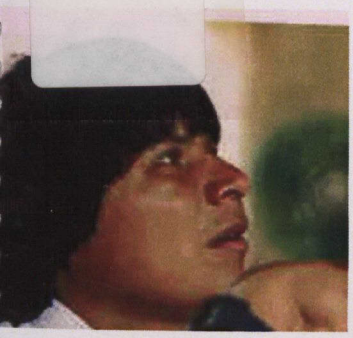

Risk Responsibility and Human Rights:

Assessing the Human Rights Impacts of Trade and Project Finance

FINAL REPORT

for

A Panel Discussion and Expert Meeting on
Developing a Human Rights Impact Assessment Framework

A Report of the NGO Working Group on EDC
Ottawa, Canada
May 3-4, 2004

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This conference was made possible thanks to the generous support of the Canadian Centre for Foreign Policy Development, the Charles Stewart Mott Foundation, Development and Peace, the Grassroots Foundation, the Sigrid Rausing Foundation, and Rights & Democracy.

Photos on cover: Alberto Achito of the Embera Katio people of Colombia (Credit: Kathy Price, KAIROS); An area quarried for dam materials for the Tehri dam, India (*Photo: Patrick McCully / IRN);* Protest against Alumysa (Credit: Peter Hartmann, CODEFF); Oilfields south of Baku that would feed the Baku-Tbilisi-Ceyhan pipeline (Photo: Yury Urbansky/CEE Bankwatch).

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Introduction and Overview

Impact assessments have evolved tremendously over the past twenty years, from the original environmental impact assessment, to social, gender, health, peace and conflict impact assessments and beyond. As these models have developed, so too has the mindset. At the 24th meeting of the International Association of Impact Assessments in April, 2004, increasing attention was focused by practitioners (and industry) on the need (and business case)

- to better involve stakeholders in the impact assessment process from very early on,
- to better integrate environmental, social, cultural, economic and technical issues into the assessment process,
- to move beyond measures that just mitigate impacts to actually promoting benefits and social development, and
- to focus greater attention on the follow-up stages of project implementation, compliance, and accountability.

One representative from ABN Amro, a large international commercial bank, even said that "The strategic imperative (for financing projects) should be placed on sustainable development". But then he highlighted the BTC and Chad-Cameroon pipelines as the quintessential projects to back. These projects have been so mired in controversy, human rights violations and questionable process, that it seems clear that even though its seems we may now all be reading from the same page, the words still mean very different things to different people. The notion that respect for human rights and the environment is the driving force behind sustainable development, is one that clearly still needs repeating.

In December 2002, the NGO Working Group on EDC (WG), a Working Group of the Halifax Initiative Coalition, organized a workshop in London to look at how to link human rights and investment. The workshop explored the applicability of different impact assessment models to international financial institutions (IFIs), and the appropriateness of different accountability mechanisms for Export Credit Agencies (ECAs). Human Rights Impact Assessments (HRIA) figured in the discussion, raising more questions than answers.

To follow up on that initial meeting, in May 2004, the WG organized a meeting on "*Risk, Responsibility and Human Rights: Assessing the Human Rights Impacts of Trade and Project Finance*". It was hoped that this meeting would address some of the questions raised in London, and give participants a chance to chew over the key components of an HRIA, and the mechanisms necessary within IFIs to ensure due human rights diligence throughout the project cycle.

The goals for the meeting were threefold:

- to provide a forum that would encourage a full and free exchange of information, views and ideas about the issue;
- to allow the broad array of participants at the meeting to explore the links that need to be made, and are currently not being made, between human rights, impact assessment and trade and project finance; and,
- to move the discussion beyond theoretical debates about human rights and investment, to practical discussions about how to make this happen in policy, process and practice.

In order to achieve these goals, representatives from government, from trade and project finance, from development, environment, faith-based, gender, human rights, indigenous and labour groups were invited to participate. Partners from the south, practitioners from the area of conflict, social, environment, gender and human rights impact assessment, and activists, advocates, academics and lawyers specializing in the area of human rights were also present.

Day one gave groups an opportunity to discuss the changing responsibilities of the state, of corporations and of IFIs with regards to human rights. It highlighted a controversial project funded by IFIs in order to underscore the need to take human rights issues better into account. And it explored a variety of models that are attempting to do this. It ended by thinking through some of the challenges of doing this. Day two was designed to engage participants in thinking through how some of these challenges could be addressed.

While many questions still lie ahead, this report highlights some of the tentative conclusions that participants reached and provides a rough sketch for mapping the way forward.

Fraser Reilly-King, Coordinator, NGO Working Group on EDC, Halifax Initiative Coalition

Carole Samdup, Programme Officer, Rights & Democracy

Human Rights Obligations in the 21st Century

Henri-Paul Normandin on "Human Rights Obligations and Corporate Responsibility in the 21st Century"

Director, Human Rights, Humanitarian Affairs and International Women's Equality Division, Department of Foreign Affairs"

Mr. Normandin began by considering the human rights obligations set out by international human rights law. For the most part, these were essentially the obligations of states, which arise by virtue of them being party to treaties and conventions. The human rights obligations of non-state actors is less evident, but generally it is accepted that states will regulate the behaviour of non-state actors. In theory, this means, that states must be consistent in how they deal with non-state actors, such that when a non-state actor does not follow state regulations, they will be subject to sanctions, usually before a domestic court.

There are of course certain nuances to this classic paradigm. In international humanitarian law, individuals can be held accountable as non-state actors, and may be held responsible for crimes of international law before an international criminal court. The concept of universal jurisdiction is also expanding, and with it, perceptions of the responsibilities of transnational corporations.

Last year, the Sub-Commission on Human Rights released a paper outlining the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. It has since triggered some controversy over the types of legal obligations which TNCs should be bound to, and the role of the Sub-Commission in overseeing this. This April, the Commission asked the High Commission to compile a report setting out the scope and legal status of all existing initiatives and standards on business responsibilities with regard to human rights, including the UN Human Rights Norms for Business. In the final paragraph of the decision, it also made explicit reference to the fact that the Sub-Commission should not perform any monitoring function with respect to the Norms, and that as a draft proposal, the UN Norms have "no legal standing." This has set in motion a whole discussion around the responsibilities of corporations.

So are the grounds shifting with respect to the classic paradigm of state and non-state actors? At least, it would appear that the paradigm is stretched and is subject to nuances. In any case, there may be merit in searching for new ways of conceptualizing how non-state actors, including corporations, relate to human rights, particularly in an international framework.

And what does this mean in practice? After all, the responses to the issues cannot just be theoretical in nature – they must be useful in the real world.

In terms of new tools like a human rights impact assessment, looking at projects on a case by case basis will help us decipher how we can move this agenda forward. We need to look at where such types of impact assessments have been used in practice. They need to be shown to be useful, to add value, and to be workable. The issue of scope will be a challenging one – will, for example, this type of an assessment address the full range of human rights, or the ones that are the most relevant to the task at hand? In terms of process, how exhaustive will this assessment be? For example, "baseline studies" which are important for measuring the implementation of a project, are often so demanding and complex that they are not completed by the time the project has started. The "no go" option is worth exploring, and is feasible, but again we need to consider how far reaching we want this to be. And where does the government and the state fit into all of this? What role should corporations play? What competencies and capacities do each have to carry out human rights impact assessment? How extensive are the requirements? Can we ask other countries to do more than what we are (or aren't) doing here in Canada? Mr. Normandin suggested that we might look at what would be realistic and feasible here in Canada in order to better appreciate what we could reasonably aim for with respect to international transactions and other countries.

David Petrasek on "Human Rights and Business"

Policy Director, Henry Dunant Centre for Humanitarian Dialogue, Switzerland

Over the years, corporations have often been able to avoid taking account of human rights by simply asking whether there was a methodology for assessing human rights impacts, knowing full well that there was none. However, what lurks behind this action are a deeper set of issues, and two important legal questions:

1) Do companies have international legal obligations to respect human rights? and
2) Are there legal obligations on governments to ensure that human rights are being respected in other countries?

Both questions arise because of the existence of an "enforcement gap". Many international corporations are unwilling to enforce human rights norms in countries where they operate. This is either because the legislation in those countries is inadequate, or it exists but is not being enforced due to lack of resources, or the people in power choose not to enforce these laws. It is because this "enforcement gap" exists that we want to attach duty to other actors (e.g. companies or governments). And so companies and individuals, in addition to governments, now find themselves as part of an expanding list of actors that are being asked to carry legal duties in relation to human rights. The classic paradigm of governmental responsibility, which Mr. Normandin has already made reference to, is being challenged and these additional entities are being added to the list of "duty-bearers".

The reason for this can also be explained by the context in which we now find ourselves. Since the beginning of the 1990s, a growing acceptance of human rights principles has emerged – so much so that even companies have begun to accept these human right principles. Even if this is only a rhetorical exercise, the fact that companies have accepted that they have a responsibility has started a dialogue on this. Secondly, people are becoming increasingly anxious about the negative impacts of globalization, and in particular the growing disparity between the rich and the poor. This has put the spotlight on transnational corporations. Thirdly, in terms of context, global rule setting has become a norm, for example through the WTO or Kyoto, and is seen as a natural and legitimate response to globalization. Fourthly, the need for global standards has been acknowledged by business, even if it is on a voluntary basis. These factors, not just some small group of activists, have brought the issue of attaching international legal obligations to TNCs to the fore.

So in terms of the first question about the legal obligations on companies to respect human rights, obligations have arisen in two ways. Firstly, they have come about indirectly – international law places obligations on governments in regard to their own agents, but also includes the obligation to ensure that private actors respect human rights (an issue not accepted 10-15 years ago). Secondly, they have come about directly – through such developments as the International Labour Organization Tripartite Declaration, and the OECD Guidelines for Multinational Enterprises. That said, international standards are not always viewed as legally binding, with many of these institutions perceived as quasi legal bodies. In any case, international human rights principles are being placed on companies, and even though there is no enforcement body to ensure that companies comply with these norms, it does not mean there is no obligation.

International law, therefore, is not just between states, but involves non-state actors. Similarly, human rights are not just about state power – companies also exercise power. That said, primary obligations will and should remain on states as they have the overarching duty to regulate.

In sum, why talk about the law? Will this complicate or clarify things? It should add clarity. But it does even more. Companies often argue that national legislation or specific national standards gives a competitive advantage to companies abroad that are not subject to the same standards. But introducing international obligations will level out that playing field. It would bring a universal standard which is necessary, and which would be advantageous to both governments and companies as it will establish rules that have been accepted internationally by governments.

There was too little time to address the second question, but suffice it to say that international human rights law does include the notion of extra-national obligations, whereby governments are responsible for the impact of their agents, actions, or policies abroad.

Joan Kuyek on "Human Rights, Human Impacts and IFIs"

National Coordinator, MiningWatch Canada

Despite environmental assessment, local opposition to projects and evidence that projects will displace massive numbers of people and disrupt livelihoods, projects still get approved. At the heart of this is a battle about power and who will benefit from limited resources, land and labour. Extractive industries is a case in point.

A few years ago, the World Bank (WB) agreed to review its involvement in the extractive industries. The final report of the Extractive Industries Review (EIR), concluded, *inter* alia, that: transforming natural resource wealth into poverty alleviation is challenging because it can bring about social disruption and conflict in communities, it can lead to environmental degradation, and it can usher in corruption and human rights abuses. It also found that the ability of extractive industries to contribute to national economic wealth is dependent on the country's economic diversification, good governance and effective legal regimes. And finally, it argued that the WB has had only limited success in alleviating poverty, promoting human rights and ecological sustainability.

To address these shortfalls, it recommended free prior and informed consent for projects from communities, benefit sharing, and phasing out investment in oil, gas and coal in favour of renewables. It also recommended supporting core labour rights, better health and safety standards, support for indigenous peoples' rights to land and their free, prior and informed consent, and a gender analysis of benefits and protection of women's rights. Now the report is being attacked by industry, and the Bank is under pressure to shelve the recommendations.

If the WB accepts the recommendations, however, one consequence would be an increasing reliance by industry on Export Credit Agencies. ECAs, however, operate with much less transparency than the World Bank. EDC, for example, is exempt from the Access to Information act and the Canadian Environmental Assessment Act. This would further reinforce an existing disjuncture between enforcement of trade rules and human rights legislation. Whereas the trade agreements that the government signs become binding through Canadian law, international agreements on the environment and human rights have no effective legal mechanisms for compliance.
Several examples demonstrate this point.

Over 5 years, EDC provided $852 million in short and long term financing to China. Some of this money went to Nortel networks for firewall technology, despite increasing government crackdowns on internet use and the right to freedom of expression. In comparison, Canadian projects on human rights came to $11 million.

In Colombia, EDC has provided loan and risk insurance for Nortel's expansion into Colombia as the telecommunications industry privatized, while CIDA has helped rewrite Colombia's mining code. This revision, however, was conducted without consulting indigenous peoples, it has reduced their land rights, and exempts them from receiving benefits from mining activities on their land. Workers are now losing their rights to collective bargaining, and are being exposed to violent threats, arbitrary detentions, and assassinations.

In Papua New Guinea, EDC provided a $29.6 million loan guarantee to the Lihir mine. While the company reaps $80 million a year in profit, it dumps 110 million cubic meters of waste into the sea, destroying over 7 kilometres of coral reef.

And so, IFIs use their power to engineer consent from national government for projects that do not benefit the long term interests of their populations, and they support trade policies that favour multinationals over the development of good governance and poverty alleviation.

Any HRIA worth its weight would not only protect human rights and hold corporations and IFIs to account, but would also ensure that it is these kinds of projects that don't get funded.

Full speech is available on-line at http://www.halifaxinitiative.org/updir/Kuyek.pdf

Questions and Comments

***Q:** How can we ensure that the enforcement gap gets closed?*

PETRASEK: I am not so much offering a solution to the notion of an enforcement gap, rather than identifying a vacuum of responsibility. When such a vacuum exists, the natural tendency is to try and attach obligations to actors who can have leverage over the situation (for example, governments and companies). But while this is a natural process, it does not mean it is an easy one.

Part of the problem is the language of "state" and "non-state" which polarizes the debate around two distinct entities. This, however, is problematic for a number of reasons. Firstly, it identifies the "non-state" actor as a negative or opposite to the state. Perhaps a better way to think about this is in terms of 'power' and 'lack of power'. In this context, those without the power are asserting their claims against the powers they confront, which may not necessarily be their own state, but could be other states or international financial institutions. This highlights the second problem with using the language of "state" and "non-state". The World Bank, companies, church organizations, and NGOs, are all very separate categories, but would all be perceived as non-state actors, which makes no sense at all. Finally it assumes that the state is the most important power, which may not be the case in the future.

KUYEK: An enforcement gap is being created not only in other countries where states perhaps lack the capacity or willingness to close the gap, but in Canada, as well. This doesn't happen by accident, but on purpose. Industry lobbyists (supported by industry departments of government) lobby for reduced enforcement and monitoring budgets, for lower taxes and tax breaks that deplete the resources of the state. The World Bank and industry enforce structural adjustments that take public service apart.

***Q:** What do you mean by prioritizing different types of human rights?*

NORMANDIN: All rights are equally important; they are universal and indivisible. However, it is also worth considering which rights are the most relevant for the specific context we are talking about. For example, the issue of discrimination is probably relevant to any kind of transaction, or labour rights in the case of an investment. But when we talk about exporting widgets, for example, would we want to consider the issue of the right to health? I would therefore say that it is not about prioritization, but rather about relevance, although I realize this is a delicate line to walk.

***Q:** Shouldn't we be careful about limiting the scope? The relevance argument doesn't always hold true because it is difficult to determine what will be relevant ahead of time. For example, Nortel has gone into China to set up a telecommunications network, but a Rights & Democracy report revealed that the network was being used to allow the Chinese government to conduct surveillance on the types of information people were accessing and transmitting.*

NORMANDIN: When it comes to communications equipment, freedom of expression is obviously relevant; but some other human rights may not be as relevant to examine.

***Q:** Given what you have said about the promotion of industry, do you see any solutions?*

KUYEK: There are many ways in which traditional livelihoods can be enhanced, but this obviously would take an approach that focuses on mitigating impacts on the environment than on sustainable development itself. In the Mining Industry, companies could put more money and resources into recycling metals vs. extracting new ones.

***Q:** We've spoken about individual rights – what about collective rights (e.g. indigenous people)?*

NORMANDIN: Particularly with respect to indigenous people, some collective rights are or should be recognised.

KUYEK: The collective rights question is a serious issue and is growing in size and importance. For mining, land title is a huge issue. For example, there are people who have lived on land for a certain amount of time, but still have no title to the land. Our Prime Minister has verbally supported giving individual property rights.

***Q:** Who should supervise non-state players? When we say government, who are we talking*

about? Who is the government? Should economists take responsibility for impact assessment since they outnumber us and are already involved?

KUYEK: I think different departments of government in the home country of the corporation should be responsible. I have described this in much more detail in a paper entitled Rights and Rhetoric on our website. In addition, a number of laws and regulations governing different actors have to be changed. Having enforceable human rights and environmental assessments would have some teeth. But having economists do these assessments, is definitely not the way to go.

***Q:** What would constitute a no-go area if it isn't Colombia? Every year countless trade union representatives are murdered or flee the country, yet EDC has funded Nortel to do business there, and Nortel has benefited greatly from the fact the privatization of the telecommunications industry.*

NORMANDIN: I don't think we will attempt to define 'No Go' zones for countries here. For me it is not necessarily or only about specific countries, but about the kinds of transactions being done.

***Q:** Who does responsibility fall on?*

PETRASEK: In a sense, this is a damages question. We need to understand that traditionally when governments sign human rights agreements, their obligations relate to their own jurisdiction. Does it expand to the actions of agents abroad? When governments ratify a treaty, they are bound by a legal obligation to help implement that treaty. And many countries already accept that they have extra-national obligations vis-à-vis social and political rights, for example, Canadian laws prohibit the exporting of equipment to be used for the purposes of torture). Similarly, it would be logical that if asbestos cannot be used in Canada, Canadian companies would be prevented from exporting it. Since there might be an obligation, or higher burden, on us to send our troops into a situation where there are extreme human rights violations, you would think that this would also translate to lower burdens as well.

KUYEK: I agree with David that we need to control what is exported. Asbestos is not banned in Canada, and it has been argued that certain kinds of asbestos are fine to use. In fact, the Canadian government has been complicit in the persecution of an activist labour inspector in Brazil who challenged the import of Canadian asbestos. What does this tell us? That the Canadian industry lobby is incredibly strong, and that for civil servants to speak out they have to have a tremendous amount of courage. Look at the case of the Congo, where EDC says there's nothing they can do, and the government does nothing to push the UN to move the panel report of experts on the Congo forward. The power of the industry makes it almost impossible for the rest of us to do anything, and the really important players and issues within government get marginalized within the bureaucracy – look at how the Human Rights Division at Foreign Affairs has been marginalized.

Human Rights and Trade Financing – A 'Case Study'

Peter Rosenblum on the "Chad Cameroon Pipeline"

Clinical Professor in Human Rights, Columbia Law School

The Chad Cameroon pipeline is part of a controversial oil project that draws oil from 3 fields in the Doba basin if southern Chad, and transports it along a 1,070 km pipeline to an offshore loading facility on the coast of Cameroon. The project involves a cosortium of oil companies led by Exxon Mobil (together with Petronas and ChevronTexaco), the World Bank and the countries of Chad and Cameroon. Canada's Encana leads a second consortium that is heavily invested in oil exploration in the region. The oil began to flow in late 2003 and profits them began to accrue in an offshore bank (where it remains at this time). The World Bank played a critical role in approving the project and unleashing funding from several bilateral and multilateral financial institutions, including the European Investment Bank, the US Ex-Im bank and Coface (France).

Chad is a difficult country in which to operate. Since independence, the country has been economically stagnant and wracked by nearly continuous internal armed conflict. The oil was discovered decades ago, but internal instability prevented development until the 1990s. With the arrival of Idriss Deby to power, there were renewed efforts to develop the oil. His regime crushed a rebel movement in the oil region in the mid-1990s, allowing for the project to move forward.

While the consortium claimed they could have funded the project themselves, the companies turned to the World Bank, essentially in order to mitigate the political risk of doing business in Chad. The Bank attached a series of conditionalities to its involvement, including the establishment of an environmental and revenue management plan. It was hoped that the revenue management plan would provide a model of oversight and control, ensuring that the Chadian government's oil revenues would be transparent and largely spent on social programs.

From the president of the Bank on down, the World Bank became deeply invested in the success of the project. In a piecemeal fashion, the Bank increased oversight such that it has become one of the most expensive projects in history, according to Bank staff. One major innovation was the creation of a special oversight body within the Bank. At the time the project was approved, strong concerns about its viability led the Bank to appoint a high-level International Advisory Group to conduct quarterly monitoring visits that would report directly to the World Bank President. The International Advisory Group reviews all aspects of the implementation from the perspective of World Bank rules. Eventually, the bank also hired two senior officials to work on the project – one in Chad and one in Washington.

When the money in the British offshore account is transferred to Chad, it will be subject to the terms of the revenue management law. That law allocates expenditures of direct revenues from the Doba field as follows:

10% - set aside for future generations
Of the 90% that remains:

- 80% allocated to five priority sectors: education, health, rural development, infrastructure, water and environment.
- 5% for the oil region
- 15% for general government expenses.

The law also establishes the '*College de Controle,*' a mixed body of 9 people including members of government, the national assembly, the courts and civil society to oversee the expenditures and insure that they are in compliance with the law.

There are serious problems with the infrastructure and operations of the law, which has not yet truly been tested since no revenue money has come into the country. But the law was put to a premature test when the government decided to spend oil bonus money without consulting the *college* or seeking to comply with the terms of the law. It allocated the initial bonus money to military expenditures. The impact of this was to alert the internal and external communities to the urgency of putting the *College* into place and ensuring that it could exercise effective control.

There has been substantial progress since that

point, though the problems that remain are significant – and many problems will only become clear once the money begins to flow into Chad. Nevertheless, it is possible to say with some confidence that the macro-economic machinery to insure transparency is in place and, in the absence of a dramatic change (e.g., a coup d'état) it will be possible to trace the flow of money from the offshore oil account to the individual projects that the terms of the law intend to be implemented. If this happens, it will represent a great leap forward in the management of African oil revenues. But it will also still leave significant questions as to how the money is actually managed on the ground. For example, at this moment, one of the only projects approved for the oil money is a single road from the capital to the North East of the country. Is this a good project? Who knows. But even if it were the right road at the right time, road construction is notorious for its corruption.

Since the adoption of the project, the World Bank initiated a two-year Extractive Industries Review to look at whether Bank support for the Extractive Industries helped it realize its goal of poverty alleviation. The Review essentially advocated that the Bank phase out its support for the Extractive Industries, and recognized the need to develop ways to take human rights into account in a more consistent way. Management, however, has apparently rejected many of the EIR's recommendations. This is a blow to many of the groups that have supported the EIR process.

On the other hand, the opposition to the project has helped awaken NGOs' and activists' interest in Chad and in managing the revenue from natural resources in developing world economies. The international scrutiny has also helped to open up space within Chad for civil society and human rights groups. This has helped to limit the scope of rights abuses occurring in the country although it hasn't kept the president from taking steps to insure his own continued political control.

Questions and Comments

One participant raised the following points:

This is less a question than a comment. I appreciate your final analysis that this opened up space for civil society, but I would question the extent to which we might consider the pipeline to have been beneficial in any way to the affected communities. The pipeline was to run through forests where the indigenous Bagyeli pigmy peoples live and this has had a devastating impact on their livelihood. The Bank has admitted that it did not adhere to its indigenous peoples guidelines, and it did not properly assess the impacts of the project on these peoples or consult with them. A lot of people lost their land. There is a lot of dust created through the construction of the pipeline as a result of all of the trucks passing by, and this has created respiratory problems. There have been increasing incidences of sexual abuse along the pipeline route, cases of young indigenous girls being used as sex slaves by pipeline workers. This has had a knock-on effect of increasing the level of sexually transmitted disease in the community. From the community perspective, the project was not working at all, and there needed to be some sort of independent mechanism of oversight. The groups submitted complaints around 27 separate issues, and the World Bank set up an inspection panel to investigate the allegations of non-compliance of internal procedures. The panel suggested that the EIA could be done better if the review is done earlier; it also maintained that the Bank needed to improve its capacity to look at the social impacts of the project; public participation could be improved, the safeguard policies should be overhauled; and the Bank needed a mechanism for dealing with 'grey' areas like human rights.

Q: *You mentioned in your talk that despite all of the negatives associated with this project, you feel optimistic about the situation because a light has now been focused on Chad. Are there other points for optimism? Do you think, for example, that civil society can play a role in monitoring developments?*

Civil society already plays an essential role. The positive elements that we associate with the project came about, largely, because of an alliance that formed between international NGOs and Chadian civil society. There have been some troubles since the project was adopted, in part because civil society was mobilized to delay the project and to change it. It is quite another thing to monitor implementation and insure compliance (particularly when still unsatisfied with many elements). But for the last year, in particular, civil society has been mobilizing at the local, regional and national level for this purpose. And the civil society members of the *College* have been its most effective members. For the future, it will be

important to support the monitoring networks that are in place and to help insure that the government does not succeed in infiltrating or distorting the civil society participation in the *College*. At this moment, for example, the government is blocking the nomination of the Catholic Church representatives inside the *College*, on the pretext that he is a lay representative and not a priest. In fact, their candidate is particularly competent.

Q: *Why are projects such as these conceived in the first place, and why are they so poorly conceived from the start? Who benefits from this project? What happens to the revenues? It goes to the oil companies, but who else? Aren't we just making the best of a really bad situation?*

This was not a human rights project or a development project; it was an oil project. The challenge for advocacy organizations is whether to invest themselves in improving the impact and mitigating the damages of projects like this or to take a principled position against them. I am certainly in the former camp. I don't see the advantage of taking the abolitionist position. In the context of the Chad project, I would go even further. I think that advocates have a stake in making it work as well as possible. At the same time, it legitimizes our efforts to hold other oil companies and international lenders to higher standards. We should be using the Chad-Cameroon project to put pressure on Exxon-Mobil, for example, to improve its work in Equitorial Guinea. We should be pushing for adoption of the Extraction Industry Transparency Initiative standards in countries around the world. The Chad case demonstrates how we can come out with a workable system, and make some incremental improvements (like with the international advisory body or revenue management plan). And it represents a step forward from which we can build. There is still a need for greater transparency, and we need to use the absence of transparency to shame other companies.

Q: *You made little distinction in your characterization of affected communities between indigenous peoples and everyone else. Yet the less attention we pay to local indigenous people (e.g. Africa), the more they will be marginalized. And if we can't pay attention to them in those kinds of assessments – impact assessments – the indigenous people are just going to be further marginalized.*

I am not convinced that the focus on indigenous communities in this case – or generally in Africa – has been helpful. Focusing on indigenous rights makes sense where indigeneity correlates with race, class or marginalization – and where the nature of claims is substantively different; for example, where the relationship to land is substantively different for surrounding communities. In the case of the pipeline, it impacted a range of communities, each of which had important interests and none of which has effective exercise of political rights. If a human rights assessment is done well then it will pick up on all the violations of rights in each of these communities. In contrast, the World Bank directives force you to focus on certain issues, such as indigenous peoples. Do Pigmies have more rights then their neighbours do? I don't know. In the context of Cameroon, there has been a lot of suffering, and it would be hard to say that the indigenous people have suffered disproportionately.

Taking Human Rights into Account

Patrick Doyle on "Political Risk Assessment".

Chief, Political Risk Insurance, Export Development Canada

Human rights impact assessments of projects can act to support strong methodological research that has already been conducted in the area of political risk assessment (PRA), and can complement a toolbox that might be considered to be somewhat incomplete. And while NGOs, export credit agencies and other international financial institutions tend to have an adversarial relationship, more dialogue such as this is needed to help think through how the PRA methodology can be further advanced.

Over the last two decades, EDC and other institutions have developed risk assessment technology. PRA helps us analyze the environment in which we are doing business, and allows us to predict whether human rights abuses may risk the successful implementation of a project. Human rights assessments can broaden the scope of analysis, and highlight the eventuality of potential political risk. Ignoring human rights, on the other hand, may result in an increased level of political, social and economic risk associated with a project.

We assess risk and opportunity at a country/macro level, and at a micro/local level. On the country level, we look at issues such as socio-economic inequality within a country – increasing disparities between the rich and poor in a country may lead to human rights abuses, which may in turn signal increased commercial risk. We look at the legitimacy of government and determine if there are institutional channels for free expression; for example, is freedom of speech denied. By asking questions like this, PRA addresses human rights issues.

In terms of the sources of information we use to make our assessment, we have a wide network of sources – both open and classified. We have a memorandum of understanding with Foreign Affairs to access their human rights country reports. We also listen to groups with a vested interest in a project and look into security arrangements that have been put in place, as we need to have a clear picture of what is at stake. That said, human rights issues are usually more difficult to identify, predict and define. However, there is strong literature from the Scandinavian countries that may help us in these areas. But unlike the environment, we cannot use science to predict potential human rights abuses. What's more, human rights and ethical behaviour are more value driven. To consistently predict potential abuses, it may be necessary to more clearly defined what constitutes a human rights abuse. If that is the case, then we also need to be careful about imposing our ethical standards of what constitutes a right or an abuse on a host country. We may need to accept their ethical standards. Or perhaps we can find a middle ground.

Any project is going to have either a negative or positive impact on the environment. Both have consequences on political risk. Reverse flow analysis (getting information from groups on the ground about potential human rights issues) provides a new way of looking at things, and has increasingly come to be integrated into PRA over the past few years. For example, a few years back, I visited a mine site, and was taken around by the firm to observe where the tailing were situated, I met with the local communities and spoke to the local head. Both painted the same idyllic picture. But when I spoke to some of the other people, it seemed that the compensation was not getting to them. As a result, EDC decided not to proceed with the project. And just as EDC's behaviour has changed as it has recognized the moral obligation to do what is right, the environment of international business has also changed, and with it more and more companies and institutions are developing codes of conduct and policies on corporate social responsibility.

Joji Carino on "Putting the World Commission on Dams Recommendations into Practice"

Indigenous Policy Adviser and European Desk Coordinator, Tebtebba Foundation

Joji Carino spoke about the recommendations of the World Commission on Dams (WCD), published in November 2000. Since the report was published, a project entitled Dams and Development has been established to follow up on the recommendations of the WCD's work.

What was the WCD about? The WCD was an independent review of the performance of dams, looking at the economic, technical, environmental and social impacts of dams. It concluded that while dams are a key source of energy for human development, and have considerable benefits, the social and environmental costs that they engender are prohibitively high. For example, there is a lack of equity in the distribution of the benefits of dams, which makes them not worthwhile for communities. There needs to be better planning and decision making processes put in place as a result – processes that are inclusive, and occur very early on, long before final project approval. Countries need to develop much clearer regulations to ensure compliance during project implementation and operations. There needs to be free, prior and informed consent (FPIC) for projects. and there need to be tools and processes developed to support this. With it, there will be actual benefits brought to communities.

We also need to pay greater attention to the actual impacts of projects on communities themselves. To do this, we need to take into account the rights of the affected communities (and identify the rights holders), and the risks involuntarily placed on these communities (and identify the risk bearers). This means identifying not only the legal rights of these communities, but also their customary rights. It also means upholding the rights of these local communities to be included in the decision-making process. This will involve quite a high level of participation.

How do you ensure compliance? A key component of the WCD process is giving local communities an opportunity to negotiate binding agreements with companies so that the communities can secure and promote their rights. These agreements or contracts should have a legal standing so that they can be contested in court if necessary.

Whereas the WCD Report has gained broad acceptance for its core values, FPIC has not been well accepted by the World Bank. At the heart of this is the fact that a rights-based approach has still not been accepted by the Board representing governments. They fail to see that such an approach will bring with it a number of positive aspects. This includes levelling the playing field in terms of the power disparities between the groups involved. Furthermore, indigenous peoples are disproportionately affected by large dams, and are already often marginalized and have few legal rights. FPIC would help remedy this power imbalance.

That said, in order for FPIC to work, we also need to determine a threshold of impacts. This threshold needs to be established in collaboration with affected communities, and needs to articulate what is acceptable and how the related impacts can be addressed.

Finally, at the heart of this approach is the goal of achieving longer term sustainable development. In the context of rights and development, free, prior and informed consent underscores the fact that sustainable development is the flip-side of self-determination. That is, those who are most affected by a project should benefit most.

Christina Shultz on "Business and Human Rights Assessments"
Acting Head, Human Rights and Business Project, Danish Institute for Human Rights

The Human Rights & Business Project bases its work on the premise that no matter where a company operates, it should rely on international human rights law. What does this mean for a company? It means that, as a minimum, every company has to adhere to the negative duties of human rights. Negative duties mean it has to at the very least respect human rights. Every company, for example, has a minimum responsibility when considering all operations. In terms of positive duties, it has to promote and protect human rights.

Since 1999, the Human Rights & Business Project has been working on developing the Human Rights Compliance Assessment (HRCA). The starting point of the HRCA is the fulfillment of the Universal Declaration of Human Rights. We use this to consider the rights of states under international law and the duties of businesses arising from these rights. In addition, we offer suggestions for promoting and strengthening the right, and consider the legal and cultural barriers to having that right fulfilled. We also allow the company to use the assessment to determine where they can go for more information about a specific right.

Questions pertaining to each of these rights have been devised, along with indicators, to help identify certain potential violations. In order to make them relevant to the business community, they have also been devised so that they apply to the areas in which businesses divide their practices. These consist of Employment Practices, Operational Practices, Land management, Products / marketing practices, Research and development, and Utilities & service. In total, we have developed 350 questions and 1000 indicators.

This tool has also been taken through quite a thorough consultation process during the past year, involving experts and vulnerable groups, as well as 40 companies and 40 NGOs. All have commented on the standards set for each right.

As part of the assessment, companies also have access to country human rights indicators developed by the Danish Institute for Human Rights to provide an independent assessment of the country and where it stands on civil and political rights, economic, social and cultural rights and gender issues. For each area, we allocate a rating from 1 to 8. This allows the company to balance its assessment of the human rights problems that need to be addressed with the likelihood that it will be able to attend to such issues in the country of operation.

The HRCA 'Quick Check' will be published on the project's website in July, while the interactive computer programme containing the full HRCA tool will be ready in the fall.

Ms. Schultz's presentation can be found on-line at www.halifaxinitiative.org/updir/HRCA_Canada.ppt

Nick Killick on 'Conflict Risk and Impact Assessments'

Adviser, Business and Conflict Program, International Alert

Before beginning, Nick Killick observed that there are many tools being developed now. And in order for us to make the most of all of these tools, we have to learn how to combine them. I agree that we are all looking at the world through different windows. The challenge now is to learn how to expand and connect these windows. If things are still this way a few years down the road, then we will have a problem.

For its part, International Alert has developed a conflict risk impact assessment. The assessment deals with both the private sector and other individuals, and looks at how to promote a constructive and positive role of implementing a project in a conflict zone while simultaneously reducing the negative impacts. This means changing the way companies approach assessments across the board.

Traditional assessment processes are not set up to look at the complexities of conflict. They tend to be too narrowly focused on analyzing the impact of a conflict on a project, rather than on the impact of their project on the conflict (or reverse-flow analysis, as EDC would call it.

For the project, we established a steering group comprised of four extractive companies to test the tool and provide us feedback.

What is Conflict Risk Impact Assessment (CRIA)? It is a set of tools which enable companies to be conflict sensitive. Firstly, it allows them to anticipate, monitor and assess the impact of their project on conflict in two ways – by developing mitigation strategies that can be applied throughout the project cycle (for negative impacts) and by making suggestions for peacebuilding (to promote positive impacts). Additionally, the CRIA is based on existing company assessment processes and is rooted in legal/voluntary and regulatory instruments. It represents a mixture of doing things differently and doing different things.

At the beginning of the project, there is a need to use some screening tools. Human rights are taken into account in this way, but more as part of a broad country overview. And then as you proceed along the project cycle, it goes into more detail looking at the project. There are potential flash point issues that may require greater attention, for example, compensation has the potential to evoke a number of problems. The issue of how to engage communities may also prove challenging.

The CRIA model has a series of component parts: screening at a macro level, scoping, gathering baseline data, identifying impacts, analyzing and rating the significance of the impacts, designing mitigation measures, monitoring and evaluating the actual outcomes.

And clearly, the more ownership a company and individuals have in the process, the higher the likelihood that the project will be a success.

Why should we apply the CRIA to project finance? There are several reasons. There is a good business case for conducting such assessments. It will lead to greater policy coherence between different agencies. And, since public money is ultimately being used to finance these projects, the end result should be favourable to the public good. The reasons speak, therefore, to both the head and the heart.

In terms of how this could be made operational, groups should insist that PIFIs use CRIA and other good practices, that they undertake a context analysis (the World Bank conducts a conflict analysis framework), and that they give a special categorization to projects in conflict zones.

A CRIA adds value to a HRIA, and the multitude of other impact assessments, because it emphasizes good process, it is conducted at the national and local level, it promotes not only mitigation measures but also peace building practices, it speaks to the company's perspective, and it is grounded in solid theory. And for this to work, a context needs to be established in which companies are engaging in dialogue with individuals.

Mr. Killick did end by saying that one point of concern he had about the HRIA and other impact assessments, is that you don't want to overload companies and practitioners with too many impact assessment methodologies, otherwise they will become overwhelmed as to which methodology to use. Perhaps what is really needed is the development of a synergy between them all.

Mr. Killick's presentation is on-line at
www.halifaxinitiative.org/updir/CRIA_Canada.ppt/

Questions and Comments

Q: *What and who do all these processes really empower? The HRCA has been designed to help companies ascertain their compliance with various human rights obligations. Where is the HRCA for communities? And if we give companies a tool like the CRIA, then they become conflict resolvers. This ultimately puts even more power in corporate hands, when what we really need is greater accountability to communities. Don't we need assessment tools for communities rather than for companies?*

SCHULTZ: This is a voluntary self-assessment tool for companies to use. It looks at internal company procedures, but could also be used by NGOs to explore right by right. It can really be used by everyone. If the results are disclosed, and the company conducts the assessment every year, then NGOs can use it to put pressure on companies to improve their policies. That said, our approach with this has been to try to be as realistic and constructive with this process as possible. It is a process that is evolving and will change over time. For now, companies have said that they want to spend no more than 40 hours on this. But this may expand over time. Through our consultation process, we have really been trying to address and obtain the acceptance of both the business and NGO community for the development of this tool.

KILLICK: Do we want companies to be conflict resolvers? I think we probably need to involve as many people as possible in conflict resolution. I believe corporations have a role, and that there a countless ways to address conflict. On the corporate side, companies can take a more proactive role in terms of their own operations (for example, who they hire, and how they hire them); they can get involved in social investment projects (schools, hospitals, technology transfer); they can become engaged in policy dialogue initiatives around issues such as corruption. I don't think that companies can be conflict resolvers on their own, but this shouldn't exclude them from participating in the dialogue.

Q: *How many applications have been turned down for human rights abuses at EDC?*

DOYLE: We use a series of indicators to look at the issue of political risk, and draw on a thick body of research, much of which comes from Scandinavian countries, to draw our conclusions. We may use a check list to make initial assessments, but as the cases become more complicated, we become more sophisticated. We might talk to people who have raised concerns as a result, and incorporate these concerns into our assessment. If there is an indication of serious or significant human rights abuses, then we will say 'No'. We have turned down projects based on our assessment of human rights and social impacts. When this happens, we tell companies not to apply, as we won't provide them with financial support.

Q: *Is this information available to the public, i.e., the names and numbers of companies you have turned down on human rights grounds?*

DOYLE: No. This is classified information, and we don't believe in blacklisting companies.

Q: *What is the long term plan for the HRCA mechanism? Are there any consequences to not abiding by its recommendations? How many companies give themselves a red light?*

SCHULTZ: As stated, the HRCA is first and foremost an internal self-assessment tool that companies can use to integrate human rights into their business practices in order to improve their human rights performance. The tool is meant as a preventative tool, so companies can implement respect for human rights and avoid ending up on the front page of a paper because of serious human rights violations within the company. Thus, if companies are afraid to give themselves a red light, they will be cheating themselves in the long run.

Q: *In terms of being realistic and constructive, what was your experience like getting corporations involved?*

SCHULTZ: Many companies realize that they should have taken better account of human rights when it is already too late. We wanted to help companies realize that taking account of human rights needs to be done as a preventative measure.

CARINO: Just to add to this, I believe we all have human rights obligations. Existing standards should be a starting point. Just to add to this, I believe we all have human rights obligations. Existing standards should be a starting point. For example, indigenous peoples consider that the World Bank's Draft Policy on Indigenous

Peoples falls short of international developments in respecting the rights of indigenous peoples on four major points: respecting indigenous peoples rights to land; to free, prior and informed consent, to self-identification and the prohibition of involuntary resettlement.

That said, however, once we have agreed to the standards, who will do the monitoring?

Q: *This is less a question than a comment. The Universal Declaration of Human Rights has been around for almost sixty years. In that time, governments have been able to codify it into national legislation. Yet people from EDC never talk in a human rights language, and when they do, it is just as an 'add on' to already existing policy or practice. But human rights is a way in which many of us have agreed to live in the world. And from this perspective, it offers the foundations for a framework that could enlighten the way in which commercial decisions are made. EDC, therefore, has to get serious about how it tackles the issue of human rights. If they are an 'add-on' to a PRA, what happens when there is a high risk of human rights abuses and a low PRA – which will you choose? Secondly, How can EDC be "committed to transparency" and "human rights principles" if their project approval process, PRA and monitoring are confidential?*

DOYLE: EDC has tremendous respect for human rights and has had separate discussions with groups to create a new and separate means of assessing human rights impacts. We don't see human rights as an 'add-on', rather it is something we spend a lot of time researching. As far as secrecy goes, IFIs can't go around saying, "These are the companies that came to us and these are the one's we turned down." We might be able to provide past examples of projects we have turned down, and the grounds for doing so, but we wouldn't be able provide names of companies and countries.

Q: *The EDC is publicly funded. But given EDC's track record, is it worthy of the public's trust? Years ago, some Canadian banks were exposed for investing in South Africa during apartheid. People were outraged and demanded their money not be invested there. Why isn't this the case at EDC?*

DOYLE: Firstly, EDC checks with DFAIT that it isn't investing in countries that are deemed to be 'off-cover', such as Burma or South Africa during apartheid. We can listen to the stories of the churches or the President of a labour union, but ultimately we are protecting the political risk of the investor, not of the people.

Q: *Corporate and EDC practices are changing slowly. But I am concerned by the extent to which these changes are more responses to managing reputational risk, than to any concern for the longer term implications on the sustainability of projects. Being guided by the former, versus the latter, will lead to very different end results.*

KILLICK: I wouldn't be so dismissive of reputational risk. From a company's perspective, this is quite important and has led companies like Shell to recruit new staff to look into these issues. I also think that there have been substantive changes relative to what was in place several years ago. Companies, after all, are exposing themselves to financial risks, and it is only natural that they would want to protect their investments. But overall, the end result has been a better product that is both more efficient and beneficial to communities. That said, there is still room for creating incentives to make this work better.

Q: *HRIAs are meant to be meaningful, and more than a checklist, I think it is about creating a good process. Some of today's models seem to be more about going through a checklist.*

KILLICK: I agree that human rights is not a checklist approach. But a human rights impact assessment is also not going to tell you everything you need to know, for example, why young people are at odds with their elders, or why certain groups are fighting each other.

Q: *Do you think these models can be meshed together? For example, can we take the criteria developed by the HRCA model, and use other elements from another model? Also why is the HRCA voluntary, as opposed to mandatory?*

SCHULTZ: I agree that this is not the perfect system, but I think it is a good start. What's more, I think that we should be careful to assume that if all the lights come up green, then there are no human rights problems. (Similarly, the system as it stands right now is a yes/no system, and to improve it, we might want to later expand on these questions to make them a little more open.) We have focused on developing a voluntary tool, as we would first and foremost like to engage companies in a constructive dialogue on human

rights to make them understand the responsibilities that pertain to companies. You may say that we actually take the UN Draft Norms one step deeper to make them as operational as possible in a business context.

***Q:** I think ten years ago there was a lack of clarity about what the idea of human rights and business meant. Since then, duties have expanded. That said, if a legal relationship is established between groups and the company through a negotiated contract, how do companies know which groups to work with and what duties to promote?*

CARINO: I think it is true that some groups may have hidden agendas, and there are big challenges to working with legitimate authorities at a local level. But if leaders are accepted as legitimate actors representing local communities with legitimate rights and interests, then companies must protect these rights and interests like any others. Right now, we need to get to a stage where companies recognize such leaders or groups as legitimate actors, with legitimate interests, and the WCD sets up mechanisms for doing so.

Dr. Audrey Macklin on "Closing the Governance Gap: Implications for Canadian Public Policy"

*Associate Professor of Law, University of Toronto**

Dr. Macklin spoke about 'Closing the Governance Gap: Corporate Self-Regulation in Conflict Zones – Implications for Human Rights and Canadian Public Policy', based on "Deconstructing Engagement", a research paper she co-wrote with Penelope Simons and Georgette Gagnon. Like David Petrasek, Ms. Macklin spoke about the governance gap, defined as "a legal vacuum wherein enterprises operating beyond the reach of effective mechanisms of accountability may commit, aid, abet, knowingly benefit from, or otherwise be complicit in violations of fundamental norms of human rights and humanitarian law".

The problem, therefore, remains one of filling the governance gap. Internationally, the UN Norms have contributed to codifying existing norms to take account of corporate obligations under international law. But even the UN Norms emphasize that the primary responsibility still remains on the state. Host states that invite foreign investment are often unable or unwilling to constrain the human-rights impacting activities of these companies; indeed, host governments are often the primary perpetrators of the violations. Domestically, companies argue against home state regulation by arguing that it will l give their competitors from other states an unfair advantage.

This means that since international law does not clearly require transnational corporations (TNCs) to respect human rights extra-territorially, when a host state's legal system is inadequate and corporate self-regulation is poor, there is a strong possibility that companies may be complicit in violating human rights. This commonly occurs when companies conduct business in areas with repressive host regimes or employ private security forces, which may in turn lead to forced disappearances, involuntary displacement, murder, sexual and other violence or slave labour.

The research that Ms. Macklin and others did focused primarily on the situation in conflict zones because this is where some of the most flagrant, egregious and most frequent human rights abuses arise. Their response, therefore, is a series of policy initiatives led by the Canadian government applicable to Canadian companies operating in conflict zones.

The goal of the regime is to design, implement and enforce a set of norms in the form of a mandatory code of conduct for TNCs operating in conflict zones. The Code would be directed at ensuring that corporations neither contribute to nor complement direct violations of human rights.

The code of conduct asks TNCs to ensure that all security arrangements meet international norms, they conduct risk assessments on the project's human rights impacts, and they establish an independent stand alone monitoring body.

This monitoring body would be made up of national and international NGOs, industry, government, auditors, academics and experts. It would be funded 50% by the government, 50% by industry operating in conflict zones. The body would be responsible for reviewing the human rights impact assessment, and would establish whether or not the TNC could proceed and, if so, the terms for doing so. It would then conduct the ongoing monitoring and evaluation.

Measures to encourage compliance would run from facilitative mechanisms that enhance consumer and shareholder ability to utilize market remedies, to state-based incentives, to sanctions. To provide incentives to companies to fulfil their requirements, there would be disclosure requirements, legislation to protect company whistleblowers, and an amendment to the income tax act to deny foreign tax deductions to complicit companies. EDC could also link the monitoring body's recommendations to the provision of financial services. In terms of disincentives, the Special Economic Measures act could be revised to prohibit certain business activities and make certain countries off-cover. Specific criminal offences could also be introduced to deal with non-compliant companies 3 years after introducing the above measures.

*This presentation in fact occurred on day two, but for the sake of flow, has been reported here.

Danwood Chirwa on "Developing a Human Rights Impact Assessment for Privatization"

*Lecturer in Law, Department of Commercial Law, Faculty of Law, University of Cape Town**

Danwood Chirwa spoke about his work on developing a HRIA for privatization. In South Africa, both water and electricity have been privatized. With it have come not only increased prices of basic services, but also a number of human rights implications.

Privatizing anything raises the issue of who becomes accountable when things go wrong. Privatization may lead to the loss of basic services for some people, yet the company involved in the privatization is accountable to the market, not parliament. People can hold Parliamentarians accountable when the government does not meet their basic needs, but how do you hold the market accountable.

Secondly, regardless of whether or not the state has the clear obligation to make sure that a basic right, such as the right to water, is being progressively met, everyone should have the right to water.

In the context of privatization, states have to bear the risk of losses and must guarantee profits. If over a ten year contract, a company does not profit as much as was predicted it would, the state must compensate the company for its losses. This puts the state in a very precarious situation over the long term and threatens its ability to protect and promote human rights.

Privatization threatens universal accessibility. When services are privatized, companies will often be looking at fully recovering their costs (plus a profit). In certain situations, the cost for delivery may be too high and the user fees may be out of the reach of the majority of the population. For those people, not being able to access water directly affects their right to health. So what is a reasonable amount to charge so that this does not occur? There are two possibilities: either the more you use the more you pay (useful for those who can't afford water or electricity), or the more you consume the less you pay (based on volume of use, but this can be environmentally disastrous). Either way, the figure seems unreasonable.

Finally, what sort of an enforcement mechanism should your service provider use? In some cases, the company may cut off water to a whole community just because one individual didn't pay their user fee. Perhaps, then, the company should set a minimum level of water to which every individual should be entitled. But how much?

All of these issues associated with privatization give rise to a separate set of human rights issues. And so how does this relate to a human rights assessment? In South Africa, some social and economic rights are clearly articulated within the constitution, and this helps define certain government obligations. But for economic and social rights, states have agreed to take on measures to progressively realize these rights. But how can you determine whether these measures are reasonable enough?

It therefore may make sense for the state to conduct a human rights impact assessment to evaluate the impacts of privatization before they decide to do so because the actual process of privatization might impede the state's ability to progressively realize some rights. With the example of water privatization, such an impact assessment would be able to identify specific human rights issues –such as the right to water and the right to health – and help put in place measures to protect these rights – for example, for people who cannot afford the services once they are privatized. The government's decision would also be better if the sort of human rights violations that might be involved could be predicted.

This then introduces a greater sense of accountability into the process. In the context of privatization, for example, it is very difficult for the state to monitor how things are proceeding once a private actor has taken on a long term service, like providing water. But this would bring some level of accountability, and make the private actor accountable to the state.

*This presentation in fact occurred on day two, but for the sake of flow, has been reported here.

The Historical Challenges of Impact Assessment

David Hunter on "The Challenges of Impact Assessment"

President of Peregrine Consulting and Advisor to the Centre for International Environmental Law

Environmental impact assessment (EIA) has been in place for 25-30 years. It is now being widely used, even by international financial institutions. Today, we almost take it for granted that there has to be an EIA for a project. But what hasn't changed, over the years, is that we are still trying to mitigate harm instead of doing no harm. To this extent, EIA could just be a co-optive, rhetorical process, engaging communities in a dialogue that simply allows projects to go ahead anyway. Despite EIAs, the environment doesn't seem to be getting any better.

Over the past 25 years, the EIA has been both refined, and it has evolved. First of all, technically, conducting an environmental impact assessment is no longer all that difficult. We know most of the methodological answers, although there are still a couple of questions we still have to tackle. Secondly, the costs of conducting an EIA in most instances are now manageable. They are internalized by most TNCs, and represent less than 1% of project costs. Some initial concerns about excessive costs of EIA have now waned. Thirdly, EIAs now include social and cultural impacts, and have developed, themselves, into separate poverty, gender and health impact assessments. It is important that separate methodologies have developed for each of these. Fourthly, despite the existence of EIAs and other kinds of impact assessment, many of the people conducting, or involved in, these assessments remain marginalized from very important decisions. That said, they wouldn't be there at all if a concern about the environment hadn't forced this issue, and educated the institutions about the need for such assessments. And no doubt, some better decisions on projects have occurred as a result. And finally, all of this has opened up space for dialogue that didn't previously exist.

But there have been some challenges and pitfalls in all of this.

1) Governments, industry and financial institutions continue to see EIAs as a technical process, which it is not. EIAs have many different functions, including learning from local communities and informing local communities.

2) Public participation and involvement of stakeholders in the decision making process still have a long way to go.

3) Companies now seem to be comfortable with complying with international and host government standards, but the public disclosure of information and exposing projects to public scrutiny still remains a problem.

4) HRIA may be easier – because it is based on a solid framework of international human rights law, whereas you might say that EIA is only based on the Rio Declaration. But it is also more politically sensitive than the environment.

5) Countless groups are still dissatisfied with the timing of the release of the EIA. IFIs and companies still hide behind the catchall of 'commercial confidentiality', but we know EIAs don't fall within the realm of what might legitimately be considered confidential. The real reason for this is that companies don't want to expose their projects to public scrutiny.

6) Quality control (of EIAs) remains a huge issue, and touches upon the necessity of building the capacity of small and medium – sized enterprises to conduct EIAs. EIAs consistently fail to address the needs and concerns of indigenous communities, and take a "cookie cutter" approach by using the same language in different situations.

7) The issue of independence is another big issue. Who is being asked to do assessments, for example, and how they are being done. Typically, local communities cannot pay to have an assessment done, so who will fund the assessment, and how will this funding be made transparent. Methodologies for this are still developing.

8) There are also challenges to ensure due diligence throughout all the various stages of the impact assessment process. With screening, for example, companies and PIFIs have been known to do just about anything to keep their environmental assessment out of a certain category because the related procedures subsequently become more onerous. To some extent, therefore, by the time we even know a project is taking place, it has already been categorized.

9) Transparency in the process is very important, but still gets ignored.

10) Scoping is rarely done up front – for example, to establish which environmental issues or human rights are relevant or not. Rather it is done while the project is being planned. This means that the people are involved at the end of a project review, and they want to talk about X, while the experts want to focus on Y. This leaves people polarized around the project, with no support for the project. But if the public had been involved in the process early on, the experts would have known to, and could have legitimately dealt with, X.

11) Analysis of impacts, mitigation measures, and issues of compliance are all dealt with too late in the process to be useful, often within the financial institution being solicited to support the project. As a result, the PIFI will always tell you that they have little choice about improving the project. But there is a choice, and this can be made by bringing this analysis and discussion of the impacts and mitigation measures much sooner.

12) Finally, the EIA is generally procedural. It provided us with information and shared this information with stakeholders. But the EIA is limited as a tool if it is only procedural. For its worth to be recognized, it needs a normative framework. Human rights is probably more suitable to this, and adds some weight to the substantive decisions that need to be made.

Given these challenges, where should we focus our attention? Firstly, we need to pay much greater attention to monitoring outcomes. Rarely it seems are there post-project assessments. But to be meaningful and effective, we need to bring that learning back in. Were we right about the impacts we predicted? Were we wrong? Did we make the right decision? Secondly, impact assessment needs to become a tool for expanding dialogue and discussion, and giving the experts the information they need to make the right decisions. If EIA becomes more of a decision-making tool, then it can help level the playing field a little better. Finally, to really level the playing field, and address power imbalances, transparency is key to shifting power imbalances.

Questions and Comments

Q: *This is less a question than a comment. An HRIA, whether dealing with environmental or social issues, should start from thinking about human rights. However, getting the perfect framework in place, derived from human rights, won't matter unless you think about the context in which it is going to be carried out. For example, companies are still paying individuals for a certain outcome, impact assessments are still very poor in quality and contain countless pages of irrelevant data, monitoring is periodic rather than ongoing, and there are not appropriate accountability mechanisms in place that apply consequences for non compliance. But this all relies on a political will which is not always there.*

I definitely agree that there are still a huge number of challenges to even making the existing process work better.

Q: *You mentioned that human rights have a greater potential than the environment to draw on a clearly defined normative framework. But this assumes it is easy to define what might be considered a violation of human rights, and that there won't be a trade off between some people's rights and others. Is a critical right for ten people more important than a less critical rights for 10 million people. Is it that easy?*

It may be true that when we get into the nuts and bolts of this, there will be trade-offs, but I think using human rights as your normative framework will create more points of clarity than of confusion. For example, the whole decision making processes is much stronger in a human rights, than an environmental, context. The environment doesn't have such a normative context and this is something I think we long for – some sort of universal declaration on the environment. Human rights is a much more legally, socially and politically accepted field than the environment.

Q: *In Ecuador, for more than 15 years, oil companies have not respected indigenous rights and their environmental rights. But who do we ask for help if the state won't help? We decided in our community to carry out our own social and environmental assessments. But we were worried about the extent to which these assessments would be considered legitimate by the company. To what extent are our assessments legitimate?*

How do we get that process to be taken seriously by companies? I think by asking ourselves the same questions that we ask of them. Who's paying for it? And what technical qualifications do they have to conduct it?

Expert Group Meeting on Developing a Human Rights Impact Assessment

The purpose of the second day of the meeting was to encourage people, in small groups, to discuss in more detail some of the issues touched upon in the preceding day. Some of the themes from the previous day raised either in the presentations or the question period included the following issues:

1) Scope – which human rights should be included in a HRIA?

2) Stakeholder identification – How do we identify stakeholders through a HRIA?

3) Identification of human rights impacts - How do we make sure a human rights screening mechanism works?

4) Setting limits - When do we say no to projects?

5) Implementation, monitoring, evaluation and compliance – How do we make sure these elements don't get ignored once the EIA has been approved?

But before tackling some of these difficult questions, participants were asked to think through some of the additional challenges of implementing a stand alone HRIA in order to help them think through what processes and practices would need to be put in place to address these challenges. The challenges that groups raised have been organized below into four themes.

Challenges to Developing a Stand Alone HRIA

What issues need to be addressed in the process of developing a stand alone HRIA?

Legal and human rights challenges

How do you identify/demonstrate the connections between the investment and the TNC's activity, and a potential abuse? How do you show complicity? How indirect a connection still remains legally relevant?

The HRIA is rooted in the strong foundation of international human rights law. However international law has a weak legal framework in terms of the obligations it places on states and companies. How do you resolve this?

How do you identify and predict potential human rights violations? Can you mitigate human rights abuses and should that be the goal?

Business challenges

How do you develop a mechanism that does not present to great a disincentive to companies to take human rights into account?

How do you make companies take account of human rights when profit is the motive?

How do you get past the question of commercial confidentiality when transparency and informed participation is a key goal?

Operational challenges

How is the HRIA structured? How do you develop a simple standard methodology that also tackles the complex issue of human rights? How do you devise a methodology that could potentially be used by different constituencies – by government, business people, and communities?

When do you do a HRIA so that it makes a difference?

What is the scope of the HRIA? And how far does it extend? Given that some may have more relevance that others, which rights do we address in the context of trade and project finance, and the project cycle? Equally, does the scope extend from considering project impacts to looking at how trade policies create the conditions that enable these impacts?

In terms of participation, what is the appropriate point of entry – that is, when do you contact the community?

How do you guarantee the early, full and meaningful participation of affected communities given the challenge of challenge of non-disclosure of information and commercial confidentiality??

How do you identify stakeholders and other interested parties? Who do we involve?

How do you establish and encourage participation at all levels? Is it important to consult with groups at all stages of the process?

Whose views count? How do you address the issue of power?

Who would carry the HRIA out? Communities or corporations? How do you ensure independence?

How do you find the balance between benefits and risks? How do you measure one human rights impact against the other?

How do we determine whether the human rights impacts we predicted played out in practice?

EIAs are often used to rubber stamp projects. Would a HRIA therefore have a real NO project alternative? What are the grounds for establishing 'No Go' Zones or categorical prohibitions? Environmental 'no go' zones are logical enough. What does the human rights equivalent look like?

Strategic challenges

What is the difference between a HRIA, and Environmental Impact Assessment and Social Impact Assessment? Do you want to develop a separate HRIA? If not, how do you ensure coherence between competing tools and frameworks? How do you integrate and build on existing frameworks and processes?

How can you avoid making the IFI/ECA/TNC both judge and jury? They are internally accountable to their own policies, but how do you make them externally accountable for the impacts of their policies on the communities they affect?

How do you build the capacity of impact assessment practitioners to conduct competent HRIAs – not just in terms of technical ability, but also in terms of their human rights mind set? Who can fill this niche?

How do you raise the awareness of World Bank and ECA staff to the importance of human rights? To the need to separate human rights assessment (which protects communities) from political risk assessment (which only protects investors)?

Who is going to carry this initiative forward? What further technical knowledge do you need?

How do you build the political will?

Out of these discussions also came a number of recommendations by various participants, including the fact that

- Human rights should be the starting point and foundation of an impact assessment, not simply included as a 'social add-on'.
- An HRIA would need to be clear in its definitions, criteria and processes
- It should be used as both a preventative mechanism to predict potential human rights abuses, and be used to evaluate and monitor projects on an ongoing basis
- It should focus on more than just identifying potential or actual human rights violations, to actually make suggestions for how to promote human rights
- It should include upfront analysis of the institutional, legal and political context
- The HRIA should be sure to involve and hear the perspectives of affected communities and interested parties from very early on. That said, the simple 'participation' of communities is not enough.

Integrate or Separate?

Where does a HRIA fit strategically and operationally? Should it be integrated into existing mechanisms or kept separate?

Following the discussion of the challenges, a number of participants were interested in exploring in more detail the question of where a HRIA fit strategically and operationally into the numerous impact assessment models that already exist.

Several people felt that all the various models needed to be integrated together in some manner, as it would become too confusing to practitioners and companies to have an excess of different models. However, this seemed to be more of an argument for greater coherence and awareness of the different models than a need to integrate each.

That said, each model added value in different ways. Environmental and social impact assessments and political risk assessments have all developed strong methodologies over the years, and international standards have been developed to guide these assessment methodologies. And while the strengths for these types of assessments lay in their methodology, the strength of a human rights impact assessment lay in it being firmly rooted in international legal obligations that would underscore the importance of such issues as participation and disclosure of information. An impact assessment based in human rights would carry with it great weight and moral authority. The promotion of human rights, for example, constitute an element of Canada's foreign policy and respect for human rights enjoys broad public support and acceptance. Human rights also covers a broad array of issues, and would likely expand the scope of a EIAs and SIAs, providing a much more comprehensive and holistic approach to assessment. Furthermore, human rights are currently not being addressed with sufficient vigour either within EIAs, SIAs, or political risk assessments.

Therefore, it was less a question of whether to have a separate HRIA or integrate it into a SIA, than of using human rights and a rights-based approach as the framework for developing a SIA. That said, the process for conducting SIAs would also need to be reviewed because, for example, they are being funded by companies and therefore not independent. Another participant also observed that if sustainable development was the end goal, then there were a number of necessary preconditions for this new approach to work. Among other things, this approach would need to have a long term perspective; there would need to be clear and comprehensive human rights indicators; there would need to be ongoing monitoring of a broad array of issues; and the IFI would need to be clear about what it would require from the company.

In order for such an assessment to work, there would also need to be both national and international support for the initiative. One participant suggested that since Canada does not appear to have a strong tradition of using SIAs, it may be advantageous to propose the development of a HRIA. EDC might, for example, use some of its profit every year towards financing HRIAs and monitoring them. Some suggested that it was not EDC's responsibility to fund such studies, but rather the proponent's. Others suggested that this would not create any level of independence and that a separate mechanism would be needed to fund HRIAs and hire truly independent consultants. But where would the money come from?

Another participant argued that in terms of international support, it would be difficult to push things on the international stage as the World Bank, for example, currently excludes human rights issues from its central mandate.

This discussion then ended by exploring the utility of developing a new and improved model when there are so many outstanding issues that have yet to be resolved. For example, one participant observed how decision-makers will sometimes ignore the recommendations of consultants. Monitoring is often the responsibility of proponents, yet there is a perverse incentive on the part of proponents to distort outcomes and render them favourable in order to secure the next trench of money. Similarly, one participant questioned whether a company, an ECA or a host government would ever say 'No' to a project when there is money to be made. Another questioned the value of developing an improved assessment process when commercial confidentiality and current disclosure practices at ECAs keep so much of the information related to these commercial transactions secret. EDC argued that it had moved forward on disclosure although there was some discussion about the extent to which it had done this.

Finally, several participants expressed the need not to try to find the perfect solution, but rather find a credible, develop a workable methodology and carry out a pilot project.

Some questions which were raised during the discussion, but that still needed further clarification included the following:

- What does a stand alone SIA do that a Environmental and Social Impact Assessment doesn't?

- What do we want to use the HRIA for - for example, for conflict, privatization, public support for private investment, or trade policies?

What are the Key Guiding Principles to Some of the Major Themes of a HRIA?

In the afternoon, groups focused on building up the methodology for the HRIA process. Groups addressed themes that had recurred throughout the two days, using the background paper as a reference. These included how to 1) synthesize methodologies; 2) upstream human rights into the Impact Assessment process through meaningful participation, involvement and stakeholder engagement; 3) establish criteria for 'No Go' zones/categorical prohibitions; 4) ensure appropriate monitoring, evaluation and compliance; and, 5) build the institutional and host government prerequisites to establish a HRIA. Groups were self-selected based on interest, and touched on one of the five issues above for approximately an hour and a half.

1) Synthesizing methodologies

Clearly with a number of methodologies already in existence for assessing different types of impacts, it would be worthwhile evaluating each to determine the value that each adds.

The principal strength of the HRIA lies in its firm foundation in human rights, well-defined international legal dimensions, and government ratification of international legal norms. On the other hand, the people engaged in environmental (EIAs) and social impact assessments (SIAs) have no such legal framework for basing their impacts. They have, however, developed a clearly articulated methodology, with few challenges in terms of scoping and identifying issues, stakeholders, and areas of impact, etc.. Human rights therefore acts as a good basis for grounding SIAs.

It was apparent to the group, that in order to move the boundaries of SIA forward, for example to an impact assessment firmly entrenched in human rights, or to achieve free, prior and informed consent, there would need to be a great deal of awareness raising and education among communities and practitioners about human rights.

In terms of cost, a HRIA was not seen to be unfeasible, as current SIAs costs in the range of $25,000 to $150,000, depending on the size of the team and the time in the field.

Finally, one participant also observed that you also need to be aware of your own impact on the assessment process, and take this into account.

2) Meaningful participation and stakeholder involvement

This group said that their opinions on this issue were perhaps somewhat biased as they offered a community-based perspective, focusing primarily on extractive industries. Consequently, they rejected the term stakeholder, opting instead for 'interested parties', 'risk bearers/duty bearers', and 'rights holders', and sought to place such rights holders at the heart of the decision-making process. Participation would also need to be iterative, rather than one-off, as it adds value to all the phases of the project cycle, in terms of initial assessment, review, monitoring, evaluation, etc. Appropriate mechanisms and staging would therefore need to be developed at each stage (as per the World Commission on Dams) to ensure that this occurred, and proponents would need to be mindful of whose criteria was being used to do develop such staging.

More specifically, the group argued that:

- Community capacity must be built up throughout the whole assessment process, including through awareness-raising of the rights of communities, interested parties and groups.
- The assessment process should be put in the context of appropriate legal and policy frameworks.
- Baseline data developed in a non-participatory way is not helpful as it ignores the values that local groups attribute to their environment and way of life.
- Similarly, baseline data also needs to build on local expertise and knowledge to help identify potential impacts.
- Rights holders and interested parties should be identified in a participatory manner, as affected communities can help identify missing groups or individuals.
- Communities should play a role in defining their own information needs, including the right to reject information.
- Communities should also have the right to say whether or not they want to be involved in the process, or not even be contacted.
- Free prior and informed consent (FPIC) of indigenous communities should be incorporated into the assessment process to ensure that the assessment corresponded to community demands. For non-indigenous communities, there is a strong moral and

power perspective for also requiring FPIC, but the legal case is perhaps less developed. In their case, we might therefore think in terms of demonstrable public acceptance rather than FPIC.

- The affected community should be involved in developing national frameworks, policies governing development projects, and their legal review.
- There should be recognition of, and respect for, indigenous peoples' own decision-making institutions, processes and time frames – although this could be problematic if these institutions turn out to be discriminatory in themselves.
- People from affected communities should be involved in defining and setting the criteria for 'no go' zones, and should have the right to say when they don't want a project.
- To guarantee appropriate levels of participation throughout the assessment process, there would need to be an independent arbitrator, tribunal or court to receive potential complaints from communities and interested parties about the participation process.
- Finally, for participation in the process to be valued by the community, it needs be seen to have a real impact, otherwise it will be perceived as a waste.

The group also raised a number of challenges, and solutions, to achieving the above. The closed nature of commercial confidentiality, the project bidding process and the fact that companies are often trying to secure the rights to an area before engaging with communities, currently contradicts attempts to integrate participation and transparency earlier into the assessment process. HRIA could use rights to challenge the legitimacy of such confidentiality. Disclosure should become a key principle. Establishing more space within the decision-making process implies shifting power relations between all those involved. How can power relations be shifted so that FPIC is accepted? A HRIA could help frame FPIC in terms of international legal obligations. What role would external experts play with this new emphasis on local knowledge, expertise and participation? The group suggested that external experts can still facilitate discussion among local groups. Who should pay for the costs associated with greater community participation? The state could give funds to communities to help identify impacts, companies could put money into a bond, or there could be a national incorporation tax. The group was unsure, however, whether any of these options offered sufficient independent.

3) 'No Go' areas/Categorical prohibitions

While discussion on this issue proved very interesting to all, the conclusions reached were not consensual, since some participants felt that developing 'No Go' zones was not a useful framework, since even 'positive projects' can occur in bad zones.

It was, however, decided that there should be a distinction between 'No Go' countries (investment could not proceed in country x because of its breach of core human rights) and areas (which are excluded from financing because of a specific breach or abuse of rights in the assessment).

In terms of countries, apart from obvious choices such as Burma or South Africa during apartheid, this would be a very difficult process to manage. Whatever criteria you develop to identify a country, however objective, its application and final outcome would be inherently political and rife with dissenting views.

On the other hand, it might be easier to develop criteria for establishing 'No Go' zones due to a breach of human rights. The Annex in the background paper was a good start. However, more thought and research would be needed to develop indicators to trigger a categorical rejection of a project from a rights-based perspective that was on par with the list developed for the environment. Participants identified the following criteria:

1) Projects without free prior informed consent;
2) Where revenue from a project fuels an abusive conflict;
3) Where the project intrudes into areas inhabited by uncontacted people;
4) Where investment or work on an area will intensify an abusive conflict;
5) Where extractive industry investment does not include a transparent revenue plan.

One other participant also suggested including the right to a clean environment as a 'No Go' factor. One participant also disputed the utility of having 'No Go' zones, in particular for countries, arguing that even good projects in bad areas can bring positive changes.

4) Monitoring, evaluation and compliance

For their observations, this group assumed that the HRIA had been conducted according to best practices, with clear and comprehensive baseline indicators, and a negotiated and binding Human Rights Protection Plan (HRPP). Monitoring would then be an ongoing process to determine how the HRIA played out. Evaluation would be an assessment of the project to determine how successfully the human rights measures were met in a specific context. Compliance would look at what tools for recourse and discipline are available to affected communities and interested parties if project sponsors are not meeting their specific commitments, and IFI policies are seen to have been applied inadequately.

In terms of monitoring, the question of who monitors is key. The group suggested the need for an independent body "with teeth" that would include representatives of the affected local community. The level and size of the monitoring body should be commensurate with the level of risk, such that for major high risk projects, there should be an independent advisory panel. In each case, the community should be involved in overviewing the implementation of the Human Rights Protection Plan. For IFI and ECA funded projects, this could be through regular reporting to a UN human rights monitoring system, or to the OECD. Such a monitoring body would be funded by the project sponsor through part of the loan from the IFI or ECA.

In terms of compliance, there should be home country legal mechanisms that can be used to regulate overseas investments. Direct sanctions should be applied to project sponsors in violation. There should also be a mechanism for addressing local grievances and complaints. Public shaming of poor practices within specific companies was viewed as a limited option for compliance as it relied on the energy and resources of civil society to expose companies, and would be difficult to sustain in the long run.

The group also noted that a necessary prerequisite would be the full disclosure of the HRIA and the HRPP.

In commenting on these ideas, one person observed that compliance mechanisms are currently limited to an advisory role. Another person noted the importance of comprehensive indicators for monitoring projects, and the challenges of doing this in the absence of public disclosure. One other person also noted the importance of binding negotiated contracts between affected communities and companies, as this provides a means of leveraging the company to ensure that they deliver on the promises they have made.

5) Prerequisites for making the HRIA work

This group looked at issues of advocacy, and the preconditions for bringing about enforceable HRIA obligations on the appropriate institutions and companies. This would require the following:

- *Extensive knowledge and understanding of the relevant institutions*, their scope and mandate. These included government-linked institutions, such as ECAs, IFIs and MDBs.
- *Capacity building within the institutions around the issues.* This would be a significant challenge at the World Bank since human rights is not part of its mandate.
- *Both a national and multilateral approach* (e.g. OECD, Export Credits Group, G8, UN). National because one country ultimately has to take the first step, and multilateral because developing international standards levels the playing field. This may be challenging since ECAs likely won't move on this until the WBG has moved, and it isn't rushing ahead, and industry have a strong pull on ECAs.
- *Identification of agencies*, groups and individuals *that have an interest* in this and the *nurturing* of these *relationships.*
- *Identification of companies that have the capacity to work on this*, and that are corporate champions. However, it is important be mindful that this is treated more as public relations than something companies want to engage in heavily.
- *Development of a critical mass of popular and political support* through petitions, public editorials, investor activism, private member's bills, etc. For example, a poll has been conducted to indicate that 75% of the Canadian public support enforceable human rights obligations on government agencies.
- *Acknowledgement of business concerns* regarding the certainty of process (what you want them to do) and remaining competitive.
- *Promotion of human rights as a necessary element of sustainable development.* In Canada, all government agencies, through the Auditor General, must complete a sustainable development plan. To the extent that you can link human rights to sustainable development, they will have to consider it in their report.
- Focus HRIA obligations on the right institutions.

Summary and Conclusions

Setting the stage for conference participants to assess the current international context and make recommendations for change, presenters began by analyzing the current relationship between international human rights law and publicly-backed private investments. States have traditionally filled the role of ensuring the respect for, and promotion of, human rights obligations, including the regulation of the behaviour of non-state actors. Over the past decade, transnational corporations (TNCs) have emerged as an important member of this amorphous category of 'non-state actors', and international human rights experts are beginning to assess the need to expand beyond the state-centric model of international obligations. Although highly controversial, the draft UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights is a clear signal of this evolution. And while they currently have no legal standing, the Draft Norms have helped launch a discussion about the responsibilities of TNCs to human rights.

This question is particularly relevant in the context of investment in developing countries due to the existence of an 'enforcement gap'. In such a situation, a host country either has insufficient resources, is unwilling, or does not have the legislation, to ensure respect for human rights. Equally, the TNC does not feel it is its place to play such a role. As a result, when state governance is weak and corporate self-regulation is poor, there is the possibility that companies may be complicit in violating human rights.

Within this legal vacuum, companies and individuals, as well as governments are being asked to carry out duties with respect to human rights. For companies, these obligations arise indirectly (private actors are expected to respect human rights) and increasingly directly (through the development of international voluntary standards (such as the OECD Guidelines on Multinational Enterprises) regulating the activities of TNCs. In Canada, closing the governance gap might start by developing a mandatory code of conduct for TNCs operating in conflict zones, with appropriate mechanisms set up to monitor compliance, and provide incentives and discipline to the company to abide by the code.

As interest arises over the responsibility of TNCs with regards to human rights, so too should our attention on the responsibilities of international financial institutions (IFIs). These agencies have often provided financial support to companies that have engaged in projects that have undermined human rights.

Export credit agencies, the particular focus of the conference, already take some human rights issues into account through political risk assessments (PRAs). As presented in a working paper prepared for the conference[1], PRAs do have a strong methodology, and provide a good country context for a project, but still primarily focus on the risks of a project to investors, rather than to the communities affected by the project. In contrast, other models presented during the conference, such as the World Commission on Dams approach, highlight the rights and risks projects place on communities and interested parties, and place these parties at the helm of making decisions about projects that affect them. Voluntary mechanisms such as the Human Rights Compliance Assessment, allow companies to evaluate in practical terms the extent to which they are compliant with international human rights law, and make suggestions of changes they could make to be more compliant. The Conflict Risk Impact Assessment allows companies to be sensitive to potential conflicts in the areas where they are conducting business, and play a more proactive role in developing strategies that both mitigate impacts and that help to build peace. In the context of a state making a decision to privatize, a state might undertake a human rights impact assessment to ascertain the types of rights that might potentially be violated as a result of privatizing national industry.

Each of these models offers a glimpse at the complex array of issues and the important role that good process plays in making sure human rights are taken into account. Conference participants reviewed the challenges and pitfalls

[1] See "Risk, responsibility and human rights: Assessing the human rights impacts of trade and project finance", A background paper for the conference of the same name, May 2004, NGO Working Group on EDC. Available on-line: www.halifaxinitiative.org/updir/Final_background_paper.doc

that have historically plagued impact assessment. These challenges include: impact assessment is still largely viewed by industry and government as a technical hurdle rather than as a way to engage with affected communities; public participation and involvement, consequently, is still not getting the attention it deserves; public disclosure, timing of its release, commercial confidentiality and transparency are still highly contentious and disputed topics; measures to guarantee the quality, independence and appropriate categorization of assessments have yet to be resolved; and initial scoping and the analysis of impacts are conducted too far along into the project cycle to permit substantive changes that might avoid human rights violations.

To overcome these challenges, an impact assessment must therefore:

- stress the importance of EIA as tool for making decisions, rather than as a simple procedure;
- increase transparency by disclosing project planning and impact assessment information to affected communities and other interested parties, and
- focus more attention on monitoring outcomes, post approval.

Particular to developing a human rights impact assessment, participants also identified a number of challenges with regard to: a) legal and human rights issues (for example, the difficulty of predicting human rights violations), b) business application (the challenge of developing a simple (yet comprehensive) enough tool for companies to readily adopt); c) procedural issues (how to guarantee early and meaningful participation, appropriate timing and scope, adequate identification and engagement of stakeholders); and, d) strategic implementation approaches (whether to integrate human rights into existing environmental and social assessment models or to promote separate human rights assessments).

On this last question of integrate or separate human rights into existing models, participants largely agreed that it was neither one nor the other. Human rights represented a strong foundation on which to base an impact assessment because of their basis in international legal norms. EIAs and SIAs derived their strength from well-developed and clearly articulated standards and methodologies. One might think therefore of building on social impact assessments by firmly rooting them in a human rights framework. Human rights would then give SIAs a moral and legal authority to tackle many of the outstanding issues that have historically challenged EIA and SIA models.

In terms of what this would mean in practice, participants made recommendations in the final session with respect to three key issues: meaningful participation and stakeholder involvement, the development of 'no go' criteria, and the need for better monitoring and compliance.

Meaningful Participation: The group that discussed the issue of meaningful participation challenged the use of the term 'stakeholder', arguing that affected communities and interested parties needed to be seen as rights holders and risk bearers. They argued that to ensure the rights of affected communities, it was necessary to do the following: develop community capacity throughout the assessment process; actively involve the affected community in developing baseline data, identifying other rights holders, defining their information and development needs, and establishing 'no go' zones; have the free prior and informed consent of indigenous communities; and establish an independent arbitrator to receive potential complaints about the participation process.

No-Go Areas: The group that discussed the issue of 'No Go' areas argued that it would be much easier to establish 'No Go' criteria for specific areas or issues (for example, marshland areas or the use of forced labour) as opposed to countries (barring any investment in a country). While there might be some obvious choices for countries, any 'objective' criteria developed to screen countries would lead to politically charged and dissenting opinions. In terms of areas, while much more research is required to develop criteria for identifying human rights 'No Go' zones (as has been done with environmental 'No Go's), the group did make some initial suggestions. These included projects conducted without free, prior and informed consent, where the project and/or its revenues will fuel or intensify existing conflict, where the project goes into areas occupied by un-contacted indigenous peoples, and where extractive and other revenue-generating activities do not include a transparent revenue investment plan.

Monitoring, Evaluation and Compliance: The group that discussed monitoring, evaluation and compliance identified the need to have an independent body monitoring projects that would have the capacity to discipline companies not complying with their Human Rights Protection Plan (HRPP). For high-risk projects, they suggested the establishment of a multi-stakeholder advisory panel. Home country legal mechanisms should be set up to regulate TNC activities overseas, and there should also be a mechanism for addressing local grievances. Full public disclosure of the HRIA and HRPP would be key.

For any of these recommendations to be taken up, one group also emphasized the need to build capacity within these institutions around these issues, to press for change nationally and multilaterally, to build a critical mass of popular support around the issue, and to promote human rights as a necessary element of sustainable development.

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Although the meeting went a good way towards meeting its goals - promoting a free exchange of ideas, further exploring the links between human rights, impact assessment, and trade and project finance, and moving beyond the theoretical to the practical – future discussions would clearly benefit from a greater participation by, and engagement with, other IFIs and private sector actors – both companies and financial institutions.

Annex I – Final Agenda

"Risk, Responsibility, and Human Rights: Assessing the Human Rights Impacts of Trade and Project Finance"

May 3rd and 4th, 2004
Volunteer Place, Volunteer Canada, 330 Gilmour Street, Ottawa

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Monday, May 3rd

8:30 – 9:00 Registration

9:00 - 9:15 **Introductions, review of objectives of seminar** – Fraser Reilly-King, NGO Working Group on EDC

9:15 – 10:45 **Human Rights obligations in the 21st century**

Chair: Carole Samdup, Rights & Democracy

- Henri-Paul Normandin, Director, Human Rights, Humanitarian Affairs and International Women's Equality Division, Department of Foreign Affairs, on "Canada, human rights and trade"
- David Petrasek, Policy Director, Henry Dunant Centre for Humanitarian Dialogue, Switzerland, on "Human rights and business"
- Joan Kuyek, National Coordinator, MiningWatch Canada, on "Human rights, human impacts and IFIs"

Questions and discussion

10:45 - 11:00 **Coffee Break**

11:00 - 12:00 **Human rights and trade financing – a 'case study'**

This presentation will provide a brief description of an IFI-funded project, highlighting in more detail the human rights components and impacts of the project, and articulating how human rights fit into the trade financing picture.

Chair: Graham Saul, Friends of the Earth Canada

- The Chad Cameroon Pipeline, Peter Rosenblum, Clinical Professor in Human Rights, Columbia Law School

Questions and discussion

12:00 – 1:00 **Lunch**

1:00 – 3:30 **Taking human rights into account**

This panel will look at the different ways in which IFIs, business, and civil society are working to take human rights into account through various assessment models and tools.

Chair: Craig Forcese, Professor, Department of Law, University of Ottawa

- Patrick Doyle, Chief, Political Risk Insurance, Export Development Canada on 'political risk assessment'
- Joji Carino, Tebtebba Foundation, on 'putting the World Commission on Dams recommendations into practice'
- Christina Schultz, Business and Human Rights project, Danish Institute for Human Rights, on the 'Human Rights Compliance Assessment'.
- Nick Killick, International Alert, on 'Conflict Risk and Impact Assessments'.

Discussion

3:30 – 3:45 **Coffee break**

3:45 – 4:30 **The historical challenges of impact assessments**

Chair: Fraser Reilly-King, Coordinator, NGO Working Group on EDC

- David Hunter, Advisor to the Centre for International Environmental Law

Discussion

4:30 **Wrap up**

6:00 **Dinner**

Tuesday, May 4th

Today's meeting will be in small group discussions, and use the background paper circulated to participants as a basis for discussion. In discussing the different aspects of an effective impact assessment methodology, groups will think through the various components of a human rights impact assessment, consider the challenges of developing such a mechanism, the measures needed to address these challenges, and the role of IFIs in making this framework workable.

9:00 – 9:20 Overview
Objectives of the day, overview of agenda

9:20 – 10:10 **Reflections on day one**

Chair: Fraser Reilly-King,

- Audrey Macklin, Associate Professor, Faculty of Law, University of Toronto
- Danwood Chirwa, Professor, Faculty of Law, University of Cape Town

10:10 - 10:40 **Human Rights Impact Assessment**
Small group discussion – predetermined groups
What are the challenges (reason for and against) in developing a stand-alone Human Rights Impact Assessment? What issues need to be addressed?

10:40 - 11:00 **Coffee break**
Opportunity to allow rapporteurs time to coordinate feedback.

11:00 - 11:20 **Plenary feedback**

11:20 - 11:50 **HRIA - Integrated or separate?**
Small group discussion – predetermined groups
Where does a HRIA fit strategically and operationally? Should it be integrated into existing mechanisms or kept separate?

11:00 – 12:30 **Plenary feedback**

12:30 – 1:30 **Lunch**

1:30 – 3:00 **What are the key guiding principles to some of the major themes of a HRIA?**
Small group discussion

3:00 – 3:15 **Coffee break**
Opportunity to allow rapporteurs time to prepare feedback.

3:15 – 4:00 **Plenary feedback**

4:00 **Closing remarks**

Annex II - Final list of presenters, moderators and participants

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A publication of

THE NGO WORKING GROUP ON EDC
A WORKING GROUP OF THE HALIFAX INITIATIVE COALITION

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