

Human Rights Defenders' Toolbox

Practical Application of Fact Sheets

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1. **Fictional case study**

- 1.1 Tierra y Paz is a peaceful coalition created by the San Fernando farming community and a neighbouring indigenous Nahuatl community, located in Colombia. Its aim is to voice the concerns of the communities and advocate for protecting their human and environmental rights. The coalition was formed after the community began seeing significant contamination from a local copper mine that started operations in 2014. That contamination has affected the health of the local community and their crops.
- 1.2 The copper mine is owned by Cobre Mex SA ("**CM**"), a subsidiary of UK Copper PLC ("**UK Copper**"). Global Bank Plc ("**Global Bank**") financed the exploration and operation of the mine through a £20 million loan to UK Copper.
- 1.3 Tierra y Paz has raised some concerns:
 - (A) Part of the land on which the mine was built belonged to local families who did not authorise any contract of sale. The Nahuatl people claim that some of the land on which the mine is built is part of their community's communally owned land, which is of sacred value to them. However, CM states that it lawfully bought the land from a member of the Nahuatl community (who now works for the mine) and from Mr Comprado, who is a member of the San Fernando farming community. Neither community was consulted prior to the mine being granted an operating licence and commencing activities.
 - (B) An environmental impact assessment ("**EIA**") has recently been unearthed, which was produced before operations commenced. Although it states that contamination of local water tables might occur, it provides no suggestions for improvements in procedures to prevent harm from taking place, nor does it provide for any remediation process should harm occur.
 - (C) CM has no human rights policy. UK Copper has no human rights policy, but it does say on its website that "*Corporate social responsibility is an utmost priority for UK Copper PLC. The welfare of local communities is a cornerstone of our operating policies.*"

- (D) Tierra y Paz do not want to meet representatives of CM directly because they fear targeting and reprisals.

2. **Objectives of Tierra y Paz**

- 2.1 For there to be a genuine, complete and independent environmental and social impact assessment (“**ESIA**”) of the mine’s activities, which includes protection measures and remedial actions.
- 2.2 For the ESIA to be communicated to the communities so that they can be consulted on the activities and any proposed remediation.
- 2.3 Monetary compensation for the environmental impacts and for the land which was illegally appropriated to be put into a fund for a local health centre and agricultural school.

3. **Legal Issues for Consideration**

This section considers international law and guidance. Tierra y Paz should ensure that they obtain local Colombian legal advice, particularly regarding environmental law and land tenure. They should also consider the existence of any local dispute resolution procedures that should be followed.

3.1 **Free Prior and Informed Consent (“FPIC”)**

(A) **Issue**

The Nahuatl people claim that some of the land on which the mine is built is part of their community’s communally owned land, which is of sacred value to them. The community was not consulted prior to the mine being granted an operating licence and commencing activities. CM claims to have bought the land from a member of the Nahuatl people who now works at the mine.

(B) **What is the obligation?**

The right of FPIC allows indigenous peoples to give, withhold or withdraw consent to a project or activity that affects the the lands, territories and natural resources that they customarily own, occupy or otherwise use. There is an ongoing debate regarding the situations in which consent, rather than consultation, is required. Article 29(2) of the UN Declaration on the Rights of Indigenous Peoples indicates that consent (and not just consultation) is required where hazardous materials are disposed of in the lands of indigenous communities (as has occurred in this scenario).¹ As a bare minimum, CM should be consulting the Nahuatl people regarding any future plans.

(C) **Has the obligation been met?**

¹ See Schedule 1 to [Fact Sheet on FPIC](#)

There is no evidence to suggest that a FPIC compliant consultation has taken place or any consent from the Nahuatl people obtained.² Specifically, actions such as bribing members of the community (e.g. by offering a job for consent) or excluding the wider community in dialogue are inconsistent with effective consultations. Furthermore, the community were not provided with the contamination report. The community should be consulted in respect of any future development plans and/or impact assessments.

(D) Practical steps

- (1) Identify the scope of the indigenous land/resources that have been affected by the mine, the legal status of the land, and identify those people that have been (or may be) affected by operations.³
- (2) Consider whether CM, UK Copper or Global Bank have signed up to any applicable sector-specific guidelines, or whether they have issued their own guidance, that requires compliance with FPIC principles.
- (3) Flag to the corporate entities their obligations regarding FPIC, drawing on relevant legal instruments and case law.⁴
- (4) Consider drafting consultation guidelines that have been designed by the community. Inform the company/State of the procedure that they should adopt in the future when consulting the community.⁵
- (5) Consider using a mediator to aid communication between the relevant parties / provide a safe forum for communications.⁶

3.2 Human Rights Due Diligence (“HRDD”), Appropriate Action and Leverage

(A) Issue

An EIA was recently unearthed, which was produced before operations commenced. The EIA states that contamination of local water might occur if operations were to commence. Although it states that contamination of local water tables might occur, it provides no suggestions for improvements in procedures to prevent harm from taking place, nor does it provide for any remediation process should harm occur. The EIA has not previously been seen by the Nahuatl people or San Fernando farming community.

² See specifically para 2.7 of [Fact Sheet on FPIC](#)

³ Consider other practical steps set out at paragraph 5 of [Fact Sheet on FPIC](#)

⁴ See [Fact Sheet on FPIC](#) for overview of FPIC requirements and relevant legal instruments. Colombia is a member of the ILO and has ratified ILO 169 (now in force). It is bound by the decisions of the Inter-American Court of Human Rights. It originally abstained from the vote on UNDRIP but has since endorsed it.

⁵ See paragraph 6 of [Fact Sheet on FPIC](#)

⁶ See paragraph 6 of [Fact Sheet on FPIC](#)

(B) What is the obligation?

Pursuant to UNGP Guiding Principle 17, businesses should carry out HRDD to identify, prevent, mitigate and account for how they address their adverse human rights impacts.⁷

UNGP Guiding Principle 19 provides that, when integrating findings from HRDD, a business is required to take “appropriate action” to mitigate any adverse impacts of its business activities on human rights. In this case, to prevent damage to human health resulting from an environmental hazard (i.e. the contaminated water) caused by the operations of the mine.⁸

“Appropriate action” will vary according to: (i) whether the business enterprise causes an adverse impact (CM), or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship (UK Copper and Global Bank); and (ii) the extent of a business’ leverage in addressing the adverse impact (i.e. the extent to which the enterprise is able to effect change in the wrongful practices of the entity that causes the harm).⁹

(C) Has the obligation been met?

The EIA falls short in that it does not meet the key parameters set out in UNGP Guiding Principles 17 to 21, which require businesses to assess actual and potential human rights impacts, integrate and act upon the findings, track responses, and communicate how impacts are addressed.¹⁰ Notably, there was no consultation with potentially affected groups prior to, or following the production of the EIA, and no action has been taken to mitigate against the negative impacts of operations.

UK Copper and Global Bank have not exercised any leverage over CM to address the human rights impacts of CM’s operations.

(D) Practical steps

- (1) Start a dialogue with CM (perhaps by way of an intermediary) to convey the key concerns of Tierra y Paz and highlight the obligations of CM under the United Nations Guiding Principles on Business and Human Rights (“**UNGPs**”) (including the need to issue a Human Rights Policy).¹¹
- (2) Communicate the expectations of Tierra y Paz to CM, including:
 - (a) The format/content of any future impact assessment. An ESIA (or equivalent) should be carried out which must consider the

⁷ See [Fact Sheet on UNGPs: Human Rights Due Diligence](#)

⁸ See [Fact Sheet on Environmental Hazards/Degradation](#) for a discussion of whether there is a specific right to a healthy environment and the interplay between international environmental law and international human rights law

⁹ See [Fact Sheet on UNGPs: Appropriate Action and Leverage](#)

¹⁰ See paragraph 2.1 of [Fact Sheet on UNGPs: Human Rights Due Diligence](#)

¹¹ See Fact Sheet on [UNGPs: Human Rights Policy Statements](#)

environmental hazards, the specific human rights impact of operations and identify and address salient human rights risks.¹²

- (b) The requirement for CM to engage with stakeholders (including the communities) during the carrying out of the ESIA's. All consultations with the communities should be carried out in accordance with the FPIC principles.¹³
- (3) Consider copying the parent company, UK Copper, to any communications to encourage it to use (and increase) leverage over its subsidiary to ensure that comprehensive HRDD is carried out and that the salient risks identified are addressed and tracked.¹⁴

3.3 Grievance Mechanisms/Remediation

(A) Issue

The adverse human rights impacts that have been caused by the operations of CM include: (i) the illegal appropriation of land from the Nahuatl people and the San Fernando farming community; and (ii) the significant contamination of the local environment, which has affected the health of the local community and their crops.

(B) What is the obligation?

Pursuant to UNGP Guiding Principle 22, where business enterprises identify that they have caused or contributed to adverse impacts on human rights, they should provide for, or cooperate in, their remediation through "legitimate processes", e.g. by way of a grievance mechanism. UNGP Guiding Principle 31 sets out the core criteria of an effective grievance mechanism. Although UK Copper and Global Bank are not required to provide for remediation under the UNGPs, they may take a role in doing so.¹⁵

(C) Has the obligation been met?

No grievance mechanism has been implemented or remediation provided by CM to address the concern that community land was obtained illegally, nor the adverse human rights impacts identified in the EIA.

(D) Practical steps

- (1) Ask that CM consults the communities (in accordance with FPIC) regarding the design/implementation of a UNGP-compliant grievance mechanism.¹⁶

¹² See paragraphs 3.3 to 3.5 and 4 of [Fact Sheet on UNGPs: Human Rights Due Diligence](#). See also [Fact Sheet on FPIC](#)

¹³ See paragraph 5 of [Fact Sheet on UNGPs: Human Rights Due Diligence](#)

¹⁴ See paragraph 4 of [Fact Sheet on UNGPs: Appropriate Action and Leverage](#)

¹⁵ See [Fact Sheet on UNGPs: Grievance Mechanisms and Remediation](#)

¹⁶ See [Fact Sheet on FPIC](#)

- (2) Ask CM to implement a Community Driven Operational Rights Grievance Mechanism, to include a community impact and benefit agreement (a contract between CM and the communities that set out how the communities will benefit from the mine).¹⁷
- (3) If no progress is made with CM, consider contacting UK Copper and the UK embassy to put pressure on CM to engage.
- (4) If no action is taken by the UK Copper, consider whether there might be scope to bring/threaten legal action against that entity in the form of a mass tort claim (noting that this area of English law is very uncertain and fact-specific).¹⁸

4. **Involvement of other entities**

- 4.1 When taking practical steps, Tierra y Paz may also decide to update, as appropriate, the UK embassy, UN Special Procedures, the Inter-American Commission on Human Rights Thematic Rapporteurships and Units and/or the Business and Human Rights Resource Centre, to help raise awareness of any concerns and/or request ongoing monitoring and support.

¹⁷ See paragraph 4 of [Fact Sheet on UNGPs: Grievance Mechanisms and Remediation](#)

¹⁸ See [Fact Sheet on Mass Tort Claims and Parent Company Liability](#)