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Human Rights Impact Assessments for Foreign Investment Projects

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Introduction

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When we launched a three-year project in 2004 to develop and test a human rights impact assessment methodology for investment, we knew that the task ahead would not be simple. We had been examining the links between human rights and economic globalization for many years and concerns related to foreign investment were impossible to avoid. We were receiving an ever-increasing number of appeals from communities around the world who often held dramatically different opinions about the benefits of foreign investment than did their governments or the corporations involved.

While we acknowledge that investment itself is neither inherently good nor bad for human rights, these stories illustrated that if foreign direct investment projects are to contribute towards sustainable and equitable development, their human rights impacts will have to be both acknowledged and addressed. This requires a process through which the impacts of specific investment projects can be understood in human rights terms.

At its first meeting in November 2004, the project's international advisory committee grappled with the challenges presented by such an ambitious idea. They understood that governments, businesses and the affected communities each have distinct roles and responsibilities with regard to the protection of human rights, albeit with very different levels of influence. They agreed also that basic human rights principles emphasize attention to the most vulnerable and that a process aimed at community empowerment would therefore be the most appropriate.

As a result of these deliberations, Rights & Democracy and the project's international advisory committee, decided to develop a draft methodology and research guide aimed at empowering communities to conduct human rights impact assessments of foreign investment projects. The model they developed was subsequently tested in five case studies, the results of which are presented here in two parts: our reflection on the experience (part one); the case study reports (part two). The case study reports are the result of a year-long process that involved members of the affected communities, local researchers and our international advisory committee. It is unfortunate that the richness of that

experience cannot be fully represented in these few pages. However, the information provided is faithful to the experience and to the data generated by using the draft methodology, although some editing of the final reports has been done by Rights & Democracy for the purposes of consistency.

You will find additional background information about this initiative on the Rights & Democracy website at www.dd-rd.ca, including the original versions of the draft methodology and the research guide. A revised methodology and research guide, based on lessons learned from this process, will be provided in a forthcoming publication.

The Challenge: Addressing the investment and human rights nexus

In recent years, corporate involvement in human rights violations has become a high-profile issue. In some cases, corporations have been held directly responsible for specific violations of human rights, such as abusive labour practices or forced evictions. In other cases, corporations have been viewed as complicit in human rights violations perpetrated by the state, for example by using government security forces to suppress opposition. What is common in most cases is that the people whose lives may be fundamentally transformed by the corporate activity are ill-equipped to negotiate with the companies, to participate in government decision-making or even to understand the international processes that facilitate project bidding and financing. To address this challenge, we determined that a community-led human rights impact assessment would be an important tool. What was needed was an assessment model that would allow those most affected by the investment to identify its specific human rights impacts and to seek appropriate remedies.

Duty-bearers in the boardroom?

One of the primary challenges of applying a human rights framework to investment is that the very nature of corporate obligations remains undefined. It is certainly true that states bear the primary responsibility for protecting and promoting human rights. Nevertheless, the integration of economies and the free flow of capital project overview across borders has made it much more difficult for them to do so. The pressing

need for foreign exchange and technology transfer often leads to the reluctance of states to enact or enforce regulations they believe might deter foreign investment. Even in a company's home state, the government commonly acts in the interests of its private sector and gives insufficient attention to the human rights impacts or potential impacts of corporate activities overseas.

Human rights advocates acknowledge that the state, the market and civil society are complex, interacting entities. In today's world, focusing on the state as the only human rights duty-bearer does not reflect the increased influence of the market and its primary actors, corporations. However, the human rights responsibilities of companies are not the same as the obligations of states. Our view is that businesses must comply with national and international law, including human rights law, and that this is best understood as a requirement to respect human rights, not to benefit from violations of human rights, and not to be complicit in human rights abuses.¹ In fact, the Universal Declaration of Human Rights states in its opening preamble that "every organ of society" must respect human rights and secure their observance.

In recent years, there have been a number of initiatives designed to more clearly articulate the responsibilities of the private sector in relation to human rights. For example, the UN Global Compact, the Kimberly Process, the Voluntary Principles on Security and Human Rights and the OECD Guidelines for Multinational Enterprises have all attempted to regulate and influence corporate activity to some degree. In 2003, the UN Sub-commission on the Protection and Promotion of Human Rights adopted the UN Norms on the Responsibilities for Business and Other Transnational Corporations with Regard to Human Rights (the Norms), although there was no corresponding consensus among states to adopt them at the Commission on Human Rights itself (now the Human Rights Council). Instead, in 2005 UN Secretary-General Kofi Annan appointed John Ruggie as his Special Representative on Business and Human Rights.³ Part of his mandate is described as the development of "materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises".

There are other initiatives led by civil society organizations.

The Danish Institute for Human Rights has developed a human rights compliance assessment model for use by business. The International Business Leaders Forum, in partnership with the International Finance Corporation, has developed its own methodology. These projects are designed to assist businesses to better understand human rights and to better respond to the range of human rights challenges encountered when operating overseas.

In Canada, the federal government has overseen a process that brought representatives of civil society, government and the private sector together to address corporate responsibility in the extractive sector. The process evolved from a June 2005 report issued by the House of Commons Standing Committee on Foreign Affairs and International Trade. It concluded that public support for corporations, including project financing and embassy services, should be conditional on the respect of human rights. In its response to the report, the Government of Canada announced that it would convene a series of roundtables across the country focused specifically on the extractive sector. Each roundtable included consultations with the public as well as closed-door sessions with experts on a number of related themes. A multi-stakeholder advisory group with representatives from industry, civil society and academia worked with a government steering committee to oversee implementation of the roundtable process. Following completion of the roundtables, the advisory group prepared a report with a series of recommendations for the Government of Canada. The report was issued in March, 2007.

Shifting the Power Dynamic

All these initiatives have succeeded in reminding states of their human rights responsibilities in relation to foreign investment. They have also made valuable contributions to the debate about the precise nature of corporate obligations with respect to human rights. Yet there has been scant attention paid to the active involvement of the rights holders themselves in these processes. The individuals and communities who are directly affected by specific investment projects have been largely excluded from international debates about corporate accountability.

There are many reasons for this. Communities often have little leverage over the states that govern them

and even less over foreign investors and their home governments. They are also disadvantaged by a lack of information and insufficient access to financial resources. There may be additional security concerns and threats to their personal safety. Yet this entire debate purports to be about the impact of foreign investment as experienced by these very communities. It has been argued that environmental and social impact assessments provide an adequate response to this challenge. In fact, such assessments are now widely used for large-scale investment projects, including those supported by the World Bank. Environmental and social impact assessments, however, do not adequately confront the challenge of unequal power among stakeholders. The value of reconceiving impact assessments within a human rights framework lies in clarifying the roles of duty-bearer (the state) and rights-holder (those living under the state's jurisdiction).

This idea is illustrated by looking at the standards upon which assessments are based. In a social impact assessment, for example, the baseline data is the current situation and all else is measured from that starting point. Repeated assessments throughout the project cycle identify impacts. A human rights impact assessment, on the other hand, emphasizes standards established by international law and reflected in domestic legislation and policies. While it is also important to measure progressive improvement from a human rights perspective, the main objective of a human rights impact assessment is to measure the gap between the legal norm and the experience.

To assist us in understanding exactly how this approach is applied, it is useful to look at some of the primary principles that govern human rights.

- **Participation:** A human rights framework requires the meaningful participation of the rights holders, be they individuals or communities. This reflects the right to take part in public affairs directly or through chosen representatives.⁶ A human rights impact assessment therefore requires the active involvement of people living in affected communities. This in turn requires enjoyment of the human rights to information, freedom of expression and opinion, security of the person, and the right to privacy.
- **Accountability:** A human rights framework emphasizes the accountability of duty-bearers, including government and corporate actors. This reflects the right of individuals and communities to an effective remedy when the state has failed to respect and ensure their rights.⁷ A human rights impact assessment therefore requires attention to judicial processes or legislative and administrative procedures

that will offer recourse to the victims of human rights violations.

- **Transparency:** A human rights framework assumes transparency in both process and content. This reflects the human right to seek and receive information.⁸ A human rights impact assessment therefore requires full disclosure of information unless restrictions are provided by law, including for the protection of national security.

- **Non-discrimination:** A human rights framework gives special attention to policies and practices that result in discriminatory outcomes. This reflects the right to equality before the law and to equal protection before the law.⁹ A human rights impact assessment therefore demands identification of the project overview 17

most vulnerable groups in a given situation and the incorporation of specific steps aimed at their protection and empowerment. Such steps might include designing an impact assessment tool specifically for use by affected communities.

- **Indivisibility:** A human rights framework adopts the view that all human rights – social, economic, cultural, civil and political – are interrelated and interdependent. This principle is derived from the preambles of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. A human rights impact assessment therefore looks not only at living standard indicators, for example, but gives equal attention to the ability of affected groups to safely participate in the project process or to express dissent related to the project. The relevance of human rights principles is sometimes unclear to the communities, the states and the companies involved in the project assessment. A fisher who can no longer eat the fish he catches because the water has been polluted might immediately understand the environmental impact but may not know that access to safe and nutritious food is actually a human right to which he is entitled. Similarly, a mining company might think that building a health clinic for the community is an act it can cite as an example of goodwill, but may not realize that the attainment of the highest standard of health is a human right required by and protected in international law. In order to encourage better understanding of human rights it is necessary to integrate education and capacity building as central components of the human rights impact assessment process.

The Response: Fitting the approach to the challenge

It is generally understood that a human rights impact assessment could be applied to policies, processes or projects. We have chosen to focus on the impact of

investment at the level of the project. This choice reflects our predisposition to work with affected communities where human rights violations are experienced first-hand. Clearly however, an assessment conducted at the project level focuses largely on the symptom rather than the cause, and some examination of the other levels (such as trade and investment policies or national development plans aimed at fulfillment of social objectives) would be valuable.

In making the choice to focus on a community-led process at the project level, we understood that our emphasis would be on established projects (ex-post) rather than projects still in the planning stage (ex-ante). Although the International Association for Impact Assessment defines assessment as a “process of identifying the future consequences of a current or proposed action”,¹⁰ our decision from the outset was to emphasize actual impacts of current investment projects as experienced by affected communities. Furthermore, conducting an ex-ante study at the community level is particularly difficult because communities rarely have adequate information about projects that are in the planning or bidding phases.

A unique dimension of ex-post impact assessments is that in addition to identifying both negative and positive impacts, they may also reveal specific violations that have occurred as a direct result of the investment. However, adequate documentation of violations would require additional steps and expertise within the research process as well as a commitment on the part of the accompanying organization to support community efforts for remedial action, including perhaps court actions, civil suits or even UN complaint procedures.

One might argue that it is in the corporate interest to ensure the free, prior and informed consent of communities in the planning stages of any investment project in order to avoid responsibility for violations down the road. At the moment, however, this is not the case.

Having made these strategic decisions for the project, Rights & Democracy and its international advisory committee launched three concurrent processes with the idea that each pillar would inform the other. The three processes were:

- Design a methodology specifically for community-led human rights impact assessments;
- Create a research guide for use during community training and investigation (also referred to as the indicators);
- Select five case studies to test and revise the methodology and the guide.

Human Rights Impact Assessments for Foreign Investment Project¹⁸ s
The methodology

Much has been written about the value of participatory

evaluation processes.¹¹ Essentially, a participatory process emphasizes the active involvement of the affected person or group in the evaluation or assessment being conducted. Active involvement means not only provision of information to researchers, but actual ownership of the research process itself. In this sense, the accompanying organization serves only to facilitate communication between various stakeholders and to provide technical assistance to researchers, depending on the situation and the need. Such an approach empowers affected communities to actively engage the assessment process, to take hold of situations affecting their well-being, and to actively assert their human rights when they determine that violations have taken place. They are no longer forced into a position of waiting for someone else to bestow their human rights upon them.

Participatory processes involve a number of departures from more conventional methods of project assessment. The level of objectivity, for example, might be quite different and there will be less emphasis on quantitative indicators. The process will also require fitting the method to the situation and not the other way around. For the affected community, however, the outcomes of a process like this are often more relevant to their actual situation. Other stakeholders benefit from the richness of data collected from an investigative process that draws upon an element of trust between the researcher and the person or group being interviewed. In putting forward a methodology that would assist the case study researchers through a participatory impact assessment process, we attempted to address all the various challenges summarized in the previous pages, while incorporating the basic human rights principles as described. We also sought to ensure that procedures were accessible and easily implemented by communities with a minimum of financial and other resources. The resulting roadmap, the Ten-Step Methodology, can be summarized in four general categories: preparation of the case study; application of