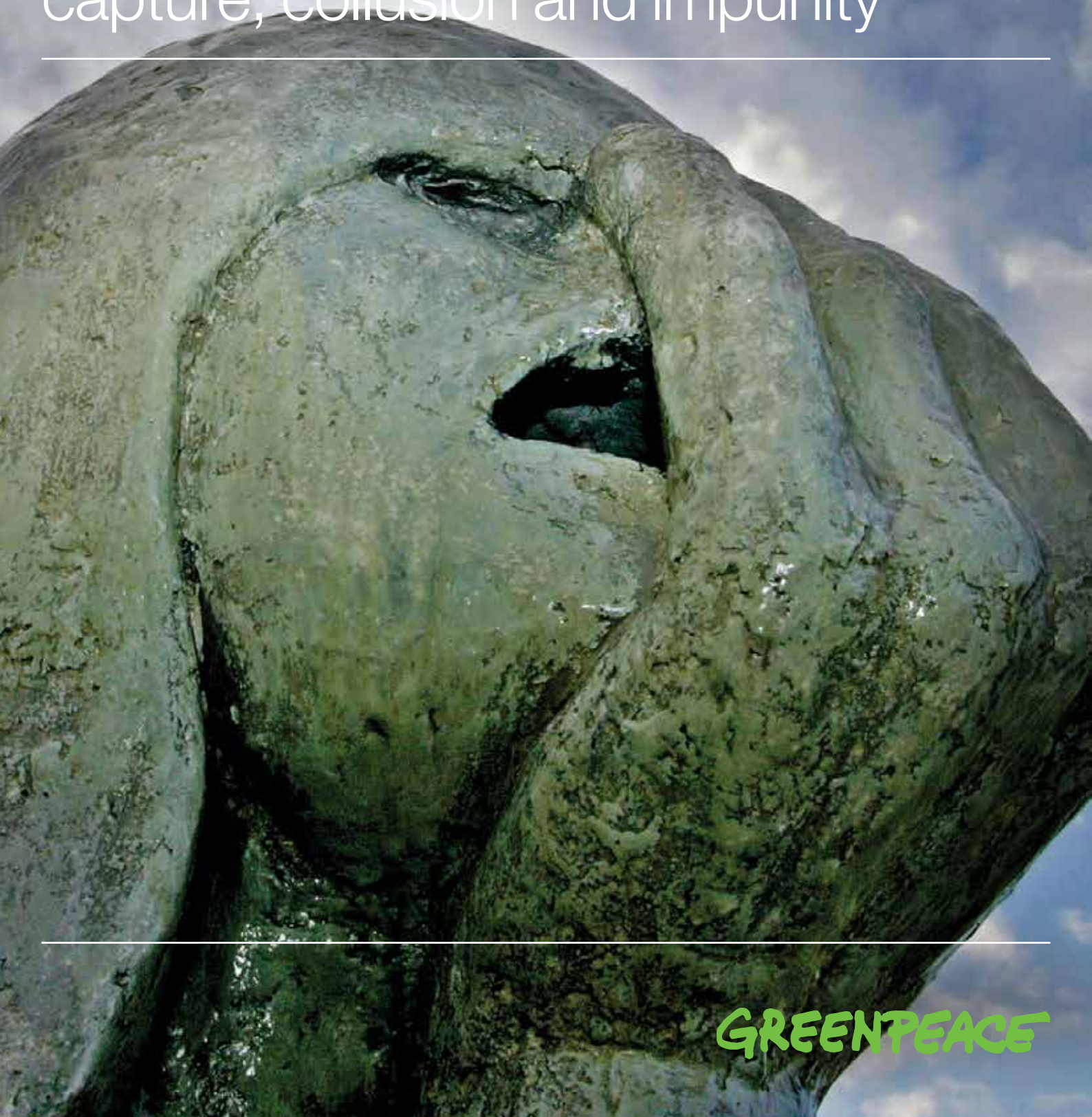


Justice for People and Planet

Ending the age of corporate
capture, collusion and impunity



GREENPEACE

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Arctic Evidence Prior to the start of a historic climate trial in Norway, Roie Galitz, a world known nature and wildlife photographer, brought back evidence from the Arctic showing its fragile state. A sign reads "Exhibit B." During the trial, environmental organisations Greenpeace Nordic and Nature and Youth take on the Norwegian government in court for opening up new areas in the Arctic to oil drilling. They are arguing that drilling for oil violates the Paris Agreement as well as the Norwegian constitution. Winning the case could set a precedent for future climate cases around the world.

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* United Nations Development Programme (UNDP). (2005). Human Development Report 2005. International cooperation at a crossroads. Aid, trade and security in an unequal world. Available at: http://hdr.undp.org/en/media/HDR05_complete.pdf

Glossary of key terms

Collusion

Improper (although not necessarily illegal) cooperation between corporations and governments or corporations amongst themselves, often shrouded in secrecy, that harms the public interest.

Corporate capture

The situation in which corporations exert undue influence over domestic or international decision-makers and public institutions.

Corporate impunity

The situation in which corporations are not held accountable by public authorities for their harmful actions, whether due to a failure to enact adequate laws or to enforce them effectively.

Corporate veil

A legal doctrine under which each separately incorporated member of a corporate group is considered to be a distinct legal entity that holds and manages its own liabilities, separately and distinct from its owners. This means a member of a corporate group is not automatically responsible for liabilities of another, even if that entity is a fully-owned subsidiary.¹

Corporate personhood

The legal notion that a corporation, separately from its owners, managers, or employees, has some of the legal rights and responsibilities enjoyed by natural persons.

Due diligence

Due diligence for human rights means that companies must identify risks related to their activities and relationships and take steps to prevent infringement of the human rights of others and account for both sets of actions. Environmental due diligence requires environmental management accounting and environmental reporting giving a clear, comprehensive and public report of environmental and social impacts of corporate activities.

Extended product responsibility

A principle of product policy that extends manufacturer responsibility for a product throughout its entire lifecycle. This principle is based on pollution prevention, life-cycle thinking, and polluter pays principles.²

Extraterritorial human rights obligations

The responsibility of States for acts and omissions of the State, within or beyond its territory, that have effects on the enjoyment of human rights outside that State's territory as well as obligations to engage in international co-operation and assistance for the realisation of human rights.

Extraterritorial jurisdiction

States exercise jurisdiction based on international legal rules. International law sets out the limits of the State's jurisdiction, that is, its entitlement to make and enforce rules with regard to the conduct of natural or legal persons. The most common and widely accepted basis for State jurisdiction is territorial jurisdiction. However, there are a number of circumstances in which States are permitted to exercise jurisdiction extraterritorially or put in place laws that have an effect beyond their borders.

Forum non conveniens

Forum non conveniens is a doctrine that allows courts to decline jurisdiction on the basis that the claimant has access to a more appropriate court to bring the claim in.

Governance gaps

Gaps in the international institutional framework, including the absence of institutions or mechanisms at a global, regional or sub-regional level, and inconsistent mandates of existing organizations and mechanisms.

Hard law

Hard law, contrasted with soft law, refers to binding legal instruments and laws that give States and individuals binding responsibilities as well as rights. The distinction is common in international law where there are no sovereign governing bodies. Three characteristics are cited as distinguishing hard from soft law. These are: a higher degree of legal obligation in hard law (soft law has weaker or no legal obligation), a higher degree of precision and detail in language (soft law uses more vague or abstract wording) and a higher degree of delegation of the interpretation or enforcement of the law to an independent third party (like an international court or tribunal), whilst interpretation and enforcement of soft law typically takes place among the agreeing parties.³

Home State

The State in which a parent or controlling company legally resides.

Host State

The State in which a company invests and develops related economic activities, typically through a subsidiary.

Limited liability

A corporate law doctrine, under which a shareholder is not liable for the debts and liabilities of the company in which it owns shares (meaning that its liability is limited to the amount it has paid for its shares in the company)

Planetary boundaries

The planetary boundary concept, introduced in 2009

Glossary of key terms

by a group of international scientists, defines a set of nine planetary boundaries⁴ within which humanity can safely operate. Crossing these boundaries could generate abrupt or irreversible environmental changes. In 2016, an update of the 2009 work found that four of nine planetary boundaries had been crossed as a result of human activity: namely, climate change, loss of biosphere integrity, land-system change, and altered biogeochemical cycles (phosphorus and nitrogen). Two of these, climate change and biosphere integrity, are what the scientists call “core boundaries”, the alteration of which will “drive the Earth System into a new state”.⁵

Precautionary principle

The precautionary principle applies where scientific evidence is insufficient, inconclusive or uncertain and preliminary scientific evaluation indicates that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with high levels of protection.

Public-private partnership

There is no universally agreed definition of public-private partnerships, but they are generally understood to be 1) a medium- or long-term contractual arrangement between the state and a private sector company, 2) an arrangement in which the private sector participates in the supply of assets and services traditionally provided by government, such as hospitals, schools, prisons, roads, bridges, tunnels, railways, water and sanitation and energy, and 3) an arrangement involving some form of risk sharing between the public and private sector.⁶

Separate legal personality

Independent existence under the law, especially in the context of a company being separate and distinct from its owners. One of the main advantages of the company structure is the limitation of liability that the separate legal personality gives to the members.

Key acronyms

CEO	Chief Executive Officer
CNCA	Canadian Network on Corporate Accountability
CSI	Coalition of Services Industries
DRC	Democratic Republic of Congo
ECCJ	European Coalition for Corporate Justice
ECOSOC	United Nations Economic and Social Council
EIA	Environmental Impact Assessment
ESCR	Economic, Social and Cultural Rights
FPIC	Free, Prior and Informed Consent
FSC	Forest Stewardship Council
GAFA	Google, Amazon, Facebook, Apple
GDP	Gross Domestic Product
HRD	Human Rights Defender
ICAR	International Corporate Accountability Roundtable
ICS	Investment Court System
IFC	International Finance Corporation
ILO	International Labour Organization
IMF	International Monetary Fund
ISDS	Investor-state dispute settlement
MIC	Multilateral Investment Court
NCP	National Contact Point
NGO	Non-government organisation
OECD	Organisation for Economic Co-operation and Development
PPP	Public-private partnership
SLAPP	Strategic lawsuits against public participation
SOE	State-owned enterprises
TISA	Trade in Services Agreement
TNC	Transnational Corporation
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Centre on Transnational Corporations
UNFCCC	UN Framework Convention on Climate Change
UNGP	United Nations Guiding Principles on Business and Human Rights

G20 Protest Wave Rally in Hamburg Supporters of the Protestwelle (Protest Wave) demonstrate in Hamburg to raise awareness on climate and energy as well as social inequality and democracy issues. The rally starts at a the City Square, moving around the city center. The G20 Protestwelle is an alliance between civil society organizations including Greenpeace, Campact, BUND, DGB Nord and Mehr Demokratie Hamburg. Hamburg will host the 2017 G20 Summit on July 7th and 8th.



Executive Summary

This report demonstrates the need for urgent action to establish **justice for people and planet** and to **end corporate capture, collusion and impunity**. If governments adopt the **Principles for Corporate Accountability** presented in this report as binding rules, the result will be a greener, more peaceful and more just planet for us all.

The 10 Principles for Corporate Accountability are:

1. People and the environment, not corporations, must be at the heart of governance and public life.
2. Public participation should be inherent to all policy making.
3. States should abandon policies that undermine environmental and human rights.
4. Corporations should be subject to binding rules both where they are based and where they operate.
5. States should require due diligence reporting and cradle to grave responsibility for corporate products and services.
6. States should promote a race to the top by prohibiting corporations from carrying out activities abroad which are prohibited in their home state for reasons of risks to environmental or human rights.
7. States should create policies that provide transparency in all corporate and government activities that impact environmental and human rights, including in trade, tax, finance and investment regimes.

8. Corporations and those individuals who direct them should be liable for environmental and human rights violations committed domestically or abroad by companies under their control.
9. People affected by environmental and human rights violations should be guaranteed their right to effective access to remedy, including in company home states where necessary.
10. States must actually enforce the regulatory and policy frameworks they create.

These are not radical changes to our legal and political system. They are long overdue preconditions for people and the planet to thrive peacefully for generations to come. This report highlights the urgency of the systemic problems we are facing and shows how simple reforms could make a big difference on the global scale.

Through **20 case studies of corporate capture, collusion and impunity** this report shows how corporate power, in the absence of these principles, has been used to repeatedly abuse and violate human and environmental rights. The cases expose corporate wrongdoing relating to deforestation, water and air pollution, plastic pollution, waste dumping, chemical spills, nuclear disaster, violations of Indigenous rights, civic and legal repression of environmental and human rights defenders, tax avoidance, corruption, climate denial, and fraudulent manipulation of the public debate. The companies highlighted are ACS Group (Grupo Cobra), the Carbon Majors (47 companies)⁷, DowDuPont, Energy Transfer Partners, Exxon, Gabriel Resources, Glencore, Grupo Bimbo, Halcyon Agri (Sudcam), ICIG (Miteni), Keskinoğlu, Monsanto, Nestlé, Novartis (Sandoz), Resolute Forest Products, Rosatom, Schörghuber Group (Ventisqueros), Total, Trafigura, and VW.

Governments must take action to protect the rights and interests of people and planet, by ending their collusion with, and protection of, corporate interests. Corporate environmental and human rights violations are not an inevitable aspect of our political economy. The **governance gaps** created by economic globalisation are not a natural phenomenon but rather a result of the political choices of policy makers. This means that effective state action could end corporate capture and close the governance gap. The cases presented in this report show that corporate impunity for environmental destruction and human rights violations is a result of the current economic and legal system. State failure to protect human rights and the environment is caused by corporate capture of decision makers and state institutions, leading to the consequent refusal of politicians to implement binding frameworks and hold corporations to account. The clear failure of voluntary codes and corporate self-regulation to safeguard human rights or the environment has led to renewed public demand for binding rules.

In Chapter 2 we show how states have, willingly and unwillingly, facilitated the development of **corporate power**. The reason for these misguided policy choices is not a lack of information but rather state capture by corporate interests. Corporate law, tax rules and trade and investment frameworks provide extensive rights for businesses, clashing with human rights frameworks and planetary boundaries. This international economic framework undermines the ability of states to regulate corporations in order to protect human rights and the environment, and hinders their efforts to raise sufficient domestic revenue to provide this protection. Closed policy making and public-private partnerships result in powerful governments abusing international fora to advance corporate agendas, with the result that policies aiming to tackle climate change and promote sustainable development are sabotaged.

States and their institutions have transformed their own role into an instrument to facilitate international investment and the agendas of large corporations. Transnational corporations (TNCs) and their home states are resisting binding codes, pursuing the counter-strategy of drafting and promoting non-binding standards.

Economic treaties, like trade, investment and tax treaties, provide companies with the kind of protection never granted to individuals or any other group in society. These treaties are generally binding and highly enforceable, in contrast to corporate accountability frameworks that are not enforceable in a court or by law. Environmental and human rights treaties also lack the kind of international enforcement mechanisms put in place for corporate investment protection.

The **international tax system**, with its tax havens, leads to large corporations amassing huge profits offshore, resulting in financial speculation, systemic financial risks, and economic inequality. States compensate for the tax losses related to this undeclared income with taxes on salaried workers and on consumption, leading to even more economic inequality.

The basic principles of **corporate law**, freedom of incorporation, limited liability, corporate personhood and the separate legal entity principle, and the lack of recognition of a corporate group in law, combine so that shareholders and chief executive officers (CEOs) enjoy practical immunity when it comes to legal responsibility for business activities harming the environment, workers or communities. They have also enabled massive tax avoidance and evasion, leading to annual public revenue losses of trillions of Euros worldwide. At the heart of corporations' failures to take into account and respect people and the planet is the erosion of the original principle that corporate activities should serve the public good.

Corporate **environmental and human rights violations** are not inevitable aspects of our political economy – the system is broken. Lack of regard for the public interest when deciding on the regulation of business activities has led to a concentration of wealth and power in transnational corporations; inducing a vicious cycle by which growing wealth increases corporations' hold over state's decision-making, which in turn leads to the further concentration of wealth.

In Chapter 3 we look at the **barriers to justice** faced by people seeking redress for the actions of corporations. Effective remedy and prosecutions of companies associated with environmental disasters, adverse health impacts, and human rights violations are rare. In charting

the struggle for justice, we show how four barriers: a lack of information, a lack of binding rules, a lack of enforcement, and the challenges of extraterritorial jurisdictions, combine to create a system of corporate impunity.

The first barrier, **lack of information**, arises because corporate law provides corporations with more rights than individuals, allowing them to obscure ownership structures and eschew liability. The vast inequality in resources between large corporations and the people who must live with the consequences of their business activities forms a major obstacle to obtaining the needed information to ensure that procedures protecting their interests are followed.

The second barrier is the **lack of binding rules**. These shortcomings in the national and international regulation of business conduct also mean that there is insufficient regard at boardroom level for human rights and environmental concerns when it comes to high-level corporate planning. This is a vicious circle leading to increasingly irresponsible behaviour, because there are no consequences for the directors or owners of companies. Large corporations can use the separate legal personalities of their subsidiaries and sub-contractors to avoid being held accountable in a court of law. Non-judicial mechanisms are generally only effective if the company is willing to change.

The third barrier is a **lack of enforcement** even in cases where clear rules exist. In addition to governments frequently lacking interest in pursuing corporate malfeasance, enforcement of existing environmental standards or human rights frameworks might be undermined by trade and investment agreements, and by mechanisms such as investor-state dispute settlement (ISDS). Large corporations and state entities can also collude to repress legitimate protest, through strategic lawsuits against public participation (SLAPP suits). It may also be difficult to get a judgement enforced; because of corporate limited liability, it is almost impossible for the plaintiff to go after the shareholders for damages.

The fourth barrier we identify is the **ineffectiveness of extraterritorial jurisdiction**. In cases with a cross-border dimension, people seeking justice may face legal and jurisdictional barriers in both the country where the violation takes place (host country) and the country where the

company is headquartered (home country). Accessing justice in the country where a TNC is headquartered can be just as difficult as it is in a host state. The specification of home and host state responsibilities and extraterritorial regulation is essential to effectively prevent companies from abusing human rights in countries other than their state of incorporation. The development of laws with an extraterritorial dimension is therefore crucial to effectively prevent companies from abusing human rights in other countries.

In Chapter 4 we present **the Ten Corporate Accountability principles** (highlighted above) which governments must adopt to ensure justice for people and the planet. We suggest specific reforms that would give each principle life, and consider how the outcomes in our case studies would have been different had the principle been respected.

People are demanding, and will continue to demand, justice in the face of ongoing corporate impunity. The growing lack of public participation in politics, in particular in decisions about investment and corporate regulation, is at the heart of this problem. A new economic model that does not incentivise the externalisation of costs, and which provides for more participatory decision-making, is no longer an ideal, but a necessity. The common demand of all these struggles and movements is this: corporations need to be regulated in the public interest. States should reflect the rights and long-term interests of the public. Under international law, states already have the obligation to prevent, mitigate and ensure remedies for human rights abuses committed by corporations. The clear failure of voluntary codes and corporate self-regulation in safeguarding human rights or the environment has led to a renewed demand to put in place binding rules.

The change required is people-centred and global, and involves people reclaiming the economy for the public good, and corporations being regulated to serve broader public and long-term interests. Together we can create societies and economies that lead to a green and peaceful future, and provide prosperity within planetary boundaries.

The structure of injustice

State failures

- › Corporate law
- › International trade deals
- › Corporate capture

Barriers to justice

- › Lack of information
- › Lack of binding rules
- › Lack of enforcement
- › Legal obstacles

Inequality

Corporate impunity

Human rights violations and Environmental Damage





Protest at Standing Rock Dakota Access Pipeline in the US A phalanx of National Guard and police advance toward a water protector holding an eagle feather at a camp near the Standing Rock Reservation in the direct path of the Dakota Access pipeline (DAPL) where 117 people were arrested.

20 cases of corporate capture, collusion and impunity

#	Case	Description	Headquarters	Place of violation	Relevant principles
1	ACS Group (Grupo Cobra)	Spanish infrastructure company Cobra (ACS Group) supported the construction of a hydraulic power plant, despite knowing it would impact the human rights of indigenous communities in Guatemala.	Spain	Guatemala	1, 2, 4, 5, 6, 8, 9, 10
2	Carbon Majors	The Philippine Commission on Human Rights is investigating 47 'Carbon Majors' for their contribution to climate change and resulting human rights violations.	multiple	Philippines, global	1, 2, 5, 8, 9
3	DowDuPont	Decades after the Bhopal disaster which killed 20 000, impacted half a million and contaminated the local water supply victims have been unable to secure adequate justice or remedies from chemical giant DowDuPont, a challenge made greater by a series of purchases and mergers.	USA	India	4, 5, 8, 9,10
4	Energy Transfer Partners	In developing the controversial North Dakota Access Pipeline fossil fuel company Energy Transfer Partners ignored the rights of indigenous communities and used violent security firms and a Strategic Lawsuit against Public Participation (SLAPP) to squash dissent.	USA	USA	2,3,5,8,9
5	Exxon	By the 1980's Exxon knew that climate change was real and caused by burning fossil fuels, but chose to mislead the public about this in order to protect its profits	USA	USA, global	1, 2, 5, 8, 9
6	Gabriel Resources	After Romania halted Canadian mining company Gabriel Resources from developing an open-pit gold and silver mine on environmental grounds, Gabriel Resources brought a \$4.4 billion claim, bypassing domestic courts.	Canada	Romania	1, 2, 3, 5, 6, 7
7	Glencore	Mining giant Glencore has made aggressive use of complex corporate structure and tax havens to deprive developing nations of tax revenues, while frequently being accused of human and environmental rights violations in the course of its business.	Switzerland	Global	1, 2, 3, 4, 5, 6, 7, 8, 9, 10
8	Grupo Bimbo	Public pressure convinced Mexican multinational bakery products Grupo Bimbo to reduce pesticide use in its supply chain and adopt the higher quality standards in its home market that it faced in other countries.	Mexico	Mexico	1, 3, 5
9	Halcyon Agri (Sudcam)	Sudcam, a subsidiary of Singapore based Halcyon Agri is responsible for devastating forest clearance in Cameroon, resulting in dispossession of community lands and other impacts on human rights, including those of indigenous Baka people.	Singapore	Cameroon	1, 2, 3, 4, 5, 6, 7, 8, 9,10
10	ICIG (Miteni)	Italian chemical company Miteni, a subsidiary of International Chemical Investors Group (ICIG) has contaminated the soil and water in an area of around 200 km2, affecting more than 35,000 people, but the Italian authorities have so far been unable to provide any remedy.	Luxembourg	Italy	1, 2, 3, 5, 7, 8, 9, 10
11	Keskinoğlu	Chicken producer Keskinoğlu was able to use a SLAPP suit to deplete the resources of civil society when its production methods were criticised	Turkey	Turkey	1, 2, 3

#	Case	Description	Headquarters	Place of violation	Relevant principles
12	Monsanto	US-based agrochemical firm Monsanto's efforts to promote GMOs in Mexico, including intense lobby efforts, led to violations of the rights of indigenous peoples.	USA	Mexico	1, 2, 5, 6, 8, 9
13	Nestlé	Swiss food and beverage company Nestlé's packaging leads to huge amounts of plastic pollution for which the company takes no responsibility	Switzerland	Philippines	1, 2, 5, 6
14	Novartis (Sandoz)	By outsourcing pharmaceutical production to countries with weak anti-pollution legislation companies like Sandoz, a subsidiary of the Swiss Novartis, contribute to the emergence of bacterial 'superbugs', blamed for 700,000 deaths every year.	Switzerland	India	1, 2, 4, 5, 6, 8, 9
15	Resolute Forest Products	Resolute Forest Products has aggressively used Strategic Lawsuits Against Public Participation (SLAPPs) to deter critics.	Canada	Canada	3
16	Rosatom	Russian nuclear corporation Rosatom has been responsible for a series of nuclear accidents at its Mayak complex and victims have been unable to secure either justice or remedy in part due to the impunity of the state-owned company in Russian courts.	Russia	Russia	1, 2, 5, 7, 8, 9, 10
17	Schörghuber Group (Ventisqueros)	Chilean seafood company Ventisqueros, owned by the German Schörghuber Group, failed to conduct a proper due diligence process and became an accomplice in an environmental disaster in the south of Chile.	Germany (Chile)	Chile	4, 5, 6, 7, 8, 9, 10
18	Total	Oil and gas company Total proposed a major offshore drilling project without performing adequate due diligence with regard to possible environmental and human rights impacts.	France	Brasil	1, 2, 4, 5, 6
19	Trafigura	After oil trader Trafigura disposed of toxic waste in Côte d'Ivoire and caused a public health crisis, weaknesses in the legal system meant many victims were denied both justice and remedy.	Singapore	Cote d'Ivoire	4, 5, 6, 8, 9, 10
20	VW	VW's systematic cheating of emission tests led to billions in punishments in the USA, but almost no penalty in Europe due to differences in law enforcement and opportunities for remedy under the law.	Germany	Germany, global	1, 2, 5, 7, 8, 9, 10

Corporate accountability principles

- 1: People and the environment, not corporations, must be at the heart of governance and public life.
- 2: Public participation should be inherent to all policy making.
- 3: States should abandon policies that undermine environmental and human rights.
- 4: Corporations should be subject to binding rules both where they are based and where they operate.
- 5: States should require due diligence reporting and cradle to grave responsibility for corporate products and services.
- 6: States should promote a race to the top by prohibiting corporations from carrying out activities abroad which are prohibited in their home state for reasons of risks to environmental or human rights.
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- 8: Corporations and those individuals who direct them should be liable for environmental and human rights violations committed domestically or abroad by companies under their control.
- 9: People affected by environmental and human rights violations should be guaranteed their right to effective access to remedy, including in company home states where necessary.
- 10: States must actually enforce the regulatory and policy frameworks they create.

G20 Protest Wave Rally in Hamburg
Supporters of the Protestwelle (Protest Wave) demonstrate in Hamburg to raise awareness on climate and energy as well as social inequality and democracy issues. The rally starts at a the City Square, moving around the city center. The G20 Protestwelle is an alliance between civil society organizations including Greenpeace, Campact, BUND, DGB Nord and Mehr Demokratie Hamburg. Hamburg will host the 2017 G20 Summit on July 7th and 8th. The protesters gather at the City Square.

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Introduction

“They threaten you so you will shut up. I can’t shut up. I can’t stay silent faced with all that is happening to my people. We are fighting for our lands, for our water, for our lives”

Jakeline Romero, Colombian land defender⁸

On 3 December 1984, the world witnessed one of the worst ever chemical disasters when a gas leak in the Union Carbide plant in Bhopal, India killed around 20,000 people, and caused permanent and debilitating injuries to more than 150,000. Union Carbide has managed to escape its obligations and liabilities for this disaster by paying less than \$3000 per person to settle all claims arising from the tragedy, and subsequently deflecting responsibility for the disaster onto the Indian government. Since Union Carbide became a subsidiary of Dow Chemicals in 2001, which in turn recently merged with DuPont, the resulting DowDuPont has shown no sign of taking responsibility over the Bhopal legacy. Justice remains more elusive than ever for the victims of this disaster.

In June 2002, in reference to this disaster, Greenpeace launched its Ten Bhopal Principles on Corporate Accountability and Liability,⁹ with a report compiling cases of corporate crimes and failures that showed how transnational corporations downplay damage and elude liability. These principles urged governments to commit to an international instrument to stem the tide of corporate environmental abuses. Now, almost 16 years later, this new report shows how corporate impunity continues, and how states have failed to address the systemic problems that lead to it.

The cases detailed in this report show that today:

- energy and extractive companies have knowingly driven climate change and distorted the debate around it;
- large corporations deprive states of due taxes, leading to economic inequality and the erosion of public services;
- corporate activities violate the rights of Indigenous communities despite existing international protection frameworks;
- victims of environmental and human rights disasters created by corporate negligence are still not remedied for their losses;
- even if states rule in the public interest, they can be sued in private tribunals by large corporations, hindering states from effectively protecting people and planet;
- critics of corporate misconduct are increasingly faced with legal suits by corporations trying to silence them;
- states fail to enforce environmental and human rights standards and neglecting their obligations to prevent corporate air pollution and water contamination, and seriously endangering human life.

1.1 The state of the world

Since 2002, policy reform has concentrated on enabling corporate activity and economic investment, with little thought about the consequences for a sustainable and just present and future. The lives of millions of people worldwide are being affected by rising inequality, forced migration, environmental destruction, and climate change. The reason for these misguided policy choices is not lack of information but rather state capture by corporate interests. The growing lack of public participation in politics, in particular in decisions about investment and corporate regulation, is at the heart of this problem.

Many movements, campaigns and reports have detailed cases of corporate impunity over the past decade. This report highlights 20 cases of corporate wrongdoing that are representative of corporate capture, impunity, and collusion with the state. Twenty companies mentioned in this report are headquartered in Canada (2), France (1), Germany (2), Luxembourg (1), Mexico (1), Russia (1), Singapore (2), Spain (1), Switzerland (3), Turkey (1) and the United States of America (5). Another 47 companies (some of whom are also specifically mentioned in the individual cases), the so-called Carbon Majors, which are being investigated by the Philippine Commission on Human Rights for their contribution to climate change and resulting human rights violations, are headquartered in Australia, Austria, Canada, France, Germany, Italy, Japan, Netherlands, Mexico, Russia, Spain, South Africa, Switzerland, United Kingdom and the the United States. Violations in these case studies occurred in, amongst others, Brazil, Cameroon, Canada, Chile, Germany, Guatemala, India, Italy, Ivory Coast, Mexico, Philippines, Romania, Russia, Turkey and the USA, some with impacts on the global level.

The cases expose business-related deforestation, water and air pollution, plastic pollution, waste dumping, chemical spills, nuclear disaster, violation of Indigenous rights, civic and legal repression of environmental and human rights defenders, tax avoidance, corruption, fraudulent manipulation of the public debate, and corporate propaganda denying climate change. The companies highlighted are **ACS Group (Grupo Cobra), The Carbon Majors (47 companies)**¹⁰, **DowDuPont, Energy Transfer Partners, Exxon, Gabriel Resources, Glencore, Grupo Bimbo, Halcyon Agri (Sudcam), ICI (Miteni), Keskinöğlü, Monsanto, Nestlé, Novartis (Sandoz), Resolute Forest Products, Rosatom, Schörghuber Group (Ventisqueros), Total, Trafigura, and VW.**

As corporate impunity persists, “*it is getting harder (and more dangerous) to hold companies accountable*”.¹¹ Just as investor claims against states often have a chilling effect on state regulation, expensive defamation lawsuits may be filed by big corporations not to win a defamation case but to have a chilling effect on human rights and environmental activism and advocacy.¹²

Under international law, states have the obligation to prevent, mitigate and ensure remedies for human rights abuses committed by corporations. This includes civil, cultural, economic, environmental, political and social rights laid down in binding international conventions. Inherent to this obligation is the restriction and regulation of private activities, including corporate conduct, to ensure they do not damage the public interest, but rather contribute to public wellbeing.¹³ At present, states and governments fail to live up to these obligations.

1.2 Why change is possible

This report highlights the urgency of the systemic problems we are facing, and shows how simple reforms could make a big difference on the global scale. It analyses the root causes of corporate impunity and state failure, which are political and not natural phenomena. Corporate impunity and unsustainable growth models were created by people in power, so they can be overturned by people in power.

The legal and institutional arrangements governing our economic system are the results of social and political struggles. Transnational corporations and global elites have successfully manipulated the democratic process in the past decades to influence policy making in their interest, and they have provoked or aggravated multiple global crises as a result: climate change, financial instability, stark economic inequality, systemic business-related human rights violations, and corporate impunity. These individual crises, taken both alone or in concert, demonstrate the urgency of the situation, and the need for people to fix the broken system.

The change required is people-centred and global, and involves people reclaiming the economy for the public good, and corporations being regulated to serve broader public and long-term interests. Together we can create societies and economies that lead to a green and peaceful future,¹⁴ and provide prosperity within planetary boundaries.

1.3 Structure of the report

Chapter 2 analyses the root cause of the problem we are facing: the unwillingness of the global political class to enforce binding rules for businesses and to protect the rights of people and the environment. It describes the 45-year long battle for legally-binding instruments to ensure corporate accountability, and shows how corporate capture and a lack of public involvement in decision-making are the result of deliberate policy choices. Using the cases drawn from the annex it shows how corporate capture by firms has lowered environmental standards, deregulated international trade, and limited states' policy space. This lack of corporate regulation in the public interest increases inequality, exacerbates climate change, and stokes corporate-state collusion, which expresses itself in a crackdown on environmental and human rights defenders and on critics of corporate impunity.

Chapter 3 highlights a number of barriers that people face when they seek remedy and justice in the face of business-related environmental and human rights violations: the imbalance of power between corporations and people because of lack of information (Barrier 1), the lack of binding corporate accountability frameworks (Barrier 2), the lack of state enforcement when binding rules exist (Barrier 3), and specific legal barriers that arise when trying to take transnational corporations (TNCs) to court (Barrier 4).

Chapter 4 presents the fundamental solutions to the systemic problems identified in this report. They range from reforming corporate law to impose rules on corporations and protect people's rights, to bringing the public back into political decision-making. States must enforce binding rules on corporations and adhere to their obligations to legislate in the public interest, protect the environment, and uphold human rights. Specific proposals include nationally enforceable due diligence laws, making parent companies and directors liable for violations committed abroad and in supply chains, and guaranteeing access to justice for victims of corporate abuses wherever they occur. These are not radical changes to our legal and political system. Rather, the solutions proposed are not only long-overdue, but a precondition for people and the planet to thrive peacefully for generations to come.

1.4 Methodology and limitations

The cases in this report provide proof of ongoing systemic state failures to regulate corporate conduct, and are not intended to provide a comprehensive picture of the geographical spread, type of negative impacts, or location of companies' headquarters. The cases were compiled on the basis of published information, some originating from in-depth research and/or ongoing campaigns. Any omissions are of course those of the authors.

In appropriate cases, companies showcased in this report¹⁵ were provided with an opportunity to reply to selected claims made in the cases and where necessary correct potential inaccuracies. Only Gabriel Resources, Glencore and Grupo Bimbo provided their opinions in a reaction to the right of reply letters. Where relevant, their comments have been integrated into the case studies.

This report builds on the work of organisations, academics and activists who document corporate misconduct, support victims of business-related environmental and human rights abuses, analyse frameworks that allow continued corporate impunity, and make detailed proposals for reform and positive alternatives. The analysis of root causes and the overview of legal barriers to access to justice is based on an extensive literature review. A number of reports from organisations working on environmental protection, human rights, trade, investment, tax, and corporate accountability have informed large parts of this report. These are referenced in the footnotes. All hyperlinked references were accessible at the end of December 2017.

The report has been reviewed by a number of experts from Greenpeace International as well as national and regional offices.

UN Climate Summit Projection in New York Greenpeace USA activists project the message "Listen to the People, Not the Polluters" on the United Nations building, after hundreds of thousands of people took to the streets of New York to demand climate action over the weekend. The projection was then translated into different languages, to be shared with communities around the world who also held rallies, marches, and protests drawing attention to the climate crisis.

02

Listen
to the
People
not the
Polluters!

Corporate impunity is a result of state failures

This chapter examines why corporate impunity persists despite the many frameworks created to protect human rights and the environment and to promote corporate accountability. It provides a brief overview of the 45-year long attempt by states and civil society to regulate transnational corporations in the public interest through international agreement, from the United Nations Centre on Transnational Corporations to the recent initiative for a UN binding instrument and national mandatory human rights due diligence laws.

Corporate law, and tax, trade and investment frameworks, provide extensive rights for businesses, frequently clashing with human rights frameworks. This international economic framework undermines the ability of states to regulate corporations in order to protect human rights and the environment, and hinders their efforts to raise sufficient domestic revenue to provide this protection.

The responsibility to act in the face of climate change and other environmental crises rests with states. States, however, are shown to collaborate with corporate interests that view such action as a threat. This manifests as institutionalised and opaque corporate and state networks that go far beyond corporate sector lobbying and the pernicious ‘revolving door’. This can lead to such things as states granting concessions to mining projects that violate human rights standards, or the criminal justice system colluding with states to serve environmental defenders with trumped-up criminal charges. The result is corporate impunity, growing economic inequality, and environmental destruction. Corporations are out of control, and people and the planet are suffering. A new economic model that does not incentivise the externalisation of costs, and which allows for more participatory decision-making, is no longer an ideal but a necessity. People must have more influence over decisions on economic investment, and how business activities are regulated. States need to prioritise public health and the well-being of people, environmental sustainability, and social justice.

2.1 The regulation of corporations: rights for businesses, rules for people

“The intended implementation of the UN Guiding Principles on Business and Human Rights in the national systems of law and policy could and should have led to a more holistic debate on the regulation and governance of business, but this has not been realised. Accordingly, none of the policy movements of the last decades on the governance and social impact of business has succeeded in providing sufficient answers to how to shift business off the path of business as usual and onto a sustainable path. The recent reinvigoration of the debate of the role of law, including notably company law, gives hope for a broader regulatory debate.”

Beate Sjøfjell, 2016¹⁶

2.1.1 The 45-year battle for a binding international instrument

In the 1970s, developing countries – many of which had recently freed themselves from colonial rule – and civil society activists from all over the world called for a New International Economic Order and for binding rules for international corporations to address abusive and unfair business practices and safeguard labour and environmental standards. Directly inspired by TNC involvement in overthrowing the democratically elected Chilean president Allende, the United Nations Economic and Social Council (ECOSOC), under resolution 1913 (LVII), took the initiative to draft an international code of conduct and set up the United Nations Centre on Transnational Corporations (UNCTC) to carry out this intergovernmental normative work. During the 1980s, several attempts were made by the United Nations (UN) to draft intergovernmental codes relating to specific products: for instance, the 1985 “Code of Conduct on the Distribution and Use of Pesticides”.¹⁷

Transnational corporations and their home states (the countries in which they were based) resisted any binding code, and devised the counter-strategy of drafting and promoting non-binding standards, which became the OECD Guidelines for Multinational Enterprises, adopted in 1976. A set of UN environmental recommendations for TNCs, drafted by the UNCTC, failed to be adopted at the Rio Conference in 1992, and OECD states prevented an agreement on the UNCTC's Draft Code of Conduct for Transnational Corporations the same year; leading to the UN General Assembly abandoning the UNCTC as a separate entity. It became a commission of the Trade and Development Board in 1994. Deregulation, rather than regulation, was encouraged by leading global North states, and the new commission's role was defined as promoting *"investment regimes and enabling environments so as to attract more foreign investment and support for enterprise developments, thereby contributing to economic growth and development of host countries"*.¹⁸ By the early 1990s, various regulatory initiatives proposed by the UNCTC were abandoned as states marginalised the UN as a global standard-setting body on business and human rights. The OECD Guidelines became the international standard.¹⁹

The UN, whose actions are outcomes of governmental positions and international power relations, changed course, shifting from designing a binding code of conduct to voluntary initiatives in cooperation with the private sector. This led first to the UN Global Compact, and then to the appointment of a Special Representative for Business and Human Rights in 2005 with a mandate to draft UN Guidelines. This resulted in the Protect, Respect and Remedy Framework, outlining the duties and responsibilities for states and businesses to address business-related human rights abuses. This was endorsed by the UN Human Rights Council in 2011, and became known as the United Nations Guiding Principles on Business and Human Rights (UNGPs).²⁰

The UNGPs, which have been integrated into the OECD Guidelines, reflect international consensus on the reforms necessary to achieve corporate accountability, especially in relation to human rights due diligence. But the UN Guiding Principles, just like the OECD Guidelines, lack the binding force and supervisory mechanism needed to implement real change. There has been an ongoing debate on the non-binding nature and effectiveness of the UNGPs among academics and activists.²¹ The clear failure of voluntary codes and corporate self-regulation in safeguarding human rights or the environment has led to a renewed demand to put in place binding rules. To be effective and have a deterring effect, these must include international accountability mechanisms with powers to impose large fines, revoke licenses to operate; and imprison senior management for criminal complicity in human rights abuses, including within their supply chains. Indeed, states' obligations to ensure corporate accountability already exist in international law, but they lack enforcement mechanisms and effective national implementation.²²

The move towards a globally binding instrument gained renewed political support in 2014, after decades of international campaigning for corporate accountability, when the UN Human Rights Council set up an intergovernmental working group²³ to establish an "international legally binding instrument on transnational corporations and other business enterprises with respect to human rights".²⁴ Increasingly, existing human rights instruments are also interpreted by authoritative bodies (such as the UN Committee on Economic, Social and Cultural Rights and the Council of Europe) as directly binding for states with regard to regulating corporations. Specifically, states are instructed to interpret human rights law as obliging them to provide access to remedy; to require corporations to disclose information; and to hold parent companies responsible for violations committed by subsidiaries and subcontractors.²⁵

Corporate accountability should be more effective at the national level, where states have clear obligations and means of enforcement, but there are currently barriers, which are explored in more detail in Chapter 3.²⁶ As a result of concerted national campaigning to lift these barriers, some European states have started implementing some binding rules for corporations at national level.²⁷

The issue of human rights and environmental impacts in state-owned enterprises (SOEs) has become subject to debate in relation to the UNGPs and a globally binding instrument. Although SOEs have been a permanent part of the economy in many States, the proportion of SOEs among globally active corporations has grown, as countries like China, Brazil, and India expand their state-led investments and state development banking.³⁶ The rise of what has been termed “state capitalism” and state shareholders is addressed in a number of international frameworks, such as trade agreements, but “*the various legal regimes seem to be missing one key element, namely, international human rights law*”.³⁷ While there may remain ambiguities under international law as to when businesses have “state-like” human rights duties, “*what is beyond doubt is that all SOEs, in their variety of forms, have a responsibility to respect human rights*”.³⁸

Apart from demanding binding frameworks, civil society is also criticising policy incoherence in corporate regulations. There are regulatory frameworks that support unhindered private activities, with damaging consequences for the public interest. These are corporate law, the principle of shareholder maximisation, and an international economic framework of bilateral trade, tax and investment treaties. These frameworks, examined in the following sections, liberalise international trade and investment, limit space for policy in the public interest, limit the liability of corporations for violations they commit, and grant far-reaching rights to investors worldwide.

Box 1: Binding national business and human rights laws and proposals

Switzerland, by means of a people’s referendum, is considering a proposal to enact legislation to compel Swiss-based firms to undertake mandatory due diligence in all their activities abroad and to become liable for human rights abuses and environmental violations caused abroad by companies under their control. This provision will enable victims to seek redress in Switzerland. The “Responsible Business Initiative”²⁸ will be put to people’s vote in 2018/2019.

In May 2017, **the EU** passed legislation requiring importers of tin, tantalum, tungsten and gold to carry out human rights due diligence in accordance with the five steps required under the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.²⁹ However, the way in which the law is to be enforced has been entirely left to member states, and it is unclear whether or how this will work in practice.

In March 2017, **France** imposed a ‘duty of vigilance’ on large French companies to prevent environmental and human rights harm caused by their subsidiaries and other business relationships.³⁰ This law – the first of its kind – requires companies in many sectors to design, implement and account for measures to identify, prevent and address human rights risks and impacts in their global operations. Crucially, it facilitates access to remedy by establishing that human rights harm resulting from a lack of vigilance as prescribed by the law can be invoked before a French civil court to seek compensation.

In February 2017, **the Netherlands’** House of Representatives approved a law requiring companies to set out measures to combat child labour in their supply chains. This law is pending approval by the Senate.³¹

In 2016, the Green Party in **Germany** tabled a proposal in parliament under which German companies of a certain size operating directly or through subsidiaries in a high-risk sector or area would be required to conduct human rights due diligence to identify and address any risks of contributing to human rights abuses.³² The government’s majority in parliament rejected the motion, but civil society organisations continue to promote it.³³

In 2015, **the EU** adopted a Directive on the disclosure of non-financial information which includes a requirement that target companies describe their human rights policy, due diligence processes, principal risks to human rights, and management of those risks.³⁴

Also in 2015, **the UK** adopted the UK Modern Slavery Act which requires that target companies carrying out business in the UK report on steps taken to ensure that slavery and trafficking are not taking place in their own businesses or supply chains.³⁵

2.1.2 Corporate law and the purpose of the corporation to maximise profits

“Corporation, n. An ingenious device for obtaining individual profit without individual responsibility.”

Ambrose Bierce, *The Devil's Dictionary*

The law provides individuals and companies with the right to create companies, which can take a number of different forms, the most common being a separate legal entity with limited liability. Corporate law today allows for the separation of the personality of a corporation from the personalities of its shareholders (often termed corporate personhood) and protects owners and directors from being personally liable for the company's debts and other obligations.³⁹

These corporate law principles of freedom of incorporation, limited liability, corporate personhood and the separate legal entity principle have been exploited by TNCs to avoid accountability and liability.⁴⁰ They enable TNCs to shop for incorporation, choosing jurisdictions with low levels of regulation, even if they do no business there. Importantly, regulatory shopping is enabled by the absence of laws that would recognise the separate entities that make up a TNC for what they really are – a unified corporate group linked by ownership and management relations.⁴¹

The result of these corporate principles, and the lack of recognition of a corporate group in law, is that shareholders and CEOs enjoy practical immunity when it comes to legal responsibility for business activities harming the environment, workers or communities. They have also enabled massive tax avoidance and evasion, leading to annual public revenue losses of billions of Euros worldwide (see section 2.3.1 below for recent estimates).

At the heart of corporations' failures to take into account and respect people and the planet, is the erosion of the original principle that corporate activities should serve the public good.⁴² The purpose of incorporation has been debated since the inception of the concept, and initially the formation of a limited liability company with a legal personality separate from its owners was restricted, with the state determining which activities it would allow that privilege. Especially from the 1970s onwards, a constant and relentless lobby by corporations and the so-called Chicago School of economic thinking narrowed down the purpose of corporations to solely maximising shareholder value.⁴³ Together with the principles described above this has led to a situation whereby shareholders, managers and even the legal entity itself can use legal and political structures to their advantage

to lower their risk of penalties when polluting or exploiting workers to maximise profits. The legal underpinnings of large publicly-held companies therefore allow for the prioritisation of self-interest, short-termism and externalisation of costs, and discourage social behaviour and long-term benefits. If corporate conduct is to change, the economic sector must be subordinated to the broader and long-term interests of people within ecological boundaries.

The case of Exxon: Fossil fuel companies knew of climate change but prioritised profits

Fossil fuel companies willingly and knowingly chose profit over people and the environment for decades, risking the lives of millions and irreversibly altering our climate. Exxon commissioned peer-reviewed research and was aware, as early as the 1980s, that climate change was caused by fossil fuel emissions and that it had to be addressed to avert “catastrophe”. Instead of taking steps to reduce carbon emissions, the company misled the public, shareholders, and governments to protect its profits.

2.1.3 International trade agreements and tax and investment treaties

There are currently thousands of bilateral and multilateral free trade agreements, bilateral tax treaties, and investment treaties collectively in force.⁴⁴ These provide foreign investor companies with the kind of protection never granted to individuals or any other group in society. Investment protection rules create far-reaching property rights and the opportunity to sue states that ‘violate’ these rights by implementing policies to protect the public interest and the environment.⁴⁵ Unlike victims of human rights abuses, companies suing states do not have to exhaust local remedies but can go directly to international arbitration – under Investor-State Dispute Settlement (ISDS) systems enshrined in treaties – and demand millions, sometimes billions of Euros in compensation.

Economic treaties are generally binding and highly enforceable. This is in contrast to corporate accountability frameworks that are often ‘soft law’ instruments not enforceable in a court or by law. Environmental and human rights treaties also lack the kind of international enforcement mechanisms put in place for investment protection.⁴⁶

Trade and investment agreements that prohibit the regulation of trade and capital flows force states to adopt policies that favour commercial activities over human rights and the environment. They impose rules and obligations to liberalise tariffs, deregulate

and open up markets for goods and services. This creates conflicts between trade and investment agreements and human rights.⁴⁷

Even though states are obliged to identify any potential conflict between their obligations under human rights treaties and under trade or investment treaties and “*refrain from entering into such treaties where such conflicts are found to exist*”,⁴⁸ there is no coherent practice in international law establishing a hierarchy between human rights and trade, tax and investment agreements.⁴⁹

Finally, the continued failure to reform the international tax system and abolish tax havens (which are typically dependencies of OECD countries), combined with states competing for foreign direct investment by lowering taxes, is leading to the erosion of public finances worldwide. Corporations are free to use letterbox companies in tax havens to shop for low regulation and low tax rates. Tax treaties, which allocate taxing rights between signatory states on income from cross-border investments, restrict the rights of states to tax income at source. Because of unequal investment relationships, complex systems of allocating profits to jurisdictions, and a lack of enforcement, taxation treaties disproportionately affect the taxing rights of poor countries, but also lead to significant losses in OECD countries.⁵³ The system also leads to large corporations amassing huge profits offshore,⁵⁴ leading to financial speculation, systemic financial risks and economic inequality.⁵⁵

The case of Glencore: Using tax havens to reduce tax bills

The Paradise Papers exposed that Swiss-based Glencore diverted millions of dollars through tax havens and fought off lawsuits and tax bills. Two of the most prominent illustrations that are provided by the leaks are Glencore operations in the Democratic Republic of Congo (DRC) and Burkina Faso. The use of subsidiaries in tax havens deprives people of tax revenue that could be used to fund schools, hospitals and other essential services.

Box 2: Negative impacts of tax, trade and investment agreements on human rights

Lowering tariffs, awarding high levels of compensation to foreign investors as a result of ISDS cases, and restricting states' right to raise taxes limits what states can spend to fulfil human rights such as education, housing, and the provision of other public services.

Such agreements limit the policy options for states to develop rules and regulations aimed at respecting, protecting and fulfilling human rights. Furthermore, the threat of foreign investors suing a country for imposing public policy that impacts (future) profits risks halting or rolling back public policy making. This is known as **regulatory chill**. **Chevron**, for instance, is reported to have lobbied for the inclusion of ISDS in the Transatlantic Trade and Investment Partnership (TTIP) negotiations as an ‘environmental deterrent’ that would give foreign investors the legal right to challenge government decisions.⁵⁰ Some companies have used international treaties to **avoid punishment** after they were accused or convicted of environmental crimes and corruption. To give some examples exposed by investigative journalist Chris Hamby:⁵¹

A Dubai real estate mogul and former business partner of Donald Trump was sentenced to prison for collaborating on a deal that would swindle the Egyptian people out of millions of dollars, but then he turned to ISDS and got his prison sentence wiped away.

In El Salvador, a court found that a factory had poisoned a village, including dozens of children, with lead, falling for years to take government-ordered steps to prevent the toxic metal from seeping out. But the factory owners' lawyers used ISDS to help the company avoid a criminal conviction and the responsibility for cleaning up the area and providing needed medical care.

Two financiers convicted of embezzling more than US\$300 million from an Indonesian bank used an ISDS finding to fend off Interpol, shield their assets, and effectively nullify their punishment.

There is thus “*an urgent need to analyse the possible impact of the future investment treaty negotiations in environmental issues, both at a local and global level. The absence of explicit and comprehensive treaty provisions that enable the host States to pursue legitimate policy objectives, suggests that progressive realisation of environmental, economic or human rights policies can become a target for arbitration claims.*”⁵²

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TTIP/CETA Demonstration in Berlin Greenpeace activists take part in a demonstration against TTIP and CETA in Berlin. They join the huge national demonstration with umbrellas, banners, and white and green balloons reading "Stop TTIP!"



Box 3: 10 Principles on trade

Greenpeace has proposed 10 principles for trade. If these principles were adopted, trade agreements could stimulate a mutually beneficial race to the top for all parties concerned, rather than the present, destructive race to the bottom.

- 1.** Trade and investment agreements are transparently and democratically mandated, negotiated, agreed upon, and reviewed.
- 2.** Trade and investment agreements respect the Earth's planetary boundaries. They ensure the equitable, sustainable and responsible use of natural resources. By upholding the 'polluter pays' principle, they ensure that society does not have to pay the environmental costs of trade and investment.
- 3.** Trade and investment agreements actively contribute to sustainable development, climate change mitigation and environmental protection. They fully uphold international agreements such as the Paris Climate Agreement, the Convention on Biological Diversity and the Sustainable Development Goals, rather than undermine or ignore them.
- 4.** Trade and investment agreements define the precautionary principle as a legal obligation to protect public health and the environment, to be applied by all parties to the agreement.
- 5.** Trade and investment agreements enforce and guarantee protection standards for the environment, impacted communities, consumers and workers, health, and public services. They enable and ensure the continuous improvement of these standards.
- 6.** Trade and investment agreements distinguish between goods based on how they are produced or harvested and caught. They provide mechanisms to prevent the adverse impact of production systems on human and social rights and the environment. They also encourage the labelling and traceability of products, services and investments.
- 7.** Trade and investment agreements reinforce fair and equal access to justice and legal protection. Investors and corporations must respect the rights of communities, workers and the environment. Business entities do not have greater rights than others and must settle investment disputes in domestic courts. Public interest laws and policies are excluded from investment protection disputes.
- 8.** Trade and investment agreements explicitly recognise social and environmental regulations as necessary protection measures, not as barriers to trade. If trade and investment agreements encourage the harmonisation of existing and future social and environmental standards, they must ensure that this takes place in a democratic and transparent way.
- 9.** Trade and investment agreements take the specific needs of the Global South into account. They cannot be imposed on countries and communities against their will. They allow market protection measures to strengthen domestic economies and regulations to protect food sovereignty, biodiversity and cultural differences. Rules and regulations reflect a variety of development paths across different countries, and they offer policy flexibility, especially for the least developed countries and in defence of indigenous peoples and community rights.
- 10.** Trade and investment agreements and draft negotiating texts for such agreements are subject to independent impact assessments, evaluating effects on human rights, the environment, and social protection. Civil society organisations are consulted in a meaningful manner. The outcomes of impact assessments are taken into timely consideration to influence negotiating mandates, ongoing negotiations, or in the review of existing agreements.

Box 4: US tech firms, Google, Amazon, Facebook and Apple, capture global trade deals and threaten policy space

From 2013-2016 a group of governments (23 parties, including the EU) calling themselves 'The Really Good Friends of Services' secretly negotiated the Trade in Services Agreement (TiSA) as part of a broader strategy to deregulate the globalised economy, with a focus on large capital, information technology and digital platforms.

US tech companies were using TiSA to expand their international operations and protect themselves from foreign government regulation of e-commerce. This power grab, driven by the mega-corporations of Silicon Valley **Google, Amazon, Facebook, and Apple** (GAFA), has led to a new focus on electronic commerce in the US trade agenda. By 2010, GAFA had displaced the old industrial giants as the world's largest corporations, and their wish list for global rules became the US trade agenda in negotiating forums.

Only a handful of governments released their own negotiations proposals from the TiSA negotiations (which were put on hold in 2016), so analysis and critique has relied on leaked texts. Documents leaked to Greenpeace and Netzpolitik.org exposed GAFA and their allies in Coalition of Services Industries (CSI) as having privileged access to decision makers through lobby networks,⁶⁴ which civil society groups do not have.

GAFA wants TiSA to prevent national governments from regulating the digital domain and demands non-discriminatory market access for digital services, including for 'new services' that do not yet exist. GAFA lobbies for 'free flow of data', so that data can be offshored and stored "in any country, however weak its privacy or consumer protections or however intrusive its surveillance may be. Yet the corporations insist that their own source code be kept secret to protect their market power". GAFA wants a "'21st century agreement' that removes all barriers to their global expansion and profitability and puts handcuffs on national governments' rights to regulate, even when new services and technologies pose unforeseen risks" for people and the planet.

GAFA companies, with the exception of **Facebook**, also sell hardware in addition to being service providers. All of them have huge data centers and server parks and are heavy energy users⁶⁵. The TiSA Annex on Energy Services aims for further liberalisation of the energy sector, restricting the right to regulate needed to meet the Paris Agreement.⁶⁶

2.2 Why do states fail to act in the public interest?

Legal and political systems do not naturally strive towards an equitable outcome, but are rather a result of continuous struggles over power. *"Corporations have gained rights at least equivalent to those of citizens, but have avoided charges of criminalization of activities that would be deemed illegal when pursued by citizens"* the United Nations Conference on Trade and Development (UNCTAD) wrote in its 2017 Trade and Development report.⁵⁷ The wave of neo-liberal policy making in the 1980s marked both the retreat of the state from regulating economic activities in the public interest and an attack on public control over decision-making. This was pushed by economically powerful states demanding that poorer countries liberalise their markets and loosening restrictions and regulation of foreign investors.⁵⁸ Privatisation, deregulation and the related decline in state provision of public services *"has weakened the leverage of civil society on political institutions"*⁵⁹ This marginalisation was accompanied by a shift of decision-making out of public sight, increasing corporate influence.⁶⁰

2.2.1 States place transnational corporations above people

"But there will be no trial, no executive will go to jail, the banks can continue to gamble in the same currency markets, and the fines – although large – are a fraction of the banks' potential gains and will be treated by the banks as costs of doing business."

Robert Reich, 2015⁶¹

Increasingly captured by business rather than guided by public interest, states liberalised the economy and deregulated international trade, leading to a concentration of transnational corporations and an increase in their power. States and their institutions transformed their own role into that of facilitating international investment and the agendas of large corporations. Rather than the nation-state disappearing, a structural link solidified between nation-states, large corporations, and the institutions protecting the free market model, such as the World Bank, the International Monetary Fund (IMF) and the OECD. This process is visible in the negotiation of international trade agreements outlined above, and in all policy processes where decision-making is done by representatives of all these entities (businesses, think tanks, lobbyists, advisors and policy-makers) rather than through public participation.

Formal sovereignty of states over resources still plays a crucial role in the creation of global markets. Yet nation-states often do not have real control over the use of those resources and the distribution of the benefits derived from them. This is particularly common in the global South where most of the world's resources are located. Yet the nation-states of the global North dictate investment conditions through trade and investment agreements. This undermines not only their own but also poorer countries' democratic steering capabilities and thus the ability to protect and fulfil human rights.⁶²

The power of the corporate lobby is a significant factor in the failure of states to regulate in the public interest. Corporate lobbying has effectively moved areas of policy making from the public to the private sphere. Public-private partnerships have created shared interests between corporations and governments, even when they operate at the expense of the public. And corporate influence over regulatory processes has weakened standards, leading to lost lives, environmental damage, and the loss of policy space, the latter being particularly evident in trade deals.

The case of Volkswagen (VW): Dieselgate exposes corporate lobby against environmental regulation and its enforcement

The emissions scandal, often referred to as Dieselgate, revealed that VW had installed 'defeat devices' in about eleven million cars, causing their NOx output to meet US standards during regulatory testing, but to emit up to 40 times more NOx in real-world driving. This scandal also exposed how the European Commission and Member States "turned a blind eye to industry-wide abuse of the system for emissions regulation, and as part of the 'Better Regulation' agenda even invited the car industry to shape regulation as well as its enforcement."⁷³

In recent decades public-private partnerships (PPPs) have become one of the main ways in which public goods and services are provided.⁷⁴ The World Bank and private industry began pushing PPPs after failed experiments with water privatisation in the 1990s made privatisation politically unpopular, leading to high profile conflicts in major cities, such as the Cochabamba "water wars"⁷⁵ in Bolivia. State institutions are increasingly made up of private parties, with businesses allocating public resources based on profit rather than on environmental sustainability or economic redistribution. Investigations have shown how these partnerships are to the detriment of the public good whilst increasing private wealth. Examples abound,

ranging from a privatised hospital in Lesotho swallowing up a quarter of the country's health budget, and motorways that nearly bankrupted the Portuguese government,⁷⁶ to India's Nagpur water privatisation case.

Nagpur's World Bank-backed PPP gained international notoriety after years of campaigning and local resistance,⁷⁷ as this water PPP led to "shutoffs, skyrocketing bills, poor service, and lengthy project delays – common outcomes of water privatization", whilst "the corporate 'partner' – a **Veolia** venture – is being paid more than double what it would cost to run the system publicly, despite not contributing any capital investment."⁷⁸ The World Bank's private sector arm, the International Finance Corporation (IFC), quietly sold its stock (worth US\$160 million) in the company after the campaigns.⁷⁹

Closed policy making and public-private partnerships result in powerful governments abusing international fora to advance corporate agendas, with the result that policies aiming to tackle climate change and promote sustainable development are sabotaged. This is especially evident at UN level. Greenpeace research from 2011⁸⁰ showed how carbon-intensive industry is preventing effective climate legislation, with "a handful of powerful polluting corporations exerting undue influence on the political process to protect their vested interests." These include **Eskom, BASF, ArcelorMittal, BHP Billiton, Shell** and **Koch Industries**, as well as the industry associations that they are members of. The UN Framework Convention on Climate Change (UNFCCC) makes no distinction between civil society groups and industry groups and has no policy on conflict of interest. This means corporate lobby groups funded by the fossil fuel industry can participate in UNFCCC meetings. Indeed, groups such as the US Chamber of Commerce, the Competitive Enterprise Institute, Business Europe, and Japan's business association Nippon Keidanren⁸¹ have spent hundreds of millions of dollars obstructing action on climate change.⁸²

Finally, the issue of human rights and environmental impacts of state-owned enterprises (SOEs) has come to the fore (see also section 2.1.1 above), as their performance "is mixed, with reported cases of corruption and lack of transparency, and harm caused to workers and communities throughout SOEs' operations."⁸³ In 2016, the UN Human Rights Council found that "these human rights impacts – and the duties of States to protect against them – remain largely ignored." There is evidence that state ownership can serve "to shield these companies from their

Box 5: From lobbying parliaments to capturing presidents

In Brazil, the relaxation of anti-slave labour rules and environmental regulation have been linked to the lobby of agribusinesses, which is said to control “over 200 of the 513 seats in the lower Brazilian house, and play a central role in maintaining [President] Temer in power.”⁸³ President Michel Temer reduced fines for environmental crimes and tried to relax the definition of slave labour, and he avoided facing trial on corruption charges after surviving a key vote in parliament.⁸⁴

In Europe, companies, trade and lobby organisations representing business interests employed 632 full-time equivalent staff in 2016. This figure outnumbers non-governmental organisations (NGOs) and unions in the European Parliament by 60%.⁸⁵ One of the major outcomes of corporate lobby in Europe, backed by some €99 million in reported corporate spending, is the EU’s ‘Better regulation’ agenda,⁸⁶ which depicts state regulation of businesses as a burden rather than a public necessity. The European Trade Union Confederation argues that the agenda in essence is a deregulation agenda aimed at dismantling European social policy, and that it provides no evidence to show that any potential cost-savings for business by cutting so-called red tape would be invested in innovation and the workforce.⁸⁷

human rights responsibilities and in some cases facilitate the abuse of rights when these companies are operating outside of their national jurisdictions.”⁸⁹ Human rights defenders have been killed or threatened when protesting against harmful impacts of state-owned enterprises.⁹⁰ At the same time, being state-owned, these companies also have distinct obligations flowing from international human rights treaties, and some countries have introduced special obligations for SOEs.⁹¹

The case of Rosatom: how state-owned companies can enjoy state protection and corporate impunity

The Mayak nuclear complex, now run by Rosatom, Russia’s state-owned nuclear corporation, was the site of the third worst nuclear disaster in history. Yet radioactive waste management continues, with around 5,000 people living in direct contact with the highly polluted Techa River and on contaminated land. The most recent known major discharge of liquid radioactive waste into the river took place in 2004 and was the subject of a criminal case. Despite Mayak’s Director being charged and the court recognising the unauthorised release of radioactive substances, he was given amnesty on the occasion of the 100th anniversary of the State Duma of the Russian Federation. In this context of a state-owned corporation, the court system could not act independently, leading to corporate as well as state impunity.

о. ТЕЧА



Radioactive Sampling from the Techa River near Mayak Complex Radioactive sampling from the Techa River. In July 2017, Greenpeace experts took water and fish samples from the Techa river near Mayak complex in Russia. The results show high levels of strontium-90 in the water. High activity of strontium-90 was found in the fish samples, and its traces were detected in meat and vegetables. The analysis of samples shows that the level of contamination is approximately the same in the village of Muslyumovo where inhabitants were resettled to a nearby area claimed by Rosatom to be safe, as in other villages located on the Techa banks and that were not resettled.

2.3 The result: economic inequality and corporate impunity

“By bringing wealth back into the discussion, Piketty has revived Adam Smith’s political economy aphorism (borrowed from Thomas Hobbes) that wealth is power, and – by implication – that an increasingly unequal distribution of wealth is likely to skew political power, and with it, policy design in favour of those at the top of the income ladder.”

UNCTAD (2017)

The outsized corporate influence in political decisions against regulating economic activity in the public interest is leading to massive revenue losses for states and major profits for corporations. These are not reinvested in productive activities or used to pay decent wages or for environmental protection, but rather kept offshore and used for financial speculation. The resulting inequality is recognised even by mainstream institutions such as the IMF as a threat to the global economy. Moreover, this dynamic of lack of regulation and corporate capture is leading to a vicious cycle, whereby corporations become ever more powerful, increasing their influence on policy processes, which in turn leads to more deregulation.

2.3.1 Tax losses and inequality due to profit shifting and tax evasion by TNCs and global elites

A number of studies have estimated the size of revenue losses incurred by states due to international tax avoidance and evasion. The **Lux Leaks**, **Panama Papers** and the **Paradise Papers** revealed how corporations and individuals hide money, avoid paying taxes, and evade rules and regulations, all with the knowledge of states, who fail to take action. Indeed, instead of intervening to end these harmful practices, many countries compete with each other to attract companies and wealthy individuals into their jurisdiction. Cities and states across North America, for instance, are offering **Amazon** billions of dollars in tax breaks and other subsidies in a bid for the

company’s location of its second headquarters. In Nigeria, oil giants **Shell**, **Total** and **Eni** have received US\$3.3 billion in tax breaks in connection with the country’s largest gas extraction project (even though these investment decisions are necessarily location-bound). **Shell** received the largest chunk of the tax breaks, totalling \$1.7 billion.⁹³

The value of these corporate commitments to states that offer these tax breaks is dubious. Studies consistently show that the promised jobs are not created, and that those that are, especially by TNCs who relocate to poorer countries for manufacturing and services, are precarious and often do not provide a living wage. Once the tax breaks, which can last up to thirty years, come to an end, the companies leave, or threaten to leave unless more tax breaks are granted.⁹⁴ Investments by these firms are most often about “*maintaining the barriers to entry that give them extensive market power*”, i.e. preventing new companies entering into the market.⁹⁵ This leads to the absurd situation in which states pay out large subsidies but are left with a gaping hole in their public finances, and people are left with poverty jobs, whilst corporations siphon off profits offshore.

Research from 2017 suggests that corporate tax avoidance results in tax losses of US\$500 billion every year.⁹⁶ UNCTAD estimated in 2015 that developing countries lose US\$100 billion annually in tax revenues owed by TNCs, solely from their use of tax havens.⁹⁷ Profit shifting by US-headquartered transnationals alone resulted in some US\$130 billion of revenue losses in 2012, compared to just US\$12 billion in 1994, “*highlighting just how the scale of abuse has grown over two decades*”.⁹⁸ Not only corporations, but rich individuals also hide their money in tax havens: estimates of private wealth held offshore amounted to US\$7.6 trillion in 2013.⁹⁹ Recent estimates show that a staggering average of 10% of world GDP is held in tax havens globally, with an unequal geographical distribution (from a few percent of GDP in Scandinavia to 15% in Continental Europe and more than 50% in Russia, Gulf countries, and a number of Latin American countries).¹⁰⁰

States compensate for the tax losses related to this undeclared income with taxes on salaried workers and on consumption, leading to even more economic inequality. The most recent World Inequality Report¹⁰¹ shows a steady rise in income inequality in the world and since 1980; rapidly so in China, India, Russia, and North America.¹⁰² At the same time, there has been a general rise in net private wealth in recent decades, from 200–350% of national

income in most rich countries in 1970 to 400–700% today. *“This increasing income inequality and the large transfers of public to private wealth occurring over the past forty years have yielded rising wealth inequality among individuals.”*¹⁰³ The authors warn against a *“business as usual”* scenario and put forward progressive taxation and an end to financial secrecy as central reforms to end inequality:

The global wealth middle class will be squeezed under *“business as usual.”* Global income inequality will also increase under a *“business as usual”* scenario, even with optimistic growth assumptions in emerging countries. This is not inevitable, however. Tax progressivity is a proven tool to combat rising income and wealth inequality at the top. A global financial register recording the ownership of financial assets would deal severe blows to tax evasion, money laundering, and rising inequality. More equal access to education and well-paying jobs is key to addressing the stagnating or sluggish income growth rates of the poorest half of the population. Governments need to invest in the future to address current income and wealth inequality levels, and to prevent further increases in them.

Thomas Piketty et al., 2017¹⁰⁴

2.3.2 The vicious cycle: putting TNCs in charge means they grow and merge

“Firms in industries ranging from agriculture to airlines collude, merge and exclude rivals, and raise consumer prices above competitive levels, while pushing prices below competitive levels for suppliers. The aggregate wealth transfer effect from pervasive monopoly and oligopoly power is likely, at a minimum, hundreds of billions of dollars per year.

On top of enabling regressive redistribution in the marketplace, market power gives firms tremendous political clout. In a system with few campaign finance constraints and a revolving door between government and industry, large businesses have tremendous power over politics.”

Khan & Vaheesan, 2016¹⁰⁵

The lack of regard for the public interest when deciding on the regulation of business activities has led to a concentration of wealth and power in the hands of transnational corporations; inducing a vicious cycle by which growing wealth increases corporations’ hold over state’s decision-making, which in turn leads to the further concentration of wealth. Mergers and acquisitions have created corporations so powerful¹⁰⁶ they can dictate the economic affairs of states. From 1995 to 2015, market concentration increased steeply in terms of revenue, physical and other assets. The Economic Innovation Group found that *“widespread consolidation meant that, by 2012, the four largest firms captured at least 25 percent of the market in nearly half of all industries in the United States”*.¹⁰⁷ The world’s top ten corporations, which include **Walmart**, **Shell** and **Apple**, have combined revenues that are higher than those of the world’s 180 least rich countries.¹⁰⁸

Rather than an unintended outcome of otherwise sound economic policies, UNCTAD says in its 2017 Trade and Development Report¹⁰⁹ that states and corporations pursue active strategies to make knowledge scarce, using intellectual property rights to fend off competitors and commercialise nature and public knowledge. Large corporations, meanwhile, benefit from various forms of public subsidies to the detriment of the public.

The problems we are facing are systemic, so systemic reforms are necessary to reduce corporate power and regain public control over decision-making. The next chapter looks at barriers to justice when people affected by corporate misconduct try to seek justice.

Protest Against Violence in the Field in Brazil Greenpeace activists protest in front of the Brazilian Congress, demanding an official response and the end of impunity on murders and violence in the field. 251 crosses were taken to the Congress, standing for the 251 murders in the Amazon from 2007 to 2016. Valdelir João de Souza, the "Polish", is the owner of Cedroarana and G.A. sawmills and the responsible for the forest management plan next to where the Colniza Massacre happened. He's currently a fugitive from justice, but his sawmills keep shipping timber internally and for other countries. In the same day of the massacre, timber was sent to Europe and to the United States. The Blood-stained Timber report, launched by Greenpeace, shows how fraud in licensing (authorizing logging from protected areas) and production chain monitoring systems (identifying the companies that buy and sell timber from the forest to end users) further increase violence in the field.

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Josivani Amaral Gusmão

antos de Souza

Washington

Barriers to justice and remedies

Effective remedy and prosecutions of companies associated with environmental disasters, adverse health impacts, and human rights violations are rare. The best way to demonstrate the consequences of state failures to enforce human rights and to protect the environment is by charting people's struggle for justice. This chapter describes the numerous barriers people face when attempting to stop harmful corporate activities and remedy the disruption caused. This starts with those who have been impacted lacking information and resources in comparison to big corporations, even finding it difficult to identify accountable corporate parties.

Corporate law provides corporations with more rights than individuals, allowing them to obscure ownership structures and eschew liability (Barrier 1). Then there is the core problem of the lack of effective national legislation (Barrier 2). France is the only nation to require mandatory due diligence or corporate liability for environmental damage or human rights violations committed abroad. Large corporations can use the separate legal personalities of their subsidiaries and sub-contractors to avoid being held accountable in a court of law. Non-judicial mechanisms are generally only effective if the company is willing to change. A lack of enforcement even if rules exist is another

barrier to justice (Barrier 3). Police and prosecutors might not enforce rights due to a lack of evidence or capacity, or there might be corporate-state collusion. Enforcement of existing environmental standards or human rights frameworks might be undermined by trade and investment agreements, and mechanisms such as ISDS. Large corporations and state entities can also collude to repress legitimate protest, through so-called SLAPP suits, and if a court finally makes a decision in favour of the complainants, that decision might not be enforced. Last but not least, in cases that have a cross-border dimension, people seeking justice from a company may face specific legal and jurisdictional barriers in the country where the violation takes place and in the country where the company is headquartered (Barrier 4).

Only a paradigm shift in international and national corporate law, corporate liability, and justice systems can break down these barriers to justice. Detailed proposals have been made by academics and human rights and environmental organisations, many of which are referred to in this report. The following is not meant to be an exhaustive list of barriers, but rather takes a look at the systemic issues shown in the cases in the annex.

3.1 Barrier 1: Lack of information and resources to identify who is accountable

When people see the first signs of a project or are faced with adverse impacts on their livelihoods from business operations, it is important for them to know: *what is the project about and who is accountable? Who is responsible for the impacts? Which companies are involved and who is financing the operations?* The vast inequality in resources between large corporations and the people who must live with the consequences of their business activities forms a major obstacle to obtaining the right information and ensuring that procedures to protect their interests are followed. While TNCs “*have vast financial resources, establishments in several countries, and may have deep links into and influence over the State, victims are often poor, marginalised and under-resourced*”.¹¹⁰ This problem is recorded in a large number of cases, and also in this report.

Linked to this unequal power relationship between people and large corporations is the lack of resources people have when trying to defend their rights. The internationally agreed right of Indigenous Peoples to grant or withhold approval for actions through their free, prior and informed consent (FPIC), for instance, is regularly violated by corporations. This is particularly the case in natural resource extraction and land grabbing.¹¹¹

Holding corporations accountable for their obligation to conduct fair and impartial environmental impact assessments (EIAs) also requires resources, as these are highly technical documents. Corporations often downplay negative impacts by paying for ‘scientific evidence’ that is ambiguous and at a later stage proven inaccurate by other scientists; refuting these claims requires knowledge and resources.¹¹² EIAs are sometimes only accessible at the offices of the government agency that carried them out – which may even be in another country.

“Evidence rules may pose a significant stumbling block for plaintiffs in the absence of the equivalent of a disclosure rule obliging the defendant to divulge information in its possession.”

Skinner et al., 2013¹¹³

People who are affected by, and wish to bring a claim against, a TNC are often at a disadvantage to the company in terms of collecting relevant information and evidence to support their case. Many countries lack a formal right of pre-trial disclosure of documents. This fact, combined with the principle that plaintiffs must often prove technical aspects of the case, leads to an enormous disadvantage for those seeking justice in court. But information regarding the social and environmental impacts of the corporation’s conduct may not have been collected by either the state or the company, and as mentioned above, the company is not always obliged under the law to disclose relevant information to a case.

The case of Sudcam, Halcyon Agri: Indigenous people vs. corporate and state Goliath

Sudcam, a subsidiary of Singapore-based **Halcyon Agri**, is responsible for clearing more than 9,000 hectares of dense tropical forest in Cameroon to develop a rubber plantation, leading to widespread dispossession of community lands and resources, including those of Indigenous Baka people. Their right to Free and Prior Informed Consent was not respected, the process having been either poor or non-existent. Dispossessed people report they are left with minimum land to grow food to feed their families, while they have no access to alternative employment and authorities are reacting to community claims and actions with threats and intimidations, according to a number of reports and investigations.

Identifying responsible parties also requires time, financial resources, and access to tools such as the internet. Companies have complex ownership structures that need to be unpicked to identify the accountable legal entity. Accountability mechanisms could lie with the financiers of the project or corporation, and identifying them is not straightforward.

Corporate law compounds the difficulty faced by those seeking justice by separating the personality of a corporation from the personalities of its shareholders, and protecting them from being held personally liable for the damage caused by the company. Because companies can own other companies, parent companies can use the corporate veil principle to absolve themselves of responsibility for the harms caused or liabilities incurred by their subsidiaries. A typical scenario is a parent company being identified and contacted by a local community resisting a project. The parent company often argues that the operations are carried out by an independent subsidiary – a separate legal entity enjoying limited liability, acting in line with local laws and regulations. In the case of cross-border activities, the parent company argues that accountability lies with the legal entities and authorities in the country of operation. This is another legal barrier to justice, explained further below.

Box 6: The civil and criminal liability of corporations in law

The liability of corporations and the related damages or fines a company is ordered to pay depend on whether a case is brought to court under civil law or criminal law. Civil liability gives the right to obtain redress from another person or legal entity. It provides the ability to sue for damages for injury. This can be financial remedies, but also an order to prevent further harm from occurring. For example, a tort action can be based on harm suffered as a result of negligence.

In some jurisdictions, a criminal complaint can be brought to a public prosecutor. Corporate criminal liability is on the rise globally. Many jurisdictions have criminal sanctions against legal entities; other jurisdictions are contemplating introducing new legal provisions on this matter.¹¹⁴ In criminal law, corporate liability determines the extent to which a corporation as a legal person can be liable for omissions of its employees.

Types of liability

Joint and several liability: Each party is independently liable for the full extent of the injuries stemming from the offence.

Chain liability: When joint and several liability not only applies to the contracting party, but also to the whole chain.

Direct liability: Liability of an individual or a business on the basis of negligence or other factors resulting in harm or damage to another individual or their property.

Strict liability: Legal responsibility for damages, or injury, even if the person found strictly liable was not at fault or negligent. It has been argued that strict liability should also be introduced in the business and human rights framework because end users exercising due diligence has proven not to be an effective mechanism to stop rights violations in sub-contracting processes.¹¹⁵

3.2 Barrier 2: Lack of binding rules – and understanding of them where they exist

Once people affected have identified the companies involved in a damaging local project, they need to find out whether the companies are breaking the law. *Which legal frameworks apply in which situation, and how can they be enforced?* Corporations in most countries are not bound by hard law to ensure their business operations have no negative impact on people's lives and the environment. International environmental and human rights standards are not directly enforceable and not transposed into national law in every country or region. This makes it difficult for victims of corporate injustices to prevent projects that will violate their rights or seek remedy when they have suffered damages. These shortcomings in the regulation of business conduct also mean that there is insufficient regard at boardroom level for human rights and environmental concerns when it comes to high-level corporate planning. This is a vicious circle leading to increasingly irresponsible behaviour and more victims, because there are no consequences for directors or owners of companies.¹¹⁶

In an unjust twist of law, whilst due diligence is not implemented and enforceable in national law, limited liability is implemented and enforceable, and case law has consistently granted corporations the above-mentioned 'corporate veil'. No-one picks up the bill, because the parent company says the subsidiary is separate legal entity that made its own decisions.

The case of ACS Group (Grupo Cobra): hiding behind weak environmental and human rights enforcement abroad

Spanish infrastructure company **Grupo Cobra**, owned by the Spanish **ACS Group**, failed to conduct a proper due diligence process when it joined the construction of the Renace hydroelectric power project, thus becoming involved in environmental and social rights violations. COBRA denies responsibility by saying it was contracted by a Guatemalan building company that had a governmental permit to carry out the construction work, but due diligence entails assessing available information on potential ecological and social harm, also abroad. There is insufficient accountability of foreign companies subcontracted in countries with weak environmental and human rights standards.

In case of a subcontractor being responsible for violations, the lack of chain liability means that companies that outsource parts of their operations can avoid liability for damages incurred as well. An effective and enforceable chain liability system is a crucial precondition for tackling the abuses taking place in the subcontracting chains. Chain liability remains rare, however. Taking Europe as an example, there is currently no European mechanism of joint and several liability with regard to subcontracting. In 2012, only seven EU member states and Norway have implemented a system of general joint and several liability for certain aspects related to wages and/or labour conditions in their legal system.¹¹⁷ General joint and several liability systems are thus not common concepts, making it hard for communities to seek justice in outsourcing and subcontracting chains, which are common in TNC operations.

The case of Trafigura: using subcontractors to dump toxic waste

In a toxic waste dumping scandal in Côte d'Ivoire, the waste producer **Trafigura** maintains that it "did nothing wrong", denying responsibility for allowing the waste to be dumped, and describing the actions of the sub-contractor **Compagnie Tommy** as a breach of both the operator's licence and its contract. However, evidence suggests that **Trafigura** knowingly used a sub-contractor that was not equipped to handle hazardous waste, and that it should have been aware that the waste would be disposed of at a public domestic waste site. Due diligence requires thorough assessment of potential harmful impacts.

3.2.1 Non-binding frameworks are not an alternative to hard law

Companies involved in violations often have detailed Corporate Social Responsibility reports and might even rank high in lists of responsible investments. Given that binding rules are either absent or hard to enforce, people may turn to other, non-binding, soft-law instruments that the company says it complies with,¹¹⁸ to try to stop the operations or seek compensation. However, the process of filing a complaint can be time-consuming and

complicated. Grievance mechanisms exist at the project, company, sector, national, regional and international levels. They may directly address a company's behaviour and responsibilities, a government's obligation to protect people, or an institution's duty to comply with its policies and procedures. Grievance mechanisms also vary in objective, approach, target groups, composition, government backing, procedure and costs.

The OECD Guidelines for Multinational Enterprises established National Contact Points (NCPs) to promote adherence to the Guidelines and in 2000, these state-based offices began accepting complaints from people harmed by companies' noncompliance. OECD Watch's analysis of the first 15 years of NCP performance reveals weaknesses throughout the NCP system and found that the majority of complaints are unsuccessful, concluding: *"If you were an indigenous or community leader defending the rights of your community in the face of a large-scale extractives project and seeking to stop the violation and obtain reparation for the damage that has already occurred, where would you turn? Would you go to an NCP seeking that outcome? The conclusions of this report would counsel against it".*¹¹⁹

An evaluation of the functioning of factory-level grievance mechanisms in the electronics sector also revealed that most workers do not know how complaints are handled, and have limited knowledge about the different complaint channels. Overall, contract workers are treated unequally: in several cases they have no access to the existing grievance mechanisms. The high level of mistrust and the low percentage of satisfactorily resolved complaints demonstrate an overall poor performance.¹²⁰

3.3. Barrier 3: Lack of enforcement where binding rules exist

Some states have a binding regulatory framework governing corporate activity that may impact the environment or human rights. This might lay down that local communities must be consulted before a project is implemented, or require environmental and social impact assessments to be carried out before operations begin. Businesses might be obliged to obtain permits, for instance, before generating various forms of pollution, which require them to monitor and report on effluent, emissions and waste disposal practices.¹²¹ In practice, however, these rules might not be enforced.

3.3.1 Police and prosecutors do not enforce rights

Using the examples described in Barriers 1 and 2, the impact of the non-enforcement of binding rules can be explored. When people have identified which legal entity can be held accountable; established that the company is actually in violation of the country's environmental and human rights laws; documented the violations; and found a lawyer to help file a legal complaint against the company, they can go to the police. However, state authorities may not prioritise the investigation and prosecution of corporate crimes. Police may lack the expertise and resources to pursue this type of offence, or may face difficulties in collecting evidence, especially if companies are located in multiple national jurisdictions.

If the public prosecution receives evidence from the police, it may decide that the evidence is insufficient or that there are no legal grounds on which to prosecute. Sometimes police and public prosecution might lack capacity to respond to legitimate legal complaints. Transnational companies, however, are rarely effectively prosecuted under the criminal law in respect of transnational human rights violations. Capacity and enforcement in host states is a common problem, as case studies in this report show (see, for instance, **Glencore** in Peru or **Sudcam** in Cameroon). But Amnesty International also points to France, Germany, the US and the UK as countries requiring reform. State agencies in the Netherlands, for instance, complained of uncertainty around their mandates, and a lack of experience and skills.¹²²

The case of Trafigura: enough laws, yet no justice

Both **Trafigura** and the Dutch state had legal obligations relating to the illegal waste dump. The export of hazardous waste from the EU to African, Caribbean and Pacific states is prohibited under EU law, yet the Dutch authorities allowed the **Probo Koala** to leave Amsterdam with the destination of the waste unknown, and **Trafigura** decided to discharge the waste at Abidjan, Côte d'Ivoire. Several court cases for criminal prosecution as well as civil claims have taken place since the toxic waste was dumped, but they have not led to adequate settlements or criminal conviction. Following a €1 million fine and €367,000 settlement agreement, the criminal prosecution of the manager in the Netherlands, for instance, was withdrawn by the Dutch Public Prosecutor's Office.

Companies can also influence prosecution decisions and given the size and power of corporations, available sanctions under criminal law may be too low to be effective; the investigative authorities may also fail to pursue all potential routes to prosecute violations, or only prosecute low- or mid-level employees of the company so that senior officials and the corporate entity itself escape sanctions. In addition, prosecutions are often halted and/or persons are released from detention following the payment of settlements.¹²³

3.3.2 Human rights enforcement and environmental protection are undermined by trade and investment agreements

International trade and investment agreements narrow the policy space of states to regulate corporations in the interest of human rights and environmental protection, and offer corporations the chance to directly sue states, under Investor-State Dispute Settlement (ISDS) systems.¹²⁴ They demand millions and sometimes billions of Euros in compensation if they perceive that the host state has prevented them from obtaining profits by enacting environmental, health and safety policies. The secret nature of these private dispute settlements which occur outside the domestic legal system means that the amount awarded to companies is typically kept secret.

As described in the previous chapter, companies also use the ISDS system to avoid punishment for crimes committed. In El Salvador, factory owners responsible for poisoning villagers, including children, with lead after failing for years to take government-ordered steps to contain the toxic metal, used ISDS to avoid a criminal conviction, the responsibility for cleaning up the area, and providing needed medical care.¹²⁵

People may successfully spend years campaigning and fundraising to pay lawyers to invoke domestic regulations to stop a TNC's project from destroying livelihoods and creating irreversible damage. But TNCs can react by taking the country to this private and secret parallel tribunal, claiming billions of Euros in damages. States that may already have difficulties balancing budgets or effectively making policy in the public interest can find themselves under immense pressure to revoke any decision to stop operations.

The case of Gabriel Resources: when states rule in the public interest, companies sue them for damages

Since 1997, the Canadian mining company **Gabriel Resources** has pressured Romania to allow the construction of the largest open-pit gold and silver mine in Europe, the Roşia Montană Project. Due to strong lobbying and protests by local, national and international citizens and organisations, the project in Roşia Montană is currently on hold. Now Gabriel Resources is suing Romania for \$4.4 billion in an investor-state dispute settlement (ISDS) procedure because of Romania's alleged failure to issue the permits needed to operate the gold and silver mine in the historic Romanian village.

3.3.3 TNCs repress legitimate protest, sometimes in collusion with States

“Across the world, in both democratic and non-democratic states, many activists and social justice organizations face an increasingly repressive and securitized environment as well as unprecedented attacks on their legitimacy and security.”

Transnational Institute, 2017¹²⁶

Corporations, sometimes supported by state institutions, increasingly use legal means to criminalise and shut down protest and advocacy groups defending human rights and the environment. While large-scale corporate crimes fail to lead to criminal sentences, human rights and environmental defenders – including NGOs – increasingly face state and corporate efforts to silence critics of corporate impunity. Environmental and human rights defenders who challenge the destruction of their livelihoods and protect environmental commons face corporate and state campaigns that depict them as criminals and, in countries with higher levels of poverty, as ‘anti-development’.¹²⁷

Often, protests and rallies against damaging TNC activities are violently suppressed by companies or state authorities acting at their call. Sometimes prosecuting authorities may accept lawsuits from the company against the protesters under criminal law, thereby suppressing freedom of assembly.

As of July 2017, more than half of United Nations Member States – 106 countries – have taken action to restrict civil society,¹²⁸ including: “Laws governing the registration, functioning and funding of associations; defamation and blasphemy legislation that stifles the freedom of expression and opinion; labour and employment laws restricting the activities of trade unions and the enjoyment of other fundamental rights at work; restrictions on access to information of public interest; laws relating to the Internet and other information and communications technology services; laws on public morale; and anti-terrorism and national security legislation.”¹²⁹ The CIVICUS Monitor reports that globally just 2 per cent of the world’s population live in a country with ‘open’ civic space and that more than three billion people live in countries with serious to extreme restrictions on fundamental civic freedoms.¹³⁰

People who nonetheless speak out about corporate misconduct put themselves at risk. In 2015 and 2016, there were 450 documented cases of attacks against human rights defenders (HRDs) working on corporate accountability world-wide – most commonly in the form of criminalisation, murder, threats and other violence.¹³¹ Companies headquartered in Canada, China and the USA were connected with 25% of those attacks.¹³² Most attacks are related to the mining sector, followed by agriculture (including palm oil) and energy (including renewable energy).¹³³

The UN Working Group on Business and Human Rights recently noted that “there are increasing records of killings, attacks, threats and harassment against human rights defenders who speak up against business-related human rights issues, including the particular challenges faced by women human rights defenders”.¹³⁴ According to Global Witness, at least 200 human rights defenders protecting their land and environment were murdered in 2016, making it the deadliest year on record.¹³⁵ It is likely that these statistics are a gross underestimate, because many attacks are neither reported nor publicised. Victims are often farmers, villagers or trade unionists. In many regions, environmental and human rights lawyers face threats of death, arrest or physical harm when working on cases of abuses by companies.

The attacks are often carried out as assassinations with killers remaining unidentified, and they often follow threats by armed forces or private security forces connected to landlords and corporations. In some cases, protesters are

shot by police forces protecting corporate activities. The state can be directly responsible for the attack or it can fail to prevent or investigate them.

Corporations also use the legal system to directly and aggressively undermine the work of human rights and environment defenders. SLAPPs (strategic lawsuits against public participation) are one of several repressive mechanisms used against environmental and human rights defenders.¹³⁶ SLAPPs are “retaliatory lawsuits intended to silence, intimidate, or punish those who have used public forums to speak, petition, or otherwise move for government action on an issue.”¹³⁷ SLAPPs often take the form of libel or defamation claims. They move the public debate away from human and environmental rights issues that were raised by activists toward a litigious battle between two parties with vastly different financial resources, weakening human rights defenders’ abilities to carry on their work. This has been recognised in court, with one US judge¹³⁸ proclaiming: “Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent. Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.”

The case of Keskinöğlü: aggressive SLAPP strategies of Turkish poultry companies divert attention from unsustainable meat production

Greenpeace Mediterranean’s campaign asking the top-7 poultry companies in Turkey to adopt sustainable production methods was met by five companies first blocking public access to the campaign’s petition site and then one company, **Keskinöğlü**, filing a criminal lawsuit against the NGOs legal representatives (alleging a breach of the anti-competition articles of the Commerce Law). Another company threatened to sue Greenpeace Mediterranean and its campaigner. Although in September 2017, the judge ruled against Keskinöğlü’s allegations and cleared all four Greenpeace representatives of all charges, the SLAPP suit intimidated Greenpeace members, strained Greenpeace’s resources, and diverted attention away from the need for sustainable meat production.

The case of Resolute Forest Products: A new script for corporate SLAPPs

Giant logging company **Resolute Forest Products** has used SLAPPs to silence critics, both civil society groups and individual staff members of these groups. The company has also sued its own environmental certification auditor in order to keep an audit report from becoming public. A lack of applicable anti-SLAPP laws in some Canadian provinces and US states gives corporations a greater ability to advance SLAPP tactics.

3.3.4 Court decisions are not enforced

If people seeking justice have overcome all the barriers cited above, and if a judge rules in their favour, the journey still has not ended: the judgement must be enforced. If the defendant is the local subsidiary of the corporation, it might not have sufficient funds to cover compensation. In the worst-case scenario, the subsidiary will be declared bankrupt and dissolved before the plaintiff receives anything. Because of corporate limited liability, it is almost impossible for the plaintiff to go after the shareholders for damages.¹³⁹ And, under both judicial and non-judicial

mechanisms, there is a high chance that the sanctions, fines and damages do not reflect the gravity of the corporate crimes committed.

The case of Glencore: government overrules court decision on mine expansion

Glencore's McArthur River Mine is the largest open cut zinc and lead mine in the world, located in the belly of the sacred McArthur River in Australia's Northern Territory. It has been mined underground since the mid-1990's and expanded into an open cut project in the mid-2000s. Glencore has been accused of acting improperly with Indigenous groups in the area who have no legal say over the mine. The mine has long been opposed by the local Gurdanji, Mara, Garawa and Yanyuwa Peoples, who have major cultural and environmental concerns related to the mine. The mine expansion ploughed through the Rainbow Serpent Dreaming Site, which was of deep spiritual significance to local clan groups. The local groups challenged the open-cut/diversion in court and won, but the government passed legislation to overrule this, exemplifying that even after drawn-out and costly court battles, people might still not get their rights because the government overrules independent court decisions.



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Protest Against Violence in the Field in Brazil Greenpeace activists protest in front of the Brazilian Congress, demanding an official response and the end of impunity on murders and violence in the field. 251 crosses were taken to the Congress, standing for the 251 murders in the Amazon from 2007 to 2016. Valdeir João de Souza, the "Polish", is the owner of Cedroarana and G.A. sawmills and the responsible for the forest management plan next to where the Colniza Massacre happened. He is currently a fugitive from justice, but his sawmills keep shipping timber internally and for other countries. In the same day of the massacre, timber was sent to Europe and to the United States. The Blood-stained Timber report, launched by Greenpeace, shows how fraud in licensing (authorizing logging from protected areas) and production chain monitoring systems (identifying the companies that buy and sell timber from the forest to end users) further increase violence in the field.

3.4 Barrier 4: Legal obstacles to justice

Different corporate violations relate to different areas of law and thus create different barriers to justice. This section details some of the legal barriers that are typically identified with corporate accountability and transnational corporations. These start in the country where the violation takes place (lack of laws or their enforcement) and end in the countries where corporations committing violations are headquartered (jurisdictional barriers). In general, people defending their rights are disadvantaged in court because companies are not obliged to disclose the information they have. This could relate to management decisions and lines of control linking parent companies to subsidiaries, environmental impact studies or other information on negative impacts the management was aware of. Finally, even if all these barriers have been overcome, the judgement might still not be enforced, and the company can avoid paying damages by shifting financial responsibility to subsidiaries that are then declared bankrupt.

3.4.1 Barriers in the country where the violation takes place

In selecting the best route to justice, some difficult questions must be answered: *which courts, local or abroad, are fully equipped to rule on the complaint, and unlikely to be influenced by the company or politicians who have an interest in the project? Is there a likelihood of retaliation for filing a complaint? What protections will the mechanism or the institutions provide? Is outside help needed to compile an eligible complaint, and if so, how will communities find the necessary support?*

The legal framework itself may not be sufficient to provide the basis for a lawsuit. Under private or tort law plaintiffs sometimes have to demonstrate the intent of the company. Similarly, when corporations can be subject to criminal prosecution – which is not the case in all jurisdictions – the law typically requires the demonstration of a level of intent or willfulness by the corporation.¹⁴⁰ But how can the intent of a corporation be proven? It is generally not enough for one employee to knowingly break a law, unless that employee is a senior official in the corporation or acting with demonstrable approval from above.

The case: of DowDuPont: no justice in India for Bhopal victims

When claims of Bhopal victims were dismissed in the US on grounds of *forum non conveniens*, they tried seeking justice in Indian courts. The Indian case ended in 1989 with a US\$ 470 million settlement, far below most estimates of the damage at the time. An intervention filed on behalf of the victims before India's Supreme Court in 1988 had claimed that INR10 billion (around US\$ 628 million) was needed as interim relief alone. The settlement was also criticised for being negotiated without the participation of the victims. Survivors, civil society groups and others overwhelmingly rejected this settlement as utterly inadequate. The Supreme Court in India later reinstated criminal charges against **Union Carbide (UCC/UCIL)**. No conviction was forthcoming until June 2010, when a local court found UCIL and seven of its executives guilty of criminal negligence, sentenced them to two years imprisonment and a fine of about US\$ 2,000 each, the maximum punishment allowed by Indian law. The search for justice continues to this day. The 2017 **DowDuPont** merger between Dupont and Dow (since 2001 owner of UCC) is "set to add a complicated new layer to the corporate structure of UCC, making it harder still for victims to get justice".¹⁴¹

The Business and Human Rights Resource Centre tracks lawsuits against corporations for alleged human rights abuses. Of the lawsuits analysed, only 16% (37 of 227) involved criminal charges, even though many more of these cases involve gross violations of human rights. Of those 37 "only 13 ultimately resulted in penalties or remedy for the victims (prison sentences for perpetrators, compensation or settlement), and of these, five were criticised for being too lenient."¹⁴² In case these legal, political and economic barriers exist in host states, people might need to take the company to court in its home state, where it is headquartered; and where other barriers exist.

3.4.2 Barriers in the country where the company is headquartered

“... there is some measurable risk that the appellants will encounter difficulty in receiving a fair trial against a powerful international company whose mining interests in Guatemala align with the political interests of the Guatemalan state. This factor points away from Guatemala as the more appropriate forum.”

Garcia v Tahoe Resources, British Columbia Court of Appeal¹⁴³

Which country's courts ('forum') hears a case also has implications for people trying to bring cases to court, including issues of transparency, accessibility, legal costs, the value of compensation that may be awarded, and the capacity of the court to enforce its findings against the company. Whilst some of these implications might favour a home state court, it is difficult to enforce a state's duty to protect human rights beyond its territorial boundaries or its 'jurisdiction'. Cases where states assert direct extraterritorial jurisdiction over foreign subsidiaries of parent companies are rare,¹⁴⁴ as the traditional 'territory-based' approach to the enforcement of business and human rights standards leads to a fragmented system of regulation and governance gaps that fail to take into account cross-border activities of TNCs. The prospect of accessing justice in the countries where TNCs are headquartered can be just as challenging as it is in the host state.

The specification of home and host state responsibilities, and extraterritorial regulation, are essential to effectively prevent companies from abusing human rights in countries outside their state of incorporation. The development of laws with an extraterritorial dimension is therefore crucial to effectively prevent companies from abusing human rights in other countries. In recent years some important legislative changes have taken place to this effect.

For decades now, human rights lawyers, academics and UN bodies¹⁴⁵ have called on state parties to take legislative or administrative measures to prevent activities of TNCs registered in their country from negatively impacting on human rights in territories outside the country, whether by directly prosecuting corporate misconduct or providing victims with access to home state courts. The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association specifies that “[a]t a minimum, States of origin should ensure that victims of human rights violations have effective judicial remedies. Doing so also entails a monitoring responsibility to ensure that companies operating abroad adhere to international human rights standards.” The Special Rapporteur highlights that playing an important role in this regard are not only “States from the global North”, but also “Brazil, China, India, the Russian Federation and South Africa, where many of the companies engaged in natural resource exploitation around the world are domiciled.”¹⁴⁶ An often-cited regressive development with regard to victims' rights to access home state courts is the 2013 United States Supreme Court decision *Kiobel v. Royal Dutch Petroleum*, which “created a most significant barrier to accessing judicial remedies for human rights violations that occur in a host State.”¹⁴⁷

A significant barrier to justice related to *forum non conveniens* is the difficulty of holding the parent company liable for the actions of its subsidiary, because of the corporate law principle of separate legal personality, whereby the parent and its subsidiary are two distinct legal entities with separate liability:

The case of DowDuPont: no justice in home state US for Bhopal victims

Decades after the Bhopal disaster which killed 20,000 people, impacted half a million and contaminated the local water supply, victims have been unable to secure adequate justice or remedies from chemical giant **DowDuPont** and its predecessor **Union Carbide**, a challenge made greater by a series of purchases and mergers. **Bhopal** led to complex litigation in both India and the United States seeking to impose criminal and civil liabilities on then parent corporation **Union Carbide Company** (UCC) and its Indian-run subsidiary **Union Carbide India Limited** (UCIL). As the US-based parent controlled its Indian subsidiary UCIL, it made sense to sue in US courts: however, for victims this proved very difficult. In 1986, claims in the US were dismissed on grounds of *forum non conveniens*.

Despite the many examples of existing barriers to holding parent companies accountable, existing legal frameworks can nevertheless be used to do so. The former UN Special Rapporteur on the right to food points to the relevant domestic court decisions in Brazil, India, Namibia, South Africa and Uganda, and those from Australia, Canada and the United Kingdom “*in which TNCs were held responsible under tort law for complicity in human rights violations abroad.*”¹⁴⁸ Host states can sometimes also

hold parent companies abroad liable, as shown by two Norwegian court decisions. They found a Danish parent company (**Hempel AS**) responsible for, respectively, the costs of investigating the extent of pollution of a property its Norwegian subsidiary had previously owned, and for paying the clean-up costs. The courts even held the Danish parent company liable without any fault or transgression on the parent company’s side, as **Hempel AS** became the parent company of the Norwegian subsidiary after most of the pollution had taken place (thus caused by the subsidiary’s previous owners). Even though Hempel AS had no way of preventing the pollution from happening, the courts found parent company liability to be applicable in the case. Lacking a provision in environmental law for holding the parent liable for the subsidiary’s pollution, the courts in this case substantiated that a piercing or setting aside of the corporate veil of limited liability was justified.¹⁴⁹

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"Planet Earth First" Hot Air Balloon Drifts over Hamburg Greenpeace activists inflate a hot air balloon that presents their G20 campaign slogan: Planet Earth First. The balloon drifts over Hamburg as a symbol for civil protests during the G20 summit, to raise awareness on climate and energy as well as social inequality and democracy issues.



Corporate Accountability Principles

First they ignore you, then they laugh at you, then they fight you, then you win.

Mahatma Gandhi

Corporate environmental and human rights violations are not an inevitable aspect of our political economy. What social movements have been saying for years is now recognised by mainstream economists:¹⁵⁰ the governance gaps created by economic globalisation are not a natural phenomenon, but rather a political choice by policy makers, leading to instability and inequality. This means that effective state action could end corporate capture and close these governance gap.

The 21 corporate wrongdoing cases presented in this report show that corporate impunity for environmental destruction and human rights violations is a result of the current economic and legal system. States that are supposed to hold corporations accountable, are failing to protect human rights and the environment because of corporate capture of decision makers and state institutions, and the consequent refusal of politicians to implement binding frameworks.

Yet people all around the world and from all walks of life are demanding fundamental reforms. Millions demonstrated against secretive international trade agreements that placed corporate interest ahead of public interest. Environmental and human rights defenders worldwide continue to fight against pollution and for sustainable societies, despite the intimidation tactics of corporations and states.

The case of Grupo Bimbo: People campaigns make a difference

Public campaigning against the use of hazardous pesticides and lack of transparency in their supply chain led the Mexican transnational group **Bimbo** to commit to transitioning to more sustainable agriculture. In this case, people power achieved a degree of social and environmental justice in the supply chain despite shareholder primacy and a lack of home state accountability.

The common demand of all these struggles and movements is this: corporations need to be regulated in the public interest. States should respect, protect and fulfill the wishes and long-term interests of the public.

The following 10 Principles for Corporate Accountability are the key to ending corporate impunity:

1 People and the environment, not corporations, must be at the heart of governance and public life.

States should not only regulate but also revoke licenses to operate when corporations violate environmental and human rights standards.

Corporate law and governance statutes should be reformed to create public purpose corporations. For instance, the law should stipulate that management and owners should make decisions that take into account long term environmental and human rights impacts, the interests of the company's workers, and direct and supply chain impact on people and the environment.

TNCs should be treated in accordance with the economic reality that they operate as single firms.

Many detailed corporate governance reform proposals exist.¹⁵¹ They only need to be implemented.

Under the principle of a people-centred corporate governance...

... those running our economy would prioritise the long-term interests of people within planetary boundaries and thus set clear limits of legitimate economic activity. Certain parts of nature would be off-limits to industrial exploitation while fully respecting the rights of Indigenous Peoples. This system would respect the intrinsic non-monetary value of nature and people's basic rights (to clean air, water, food, shelter, health, education, etc.), and thus challenge the legitimacy of certain businesses as a matter of principle where they commodify nature

and by doing so accelerate environmental destruction and exacerbate social tensions and inequalities. Economic success would not be measured by the quantity of produced goods and services (GDP) but by the contribution of companies and organisations to the preservation of public goods and welfare.

Under such an economic model, more cooperative business models would develop, and climate change action would happen faster. The **Carbon Majors** that extract, produce and sell coal, oil, gas, cement, electric power and other raw materials would have to take into account long-term impacts of the fossil fuel industry. **Exxon** would have acted on the scientific studies it commissioned that proved the oil industry was a major contributor to climate change. Public purpose companies in the energy sector with a long-term vision of environmental sustainability would invest in alternative energy systems instead of promoting nuclear power and fossil fuel, realising a global shift towards 100% distributed renewable energy. Fossil fuels would be phased out in time to limit global warming to 1.5° Celsius. People-centred governance would also mean a closing and slowing down of rent-seeking economic activities and a move towards regulation of businesses in the public interest. Business models would be driven by more distributed ways of exchange and value creation. Cooperatives, user-owned platforms, peer-to-peer lending, and repairing networks, supported by new technologies, have great potential to collectivise ownership, democratise decision-making on investments, and enhance redistribution.

2 Public participation must be inherent to all policy making.

State institutions should be reformed to ensure that the public interest, rather than corporations, is the dominant influence on policy making.

Civil society's rights to free speech and assembly should be protected from SLAPPs and other forms of corporate repression.

States must respect Indigenous Peoples' right to free, prior, and informed consent (FPIC) for decisions that will affect their interests, including their right to say no.

If the principles of public participation, FPIC and free speech were enforced...

... new institutions and structures would be developed that are less hierarchical and more inclusive; structures that open-source knowledge, information and resources, distribute power, and decentralise

energy and food production. Public participation in decision-making would increase the accountability of governments. Corporations would be less able to influence policy and elections, making government interventions more beneficial to people and more likely to promote healthy and sustainable environments.

The Mexican federal authorities would not have granted **Monsanto** authorisation to grow genetically modified soybeans without first consulting the affected Indigenous communities, preventing the contamination of water with herbicides, deforestation, and negative impacts on local beekeeping. In this case, the Mayan communities fought for their right to self-sufficiency and traditional farming in the courts and won, showing the potential for people action.

Energy Transfer Partners would not have been able to impose the North Dakota Access Pipeline onto Indigenous communities in the United States, or use violent security firms and Strategic Lawsuits against Public Participation (SLAPP) to squash legitimate dissent. The concerns of the communities affected would be respected, making investment decisions subject to scrutiny beyond short-term gains, and include concerns for the long-term impact of oil extraction on climate change.

3 States should abandon policies that undermine environmental and human rights.

State should stop granting corporations (inter)national judicial protection through ISDS mechanisms and undue financial benefits through trade and tax treaties.

States should stop creating loopholes that enable legal tax avoidance, creating tax havens that deprive state coffers of much needed revenue.

If environmental and human rights guided all government actions...

... states would end their financial support and judicial protection to corporations pursuing harmful activities, companies would not be able to make ISDS claims on public interest laws and policies, and people would be supported by (inter)national frameworks in protecting their livelihoods and the environment. Companies would no longer have access to private corporate-friendly court systems where they can bypass domestic courts and sue governments for billions of taxpayers money in compensation for public interest measures.

Romania's policy choice to prevent an open-pit gold

and silver mining project destroying cultural and environmental sites at Roşia Montană would have been the end of the story. The Canadian mining company **Gabriel Resources** would not have been able to sue Romania for \$4.4 billion in an ISDS procedure.

Glencore could not demand US\$ 675.7 million in damages from the Bolivian government in an ISDS claim. The country's decision to retract mining concessions awarded under suspicious circumstances and nationalise them in the public interest would have protected the local population from the sell-out of their natural resources.

4 Corporations should be subject to binding rules both where they are based and where they operate.

States should not think that their environmental and human rights obligations are fulfilled after creating or endorsing guiding (voluntary) principles. Voluntary measures and self-regulation alone do not guarantee corporate liability or effective access to remedy for those affected by corporate misconduct and environmental harm.

States should support a globally binding business and human rights instrument to put an end to companies choosing which set of laws they follow, doing abroad what they would not be legally allowed to do at home.

With a globally binding business and human rights instrument and binding laws on the national level...

... corporations, their managers and shareholders, would be held accountable in a court of law if their companies violate human rights. Liability in practice would mean directors would be discouraged from engaging in harmful activities abroad and at home, and investors would divest from companies associated with unsustainable and unjust practices.

The existence of criminal and civil fines enforced by courts ruling on a claim made by affected communities would have deterred the Chilean company Ventisqueros, owned by the German **Schörghuber Group**, from dumping organic waste in the ocean, despite being given a governmental permit. Had company decision-makers been guided by environmental and human rights standards, they would not have considered this dumping as a viable option, thus protecting the local population and industry.

5 States should require due diligence reporting and cradle to grave responsibility for corporate products and services.

States should impose mandatory national human rights due diligence requirements on companies, to complement the United Nations Guiding Principles (UNGPs) with hard law. This means companies must identify risks related to their activities and relationships, and take steps to prevent infringement of the rights of others; and account for both sets of actions. This should include mandatory climate risk reporting.

Corporations must bear cradle to grave responsibility for manufactured products in line with Extended Producer Responsibility principles.

States should enforce specific environmental due diligence laws, requiring environmental management accounting, and environmental reporting which gives a clear, comprehensive and public report of environmental and social impacts of corporate activities. This means companies should be obliged to routinely disclose to the public all information concerning releases to the environment from their respective facilities, as well as product composition and upstream and downstream impacts. Commercial confidentiality must not outweigh the interest of the public to know the dangers and liabilities associated with corporate products and services.

States must implement the precautionary principle and require corporations to take preventative action before environmental damage or health effects are incurred, when there is a threat of serious or irreversible harm to the environment or health from an activity, a practice or a product. This includes requiring companies to undertake independent environmental and human rights impact assessments with public participation. Policies should take these impact assessments into account.

If companies were to report on and take responsibility for the harmful impacts of their products and services...

... home and host states would oblige corporations to prevent, control and remedy pollution generated by products in their transnational operations and downstream activities, as required by mandatory due diligence and Extended Producer Responsibility principles. **Nestlé**, a major single-use plastics producer, would have been forced to acknowledge and remedy the polluting impacts of unsustainable production of

single-use plastics on the planet's ecosystem. This could have reduced the estimated annual eight million tons of plastic trash that ends up in the ocean from coastal countries such as the Philippines.

The new mandatory due diligence laws in France are a hopeful step: they might stop the French company **Total's** plan to engage in risky offshore oil exploration close to French Guiana in the mouth of the Amazon river basin. On 28 August 2017, the Brazilian Environmental Institute Ibama rejected Total's environmental impact study for the oil exploration license as inadequate. According to the new due diligence principle, Total S.A. should be able to demonstrate that as a parent company it took all appropriate steps against such a risky project. If it cannot do so, the French mandatory due diligence law should forbid the company from starting this project.

6 States should promote a race to the top by prohibiting corporations from carrying out activities abroad which are prohibited in their home state for reasons of risks to environmental or human rights.

States should ensure that corporations adhere to the highest standards for protecting human and environmental rights wherever they operate.¹⁵²

States should promote a race to the top by prohibiting corporations from operating according to lowering standards in places where public health, safety and environmental protection regimes, or their implementation, are weaker.

With explicit rules stopping companies from exploiting lower environmental and social standards in poorer or weakly regulated countries...

... directors, managers and shareholders would think twice before outsourcing polluting activities to poor countries and externalise costs by undercutting decent working standards abroad.

Transnational oil trading company **Trafigura** would have internalised, not externalised, the costs for the treatment of the toxic waste it produced on board the Panama-registered vessel *Probo Koala*. Originally, the waste was brought to the Netherlands, but Trafigura turned down

the option to have it properly treated there because it considered the quoted price too high. The vessel would not have disposed of the waste in Côte d'Ivoire instead, by contracting a small, local company, described by Trafigura as "a recently licensed local operator" which took the waste to a municipal dump in Akouédo, a poor residential area of Abidjan. The waste would not have been dumped there and in other places around the city, causing up to 100,000 people to fall ill and, according to authorities, 15 dying from exposure to the toxic waste. "The biggest health catastrophe that Côte d'Ivoire has ever known" could thereby have been averted.

7 States should create policies that provide transparency in all corporate and government activities that impact environmental and human rights, including in trade, tax, finance and investment regimes.

States should pursue international economic agreements and institutional reforms that prioritise human rights and environmental sustainability over and above economic gain for corporations.

States should enact effective taxation regimes to make corporations contribute their fair share to public goods, and should end all subsidies for environmentally or socially harmful activities.

Corporations, in all legal forms and in all countries, should be obliged to provide detailed annual financial statements, including country-by-country reporting on assets, staff, sales, profits and tax payments for corporate groups.

States should enforce public registries providing beneficial ownership information on corporations, and end their support for financial secrecy jurisdictions and tax havens. Determining the responsible party and ultimate economic beneficiary of projects should be straightforward.

Regulations should require that all lobbying activity be conducted in an open and transparent manner. Corporate financial support for political parties should be strictly regulated.

If we had fair trade, tax, finance and investment regimes and public transparency of financial activities and ownership...

... human rights and environmental protection would be supported by international trade, investment and finance. Countries would retain policy space to protect their economies with sound macroeconomic and monetary policies whilst pursuing international economic solidarity by refraining from harmful tax competition and a race to the bottom. The public would have access to beneficial ownership information and tax payments by companies per country and, together with states, would ensure private actors pay a fair share towards society. With tax havens abolished, corporations could no longer hide behind opaque artificial legal structures and would be held accountable by people for harmful impacts of their business operations.

Miteni SpA's parent company **International Chemical Investors Group (ICIG)**, for instance, could not locate its headquarters in holding companies in low-tax jurisdictions and thus enjoy extremely low effective tax rates (between 3.19% and 13.3%). An increase in corporate tax payments would lead to higher public revenues, which people could demand to be used to improve essential public services.

8 Corporations and those individuals who direct them should be liable for environmental and human rights violations committed domestically or abroad by companies under their control.

States should ensure that corporations are liable for injury to persons and damage to people's livelihoods, biological diversity, and the environment beyond the limits of national jurisdiction, and to the global commons such as atmosphere and oceans. Liability must include responsibility for environmental cleanup and restoration. Specifically, this means that:

- Corporations, parent companies and subsidiaries, must be held strictly liable for damage arising from any of their activities that cause violations of rights laid down in international and national environmental and human rights conventions and laws, including site remediation.

- States must implement individual liability for directors and officers for actions or omissions of the corporation, including for those of subsidiaries.
- Corporate liability must be extended along the entire supply chain.

Under an effective director and parent company liability system...

... corporations and their directors would be discouraged from engaging in business activities with severe human rights implications and environmental destruction. Parent company and director liability would prevent severe human rights violations and provide victims of such violations with much-needed access to justice and remedy.

VW's CEOs would be tried in court for their knowledge of defeat devices misleading environmental authorities and the public, exacerbating harmful air pollution; the Dutch courts would have convicted **Trafigura's** director for his implication in the toxic waste scandal, and the Swiss-based pharmaceutical company **Novartis** would be held responsible for outsourcing pharmaceutical production to India, where related sewage and industrial emissions are creating bacterial 'superbugs', which are blamed for 700,000 deaths every year.

9 People affected by environmental and human rights violations should be guaranteed their right to effective access to remedy, including in company home states where necessary.

In addition to global and national binding corporate accountability rules (Principle 4) and liability for parent companies and directors (Principle 8), States should enact specific measures to ensure that all people have access to remedy in the most convenient forum for them. The Swiss Responsible Business Initiative, for instance, recommends that the proposed due diligence law itself would clarify that the due diligence responsibilities it establishes, "apply irrespective of the law applicable under private international law."¹⁵³

States should ensure that specific public funds are set up that support claimants in human rights cases, to balance the unequal (financial) relationship between people and corporations and thus ensure equality before the law.

With adequate access to remedy in host and home states...

... the legal system would support people in their quest for justice by offering various avenues towards remedy and financially enable people to address corporate wrongdoings.

If all communities and individuals had access to remedy in home states, US courts would have accepted the damages claim against (now) **DowDuPont** put forward by the families of the 20,000 Bhopal victims and many more affected by the biggest chemical disaster in history.

10 States must actually enforce the regulatory and policy frameworks they create.

States should adequately resource the enforcement of their laws and regulations. This includes giving strong support and direction to authorities to investigate corporate violations as a matter of priority, ensuring investigators and prosecutors understand how abuses by companies can amount to a rights violation in their legal system.

This means states should ensure there are adequate financial, technical and other resources to successfully investigate and prosecute corporate abuses, encouraging international cooperation and assistance directly with police and judiciary in relevant jurisdictions, including those where abuses are alleged to have been committed.¹⁵⁴

If our environmental and human rights laws were actually enforced...

... public health, respect for human rights and a livable environment would move beyond commitments on paper reality to become the norm.

The German government would deal with Dieselgate in a timely and appropriate manner, and would not have approved polluting **VW** models for the European market. Despite being told by VW that in the new Real Driving Emissions (RDE) tests cars would continue to exceed emissions by a factor of 3 to 5, the German authorities signed off the software fix. It has been two years since VW was caught cheating on emissions tests, yet its polluting diesels are still rolling onto Europe's roads. Effective enforcement would prevent higher levels of air pollution and its potentially irreversible impacts on our health. An MIT study showed that VW's excess emissions will lead to 1,200 premature deaths across Europe, because it produced nearly 1 million tonnes of extra pollution across the continent.

Effective national and regional enforcement by public authorities and the judiciary would have prevented **ICIG**, from releasing hazardous chemicals associated to cancer in humans into the Italian water supply, impacting at least 350,000 people. Moreover, it would have led to effective cleanup operations and the recovery of the related costs from the company (an estimated €200 million). So far, no efforts have been made to hold the company liable.



**Preparing the "Planet Earth First"
Hot Air Balloon in Hamburg**

Greenpeace activists inflate a hot air balloon that presents their G20 campaign slogan: Planet Earth First. The balloon drifts over Hamburg as a symbol for civil protests during the G20 summit, to raise awareness on climate and energy as well as social inequality and democracy issues.

Endnotes

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G20 Group Action Day in Duesseldorf
Greenpeace Group Action Day for G20 Summit along the Rhine promenade in Duesseldorf. Greenpeace presents its G20 campaign slogan "Planet Earth First" and offers the public the chance to create their own banners and signs for civil protests during the G20 summit in Hamburg beginning with the "Protestwelle" ("Protest Wave") on July 2nd. The aim is to use people power to demand social justice, effective climate protection, fair world trade and stronger democracy worldwide of the world leaders. Planet Earth First Stencil on the ground.

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Carbon Majors: People vs. Big Polluters

The Philippine Commission on Human Rights is investigating 47 'Carbon Majors' for their contribution to climate change and resulting human rights violations.

Problem Analysis

This case exposes the crime of corporations continuing to fuel climate change whilst deriving huge profits from it. Climate change is fueling extreme weather events such as ferocious typhoons and severe droughts that batter vulnerable nations like the Philippines, discussed in this case. As a test case for remedies using the human rights framework, the complaint highlights the failure of the current corporate accountability system to ensure extraterritorial accountability for human rights implications of climate change and the lack of access to remedy for its victims.¹

Company

Companies: 47 investor-owned carbon majors²

Head offices: United States, UK, Germany, France, Italy, Switzerland, Netherlands, Spain, Austria, Canada, Russia, Australia, Japan, Mexico and South Africa.

Company background

Detailed information on all companies can be found online³

Company activity

Carbon majors are extraction and energy industries active in the extraction, production and sale of coal, oil, gas, cement, electric power and other raw materials.

Country and location in which the violation occurred

Australia, Austria, Canada, France, Germany, Italy, Japan, Mexico, Netherlands, Philippines, Russia, Spain, South Africa, United Kingdom and United States.

Summary of the case

On 22 September 2015, Greenpeace Southeast Asia, together with 13 Filipino civil society organisations and 18 individuals filed a petition against the world's largest fossil fuel producers, the Carbon Majors. The petition implores the Commission on Human Rights (CHR) to use its investigatory, recommendatory, and monitoring powers to look into the Carbon Majors' responsibility for human rights violations

or threats thereof, resulting from the impacts of climate change. Specifically, the petitioners ask the CHR to take official or administrative notice of the scientific basis of the petition concerning the human rights implications of climate change, ocean acidification and the estimated responsibility of the Carbon Majors.⁴

The petition draws on recent peer-reviewed research undertaken by Mr. Richard Heede of the Climate Accountability Institute. This research quantified and traced emissions of carbon dioxide and methane from 1854 to 2010 to the largest multinational and state-owned producers of crude oil, natural gas, coal, and cement – the Carbon Majors.⁵ These findings are of serious importance and consequence to the Philippines due to the country's high vulnerability to the impacts of climate change. The findings call attention to the role of the Carbon Majors because these producers contributed a significant portion of the estimated emissions of greenhouse gases. According to the Intergovernmental Panel on Climate Change (IPCC), continued emissions of these gases "will cause further warming and long-lasting changes in all components of the climate system, increasing the likelihood of severe, pervasive, and irreversible impacts for people and ecosystems."

The petitioners claim that as a result of the Carbon Majors' contribution to global climate change; their failure to curb those emissions despite the capacity to do so; these companies' knowledge of the harm caused; and their potential involvement in activities that have been or may be undermining climate science and action, they are violating or threaten to violate the human rights of all Filipinos as contained in the 1987 Constitution of the Philippines, as well as the various international human rights treaties to which the Philippines is a signatory. In addition, the petitioners claim violations or threatened violations to the right to health, and the right to a balanced and healthful ecology. The Petition asks the Commission to take note of the fact that climate change and ocean acidification have harmed or increased the risk of harm to the Filipino people generally, including increased risk of extreme weather events, such as super-typhoon Yolanda, which killed more than 6,000 people. It also provides evidence of specific harms suffered by individual petitioners from Alabat Island, Quezon Province, who have had to relocate their homes due to sea level rise and have experienced declining fishing catches and reduced agricultural productivity.⁶

The Commission resolved to conduct an investigation in response to the petition in December 2015. The investigation is on-going in the form of a national inquiry.^{7,8,9} The Commission, a body established by the Constitution, has a mandate to investigate and monitor all forms of human rights violations and abuses, as well as threats of violations, involving civil and political rights and economic, social and cultural rights. Although the Commission is not a judicial body, its finding of fact is generally accorded great respect by courts, as well as by Congress and the Executive Department. It has the power to compel persons accused of human rights violations to attend and testify at hearing or public inquiry or to produce relevant documentation. The Commission can also recommend that a claim be filed with a competent court.¹⁰ By May 2017 several of the Carbon Majors had submitted their respective rejoinders to the Commission.¹¹

The role of governments in the home countries of the Carbon Majors is to provide regulation and to ensure that the companies in their territories respect human rights within and outside their national boundaries. The role of the Philippine government in the is to protect, fulfil, promote and monitor the human rights of Filipinos in the context of climate change.¹² Home state accountability is also demanded in the petition.¹³

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ACS Group (Grupo Cobra): Kidnapping rivers

Spanish infrastructure company Grupo Cobra supported the construction of a hydraulic power plant, despite knowing it would impact the human rights of indigenous communities in Guatemala.

Problem Analysis

This case illustrates how corporations headquartered in Europe make profits in developing countries without respecting human rights and the environment.

This case shows how Grupo Cobra, owned by the Spanish ACS Group, failed to conduct a proper due diligence process when it joined the construction of the Renace hydroelectric power project, and so became an accomplice in an environmental and social catastrophe in Guatemala. Despite the fact that Grupo Cobra was contracted by a local company, which had a governmental permit to carry out the construction work, Grupo Cobra should have known that the project would cause ecological and social harm. The case shows that there is insufficient accountability when foreign companies are subcontracted by companies located in countries with weak environmental and human rights standards.

Company

Company: ACS Group (Spanish construction and infrastructure multinational)

Head office: Spain

Subsidiary: Grupo Cobra

Company background

Public company (traded on the stock exchange)

Top 5 shareholders: Inversiones Vesan, S.A. (12.52%), Blackrock (3.01%), Invernelin Patrimonio, S.L. (2.77%), Percacer, S.L. (1.39%) and Comercio y Finanzas, S.L. (1.37%)¹

CEO & Chairman: Florentino Pérez, \$2.1 billion wealth (salary 2016: € 1.89 million in fixed salary and € 2.67 million in bonus²)

Annual net profit: € 751 million (2016)³

Annual turnover: € 32.5 billion (2016)⁴

Presence: North America hosts 46% of the company's total activity, followed by the Asia-Pacific region (26%) and Europe (21%), South America (6%) and Africa (1%). Primary countries of operation (annual billings exceeding €900 million) are the United States, Australia, Spain, Hong Kong, Mexico, Canada and Germany.⁵

Number of employees: 176,755 (2016)⁶

Company activity

Grupo Cobra is the main industrial sub-holding company of the ACS Group which is involved in infrastructure, manufacturing and construction.⁷

Country and location in which the violation occurred

Guatemala, specifically the Renace hydroelectric power plant construction, which affects a 30 kilometers stretch of the Cahabón river bed in Alta Verapaz Department, to the north of Guatemala city.

Summary of the case

ACS is one of the largest companies in Spain. Its CEO is the president of Real Madrid football club and one of the richest men in Spain.⁸ ACS's subsidiary company Grupo Cobra is harming the environment and threatening the survival of indigenous communities in Central America by building parts of a hydraulic power plant along the Cahabón river. The water from the river is essential for the drinking water supply of the almost 29,000-strong Quekch'is community but has almost disappeared.

The Renace hydroelectric power project is promoted by the family-owned Guatemalan multinational company Corporación Multi-Inversiones (CMI).⁹ Once completed, Renace will be the largest hydroelectric power plant in Guatemala. The construction is taking place along 30 kilometres of the Cahabón riverbed in Alta Verapaz. The Spanish firm Grupo Cobra, a subsidiary of ACS, is building parts of the project.

The Cobra Group is carrying out construction works for the plant in phases II, III, IV and V according to the following chronology:

- Construction of RENACE II was awarded to the ACS-Cobra Group in 2012. Construction started in January 2012 and ended in June 2014.
- Construction of RENACE III was awarded to the ACS-Cobra Group in 2014.
- Construction of RENACE IV was begun in June 2016 by the ACS-Cobra Group, and it is expected to be operational by 2019.
- RENACE V began construction with the participation of the ACS-Cobra Group during 2017.

The project was approved by The Commission on the Environment of Natural Resources and the Ministry of Energy and Mines, despite serious weaknesses in the environmental impact assessment and despite a lack of consultation of indigenous communities. This is required under the ILO Indigenous and Tribal Peoples Convention (No. 169), which has been ratified by Guatemala. Although partial studies of each of the five phases have been done to obtain the required permits, a study of the 30km long hydroelectric complex that takes into account the cumulative impacts of the entire project has not been carried out. This omission has diluted the perception of the impacts that are generated and, therefore, the environmental and social responsibilities of this initiative. The river near the hydraulic plant is the main source of electricity and drinking water for the thousands of people living along it, yet it is being diverted to fuel the power plant. As a result, the water flow of the river near the communities and thus their livelihood, has almost disappeared.¹⁰

The Cahabón river is not privately-owned, yet communities that depend on it for survival have been stopped from accessing it freely, with access restricted to between 5am and 7pm.¹¹ In Spain the NGO Alianza por la Solidaridad ran a public campaign, launched a report and collected around 25,000 signatures.¹² The Guatemalan NGO MadreSelva appealed to the Guatemalan Constitutional Court in support of the indigenous community and indigenous leaders. This appeal was rejected in September 2017. In a hearing in the Inter-American Commission on Human Rights (IACHR), a group of organizations and communities denounced the fact that those who assert their rights and those indigenous communities opposed to hydroelectric projects in Guatemala suffer human rights violations and are victims of threats, attacks and murders.¹³

Alianza por la Solidaridad tried to contact the ACS group in Spain to discuss the concerns surrounding the project, but the company refused to meet with them, arguing that Grupo Cobra / ACS are not responsible for any social or environmental issues since they are subcontracted by the local company CMI, which Grupo Cobra maintains is ultimately responsible for the site and its operations.¹⁴

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Energy Transfer Partners: ETP's corporate playbook for suppressing assembly rights

In developing the controversial North Dakota Access Pipeline oil company Energy Transfer Partners violated the rights of indigenous communities and used violent security firms and Strategic Litigations against Public Participation (SLAPP) to squash dissent.

Problem Analysis

This case shows that companies fail to take responsibility for negative human rights and environmental impacts resulting from their business operations, and that corporations, often supported by state institutions, are increasingly using legal means in an attempt to criminalise and shut down protest and advocacy groups defending human rights. Energy Transfer Partners (ETP) violated the right of the indigenous communities to free, prior and informed consent (FPIC), relied on an inadequate environmental assessment, and used violent security firms and Strategic Litigations Against Public Participation (SLAPPs) to squash dissent. No anti-SLAPP laws are available in North Dakota to protect advocacy groups. The legal tactics used by ETP, in particular the use of the US Racketeer Influenced and Corrupt Organizations Act (RICO), are increasingly being recognised as a growing threat to free speech. The US Government fails to provide impartial and timely support for communities and advocacy groups subject to human rights and/or environmental violations.

Company

Main Company: Energy Transfer Partners LP (ETP)

Headquarters: United States¹

Subsidiary: Dakota Access, LLC²

Company background

Publicly owned

5 top institutional shareholders: Harvest Fund Advisors LLC, Alps Advisory Inc, Oppenheimerfunds, Inc., Goldman Sachs Group Inc., Toroise Capital Advisors, LLC.³

CEO: Kelcy Warren (salary 2016: \$5,978)⁴ ("net worth": \$4.3B)⁵

President & Director: Matthew S. Ramsey (salary 2016: \$4,990,939)⁶

Operating income 2016: \$1.8 billion⁷

Total revenues 2016: \$21.8 billion⁸

Presence: United States of America

Number of employees: 8,482 persons, 1,428 of which are represented by labor unions⁹

Company activity

ETP is active in the natural gas and oil sector, focusing on pipeline construction and operation.

Country and location in which the violation occurred

United States, Sacred Stone Camp.

Summary of the case

1. Dakota pipeline and related violations

In June 2016, ETP's subsidiary Dakota Access, LLC, initiated the construction of the Dakota Access pipeline (DAPL) or Bakken Pipeline. This US\$ 3.2 billion underground oil pipeline is built under the traditional and cultural lands of indigenous populations, specifically the Standing Rock Sioux Tribe, and threatens the community's water source. The UN Permanent Forum on Indigenous Issues reported in 2016 that 380 cultural and sacred sites had been destroyed by work associated with the right of way clearing for the pipeline.¹⁰ In her 2017 report UN Special Rapporteur on Indigenous Rights, Victoria Tauli-Corpuz, reported that the lack of consultation violated the right of the indigenous communities in question to free, prior and informed consent (FPIC) and that the tribe's interests have not been recognised.^{11,12}

Members of the Standing Rock Sioux Tribe have opposed construction of the pipeline since its inception in 2014. Over 200 Native American tribes and thousands of supporters have joined the protests at rallies and primary encampments. These gatherings of pipeline opponents have been violently suppressed by ETP, as well as state and federal authorities. In the month of December 2016 alone, more than 400 protesters were arrested and subjected to highly questionable charges.¹³

All this is in the context of a broader corporate clampdown on assembly rights, in which ETP has been a market leader. ETP and the authorities' response to the DAPL protests was so controversial as to lead both Amnesty International and the UN Permanent Forum on Indigenous Issues to send experts to review conditions on the ground.¹⁴ A wide range of human rights violations were documented by these experts and others: Maina Kiai, the UN Special Rapporteur on the right to freedom of peaceful assembly and association, labelled the treatment of protesters (including "marking people with numbers and detaining them in overcrowded cages") as "inhumane and degrading". This statement was endorsed by six other UN special experts.¹⁵

Kiai also pointed to the excessive use of force to suppress protest or other acts of dissent as being contrary to the UN Guiding Principles on Business and Human Rights. In particular, security firms employed by ETP have been accused of using automatic rifles, sound cannons, concussion grenades, and water cannons in subfreezing weather.^{16,17,18,19}

2. SLAPP

In May 2016 Resolute Forest Products filed a CAD\$300 million lawsuit under the Racketeer Influenced and Corrupt Organizations Act (RICO) in the United States District Court for Southern Georgia, against Greenpeace International, Greenpeace, Inc., Greenpeace Fund, Inc., STAND.earth (formerly ForestEthics), and five individual staff members of these independent organizations.²⁰ Over 100 advocacy groups warned at the time that Resolute Forest Products' abusive application of the RICO Act – a law designed to tackle Mafia activity – would set a dangerous precedent and embolden others. In August 2017, a \$900 million RICO lawsuit was filed by Energy Transfer Partners (ETP).²¹

As well as again trying to use RICO to treat advocacy activity as inherently criminal in nature, the 187 page complaint again demands exorbitant damages – here at least \$300 million, trebled under RICO to \$900 million. One of the most striking things about the lawsuit, however, is how peripheral the stated role of Greenpeace is in the so-called "criminal enterprise". Despite the criminal activity being said in the complaint to follow the "Greenpeace Model", the role of Greenpeace is only discussed in 23 of the complaint's 187 pages. It therefore appears that the lawsuit represents part of a coordinated attempt to shut Greenpeace down or severely cripple the NGO's campaigning capacity. In recent interviews with CNBC²² and Valley News Live²³, ETP CEO Kelcy Warren said he was "absolutely" trying to cease funding for Greenpeace, and that his "primary objective" in

suing Greenpeace entities was not to recover damages but to "send a message" to the NGO that they "can't do this in the US". This has to be seen in the light of a trend where corporates like ETP are limiting assembly rights and similar rights.²⁴

The prospect of crippling high legal fees, public vilification, and ruinous awards for damages is enough to chill the speech of many campaigners. ETP's lawsuit names 10 other advocacy groups and 8 individuals as members of the "criminal enterprise", leaving the chilling prospect that others will be sued. The lawsuit conflates peaceful protest and advocacy with violent acts by claiming them to be part of the same "Greenpeace model", which "directed and incited acts of ecoterrorism"; should this be successful, it would set a devastating precedent against assembly rights in the US.

ETP has used every repressive tool in the corporate playbook to clamp down on protest. Indeed, this is not even the first time it has filed aggressive lawsuits against opponents of the pipeline. In August 2016 Dakota Access filed a \$75,000 lawsuit (also asking for a permanent injunction) against Standing Rock Sioux Tribe Chairman Dave Archambault II, Councilman Dana Yellowfat, and a number of protesters.²⁵ The SLAPP suit meant to prevent water protectors from protesting near the pipeline and make them pay damages for past protests. The case was dismissed.

The company filed these lawsuits in North Dakota, which doesn't have a law that provides a direct redress against SLAPPs. As with all cases, there is the possibility of filing a separate lawsuit for malicious prosecution. This option will only become available, however, if and after the lawsuits are disposed of in the defendants' favour. It will also require filing a separate lawsuit, with all the associated time and costs involved.

Two lawsuits against ETP have been filed, but so far the outcome has been disappointing. The first of these lawsuits, filed by EarthJustice in 2016²⁶, pointed to the Standing Rock Sioux Tribe's treaty rights and a flawed environment assessment to argue that the pipeline's permit was issued illegally. Judge James Boasberg ruled in 2017 that the federal permits authorizing the pipeline to cross the Missouri River just upstream of the Standing Rock Sioux reservation violated the law. However, the pipeline does not have to be shut down while a new environmental review is conducted. The second lawsuit related to the use of excessive force on protesters on the construction site of the pipeline. *Dundon v.*

Kirchmeier concluded with the federal district court, finding law enforcement's use of force to be appropriate.²⁷ The plaintiffs appealed in May 2017 and the proceedings are still ongoing.²⁸

With Donald Trump in office, the defence of environmental, economic and cultural needs of affected communities seems unlikely. During the presidential campaign, Trump's close financial ties to ETP were exposed in his financial disclosure forms. This showed Trump had invested between \$500,000 and \$1m in ETP, with a further \$500,000 to \$1m holding in Phillips 66, which will have a 25% stake in the project once completed. The disclosures further showed that ETP's CEO Kelcy Warren had given \$103,000 to elect Trump.²⁹ One of Donald Trump's first executive actions was to advance approval for the Dakota Access pipeline.

This is not Trump's only connection with the lawsuit, however: one of his personal lawyers in the Russia investigation is Michael Bowe³⁰, the lead lawyer in the Resolute and ETP lawsuits. Bowe's law firm, Kasowitz Benson Torres LLP, is Trump's go-to law firm for SLAPPs and SLAPP tactics; Marc Kasowitz, for example, has issued legal threats against James Comey³¹ and the New York Times³² for its report on the sexual harassment allegations made against Trump.

Most worrying was the apparent collusion between private security firms employed by ETP and police forces. Democracy Now! captured footage of private security guards brutally attacking demonstrators; days later, the North Dakota Bureau of Criminal Investigation issued an arrest warrant for Amy Goodman, host of Democracy Now!, on charges of engaging in a riot³³. Such an arbitrary arrest was sadly not an isolated incident. Open Democracy reported that in the month of December 2016 alone, more than 400 protesters were arrested and subjected to highly questionable charges including engaging in riots and conspiracy to endanger by fire and explosion.³⁴

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Grupo Bimbo: A step toward ecological farming

Public pressure convinced Mexican corporation Grupo Bimbo to adopt in its home market the higher quality standards that it faced in other countries.

Problem Analysis

This case shows how people power can achieve substantial changes in the private sector. It demonstrates how a powerful, globally active company, Grupo Bimbo, was confronted by the public and convinced to change hazardous agricultural practices in its supply chain. Social and environmental justice in the value chain were achieved, despite a lack of home state accountability. Even in a country like Mexico, with widespread corruption and inequality, Grupo Bimbo was open to adjusting its working process in order to maintain its reputation.¹

Company

Company: Grupo Bimbo

Head office: Mexico City, Mexico

Subsidiaries: 137

Other companies involved: Cargill de Mexico S.A. de C.V. and Bunge Comercial S.A. de C.V.

Company background

Bimbo is privately owned

CEO & President: Daniel Servitje Montull (family fortune US\$ 4,200 million)^{2,3}

Profit: Mexican Pesos 136,143 million (2016)⁴

Turnover: US\$13.42 billion (2016)⁵

Presence: 165 manufacturing plants and 2.5 million sales centers located in 32 countries throughout the Americas, Asia, Africa, and Europe⁶

Number of employees: > 130,000⁷

Additional sources: ^{8,9}

Company activity

Grupo Bimbo is the largest baking company in the world, and the third most consumed brand in Mexico. The company produces over 13,000 products and owns over 100 brands.¹⁰

Country and location in which the violation occurred

Poncitlán municipality, in the state of Jalisco, Mexico;

Culiacan and Navolato municipalities in the state of Sinaloa, Mexico.

Summary of the case

The food and beverage industry in Mexico is one of the most important parts of the country's economy. The Mexican food processing sector produced \$135.5 billion dollars worth of processed foods in 2015¹¹, or 18.5% of Mexican manufacturing output and 6.5% of total national production.¹² To produce such volumes, high quantities of inputs are imported. In 2014 14.1% of inputs were of foreign origin.¹³ The most significant parts of the sector are the bakery, dairy and confectionery industries.

Grupo Bimbo is the leading bakery in the world, and is the third most consumed brand in Mexico.¹⁴ Grupo Bimbo claims that its 37 national plants conform with its vision of corporate responsibility, applying high standards from raw ingredients to finished products.¹⁵ In reality the practices of suppliers of the company lead to the violation of human rights related to health, a healthy environment, adequate food, and access to information. These violations were closely related to the use of toxic inputs in the form of pesticides and fertilizers.

The company's supply chain purchases raw materials via intermediaries that buy from large collectors who in turn pay farmers for their peasant harvest. Grupo Bimbo sources from states such as Sinaloa and Jalisco that produce under a model of industrial agriculture, where highly toxic pesticides are used. 140 pesticides are used in Mexico despite being banned or prohibited in other

countries because of their adverse health and environmental impacts. 111 of these are catalogued as Highly Hazardous Pesticides. A study performed by Greenpeace and researchers from the Faculty of Sciences of the UNAM and the Red Temática de Florecimientos Algales Nocivos (Research Network on Harmful Algal Blooms), found substances such as glyphosate, endrin, lindane, and DDE, in rivers, drains, lagoons and the sea coast of Sinaloa, where maize is produced for the food industry and enters the supply chain of Grupo Bimbo.¹⁶ Despite the use of these substances being permitted, they can have serious health impacts, including causing cancer, hormonal alteration and neurotoxic effects; and they do not remain in the area of application but pollute surrounding water bodies where they affect essential natural resources and communities.^{17,18}

The lack of transparency in the value chain impacts consumers and workers in a number of ways. Due to the lack of monitoring in Mexico, there is no official data on the effects of pesticide use, since cases are often treated under other diagnoses related to respiratory diseases. Mexican consumers have insufficient access to information and there is no transparency about the way their food is being produced. And if Mexican food exports do not reach the standards of their destination country, the products are often returned for national consumption.¹⁹

Following a two and a half year campaign by Greenpeace Mexico and 160,000 consumers, Grupo Bimbo committed to transitioning to sustainable agriculture, beginning with a pilot program for maize²⁰ and the development of a Global Agriculture Policy.²¹ This includes promoting economic, social and environmental resilience. As part of its policy Grupo Bimbo is working with the International Center for Maize and Wheat Improvement (CIMMYT), to develop a pilot program on sustainable maize supply.²² Implementation of these commitments is still needed.

Suppliers have now committed to using the techniques of Integrated Pest Management as appropriate to their context, and gradually reducing the use of agrochemicals, in line with the Global Agriculture Policy.^{23,24}

Grupo Bimbo had earlier taken steps to remove specific ingredients from its supply chain, sourcing deforestation-free palm oil, and ensuring the procurement of eggs from non-battery hens.

While Grupo Bimbo's actions are welcome, it is urgent that Mexico break with public policies that focus on exports rather than feeding the population, and which privilege monoculture, with its technologies that damage the environment and endanger people's health.

In Mexico 24 million people suffer from food shortages. Most of the people affected by these shortages live in rural areas.²⁵ The policy that is supposed to support the countryside leaves out 70% of the producers, concentrating resources in the hands of a few. There is no monitoring or evaluation to check how these incentives are applied or who benefits from them.

The oligopolies that control the seed and agrochemicals markets in Mexico support a monoculture model based on hybrid seeds and the intensive use of agrochemicals. This results in the displacement of native seeds and marginalisation of small farmers. In this they are aided by policies such as the Program of Incentives for Maize and Bean Producers (PIMAF) which is part of the Support Programme for Small Producers.²⁶

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Gabriel Resources: Prospecting for ISDS gold

After Romania prevented Canadian company Gabriel Resources from opening an open-pit gold and silver mine on environmental grounds Gabriel Resources brought a US\$4.4 billion claim, bypassing domestic courts.

Problem Analysis

This case shows how the mining company Gabriel Resources has manipulated governments and laws, for private gain and with public loss. It also shows the power of people in opposing mega mining projects.

Since 1997, the Canadian mining company Gabriel Resources has pressured Romania to allow the construction of the largest open-pit gold and silver mine in Europe, the Roșia Montană Project. Due to strong lobbying and protests by local, national and international citizens and organisations, the project in Roșia Montană is currently on hold.

Gabriel Resources is suing Romania for US\$4.4 billion in an investor-state dispute settlement (ISDS) procedure because of Romania's alleged failure to issue the permits needed to operate the gold and silver mine in the historic Romanian village of Roșia Montană. The case shows how companies have access to a parallel corporate-friendly court system where they can bypass domestic courts and sue governments for billions of taxpayers money in compensation for public interest measures.

Not only is there an absence of home state accountability, Canada's former ambassador to Romania later worked for the company as a lobbyist and several other government representatives have actively advocated for the mine.

Company

Main Company: Gabriel Resources Ltd.

Head office: Toronto, Ontario, Canada

Subsidiary: The Project is owned through Rosia Montana Gold Corporation S.A. (RMGC), in which Gabriel holds an 80.69% stake with the balance held by the Romanian State.¹

Company background

Publicly owned

Top 5 shareholders: Electrum Strategic Holdings LLC, BSG Capital Markets PCC Ltd., The Baupost Group LLC, Newmont Mining Corp., Kopernik Global Investors LLC²

President & CEO (income): Jonathan Henry (US\$780,000)³

Non-Executive Chairman & Director (income): Keith Hulley (US\$121,500)⁴

Annual profit: -4 billion in the past years" GR claims.^{5,6}

Annual turnover: US\$17.8 million (Estimated)

Presence: Romania, UK (office), Canada (hq)

Number of employees: 250–1,000⁷

Company activity

Mining; Since 1997, the Company's principal focus has been the exploration and development of the Roșia Montană gold and silver project in Romania (the "Roșia Montană Project"). More recently, the ICSID arbitration has become the core focus of the Company.⁸

Country and location in which the violation occurred

Romania, Roșia Montană

Hungary is the downstream country in case of pollution

Summary of the case

Since 1997, the Canadian mining company Gabriel Resources has pressured Romania to allow the construction of what would be the largest open-pit gold and silver mine in Europe, the Roșia Montană Project. Residents living in and around the town of Roșia Montană, environmentalists and concerned citizens from all over Romania and Hungary have fought against the proposal for a multi-billion-dollar mining project, which would be harmful for their community and the surrounding environment.

Local inhabitants have already been driven away by the plans. The mine would destroy three villages, level four mountains, displace 2,000 people and leave behind a lake of heavy metals and cyanide-contaminated waste.⁹ The cyanide sludge would pollute the surrounding environment and nearby rivers, endangering the livelihood of 6,000 people living downstream from the proposed mining project.¹⁰ The Environmental Impact Assessment (EIA) procedure for the project started in 2004 and is still being finalised.

Concerns over possible pollution from the mining project is fuelled by memories of an earlier disaster. In 2000, a storage lake near the Romanian town of Baia Mare burst a dyke, releasing 130,000 cubic metres of cyanide-tainted water. Romania was found in breach of the European Convention on Human Rights (ECHR) because the Romanian authorities had failed in their duty to assess the risks which the mining company's activity might entail, and to take suitable measures to protect the rights of those concerned, in particular their right to enjoy a healthy and protected environment.^{11,12}

Gabriel Resources, whose only activity is the development of this project, secured the Roşia Montană Project with secretive government contacts and lucrative advertising contracts with local media.^{13,14} The concession license for exploiting the gold and silver ore from the Roşia Montană area was largely declared classified information by Mihail Ianas – the former president of the National Agency for Ore Resources. Although there have been countless requests to declassify the license and the contract signed by the Romanian state with the mining company, they remain classified to this day.¹⁵

Due to strong lobbying and protests by local, national and international citizens and organisations, the investment for the Roşia Montană Project is currently on hold. The government's proposal for a law that would bypass laws and allow for this exploitation was rejected by Parliament in 2013 following the largest protest in Romania since the fall of communism. In 2016, the Romanian government tabled a proposal for a ten-year moratorium on the use of cyanide in mining, but this law is stuck in Parliament. In early 2017, the government officially submitted a request to the United Nations to declare Roşia Montană a UNESCO World Heritage Site.

Since 2015 Gabriel Resources has been suing the Romanian government before the World Bank's International Centre for Settlement of Investment Disputes (ICSID) for denying the permits, seeking US\$4.4 billion in

damages.¹⁶ According to the company, denying the permits constitutes a breach of the bilateral investment agreements Romania signed with Canada and the UK respectively. After the inception of the ISDS case in 2015, Alburnus Maior, Greenpeace Romania and the Independent Centre for the Development of Environmental Resources (ICDER) contacted the ICSID Tribunal to request access to information as prospective *amici curiae*¹⁷. "After today's confirmation of Gabriel seeking US\$4.4 billion in damages, this case is an issue for the country as a whole. It is taxpayers money that would pay for the damages. Together we need to make sure that the government is determined to win, because right now it doesn't look like it at all," said Eugen David, president of Alburnus Maior.¹⁸

In July 2017, Romania served Gabriel Resources with an outstanding VAT tax bill of US\$8.6 million, related to the purchase of goods and services between 2011 and 2016, and warned that the company could also be liable for millions more in interest and penalties.¹⁹

In October 2017, DeSmog Canada exposed that Canadian officials have been actively advocating for the mine since 2007. The revelations were based on internal correspondence from the Canadian Department of Foreign Affairs and International Trade relating to the Roşia Montană mine and going back to 2004. The communications were obtained through a Freedom of Information request by the NGO Mining Watch Romania. In a 2008 email, a trade commissioner with Foreign Affairs and International Trade Canada clearly stated: "Our embassies in Bucharest, Brussels and London have provided extensive support to Gabriel Resources, such as offering business development advice and facilitating meetings with key decision makers." The documents show that the former Canadian ambassador to Romania later joined the board of Gabriel Resources and that he also worked as a lobbyist for the company and used connections inside the ministry to push for the project.²⁰

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DowDuPont: Justice out of sight, the Bhopal tragedy 1984-2017

Decades after the Bhopal disaster which killed 20,000, impacted half a million and contaminated the local water supply, victims have been unable to secure adequate justice or remedies from chemical giant DowDuPont; a challenge made greater by a series of purchases and mergers.

Problem Analysis

The Bhopal gas disaster was one of the biggest industrial accidents in history, a tragedy resulting from corporate gross negligence and insufficient security measures.¹ Thousands died and many others are still affected by pollution from heavy metals in and around the company sites and the groundwater.^{2,3,4,5} Bhopal has since become an example of how mergers and acquisitions create corporate impunity by making it more difficult to prosecute the companies and individuals who bear responsibility.

There is no regulatory framework in place that can prevent and provide redress for human rights abuses such as this one. In February 2015, the UN's special rapporteur on hazardous substances and wastes, Mr. Tuncak, said that he is "deeply concerned" that the current merger between Dow Chemical and DuPont may erase the possibility of justice: "The victims have faced insurmountable obstacles in getting past the corporate veil of Dow and UCC to find accountability and justice. [...] "This merger creates yet another layer of legal hurdles for victims to arrive at any semblance of an effective remedy and accountability for a preventable disaster now more than 30 years old."⁶ Bhopal also illustrates that companies can deny, and continue to deny for decades, any responsibility for human rights abuses – unless they are subjected to significant pressure.⁷

This case illustrates many of the substantive, procedural, conceptual, and practical obstacle that arise in dealing with human rights violations by TNCs.⁸ The obstacles include, amongst others, a lack of home state responsibility, difficulty piercing the corporate veil, misuse of *forum non conveniens*, a lack of resources, and access to courts.

Company

Company: DowDuPont

Union Carbide was founded in 1917 in Texas, USA and became a subsidiary of Dow Chemical in 2001 (17 years after the disaster in Bhopal). The Dow Chemical Company merged with DuPont on August 31, 2017.⁹

Head office: DowDuPont is dually headquartered in a) Midland, Michigan and b) Wilmington, Delaware, United States.¹⁰

Subsidiary: The Bhopal plant directly was owned and operated by Union Carbide India Limited (UCIL),¹¹ subsidiary of the Union Carbide Corporation (UCC).¹²

Company background

Publicly traded company

Shareholders: Vanguard Group Inc (7.17%), Capital Research and Management Company (6.40%), Fidelity Management & Research Company (2.28%), BlackRock Fund Advisors (1.59%), and State Street Global Advisors (Aus) Ltd (1.44%).¹³

CEO: Andrew N. Liveris,^{14,15} \$23 million income (2016).¹⁶

Executive Chairman until 2014: Union Carbide Corporation chairman Warren Anderson, who was charged for culpable homicide in India but remained outside Indian jurisdiction in the US until his death in 2014.

Estimated profit and turnover: Dow and DuPont combine for nearly \$73 billion in annual sales. On the basis of recent stock prices, DowDuPont has a market capitalization approaching \$150 billion.¹⁷

- Dow Chemicals: Profit: US\$ 2.5 billion & turnover US\$ 12 billion¹⁸
- Du Pont: US\$ 24.5 million net sales¹⁹

Presence:

- Dow Chemicals: Africa (8), Asia (15), Europe (24), Latin America (7), Middle East (5), and North America (2)

- DuPont: Africa (12), Asia and the Pacific (16), Europe and the Middle East (34), North America (3), South America (6)

Number of employees: > 100,000 (Dow Chemicals +/- 56,000 + DuPont +/- 52,000)

Company activity

DowDuPont, one of the largest global chemical companies, currently pursues a separation into three independent, publicly traded companies: an agriculture, a materials science, and a specialty products company.²⁰

Country and location in which the violation occurred

Bhopal, India

Summary of the case

Union Carbide India Limited (UCIL) pesticide plant a massive leak of toxic methyl isocyanate (MIC), caused more than 20,000 casualties.²¹ Most victims died from suffocation. Approximately 560,000 of the 895,000 inhabitants of Bhopal were affected in some way.^{22,23} They suffer from acute breathlessness, brain damage, menstrual irregularities, loss of immunity, cancer and tuberculosis.²⁴ An investigation by *The New York Times* produced evidence of at least ten violations of standard procedures by both the parent corporation Union Carbide Company (UCC) and its Indian-run subsidiary Union Carbide India Limited (UCIL) that led to the disaster.²⁵

The disaster also had an enormous environmental impact. The gas was absorbed by nearby rivers, contaminating water and soil in the area, harming health and access to clean drinking water.²⁶ The site was never fully restored by Union Carbide or the Indian government²⁷ and the contamination has remained untreated for decades. Researchers estimate that more than 400 tons of poisonous chemicals are still buried there, leaking into groundwater and soils.^{28,29,30,31,32}

Little attention has been paid to the state of the UCIL site and its immediate surroundings with respect to other contaminants that may have been present for reasons not connected to the accident.³³ As such, the impact of the plant on human rights is not confined to the gas leak. Since the opening of the plant in 1970, it had been a source of environmental pollution.³⁴ UCC's engineering department warned in 1973 that the design of the Bhopal plant, which used solar evaporation ponds for waste effluent, posed a "danger of polluting sub-surface water supplies in the Bhopal area".³⁵

The cause of the disaster remains under debate. The Indian government and local activists argue that slack management and deferred maintenance created a situation where routine pipe maintenance caused a backflow of water into an MIC tank, triggering the disaster. Union Carbide Corporation (UCC) contends water entered the tank through an act of sabotage.³⁶

Since the disaster many local and international human rights and environmental groups, including the Pesticide Action Network, International Campaign for Justice for Bhopal, Greenpeace and Amnesty International have been involved in the search for remedies.

Bhopal led to complex litigation in both India and the United States seeking to impose criminal and civil liabilities on UCIL and UCC.^{37,38} As the US-based Union Carbide company controlled its Indian subsidiary UCIL it made sense to sue in US courts, however, for victims this proved very difficult. A law was passed giving the Indian government the exclusive right to represent all victims, inside and outside India. In 1986, claims in the US were dismissed on grounds of forum *non conveniens*. Proceedings in India began. The Indian case ended in 1989 with a US\$ 470 million settlement, far below most estimates of the damage at the time. An intervention filed on behalf of the victims before India's Supreme Court in 1988 had claimed that INR10 billion (around US\$ 628 million) was needed as interim relief alone.³⁹ The settlement was also criticised for being negotiated without the participation of the victims.⁴⁰ Survivors, civil society groups and others overwhelmingly rejected this settlement as utterly inadequate.⁴¹

The Supreme Court in India later reinstated criminal charges against UCC/UCIL. No conviction was forthcoming until June 2010, when a local court found UCIL and seven of its executives guilty of criminal negligence, sentenced them to two years imprisonment and a fine of about US\$ 2,000 each, the maximum punishment allowed by Indian law.⁴² The search for justice continues to this day.⁴³

On 3 December 1984, one of the world's worst industrial disasters took place in Bhopal. In a Following the 2015 announcement of a planned merger of Dow Chemical and DuPont, Baskut Tuncak, the UN's special rapporteur on hazardous substances and wastes, said that he was "deeply concerned" and that the merger may erase any remaining possibility of the victims of the Bhopal disaster seeing an "effective remedy".⁴⁴ The Bhopal Medical Appeal launched a campaign targeting the Dow-DuPont merger urging: "Don't bury Bhopal." The merger took effect in 2017.

After the disaster UCC began attempts to dissociate itself from responsibility for the gas leak and to shift the responsibility to UCIL.⁴⁵ UCC stated that the plant was wholly built and operated by the Indian subsidiary. This argument is still being used today: “The 1984 gas release from the plant in Bhopal, India was a terrible tragedy,” a statement from DowDuPont reads. “It is important to note that Dow never owned or operated the plant, which today is under the control of the Madhya Pradesh state government.”⁴⁶ However, there is overwhelming evidence to suggest that UCC management was aware of safety problems at the Bhopal plant for at least several years before December 1984.⁴⁷

The Indian government also failed to provide safety in this case. The government had a 22% stake in UCIL.⁴⁸ The specific site within the city was zoned for light industrial and commercial use, not for hazardous industry. UCIL built the plant in Bhopal because of its central location and access to transport infrastructure.

The local government was also aware of safety problems but was reluctant to place heavy industrial safety and pollution control burdens on the struggling industry because it feared the economic effects of the loss of such a large employer. Human rights scholar Surya Deva has commented: “Based on the government’s previous failure to discharge its duty to respect, protect and fulfill human rights in relation to Bhopal, the future prospects of tough state actions in cleaning the site or providing continuous medical help to the affected victims do not appear very promising”.⁴⁹

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Exxon: Exxon knew!

By the 1980's Exxon knew that climate change was real and caused by burning fossil fuels, but chose to mislead the public about this in order to protect its profits.

Problem Analysis

This case illustrates that fossil fuel companies willingly and knowingly chose profit over people and the environment for decades, risking the lives of millions and irreversibly altering our climate. Exxon (together with the rest of the fossil fuel industry and its trade associations) knew that climate change was happening, knew that it was caused by fossil fuel emissions, and knew that it had to be addressed in order to avert catastrophe. Instead of taking any steps to do so, the company misled the public, shareholders, and governments in order to protect its profits. When considering the far-reaching economic and human impacts of climate change, this corporate deceit potentially constitutes one of the biggest moral and economic failures in history.

The case provides a clear example of the impact that aggressive and effective corporate lobbying has had on hindering much-needed and long overdue effective regulations to address climate change. The case also shows how Exxon and the fossil fuel industry politicized the issue of climate change, and created a culture of climate denial, which continues to slow action to this day.

Company

Company: ExxonMobil Corporation

Head office: United States

Company background

Publicly owned

Top 5 shareholders: The Vanguard Group Inc., State Street Corp, BlackRock Institutional Trust Company NA, State Street Global Advisors (Aus) Ltd, and Northern Trust Investments N A¹

CEO of company, income: Darren Woods, \$16,846,928 (2016)²

Company's annual PROFIT: \$7.8 billion (2016)³

Company's annual TURNOVER: \$218.6 billion (2016)⁴

Presence: ExxonMobil is active in North and South America, Europe, Africa, the Middle East and the Asia Pacific.

Number of employees: 73,500 (2016)⁵

Company activity

ExxonMobil Corporation is one of the world's largest oil, gas, and petrochemical corporations. It engages in the extraction, production, and sale of petroleum products.

Country and location in which the violation occurred

Global impact

Summary of the case

As early as the 1970s, Exxon (or its predecessor corporations) was researching climate change, including its causes and potential impacts.⁶ By the 1980s, Exxon's own research confirmed that burning fossil fuels caused climate change, and that if carbon emissions were not reduced, effects could be "catastrophic".^{7,8,9} Fully 83% of Exxon's published, peer-reviewed papers from this period, as well as 80% of its internal communications, "acknowledged that climate change was real and human-caused".¹⁰ Exxon's climate research was at the cutting edge, and it initially shared that research with scientific community, as advocated by Exxon's climate scientists. They also acknowledged that this would help the company shape laws relating to carbon emissions, which was inextricably linked to Exxon's core business.¹¹

By the late 1980s, the broader scientific community, governments and the general public were becoming increasingly aware of the causes of and potential impacts of climate change. In 1988, the IPCC was formed. In 1992, the UN adopted the Framework Convention on Climate Change, intended to help the world solve the coming climate crisis through reducing fossil fuel emissions.

At this time Exxon and the fossil fuel industry began to tell a different story about climate change in their public communications. Exxon, mainly through trade associations and other ostensibly independent “think tanks” and policy organizations, engaged in a public relations and lobbying campaign to: create doubt over the existence of climate change; create doubt over what or who was responsible for it; create doubt over how bad the effects would be; and seed the idea that it was impossible to solve it.¹² Indeed, according to a peer-reviewed analysis, only 12% of Exxon’s public-facing communications acknowledged climate change was real, while 81% expressed doubt over it.¹³

Beyond Exxon, the broader industry lobbying campaign (which Exxon contributed to with both monetary and policy support) has effectively delayed and stopped meaningful policies and laws to limit emissions in the United States and globally, and slowed the transition to clean renewable energy for decades.^{14,15} Exxon was a founding member of the Global Climate Coalition (GCC) (along with the American Petroleum Institute (API), Shell, Chevron, and other oil majors and lobbying groups), which engaged in a multiyear, multimillion-dollar campaign determined to sow doubt about climate science and hamper regulation of carbon emissions.¹⁶ Exxon is also a member of the API, whose aims include ensuring that “recognition of uncertainties (of climate science) becomes part of the ‘conventional wisdom.’”¹⁷ Climate denial is the prevailing position of the Republican party – and the President of the United States – with talking points that can be traced directly to this PR campaign.¹⁸ While Exxon has publicly stated that it now accepts that climate change is real and human-caused, in 2015 it gave over 2 million dollars to members of Congress and to trade groups that are opposed to climate regulations.¹⁹

Just as the tobacco industry knew that nicotine was addictive and that smoking leads to diseases and death, Exxon (and the oil industry) knew that climate change was real, that extracting and burning carbon caused it, and that climate change would be devastating for the planet. Just as the tobacco industry funded false science and public relations campaigns to deny that smoking was harmful in order to protect its profits and its executives, Exxon and the fossil fuel industry has followed the same playbook. The tobacco industry eventually faced liability in the hundreds of billions of dollars and has been restricted from everything from advertising to participating in international negotiations. Exxon and the fossil fuel industry should expect the same kind of accountability.

What forms that accountability may take remains to be seen. Exxon and other oil majors are facing a wave of recent litigation and legal actions. The attorneys general of New York and Massachusetts are investigating the company for potential financial (and other) fraud.²⁰ The Securities and Exchange Commission has also opened an investigation into how the company may have misvalued its reserves due to stranded assets.²¹ Investors have filed a claim alleging that Exxon has misrepresented climate risks to them, resulting in a drop in share price.²² Five California communities have sued Exxon (and many other oil majors) for damages relating to coming sea level rise.^{23,24} And the Commission on Human Rights of the Philippines is currently conducting an investigation into how carbon majors may have violated Filipinos’ human rights via their contributions to climate change and climate denial.²⁵

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Glencore: Notorious crimes and failures

Mining giant Glencore has made aggressive use of complex corporate structure and tax havens to deprive developing nations of tax revenues, while frequently being accused of human and environmental rights violations in the course of its business.

Problem Analysis

Swiss mining giant Glencore has made extensive efforts to exploit corporate power for its own advantage, often at the expense of human and environmental rights. It has made use of Investor–State dispute mechanisms when governments have restricted its activity. It has adopted a complex international structure to minimise its tax exposure and so deprived a number of developing nations of tax revenues, including Zambia and Burkina Faso. It has been accused of causing human rights violations and environmental damage at mining operations as far afield as Peru and Australia.

Company

Main Company: Glencore plc.

Head office: Baar, Switzerland

Registered office: Saint Helier, Jersey

Subsidiary: Since 2015, the world's largest commodity trader. Glencore was founded by Marc Rich in 1974, who was forced to sell the company in 1994, after commodity trading and marketing company Trafigura was split off in 1993.¹ In 2013, Glencore merged with Anglo-Swiss mining company Xstrata (but still operates under the name Glencore).

Company background

Listed on the stock markets in London, Hong Kong and Johannesburg.

Biggest shareholder is the Qatar Investment Authority.¹

CEO of company: Ivan Glasenberg (CEO)
(total remuneration: US\$ 1.51 million, 2015;
salary US\$ 1.447 million, 2015)²

Company's annual PROFIT: \$0.93 billion (2016)³

Company's annual TURNOVER: \$ 152.9 billion (2016)⁴

Presence: 50+ countries

Number of employees: 155.000 (2016)⁵

Company activity

Main activities: production, sourcing, processing, refining, transporting, storage, financing and supply of metals and minerals, energy products and agricultural products.

Country and location in which the violation occurred

As Glencore owns over 150 mining & metallurgical, oil production and agricultural assets around the world, there are many different countries involved and affected.

Ghana, Chad, Zambia, Bolivia, Colombia, Philippines, Argentina etc.⁷

Summary of the case

Response of Glencore to several of these issues <http://www.glencore.com/assets/public-positions/doc/Glencores-response-to-the-2015-Public-Eye-Nomination.pdf> & <http://www.glencore.com/public-positions>

1. ISDS cases

In 2016, Glencore initiated two ISDS (Investor State Dispute Settlement) cases. One against Bolivia and the other against Colombia. The claim against Bolivia arose out of the expropriations of two tin and antimony smelting plants (the Vinto Metallurgical Complex and the Vinto Antimony Plant) as well as a tin and zinc mine (Colquiri Mining Center).⁸ The government claims that the mining concessions had been awarded under suspicious circumstances and that it nationalised them in the public interest.^{9,10} Glencore claims, via its subsidiary located in the tax haven of Bermuda, US\$ 675.7 million in damages from the Bolivian government.¹¹

Bolivia has taken several steps to prevent international tribunals from rendering decisions that can be enforced against the country by foreign investors. The country withdrew from ICSID (International Centre for Settlement of Investment Disputes) in 2007, modified the Bolivian Constitution in 2009, terminated bilateral investment treaties (BITs) with nine countries, and introduced a new domestic arbitration framework in 2015. The goal of the new act is to keep arbitration proceedings inside the country and

subject to Bolivian law and its authorities, including investment arbitrations involving foreign investors.¹² It is still unclear how Bolivia's new arbitration mechanism will work in practice and, clearly, it did not prevent Glencore from starting its ISDS case in 2016.¹³

Glencore sued the Colombian government because it has sought to revoke parts of an amended concession agreement signed with the government in 2010 to expand the Calenturitas coal mine run by Glencore's subsidiary Prodeco.¹⁴ Glencore's activities in Colombia have been dogged by scandals, with at least ten people murdered when paramilitaries seized a patch of land called El Prado next to Calenturitas in 2002^{15,16}, while communities have been rehoused over environmental damage and the firm has faced large-scale strikes by workers over low salaries¹⁷. The damages sought by Glencore are unknown.¹⁸

2. Tax avoidance, corruption and other irregularities

There is growing evidence of Glencore's tax avoidance and involvement in corruption. "Publish What You Pay" named Glencore the most opaque mining company in terms of tax transparency as it incorporated half of its 46 subsidiaries in tax havens.¹⁹ Its massive global network of subsidiaries and related companies was revealed in 2017 by the release of the Paradise Papers, explored by the International Consortium of Investigative Journalists (ICIJ).^{20,21}

The ICIJ and 95 media partners explored 13.4 million leaked files from a combination of offshore service providers and the company registries of some of the world's most secretive countries. The Paradise Papers documents include nearly 7 million loan agreements, financial statements, emails, trust deeds and other paperwork from nearly 50 years at Appleby, a leading offshore law firm with offices in Bermuda and beyond.²² Glencore was one of Appleby's top clients. The leaks reveal how "Glencore made secret payments, battled cash-strapped countries in court, and sought to reduce its tax bill in nations around the world."²³ Glencore diverted millions of dollars through tax havens and fought off lawsuits and tax bills. Two of the most prominent illustrations that are provided by the leaks are Glencore operations in the Democratic Republic of Congo (DRC) and Burkina Faso.

In May 2014, Global Witness revealed how back in 2009, an opaque Glencore company in Bermuda loaned US\$45 million to an equally opaque entity in the British Virgin Islands controlled by Dan Gertler without revealing the loan publicly.²⁴ The leaked documents in the Paradise Papers showed that Glencore provided this undisclosed loan to Gertler's company in return for helping a company in which Glencore held a stake strike a mining deal with Congolese officials.^{25,26}

"The leaked files provide the most detailed evidence yet of

the behind-the-scenes lobbying and the money flows that helped Katanga, in which Glencore was just a shareholder at the time, acquire mining licenses. The files also raise questions about how Katanga, which was later taken over by Glencore, managed to pay a price that critics have viewed as less than the licenses' real value. In response to questions from ICIJ, Glencore said that the price for the mining licenses was agreed to before Gertler entered the negotiations and that its loan to the company controlled by Gertler was "made on commercial terms" with standard provisions in place."^{27,28}

In March 2017 Global Witness reported that, between 2013 and 2016, Glencore redirected over \$75 million in mining payments to Gertler.²⁹

In addition to the Appleby files, ICIJ has obtained a confidential assessment by Burkina Faso's tax office. It accuses a Glencore subsidiary of abusing tax loopholes and creating fictitious charges by shell companies to reduce taxable earnings and avoid paying tens of millions of dollars in taxes to one of the world's poorest countries. Burkina Faso's tax office fined the Glencore subsidiary after allegations that the company abused loopholes to avoid tax. The tax office said the subsidiary made "fictitious" charges to an offshore company, an allegation Glencore denies.³⁰

"As villagers struggled with hunger, poverty and other hardships, boardroom machinations in faraway Switzerland, Bermuda and other tax havens moved millions of dollars into – and then out of – the small African nation whose name means "Land of Honest Men."³¹

In the spring of 2012, the British Parliament's International Development Committee opened an inquiry into taxation in developing countries, including a Glencore subsidiary in Zambia.³² According to one estimate by ActionAid³³, alleged tax avoidance in relation to a copper mine may have cost Zambia as much as £76 million (equivalent to \$63.6 million) in one year. If the estimate is correct, it would be roughly double the country's health budget in 2007.³⁴

It is not only in developing countries that Glencore stands accused of using tax tricks. A British tax expert alleged that the company raised costs of its UK-based subsidiary by buying complex insurance contracts with the parent in low-tax Switzerland worth US\$ 122.8 million.³⁵ And the Australian arm of Glencore has been involved in cross-currency swaps of up to AU\$ 25 billion of a type under specific investigation by the Australian tax office, the Paradise Papers reveal. A cross-currency swap is an agreement between two parties to exchange interest payments and principal on loans in two different

currencies. Companies use such swaps to get access to favorable tax rates. The Australian arm of Glencore is accused of using swaps to enter into deals at unrealistic, non-commercial rates, then using the swaps as a way to shift profits from high-tax to low-tax jurisdictions.³⁶

Glencore is linked to various corruption and other scandals across the world. In 2012 a Glencore International Plc unit was fined 500,000 euros (\$622,800) by a Belgian court in a corruption case involving a European Union official in return for market-sensitive information. The company received confidential information that allowed it to put in favourable bids in tenders for European export subsidies.³⁷ In a 2017 UK High Court case, Glencore was accused of working as an oil trader in Ghana without licence, illegally importing and storing oil in Ghana. Springfield Energy sued Glencore claiming a partial refund of the money it has paid to Glencore on the basis of “unjust enrichment” in Ghana. It has demanded \$1.1 million plus interest.^{38,39} Glencore however maintains that reports of illegal involvement in the Ghanaian petroleum industry are totally inaccurate,⁴⁰ and the case remains pending.

And in Queensland, Australia, QCoal managing director Chris Wallin lodged a formal complaint to the Crime and Corruption Commission (CCC) in 2017, that accused the Department of Natural Resources and Mines (DNRM) of not prosecuting Glencore for alleged illegal mining activity on land it does not have rights over in the Bowen Basin. These alleged illegal mining activities have continued for more than 10 years.⁴¹ The Queensland government resolved the dispute by amending the law to validate Glencore’s claim.

3. Australia’s open zinc and lead mine

Glencore’s McArthur River Mine (MRM) is the largest open cut zinc and lead mine in the world.⁴² It is located in the belly of the sacred McArthur River in Australia’s Northern Territory (NT). It has been mined underground since the mid-1990s and expanded into an open cut project in the mid-2000s. Glencore has been accused of acting improperly with Indigenous groups in the area who have no legal say over the mine. The mine has long been opposed by the local Gurdanji, Mara, Garawa and Yanyuwa Peoples, who have major cultural and environmental concerns related to the mine. The mine expansion ploughed through the Rainbow Serpent Dreaming Site, which was of deep spiritual significance to local clan groups. The local groups challenged the open-cut/diversion in court and won, but the government passed legislation to overrule this.^{43,44}

Issues of great concern are uncontrolled seepage from the tailings storage facility (TSF), risk of failure of the TSF embankment and the failure of revegetation and continued

erosion of the McArthur River diversion, spontaneous combustion of the pyrite (iron disulfide) in the waste rock, sending toxic sulphur dioxide fumes into the atmosphere and affecting the inhabitants of a nearby Aboriginal outstation, and high levels of mine derived lead found in fish near the mine.⁴⁵ In 2013 a waste rock dump spontaneously ignited, releasing toxic plumes into the air for more than a year. The company did not notify anyone, therefore the NT Mines Department only found out 6 months after it started. Since then there have been more incidents of burning waste rock.^{46,47} Elevated levels of heavy metals (cadmium, lead) were detected in water samples as well as fish, invertebrates and cattle in 2013 and 2014⁴⁸, but government departments have largely dismissed concerns.⁴⁹ 400 cattle had to be killed and the cattle station was quarantined.⁵⁰ According to Greenpeace analysis of official figures, levels of poisonous sulphur dioxide measured at the mine exceeded national standards at least 19 times during 2017. While these national standards apply to air quality likely to be experienced by the general population, rather than at a mine site, the measurements are nevertheless indicative of a significant source of pollution of concern to those in the mine’s vicinity.

The company has recently admitted that it will take hundreds of years to manage and rehabilitate the site.⁵¹ Documents indicate that Glencore intends to have little or no involvement after the mine’s life ends. Their current proposal is to leave 500 million tonnes of waste on the bank of the McArthur River forever. Environmental groups and the local people want the mine completely backfilled upon closure, which is supported by a 2016 report from the Mineral Policy Institute.^{52,53} The company rejects this as too costly.

Glencore makes billions each year, but has reportedly paid no royalties to the Northern Territory Government.⁵⁴ The company has been investigated by the Australian Tax Office for its tax practices.⁵⁵

4. Australia’s mining weaknesses

In August 2017, Glencore’s multibillion Wandoan coal mine won approval from the Queensland government. The open-cut mine is proposed to operate for 35 years in the Surat basin, and will require a railway to the Gladstone port.⁵⁶ Doubts about the future of the Wandoan mine had lingered since 2012, amid falling thermal coal prices and a poor market outlook.⁵⁷ The approval has enraged environmental groups, who say the government is prioritising a flailing coal industry over communities, and putting the state’s agricultural industry at further risk.⁵⁸ Protest groups are concerned with the adverse impacts

of proposed coal mine developments on climate change, groundwater, threatened species, Indigenous rights, and the Great Barrier Reef.⁵⁹

A large number of farmers have already been displaced by Glencore over this vast area, and Lock the Gate fears that remaining farmers on and near the lease will be forced out. “In 2010 local landholders took this mine to court on the basis of destruction to their land and water, and the mine has been troubled by complex compensation claims,” said a Queensland campaigner, Ellen Roberts. According to Lock the Gate “This project will be eligible for a secretive Queensland government loan via the royalty deferral package announced in June. So, Queenslanders are expected to subsidise mining giant Glencore for five years as it rips through one of our core agricultural regions.”⁶⁰

5. Carbon Majors

Human-induced climate change was officially recognized in 1988. Nevertheless, the fossil fuel company operations and products worldwide have doubled their contribution of fossil fuels since then. Using the most comprehensive dataset of historic company-related greenhouse gas emissions (GHGs) produced to date, the Carbon Disclosure Project (CDP) revealed that 71% of all global GHG emissions since 1988 can be traced to just 100 fossil fuel producers.⁶¹ Glencore is number 43 on this list and responsible for an estimated 0.38% of all global industrial greenhouse gas emissions between 1988 and 2015.

In July 2016, the Commission on Human Rights of the Philippines forwarded a climate-change-related complaint lodged by typhoon survivors and non-governmental organisations to the oil, coal, mining and cement companies, and asked them to respond to the allegations. Glencore responded:⁶² “While we take this matter seriously, we believe that our annual and sustainability reports as well as our publication ‘Climate change considerations for our business’, which set out our approach towards climate change and our performance, provide a full response to the issues raised by the Petition.”

6. Peru

The mining projects Tintaya and Antapaccay currently owned by Glencore are located in the province of Espinar, the South of the Peruvian Andes. The Tintaya open pit copper mine has two tailings dams that retain the water containing waste products from the extraction process. The Antapaccay project, located approximately ten kilometres from the Tintaya mine, began its operations in 2012. Tintaya’s open pit is since then in closure, but will be reused as a huge tailings dam for the new expansion project.⁶³

For more than a decade, communities have complained

about a scarcity of water and a growing mortality among animals.⁶⁴ A report of the Minister of Health, confirmed the contamination of water with heavy metals as well as the presence of a highly dangerous concentration of arsenic, lead, chromium and mercury in the blood and urine of people living around the mining activities. It concluded that 2.2% of the samples were severely contaminated and 52.71% contained at least one parameter that exceeded official thresholds.⁶⁵ The mine’s management denied that the pollution was a consequence of the company’s activities, and claimed is the result of the natural mineralization of the area.

The situation worsened in May 2012 and sparked widespread protests, as well as heavy clashes between protesters and police. The government declared a state of emergency and sent police forces to the province to contain the mobilizations and protect the facilities of Xstrata (later part of Glencore).⁶⁶ In the following days, the repression continued, several civilians were wounded and two were killed. The police apparently acted like a private security firm at the service of the mining company. Peruvian authorities confirmed the existence of an agreement for the provision of police services complementing the original police function.^{67,68}

The company is currently facing claims in a London court for hiring security forces to mistreat protesting environmental activists.⁶⁹ The Peruvian government has sided with the mining company, facilitating the presence of police forces to hold down protesters and not recognizing the contamination.⁷⁰ Glencore rejects any responsibility for the harm caused. The Peruvian authorities have made little progress with their investigations into the causes of the pollution and into remedial measures.⁷¹

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Halcyon Agri (Sudcam): Ruinous rubber

Sudcam, a subsidiary of Singapore based Halcyon Agri, is responsible for devastating forest clearance in Cameroon, resulting in dispossession of community lands and other impacts on human rights, including those of indigenous Baka people.

Problem Analysis

This case shows how the nexus in postcolonial Africa between kleptocratic regimes and foreign investors obstructs attempts to hold multinationals accountable and ensure victims' access to remedy. Cameroon, ruled by a head of state in power for 35 years, is characterized by widespread corruption and rent-seeking at all levels, constant involvement of the ex-colonial power, little or no transparency, low democratic accountability, poor access to justice and absence of the rule of law.^{1,2,3,4,5,6} It is extremely difficult for ordinary citizens, community organizations and civil society to obtain recognition of their rights, much less enforcement of them. Nonetheless, multinational companies like Halcyon Agri and their European taxpayer-financed allies like CIRAD, which partnered with the company from 2014 to 2017, operate in Cameroon, often attracted by special conditions like tax exemptions and protections against future legal changes. There is neither host nor home-state accountability.

Company

Company: Halcyon Agri Corporation Limited⁷ (Halcyon Agri)

Halcyon is the parent company of Halcyon Rubber & Plantations Pte. Ltd. (formerly GMG Global Ltd.), Singapore, which is the parent company of Cameroon Holdings Pte. Ltd. (formerly GMG Investments Pte. Ltd.), which is the parent company of Société de Développement du Caoutchouc Camerounais S.A. (SDCC) (formerly GMG International S.A.). Sud-Cameroun Hévéa S.A. is a joint venture between SDCC and the Cameroonian company Société de Production de Palmeraies et d'Hevea S.A. (SPPH).⁸ As of 22 August 2016, Halcyon Agri Corporation Limited operates as a subsidiary of Sinochem International (Overseas) Pte Ltd.⁹

Head office: Singapore

Subsidiary: Sud-Cameroun Hévéa S.A. (Sudcam)¹⁰

Company background

Publicly listed company (Singapore exchange)

Top 5 shareholders: Sinochem International Corp. (54.99%),

China-Africa Development Fund Co., Ltd. (Invst Mgmt) (10.21%), Gondobintoro Family, Robert Günther Meyer, Credence Partners Pte Ltd.¹¹

CEO: Robert Meyer¹² (income: SGD 2,100,000 = EUR 1,378,000)¹³

President: Liu Hongsheng¹⁴

Annual profit: US\$ 71,942,000 (2016)¹⁵

Annual turnover: US\$ 1,010,310,000 (2016)¹⁶

Presence: Halcyon has rubber production factories (33) and land ownership in Indonesia, Malaysia, Thailand, China, Ivory Coast and Cameroon. It distributes its products through a network of logistics assets and sales offices in 39 cities spanning Asia, Europe, Africa, and North America.^{17,18,19}

Number of employees: 10,000–250,000²⁰

Other companies involved:

- Société de Production de Palmeraies et d'Hevea S.A. (SPPH), Cameroon, is one of the two partners in the Sudcam joint venture, owning 20%.
- Hévéa Cameroun S.A. ("Hevecam"), Cameroon: another rubber plantation company involved in forest clearance and social conflicts and a sister company of Sudcam, controlled 90% by SDCC. The other 10% of Hévéa Cameroun S.A. is owned by the Cameroonian state. Hevecam has a rubber processing factory where Sudcam natural rubber is processed.

Company activity

Natural rubber supply chain management, including plantation development and management, processing and distribution.²¹

Country and location in which the violation occurred

Cameroon: Meyomessala, Meyomessi and Djoum subdivisions

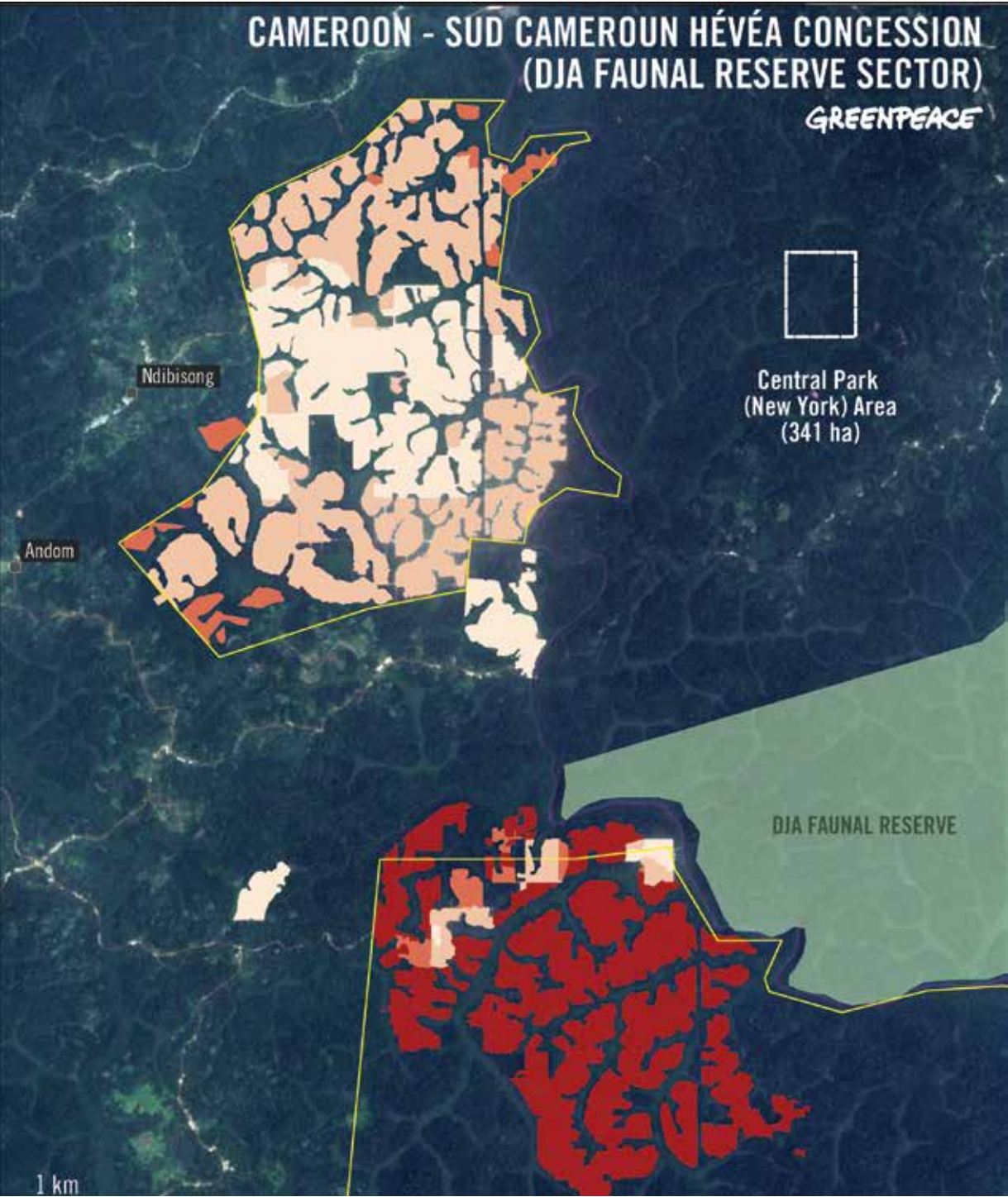
Summary of the case

Between 2008 and 2015, the Cameroonian government awarded Sudcam, Halcyon Agri's subsidiary, land rights to more than 75,000 hectares. In 2011, the Cameroonian government and Sudcam signed a convention for the

duration of 50 years, renewable for another 25 years, granting the company tax exemptions and protection against unfavourable legal changes, amongst others. Since then the company has cleared more than 9,000 hectares of dense tropical forest in the south of Cameroon to develop

a rubber plantation. The Sudcam plantation is by far the most devastating new clearing of forest for industrial agriculture in the Congo Basin.²²

The Sudcam plantation area is very close to the Dja Faunal Reserve, listed as a UNESCO World Heritage site since 1987



due to its outstanding plant and wildlife biodiversity.^{23,24} In 2012 UNESCO's World Heritage Centre and IUCN concluded that the reserve met the criteria for inscription on the List of World Heritage in Danger. They warned that the development of Sudcam would result in additional human pressures on the Dja Reserve. Remarkably, UNESCO failed to mention this threat in a subsequent field mission report three years later.²⁵ In 2016, Greenpeace wrote to UNESCO to express its support for a draft decision to inscribe the Dja reserve on the List of World Heritage in Danger and to highlight the danger posed by Sudcam.²⁶ The draft decision, however, was rejected by the government parties of the World Heritage Committee.²⁷

In 2013, the EU-financed Independent Observer of Forestry Control recommended the clearing of at least 11,300 hectares of forest, despite the obvious impact of the plantation.²⁸ The Independent Observer admitted it provided this crucial green light without having checked the legality of Sudcam's land tenure or plantation operations, which it described as beyond its objectives.²⁹ The devastating impact of the plantation did not stop the French publicly funded research institute CIRAD (Centre de coopération internationale en recherche agronomique pour le développement) from signing a 'long-term collaboration' with Sudcam's parent company to help the company 'maximise productivity and yield'.^{30,31} This partnership ended, prematurely, early 2017.

Forest clearing by Sudcam is ongoing. Divisional and subdivisional authorities are reported to react to community claims and actions with threats and intimidations.³² Rainforest Foundation UK has reported on this and local inhabitants have testified to Greenpeace Africa that the Sudcam plantation has led to widespread dispossession of community lands and resources, including those of indigenous Baka people, as well as demolition of settlements, graves and farms. They have also lamented over the very poor or non-existent consultation and inadequate compensation.^{33,34} Dispossessed people claim they are left with minimum land to grow food to feed their families, while they have no access to alternative employment. Instead of being heard, they are threatened with imprisonment by local authorities. Unregistered forest land in Cameroon is considered to be the property of the state. Cameroonian law fails to acknowledge customary land tenure, making Cameroonians who live in rural communities little better than squatters on their own land.³⁵

In 2014, Greenpeace Africa contacted Sudcam requesting information about its company structure, its finance, its land acquisitions, its application of the FPIC principle and its plantation development plans.³⁶ No reaction was received.

Halcyon Agri, a multinational rubber company, is colluding with one of the world's longest-ruling autocrats to satisfy

global rubber markets and benefiting from the opacity of France's overseas "development" policy.

The government of Cameroon awarded temporary grants and an absolute grant to Sudcam for plantation development, disrespecting the free, prior and informed consent of local communities and indigenous peoples living in the area. Transparency about the land acquisition is absent and none of the concession decrees have been published.^{37,38,39,40} According to researchers, the award of the land to Sudcam violated the criteria specified in Cameroon land regulations because it was already awarded to logging companies. They qualify the award as an instance of 'the use of law for political ends in Africa'.⁴¹

Various sources suggest Paul Biya, one of the world's longest-serving heads of state, has family ties to Sudcam's parent company SPPH. One source alleges that is the reason that land acquisition rules were not respected.^{42,43,44,45} The plantation lies only a dozen kilometres east of the Biya's Mvomeka'a mansion and airstrip. In March 2012 UNESCO inspectors were refused access to the Sudcam zone 'for so-called security reasons'.⁴⁶

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ICIG (Miteni): Drinking water pollution and tax avoidance

Italian chemical company Miteni, a subsidiary of International Chemical Investors Group (ICIG), has contaminated the soil and water in an area of around 200 km², affecting more than 350,000 people: but the Italian authorities have so far been unable to provide any remedy.

Problem Analysis

This case shows how ineffective national and regional governments and the judiciary system in Italy stood by as Miteni SpA released hazardous chemicals associated with cancer in humans into the Italian water supply, impacting at least 350,000 people. The damage has been estimated at €200 million but so far no efforts have been made to punish the company or to recover these costs.

Miteni's parent, ICIG group, has engaged in aggressive tax avoidance throughout its operations. This illustrates how the current system of financial contributions by corporations to society is broken. Corporations can amass huge profits while neither being held responsible for externalities nor being made to contribute their fair share to the society which hosts them.

Company

Company: International Chemical Investors Group (ICIG)

Head office: Luxembourg

Subsidiary: Miteni SpA¹, Italy. ICIG bought Miteni from Japanese Mitsubishi Corp. in 2009. Miteni was formerly called Rimar Chimica, set up by the Marzotto textile group in 1965.

Company background

Privately owned

Shareholders: Susi and Achim Riemann jointly control 50 per cent of ICIG through Acsuri GmbH. Patrick Schnitzer and any other possible owners of PE Investors Ltd. own the remaining 50 per cent of ICIG through PE Investors Ltd.²

The group's parent company is located in Luxembourg.³

CEO MITENI: Mr. Antonio Nardone (income data not public)

President MITENI: Brian A. McGlynn

Annual profit: € 76.5 million (2016)⁴

Annual turnover: € 1,920 million (2016)⁵

Presence: ICIG companies operate 29 manufacturing plants, ten in Germany, five in Italy, four in France, three in the United States, two in Belgium, two in the United Kingdom, one in Poland, one in Switzerland and one in the Netherlands. The Group has sales or research and development offices in Germany, the United States, Switzerland, France, Italy, the United Kingdom, Finland, Russia and China.⁶

Number of employees: More than 6,000 employees worldwide.

Company activity

ICIG is active in pharmaceuticals (CordenPharma brand), Fine Chemicals (WeylChem brand) and Chlorovinyls (VYNOVA brand).

Miteni, formerly called Rimar Chimica, started as a research and development operation for a textile group (Marzotto Group) and was later expanded to develop fluorochemicals, which are used to make stain-resistant, waterproof or non-stick finishes.

Country and location in which the violation occurred

Trissino (VI), Italy

Luxembourg

Summary of the case

Water pollution resulting in increased cancer and mortality rates

In 2013, the Italian National Research Council published a study accusing the Italian chemical company Miteni SpA of causing water pollution and contamination on a large scale across the Veneto Region in northeast Italy. The study stated that Miteni SpA was responsible for large quantities of Per- and Polyfluoroalkyl Substances (PFASs) leaking into water sources around the chemical manufacturing plant, and of contaminating drinking water.

PFASs are resistant to heat, water and oil and do not easily degrade in the natural environment. PFASs can also bioaccumulate, meaning their concentration in the blood

and organs can increase over time as people ingest these chemicals through their drinking water. PFASs have a multitude of adverse health effects on animals and people, including causing liver damage, cancer and child mortality.^{7,8} The 2013 research covered a 150 km² area spanning the three Italian municipalities of Vicenza, Padua and Verona in the Veneto region, where between 350,000 and 400,000 people were believed to have been potentially exposed to PFASs.

The levels of PFASs in surface water and drinking water in the area were found to be much higher than usual. Concentrations of one possible carcinogenic PFAS called Perfluoro-octanoic Acid (PFOA) were found to be between 230 and 3,600 times the usual level. Higher than normal concentrations were confirmed in a follow-up study by the Veneto regional government (May 2015), and a 2017 study by the Universities of Padua and Verona found that incidences of cancer, diabetes and hypertension, as well as mortality rates, among Miteni's workers were significantly higher than average. The pollution by Miteni was found to have polluted the soil and water of 23 municipalities, affecting a total of 120,000 people. A study of the blood of 14 people living in the polluted area found PFAS levels that were 30 times higher than normal.

At this stage no real action has been taken other than installing an active carbon filter for filtering drinking water. The regional and national government have not taken action to stop the pollution. Restoring the water system of the region would cost € 200 million. However, the total costs are expected to be much higher, because the costs for environmental and health impacts as well as restorations for the affected population have as yet not been estimated by the authorities.

Tax avoidance

There are a number of indications that ICIG, Miteni's parent company, engages in aggressive tax avoidance. First, all of the controlling (parent) holding companies are based in tax havens (Luxembourg, Switzerland and Delaware/USA), despite the company having no operations in these countries. Secondly, based on their annual accounts and consolidated figures the group's parent company ICI SE and the corporate group appear to enjoy very low effective tax rates, of 3.19% and 13.3% respectively. These are far below Luxembourg's official statutory corporate income tax rate of 29.22%, and below the rates that apply in every country where ICIG operates; where they are also obliged to pay corporate income taxes.

These low effective tax rates are achieved in a number of ways. A large part is a result of profit-shifting, whereby subsidiaries are kept unprofitable by creating artificial

costs, such as interest payments to the parent company, management fees or royalty payments for use of intellectual property. ICI SE has €45.9 million outstanding in loans to its subsidiaries, which generate costs for them. Financing through equity, which does not generate costs for subsidiaries, is much lower. ICI SE owns just €9.9 million worth of shares in its subsidiaries. The company also owns intangible assets in the form of patents or trademarks valued at €149,000. Together, these three asset types make up 84% of ICI SE's €66.8 million in assets. ICI SE's profit is derived from passive income, such as interest payments on loans, dividend payments from shareholdings, capital gains on the sale of subsidiaries and royalty payments for intangible assets.

Given that ICI SE's subsidiaries deduct interest payments for the loans from their pre-tax profit, these interest payments effectively shift profit to ICI SE from its subsidiaries. Considering ICI SE's low effective tax rate, it appears that the income that ICI SE in Luxembourg receives as interest payments from its operational subsidiaries is taxed at a lower rate than it would have been had it been taxed in the country where it operates. Furthermore, ICIG has trademarks registered in Luxembourg, which generate costs for subsidiaries who use them. Again, this indicates profit-shifting.

As an example, ICIG acquired the company Enka GmbH in 2005. Its 'Enka' trademark is controlled by ICIG's subsidiary International Chemical Investors IV SA (ICI IV), registered in Luxembourg. As the value of that trademark was created in Germany, it should be taxed there, where all of Enka's operations are located. Whilst there is not sufficient financial transparency at subsidiary level to identify the volume of these transactions and related tax losses, it is likely Enka GmbH makes use of its own trademark and pays royalties to its parent company in Luxembourg, thereby lowering its profits in Germany, where a tax rate of 29.79% applies.

Until 2014 ICIG undertook research and development (R&D) activities in Ireland, at its subsidiary Corden Pharma Ltd. Corden Pharma Ltd. made annual royalty payments to one of its subsidiaries, called Corden Pharma IP Ltd. for the use of its patents. In the years 2009, 2010 and 2011, these payments amounted to €589,000, €92,000 and €33,000, respectively. During these years, royalty payments from its parent company made up Corden Pharma IP Ltd.'s entire turnover. Due to a lack of publicly available information, any payments that were made in others years could not be identified.

In its 2010 annual accounts, Corden Pharma IP Ltd. reported that its profits arising from patent income were exempted from corporate income tax. This allowed the company to pay nothing in corporate income taxes. Its parent company, Corden Pharma Ltd., was reportedly subject to Ireland's regular 12.5 per cent statutory tax rate. However, following an explosion at its facilities in 2008, Corden Pharma Ltd. suffered a loss and subsequently received a tax credit. This tax credit allowed the company to pay nothing in taxes from 2010 until it was wound down in 2015.

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Keskinoğlu: Chicken censorship

Chicken producer Keskinoğlu was able to use a SLAPP suit to deplete the resources of civil society when its production methods were criticised.

Problem Analysis

This case shows how a large agricultural company has succeeded in its attempted Strategic Lawsuit Against Public Participation (SLAPP). Although the company lost the SLAPP suit itself, it managed to slow the campaign with the result that campaigners lost momentum in their campaign for more sustainable meat production.

SLAPPING is not discussed as such in the public sphere in Turkey; hence no discussion of “anti-SLAPP” laws has entered the public discourse yet. Therefore the industry can go ahead with these procedures and tactics. The case illustrates firm government support of the industry with negative impacts for citizens and the environment and a lack of home-state accountability.

Company

Main Company: Keskinoğlu Tavukçuluk ve Damızlık İşl. San Tic. A.Ş.

Head office: Turkey

Company background

Privately owned company

Shareholders: Fevzi Keskinoğlu (50%) - Mehmet Keskinoğlu (50%)

President & CEO: Fevzi Keskinoğlu

Non-Executive Chairman & Director:

Annual profit: Unknown

Annual turnover: 1,041,666,084 TRY / US\$ 382,241,742 (2015)¹

Presence: Turkey

Number of employees: +/- 3,600²

Company activity

Keskinoğlu Group is a major producer and exporter of chicken, eggs and chicken related products in Turkey.^{3,4}

Country and location in which the violation occurred

Turkey

Summary of the case

In May 2016 Greenpeace Mediterranean launched its livestock campaign in Turkey. It asked the top seven poultry companies to adopt sustainable production methods by complying with a list of demands by 2020, including announcing a roadmap for their transition, which they would be held accountable for.⁵ These seven companies are each represented by one member in the seven-member board of the poultry industry association (BESD-BİR). Five of the seven companies, immediately and separately, went to court to block public access to the campaign’s petition site, as well as Greenpeace Mediterranean’s websites and Facebook pages which linked to the petition site, claiming that the use of the names and logos of their companies on the petition site was in breach of the companies’ personal rights.

As a result, a court order was issued that blocked access to the campaign’s petition site. Greenpeace Med immediately launched a new petition site, this time without the names and logos of the companies.⁶ On May 23rd, 2016, Keskinoğlu Tavukçuluk ve Damızlık İşl. San Tic. A.Ş. (Keskinoğlu) filed a criminal lawsuit against legal representatives of Greenpeace Med (registered in Turkey as Greenpeace Akdeniz) alleging a breach of the anti-competition articles of the Commerce Law.

Despite the fact that these articles of the Commerce Law are meant to regulate the terms of competition in a liberal economic system, Keskinoğlu used this law to launch a SLAPP suit to silence and censor the demands of civil society.⁷ Two other companies tried to put pressure on the campaign. The company Besd-Bir contacted Greenpeace International and the company Beypiliç sent an official letter in which it threatened to sue Greenpeace Mediterranean and its campaigner.

The first hearing in the Keskinoglu case was held in January 2017. After four hearings, on 29 September 2017, the Judge ruled against Keskinoglu's allegations and cleared all four Greenpeace representatives of all charges, declaring that no crime was committed and the Commerce Law was not breached. Keskinoglu is now appealing the verdict.^{8,9,10}

The CEO of Beypiliç, which threatened to sue Greenpeace, is also the President of the poultry industry association BESD-BİR. And one of the attorneys that represented Keskinoglu in their fourth and final hearing is the legal representative of both Beypiliç and BESD-BİR. So there is a de facto involvement of the remaining poultry companies as complainants in the criminal case and an apparent collective action on the part of the Industry.

Primary damage was done to the four current and past Greenpeace members who were registered at the time as legal representatives of Greenpeace Akdeniz, two of whom were no longer working for Greenpeace Akdeniz at the time of the incident. Secondly, the court case put strains on Greenpeace Mediterranean's and Greenpeace International's resources, in particular by occupying the legal team. This process created an additional burden as information and documents needed to be exchanged back and forth continuously in bilingual format, incurring translation headaches. Third, the case diverted campaign resources as the campaigner and the campaign project team had to focus on the court case rather than the overall campaign strategy for over a year. Finally, and most importantly, the campaign for more sustainable meat production in Turkey was stalled by the need to address the court case.

The SLAPP suit did create some opportunities for the campaign. It made it possible for Greenpeace to target Keskinoglu and mention Keskinoglu by its name – an act which is otherwise barred by the commercial law in the context of campaign activity. The case also brought significant attention to the underlying issue.¹¹

Despite a long history of using strategic lawsuit against public participation (SLAPPING) in Turkey, both on behalf of public authorities and of companies, this practice is not discussed and crystallized as “SLAPP” in the public sphere; hence no discussion of “anti-SLAPP” laws has entered the public discourse. Recently BESD-BİR filed similar cases in criminal court, using the same allegations about breach of anti-competition articles of the Commerce Law, against a prominent medical doctor who was advocating for healthy food and criticizing the industrial agro-food business. Even though BESD-BİR has lost most or all of these cases, with

the courts declaring their allegations unfounded, this has not prevented the industry from filing new complaints.¹²

The government did not play any role in the Greenpeace case and the proceedings did not raise any concerns about a fair trial in this respect. However, whenever the industrial model of poultry production is criticised in the public sphere, the Ministry of Agriculture intervenes in support of it.

This is best exemplified by the TV ads produced by the Ministry of Agriculture, with taxpayers' money, which national TV channels are obliged to air free of charge under the guise of “Public Service Adverts”. These ran from 2014–2016, before and during Greenpeace-Mediterranean's poultry campaign, telling the public how safe and healthy chickens produced by industrial poultry companies are.¹³

In Turkey, recourse to SLAPP cases is not limited to the poultry industry. Labour unions are frequently targeted on the same “unjust competition” grounds, and addressing these cases constitutes an important element of civil society's struggle in the country. There is also a trend toward companies asking for a court order to block certain websites. This is happening in the context of the shrinking democratic space in Turkey.^{14,15,16,17,18,19} Because of this the positive outcome of the criminal proceedings must not be viewed as solely legal gains. We expect the Keskinoglu decision to form a favourable precedent.

Endnotes

1 Calculation based on 2015 annual average USD / TRY exchange rate of 2,72515. In 2016 the Company chose not to publicly disclose its turnover. However, based on its ranking, its 2016 turnover stands between 805–820M TRY / US\$ 266–271M; reflecting approximately a 30% drop.

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<http://yavuzdizdar.com/tavuk-davasi-ilk-suda-20-dakikada-kaybedilmis-bir- itibar-oykusu>

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14 For reports of internet mass-censorship in Turkey see Turkey Blocks at <https://turkeyblocks.org/reports>

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Monsanto: GM soybeans and the Mayan communities of Campeche, Mexico

US-based agrochemical firm Monsanto's efforts to promote GMOs in Mexico, including intense lobby efforts, led to violations of the rights of indigenous peoples.

Problem Analysis

This case shows how the promotion of an agri-industrial, monoculture-based approach to farming violated the human rights of indigenous peoples. It shows how the agri-industrial production model clashed with the Mayan cosmivision of respect for nature. But public authorities failed to consult with local communities or to protect a variety of human rights, while supporting the development of Monsanto's genetically modified soybeans. Indigenous communities have had insufficient access to remedy and have not been granted redress for the damage done. The case also shows what these communities were able to achieve through resistance to corporate power and corporate-state collaboration.

Company

Company (and local subsidiary): Monsanto

Head office: United States

Subsidiary: Monsanto Comercial S.A. de C.V.

Company background

Public company (traded on the stock exchange)

Top 5 shareholders: Vanguard Total Stock Market Index Fund, Vanguard 500 Index Investor Fund, Vanguard PRIMECAP Inv Fund, SPDR S&P 500 ETF AUD, and SPDR S&P 500 ETF USD¹

Monsanto agreed to sell itself to Bayer. This merger is now under investigation by anti-trust authorities and regulators.²

Chairman and CEO: Hugh Grant (total compensation 2016 : US\$11.841 million)³

President and Chief Operating Officer: Brett D. Begemann (total compensation 2016: US\$5,657,885)⁴

Annual profit: US\$2.26 billion (2017)⁵

Annual turnover (revenue): US\$14.46 billion (2017)⁶

Countries in which main company is present: > 80⁷

North / Central America: Canada, Guatemala, Mexico, Puerto Rico, United States.

South America: Argentina, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay.

Europe: Albania, Belarus, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Greece, Hungary, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom

Middle East: Israel, Middle East

Asia / Pacific: Australia, Bangladesh, China, India, Indonesia, Japan, Kazakhstan, Malaysia, New Zealand, Pakistan, Philippines, Singapore, South Korea, Sri Lanka, Taiwan, Thailand, Uzbekistan, Vietnam

Africa: Algeria, Burkina Faso, Kenya, Malawi, Morocco, South Africa, Zimbabwe

Number of employees: +/- 20,800 (2017)⁸ regular employees and +/- 3,300 temporary outside the United States (2016)⁹

Company activity

Monsanto Company, together with its subsidiaries, is one of the largest agricultural corporations worldwide. It operates in two segments: 1. 'Seeds and Genomics': including genetically modified seeds; 2. 'Agricultural Productivity': Roundup brand herbicides and other herbicides for agricultural purposes and lawn-and-garden herbicide products for the residential market.¹⁰

Country and location in which the violation occurred

Yucatán and Campeche, Mexico

Summary of the case

Monsanto has a history of activity in Mexico's soybean sector. For ten years (2000–2009) production took place under the status of 'experimental' stage. In 2010 and 2011, these plantations became a 'pilot program', giving them more legal flexibility.¹¹ In 2012 federal authorities

granted Monsanto authorization to grow genetically modified (GM) soybeans for commercial purposes without first consulting the affected indigenous communities. The permit covered 253,500 hectares in seven Mexican states, including Yucatán and Campeche. The local Mayan communities pointed out, among other grievances, that the contamination of water with herbicides, deforestation and the impact of the project on beekeeping were causes for concern.¹² Bee populations have already been significantly reduced due to the use of other pesticides in industrial farming, such as neonicotinoids. Other adverse effects include social conflicts between farmers who promote the industrial model and Mayan communities that maintain a cosmovision based respect for nature.^{13,14}

A number of administrative and judicial complaints have been filed by civil society organizations and the communities of Campeche and Hopelchén.¹⁵ In 2012 Mayan beekeepers from Yucatan and Campeche filed a lawsuit against Monsanto's permit. The arguments put forward included violations of a range of Mayan people's rights in the state of Campeche: labour rights, due to the fact that German consumers (an important export market) reject honey with pollen traces coming from GE soybean plantings; the right to a healthy environment; the right to free, prior and informed consent (ILO Convention 169 on Indigenous and Tribal Peoples); and the need to apply the precautionary principle as contained in the Cartagena Protocol on Biosafety and Rio Declaration on Environment and Development. The case reached the second chamber of the Supreme Court of Justice (SCJN), and in November 2015 it ruled, that those responsible for having granted permission to Monsanto (the Ministry of Agriculture, Livestock, Rural Development, Fisheries and Food, together with the Ministry Environment and Natural Resources), were obliged to seek prior consent from the indigenous communities affected. After the Ministries again failed to do so, the Supreme Court ruled there could be no legal planting of GM soy until the National Commission for the Development of Indigenous Peoples (CDI) and the Interministerial Commission on the Biosafety of GMOs (CIBIOGEM) consult with the indigenous communities who filed the lawsuit.^{16,17,18,19,20,21}

The judicial authorities did not recognize the obligation to grant redress for damages to the Mayan communities, without being provided with arguments regarding this. In March 2016 the indigenous consultation began, but with many shortcomings and violations²², and GM soybeans continued to be illegally planted in the State of Campeche in 2016. In reaction to these violations, indigenous farmers

filed a petition (1447-1416) with the Inter-American Commission on Human Rights (IACHR) and testified before the International Monsanto Tribunal – an international civil society initiative – in October of 2016. Finally, in 2017, the Ministry of Agriculture sanctioned several farmers for planting illegal GM soybeans. In June 2017 Monsanto, who had been distributing the soybeans in previous years, stated on their website that the company has decided not to market GM soybeans in Mexico.²³

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Nestlé: Plastic brand-waste audit in the Philippines

Swiss food and beverage company Nestlé's packaging leads to huge amounts of plastic pollution for which the company takes no responsibility.

Problem Analysis

The Philippines is the third-biggest source of plastic pollution entering the world's oceans. The environmental damage has a domino effect, impacting on fishing, food security, the health of people and marine life, tourism, and people's livelihoods. This case shows how the absence of government policy and corporate accountability allows the problem to persist and worsen. Transnational companies like Swiss-based Nestlé can continue to act as the originators of plastic pollution, due to a lack of regulation in their home states, and an inadequate and ineffective national waste management system in host states such as the Philippines. The first step to reducing the volume of plastics at source is Extended Producer Responsibility (EPR)¹ and company disclosure, which makes important information available to the public.

Company

Main Company: Nestlé S.A.

Head office: Switzerland²

Subsidiary: Nestlé Philippines

Other companies in the plastic pollution top 10: PT Torabika, Universal Robina Corp, Unilever, Zesto, Procter & Gamble, Colgate, Palmolive, Monde Nissin, and Nutri Asia³

Company background

Publicly traded company

Top 5 shareholders: Norges Bank Investment Management (2.76%), Capital Research and Management Company (2.52%), Vanguard Group Inc (2.31%), Massachusetts Financial Services Co (1.43%) and BlackRock Fund Advisors (1.36%).⁴

President: Peter Brabeck-Letmathe (income US\$ 5 million, estimate)⁵

CEO: Paul Bulcke (salary 2016: US\$ 2,598,898; total income \$11,614,166)⁶

Annual profit: CHF 13,693 million⁷

Annual turnover: CHF 89,469 million

Presence: sales in 191 countries; 418 factories in 86 countries

Number of employees: +/- 328 000

Company activity

Nestlé is the world's largest food and beverage company. It has more than 2,000 brands and is present in 191 countries.⁸

Country and location in which the violation occurred

Freedom Island, Paranaque, Metro Manila, Philippines

Summary of the case

In 2010, eight million tons of plastic trash from coastal countries ended up in the ocean.^{9,10,11,12} The Philippines has been identified as the third-biggest source of plastics leaking into the world's oceans.^{13,14} During an eight-day beach cleanup at Freedom Island, a critical wetland habitat and Ramsar site in Manila Bay, Greenpeace volunteers and coalition partners from the #breakfreefromplastic movement found items ranging from styrofoam to footwear, along with single-use plastics such as bags, plastic bottle labels, and straws. A total of 54,260 pieces of plastic waste were collected during the audit, with most products being sachets, i.e. small sealed packets made of plastic, usually containing small quantities of consumer products, which are designed for low-income consumer segments in the so-called "sachet-economy".^{15,16} Through this cleanup, companies from which plastic pollution originates could be identified, Nestlé being number one.^{17,18,19}

The mangroves at Freedom Island face physical threats, since their roots are literally smothered by plastic marine debris and their openings clogged with refuse washing in from the bay. The mangrove forest and swamps serve as critical habitat for more than 80 migratory bird species

and as spawning grounds for numerous fish species. The livelihood of fisherfolk living around Freedom Island is under threat as the mangroves are destroyed and the fisheries that depend on them decline. Fisherfolk in the area have recently revealed that up to 40% of their catch is plastic.^{20,21}

Some government action against plastic pollution has been taken. On March 15, 2017 Senator Cynthia Villar filed Senate Resolution No. 329 on Plastic Wastes Leakage into the Seas.²² The resolution directs the Senate Committee on Environment and Natural Resources to conduct an inquiry, in aid of legislation, on the measures being undertaken to prevent plastic waste polluting the seas. On Nov. 15, 2017 the Association of Southeast Asian Nations (ASEAN) under the Philippine chairmanship recognised “with great concern” the plastic waste problem and committed to “strengthen coordinated efforts at regional level to address this issue”.²³

However, ending plastic pollution requires more strategic policy making in the long term, such as banning corporations from producing single-use plastic packaging. Today the absence of such a policy and of corporate accountability in line with Extended Producer Responsibility-principles (EPR)²⁴ allows the problem to continue and worsen.

The consumer goods sector is a primary user of plastics. The social and environmental impacts of their use of plastics have been quantified in their ‘natural capital cost’, which equates to a monetary value of \$75bn per year. The natural capital cost to marine ecosystems of plastic waste is \$13bn per year. As such, it is important for companies to monitor their production of plastic to cut pollution and improve resource efficiency. In one study, only half of 100 companies assessed reported quantitative data on plastics.^{25,26}

There are a multitude of steps companies can take to reduce the pollutants they produce, reduce the quantity of plastics used and increase recyclability of their products. Company disclosure, which makes important information available to the public, is the first step to increase pressure on companies to reduce the volume of plastics at source.

Greenpeace entered a dialogue with Nestlé after the 2017 brand audit.^{27,28} While Nestlé is taking some measures, they are far from what Greenpeace and the Break Free From Plastic movement are calling for. The company hardly addresses the problem at source, and reduction targets are vague. In an official reply, Nestlé has agreed to engage with Break Free From Plastic on the issue²⁹ and to address the following key concerns:

stopping the production, distribution and use of single-use and zero-value plastic packaging for their products, and investing in alternative reuse and delivery systems;

saying no to incineration, burning in cement kilns or waste-to-energy processes to deal with the problem;

supporting Zero Waste programmes and solutions³⁰; and advocating for and supporting the implementation of Extended Producer Responsibility (EPR)³¹ regulations that strongly support the above objectives.

With regard to home state action, there is a lack of regulation in Nestlé’s home state Switzerland to implement due diligence of Swiss-based corporations in preventing, controlling and remedying plastic pollution in their transnational operations.

As a host state, the Philippines lacks policy and regulation on single-use plastic, and the national waste management system is inadequate and ineffective. This makes it difficult to access available remedies and reduces chances of successful litigation.

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-Targets for reuse and refill systems as a priority as well as separate collection, preparation for reuse, recycling, recycled content and waste reduction#. Minimum requirements ensuring:
Coverage of full costs of plastic pollution (including impacts on oceans, waterways and communities) and of waste management of single-use packaging waste
Lower fees for products that are reusable, more durable, non-toxic and recyclable, and higher fees for lightweighted or no-value plastic packaging materials such as multi-layered packaging, sachets, polystyrene and others and
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Novartis (Sandoz): Pharmaceutical waste causing resistant superbugs and health risks

By outsourcing pharmaceutical production to countries with weak anti-pollution legislation companies like Sandoz, a subsidiary of the Swiss Novartis, contribute to the emergence of bacterial 'superbugs', blamed for 700,000 deaths every year.

Problem Analysis

Next to climate change, the international spread of multiresistant bacteria is one of today's biggest catastrophes. "About 700,000 deaths every year worldwide are linked to common antimicrobial therapies becoming ineffective against these superbugs."¹ It has been estimated that total global deaths caused by antibiotic-resistant infections could reach 10 million per year by 2050². Water sources in and around major pharmaceutical production hubs often contain excessively high levels of drug residue because sewage and industrial emissions from bulk drug production are often dumped untreated or only partially treated in the environment. Local bacteria then become resistant to those drugs, becoming the so-called superbugs, which have created a global public health emergency.³

Many pharmaceutical majors, including Novartis, outsource their production to emerging markets where labour is cheap, workforces skilled and environmental standards weak. As a result, places like Hyderabad where Novartis subcontractor Mylan Laboratories is based, come to depend on the economic benefits provided by the sector. The contamination will continue until pharmaceutical companies and major buyers of antibiotics take their responsibility for their entire supply chain.

Company

Main Company: Novartis International AG

Head office: Basel, Switzerland

Subsidiary: Sandoz, Germany

Other company involved: Mylan Laboratories Ltd, Hyderabad (India)

Sandoz claims to be the the "largest generic antibiotic

manufacturer in the world, with 300 million packs of antibiotics produced annually" and "the 3rd largest maker of antibiotics globally and we produce the active pharmaceutical ingredients (API) for other leading companies."⁴

Company background

CEO of company: Joseph Jimenez (Novartis)

Total compensation: 11,989,448 CHF⁵

Company's annual net PROFIT: US\$ 6.7 billion (2016)⁶

Company's annual TURNOVER: US\$ 48.5 billion (2016)⁷

Countries in which main company is present: Novartis products are available in 155 countries⁸

Number of employees: 123,000 employees worldwide⁹

Company activity

Company activity: Pharmaceuticals

Business sector: Antibiotic production

Country and location in which the violation occurred

India, Hyderabad

Summary of the case

India is in the grip of a severe water pollution crisis of which industrial pollution is a leading cause. This is in particular due to its bulk drug production sector, which has a major hub in the southern Indian city of Hyderabad, where around 170 pharmaceutical companies are located.¹⁰ During the last 40 years the sector has become more and more economically important to the area. Many pharmaceutical majors, based in the US and Europe, outsource their production to emerging markets where labour is cheap, workforces skilled, and environmental standards weak.¹¹ The production plants in Hyderabad supply almost all of the world's major drug companies. As such Mylan Laboratories Ltd, one of India's top ten pharmaceutical exporters and one of the major

polluters, supplies Germany's Sandoz (the generics arm of Switzerland's Novartis).¹² Despite this concentration of drug manufacturing very little attention has been paid to the impact of pharmaceutical production on the environment and the inhabitants living in proximity to factories and industrial parks.¹³

In Hyderabad, sewage and industrial emissions from drug manufacturing are often dumped untreated or partially treated into the environment. Scientific studies have found excessively high levels of drug residue (antibiotic and antifungal) in water sources in and around a major production hub in Hyderabad, as well as high levels of bacteria and fungi resistant to drugs. This results in the creation of superbugs, as the microbes living there build up resistance to the ingredients in the medicines that are supposed to kill them. These superbugs travel easily and have multiplied in massive numbers all over the world; the result is a public health emergency that is already killing hundreds of thousands of people a year.^{14,15}

International bodies, such as the World Health Organization, say the governments of the countries where the drugs are made are the ones responsible for stopping the pollution – but studies show that domestic legislation is having little impact on the ground.¹⁶ The Hyderabad-based state pollution control board said they did not find antibiotics in their studies of the water in the area and that the situation has improved. However, despite several requests from media outlets they did not share a copy of their report.¹⁷ A study of this issue prepared for Nordea by Changing Markets and Ecostorm¹⁸ attracted media attention, but neither Indian authorities nor the companies responded. Hyderabad heavily depends on the economic benefits that come from the bulk drug production sector. It's up to the home states of pharmaceutical companies, and the major buyers of antibiotics, to ensure they take their responsibility for the impacts of their entire supply chain..

Endnotes

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Resolute Forest Products: A new script for corporate SLAPPs

Resolute Forest Products has aggressively used Strategic Lawsuits Against Public Participation (SLAPPs) to deter critics.

Problem Analysis

This case is an example of how corporations are increasingly attempting to use legal means to criminalise and shut down protest and advocacy groups defending environmental and human rights.

Canada's great northern forest is an ancient forest, shaped by forces of nature and stewarded by Indigenous Peoples since time immemorial. Also known as Canada's boreal forest, it has some of the last large expanses of undisturbed natural forest, is home to threatened species, and is one of the world's largest terrestrial stores of carbon. Resolute Forest Products, one of the largest logging companies in North America, is destroying key areas of this magnificent forest and has abandoned relevant sustainable forestry efforts. In the face of criticism and attempts to hold it accountable for its controversial environmental record, Resolute has used Strategic Lawsuits Against Public Participation (SLAPPs). SLAPPs are increasingly being recognised as a growing threat to advocacy groups.¹ This trend has been particularly pronounced in the United States and Canada, due to high legal fees and fewer procedural safeguards. A lack of applicable anti-SLAPP laws in some Canadian provinces and U.S. states gives corporations a greater ability to advance SLAPP tactics.

Company

Main company (and local subsidiary): Resolute Forest Products²

Head office: Montreal, Canada

Company background

President and CEO of company : Richard Garneau³ (total compensation 2016: US\$ 3,813,432. Of this total \$1,017,686 was received as a salary, \$1,804,600 was received as a bonus, \$0 was received in stock options, \$790,000 was awarded as stock and \$201,146 came from other types of compensation)⁴

Annual gross profit 2016: US\$ 829 million⁵

Annual turnover 2016: US\$ 3,545 million⁶

Presence: some 40 facilities in the United States and Canada⁷

Number of employees: 8,445 (2016)⁸

Company activity

Company activity: Logging and the production of pulp, newsprint, lumber, paper (end products) books, magazines, tissue papers, catalogues and flyers.

Country and location in which the violation occurred

United States

Canada, Boreal Forest

Summary of the case

In their criticism of Resolute, NGOs and journalists have cited independent third-party social and environmental audits from the Forest Stewardship Council (FSC)⁹ that recorded major non-conformities in regards to woodland caribou habitat protection, the maintenance of old-growth areas and high conservation value forests¹⁰, and disputes with Indigenous Peoples.¹¹

Resolute's approach to criticism has been to respond forcefully enough to deter any future attempts to hold the company to account. As part of its belligerent tactics, Resolute has used both public relations campaigns and legal intimidation to respond to critics. The company has used blogs and tweets to vilify organisations such as WWF¹², NRDC¹³, Canadian Parks and Wilderness Society¹⁴, the FSC certification system¹⁵ and media outlets like InsideClimate News.¹⁶ In 2013, Resolute filed a CA \$7 million lawsuit in Ontario against Greenpeace Canada and two staff members, for defamation and economic interference, in an attempt to shut down their advocacy work.^{17,18} In 2014, Resolute also filed a lawsuit against Rainforest Alliance, an independent auditor that was about to publish an audit that found some of the company's operations noncompliant with the leading forest certification scheme, the Forest Stewardship Council's (FSC), standards.¹⁹ One legal expert noted that,

rather than participate in a formal dispute resolution process set up within FSC, Resolute's "strategy appears to be ... to suppress these facts."²⁰ Resolute took out an injunction in court, sealing the audit and preventing it from being publicly released.²¹ Once again, Resolute's lawsuit was notable for naming an individual auditor as a defendant.

In August 2016, the Ontario Superior Court ruled that a portion Resolute's allegations against Greenpeace Canada in the ongoing 2013 defamation lawsuit were 'scandalous and vexatious' after Resolute tried to broaden the scope of inquiries into the 45-year history of the organization and its international campaigns.²² The same year, Resolute filed a CAD\$300 million defamation and racketeering lawsuit in Georgia, against Greenpeace International, Greenpeace U.S. entities, STAND.earth (formerly Forestethics), and five individual staff members from these organizations, calling Greenpeace a 'global fraud'. By claiming violations of the Racketeering Influenced and Corrupt Organizations Act (RICO), Resolute attempted to target the entire Greenpeace network by claiming it constituted the same "criminal enterprise". The company attempted to expand the scope of RICO, a law intended for use against the Mafia, by telling the court that 'RICO is to be read broadly' and 'liberally construed to effectuate its remedial purposes'.²³

Dismissing any meritless lawsuit can be very expensive and time consuming. In some jurisdictions, "anti-SLAPP" laws have been introduced to enable early dismissal of meritless claims and to provide a deterrent in the form of attorney fees and legal costs.²⁴ Resolute, however, filed its SLAPP lawsuits in states/provinces that at the time had not passed anti-SLAPP legislation (Ontario) or whose anti-SLAPP law was limited to statements to government bodies or related to official proceedings (Georgia).²⁵ When Ontario subsequently tried to pass an anti-SLAPP law similar to Quebec's, Resolute went to extraordinary lengths to lobby against the bill.^{26,27} Resolute's CEO, Richard Garneau, in an e-mail, appeared to admit that the Ontario government's proposed anti-SLAPP legislation passed as originally written, "would put [Resolute's case against Greenpeace Canada] in grave peril."²⁸

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1 See, amongst others, for articles that put the lawsuits in the context of the wider SLAPP trend:

Katie Redford, "The New Corporate Playbook, Or What To Do When Environmentalists Stand In Your Way," Huffington Post, 29 June 2016 at http://www.huffingtonpost.com/katie-redford/the-new-corporate-playbook_b_10599544.html (accessed at 4-12-2017)

2 See Resolute Forest Products company website at <http://www.pfresolu.com/en/?langtype=4105> (accessed at 4-12-2017)

3 See Resolute Forest Products company website at http://www.pfresolu.com/About_Us/Executive_Team (accessed at 4-12-2017)

4 Salary.com at <https://www1.salary.com/Richard-Garneau-Salary-Bonus-Stock-Options-for-RESOLUTE-FOREST-PRODUCTS-INC.html> (accessed at 4-12-2017)

5 Annual Report 2016, p13 at http://www.resolutefp.com/Investors/Financial_Reports (accessed at 4-12-2017)

6 Ibid. p.13

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9 The Forest Stewardship Council is an independent nonprofit organization established to promote the responsible management of the world's forests. The FSC is a voluntary, multi-stakeholder system, established more than 20 years ago, that certifies forestry operations according to key social and environmental criteria. In March 2017, there were over 1400 certifications in more than 80 countries. See "Forest Stewardship Council (2017): Facts and Figures" at <https://ic.fsc.org/en/facts-and-figures> (accessed at 4-12-2017)

To acquire and maintain FSC certification, companies must demonstrate on-the-ground compliance with FSC standards, which is monitored by independent bodies. Some of the key requirements that companies operating in the Canadian boreal forest must pay special attention to include: the rights of Indigenous Peoples, adequate protection for species at risk (such as Woodland Caribou and their habitat), conserving and/or enhancing High Conservation Value Forests (which now explicitly includes Intact Forest Landscapes), and maintaining old-growth forests in proportions comparable to natural levels. See "National Boreal Standard Accredited by FSC," Forest Stewardship Council Canada Working Group, 6 August 2004 at <https://ca.fsc.org/preview.national-boreal-standard.a-822.pdf> (accessed at 4-12-2017)

Failure to meet these requirements can lead auditors to issue major and minor non-conformances. Where the certificate holder fails or is unwilling to adjust operations within the timeframe set by the FSC and auditors, certificate suspensions and terminations will result. See "General requirements for FSC® accredited certification bodies Revision Crosswalk," Forest Stewardship Council (FSC), 15 December 2015 at <https://ic.fsc.org/file-download.crosswalk-fsc-std-20-001-v4-0-en.a-563.pdf>

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Rosatom: Continuous nuclear contamination of the area around the Mayak complex

Russian nuclear corporation Rosatom has been responsible for a series of nuclear accidents at its Mayak complex, and victims have been unable to secure either justice or remedy in part due to the impunity of the state-owned company in Russian courts.

Problem Analysis

The Kyshtym nuclear disaster, caused by the Mayak nuclear complex, was the third worst nuclear disaster in history. Despite this the Mayak nuclear complex, whose core business is reprocessing spent nuclear fuel, remains in operation. Local residents are affected both by the historical contamination and by the emissions from current activities. Today Mayak is run by Rosatom, Russia's state nuclear corporation. This case illustrates how the Russian state and its flagship company work closely together to continue their operations, despite the negative impacts on both public health and the environment.

Although Russian laws and regulations provide many opportunities to protect human and environmental rights, this case shows that in the context of state-owned corporations, the court system is not always independent, the possibility of fair court decisions is low, and impunity remains. This makes it difficult to prosecute the companies and the people who bear responsibility for serious social and environmental impacts.

Company

Company: ROSATOM State Atomic Energy Corporation

Head office: Moscow, Russia

Company background

Russian state nuclear energy corporation

CEO & president: Alexey Likhachev (general director)¹

Annual profit: 14,252,598 Russian Roubles (about 210 thousand EUR)

Annual turnover: 821 billion Russian Roubles in 2015 (14.3 billion USD)²

Presence: 44 countries³

Number of employees: 256,600 people⁴

Company activity

Nuclear power and power engineering assets, as well as nuclear power plant (NPP) and facilities of full nuclear fuel cycle design and construction.⁵ Rosatom is also responsible for part of the military nuclear activities of Russia, including in Mayak. The company has a range of other businesses, including power generation in its existing nuclear plants; it has a renewable division with increasing investments in wind; and it has uranium mining and nuclear weapon development, amongst others.

Country and location in which the violation occurred

Ozyorsk, Chelyabinsk Oblast, the Southern Urals region, Russia

Summary of the case

Rosatom's Mayak Combine is part of the Russian state nuclear energy corporation and one of the largest nuclear complexes in the world. Located by the Techa river, it is a facility for reprocessing spent nuclear fuel⁶ and radioactive waste management. In 1957, an underground container of liquid radioactive waste exploded and an area of 20,000 square kilometers was covered with radioactive material.⁷ In the last 60 years, more than 20,000 people have been affected by the consequences of this accident, the disregard of basic safety standards and the dumping of radioactive waste into the nearby river from 1940 to 1950, and the ongoing penetration of dangerous radionuclides into the same river.

These historical and ongoing discharges are similar to those caused by nuclear reprocessing at La Hague complex in France and Sellafield in the UK^{8,9}. Mayak is also a source of regular, permitted discharges of plutonium isotopes, Cs-137 and Sr-90, which add to the existing contamination.¹⁰ According to official Mayak reports the annual fallout of Pu isotopes in the so-called "observation zone" around the Combine is 6–14 Bq per m². This area extends dozens of kilometers from Mayak and includes the towns of Kasli, with more than 16,000 people, and Kyshtym, with more than 37,000 people.

Total density of Pu in soil at the outside boundary of the observation zone is 0.05 Curie per km². For comparison the resettlement zone in Russian legislation starts from 0.1 Curie per km² for isotopes Pu-239 and -240;¹¹ and the level of background radiation in Chelyabinsk province for Pu is 0.003 Curie per km².

Currently, around 5,000 people live in direct contact with the highly polluted Techa River and on contaminated land in the villages of Brodokalmak, Russkaya Techa, and Nizhnepetropavlovskoye, among others.¹²

Neither Mayak's plant management nor the Russian government have provided proper remedy for the people living along the banks of the contaminated Techa River, or for those who participated in cleaning up earlier nuclear accidents caused by Mayak's activities.¹³ Official Mayak reports deny any discharges, but do mention "placing liquid radioactive waste for storage" into the ponds. Mayak did undertake some measures to prevent the discharge of radioactive substances into the environment, such as the vitrification and concretization of radioactive waste, but simultaneously doubled the volume of spent nuclear fuel it was reprocessing, which casts doubt on the net effect of these measures.¹⁴

Today, the environment remains contaminated, limiting agriculture and other economic activities in the region. Due to a lack of funds, the official medical commission that was set up to assess the connection between health effects and radiation exposure has not been in operation since 2016.¹⁵ After Greenpeace and others drew attention to the fate of the inhabitants of the village of Muslyumovo, Rosatom partly resettled them between 2007 and 2012. The inhabitants were given a choice between accepting money to buy a home elsewhere, or being resettled only slightly further away from the Techa River. The inhabitants of eight houses were not resettled at all due to problems with documents and are still living in the deserted village without any infrastructure.¹⁶ The company has no plans to clean up the contamination in the Mayak region.

As the Mayak plant is a state-owned facility, both the government and the company could be held accountable for their inaction and failure to respect the environmental and health rights of the affected workers and communities. The most recent known major discharge of liquid radioactive waste into the Techa River happened in 2004 and was the subject of a criminal case. Mayak's Director General V. Sadovnikov was charged under articles 246 and 247 of the Criminal Code. The court recognized the unauthorised release of radioactive substances and the pollution of

the Techa River, but Sadovnikov was released from responsibility in an amnesty connected to the 100th anniversary of the State Duma of the Russian Federation.

In the summer of 2017, Russia's Presidential Human Rights Council visited Brodokalmak and confirmed that the basic human rights of local inhabitants had been and still are being violated. The Council recommended the government of the Russian Federation research the possibility of resettling the inhabitants. To Rosatom they recommend speeding up the implementation of measures that would prevent discharges of radioactive substances into the environment.¹⁷

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Schörghuber Group (Ventisqueros): The salmon crisis in southern Chile

Chilean seafood company Ventisqueros, owned by the German Schörghuber Group, failed to conduct a proper due diligence process and became an accomplice in an environmental disaster in the south of Chile.

Problem Analysis

This case shows how the Chilean company Ventisqueros, owned by the German Schörghuber Group, is accused of causing an ecological crisis around the island of Chiloé by dumping 5000 tonnes of rotten salmon into the ocean.

Despite the fact that Ventisqueros, like other local companies, was given a governmental permit to dump organic waste in the ocean, it should have known that this act would cause an ecological disaster in the fragile maritime ecosystem, as well as causing an economic problem for the local population and local industry that depend on the ecosystem.

Company

Company: Schörghuber Stiftung & Co. Holding KG – Group

Head office: Munich, Germany

Subsidiary: Ventisqueros S.A. (Chile)

Company background

CEO of the main company: Dr. Klaus N. Naeve (Chairman of the Executive Board)

The CEO of the Chilean subsidiary is Jose Luis Vial.

Company's annual profit: €73,696,000¹

Company's annual turnover: €3,688,568,000 (balance sheet total)

Countries in which main company is present: the group's salmon farming and processing activities are located in Chile²

Number of employees: 2,972 (of which 724 in the seafood division)³

Company activity

The main activities of the mother company Schörghuber Group are construction and real estate, beverages, hotels and seafood.⁴ Ventisqueros itself is the Seafood Division of the Schörghuber Corporate Group.

Country and location in which the violation occurred

Chile, specifically the island of Chiloé in southern Chile.

Summary of the case

The aquaculture industry in southern Chile has been polluting the sea around the island of Chiloé for the past 30 years. One of the most significant crises occurred in May 2016 when a 'red tide' algal bloom – which turns the sea water red and makes seafood toxic – affected the island.⁵ Although the algal bloom is a naturally recurring phenomenon, never in history had the tide been so extensive. It is suspected that the 5,000 tons of rotten salmon that had been dumped off the coast of the island by the salmon industry, including Ventisqueros⁶, prior to the red tide acted as a "fertilizer" and increased the magnitude, intensity and reach of the phenomenon.⁷

Within one day and without conducting a prior study to assess the safety of the procedure as required under the fishing and aquaculture national law, the government granted the companies permission to pour their waste into the ocean. There is an ongoing judicial inquiry into how the dumping of the salmon was authorised, but the issue remains unresolved. Even though the companies were authorized by the government to dump the rotten salmon, it is clear that the procedure did not comply with legal requirements.⁸ Some of the politicians who were responsible for this episode left the government due to (unrelated) corruption.⁹

The local communities of the island depend mainly on the sea for their livelihood. The deaths of the animals prevented them from carrying out their regular activities in order to maintain their families.¹⁰ The companies should not only be held accountable for the industrial pollution of the most pristine places on the planet, but also because their activities had produced 5,000 tons of rotten salmon.¹¹

The companies did not provide any compensation for the damage done. The economic aid provided by the government to those who work at sea was insufficient and did not reach everyone who needed it. However Ventisqueros and some other companies received some financial support because they were affected by the crisis they themselves were implicated in causing.¹² The inhabitants of the island feel betrayed by the companies and abandoned by the government.

In addition to the violation of the national law, the joint action of the companies and the authorities also infringed the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (the London Dumping Convention).¹³

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Total: Oil exploration project threatens Amazon reef

Oil and gas company Total proposed a major offshore drilling project without performing adequate due diligence with regard to possible environmental and human rights impacts.

Problem Analysis

In preparing its Environmental Assessment Report in support of a proposed offshore drilling project in Brazil, Total failed to carry out adequate due diligence with respect to environmental and human rights risks. Because Total's application was rejected in Brazil it will not be held accountable for its failure to respect the rights of others.

Company

Company: Total S.A.¹

Head office: France

Subsidiary:

Total E&P do Brasil Ltda (100% ownership)

Other companies involved: BP and PETROBAS

Company background

Stock-listed company

Top 5 shareholders: Amundi (7.73%), T. Rowe Price Associates, Inc. (0.75%), Wellington Management Company LLP (0.49%), Managed Account Advisors LLC (0.28%) and BlackRock Advisors LLC (0.26%)²

CEO & President: Patrick Pouyanné, Chairman, Chief Executive Officer and President (Income: €3.8 million in remuneration and €2.6 million worth of performance shares granted in 2016)³

Annual profit: Net income, group share: € 6,2 billion in 2016⁴

Presence: Global

Number of employees: 102,168 in 2016⁵

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Company activity

Total SA engages in discovery, production, processing, sale and marketing of energy, largely oil and gas. Activities comprise crude oil and natural gas exploration and production, power generation, transportation, refining, petroleum product marketing, and international crude oil and product trading.⁶

Country and location in which the violation occurred

Brazil, specifically the Amazon mouth region; the French territory of Guiana (impact of potential oil spill); and France, where the mother company has its HQ.

Summary of the case

In May 2013, the Brazilian Oil and Gas Agency (ANP) put oil exploration concessions in the mouth of the Amazon river basin up for auction. This basin is part of a geological formation called the Equatorial Margins of Northern Brazil, located along the coast of the states of Amapá and Pará. The sale of the concessions attracted a record number of offers, as oil companies believe that this basin could constitute a "new oil frontier" with potentially important resources. According to ANP estimates, the 282,909 km² area could house up to 14 billion barrels of oil,⁷ more than the entire proven reserves of the Gulf of Mexico.⁸

In 2013, Total led a group, including Britain's BP Plc and Brazilian state oil company Petrobras, in buying five exploration blocks close to French Guiana in the mouth of the Amazon river basin. The group planned to launch an offshore oil drilling project.

The existence of a massive reef off the mouth of the Amazon was officially confirmed by scientists in April 2016.⁹ One of TOTAL's wells is located 28 km from the reef. The resulting attention exposed the potential environmental risks related to the drilling plans, as an oil spill could harm the reef, and destroy mangrove forests in Brazil's far northern Amapá state, according to scientists and environmental activists.

Greenpeace offices in France and Brazil are campaigning for the companies' plans to be abandoned¹⁰ and have exposed flaws in Total's environmental impact assessment. A May 2017 report by Greenpeace France provided a detailed assessment of the environmental situation, and found that many risks related to the area's environment and biodiversity were not taken into account or handled appropriately. The report discusses these failures, as well as the underestimation of the impacts of exploratory drilling in the Environmental Impact Assessments (EIAs) submitted by Total to the Brazilian Environmental Agency (Ibama). It also addresses the use of inaccurate models to determine the potential effects of an oil spill; and the absence of the reef in the first EIA.¹¹

Total Group presents itself as a specialist in risky drilling in ultra-deep waters. However, the Greenpeace France report shows that the specific conditions in the mouth of the Amazon river basin increase the risk of oil spills and are likely to make the consequences worse and more difficult to contain. An oil spill could be catastrophic for either the reef or the mangroves, since it would be extremely difficult to clean these habitats, which would take several decades to recover.

In view of these problems the measures proposed by Total in the event of an emergency are far from adequate. Total plans to contain any leaks by installing a capping stack. However, it would take at least ten days to transport this equipment to the site, during which time significant quantities of oil could pour into the ocean.¹²

On 28 August 2017, the Brazilian Institute for Environment and Renewable Natural Resources (Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis, Ibama) rejected an environmental impact study submitted by Total E&P do Brasil Ltda to the agency to receive a license for oil exploration in the Foz do Amazonas basin.¹³ Ibama's president, Suely Araújo, listed in a technical opinion the pending issues which meant the impact study was inadequate and prevented the issuance of a license. Ibama's repeated requests for additional documentation had not been met by the company. Ibama announced that if Total does not comply with the requests the license application will be 'archived', meaning the decision on Total's drilling proposal could be suspended indefinitely.

Ibama wants Total to address how to limit the impact of its project on marine mammals and turtles, to clarify models for how oil in the water would disperse, and to address Ibama's initial rejection of Total's proposals for environmental monitoring. Araújo also said: "Oil dispersion modeling, for example, can leave no doubt about the potential impacts on the coral reef and marine biodiversity more broadly". He also highlighted the need for international discussions regarding potential cross-border risks in the licensing of maritime drilling and the interconnectedness with French Guiana, Suriname, Guyana and Venezuela, and the Caribbean archipelagos.

Total now can submit a new environmental study, compliant with environmental rules. The environmental impact assessment was led by Total E&P do Brasil Ltda, a wholly-owned subsidiary of Total S.A. Greenpeace argues that Total S.A. should respect Brazilian environmental rules and the precautionary principle, and thus classify the exploration as "risky projects". According to the new due diligence principle, Total S.A. should be able to demonstrate that as a parent company it took all appropriate steps against such risks. If not, the compliance of the project with the future French mandatory due diligence law is at risk.

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Trafigura: The dumping of toxic waste in Côte d'Ivoire

After oil trader Trafigura disposed of toxic waste in Côte d'Ivoire and caused a public health crisis, weaknesses in the legal system meant many victims were denied both justice and remedy.

Problem Analysis

This case illustrates that even when a company is fully aware of the social, environmental and economic consequences of its operations, if it deliberately refuses to act upon them, justice and compensation for victims and effective prosecution remain rare. While there have been legal proceedings in Côte d'Ivoire and the Netherlands, and some compensation has been paid, the role played by Trafigura in relation to the dumping of toxic waste in Abidjan has never been subject to a full court proceeding.¹

The case shows the limited effectiveness of criminal law in prosecuting corporate crimes. A fine was issued by the Dutch courts, but the series of criminal actions were ultimately settled with Trafigura. It shows the weak position of the victims vis-à-vis the company and the authorities. The courts of Côte d'Ivoire concluded that a settlement paid by Trafigura to the authorities was sufficient to oust the rights of victims, denying them the opportunity to seek private redress in local courts.² In addition, home state responsibility is lacking, as many questions arose around the Netherlands' enforcement mechanisms. In several cases prosecutions were halted and/or persons were released from detention following the payment of 'settlements'. Greenpeace Netherlands pressured Dutch prosecutors and agencies, with some success.

Company

Company: : Trafigura Group Pte. Ltd.

Head office: Singapore³

Subsidiary: The immediate and ultimate holding companies are Trafigura Beheer B.V. and Farringford N.V., respectively. Trafigura Beheer B.V. is incorporated in The Netherlands and Farringford N.V. is incorporated in Curacao.⁴

Company background

Privately owned

Shareholders: Trafigura is exclusively owned by its management and about 600 of its senior employees⁵

CEO: Jeremy Weir⁶

Annual profit: \$2.3 billion (2016)⁷

Annual turnover: \$98.1 billion (2016)⁸

Presence: Global.⁹

Number of employees: 4,107 (2016)¹⁰

Company activity

Trafigura is one of the world's largest physical commodities trading and logistics groups, with operations worldwide. Almost three-quarters of its profits are derived from its oil trade.

Country and location in which the violation occurred

Côte d'Ivoire, Trafigura Beheer B.V. chartered the vessel Probo Koala, on which toxic waste was created that ended up being dumped in the Côte d'Ivoire, followed by environmental damage and severe health problems for the people of Abidjan.¹¹

Summary of the case

Multinational oil trading company Trafigura produced toxic waste, the residue of an industrial process called caustic washing, on board the Panama-registered vessel Probo Koala. Originally, the waste was brought to the Netherlands; but Trafigura turned down the option to have it properly treated there because it considered the quoted price too high. Instead, on 19 August 2006, the Probo Koala delivered the toxic waste to Abidjan, capital of Côte d'Ivoire.^{12,13}

To dispose of the waste in Côte d'Ivoire, the vessel contracted a small, local company, Compagnie Tommy, described by Trafigura as "a recently licensed local operator" to take the waste to a municipal dump in Akouédo, a poor residential area of Abidjan.^{14,15} The waste was dumped there and in other places around the

city. In the wake of the event, more than 100,000 people reportedly fell ill and had to seek medical help.¹⁶ The Ivorian authorities reported between 15 and 17 deaths, which they attributed to exposure to the toxic waste.¹⁷ One doctor told Amnesty International it was “the biggest health catastrophe that Côte d’Ivoire has ever known”.¹⁸

Several court cases have taken place since then:

- Two senior Trafigura executives, Claude Dauphin and Jean-Pierre Valentini, were arrested in Côte d’Ivoire straight after the dumping and charged with multiple offences. However, in February 2007, and without consultation with victims’ associations, Côte d’Ivoire and Trafigura reached a settlement in which Trafigura agreed to pay the State approximately US \$195 million.¹⁹ In exchange for compensation, the government agreed that it “waives once and for all its right to prosecute, claim, or mount any action or proceedings in the present or in the future” against Trafigura parties; and the two executives were released.²⁰ As Greenpeace and Amnesty wrote: “A large portion of the settlement amount paid to the state of Côte d’Ivoire was supposed to be allocated as compensation to the victims and for clean-up. As of July 2012, clean-up was reported to be complete, but questions remain about the adequacy of the process in some of the affected areas. The status of the compensation fund is unclear, but thousands of people whose health was affected could not access the government compensation scheme.”²¹
- The UK law firm Leigh Day and Co., acting on behalf of around 30,000 victims, brought a UK civil suit claiming more than £100 million in 2006. However, it was not on behalf of all victims and it again failed to establish liability.²²
- In 2008, a Dutch criminal prosecution was opened, amongst others, against the captain of the Probo Koala, Trafigura Beheer BV, a London-based Trafigura executive, and the company’s Chairman Claude Dauphin.^{23,24} While the court dismissed the case against Trafigura’s Chairman, it was overturned by the Supreme Court after the Prosecution Service appealed.²⁵ On 23 July 2010, the Court of Appeal ruled that Trafigura would be fined €1 million for breaching rules on the transport of hazardous waste, contrary to the European Waste Shipment Regulation (259/93/EC), the EU Port Reception Facilities Directive (2000/59/EC) and the MARPOL Convention (73/78) of 1983.^{26,27 28} On 16

November 2012, a settlement was reached, with the company agreeing to pay the existing €1 million fine, plus a further €367,000.²⁹ Following the fine and settlement agreement, the criminal prosecution of the manager was withdrawn by the Dutch Public Prosecutor’s Office.³⁰

- In the Netherlands, there is still an outstanding civil court claim.³¹

More than ten years later many victims are still seeking justice. In 2016, a group of UN Special Rapporteurs stated that “many victims also report that they have still not received compensation. It is estimated that only 63% of registered victims received compensation under a February 2007 settlement agreement between Trafigura and the Ivorian Government. Victims’ associations appear not to have been consulted before the agreement was signed”.³²

The company maintains that it “did nothing wrong and its staff acted in an appropriate manner throughout”.³³ The company denies responsibility for allowing the waste to be dumped, and describes the dumping of waste by Compagnie Tommy as “in flagrant breach” of both the operator’s licence and Compagnie Tommy’s contractual undertaking to Trafigura.³⁴ However, evidence suggests that Trafigura knowingly used a sub-contractor in Côte d’Ivoire that was not equipped to handle hazardous waste, and that Trafigura was, or at least should have been, aware that the waste would be disposed of at a public domestic waste site.³⁵ Trafigura has consistently denied that the waste could have caused anything other than mild health effects.³⁶ In addition, Trafigura’s reputational management in the course of these events sparked widespread concern about the use of legal methods to restrict reporting in the public interest.³⁷

Both Trafigura and the Dutch state had legal obligations relating to the illegal waste dump. The export of hazardous waste from the EU to African, Caribbean and Pacific states is prohibited under EU law, yet the Dutch authorities allowed the Probo Koala to leave Amsterdam with the destination of the waste unknown, and Trafigura decided to discharge the waste at Abidjan, Côte d’Ivoire.

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VW: Dieseldate, a scandal on multiple fronts

VW's systematic cheating of emission tests led to billions in punishments in the USA, but almost no penalty in Europe due to differences in law enforcement and opportunities for remedy under the law.

Problem Analysis

The Dieseldate scandal became the automotive industry's equivalent of the financial crisis, comparable to the BP Deepwater Horizon disaster in terms of the way in which it has fundamentally changed the public's perspective on VW and the broader industry.

In the USA, Volkswagen received the highest fines ever applied to an automotive manufacturer in US history. There the scandal became one of the first examples of criminal charges being filed against individual staff members in addition to the imposing of corporate fines in a high profile corporate misconduct case.¹ In Europe, punishments were almost non-existent, because of large differences in the strictness and enforcement of regulations and apparent enforcement failures by the European Commission and several EU member states.

Company

Company: Volkswagen Group AG

Head office: Germany
Volkswagen AG, Berliner Ring 2, 38440 Wolfsburg, Germany

Subsidiary involved in violations:

Audi, SEAT, Skoda, Porsche

Other companies investigated for emissions cheating: BMW, Germany; Daimler, Germany; PSA Group, France; Renault-Nissan, France & Japan; Ford, USA.

Company background

Public company

Top 5 shareholders (institutions): Government Pension Fund of Norway – Global (1.11%), Vanguard Group Inc (0.14%), BlackRock Fund Advisors (0.12%), Dimensional Fund Advisors LP (0.04 %) and BlackRock Advisors (UK) Limited (0.03%)²

CEO: Matthias Müller³ (Income: €7.25 million⁴)

Annual profit: €5,379 million earnings after tax⁵

Annual turnover: €217,267 million sales revenue⁶

Presence: >100

Number of employees: 626,715 employees at Dec. 31 2016.⁷

Company activity

Company activity: Car manufacturer

Business sector: Secondary sector of industry (manufacturing and construction)

Country and location in which the violation occurred

Primary country in which the violation took place: United States and Europe

Summary of the case

Volkswagen is one of the largest car manufacturers in the world and the biggest in Europe. In 2015, it was caught selling diesel cars that emitted up to 40 times more NOx (Nitrogen oxides) than they were legally allowed to. The California Air Resources Board (CARB) exposed Volkswagen's defeat device to the US Environmental Protection Agency (EPA) who held a press conference on the 18th September 2015, accusing the company of using software "known in the industry as a 'defeat device' to cheat the emissions standards tests. A defeat device circumvents emissions testing for certain air pollutants".⁸ The EPA and CARB showed VW had programmed the software that controls the emissions filtering and neutralising systems in their vehicles to recognise the driving patterns of twenty-minute laboratory test conditions, and to only operate the emissions controls fully during tests. The defeat device was first developed by Audi, and was then used in vehicles across the VW Group including VW brand, SEAT, Skoda and Porsche.⁹ The cars performed better in laboratory tests than they did on the road. Following an International Council on Clean Transportation (ICCT) report looking at road emissions performance, CARB had been liaising with Volkswagen to investigate discrepancies between VW

vehicle emissions in the laboratory and on the roads for over a year, and Volkswagen representatives had denied knowledge of the 'defeat device', which was labelled in the software as an 'acoustic function'.¹⁰ In the US, VW executives denied knowledge of the cheating to the Californian authorities for over a year, and the defeat device was used in vehicles sold between 2009 to 2015.¹¹

Worldwide 11 million cars were affected¹², of which 580,000 were sold in the US¹³ and 9 million in Europe¹⁴. Since the revelation, Volkswagen has paid fines and compensation amounting to over 20 billion US dollars in the USA – and stopped selling new diesel cars in the US market – but has refused to take responsibility for its actions in Europe. Even after Dieselgate became public in September 2015, VW continued to introduce new models that had an even more sophisticated defeat device – this time hidden in the gearbox software.¹⁵ On average the NO₂ emissions of the models sold in 2017 by VW and its subsidiaries continued to be about twice the legal limit of 80mg/km when measured on the road.¹⁶

The urgency of the air pollution problem for the health of people living in cities makes the Dieselgate scandal even more outrageous. Exposure to high levels of air pollution can have potentially irreversible impacts on our health.¹⁷ An MIT study shows that VW's excess emissions will lead to 1,200 premature deaths across Europe, as they amounted to nearly 1 million tonnes of extra pollution.¹⁸

In the months following the revelations, car owners in the US tried to sell back their affected vehicles to dealers, sometimes at as little as 50% of the sale value¹⁹. In Europe the affected vehicles were recalled for the software to be fixed, but correspondence between VW and German authorities shows that many Audi and SEAT vehicles (brands within the VW Group) didn't show "any significant difference" in the emissions produced before and after the fix.²⁰

The US Department of Justice, Federal Trade Commission, the state of California and vehicle owners who had filed a class action lawsuit against VW pursued a settlement with VW to compensate customers and dealers, buy back affected vehicles, and set up emissions reduction schemes.²¹ The US Department of Justice also pursued three criminal felony counts as well as civil claims from the EPA and the US Customs and Border Protection.²²

French, German, British and Italian authorities launched investigations into the case; however, EU law does not offer the kind of penalties available to law enforcers in the US.²³ The European Parliament is investigating the European Commission for its role in allowing the scandal to occur

unchecked.²⁴ The European Commission has started an infringement procedure against seven EU nations including Germany and Britain for failing to fulfil their obligations under EU vehicle type approval legislation.²⁵ The German government, which has oversight over the Kraftfahrtbundesamt (KBA), which approved all VW models for the European market, has acted leniently on VW and failed to deal with this case in a timely and appropriate manner across the continent. The KBA only required VW to scrap the defeat device from the code of the motor control unit in a way that would ensure that the cars still met the standards in a roller bench test. The KBA accepted that this would only marginally improve on-road exhaust treatment. Despite being told by VW that in RDE tests cars would continue to exceed emissions by a factor of 3 to 5, the KBA signed off on the software fix.²⁶ Having granted the type approval, the KBA is the only authority to withdraw it, thus making it difficult for other member states to restrict sales of affected VW diesel cars.

In the USA, Volkswagen agreed to spend up to \$10 billion buying back vehicles and compensating owners and dealers, and \$4.7 billion on programs to offset excess emissions and clean vehicle programmes.²⁷ Volkswagen paid criminal fines of \$2.8 billion and civil fines of \$1.5 billion.²⁸

James Robert Liang was sentenced to a 40-month prison sentence and a \$200,000 fine.²⁹ Oliver Schmidt, general manager in charge of VW's environmental and engineering office in Michigan, pled guilty to a charge of defrauding the government and violating the Clean Air Act³⁰ in August 2017 and will be sentenced in December 2017.³¹ His expected penalty is a prison term of 7 years and fine of between \$40 to \$400,000.³²

In the EU, VW spends millions on EU lobbying, coming 22nd in the list of highest corporate spenders, the 3rd highest-spending German company behind only Deutsche Bank and Siemens.³³ VW also has the highest number of lobbyists in Brussels of all the car companies – 43 in 2015, well above Daimler's 14 and BMW's 8.³⁴ Since the mid-90s VW has used its power and influence at the European level to delay and water down legally binding emissions reduction targets, as well as delay testing procedures.³⁵

The US government acted quickly and forcefully in response to the scandal. The EPA and Department of Justice pushed for settlements, civil and criminal charges.³⁶ European governments have failed to seriously hold the company accountable, and the UK, France and Germany all lobbied to weaken emissions standards.³⁷

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GREENPEACE

Greenpeace International

Ottho Heldringstraat 5
1066 AZ Amsterdam
The Netherlands

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