisure</li><li>• Right to work</li></ul>	<ul style="list-style-type: none"><li>• Right to life, liberty and security of the person</li><li>• Right of peaceful assembly</li><li>• Right to an adequate standard of living (including food, clothing, and housing)</li><li>• Right to physical and mental health; access to medical services</li><li>• Equal recognition and protection under the law</li><li>• Right to education</li><li>• Right to participate in cultural life</li><li>• Freedom of movement</li></ul>

### 3. 'Protect, Respect, Remedy' framework

- Recent developments at UN have provided new way of thinking about HR and business (UN 2008).
- State's duty to protect
  - States have a duty to protect persons within their jurisdiction against human rights abuses, be these from government, non-state parties, or business.
- Company's responsibility to respect
  - Business must not infringe the human rights of others - 'put simply, to do no harm'
  - Obligation exists independently of any state duty to protect, and this requires a due diligence process by the company of its activities so that it can be 'aware of, prevent, and address adverse human rights impacts'.
- Both state and business have obligations around access to remedies
  - State must provide formal public mechanisms such as courts, but
  - The company and the government should also provide non-judicial mechanisms

## 4. Business 'responsibility to respect'

- The 'protect, respect, remedy' framework was given detail in the *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (or GPs)*: UN 2011.
- The three obligations that GPs direct for each business is:
  - adopt a human rights policy: GP 16;
  - conduct due diligence: GP 17; and
  - have remediation processes to address any impacts: GP 22 & 31.

## 5. Implementing the GPs

The GPs are accepted and enforced by various other structures, eg:

- *OECD Guidelines on Multinational Enterprises* (OECD 2011 - next slides)
- *World Bank* performance standards and the Banks's ombudsman/compliance process (eg. IFC 2012, [12]; CAO 2007; so if World Bank funding involved, GPs relevant).
- *Equator Principles*, many large lenders follow the Equator Principles which emplace similar decision-making to World Bank funding processes (EPIII 2013, preamble).
- *Canadian Government's Enhanced CSR Strategy* (CAN Gov 2014, 'The Government of Canada expects Canadian companies operating abroad to respect human rights ... If this is not possible, companies may wish to reconsider their investment' with structures reinforcing OECD Guidelines process).
- *International Council on Mining and Metals*, ICMM 2012 ('all company members are required to...uphold fundamental human rights ... in dealings with employees and others who are affected by our activities')
  - ICMM members with operations in Chile include: Anglo American, Antofagasta Minerals, Barrick Gold, BHP Billiton, Codelco, Freeport-McMoran Copper & Gold, Glencore Xstrata, Goldcorp, Rio Tinto, Teck (KPMG 2014, ICMM 2015).

More about the government/lender's processes, so mining company 'liability' is indirect



## 6. OECD Guidelines - overview

- *OECD Guidelines for Multinational Enterprises*, adopted 1976 (latest version 2011).
- Code of principles and standards for responsible business conduct, covering various subjects including human rights.
- Applies to the government and companies operating from or in an ‘adhering country’.
- Currently 44 ‘adhering governments’ (about 85% of foreign direct investment), including Chile.

## 7. OECD Guidelines - process

- State Party Governments:
  - commit to encourage MNEs operating in or from adhering states to comply with the Guidelines in their business activities
  - must establish National Contact Points (NCPs) for administering the Guidelines, including receiving and considering “specific instances” (ie. complaints) alleging breach of the Guidelines by MNEs and promoting resolution of the issues raised by these specific instances.
- The findings of these NCPs are not legally enforceable but the NCPs’ procedure is enforceable

## 8. OECD Guidelines - Chile

- Chile's National Contact Point (<https://mneguidelines.oecd.org/ncps/chile.htm>)
  - ‘Viviana Araneda; Head of the OECD Department; Dirección General de Relaciones Económicas Internacionales; Ministerio de Relaciones Exteriores de Chile’
  - ‘The office of the Chilean NCP is located in the General Directorate for International Economic Relations, Ministry of Foreign Affairs of Chile. An advisory body composed of various government agencies is being put in place’.
- To date, there have been only three cases about mining in Chile:
  - 2014 (complaint by local municipality that the foreign company 'had breached the environment provisions of the Guidelines'. While NCP investigating, negotiations started, so no further action);
  - 2013 (Minera Escondida, complaint by Escapes Santander over intellectual property, with parallel legal proceedings also underway, Chilean NCP indicated no breach and concluded)
  - 2007 (Barrick Gold subsidiary, complaint by trade union that 'Entreprise Zaldivar had breached the employment and industrial relations, and environment provisions of the Guidelines', but investigation ceased when no formal complaint filed).
- There have been significant cases regarding other mining operations in South America (eg. BHP Billiton Cerrejon Coal in Colombia: AUS NCP 2009).
- An example of a detailed Chilean NCP issue (in fisheries): CHL NCP 2003.

## 9. Human rights law and mining

- There is voluminous material (including official UN reports) suggesting that mining operations might or do breach human rights, eg. Greenspan 2014, Doyle & Cariño 2013, UNDP 2012, CERD 2007.
- There is, however, ambiguity and inconsistency in what human rights is said to require.
- There is also much advocacy and suggestions that the new business-human rights structure will indicate many current practices inadequate: eg. A4ID 2013, UN 2013b.
- But...

# 10. Assertions -v- actual cases

When looking at the existing jurisprudence (eg. HR treaty bodies, OECD NCPs, CAO, ILO) few mining operations have been explicitly ruled to be in breach of human rights standards.

- A big exception is indigenous land issues, where consultation/consent is necessary for developments affecting indigenous land/communities (eg. CIDH decisions, Donoso 2014, Gómez & o'rs 2013).
- More generally, human rights breaches arise where it is shown that the specific action prevented the exercise/enjoyment of that right (this is difficult to prove, and many allegations against mining not substantiated).
- Where the impact is clear (eg. cyanide risk, failure to respond to accident, failure to follow domestic law granting/suspending operations, failure to provide information) then that has breached human rights.
- Domestic law inconsistent with international human rights is only valid:
  - where that variance is permitted under international law (eg. public order, within "margin of discretion/appreciation"); and
  - any restriction on human rights comes from careful and considered decision-making about the necessity and proportionality of the limit (eg. Spano 2014)

# 11. Where to from here?

- The lack of international jurisprudence on mining and human rights will change. Expect:
  - more decisions about indigenous land issues, and where community's lack involvement in decision-making this will result in mining rights being declared invalid (or company's use of them breaching GPs), eg. IACHR 2009, ILO 2009, Gómez & o'rs 2013;
  - for companies, a failure to have the GP process/procedures is likely to be the initial focus (many 'human rights' cases currently under assessment in OECD's NCP process);
  - more government initiatives/laws enforcing the GP process on companies (eg. *CRC AUS conclusions* 2012).
- Mining lawyers will need increased familiarity in this area to properly advise/assist clients (and perhaps even avoid negligence/liability, eg. A4ID 2013).
- Will continue to be attention on the State and its actions in implementing human rights, including extra-territorially (eg. *Matta Aylwin & Montt Oyarzún* 2011; *Sanhueza & o'rs* 2013, UN 2014).

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# 12. Observations on mining human rights & Chile

- In Chile, like Australia and other countries, one of the main areas of human rights attention in mining is land impacts and indigenous rights.
- For companies, key question (in needing to respect human rights):
  - how much can you rely on the current government/legal structure of providing mineral rights?
  - do the processes and rights granted meet with international standards, or is more required from the company?
- Concerns have been identified with Chile's granting land rights which impact on indigenous people (eg. CEACR 2014b (ILO); CCPR CHL conclusions 2014, [10]; CERD CHL conclusions 2013, [12]-[13]; Aymara -v- CHL 2013, [51]-[52] (IACHR admissibility)).
- Two relevant issues:
  1. can national laws impacting rights be accepted internationally?
  2. is a negotiated structure about indigenous rights valid?

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# 13. National laws & international human rights

- When are domestic legal structures, affecting peoples' rights, accepted internationally?
  - Where no impact on specific human rights, eg. not 'so substantial that it...effectively den[ies]... the right to enjoy their cultural rights in that region': *Länsmän -v- FIN* 1994, [9.5]
  - Where international rights permit limitations, there must be careful parliamentary /judicial review of the necessity of limitations: eg. allowed in *Animal Defenders v GBR* 2013, [108], but rejected in *Hirst v GBR* 2005, [79]
  - Not permitted where there is racial inequality in treatment, eg. different procedures and protections for property rights: *Dann -v- USA* 2002, [144]



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# 14. Negotiated national indigenous rights laws

- Domestic laws about land, which impacts indigenous human rights, have been examined in many countries.
  - One structure in NZ allowed because Government made 'broad consultation before proceeding to legislate' and there was 'broad Maori support to a nation-wide settlement and regulation of fishing activities': *Mahuika -v- NZL* 2000, [9.6]-[9.8]
  - Where laws made without effective participation, then the arrangements ruled inconsistent with human rights: eg. *CERD AUS decn* 1999, [9]; *CERD NZL decision* 2005, [6]-[7]; *CERD USA decision* 2006, [9]

# 15. Summary

- International human rights standards apply to business, regardless of what national law says, and also apply to supply chain partners.
- Businesses are required to:
  - have a policy about HR,
  - conduct due diligence; and
  - address/remediate any impacts identified.
- These structures apply to Chilean companies and operations in Chile.

*‘although the influence of human rights on businesses is in its infancy, international human rights law is poised to, much as environmental law was 30 years ago, to become a formidable force in shaping the way businesses carry out their operations across the globe’*

A4ID 2013, 4



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