CIDSE submission to the Special Representative of the United Nations Secretary-General on Business and Human Rights

Recommendations to reduce the risk of human rights violations and improve access to justice

February 2008

A Submission by CIDSE Member Agencies:

This document was produced by the CIDSE Private Sector Group as a submission to Prof. John Ruggie, Special Representative of the UN Secretary General, for his consideration in his review of the issue of human rights and transnational corporations and other business enterprises.

The analysis and proposals presented in this paper do not necessarily reflect the views of all CIDSE members.

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CIDSE is a coalition of 16 Catholic development agencies in Europe and North America which share a common vision on poverty eradication and social justice and a common strategy on development programmes, development education and advocacy. CIDSE's advocacy work covers trade and food security, resources for development, global governance, EU development policy, climate change and the Private Sector.

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LIST OF ACRONYMS

ACFTU	All-China Federation of Trade Unions (official Chinese trade union federation)
CIDSE	International Co-operation for Development and Solidarity
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEREAL	Centre for Reflection and Action on Labour Issues
CERD	Committee on the Elimination of Racial Discrimination
CRC	Convention on the Rights of the Child
COTCO	Cameroon Oil Transportation Company
CSO	Civil Society Organisation(s)
ECLAC	Economic Commission for Latin America
ECSR-net	International Network for Economic, Social and Cultural Rights
ECZ	Environmental Council of Zambia
EITI	Extractive Industries Transparency Initiative
FPIC	Free, Prior and Informed Consent
GRI	Global Reporting Initiative
IBRD	International Bank for Reconstruction and Development
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTI	International Council of Toy Industries
IFC	International Finance Corporation
ILO	International Labour Organisation
IPRA	Indigenous Peoples Rights Act
KCM	Konkola Copper Mines
MUZ	Mineworker's Union Zambia
NASSA	National Secretariat for Social Action Justice and Peace
NCP	National Contact Point
NCIP	National Commission on Indigenous Peoples
NGO	Non-Governmental Organisation
NUMAW	National Union of Miners and Allied Workers
OECD	Organisation for Economic Cooperation and Development
PMP	Philippines Misereor Partnership
SACOM	Students and Scholars Against Corporate Misbehaviour
TOTCO	Tchad Oil Transportation Company
TNC	Transnational Corporation
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
UNEP	United Nations Environmental Programme
WHO	World Health Organisation

Executive summary

Introduction

CIDSE (International Co-operation for Development and Solidarity) is an alliance of 16 Catholic development organisations from Europe and North America. CIDSE and its member agencies are inspired and guided by the social teachings of the Church—as well as by their close work with Southern organisations—to make an 'option for the poor' and to assess policies, structures and actions in terms of their impact on vulnerable people.

This submission provides recommendations in relation to the first two parts of the mandate of John Ruggie, the Special Representative to the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises;

> a) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights.
>
> b) To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation.

The document draws on a rich body of Catholic Social Teaching. CST holds that human rights are universal in scope and that their protection and promotion are everyone's concern. This analysis is combined with case studies drawn from specific areas where CIDSE agencies and in particular their partner organisations on the ground have experiences of communities directly affected by the actions of businesses. CIDSE agencies have a long history of working on issues around corporate responsibility and accountability in countries as varied as Zambia, Mexico, Brazil and the Philippines and in sectors ranging from agri-business to electronics and extractives. As the case study examples demonstrate, local groups are looking to international organisations or networks for assistance and support in dealing with the impacts of transnational corporations (TNCs) because of the difficulty in finding a rapid and effective resolution at national level.

Structure of submission

The document, divided into three parts, uses case studies to highlight the following;

Section 1 – Actions by companies

- The opportunities and limitations inherent within voluntary standards or codes of conduct and the need for measures, which would lead to greater and global accountability for all companies

Section 2 – Actions by states at the national level

- The need for developing country governments, hosting TNCs, to hold companies accountable for their activities

- The critical need for effective regulation in the home countries of TNCs, given the difficulties often faced by governments hosting TNCs in holding them to account.

Section 3 – Actions by states at the international level

- The need for a range of both longer term and more immediate actions at an international level, which will provide additional internationally agreed protection and redress mechanisms for the victims of human rights violations.

Summary of recommendations

Section 1 - Actions by companies

Over the last decades voluntary corporate and industry codes and CSR initiatives have proliferated. Yet at the same time, a number of businesses continue to be associated with human rights abuses. The submission draws on experiences related to supply chain working conditions in the toy industry in China. It highlights the opportunities and difficulties with industry-led codes and advocates that they need a monitoring mechanism by the workforce to become effective. CIDSE calls for the on-going growth in CSR initiatives to be complemented by stronger measures which would lead to greater and global accountability for all companies. These include binding measures which would reach 'laggard' companies, and ways of improving the capacity of states to enforce existing regulations more effectively.

Section 2 – Actions by states at the national level

States have the primary responsibility to promote and ensure the respect of human rights recognised in international law. Drawing from the recommendations of an international gathering of over 80 partner organisations, at the World Social Forum in Nairobi in January 2007, CIDSE calls firstly on developing country governments to do their utmost to ensure transparency, accountability and oversight of the actions of TNCs within their borders. However as the case studies in this report illustrate, citizens experiencing human rights abuses may find that their own governments are unable or unwilling to protect and uphold their rights. Case-studies on soy bean production in Brazil and gold mining in Honduras highlight the inability of host states to regulate the actions of TNCs effectively. The submission makes therefore a strong case for complementary home country regulation, as well as international mechanisms which will be dealt with in 'Section 3'. These are as follows;

***Directors' duties*:**
Introduce a legal requirement on company directors to take action to minimise the negative environmental and social impacts of the company.

Transparency:
Introduce legislation requiring mandatory annual disclosure of the social and environmental impacts of the business, including disclosure of human rights risks in the supply chain. To ensure consistency in reporting, this disclosure should follow Global Reporting Initiative standards.

Governments should also introduce legislation requiring extractive companies to disclose all contracts entered into with host governments, and to disclose revenue transfers of all kinds to governments (e.g. mineral royalties, dividends, corporation tax). This should be made a

requirement for listing on national stock exchanges, and subsequently broadened to include private companies.

Redress mechanisms:
A **model** OECD National Contact Point (NCP), going beyond the existing NCP, should be established in all OECD and adhering countries. The Model National Contact Point (MNCP) would be independent, informed, authoritative, and command the confidence of all parties. It would be properly staffed and resourced and be able to resolve questions of fact, including carrying out information-gathering or fact-finding visits.

Promotion of activities of companies abroad:
Export credits and investment guarantees should be denied to those companies that do not meet the highest internationally accepted standards including the OECD Guidelines for Multinational Enterprises, the ILO core labour standards, and in the case of the extractive industries, EITI reporting criteria. The free, prior and informed consent of indigenous peoples and local communities should be a pre-requisite for granting any export credit or investment guarantee for projects which would affect such communities.

Section 3 – Actions by states at the international level

In view of the gradually emerging international law relating to corporations, CIDSE members believe that ultimately the best way to clarify the legal responsibilities of companies is to agree a binding, international human rights framework. Such a mechanism will take time to develop and establish, but would be of value in numerous instances where corporate activity has significant impact on the rights of individuals and communities, including the case studies described in this report. In addition, CIDSE members wish to suggest short to medium-term initiatives that states can propose at the international level and that would serve as interim solutions with immediate practical benefit to victims of human rights abuses. In particular, we focus on two suggestions;

An international advisory centre

The case of mining in the Copperbelt, Zambia, highlights the challenges faced by developing country governments, which seek to safeguard the human rights of their populations. Developing countries are often the weaker partner in negotiations with TNCs as they may lack the technical expertise or policy space to maximise their negotiating position. CIDSE calls for a legal centre (similar to the one proposed under the former UN Centre for Transnational Corporations) to be established through the UN to provide affordable, independent legal advice in contract negotiation with multinational companies.

An independent global ombudsperson

Many human rights abuses are characterised by the lack of an independent national legal system capable not only of providing access to justice for past and present victims but also acting as a deterrent to prevent further human rights abuses in the future. This is true not only in the two case studies presented here of the electronics industry in Mexico and the Chad/Cameroon pipeline but can be observed in most, if not all, of the other case studies featured in this report. The case studies demonstrate the need for an independent international Ombudsperson, with a mandate to investigate complaints of alleged malfeasance by TNCs, which would be passed to an international committee of experts who would make a binding

determination of the case resulting in follow up actions as appropriate. For example such actions could include fines.

Free, prior and informed consent (FPIC)

The case study of mining in the Philippines and its devastating impacts on indigenous peoples highlights not only once again the need for an international ombudsperson but for further efforts to promote FPIC which include measures aimed at national governments, the UN system and in particular the World Bank which is still operating to a standard involving 'consultation' rather than 'consent'.

Conclusion

Informed by Catholic Social Teaching and the experiences outlined in the various case studies, this submission highlights the need for longer-term fundamental solutions in the form of a binding human rights framework. At the same time a series of short and medium-term measures are proposed which are nuanced and realistic with most being realisable in a short space of time.

Recommendations to reduce the risk of human rights violations and improve access to justice

CIDSE submission to the Special Representative of the United Nations Secretary-General on Business and Human Rights

Introduction

CIDSE (International Co-operation for Development and Solidarity) is an alliance of 16 Catholic development organisations from Europe and North America. CIDSE and its member agencies are inspired and guided by the social teachings of the Church—as well as by their close work with Southern organisations—to make a 'preferential option for the poor' and to assess policies, structures and actions in North and South in terms of their impact on vulnerable people. As part of this commitment, CIDSE agencies have a long history of working on issues of corporate responsibility and accountability in countries as varied as Zambia, Mexico, Brazil and the Philippines and in sectors ranging from agri-business to electronics and extractives.

Acknowledging that business activities are central to the well-being of national economies and the international economy, CIDSE member organisations are concerned that there is still a lack of national and international safeguards to prevent business enterprises from becoming complicit in or tacitly benefiting from human rights violations. One of our major concerns is that citizens often lack the necessary access to justice either to prevent human rights violations being committed in the context of business activities or at the very least to receive fair treatment and compensation when such violations occur.

We have therefore been following the mandate and work of the Special Representative to the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie,[1] with great interest and note with approval his recent confirmation that the recommendatory phase of the mandate will be carried out in an 'inclusive and transparent manner.' In this spirit, we would like to make some proposals in relation to parts a) and b) of the mandate. [2]

Our starting point for this submission, in keeping with a long tradition of Catholic social thought (what we call 'Catholic Social Teaching' or CST), is that human rights are universal in scope and interdependent. Each State has a duty to respect, protect and fulfil the human rights of its citizens, and those of other persons and groups subject to its authority. Although the state bears the prime responsibility, the Universal Declaration of Human Rights in its preamble calls on "all individuals" and on "all organs of society" to uphold and promote those rights. This includes business enterprises. As, for instance, the US Conference of Catholic Bishops has noted, 'governments, international financial institutions, and private corporations involved in exploration, development, production, and sales of natural resources [...] all have a moral responsibility to ensure that the otherwise legitimate development of these resources does not contribute directly or indirectly to corruption, conflict, and repression.'[3]

Thus the protection and promotion of human rights are everyone's concern. The Canadian Conference of Catholic Bishops has, in addition, stressed that human rights obligations should

be mandatory in nature, and are not limited to a particular territory: 'It is, as you know, a foundational principle of international law that human rights are in no sense voluntary; the protection of human rights is in no sense optional. The mandatory nature of human rights must continue to be a cornerstone of Canada's presence in the world, and it must govern the actions of Canadian corporations worldwide, particularly those engaged in resource extraction.'[4]

CST examines the economic activities of businesses in the broader context of their impact on creation and human development. As Cardinal Oscar Andres Rodriguez from Honduras notes, 'Trade treaties must be accompanied by ethical agreements and codes in order to resolve the current contradictions that occur when on the one hand, world or regional summits adopt policies of environmental protection and conservation…while at the same time…industries, taking advantage of the weak legislation in our countries, behave in an unethical and irresponsible manner that fuels corruption, environmental degradation, pollution of our natural resources, and social divisions in our communities.' [5]

An important tenet of CST is the idea that the private sector, a term which covers small and medium-sized enterprises as well as multinational companies, can often be a force for good in developing countries. The key is to ensure such investment takes place in the context of standards and regulation which are enforced effectively so that fair and reasonable benefits accrue to the host country and host communities. As the Catechism of the Catholic Church states, 'those responsible for business enterprises are responsible to society for the economic and ecological effects of their operations. They have an obligation to consider the good of persons and not only the increase of profits.' [6]

Structure of the Submission

Building on a format originally suggested by ESCR-net, and based on work with Southern civil society organisations, CIDSE has gathered together a collection of case studies to build on these key insights.

The case studies illustrate the implications that business activities can have for human rights, guaranteed in the Universal Declaration of Human Rights (UDHR) and UN Conventions, in particular the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Making these linkages is not an accusation that a specific company is therefore directly responsible for human rights violations. Rather we aim to use concrete examples of the direct and indirect implications that business activities can have for selected human rights to discuss measures to reduce the risk of negative impacts occurring.

Specifically, the case studies:

- Provide examples of cases in which developing countries have been unable or unwilling to regulate multinational corporations effectively, and illustrate the implications that this has had for the human rights of their citizens.
- Highlight key reasons for this, from governments signing away their ability to update legislation, to ineffective judicial systems.
- Demonstrate that companies themselves are not passive actors but seek to influence how governments regulate and adjudicate the role of enterprises with regard to human rights.
- Point to a range of solutions for consideration by the Special Representative.

Section 1 of this submission provides a brief context looking at the variety of actions that companies take to ensure that their core business operations do not contribute to abuses of human rights. Section 2 focuses on actions that governments can take at the national level, whilst Section 3 looks at actions that governments can take at the international level. As we are focusing specifically on parts a) and b) of John Ruggie's mandate, the focus here is predominantly on recommendations for action by government, not by individual companies.

In formulating these recommendations, we believe it is important that the Special Representative considers both short and long term measures at national and international level. Whilst short term measures will be of most immediate help to the victims of human rights abuses, they are no substitute for the longer term solutions—in particular the creation of an effective human rights framework—which will be necessary if a fundamental solution to the recurring and structural problem of human rights abuses is to be found.

Section 1: actions by companies

There is clearly great benefit in companies pro-actively understanding and addressing any negative impacts that their operations might have on society and the environment. CIDSE believes that to have maximum impact these actions should draw on international UN human rights instruments including the Universal Declaration of Human Rights, Core UN Conventions and the ILO Core Labour Standards. A small number of transnational corporations have for instance chosen to road-test the "UN Norms" to benchmark and develop their own human rights policies and management systems. In 2003 the UN Sub-Commission on the Promotion and Protection of Human Rights unanimously adopted these "Norms on the Responsibilities of Transnational Companies and Other Business Enterprises with regard to Human Rights". They still are the most comprehensive and detailed document to guide enterprises in order to ensure that their business activities do not contribute to human rights violations. The UN Commission on Human Rights has not endorsed the Norms. However, those companies using them as a benchmark tool apparently found them useful.[7]

CIDSE members also have experience of working with companies through a number of national and international multi-stakeholder initiatives. Development and Peace participated in the recent Canadian National Roundtables on Corporate Social Responsibility process, the Catholic Agency for Overseas Development (CAFOD) has been actively involved in both the Ethical Trading Initiative (ETI) and the Extractive Industries Transparency Initiative (EITI) since their inception. MISEREOR has participated in the German Round Table on Codes of Conduct. Our experience is that such multi-stakeholder initiatives can provide useful learning and contribute to raising standards. The self-selection which is part of most multi-stakeholder approaches does mean, however, that their coverage is limited. In the last couple of years, evidence has also emerged of 'hard to tackle' issues, where progress via multistakeholder initiatives has been much more patchy, and of accountability gaps. Here examples include safeguarding the rights of temporary workers in supply chains[8] and protection of civil society participants working on corruption issues.[9]

Over the last decades voluntary corporate and industry codes and CSR initiatives have proliferated. Yet at the same time businesses continue to be associated with abuse of human rights, in particular, as John Ruggie himself has pointed out, in countries with low governance and high corruption indicators.[10]

It is important to be realistic about the strengths and weaknesses of voluntary measures. By bringing companies together, collective approaches have the potential to reduce duplication and have a much greater reach globally. The limitations of voluntary CSR initiatives are that they frequently lack effective accountability mechanisms and are often piecemeal. In many cases voluntary approaches are a response to public campaigning by increasingly informed consumers. While this creates useful pressure for change, attention is focussed on a limited number of high profile companies. The human rights practices of transnational corporations that are not recognised brands may receive little scrutiny.

The protection of universal human rights requires consistent enforcement. Industry approaches are usually a welcome addition but clearly not a substitute for such enforcement. In some cases, dependence on voluntary codes of conduct may weaken international human rights protection, if such voluntary codes are actually weaker than the mandatory international standard that a State has ratified. For example, although the Electronic Industry Code of Conduct (EICC) references ILO Labour Standards, the actual provisions of the code do not

meet the core ILO Labour Standards on freedom of association and the right to collective bargaining.[11] The companies which control the content of the industry code have so far been unresponsive to calls from socially responsible investors and labour rights NGOs to bring their industry code fully into line with core ILO standards, although lack of freedom of association has been identified as a serious problem for workers within the industry in Mexico, Thailand, Malaysia and India. The Code of Conduct by the International Council of Toy Industries (ICTI), although addressing the main problems that arise within toy production in Asia and particularly China - such as long working hours, health and safety issues and insecure contract for workers - refers only to local labour laws, not to ILO core labour conventions. Cross check audits have shown a large number of errors and even fraud in some initial audits of Chinese supplier companies. The ICTI has started to address these issues.

Case study: Working conditions in the Toy Industry in China

China is the most important supplier of toy products worldwide, the source of 75 to 80 % of all toys traded. According to Chinese statistics, in 2006 the country exported 'classic' toys worth about US$ 9.5 billion or US$17.7 billion including video games. Major importing countries in 2006 were: USA (US$ 6.5 bn), Germany (US$1.5 bn), Netherlands (US$1.1 bn) and United Kingdom (US$ 1.1 bn). According to the China Toy Association, more than 8500 companies in the coastal region of Southern China are producing toys for the world market. About 5000 of them are located in the province of Guangdong. Most major toy companies in Europe and the USA have suppliers in China, some sourcing up to 100 %.

The majority of the two to three million people employed in China's toy industry are young, female, and they come into the booming southern Chinese industrialised region as migrant workers from poor rural areas hundreds of kilometres away. Migrant workers in China only have limited civil rights (e.g. no free primary schooling for their children.)[12] Ten years of experience of the German NGO coalition "Aktion fair spielt" shows that efforts to guarantee and promote safe working conditions throughout the supply chain can vary from company to company.

Working conditions in the toy industry are similar to those in the textile or the electronics industry. Long working hours (of up to 14 hours a day, sometimes even more) and compulsory work seven days a week are common, in particular in peak times from about May to September, when toys are produced for the pre-Christmas markets in Europe, USA and Japan. Health and safety standards are often poor due to hazardous paint and solvent, extreme heat and dust at production facilities, defective machinery and unsafe electric equipment. Skin and respiratory diseases are common amongst workers in the toy industry. Often costs for food or lodging are deducted from the – already – poor salaries and overtime is not paid adequately, or not paid at all. Working contracts are often short term; social security payments and provisions are usually very limited or non-existent. Workers may have to share a room with four – or reportedly even up to ten - colleagues, and sanitation facilities are often extremely poor.[13]

Labour-related laws in China contain a number of good provisions to protect workers' rights. Thus Chinese labour law allows for 40 working hours per week, plus overtime of a maximum of 36 hours a month. Chinese labour law also prescribes a minimum wage – though this differs from province to province, sometimes even within provinces. However, all too often these labour laws are not effectively enforced.[14] Local Labour Offices admit extensive

exceptions to the rule – at the cost of workers in the toy industry. One major problem is that Chinese law does not allow for independent trade unions and collective bargaining.[15]

The new Chinese labour law, in force since 1 January 2008 does aim at regulating short term contracts and improving protection of workers' rights; it calls for employment contracts for all, aims at tightening probation periods and has a new section on collective contracts negotiated above the very low minimum wages, with provisions for employee agreement and the role of the union (the ACFTU). Although these labour law amendments are modest protections for Chinese workers in an increasingly precarious market economy, some global corporations and US business and European lobby groups in China sought to water down key elements of the proposed amendments.[16]

Implications for Human Rights

Working conditions in the Chinese toy industry have implications for the

- Right to adequate health of the workforce. (UDHR, art. 23 and 25; ICESR, art. 7 and 12)
- Right to adequate remuneration, including adequate overtime compensation as well as social security. (UDHR, art. 23 and 25; ICESR, art. 7)
- Right of freedom of association and collective bargaining. (UDHR, art. 23; ICESR, art.

Companies' Response

In response to strong international criticism of working conditions in toy factories in Asia in the 1990s, the International Council of Toy Industries (ICTI) published its own code of conduct in 1996. The code was intended to be applicable for the whole sector and worldwide. The largest and most influential national associations of the toy industry are members of ICTI. Thus, such a sector wide code does have stronger influence than codes promoted by single companies or even national industries. In 2001 the Code was revised and specific procedural requirements were added. Since 2003 the ICTI Care Foundation has been promoting and monitoring application of those requirements in China.

Whereas the code seems to have most influence on the improvement of occupational health and safety standards, it has less influence on issues such as long working hours, freedom of association or the right to collective bargaining.[17] Chinese supplier companies that have undergone an audit by an audit company and were found to be complying with the code are given a certificate of compliance. The certificate has to be renewed after one year. Cross check audits, which were started recently – meeting a longstanding recommendation by the "Aktion fair spielt", showed an extremely high degree of mistakes in the original audits. Interviews with workers have revealed reports of fraud committed in audits.[18] The ICTI Care Foundation is open to dialogue with NGOs and stays in regular contact with the "Aktion fair spielt" as well as with NGOs in Hong Kong. Complaints mechanisms for workers in factories and training programmes for management and workers are starting. Audit companies can no longer be freely chosen by the supplier company, but are allocated by ICTI.

A global response to a global problem: Attempts by civil society in North and South to change company behaviour

In the mid 1990s hundreds of workers in two Chinese toy factories lost their lives or were badly injured because they could not escape when fire broke out in their factories. All doors and windows were locked – not unusual at that time. Such fires broke out regularly, with workers trapped within factory buildings.[19] These accidents caused Hong Kong based NGOs to sound the alarm. Between 1994 and 2003, the Asia Monitor Resource Center (AMRC) and the Hong Kong Christian Industrial Committee (HKCIC) published a number of reports on working conditions within China's toy industry, mainly in the province of Guangdong. The reports were largely based on interviews with factory workers. Other NGOs, including SACOM, are also now publishing reports on working conditions in Chinese factories[20]. The reports of the 1990s led to an international solidarity movement and started an international campaign, with NGOs from Europe and USA participating, including MISEREOR in Germany. The NGOs involved in the campaign have achieved some important improvements to the ICTI Code of Conduct and in particular its implementation and monitoring. However, there are still some substantial gaps which the ICTI, and in particular the ICTI Care Foundation has yet to address:

- To establish an effective and safe complaints mechanism for factory workers whose human rights are violated.
- The majority of members of the Board supervising the ICTI Care Foundation come from or have close connections to the toy industry, thus putting the board's independence in question.
- Whereas Chinese suppliers are held accountable towards the code and are regularly audited, brands are not (although the Code does also apply to them).
- The code does not address the problem that brands and retailers are putting extreme pressure on suppliers, in particular in peak seasons, regarding price and delivery times. Such pressure can increase the risk that human rights abuses will occur.

Towards a solution

Voluntary codes of conduct vary in scope and content. Codes of conduct are more likely to be applied by industry sectors that are highly visible and/or very sensitive to consumer opinion and behaviour. Even with external monitoring mechanism and an auditing and certification system in place, progress is slow. They are most effective on occupational health and safety standards, whereas progress on issues such as working hours, payment of overtime etc. is hard to document and prove. In some areas a new industry seems to develop to 'help' supplier companies to comply with the requirements of the audits and to achieve positive audit results. Cross check audits of suppliers with ICTI certificates indicate the limits of what a Hong Kong based NGO called the "policing approach." To become effective, codes of conduct need to be monitored by the workforce itself.

In summary, actions by individual companies and voluntary and multi-stakeholder initiatives can be useful. Where those initiatives are transparent and effective, promoting standards consistent with UN human rights instruments, they should be supported. It seems highly likely that the growth in voluntary approaches and multi-stakeholder initiatives will continue. However, such voluntary initiatives must be complemented by regulatory requirements which are enforced. CIDSE believes that there is particular value in the Special Representative

focussing his recommendations on those measures which would lead to greater and global accountability for all companies. These should include both binding measures which would reach 'laggard' companies as well as ways of improving the capacity of states to enforce existing regulations more effectively. In view of the unwillingness or inability of some nation states to control laggard companies, actions at national level need to be complemented by some form of international support and redress mechanisms.

As the Special Representative points out himself, "we see an emerging trend whereby business as rule *maker* increasingly operates in a single global economic space; but business as rule *taker* largely continues to operate in the world of separate national jurisdictions, with only a thin overlay of relatively weak international institutions and legal instruments." [21]
This misalignment clearly should be adjusted.

Section 2: Actions by states at the national level

States have the primary responsibility to promote and ensure the respect of human rights recognised in international law. However as the case studies in this report illustrate, victims of human rights abuses may find that their own government is unable or unwilling to protect and uphold their rights.

There are multiple reasons for this which can range from a need to attract Foreign Direct Investment and fear of damaging an 'investor-friendly' reputation to a lack of understanding of the full extent of the problem; or lack of appropriate expertise and capacity. This problem is seen most clearly in states which are weak or prone to conflict, such as the Democratic Republic of Congo or Nigeria. While some businesses avoid countries with weak governance, others actively choose to work in such weak regulatory environments, be it due to natural resource endowment, cheap labour supply or other factors.

The problem is widely replicated in developing countries across the globe, regardless of their poverty and governance indicators. When even a middle-income developing country like Brazil struggles to regulate multinational companies effectively, it is clear that current host country regulation is not enough to guarantee the human rights of affected populations.

It is essential to be realistic about the extensive influence, both positive and negative, which businesses have in today's world and the challenges for accountability created by the complex structure of transnational corporations operating on a regional or global basis. As the Special Representative to the Secretary General has recognised, there is an imbalance of power, in that companies are quick to use legal instruments and international arbitration to defend their interests but it is difficult to hold a parent company legally liable for abuses committed by an overseas subsidiary.[22]

CIDSE member organisations believe that to address this tension, it is important to look at the role of the state where a company has its headquarters. The home state also has a duty to promote human rights and protect against abuses by third parties, including businesses. This duty does not conflict with the responsibility of the host state to protect its citizens; rather it would provide an additional protection mechanism, given that transnational corporations are global actors spread across a number of countries and national legislative systems. In this section of the report, we take the opportunity to outline what we see as the role of host and home country governments.

Recommendation 1:
The role of host country governments at the national level

At a workshop facilitated by CIDSE at the World Social Forum in Nairobi in January 2007, more than 80 civil society organisations from Asia, Africa and Latin America agreed on a joint appeal to address problems arising from the operations of extractive industries in their countries.[23] They also agreed a list of recommendations to home and host governments, for transnational corporations, International Financial Institutions, and for the UN, including the Special Representative. These recommendations, though predominantly focused around the extractive industries, have wider relevance for other sectors. The aim of making procedures more transparent and ensuring that there is a genuine social licence for companies to operate is to reduce the risk of corruption and conflict with associated human rights abuses. One of

the major recommendations was for governments to hold companies accountable for their activities, wherever they operate and to:

- include in their legal frameworks a guarantee for the genuine participation of local communities at all stages of extractive projects;

- only grant licences for extractive industries' operations with the free, prior and informed consent of the local community;

- require independent environmental, social and human rights impact assessments and publish the results at an early stage and in a form that is accessible and comprehensive to the population affected;

- allow for the renegotiation of contracts which are not in the best interests of affected communities;

- develop and ensure compliance with clear policies and legal frameworks to control extractive industries effectively. Such policies and legislation should be in line with international human rights and environmental standards, including the International Covenant on Civil and Political Rights, the International Covenant on Social, Economic and Cultural Rights, the Convention on the Elimination of all Discrimination against Women, indigenous peoples' human rights safeguards and the ILO Core Labour Standards;

- immediately end all harassment and intimidation of individuals advocating against corruption, human rights violations and environmental destruction associated with natural resource exploitation;

- improve transparency with regard to revenue management by signing up to the Extractive Industries Transparency Initiative (EITI) and guarantee a fair and equitable distribution of such revenues, in order to serve poverty reduction.

Equitable distribution is a mechanism which aims to reduce the risk of corruption, conflict and human rights abuses. As the L'Association des conférences épiscopales de la région de l'Afrique Centrale (ACERAC) has noted with regard to oil, "our oil is still, in most cases, the private financial reserve of the powers that be. They use it as they choose for funding political activities of their sole party, diverting people's consciousness during elections, and for buying arms to ensure their safety. Our oil is sometimes mortgaged to pay off debts that have served the personal interests of certain fellow citizens."[24]

Recommendation 2:
The role of home country governments at the national level

Effective regulation at the level of the corporation's home country has a crucial role to play in complementing initiatives at the host country level. At the moment this approach seems to be under-utilized. Home country governments have not only the capacity, but also the responsibility, to ensure effective company regulation which is enforced – something with which developing countries can struggle, as the following case studies show.

Case study: Cargill and soy bean production in Brazil

Soy bean is Brazil's top agricultural export product, mostly destined for the European feed market, and it is produced in most Brazilian states. In the Amazon, approximately 1 million hectares of soy are planted[25]; about 6% of total Brazilian production.

Civil society organisations in the area claim that soy cultivation is related to numerous social and environmental problems such as deforestation, water and soil pollution, land grabbing, modern slave labour, and other human rights abuses.[26] Although Brazil has strong environmental and social legislation, Brazilian authorities are not enforcing the existing laws and regulations effectively. Enforcement is slow and cumbersome and competing jurisdictions between local and federal courts can present an additional problem.

Cargill is a global food business, headquartered in the United States, with 158,000 employees in 66 countries.[27] In the late 1990s, Cargill constructed a grain terminal in Santarém, in the heart of the Amazon, without proper environmental licensing. In 1999, Cargill was ordered by the Santarém Court to suspend the construction until a proper environmental impact assessment was carried out. Pending appeal, Cargill continued the construction of the port. In 2003, the Federal Court in Brasilia, confirmed the previous sentence and ordered the port to be shut. Cargill filed an appeal with the Supreme Court and continued operations. In March 2007, the Supreme Court judged that Cargill operated illegally and the port was closed. Cargill then pledged to carry out the environmental impact assessment and 20 days later the port was reopened.[28] At the time of writing, a deadlock has emerged as to whether the local or the federal authorities are responsible for the environmental impact assessment of the Cargill facility. It is not clear whether the terms of reference will include the indirect effects of the facility and whether a public consultation will take place.

In addition to the problems in the juridical process, the port constructed by Cargill attracted migrant farmers who acquired deforested land – often illegally – to produce soy on a large scale. Soy production in the Amazon region of Brazil has been found to have the following indirect effects: land conflicts, illegal acquisition of land titles and eviction of smallholders and indigenous people[29]; unfavourable labour conditions including slave labour[30]; deforestation[31] and related environmental damage[32]; pollution of soils and water by the use of agrochemicals; human rights abuses.[33]

Implications for human rights

On the basis of the foregoing facts CIDSE believes that Cargill's behaviour, albeit indirectly, has had implications for the human rights of local communities, specifically:

- Right to personal, home and family life and property. (UDHR, art. 17, 23 and 25)
- Worker's rights, including prohibition of forced labour and right to adequate remuneration. (UDHR, art. 23; ICCPR, art. 8; ICESCR, art. 7)
- Right to safe drinking water and highest attainable standard of health. (UDHR, art. 25; ICESCR, art. 11)

Company Response

Cargill states that it respects Brazilian law and that once either the local authority or the federal authority has drafted the terms of reference of the environmental impact assessment, Cargill will carry out the required assessment. It will abide by the decision of the courts.

In 2006, Cargill signed a two-year moratorium on the procurement of soy from land deforested after July 2006.[34] It also is a signatory to the Brazilian 'Pact to eradicate slave labour' and participates in the Round Table on Responsible Soy, a multi-stakeholder forum, which is supposed to produce appropriate criteria for responsible soy production. In conversations between Cordaid, member of the Dutch Soy Coalition, and Cargill Benelux on 7 September and 30 November 2007, it became clear that although Cargill is willing to comply with judicial decisions, in this case it has not taken a proactive stance to organise a public consultation with affected communities for example or express a preference for a state of the art environmental impact assessment which would look at not only the direct but also the indirect effects of the grain facility.

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Cordaid and other members of the Dutch Soy Coalition (development organisations and environmental organisations), various local civil society organisations in the Santarém region have worked on this issue.

- Local civil society organisations, partners of Cordaid and other members of the Dutch Soy Coalition have sought legal assistance to accelerate the judicial process.
- In recent years, there have been various demonstrations and other popular protests in Santarém demanding permanent closure of the Cargill facility.
- Multiple requests by local civil society organisations to include indirect impacts in the terms of reference of the environmental impact assessment have not been answered.
- The Dutch Soy Coalition is publishing a fact sheet specifically on this case. Greenpeace International has published a more general report on the effects of soy expansion in the Amazon "Eating up the Amazon" (2006).

Case study: Entre Mares/Goldcorp and gold mining in Honduras

Honduras has pressing development needs that have encouraged governments to seek foreign investment, often at whatever cost. In 1998, while Honduras was still reeling from the devastating effects of Hurricane Mitch, on the advice of the Economic Commission for Latin America, the Honduran Congress approved the 1998 Mining Law, which was an attempt to garner foreign investment. The law was overwhelmingly in favour of mining companies, allowing investment anywhere in the country (no environmentally protected areas were exempted, nor private property), failing to ensure people's water needs were met before allowing mining operations, offering tax holidays and incentives to companies, and offering a very low dividend to the affected communities. Social and environmental controls are also very weak. In addition, the state body responsible for regulating mining, DEFOMIN[35], is also

responsible for promoting mining. Neither does the law provide for DEFOMIN having laboratory facilities, nor the capacity to carry out analyses in cases of possible pollution.

In this context, Entre Mares, a subsidiary of US-Canadian company Glamis Gold started an open pit gold mine in the Siria Valley in 1999. Its arrival was fraught with irregularities: Development and Peace and CAFOD partner Caritas Tegucigalpa has documented how Entre Mares started operations two months before being officially registered with the government, and before having an environmental licence to operate, in violation of the terms of the concession.[36] Without government authorisation, and in violation of Honduran laws, the company also diverted the natural water course, damming a stream and causing severe local water shortages.[37] Entre Mares was fined a mere 5000 lempiras (US$ 277) by the department of the Environment for these serious contraventions of the law. It was also ordered to stop extracting huge quantities of water from local sources. By the time the company started using more rain water, damage to local water tables had already been done, and thirteen local streams and rivers dried up.

Some local groups claim that Entre Mares failed to consult adequately with the local community before the project began, and throughout the mining operation has shown little respect for transparency.[38] In 2006 Glamis Gold was taken over by Goldcorp, another Canadian-US company. After a long battle by the affected community and Caritas Tegucigalpa, Entre Mares was finally found responsible by the Honduran government for cyanide and arsenic pollution and was fined one million lempiras (about US$55,000).[39] The mine is now approaching its closure phase. So far Goldcorp/Entre Mares has refused to give any guarantee to be responsible for any serious environmental damage such as acid mine drainage that may be discovered after the closure of the mine.

By September 2007, eight years after the relocation of the community of Palos Ralos to accommodate the mine, a number of families still had not received proper title deeds to their land, and their security of tenure, in particular after the departure of the company, was uncertain.

There have been intense efforts by civil society to reject the 1998 Mining Law and mobilise support for a more just alternative mining law. However in a country of weak governance, with a weak congress, government institutions and an inexperienced and sometimes divided civil society, the reform bill has still not been passed despite years of discussion. Essentially this has allowed mining companies to continue to benefit from a law weighted in their favour while the reforms debate became mired in political squabbles.

Community leaders told a visiting delegation of MPs in September 2007 that they believe that the company is behind attempts to create a parallel legally constituted community organisation ('*patronato*').[40] The current *patronato* has taken a position that is highly critical of the activities of Entre Mares; its members now say that the local Governor of the province is working with the company to attempt to set up a parallel structure.

Government Position

Honduras is ranked 141 on Transparency International's Corruption Perceptions Index.[41] Despite a very weak regulatory framework, and widespread corruption in the government, sectors of the latter have made significant efforts to ensure at least improved environmental regulation, cf. the Secretary of State for Natural Resources' fine of one million lempiras on

the company for environmental pollution. This ruling was the result of intense and sustained pressure from the community affected with the support of Caritas Tegucigalpa. Within the Congress, also, there is a Bill Amendments Committee headed by a member of the opposition Nationalist Party that is working to promote a reforms bill to the current mining law. If the bill is approved, it would provide a much strengthened regulatory framework that would, if enforced, ensure significant improvements in social and environmental regulation of mining, increased taxes and possibly even a ban on open pit mining. Nonetheless, there is also major opposition within sectors of the Executive and the Legislative to such change.

Implications for Human Rights

- Right to Water (Implicit in article 11 of ICESCR)
- Right to Housing (those people without title deeds risk eviction) (ICESCR, Article 11; also cf. General Comment 7, issued by the UN Committee on Economic, Social and Cultural Rights, on the Human Right to Adequate Housing)
- Right to Health (pollution from cyanide and arsenic) (ICESCR, art. 12)

Company Response

Entre Mares has had several angry exchanges with Mayra Meija, the Secretary of State for Natural Resources and Environment, and the Minister has accused the company of trying to discredit and undermine her.[42] As of January 2008, Mayra Mejia had been removed from her post as Secretary of State for Natural Resources and Environment. Entre Mares has also announced its refusal to pay the recent fine imposed by the Ministry for environmental pollution, and has said the courts will have to force it to pay, as it contests the legitimacy of water tests.[43] In addition, the company has also challenged biological tests that the Public Ministry has carried out on residents in the area surrounding the mine.[44] The tests tried to establish whether there is a link between skin, respiratory and gastro-intestinal diseases and mine-caused pollution. The company contested the procedure for sample taking and sent its representatives to the independent laboratory in Colombia where the samples were analysed.

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In response to information disseminated by the community affected by the mine and Caritas Tegucigalpa, a broad cross section of civil society organisations in the North, have mobilised to put pressure on Goldcorp regarding the demands of local people affected by the San Martin mine and indeed communities affected by other Goldcorp-run mines in Central America. In Canada, the San Martin mine and the weak regulation by the Honduran government has been used as a key example as to why the government of Canada should introduce accountability mechanisms for its mining, oil and gas companies in their overseas operations.

Towards a solution

The above case studies show that there is a need for better home country regulation, as well as international mechanisms to bring international trade law in line with human rights law (for

the latter see Section 3). But what form should this regulation take and in what areas should it focus? Recent reform of company law in the UK has started to address broader issues of corporate responsibility by increasing disclosure requirements. The Companies Law Act 2006 requires company directors for the first time to consider the impacts of their business operations on the community and the environment. The law now requires that publicly listed companies report on the following issues where they are necessary for an understanding of the development, performance or position of the company's business.

I. Environmental matters (including the impact of the company's business on the environment);
II. The company's employees;
III. Social and community issues; and
IV. Risks down company supply chains.

CIDSE suggest that home governments should focus their efforts on the following areas:

***Directors' duties*:**
Introduce a legal requirement on company directors to take action to minimise the negative environmental and social impacts of the company. This must include a responsibility for Directors to think ahead and actively anticipate the likely consequences of company actions. For example, if suppliers are expected to comply with a Code of Conduct, it may be necessary to pay them extra to cover any additional costs incurred or re-examine the way that orders are placed and prices agreed.

Examples of positive measures and frameworks that companies could put in place to help them assess and minimise such impacts include establishing safeguards within the company's risk assessment mechanisms and management structure to avoid becoming complicit in human rights violations and to minimise environmental damage.

Transparency:
Introduce legislation for TNCs requiring mandatory annual disclosure of the social and environmental impacts of the business and of its subsidiaries, including disclosure of human rights risks in the supply chain. This should include carrying out appropriate environmental, social and human rights impact assessments and publishing the results. Such disclosure would also ensure that governments, citizens and investors had a more complete picture of the analysis that companies have carried out regarding the impact of their operations on the environment and human rights. To ensure consistency in reporting this disclosure should follow Global Reporting Initiative standards. Some leading companies are already demonstrating that is possible to disclose more information about their supply chain without suffering competitive disadvantage.[45]

Governments should also introduce legislation requiring extractive companies to disclose all contracts that they, and their subsidiaries, enter into with host governments, and to disclose all kinds of revenue transfers to governments (e.g. mineral royalties, dividends, corporation tax). This should be made a requirement for listing on national stock exchanges, and subsequently broadened to include both privately-owned and state-owned companies. Because of the scale and impact of their operations, there is increasing recognition of the need for extractive industry companies to be consistently transparent. The IMF states that it is good practice for all signed contracts to be publicly disclosed and that this could actually strengthen the hand of governments in negotiations with companies.[46] The European Parliament recently adopted a resolution calling on the Commission to "go beyond voluntary guidelines and support the

development of an appropriate accounting standard requiring country-by-country reporting by extractive companies."[47]

Redress mechanisms:
Citizens in the developing world often find that it is very difficult to use the justice system in their own country to put an end to human rights violations or at the very least to receive fair treatment and compensation when such violations occur as a result of a TNC's activities.
CIDSE members believe it is important to ensure that there is a means of redress based in the company's home country. Here something more than the status quo of existing OECD National Contact Points is needed to be effective. One approach could be, for example, establishing a model OECD National Contact Point, as suggested by OECD Watch and others, in all OECD and adhering countries.[48] The Model National Contact Point (MNCP) would be independent, informed, authoritative and command the confidence of all parties. It would be properly staffed and resourced and be able to resolve questions of fact, including carrying out information-gathering or fact-finding visits. External advisers should assist the MNCP and it should report to National Parliaments.

Complaints should be pursued within a clear time-frame and – usually - be completed within twelve months. The MNCP would not unduly narrow the scope of its operation – e.g. by a very restrictive interpretation of the due "investment nexus".[49] To encourage the free flow of information between the parties concerned and ensure that the public are kept informed of matters in the public interest, transparency should be the rule and confidentiality the exception.

Promoting activities of companies abroad:
Home countries should deny export credits and investment guarantees to those companies that do not meet internationally accepted standards, including for example the OECD Guidelines for Multinational Enterprises, the ILO core labour standards and in the case of the extractive industries, EITI reporting criteria. The free, prior and informed consent of indigenous peoples' and local communities should be a pre-requisite for granting any export credit or investment guarantee for projects which would affect such communities.

Having outlined some of the steps that both home and host country governments can take at the national level, the paper now turns to look at actions states can undertake collectively to help promote a conducive relationship between business and human rights at the international level.

Section 3: Actions by states at the international level.

CIDSE identifies a spectrum of actions that states can promote at the international level.

Recommendation 3:
A binding international human rights instrument setting out the legal responsibilities of corporations

There is much value in the Special Representative's analysis that there is currently a "misalignment …between the scope and impact of economic forces and actors, on the one hand, and the capacity of societies to manage their adverse consequences on the other.[50]"

In view of the gradually emerging international law relating to corporations, CIDSE members believe that ultimately the best way to clarify the legal responsibilities of companies is to agree a binding, international human rights framework that applies to companies directly.

Such a mechanism will take time to develop and establish but would be of value in numerous instances where corporate activity has significant impact on the rights of individuals and communities, including many of the case studies described in the report. Commentators have highlighted that it can take years to negotiate and ratify human rights treaties or declarations.[51] At the same time, as the influence of corporate actors continues to grow worldwide, the need for a binding international human rights instrument will only increase. In addition, we wish to suggest short to medium term initiatives that states can promote at the international level and that would serve as interim solutions with practical benefit to victims of human rights abuses. In particular, we focus on three recommendations; an international advisory centre and an independent ombudsperson and making progress on Free, Prior and Informed Consent.

Recommendation 4:
An International Advisory Centre

Developing country governments which seek to safeguard the human rights of their population can face many challenges. A key issue is negotiation of long-lasting contracts with powerful companies (often, but not always, multinationals). Sometimes government officials might use their limited negotiating powers to their personal advantage. In many resource-rich countries corruption is a major problem. In the Democratic Republic of Congo for example, a 2005 report by the Lutundula Parliamentary Commission recommended that sixteen business contracts signed during a period of conflict should be renegotiated because they were either illegal or of limited value for the country's development. Other African countries, including Guinea have also called for a review of mining contracts. This situation illustrates the weak position that developing countries can find themselves in when negotiating with TNCs. This imbalance of power can encourage corruption, increasing the risk that safeguards to protect human rights may be overlooked or sacrificed.

Developing countries are often the weaker partners in negotiations with transnational companies as they may lack the appropriate technical expertise, necessary funds and/or policy space to allow them to maximise their negotiating position. Whatever the reason, be it the lack of political power or the lack of political will, the result may be that governments sign away their ability to protect the human rights of their citizens; in the words of the Special

Representative 'through…host government agreements, companies can seek to insulate their direct foreign investments from future legislative or regulatory changes in host countries, including policies that promote human rights.'[52]

In advance of the joint report by the Special Representative and the IFC into this very topic, CIDSE is providing a case study which we believe illustrates the need for an international advisory centre to help developing countries in their contract negotiations.

Case study: Konkola Copper Mines in Zambia

Copper is crucial to the Zambian economy — accounting for 75% of the countries foreign exchange earnings.[53] Copper mining was traditionally carried out by the state but the industry was privatized in the late 1990s. Konkola Copper Mines (KCM) — the largest copper mining company in Zambia — was sold in 2000 to a consortium including Anglo American. In 2004, UK based company Vedanta Resources became the majority shareholder.

The 20 year contract signed between the government and KCM investors in 2000 is deeply troubling as it constrains the Zambian government's ability to apply the environmental legislation necessary to ensure the health of its population. The contract states that KCM is bound, not by Zambia's national environmental laws and regulations applicable, but by provisions contained within the Environmental Management Plan (EMP), which is drawn up through a process of negotiation with the government. Where standards differ in the EMP and pre-existing national laws, the EMP takes precedence.[54] Moreover, KCM's contract prevents the Zambian government from changing environmental standards to make them 'more onerous than those specified in the Environmental Plan or statutory instruments.'[55]

The implications of this can be seen with the example of sulphur dioxide emissions. Although Zambia's Environmental Protection and Pollution Control Act states that companies must not discharge in excess of 125 micrograms per cubic metre of sulphur dioxide on average over a 24-hour period[56], it appears that KCM's environmental management plan and related documents allow KCM's key copper smelter to emit 500 micrograms per cubic metre on average over a 24-hour period from 2005 onwards.[57]

World Health Organisation Guidelines, revised in 2005, advise emissions of 20 micrograms per cubic metre averaged over a 24-hour period.[58] From these documents, it appears that the level of emissions allowed is in violation of Zambia's national environmental pollution laws, 25 times higher than the level currently recommended by the World Health Organisation and risks seriously damaging the health of the local population. Whether KCM is currently emitting 500 micrograms per cubic metre is unclear due to lack of transparency, although a report commissioned by the UK's Department for International Development (DFID) and published before Vedanta took over found that 'sulphur dioxide capture is non-compliant with Enivronmental Council of Zambia statutory limits…emissions are not being measured or managed, or indeed recognised as a potential problem…this is a high risk situation for employees on site and surrounding communities.'[59] We have been unable to ascertain whether this assessment still holds true but the key point is that KCM have the regulatory freedom to emit harmful levels of sulphur dioxide if they so choose.

Implications for Human Rights

This has implications for the right to 'the highest attainable standard of physical and mental health', as recognised in the International Covenant on Economic, Social and Cultural rights (art. 11), as high sulphur dioxide levels can cause breathing difficulties and chronic respiratory illness. They can also reduce lung functions and worsen cardiovascular disease.

It also has implications for the right to food—i.e. to a 'standard of living adequate for the health and well-being of himself and of his family' (Universal Declaration of Human Rights, art. 25) which includes food as well as other basic needs - and the right to a livelihood, in particular the right to work for 'just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity' (Universal Declaration of Human Rights, art. 23). When mixed with water, sulphur dioxide can produce acid rain, changing the soil chemistry and reducing the photosynthesis process in plants. This in turn causes problems for the local farming communities and can impede the growth of plants.

Company Response

Vedanta does not detail sulphur dioxide emissions from its Zambia operations in its annual report and has declined several invitations to comment on this issue. However, Vedanta's annual report does state that 'some of our activities generate airborne emissions such as sulphur dioxide…We have taken adequate control measures to reduce such emission to within permissible regulatory standards and have complied with the same.'

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The Catholic Commission for Justice, Development and Peace (CCJDP), and Civil Society Trade Network Zambia, in conjunction with Christian Aid, commissioned a substantive report on copper mining in which the aforementioned incident featured as a case study. Most recently, the Scottish Catholic International Aid Fund (SCIAF), together with Christian Aid, Action for Southern Africa and members of Zambian civil society, published a report, *Undermining Development*, which focused specifically on KCM.

Civil society groups in Zambia have also been working on a broader spectrum of issues surrounding copper mining since the advent of privatization in 2000, from a variety of perspectives. Religious organisations (CCJDP), secular organisations (Civil Society Trade Network Zambia, Former Chingola Mine Employees Association), environmental and community organisations (Citizens for a Better Environment), trade unions (MUZ and NUMAW) and Zambian academics have pursued a variety of initiatives on this issue—sometimes, but not always, in conjunction with Northern advocacy partners—and can point to some recent success such as the publication of the development agreements and the revision of Zambia's Mines and Minerals Act.

Towards a solution

The case study on mining in Zambia illustrates that host governments must be able to legislate to safeguard environmental and human rights and must not enter into contracts which curtail their ability to do so.

CIDSE believes that measures such as the insertion of a 'model clause' into bilateral investment treaties could go some way in tackling this problem. However, to tackle the broader issues around developing countries' negotiating capacity and to minimise the risk of governments entering into similar contracts in the future, a legal centre (similar to the one proposed under the former UN Centre for Transnational Corporations) could be established through the UN to provide independent legal advice in contract negotiation with multinational companies. This could help insert clauses into future contracts to ensure that governments do not forfeit the ability to update environmental standards and other measures necessary to ensure the health and wellbeing of their population, as well as providing broader advice on other topics of concern in the negotiations.

Such an advisory centre would be based upon the advisory centre established through the (now defunct) UN Centre for Transnational Corporations and would build upon the precedent established by the WTO's Advisory Centre for WTO Law. It would provide free legal and technical advice to developing country governments negotiating contracts with multinational companies and would have the following characteristics:

- The centre would have responsibility for publicising its existence and its functions to potential clientele
- It would strengthen the negotiating capacity of developing countries in their dealings with multinational corporations by i) the facilitation of independent, specialist advice on a case by case basis and ii) the provision of training courses on selected topics.
- By sharing examples of the measures individual states have adopted to protect human rights from abuse by companies, the centre would contribute to a common understanding of state practice.
- The centre must be easily accessible to developing county governments and provide advice of a consistently high standard, covering a comprehensive list of relevant topics.
- The centre must have paid, full time, permanent staff with expertise in a broad range of areas and should be funded by developed countries, not their less developed counterparts.
- The centre should have the right to pro-actively offer advice and support to developing countries.

It may also be helpful for the advice of the centre to be made available to NGOs, communities and others entering into dialogue with companies.

Recommendation 5:
International ombudsperson

Many human rights abuses are characterised by the lack of an effective national legal system capable not only of providing access to justice for past and present victims but also acting as a deterrent to prevent further human rights abuses in the future. This is true not only in the two case studies elaborated below, but can be observed in most, if not all, of the other case studies featured in this report.

There have been several attempts to complement legal systems in host and home countries, most recently with the establishment of OECD National Contact Points. The very existence of NCPs points to widespread acceptance—by developed and developing country governments alike—of the need for some kind of independent enquiry point/dispute mechanism system. Thus proposals of this nature could be pushing at an open door, as this principle is already internationally accepted – at least in theory.

However, in practice, flaws in NCPs implementation, application and interpretation—often due to differences from one OECD country to the next in national context, political climate, resource constraints—mean that the quality of NCPs, and their ability to perform the function ascribed to them, can vary greatly from country to country. Thus the experience of the NCPs over the last seven years is more of a 'lottery' than an effective system allowing victims to claim access to justice. Therefore, as highlighted in the previous section, the establishment of a "model contact point," should be promoted by all OECD and adhering countries.

Nevertheless, there is an outstanding need for an international ombudsperson and dispute settlement mechanism, above and beyond national and regional lines. This call is not only backed by civil society – it was also one of the recommendations to come out of the Report of the Advisory Group of the Canadian National Roundtables on Corporate Social Responsibility. The next two case studies show why such a body is necessary in practice.

Case study: the electronics industry in Mexico

The electronics industry is the largest industrial sector in Mexico, accounting for US$46 billion of exports in 2006, mainly to the US. Of the approximately 400 000 workers within Mexican electronics industry the majority are women. Around 50-60% of electronics workers are sub-contracted through employment agencies.[60] Export Processing Zones are clustered around Guadalajara and the US border. Companies such as Hitachi, USI, Benchmark, Solectron, Jabil, Flextronics, Foxconn, and Sanmina SCI have operations in Mexico. These companies supply brands such as Nokia, Motorola, Lenovo, Intel, Dell and HP. Workers are recruited directly by electronics companies and through employment agencies.

CST emphasises that "workers have rights which…are superior to the rights of capital. These include the right to decent work, to just wages, to security of employment, to adequate rest and holidays, to limitation of hours of work, to health and safety protection, to non-discrimination, to form and join trade unions, and, as a last resort, to go on strike." [61] However, research into the Mexican electronics industry reveals that for many workers low wages and precarious working conditions are the norm. Typical electronics workers are young women with low levels of education recruited via an employment agency.[62] Workers often receive repeated short-term contracts, sometimes of just 15 days, and in some cases are asked to sign advance letters of resignation so that they can later be sacked without compensation.[63] Women workers report instances of sexual harassment by supervisors. Health and safety is also a big concern. In March 2006 water contamination at a factory in Chihuahua affected hundreds of workers.[64] Also during 2006 there were two cases of work-related mutilations and one death in Guadalajara alone.[65]

There are documented cases of employment agencies asking recruits if they are members of a union, if they have tattoos, about their marital status and even whether they have relatives who are lawyers. Serial use of short-term contracts is widespread although this is actually illegal in Mexican law. This means that employees do not build up legal rights to severance

pay and holiday. One worker reports that she has had more than 30 contracts in 2 years.[66] In Mexico it is almost impossible for electronics workers to organise to raise concerns and negotiate improved conditions themselves. Companies use Collective Employment Contracts with inactive unions to prevent workers from being able to organise. In Guadalajara for instance an estimated 90% of electronics workers belong to a trade union but most of those do not know they have been enrolled.[67] Those who do stand up for themselves report being threatened with blacklisting by employment agencies so they will be unable to get another job, and are often fired.

Mexican Labour Law contains a number of good provisions for worker rights but these are not enforced effectively. The labour authority (which is directly under the jurisdiction of the President of the Republic and not under the judicial system) allows a series of practices by companies, such as the unregulated use of outsourcing and temporary hiring; collective protection agreements or unfair dismissals without fair severance pay. A major problem is that the law allows agreements with unrepresentative trade unions.

Mexican civil society groups such as the Centre for Reflection and Action on Labour Issues, (CEREAL) use a variety of methods to try to help workers to access justice within this legal framework, including:

- Providing legal advice for workers and pursing legal claims.
- Supporting workers who want to organise their own representative groups.
- Monitoring working conditions across the sector and sharing findings with companies to speed resolution of cases.
- Engaging in dialogue with electronics companies to highlight where labour rights abuses are occurring.

However, filing legal cases has proved problematic. National laws are being used deliberately to prevent workers from exercising core labour rights of freedom of association and the right to collective bargaining and there is a lack of confidence in the impartiality of the legal system. The process is slow and many workers cannot afford to hold out for full compensation payments. Whilst dialogue with the companies has helped to speed up the resolution of individual cases, there is little progress in addressing systematic problems within the industry. An international ombudsperson to which workers groups and labour rights organisations such as CEREAL could appeal could help to overcome the sector's reluctance to tackle these inherent problems, whilst simultaneously providing an impartial hearing and redress mechanism for workers who believe that their human rights have been affected.

Implications for human rights

- Right to freedom from degrading treatment. (UDHR, art. 5 and 22; ICCPR, art. 17)
- Right to adequate health (ICESCR, art. 12), including ending the use of hazardous chemicals, inadequate medical care, inadequate workplace health and safety standards, inadequate information on health risks of company activities.
- Worker's rights, including right of free association and collective bargaining, freedom from discrimination, and right to adequate remuneration. (ICESCR, art. 7 and 8)

Company Response

Some companies have responded promptly to evidence of problems within their supply chains. Collaboration has resulted in a number of industry approaches. In 2004, eight

companies created the voluntary Electronics Industry Code of Conduct and the number of companies signed up to it has increased rapidly. However while the EICC describes itself as a code of best practices, its provisions do not meet the threshold of ILO core labour standards. Research shows that even this weaker code is not being enforced effectively.[68] In Mexico the National Chamber of the Electronics, Telecommunications and Informatics Industry (CANIETI) has been open to setting up a new dialogue with CEREAL to address problems. This has led to progress with specific cases but responses from individual companies to problems in their factories or their supply chain have varied considerably. Less progress has been made in preventing new cases of labour rights abuses occurring. Many problems identified in 2003 remain widespread within the industry.[69]

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Campaigns by consumers in Europe and the US have increased pressure on electronic brands to address abuses in their global supply chains, including Mexico. Many of the problems identified in this case study are widespread in the electronics industry in other countries such as Thailand and China. The GoodElectronics Network (http://www.goodelectronics.nl) supports information exchange between labour rights groups, environmental groups, trade unions and workers' organisations around the world.

Case study: the Chad/Cameroon Oil Pipeline Project

On July 1st 2000, the governments of Chad and Cameroon signed an agreement with the World Bank and a consortium of transnational companies to construct a 1,070 km long pipeline from Chad across Cameroon to the Atlantic coast. The consortium consists of the two US-based TNCs ExxonMobil (40 %) and Chevron (25 %) and also includes the Malaysian state oil company Petronas (35 %). The consortium owns about 80 % of the shares of the Cameroon Oil Transportation Company (COTCO) and the Tchad Oil Transportation Company (TOTCO). The government of Chad and Cameroon used World Bank loans to buy the other 20 % of shares of COTCO and TOTCO respectively. Three institutions of the World Bank Group – IDA, IBRD and IFC - have provided over US$ 300 million in loans. The US$ 4.2 billion Chad-Cameroon Oil Development and Pipeline Project is one of the largest private sector investments in sub-Saharan Africa. Construction began in August 2000 and was completed in June 2003, a full year ahead of schedule. Oil began to flow from the Doba oil fields in southern Chad in July 2003. The ExxonMobil-led Consortium had made World Bank participation a pre-condition for the project: for reasons of political risk insurance and to attract financing from other public and private sources. If managed wisely, the incoming oil money could be a source of funds for poverty reduction in both Chad and Cameroon.

At the time of negotiating the agreement, civil society organisations had already warned that political and administrative structures in both countries were not sufficient to cope with the enormous amount of money that would come from oil drilling and export and that the people of Chad and Cameroon would suffer rather than gain from oil production. Due to civil society protests, a number of safeguards were established, in particular in Chad, such as the

Chadian "Law001" to guarantee that incoming money was spent primarily on poverty reduction programs and some amount was put aside into a "fund for future generations." However, this law was "amended" by the Chadian government in 2006 so that oil money can now also be spent on the security sector. The "Collège de Control", a group of civil society representatives established to control which programs should be funded by oil money, had no say in the amendment which was negotiated by the Chadian government and the World Bank.

More than two-thirds of the pipeline crosses through Cameroon, some of it above ground. There are no emergency plans in case of an environmental disaster, something which could easily happen along the pipeline or at the site of the terminal – a one-sided oil tanker. This terminal is located 12 km offshore of Kribi, one of the most attractive tourist resorts of the country. People in the area mostly live from the fishing and tourism industry. Land rights and the living conditions of the Bagyeli ethnic group have been severely affected by the pipeline and terminal, threatening their survival as a distinct ethnic group.[70]

Specific mechanisms were set up by the World Bank to monitor the impact of the project and compliance with conditions of operation, including an External Compliance Monitoring Group (ECMG) and the International Advisory Group (IAG). The ECMG was set up to monitor and evaluate implementation of the environmental commitments by the companies concerned as well as the governments. The IAG's main function is to advise the World Bank and the governments of Chad and Cameroon on the overall implementation of the project. However, the IAG member responsible for governance questions, including human rights, resigned shortly after her appointment and her post was not filled.

Whereas the IAG was not intended as a formal complaints mechanism, environmental grievances rejected by the consortium can be brought before the ECMG. However, communities do not have a right to have their cases investigated by ECMG. In the past, in addition to these project-related mechanisms, affected communities could address the World Bank Inspection Panel. Local communities addressed the Inspection Panel in 2001 (Chad) and in 2002 (Cameroon), when the impact of the project was felt on the ground. Now this avenue is no longer open to project-affected communities as all loans have been closed.

Company response

The consortium, in particular Esso, and also COTCO, are in contact with the communities and civil society organisations. Some of the early meetings – during the late 1990s - were held in the presence of security personnel whom local people believed responsible for severe human rights violations. In the presence of these security forces the prior, free and informed consent of the communities could hardly be obtained.[71] Time and time again, roads in the vicinity of the operation plant have been closed at the request of the consortium, apparently for security reasons. In effect the freedom of movement of local population and civil society organisations is repeatedly denied.[72]

A project-specific grievance procedure was established, which is basically a management tool operated by the consortium: those affected by expropriation during the construction of the pipeline (and only those) can address the liaison officers of the consortium if they believe that they have not been compensated or otherwise treated according to the procedures. While the World Bank Inspection Panel in 2002 concluded that the grievances mechanism complied with the Operational Directive 4.30 on involuntary resettlement, this procedure is very restricted and weak when measured by human rights standards, as the consortium either accepts or rejects the complaint. If accepted, the consortium or its representative offers

compensation for the damage claimed. If rejected, the individual has no appeal to an independent forum. Moreover, there is no enforcement mechanism to ensure delivery of compensation.

The Cameroonian NGO FOCARFE has been systematically monitoring whether the rights of the local population along the pipeline in Cameroon are respected and the promised compensation has actually arrived where it was meant to go. In many documented cases this did not happen. Due to negotiations with COTCO and public pressure, most of the cases compiled by FOCARFE were eventually accepted by the company and remedies were agreed.

The consortium did not respond adequately to complaints by NGOs concerning the host government agreement that it signed with the governments of Chad and Cameroon respectively and which, according to a detailed analysis by Amnesty International (UK) could effectively bind the hands of the governments concerned to amend human rights or environmental laws in the future.[73]

Implications for Human Rights[74]

Overall the project has had a number of direct and indirect implications for the human rights of local communities and for broader civil society. Such implications include:

- Harassment, intimidation (including death threats) and arbitrary arrests of human rights defenders and politicians from opposition parties who were critical of the project, thereby violating their right to freedom of association and opinion and of freedom from arbitrary arrest. (UDHR, art. 3, 9, 12 and 19; ICCPR, art. 9 and 19)
- Violation of the right to access justice, including the right to a fair trial. (UDRH, art. 10 and 11; ICCPR, art. 9)
- Rights to an adequate standard of living and to the highest attainable mental and physical health (UDHR, art. 25; ICESCR, art. 12) were denied, as people suffered from the contamination of the environment, from the use of hazardous chemicals, discriminatory access to and usurpation of local water supplies for company activities. Also cases of HIV/AIDS rose dramatically along the pipeline.
- Workers human rights were violated at building sites during the construction phase, as health and safety standards at the workplace were poor. Contracts usually were only short term and wages were extremely low. (UDHR, art. 23; ICESR, art. 7)

A global response to a global problem: attempts by civil society in North and South to change company behaviour

In the late 1990s, an international coalition of civil society organisations from Chad, Cameroon, Europe and the USA was formed. They combined efforts to lobby their home governments, the consortium, and in particular the World Bank. In Germany, MISEREOR, Bread for the World, Amnesty International (the Chad and Cameroon coordination groups), Transparency International and others founded "AG Erdöl Tschad-Kamerun." Environmental Defense (USA) played a major role in the international NGO coalition and in lobbying the World Bank. Cameroonian and in particular Chadian NGOs gained a lot of strength over time and have become more and more important within the international coalition. These groups include: ATPDH (Association Tchadienne pour les Droits de l'Homme), FOCARFE, CPPN and CPPL.

- Chadian and Cameroonian NGOs informed people in Chad and Cameroon about the pipeline projects and about their rights.
- They demanded and negotiated for just and adequate compensation for people that were to be relocated or otherwise affected by the pipeline.
- NGOs in the North lobbied their home governments and increased public awareness of the problems involved with the pipeline project. They supported their Chadian and Cameroonian colleagues as best as they could. This included support for those who received death threats because of their peaceful engagement for human rights and the protection of the environment, support for those who were arbitrarily arrested and assistance for individuals who had suffered injuries from attacks or imprisonment to receive medical treatment abroad.
- Jointly, the NGO coalition lobbied the World Bank to deny the loans until the necessary good governance mechanisms and management skills were in place that would assure that international environmental and human rights standards would be observed, that people affected by the pipeline would receive adequate compensation and that the incoming money would be spend on poverty reduction.
- Now they are lobbying the World Bank not to withdraw from the project but to meet its responsibility to ensure that oil revenues are spent on poverty reduction and the human rights of the citizens of Chad and Cameroon are fulfilled.

Towards a solution

Both these case studies demonstrate the need for an independent international ombudsperson, with a mandate to investigate complaints of alleged malfeasance by TNCs, to complement justice mechanisms at the national level. Complaints to the ombudsperson could be brought directly by aggrieved parties, or brought via individuals and organisations acting on their behalf.

The ombudsperson should be independent, and have credibility with civil society organisations, the industry, governments and within the UN system. The ombudsperson must have resources at his or her disposal – qualified staff, the financial resources to launch investigations, and the expertise in terms of knowledge of relevant human rights treaties. The ombudsperson should also have a bank of legal and technical advice to be made freely available to potential complainants who are considering bringing a case. The ombudsperson would work with existing UN bodies including for instance the relevant UN Special Procedures and the ILO, however, this post would be complementary because the focus of the role would be looking at the conduct of specific companies. The ombudsperson's international remit would mean that their investigations could scrutinise corporate or supply chain relationships across state boundaries.

The task of the ombudsperson would be to investigate the facts surrounding a complaint, and conclude whether or not the company in question has acted in a socially or environmentally responsible manner, according to international treaties and standards. The ombudsperson's findings would be passed onto a Compliance Review Committee. At the same time, such findings would be made public.

The above Committee would be made up of a body of experts with expertise on the different UN treaties (e.g. the ICESCR, ICCPR, ILO Convention 169, CEDAW, CRC), international

civil society experts (who would not be asked to participate in deliberations on cases related to their country), and international representatives of industry and/or academics with expertise in business.

The Compliance Review Committee would review a case, and make time-bound recommendations to the host as well as the home country of the particular TNC involved, as to how to resolve the case as well as to the company concerned. Recommendations could range from financial compensation to victims, or a specific course of action - such as a special project to mitigate damage caused - to prosecution of the company in its home country. The ombudsperson may also recommend dialogue between the TNC and the community affected, and provide an international independent mediator. CIDSE would hope that the inclusion of business and industry representatives on the Compliance Review Committee would reduce the rate of non-compliance with the Committee's findings. Nevertheless, the Compliance Review Committee would need some kind of international compliance mechanism for it to be as effective as possible. We suggest that such a mechanism could be hosted through the UN and influenced by learning from, and adopting best practice prevalent in, already existing enforcement mechanisms. The UN would also need to supervise the construction of international jurisprudence in this area.

There should be a standardised timetable for each stage. The whole process, from a complaint first being brought to the ombudsperson to the Committee making its recommendations, should take no longer than one year.

Recommendation 6:
Free, Prior and Informed Consent

Indigenous peoples all over the world have suffered from historic injustices as a result of, *inter alia*, their colonisation and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests. They are a group which is particularly vulnerable to human rights violations.

Taking note of their particular situation, ILO convention 169, in force since 1991, as well as the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly at its 107th plenary meeting on 13 September 2007, thus affirm the specific rights of indigenous peoples.

In its preamble, the Declaration recognises the need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources. Art. 3 of the Declaration recognises the right of indigenous peoples to self-determination and confirms that "[b]y virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." However, in practice these rights are often at stake, when economic interests of companies or of national or regional governments and elites are in conflict with indigenous interests. Thus the UN Declaration strongly recommends that in certain cases, economic development shall only go ahead with the free, prior and informed consent of indigenous peoples. Art. 32 (2) of the Declaration specifically asks that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the

approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources."

Acknowledging that indigenous peoples and their traditional lands are frequently affected by extractive industries projects, sometimes in ways which threaten their existence as distinct peoples, the World Bank's "Extractive Industries' Review" of 2003 also promoted the concept of indigenous "free, prior and informed consent" as a necessary condition for extractive industries' projects. However, the World Bank has not fully adopted this recommendation, preferring the weaker concept of "consultation".

The Centre for Australian Ethical Research (CAER), rightly notes that the relationship between corporations and indigenous peoples is complex and often difficult.[75] It seeks to identify risks for companies and opportunities with respect to managing indigenous rights issues. CAER's briefing paper examines the policies and strategies of seven companies with regard to their dealings with indigenous issues. It examines, amongst other issues, various sectoral problems, NGO initiatives, as well as national laws and regulations, namely: Australia (N.T.), Canada, Colombia, Papua New Guinea and the Philippines. In the case of the Philippines, the briefing refers to the Indigenous Peoples Rights Act 1997. However, in practice, the Act is a sad example of how little protection even a very good national law offers for indigenous peoples if it is not implemented, or – as is the case in the Philippines – other laws and regulations take precedence if extractive projects are perceived to be 'in the national interest'.

Case Study: Mining in the Philippines

The Philippines is rich in mineral resources, amongst them gold, copper, bauxite, chrome and nickel. In spite of its resource wealth, and although the Human Development Index shows the Philippines in place 90 (out of 177 countries listed)[76], more than 40 % of the population live on less than 2 US dollars a day. Indigenous people are particularly vulnerable, not only to poverty, but also to the negative impacts of the booming mining sector. Of the Philippine population of 87 million, about 11 million are indigenous people. Most of them live in mountainous areas, where they have retreated since the time of colonization. Today, their survival as distinct peoples is threatened by new settlers coming into these areas, by logging, agribusiness and particularly by mining. Many mining projects in the Philippines are undertaken by small or medium sized enterprises but transnational companies also play a major role. In 2006, 23 mining projects by transnational companies were registered for the country, of which 18 were on indigenous lands.

The legal framework for the protection of rights[77]

The Philippines has ratified all the major UN human rights treaties and its 1987 Constitution recognises and promotes the rights of indigenous cultural communities in line with international law. The Constitution upholds the right of indigenous communities to practice their customary laws governing their ancestral domain, guarantees respect for their traditional institutions and "recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development."[78]

To ensure that these various obligations were translated into practice, the Indigenous Peoples Rights Act was passed in 1997. Under the IPRA the state is required to recognise indigenous

peoples' rights to self-governance and self-determination and respect their customary law and institutions. The IPRA also sets out the right to Free, Prior and Informed Consent. In cases where development projects, including natural resource extraction, impact on indigenous peoples their Free, Prior and Informed Consent (FPIC) must be sought 'in accordance with their respective customary laws and practices.' Free, Prior and Informed Consent is defined in the IPRA as:

> "the consensus of all members of the ICCs/IPs [Indigenous Cultural Communities/Indigenous Peoples] to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference or coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community." [79]

On paper the Philippines legislation on indigenous peoples' rights is considered to be progressive and in line with the recently adopted UN Declaration on the Rights of Indigenous Peoples. However, in practice, this progressive legislation is often overruled in favour of foreign direct investments or in the interests of powerful individuals. A Supreme Court Ruling of 1 December 2004, for instance, contravenes IPRA legislation and gives business interests priority over indigenous rights, if such business interests are declared to be "in the national interest." Together with an executive order (EO 270) that promotes mining all over the Philippines, the consequences for the human rights of indigenous peoples are extremely serious.

The UN Committee on the Elimination of Racial Discrimination (CERD), in its letter to the Permanent Representative of the Permanent Mission of the Philippines in Geneva, written under the Committee's early warning and urgent action procedure on 24 August 2007, expresses concern about reports that the Indigenous Peoples Rights Act (1997) has not been implemented, but that: "Furthermore, the 1998 Implementing Rules and Regulations, revised in 2002 and 2006, have allegedly reduced the rights granted to indigenous peoples by the Indigenous Peoples Rights Act."[80]

Realising rights is a different matter: Mining in the Philippines

An international fact finding team which recently visited the Philippines, found that the National Commission on Indigenous Peoples (NCIP) - the body mandated to 'protect and promote the interest and well-being of the ICCs/IPs' is perceived among indigenous peoples as a body that is failing its mandate. This perception is based on their experiences of the FPIC process to date. Rather than protecting and promoting the rights of indigenous peoples, it appears that the NCIP is facilitating the entry of mining companies.[81]

The promotion of mining is a central element of the current Government's economic policy. The Philippine Government's Mining Revitalisation Programme was upgraded in September 2007 to cover 32 priority projects. Current mining plans target up to 30% of the country for mining applications. In order to attract FDI, the Mining Act of 1995 offers freedom from company tax to foreign investors for the first five to eight years after investment. It also offers freedom from import tax for goods imported by those companies.

Corruption is a major problem in the Philippines which is rated 131 on Transparency International's Corruption Perceptions Index 2007.

For a number of years, the Catholic Bishops of the Philippines have made strongly worded statements about the damage done to local, and in particular indigenous, communities, in the Philippines as a result of mining activities.

In a letter to President Gloria Macapagal Arroyo of 31 January 2005, the bishops reaffirmed: "We are not against all forms of mining. We are only against those that are not pro-environment and pro-people. We also believe that what is legal is not always moral. As a body which our people expect to articulate their sentiments in all empathy, we respectfully suggest that the strictest implementation of the law be followed."

The Bishops make nine specific recommendations to the President to improve mining in the Philippines. The suggestions concern the protection of the environment, indigenous rights and those of local communities, as well as transparency issues. The letter concludes: "The Philippines is rich in natural resources. It is a waste to not use these resources for the benefit of the Filipinos, but it is a greater waste to misuse and abuse this natural wealth. The question remains: what ecological and social costs accompany the economic bonanza?" [82]

In the Philippines there have been a number of environmental disasters linked to mining.[83] For instance, the 1996 Marcopper mine tailings spill, on Marinduque Island, was so severe that the UNEP later declared the Boac river biologically dead.[84] Years later local people reported that the effects of the disaster were still having an impact on their livelihoods and health.[85] About 40 to 60 tonnes of gold are mined in the Philippines on average each year – with severe consequences for the health and well being of the affected communities. For example, in 2006 there were spills of cyanide and tailings at the Lafayette gold mine on Rapu Rapu Island. An independent commission established by the Government found the company guilty of negligence and recommended that the mining operation be closed down.[86] However, the mine remains open and local people fear that recent fish kills are linked to the mine.[87]

A number of cases of forced evictions from mining areas on indigenous lands have been reported and documented, amongst others by UN bodies.[88] Peaceful protests against mining operations and evictions have also been violently suppressed.[89] Human rights abuses have, for example, been documented in connection with operations of the Canadian mining company TVI Pacific in Canatuan, Zamboanga del Norte.[90] One protestor described how at a picket in 2004, he and other protestors were shot and injured by paramilitaries paid by the company to guard the mine site.[91] A woman described how, in 2006, her house and farm was bulldozed by armed paramilitaries.[92]

The UN Committee for the Elimination of Racial Discrimination (CERD) in its early warning and urgent action procedure expressed particular concern "about information that paramilitary forces deployed by TVI Pacific are accused of human rights violations and that mining activities on Mount Canatuan continue and are being expanded." CERD asked for a response to its urgent action by the Philippine government by 31 December 2007, to be examined at its 72nd session in Geneva from 18 February to 7 March 2008.[93]

Militarization is often associated with mining companies choosing to operate in areas where there are on-going conflicts. In the Philippines, several regions have experienced insurgency actions by armed groups and government anti-insurgency measures.[94] A recent Pastoral Letter of Bishop Dinualdo of the Diocese of Marbel illustrates his fears that the presence of SMI/Xstrata and their copper-gold project in Tampakan increases the likelihood of such

militarisation.[95] The conflict has taken a new turn with communist rebel groups stating that they will target mining sites following an attack on the project site on 1 January 2008.[96]

A 2007 NGO Submission to the Human Rights Council Universal Periodic Review Mechanism also noted the issue of past payments of protection money by mining companies to armed groups. During a 2005 Canadian parliamentary hearing into the activities of Canadian mining companies overseas, the parliamentary committee referred to statements made by a former project manager of a mine located in Southern Mindanao where he claimed that it was the practice for the mine to make illegal payments of protection money to a range of terrorist and military groups.[97]

Implications for Human Rights

Mining in the Philippines has implications for a number of human rights of the affected communities and people, in particular indigenous peoples. They include, amongst others:

- the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions (ICESCR, Art. 11)
- the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (ICESCR, Art. 12)
- the right to freedom of opinion and expression (ICCPR, Art. 19)
- the right to liberty and security of person (ICCPR, Art. 9)
- the right of indigenous peoples to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development (ILO Convention 169, Art. 7(1))
- the right to free, prior and informed consent (UN Declaration on the Rights of Indigenous Peoples, Art. 32)

A global response to a global problem: Attempts by civil society in North and South to change company behaviour

For many years, MISEREOR has been supporting an NGO network in the Philippines, the "Philippine MISEREOR Partnership" (PMP). Of the 300 member organisations it comprises, about 260 are MISEREOR partner organisations. They have joined forces in the network to mobilise and train local communities threatened with forced eviction and environmental degradation, to document cases of human rights violations, to organise protest and lobby politicians at local, regional, national and international level, and to work for an amendment of mining laws and regulations in order to minimise the negative impact of mining on local and indigenous communities.

Members of the PMP come from all social sectors and work on different issues. Mining is one of the priority issues chosen by the network which looks at concrete problems in specific localities. The number of such "sites of struggle" – i.e. areas of acute crisis due to enforced mining activities – is increasing. MISEREOR also supports PMP through lobby and advocacy work in Germany and at European level.

Towards a solution

The example of the Philippines shows that even the best of laws are ineffective in protecting rights if they are not implemented. This case study demonstrates the need for some form of international regulation and grievance mechanisms (such as the suggested ombudsperson), which indigenous people and local communities whose human rights are adversely affected by business activities, can turn to for dispute settlement or redress if they are not being adequately protected under national law. Notwithstanding the need for such an international ombudsperson, which would support access to justice, CIDSE recommends the following steps with regard to promoting FPIC:

- National Governments should ratify ILO Convention 169 on Indigenous and Tribal Peoples.
- Relevant UN Agencies, with the agreement of the affected indigenous communities, could assist in the monitoring and provision of independent information in FPIC processes.
- The World Bank Group should update its OP 4.10 on Indigenous Peoples, OD 430 on Involuntary Resettlement and IFC Safeguard policies to comply with the UN Declaration on the Rights of Indigenous Peoples, in particular article 32 of the Declaration requiring Free Prior Informed consent rather than the current standard of Free Prior and Informed Consultation.

Conclusion

Acknowledging that business activities are central to the well-being of national economies and the international economy, CIDSE member organisations are concerned that there is still a lack of national and international safeguards to prevent business enterprises from becoming complicit in or tacitly benefiting from human rights violations. One of our major concerns is that citizens often lack the necessary access to justice either to prevent human rights violations being committed in the context of business activities or at the very least to receive fair treatment and compensation when such violations occur.

The case studies detailed above have demonstrated the need for a range of actions by various actors at multiple levels to tackle the complex issue of protection and promotion of human rights. We believe the resultant recommendations are nuanced, realistic and relevant to the Special Representative's mandate, especially Parts A and B.

Thus the document emphasises that multi-stakeholder initiatives and voluntary company actions can play a role in raising 'standards of corporate responsibility and accountability.' This does not obviate the need for a long term, binding human rights framework for companies, building on existing UN Conventions and other human rights instruments. Both host and home governments have a responsibility to 'effectively regulate and adjudicate the role of transnational corporations' at the national level by designing, implementing and enforcing regulation which effectively and transparently holds companies to account for their actions and protects and promotes human rights.

With a particular view to the cases presented in this briefing paper, it can be concluded that where a host country government is unable or unwilling to prevent a multinational company from becoming complicit in human rights violations or – knowingly or unknowingly -

tolerating or benefiting from them, the responsibility (or extraterritorial state obligation) of the home government of that company increases.

At the international level, we recommend realistic short to medium-term solutions—namely an international advisory system, the creation of an independent ombudsperson and initiatives around FPIC—but also seek to complement these with the longer-term, fundamental solutions which catholic social teaching tells us are ultimately necessary. We have sought to balance the urgency of the issue with the unique opportunity presented by the Special Representative's mandate which, we believe, necessitates a longer term perspective. We hope that the Special Representative will consider these recommendations in the preparation of his final report.

ANNEX 1

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Project Non-Completion Report, April 2007, as well as information received regularly by MISEREOR and the "AG Erdöl Tschad-Kamerun" from partner organisations.

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[77] For a more detailed treatment see NGO Submission to the Human Rights Council Universal Periodic Review Mechanism. UPR 1st Session, 7-18 April 2008 Philippines. Submitted on behalf of CAFOD, Columban Faith and Justice Office, Indigenous Peoples Links. Irish Centre for Human Rights, National University of Ireland, Galway, IUCN Commission on Environmental, Economic, and Social Policy, Trocaire. 23 November, 2007.

[78] The 1987 Constitution of the Republic of the Philippines, Article 2, Sec 22 quoted in NGO Submission to the Human Rights Council Universal Periodic Review Mechanism.

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[80] letter by Régis de Gouttes, Chairman of CERD to S.E.M. Enrique A. Manalo, Permanent Representative, Ambassdor extraordinary and plenipotentiary, Permanent Mission of the Philippines, of 24 August 2007 (Reference : NP/JF).

[81] The report by the FFT «Mining in the Philippines : Concerns and Conflicts» gives many details about the shortcomings indigenouse peoples experienced or perceive with the work of NCIP. Also see letter by Régis de Gouttes, Chairman of CERD to S.E.M. Enrique A. Manalo, Ibid

[82] Fernando R. Capalla, D.D., Archbishop of Davao, President of the Catholic Bishops' Conference of the Philippines, January 31, 2005.

[83] As of 2003, there had been at least 16 serious tailings dam failures in the preceding 20 years and over 800 abandoned mine sites have not been cleaned up see Chronology of Tailings Dam Failures in the Philippines (1982-2002) Compiled by Philippine Indigenous Peoples Links http://www.piplinks.org last updated: 29 October 2003 see also Ronnie E Calumpita, '857 abandoned mines pose health menace, say NGOs', The Manila Times Reporter, 11 October 2005.

[84] UNEP report Final Report of the United Nations Expert Assessment Mission Marinduque Island, Philippines 30 September, 1996 pp65, 69

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'Although the mine closed almost a decade ago, communities throughout Marinduque report that their daily lives and environment are still affected by the mine… Women and men of Marinduque told the Ombudsman that they have experienced loss of livelihoods and serious health impacts which they attribute to the mine. Fish are no longer abundant or healthy and some fishermen have lost limbs, they believe as the result of long-term exposure to arsenic in the mine waste. Children have also suffered lead poisoning which community members attribute to the mine.'

[86] President Gloria Macapagal Arroyo's Administrative Order No. 145, created the Rapu-Rapu fact-finding commission. See Findings and Recommendations of the Fact-Finding Commission on the Mining Operations in Rapu-Rapu Island May 19th 2006 Executive Summary p12, p24.
The DENR's own report also stated 'The main cause of the two incidents can largely be attributed to the negligence and un-preparedness of the company to address such emergencies.' DENR Assessment of the Rapu-Rapu Polymetallic Project P35 available at http://www.greenpeace.org/raw/content/seasia/en/press/reports/denr-assessment-of-the-rapu-ra.pdf.

[87] See BFAR tests: Rapu-Rapu waters safe for marine life - But Lafayette not yet cleared in fish kill by Ephraim Aguilar, Inquirer 9 November 2007 http://newsinfo.inquirer.net/breakingnews/regions/view_article.php?article_id=99885 see also Lafayette Mining - Rapu-Rapu Folk Going Hungry after Fish Kill, Lisa Ito, 11-17 November 2007 Bulatlat, Vol. VII, No. 40 - http://bulatlat.com/2007/11/rapu-rapu-folk-going-hungry-after-fish-kill-locals-report-possible-seafood-poisoning

[88] See, for instance, paragraph 17 of the concluding observations of CERD, adopted at its 51st session 14 August 1997, which states: «[...] concern is expressed at reports of forced evictions and displacements of indigenous populations in development zones, as well as at reports that specific groups of indigenous peoples have been denied by force the right to return to some of their ancestral lands. »
See also 'Report of the Special Rapporteur on the situation of human rights and the fundamental freedoms of indigenous people, Mr Rodolfo Stavenhagen, submitted in accordance with Commission on Human Rights resolution 2002/65. Addendum Mission to the Philippines, 5 March 2003.

[89] Since 2001, more than forty journalists have been killed, often after investigative reports into cases of corruption, – more than half the total number of journalists killed since President Marcos was ousted from power in 1986. Human Rights defenders, many of them church people, are harrassed, arbitrarily arrested, threatened with death or even killed if they oppose minining interests and defend the human rights of indigenous peoples.

(See for instance : MISEREOR et al. : Aide-Memoire Philippines, submitted to the Fourth Session of the UN Human Rights Council, 12 March – 6 April 2007.

[90] An international fact-finding team that visited the Philippines in July and August 2006, was told that 169 armed security guards, hired by a Canadian mining company, TVI Pacific, were manning checkpoints and blocking access to their ancestral domain. Church and other groups reported to the team that the use of intimidation and force by mining security forces, military and police against indigenous peoples and small-scale miners at mining sites is widespread. Past experience of communities throughout Mindanao and in Mindoro attest to such practices.
The fact-finding team consisted of the Rt Honourable Clare Short MP and former UK International Development Secretary; Clive Wicks, a Member of CEESP the IUCN Commission on Environmental Economic and Social Policy; Cathal Doyle, a representative of the Irish Centre for Human Rights; and Fr Frank Nally, Columban Faith and Justice Office. Their aim was to assess reports of human rights abuses, environmental degradation and corruption associated with planned and current mining operations. Their findings were documented in the report "Mining in the Philippines: Concerns and Conflicts", Society of St. Columban, 2007.

[91] CAFOD interview with former artisanal miner in Zamboanga del Norte, 25-26 September 2007.

[92] CAFOD interview with former farmer in Zamboanga del Norte, 8 October 2007.

[93] See source reference in footnote 80.

[94] Report of the Special Rapporteur on the situation of human rights and the fundamental freedoms of indigenous people, Mr Rodolfo Stavenhagen. Addendum Mission to the Philippines, 5 March 2003

[95] See Pastoral Letter by Dinualdo D. Gutierrez, Bishop of Marbel, January 2008

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http://www.mineweb.com/mineweb/view/mineweb/en/page34?oid=43587&sn=Detail

[97] Statement by Allan Laird to the Subcommittee on Human Rights and International Development of the Standing Committee on Foreign Affairs and International Trade Meeting May 18, 2005. Ottawa Kingking Mines Inc. Corporate Support of Terrorism in the Philippines available at http://www.dcmiphil.org/Allan_Laird%27s_Statement.pdf quoted in the NGO Submission to the Human Rights Council.