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Foreword

Human rights, whether economic, social, cultural, civil or political rights, are typically considered a state affair. A part of its international obligation is respecting, protecting and carrying out those rights. However, at international level the conviction is, according to a constitutional doctrine of a lot of countries, that the basic rights and human rights should be respected by all actors of society (called "horizontal effect" by constitutionalists). In fact, this idea has a precursor in the same Universal Statement of Human Rights as it is directed not only to states but all willingly people.

Over the last years, marked by globalization effects, responsibilities of juridical people, particularly of businesses, have been more clearly established. The latter, in pursuit of the human rights respect in the exercise of business activities, or if not, to allow solving possible human rights abuses. These responsibilities extend to, according to the Special Representative of United Nations General Secretary for Business and Human Rights, Professor John Ruggie, all human rights recognized at international level.

While these responsibilities cannot be internationally vindicated or claimed against in international courts, the states should be pushed to embrace a civil, trade, constitutional or criminal legislation, so responsibilities of businesses for human rights can be realized, and thus clear juridical obligations be generated, with the resulting juridical security for the businesses themselves and guarantees for the human rights regulars, particularly vulnerable groups and adjoining communities.

The frame made by John Ruggie clearly shows interaction between corporate responsibilities for "respecting" human rights and state obligations to "guarantee" them. The latter, by regulating those areas which can negatively affect the enjoyment of human rights, and by supervising complete fulfillment of regulation. This frame has reflected, for example, on the widely consulted standard over social responsibility ISO 26000 and on the review of the OECD Directing Lines for Multinational Enterprises in May, 2011. So any support has been found in two stakeholder forums (multi-stakeholder forum), after being developed through an intense consulting agenda with businessmen and the civil society as well as expert rounds, which is well documented in www.business-humanrights.org. The above mentioned representative chose this site to present the vast material received and generated over his two mandates.

In this occasion, we want to capitalize the European Union summons in the first international conference in Chile on "business and human rights", to invite to reflect on the social dialogue about human rights in the Chilean energy area. This paper compilation is not conference minutes, but input additional to discussions that will be taking place in the course of it. A representative of the civil society, of the academia and the International Labor Organization (ILO), contribute to this effort, reflecting on different aspects of debate about economy

and human rights, and on social dialogue which is a way to resolve conflicts rising from energy alternatives chosen in Chile. The latter in addition to consequent private investments in small, medium and large projects.
As far as it is concerned, the social dialogue will be an interesting alternative as long as the engaged actors decide to respect and actively search for an equality of conditions to promote it. So, a method to resolve disputes could set up out of courts, which many times have been the only way to express complaints or allegations about violations or threats against human rights. Also, it could be a mechanism beyond informative activities organized by businesses themselves that any times are not worth of the name of dialogue, as engaged parts are not in an horizontal level or free of hurdles making possible the expected exchange of ideas; whether for want of information, lack of proper knowledge or no interest in discussion.
This practice is most of the time away of speech over human rights that we can read in sections over business sustainability. Such a situation above mentioned hinders efforts made by people in good faith and who seriously seek in businesses —civil society, international organizations and the government— to promote prevention and mitigation of social and environmental impacts, including impacts on exercise of human rights, as it is a dichotomy between the ideal thing that business promotes and the challenges and real situations on the ground.
The European Union dialogue with civil society points to a discussion among various social actors about issue of human rights in the business duty and in energy investment projects. The aim of this is, in addition to reflecting through discussions with public the different standings in Chilean society about it, presenting several tools which have proven useful in Chile and in Europe upon assessing, preventing, alleviating and solving impact of economic activity on adjoining community human rights. Therefore in the conference, special representative John Ruggie's contributions, the assessments of impact on human rights, the OECD directions, techniques of responsible investment and social dialogue as an ILO method potentially useful when businesses and communities want to negotiate on an impact-benefit deal will be discussed. So, we present a version of social dialogue concept including an approach to human rights in order to be discussed, proved and tested by businesses and interested communities.
In this context, the array of essays we make available provides additional reflections to deeply analyze some of the points discussed in the conference. Particularly, the three contributions are working papers that propose input to a discussion deepening intricate aspects of debate. On one hand, José Aylwin discusses what the experience of vulnerable groups, particularly Chilean native peoples, has been about big energy projects and how the state has reacted in front of these experiences. Then, Alicia Díaz inquire into what can we learn from bipartite and tripartite social dialogue promoted by the ILO, for the dialogue and negotiation between communities and businesses in areas of big impact. Later, Alberto Coddou discusses any of challenges of current foreign investment system, in terms of the human rights and the contribution that businesses can make for them to be respected. Finally, Andrés Romero and Andrea Olea review and judge how the new regulation over civic activism, as a key legal element in terms of human rights, is reflecting on energy regulating institutions in Chile.

I am very thankful to the European Union support in making this conference possible the conference and this array of input, as well as Dinka Benítez, Valentina Maturana and Rébecca Steward backing in edition. The author of it is the only responsible for the content of each one of the essays. We hope it will be useful and bring about the dialogue we aspire to.

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Energy businesses, vulnerable groups and human rights in Chile

By José Aylwin [1]

Foreword

In this article can be found any information about the growth of business activity connected to energy in Chile, about more critical issues facing that activity today, and about environmental and social implications it produces and its effects on human rights of vulnerable sectors. In particular, hydroelectric, thermoelectric and geothermal projects in the making and their impacts on native peoples, farming communities and isolated coast communities are discussed. Any domestic legislative frameworks are reviewed, concluding that these do no permit to guarantee the community rights.
Also the evolution of international tools in the United Nations system and the Inter American system for human rights is reviewed, as well as responsibility in them established for states in front of human rights violation as a result of investment projects driven by businesses. The way these tools have been interpreted by treaty bodies, the directions emerging from the United Nations expert agencies regarding businesses and human rights, and native people rights are analyzed. Also directions related to that issue emerging from institutions such as the OECD and the World Bank, which set up guidance to a bigger supervision of businesses activities resulting in human rights violation are reviewed. Finally methodology to assess foreign investment impact on human rights made from the civil society by Rights and Democracy in Canada is given.
The conclusion is the Chilean state has failed to fulfill its international obligations in human rights with respect to power plants, not taking needed steps to protect communities harmed by abuses they commit. Also it is concluded that businesses of such a sector have not showed the due diligence to prevent and be responsible for harmful effects their activity has caused in communities. It is maintained that communities affected by this activity have not used the tools available at an international level to prevent human rights violation or to get a redress for damages they cause. At the end any challenges are identified both for the state and power plants, but also for communities affected by these businesses, in order to set up a more effective protection of their human rights.

[1] Co Director, Observatorio Ciudadano. Papers will be presented in Human Rights Seminar. A meeting between Europe and Chile, organized by the European Union Delegation and Universidad Diego Portales, in Santiago, Chile, October 12-13, 2011.

Energy activity in Chile and its growing impacts

Demand for energy in Chile has steadily grown in the last two decades, leading to a fast development of business activity related to energy. Privatization of energy activity in Chile in 80's, and its growing deregulation, have given rise through the last three decades to many problems in this area, standing out among them the significant concentration of generation in a few enterprises, including transnational enterprises, which control energy development and energy policy in the country, distorting market. Adding to this, is the scarce diversification of generating sources, which today feed largely on hydroelectricity (35%) and coal (30%), what along with producing security problems in electric supply and dependence on imports, has had any influence on the local and global impact pollution. Adding to this is the fact that investment in energy efficiency projects is scarce; if these projects had been pushed, they would have made possible to prevent construction of generating plants and its negative impacts.

Also, energy activity has caused heavy social impacts, particularly in more vulnerable sectors, among them native peoples, farming and isolated communities, and coast communities. So, investments of businesses, usually private, with the state authorization, in hydroelectric, steam-electric, geothermal power plants, among others, and operation of them in these communities' land, have resulted any times in people relocalization, and have seriously disturbed their traditional ecosystems, seriously shaking their lives and cultures, resulting in violation —or violation threat— of their human rights, which are recognized in international treaties ratified by Chile. Impacts more widely known have been those caused by the mentioned activity on native peoples, both in Mapuche communities in the south of country and in Andean communities in the north.

The Ralco case and the Pehuenche Mapuche from Alto Biobío

The majority of hydroelectric power plants in the country have been set up, or considering setting up, in land legally and/or ancestrally owned by Mapuche communities. One of the most symbolic of those projects was that boosted by Endesa, a state-owned company privatized in 80's, to construct six power plants in Biobío River's higher watershed, on Mapuche-Pehuenche land. The first plant, Pangue, opened in 1996, was set up on Pehuenche ancestral land, was conceived with no legislative frame on environmental and native people protection, and resulted in forced relocalization of around 100 people. The second plant, Ralco, was opened in 2004, flooding around 8,750 acres, much of it legally owned by Pehuenches. Such a plant forced a relocalization of 675 people, 500 of them belonged to Pehuenche communities.

Ralco was the first "megaproject" that showed evident failures in the current legal frame to guarantee rights of local and native communities in front of this kind of initiatives. In fact, while its construction was approved of by environmental and native bodies established to supervise these initiatives, consulting processes with affected communities were far away to make sure that their views and rights were safeguarded. Its environmental impact study

(EIS) was approved of not only against express will of directly affected communities, but with 20 government services opposing to it.
Ralco, as well as other similar projects following it, permitted to confirm that the Basis for the Environment Law (No. 19,300, 1994) did not guarantee an effective civic and native activism in assessing processes of environmental impact in the law established. Neither made it sure that social and cultural impacts were alleviated, or damages caused by this kind of initiatives were indemnified. The same situation occurred with legislation about native people (Development, Protection and Growth of Native People Law, No. 19.253, 1993), which had no binding consultation mechanisms for the affected communities, and it could not prevent expropriation in land considered as "native" on the ground of Electric Services General Law (DFL 1, 1982). Such a law did not protect either native community rights over nature resources, in this case water, which was granted to Endesa by the state to develop this project according to Water Code.
The opposition from Pehuenches and other Mapuche organizations to power plants was criminalized by the state, both through cracking down by police in the area and by court actions, taking tough steps against social demonstration caused by Ralco, leading to the persecution of Mapuche leaders.
Flooding of ancestral Pehuenche land, including a cemetery and many cultural sites, people relocalization in other land where it was impossible to continue with their farming and animal breeding activities, caused tough socio-cultural impacts in Pehuenche world —migration, adoption of another culture, impoverishment, internal division— among others. Mitigating plans and redress actions considered by company and its Fundación Pehuén did not alleviate socio-environmental impacts by power plants. In fact, the new Alto Biobío community where these power plants are placed, with 49% of its people in poor conditions, remains the poorest community in the country, showing that profits generated by power plants are almost not, or not at all, shared with communities. Pangue and Ralco power plants not only impacted Pehuenche communities, but also they had to do with flooding, many times, suffered by other people located downstream, in Biobío region's poor communities. This happens when reservoir water is liberated, resulting in flooding of urban neighborhoods and in a huge damage on property. An indemnity civil action against the state and the company for their responsibility in this fact was filed by families affected by flooding in 2008. So far, courts still do not rule about it.

Other hydroelectric projects and their impact on native people and rural communities

Deficit of energy generation to fulfill increasing demand particularly from mining and industry sector in north and south of the country, has increased pressure in the last years on rivers in the center and the south of the country. Just in the Araucanía and Los Ríos regions today there are about 30 hydroelectric generating projects, both in passing and reservoir, much of them placed in Mapuche community land or adjacent territory. So far, half of them have been approved of by the environmental agency.
Many of these projects have been submitted to the assessment of environmental impact while Chile ratified in 2008 the ILO 169 Agreement on native and tribal people, as well as the reform approved of to environmental

legislation (Law No. 20.417, 2010). However, regulations that the Agreement states regarding consultation of administrative measures susceptible to directly affecting native people (art. 6.1), and the reform to the environmental law regarding civic activism, those projects have been approved of by sector and environmental officials with no proper consultation processes, many times against community opinion.

Many of these projects have been approved of violating the ownership and possession rights over land that these people traditionally live in (art. 14), and the rights over its nature resources, including exploitation and conservation rights, and rights to share in profits and a compensation for damages (art. 15).

Many of the projects of hydroelectric generation affect also no native communities, particularly rural communities, which also are vulnerable. A symbolic case is that of the HidroAysén project, which is considering to construct five power plants, flooding 15,000 acres in Baker and Pascua rivers, approved of early this year by environmental agency (Comisión de Evaluación Ambiental) in Aysén region. It is a project driven by Endesa and Colbún, two of three companies concentrating 90% of non-consuming water rights for hydroelectricity generation in Chile. The environmental impacts this project will cause by constructing dams and reservoirs and high tension towers in a pristine landscape —in a region defined as "Life Reserve" in its Strategy of Regional Development 2000-2006, that sets up tourism, forestry and agricultural development, and fishing and aquiculture as its productive vocation— ignited a big rejection from regional people. Along with environmental impacts are those social impacts, including hiring more than 5,000 workers over its 10 years of construction, whose long staying in rural areas will heavily disturb local way of life.

HidroAysén obtained the regional environmental authorization ignoring communities' opinion raised in the process of civic activism considered in the environmental law. Moreover, this project made evident the persistence in an incompatible negotiation, since involved companies began to provide funds, parallel to EIA, for residents living where project will be placed, funds that clearly distortion the civic activism in this process of public law. Also, in this case, the environmental agency permitted a project division for the construction of power plant in Baker and Pascua rivers with the project of construction of transmission lines, which extend more than 1,200 miles, affect seven regions, and about 4,000 to 5,000 owners, whose accumulative environmental impact, for that very reason, is huge. Despite of their apparent linking, those projects, according to legislation in force, continue to be separately assessed by the environmental agency.

HidroAysén is an example of how decisions on energy developing initiatives continue to be adopted by government. Region officials taking part in the Commission for Environmental Assessing in Aysén are civil servants appointed by President, and not by region people. If this project realizes, HidroAysén will not pay taxes in region, but essentially in Santiago. These power plants will feed on region waters, and impact the lives of local communities, but these communities will not get, excepting very small compensations for proceeds they generate, any profit from them.

Unlike native communities above mentioned, communities affected by this project have no consulting processes in front of this kind of initiatives as those established by the Agreement 169, and it is applied on them only the civic

activism from assessment of environmental impact, whose insufficiency to guarantee any respect for the local community vision was already mentioned. On the other hand, their land and resources do not have either a special protection, so they are still most exposed than those of native ownership's. Their organization levels use to be poorest than those of native people's, which determine that they find themselves far more helpless and vulnerable than native people.
Many rural communities affected by hydroelectric projects do not have electricity, or they have to pay rates 30% to 70% higher than those in the rest of the country. The law in force does not fix mechanisms for the communities, or the communities where projects are placed, to benefit from investments.

Geothermal prospecting and its impact on native peoples and rural communities

In the north case, government bade in 2009, without previous consulting, 20 concessions of geothermal prospecting in the country, 15 of which engage territories and hydric resources of Andean people in north of Chile. Adding to this, it is the Géiseres del Tatio geothermal project in Lickanantai territory, whose prospecting began in 2009. Moreover, five geothermal concessions are in stage of negotiation and they also engage Aymara territory. Seriousness of geothermal project impact was evident in Géiseres del Tatio, a touring site managed by Lickanantai communities from Toconce and Caspana. In developing prospecting works by a company, Geotérmica del Norte S.A., there was a geothermal fluid spilling caused by drilling trials. From that pit emerged a more than 300 feet high geothermal fluid column for a month. Because of spilling, reservoir pressure and Géiseres del Tatio activity went down, and it caused extinction of any geysers. This also had an impact on Andean communities placed downstream, and whose activities, farming and shepherding, depend on waters from that reservoir. Geothermal prospecting was suspended by environmental officials. But the remedy of protection submitted by affected communities was rejected by Appeal Court in Antofagasta, in January, 2010.
In the south case, geothermal prospecting threats also 17 Mapuche communities in Melipeuco and Curarrewe, Araucanía, since they are included in a 2009 bidding as a geothermal prospecting area in Sollipulli zone, much of it placed on an protected area (Reserva Nacional Villarrica). The affected communities took administrative and judicial actions in defense of their territory rights, so far fruitlessly.

Thermoelectricity and its impacts on coastal communities

Finally, the other energy activity having a huge socio-environmental impact in the country is thermoelectricity. While is an old activity, it has seen a strong boost in recent years. So between 2005 and 2009 came into Environmental Impact Assessment 22 projects to construct 44 coal-and- petcoke-fed thermoelecric plants, of which 11 with 19 plants had already been authorized and other 11 with 25 plants more were in a stage of negotiations. By 2009, thermoelectric plants generated more than 50% of electricity in Chile (54.9%).

By that time, thermoelectric plants fed mainly on coal (44.1%), oil and diesel (29%) and coke (7%), determining that their environmental impacts, particularly coal plants, had greatly increased. Many of the operating thermoelectric plants (44%) do not count on an environmental assessment because they were constructed before Ley 19.300 was in force. Until recently (January 2011) there was not a regulation about air emissions in thermoelectric plants, and so far there is not a regulation about water emissions for these plants.
One of the most serious cases is that of Quinteros bay, Valparaíso region, where, since 1964, three coal-operated thermoelectric plants have been constructed (Ventanas I in 1964, Ventanas II beginning in1977 and Nueva Ventanas beginning in 2010) today managed by AES Gener (then Chilectra), and four new coal plants are approved of to be constructed by several companies (Campiche from the same company, and three plants more from Energía Minera (Codelco)). Emissions from these plants containing high levels of particulate material, sulfur dioxide, nitrogen oxide, among other pollutants, have caused serious damages to human health, including that of the children who live there, and to ocean and earth ecosystems. Impacts generated on ocean ecosystems have affected the traditional fishing activity developed in bay, according to several studies in the last decade. Despite of this situation, environmental officials have continue to approve of construction in this bay of thermoelectric projects above mentioned, as well as other productive projects (refineries), in an environmentally saturated area. Damages suffered by people, and by non-industrial fishing, have not been punished by courts and redressed by companies or the state.

International standards and mechanisms of human rights protection

Domestic standards, just as domestic mechanisms, in regard to environmental and social issues, have been usually not able to protect rights of sectors affected by energy projects here mentioned. Objection through official channels of decisions on environmental assessment by which administration confirms these projects has usually not been well received. It can say the same about judicial objection based on the constitutional right to a pollution-free environment (Art. 19.8), which saving exceptions, has not been successful as a strategy to prevent rights be damaged. The domestic legislation has not permitted either a redress before environmental and social damages on local communities here mentioned.
A new scene appeared in the native people case with the ILO's 169 Agreement approval. Though it is not attributed to cases straight linked to projects of power generation, in a recent Supreme Court ruling it has begun to receive claims from native people in front of investment projects or administrative steps taken by authorities with no consulting processes stated in this international treaty. In two recent verdicts, the Supreme Court in 2011 has ruled that native people straight affected by these administrative steps taken by state-owned agencies have to be consulted according to this treaty establishes, which it is not consistent with the civic activism procedure included in environmental law.
Existing international mechanisms to protect human rights have been underused in these cases. An exception to it, has been Ralco case, where Pehuenches, after using up domestic institutions, they appealed to different bodies to protect their rights harmed by this project. So they filed a complaint

before the World Bank claiming non-compliance by ENDESA in the case of Pangue plant of World Bank's environmental and social requirements. Despite of rejecting complaint, the World Bank asked to International Financing Corporation (IFC) to support this project, to make an independent report about the case, in which was showed that ENDESA failed to comply with the World Bank's directives about environment and native people.
Moreover, five Pehuenche women denounced the state before Inter American Commission for Human Rights (ICHR) in 2002, claiming that it violated the rights pledged in the American Convention for Human Rights (ACHR) in relation to Ralco construction. In 2004, Pehuenche women and government subscribed a friendly resolution deal, deciding a set of collective compensations for native people and for Pehuenches, as well as individual compensations for complainant women. Also, in relation to Ralco, in 2005 Víctor Ancalaf, who was convicted by Chilean courts under charges to allegedly set fire in a terror act power plant's machinery, filed a complaint before ICHR, claiming violation of right to equality before the law and to due process of law pledged in ACHR. Recently, in August, 2011, the ICHR submitted the case before the Inter American Court for Human Rights (Corte IDH), claiming that this proceeding, just as that of others Mapuches convicted by this law for charges of social protest, is against the legality principle, affected the due process of law, is discriminatory, and it would have been applied in consideration of their Mapuche ethnic origin. The ICHR asked to the Court to eliminate effects of convictions, to review conviction, and to redress victims at a moral and material plane.

Other applicable standards of human rights

The international law on human rights has significantly evolved in the last years, issuing instruments that make states responsible for human rights violation into the frame of investment projects -as those related to energy generation- including those violations that are a consequence of abuses committed by companies, and are borne by states. Also, as we see below, treaty bodies in charge of interpreting these instruments have underlined the responsibility having not only states for these abuses, but also private actors. Moreover, they have given an increasing reception to claims by native people and other vulnerable sectors in front of such abuses, urging states to protect and redress them.

The Inter American system of human rights

The human rights Inter American system, while has no a specific regulatory development about it, it has developed a relevant jurisprudence in this sense, particularly in relation to native people whose rights have been damaged by, among other things, investment projects. So, in the last decade the Corte IDH along with recognizing validity of land possession based on a native custom, even for lack of a title deed, as a reason to their ownership over it, has affirmed the right to these people to use and enjoy nature resources available in land where they traditionally live in, and which they need to survive, develop and continue their way of life. Moreover, it has argued about plans of development or investment on a large scale causing a bigger impact on native territory, that

states have the obligation not only of consulting them properly, but also obtaining their free, previous and informed acquiescence, according to their customs and traditions. The Corte IDH has also decided that native people have a right to share, in a fair way, in profits derived from restraint and privation of the right to use or enjoy their land and nature resources needed to survive, understanding that this sharing as a way of indemnity deriving from land and nature resource tapping.

More recently, the IDH Commission has given protection to native people affected by construction of hydroelectric dams on their land, whose ownership and/or possession is ancestral. So in 2009, it granted precautionary measures in favor of community members of Ngöbe people in Panama, settled along Changuinola river, over which the Panamian state granted in favor of a private company (AES Changuinola) a concession to construct hydroelectric dams. The ICHR granted these measures in order to prevent unmendable damages to the right to property and security of Ngöbe people, asking the Panamian state to suspend construction works and the rest of activities related to concession until a definitive decision be made about complaint filed by these people. Later, in 2011, it granted a similar measure in favor of native communities living in Xingú river basin, in Para, Brazil, whose lives and individual integrity were put in danger by impact of constructing an hydroelectric plant, Belo Monte, by a state-owned company (Electronorte). The ICHR asked Brazilian government to suspend this project's license process and prevent any material work until any conditions be observed, as for instance: carrying out consulting processes, "previous, free, informed, in good faith, culturally proper, and with the aim of reaching an agreement, in relation to each one of the affected native communities, beneficiaries from current precautionary measures"; and adopting measures to protect lives and individual integrity of native peoples who live voluntarily isolated in Xingú's basin.

Those measures reassert state responsibility in front of company activities, demanding, according to decisions by American Convention and other international legal institutions applicable to native peoples, the right to an agreement and acquiescence-oriented consult with native peoples, previously to this kind of project, as also the necessity that states to guarantee their lives and integrity threatened by them.

The United Nations system

The United Nations system has established guidelines to protect people and community rights, particularly more vulnerable groups, including native people, women, children, in front of company activities resulting in violation of human rights relevant to mention here. First instruments appearing after the Universal Statement of Human Rights, did not specifically address state obligations in relation to companies, but they rather imposed overall obligations to guarantee the exercise of rights and to prevent abuses not committed by the state. Subsequent instruments, such as the Convention on Elimination of all kind of Discrimination against Women (CEDAW), the Convention on Child Rights and the Convention on Rights of Disabled People, have been more explicit in making reference to business activities, and establishing the duty of a state to regulate abuses committed by non-state actors.

In this sense, it is very interesting the interpretation made by treaty bodies in relation to company responsibility in violating human rights and the state obligations about it. The Committee for Human Rights, for instance, in its General Remark No. 31, recognized this responsibility by saying that "positive obligations of Party States to watch over Pact rights only will be fully fulfilled if individuals are protected by the state, not only against violations of Pact rights by its agents, but also against actions committed by people or private organizations..." The Committee stated also that states have to move with a due diligence, and they can infringe obligations imposed by the Pact if they do not adopt proper measures to "prevent, punish, investigate or redress any damage caused by people or private organization actions".

Also important are any remarks by other treaty bodies about effects of company's investment projects, whether state-owned or private, or in specific sectors, or in resources essentials for human livelihood, which have to be guaranteed. It is important in that sense to stand out the Committee for the Elimination of Race Discrimination's General Recommendation XXIII (1997) in regard to native people rights. Committee admits in it that in a lot of world regions native people are discriminated and deprived of their rights to land and resources by commercial companies and state companies. To face this situation, it urges to states to "recognize and protect native people rights to own, cultivate, control and use their land, territory and community resources, and in such a case that they have been deprived of their land and territory, which traditionally belonged to them, or have been occupied or used without free and informed acquiescence given by those people, states have to take actions to give them back to them".

Then the United Nations' Committee for Economic, Social and Cultural Rights established in its 2002 General Remark No. 15, about the right to water, basic resource for many projects of power generation, that "the obligation of protecting requires that Party States to prevent third parties from diminishing, in any way, the enjoyment of right to water. Taking note of obligation stated in Pact's paragraph 2, article 1, which determines that a group of people can be deprived of their livelihood, the Committee said that the Party States should guarantee an enough access to water for subsistence farming, and to secure native people 's subsistence farming ".

The Committee also urged sates to pay special attention to people or group of people who have traditionally had problems to assert this right, including women, children, minority groups and native people. Finally, it made clear that states violate the right to water not only when they act straight in that sense, but when they do not take all steps needed to guarantee the enjoyment of right to water, among them not embrace or carry out a national policy on the water with a view to guarantee to all the right to water; not take steps against a no-fair delivery of water facilities and services; not set up devises for emergency assistance; not make that all enjoy of right to water at an indispensable minimum level .

While they do not have a binding character as that of decisions and remarks in treaty bodies, the guidelines are not less relevant than those established, about the same topic, in recent years by the United Nations Special Representative for Human Rights and Transnational Businesses and other Commercial Companies, John Ruggie. This special representative (SR) has tried to establish a conceptual and policy frame with the aim to guide the action of the

state and businesses in regard to consequences of businesses actions for human rights. Such a frame counts on three essential principles which are: the establishment of the state duty of protecting against human rights abuses committed by third parties, particularly businesses; the obligation and responsibility of businesses for respecting human rights; and the necessity of setting up effective resources for reparation of human rights abuses committed by third parties.

According to SR Ruggie, the protection duty of states means that the states have to take "all steps needed to protect against those abuses, particularly the duty of preventing, investigating and punishing abuses, and the duty of providing ways of reparation". This duty –applicable to activities of all kind of businesses, whether national or transnational, big or small- includes encouraging a business culture respecting human rights, promoting a public policy with a view to that aim, and regulating and judicially resolving businesses activities in regard to human rights.

Responsibility for respecting human rights requires the business due diligence. This concept describes "steps that have to be taken by a business in order to learning, preventing and reacting to negative effects over human rights". According to SR Ruggie, businesses have to consider specific problems of human rights raised in the context where they develop their business activities; discuss effects their activities have on these human rights; and see if they can contribute to rights abuse through relations linked to their activities.

The United Nations´ Special Reporter for Human Rights and Basic Liberties of Native People, James Anaya, as far as he is concerned, has tried to determine, based on conceptual frame by SR Ruggie, the business's due diligence in relation to the duty of respecting native people rights. So, Anaya has argued, regarding to those people rights to their land, territory and resources, that businesses cannot consider absence of native ownership official reconnaissance over them as an excuse to be ignorant of it, saying that the mere existence of those groups in geographic areas where they think to develop their activities, should be assumed as a presumption that they own any kind of rights over them. He says that the duty of consulting with native people before adopting measures susceptible to affect them, according to applicable international rules, requires in any cases affected people acquiescence. He makes clear that it is about a state basic obligation, and businesses, even acting in good faith, lack of proper knowledge to do any consultation. Notwithstanding, he maintains that businesses can push, under the state supervision, dialogues with specially affected communities about carrying out social impact studies, adopting compensation measures and sharing in profits derived from projects.

As to impact studies, the Special Reporter (SR) says that they have to be based on human rights criteria and focused on adopting all measures to prevent potential and negative impacts of planned activities over environment and economic, social and cultural lives of native people. As to sharing in profits, a consequence of right to limitation or deprivation of native ownership over land and resources, Reporter Anaya says that it has to be fair and equitable and it has to be understood as a way of complying with a right and not as a charitable concession searching for a social support of project or minimizing the conflict. Finally, Reporter suggests that what is needed is overcoming such a focus on a monetary payment only, which can be negative and has adverse implications

for these people, and looking for other profit- sharing mechanisms that strengthen these people ability to support their institutions and development priorities.

Voluntary guidelines related to businesses

Finally, it is necessary to make reference to any guidelines and proposals that have emerged in recent years from multilateral instances, also mentioned as voluntary guidelines or soft law, just as from civil society or no-governmental instances.

It is the case of the OECD Guidelines for Multinational Enterprises, which have been subscribed by Chile, and are important for the country not only because it is part of the organization, but for the critical assessment the OECD has made about the country in the last years (2005, 2011) in regard to environmental and social issues. Adopted in 1976, and reviewed in 2000 and 2011, among their general principles they state that businesses will have to "respect human rights internationally recognized of people affected by their activities". A chapter talking about human rights specifies those responsibilities. In environmental terms, it says that "Businesses will have to take properly into account, in the frame of statutory and regulating provisions and administrative practices of countries in which they carry out their activities, and taking account of agreements, principles, aims and relevant international regulations, the necessity to protect environment, health and public security and to carry out, in general, their activities in such a way to contribute to the larger aim of a sustainable development". Also, it adds that they will have to "maintain emergency plans intended for preventing, minimizing and controlling serious damages on environment and health derived from their activities, including accident cases and emergency situations".

While these guidelines contain relevant topics, stipulate a procedure for a complaint (through National Contact Points) and have an offshore suitability for states, they have been criticized because their terms are written in such a way that they weaken their extent, complaint procedures they stipulate are confidential, penalties they propose are minimum, and mechanisms for they to work are in many countries weak. It appears that this would be because the complaint procedure is more about mediation than determination of responsibilities.

Also, in this sense, it is important the Operational Policy OP 4.10 and World Bank's Rules of Proceeding about Native Peoples BP 4.10. In them a procedure to finance projects affecting native peoples is established. Among requirements established by the Bank for this purpose is the development of a draft study to determine presence of these people on the project zone, a social assessment on the responsibility of borrower, and a previous, free and informed consult that gives rise to a wide support to project by affected native community.

In the other hand, this policy determines also that, in projects financed by the Bank, be included measures to "a) prevent potential adverse effects over native communities, or b) reduce them the most possible, diminish them or compensate them, when they cannot be prevented. The same policy says that projects financed by the Bank have to be designed so that native peoples receive social and economic benefits being culturally proper and inclusive in terms of intergeneration and genre. Finally, it considers the necessity of giving

protection to rights over native land and resources, and avoiding physical resettlement on their land and territory where they usually live, excepting in exceptional circumstances in which it, according to international guidelines on human rights, counts on a wide support from affected communities after proper consulting processes.

Finally, while it has emerged from a civil society body, it is interesting to refer to methodology for impact assessment of foreign investment on human rights made by Derechos y Democracia in Canada. This methodology, driven since 2004 and implemented in foreign investment projects into different contexts in the world, including at the region level, is intended for determining, with affected community participation, impacts that an investment project has over human rights. Through this mechanism, situation generated by an investment is analyzed in terms of human rights guaranteed in Universal Statement of Human Rights and in other treaties and instruments, making possible to elucidate the role played by those responsible (governments) as also right holders living into a state jurisdiction.

Methodology has been applied in the region in a water privatization case in Argentina, in which waters were allocated to an European and Argentinean business consortium (Aguas Argentinas S.A.). The study determined that this investment had a negative impact on resident ability in Buenos Aires to have enough and secure access to water (2007). More recently (2009-2011), methodology was applied in Ecuador to study impact on human rights by a company (Corriente Resource Inc.) that bought and operated ore bodies in the Amazonian zone. Results of study that was carried out along with local counterparts and community permitted concluding that project, besides having irregularities in the consulting process and land procurement, made a criminal act of social protest. The study identified risks on a large scale mining in native communities nearby.

Applying this methodology to study impacts on human rights by foreign investments in energy in Chile could have a big potential as a way of civic monitoring of this kind of initiatives. Also it permitted bigger levels of identification, socialization, and so prevention of impacts that this kind of projects produces on local and native communities, and those existing to date.

Conclusions

In this document we have seen how growing activity of power companies in Chile, deregulated by the state and today controlled by private sector, has adversely impacted on vulnerable sectors, among them native people, rural communities and coast communities, affecting their land and ecosystems, disrupting their lives and cultures, and resulting in violation –or threat of violation- of their human rights recognized in international treaties, ratified by the country.

We have also analyzed how juridical regulation in force in the country for the environment does not permit to communities affected by this kind of initiatives to influence in decision- making about them, and to prevent environmental and social impact they generate. Such a regulation does not permit them either to get a compensation for damages caused, and even less to share in profit generated. So far, situation has not been different for native peoples, whose communities have been particularly affected by development of hydroelectric

and thermoelectric initiatives on their land and territory. Ratification of the 169 Agreement, however, states a new juridical scene in which, according to recent domestic rulings, communities have to be consulted by the state, through special procedures and in good faith, with the aim to make deals whenever the state takes administrative actions to sanction those initiatives. Also, it would be expected that their land and resources had a bigger protection in front of measures adopted by the state, and damages that measures caused them be compensated.

It is evident that the state has failed to comply with its international obligations in human rights in this front. Because it did not adopted needed measures to protect communities affected by abuses committed by power companies during their activities. It can say the same about those companies, which have not showed a due diligence required to prevent and be responsible for negative effects that their activity has produced on those communities. Likewise we can conclude that affected communities, just as civil society on the whole, despite of their campaign against power company abuses, have not used all instruments existing today at international level to prevent human rights violation or obtain a redress for damages generated.

It is in this context that international guidelines coming both from the international treaties on human rights ratified by Chile, and the interpretation of these made by bodies in charge of their supervision, assume a big relevance. It can say the same over guidelines about it that have emerged in recent years both from the United Nations special bodies existing in the matter of businesses and human rights, and those bodies devoted to situation of native people's rights. Also important are those guidelines emerging from multilateral bodies as the OECD and the World Bank, which despite of being binding, establish directions for a bigger supervision of power companies' activities that violate human rights.

From these guidelines emerge key directions for actors involved in Chile's energy activity, including the state and businesses. Notwithstanding questioning emerged from human rights organizations due to their deficiencies in different aspects above mentioned, the frame of "protecting, respecting and solving" proposed by the Special Representative Ruggie for business activities and human rights permits to establish any responsibilities that we think fall to those actors in the country. According to this frame, we can identify as challenges for the state in this sense the embracing of legislative measures that properly regulate business activities, do not permit that such an activity develops to the detriment of vulnerable sectors, as well as of their land, resources and ways of living, and make possible that these vulnerable sectors can influence decision-making regarding their plans. The legislation should permit investigation and punishment of abuses committed by businesses, as also a redress for damages caused.

In the case of power companies, due diligence that representative Ruggie proposes that they adopt to properly respect human rights, it would mean that they would have to pay much more attention than they have put so far to affected people for their activities. It involves, among other aspects, identifying previously to their investment plans potential impacts that these plans can have on local people; determining alternatives to mentioned plans or locations in the event of identifying potential social and cultural impacts; consulting to affected communities about those plans; compensating for damages their activities inflict

to people, avoiding terms of anticipated cooptation of population that they until now have developed through mechanisms as a conflict of interest; and bringing about terms of a fair sharing in profits that such activities generate.
In the case of native people, and taking into account guidelines established by SR James Anaya, a due diligence by power companies in the country should mean also that they have to adjust their activities in order to respect the international rules, including the ILO's 169 Agreement and the Statement of United Nations over Rights of Native Peoples. Due diligence would involve also special attention by businesses to identification and protection of land, territory and resources of these peoples susceptible to be affected by their initiatives; development of consulting processes by the state, directed to attain their previous, free and informed acquiescence on proposed plans; prevention of negative impacts from those plans and sharing in profits that generate these activities.
From this analysis emerge also challenges for communities affected by power companies' activity, which could more intensely use international bodies and instruments that we have pointed out in this document. And this particularly in the native people case, whose rights threatened and violated by big investment projects have found a growing protection both in the human rights Inter American system and in the United Nations system. The same communities, just as the civil society as a whole, also have challenges ahead in relation to monitoring the state's international obligations and abuses committed by businesses. They can do this by using any mechanisms as studies of foreign investment impact on human rights that Derechos y Democracia proposes. Their application in other contexts show us that using this kind of instruments can be essential to identify impacts that this kind of activities generates on these rights, and to take actions permitting to avoid such impacts or redress damages that they produce.

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Contributions from the trade union world to social dialogue on human rights and businesses

By Alicia Díaz Nilo[2]

The International Labor Organization (ILO) is a United Nations' body, whose mission is promoting social justice, human and labor rights internationally recognized. Its originality rests on the fact that it is the only world organization founded on a tripartite structure in which governments, workers and employers are equally represented. The principal means on which the ILO counts to attain its aim of economic progress and social justice are the regulatory activities and technical cooperation. Since its foundation in 1919, as a result of Peace Conference which took place at the end of I World War, it has established a link between peace and social justice by stating that "the universal and enduring peace just can be based on social justice". In the course of time, it has been interested in protecting all workers´ basic rights to build a more humane society and avoid negative models within the scope of international competition resulted from economic and social changes. Embracing Agreements and Recommendations rising from consensus and social dialogue among countries is a proof of this humanitarian course.

Recently, in the region, the CEPAL (ECLA) through its publication "La Hora de la Igualdad" (2010) raises the necessity of building an agenda for equality as an inevitable task for Latin American countries. The explanation it gives to call to this Agenda is that social cohesion is a key element to sustain growth; increase legitimacy and governance in states; and diminish the conflictive character. Second, it is said that a more integrated society favors what is called "authentic competitivity", a space where use of workforce skills are at stake, access and opportunities for people are increased, is about a virtuous confluence between economic development and social equality. Third, it is said that in front of a major equality regarding social rights, a window is opened to a major democratization in political decisions. Levels of representativity in societies increase and diversify. Fourth, the CEPAL says in its document that a "major equality makes a regulatory reference that will guide public action in pursuit of reducing vulnerability and turning economic growth in a broader access to welfare" (CEPAL, 2010).

This invitation and calling by CEPAL arrive simultaneously with the challenge Decent Job by the ILO and with the idea of social actors engaged to nation growth, stressing urgency and necessity of deepening all those activities that permit to attain equality, actions that have a systemic character in their expression and in results they generate for societies.

For the ILO's Regional Program for Dialogue and Social Cohesion in Latin America, this challenge of contributing to social justice and progressing in equality lines up with an achievement to move forward Decent Job in a frame of understanding, social peace and cooperation among actors. It is the reason why the syndical actor's action is so important in playing an active role to correct inequalities that labor market operation generates, and in driving changes to make possible development in an environment in which human rights are full in force.

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Chile

The situation of syndicalism in Chile (SEHNBRUCH, 2011) is similar to that of other countries that have suffered effects from deindustrialization, privatization, legislation and antisyndical action, such as United Kingdom and America. But syndicalism in Chile is still weakest than in these countries, labor regulation is one of the most disadvantageous in the world, second place, and antisyndical practices are vastly spread, particularly illegal layoff of trade union organizers and the existence of black lists to prevent workers from associating. Sehnbruch says that besides these conditions, over period of post-transition to democracy in Chile, public policies conceived syndical world as an actor that in the last resort negatively affects the economic growth more than being a positive contribution to development and productive process.

In Chile, labor reform that was approved of late in 2001 repaired the labor rights that had been broken over dictatorship, increased layoff cost for workers who had a less than five years seniority, but it did not change what was arranged in 1979 in relation to grounds of laying off, which continued to be as vague as they had been until that moment, particularly because of the employer held the right to lay off without any cause. In that period, trade union obtained the right to exist, security in the work place and legally autonomous status for trade union leaders.

Labor conditions, labor legislation that have disfavored their organization and performing have weakened syndical activity, preventing them from making a counterpart with power in negotiating spaces created over the last 20 years. The big negotiation has fallen so far to politic parties and the parliament, which represents citizens. Syndicalism in Latin America has lost too any influence on the operation of labor market. In Chile case, privileged spaces for social dialogue and discussion with governments, from the Concertación to the Coalición por el Cambio, have fallen to the minimum salary and family allowance, as well as wages of public sector without entering in major reforms to system of labor relations.

While undermining and atomizing of syndical organization are a common phenomenon in Latin America, its reappearance as a social force, key at the moment of arguing about society development and future, remains intact. In Chile, the last opinion polls show a progressive drop in credibility, support and trust toward political parties and the parliament, and a sustained rise toward the syndical world and its trade unions. Demand for an increase of syndicalism representation of labor matters begins to redesign itself into the current context. Uruguay shows an interesting trend where labor reforms permitted and encouraged a strong growth in the syndication rate.

But problems that national syndicalism faces are a drop in enrollment rate by people in trade unions (12.5%) and in collective bargaining which hardly reaches to 5%; just eight workers are required to form a trade union, bringing about a multiplication of them with scant power of influence; a banning on syndication for workers in public sector and a restraint of organizing inter-enterprise trade unions are held, hampering a joint syndical action. This is not the case in other countries of the region, such as Argentina, Brazil and Uruguay where trade unions by branches prevail.

Syndicalism and the new issues of the labor environment

Syndicalism's capacity to influence government and public policies has weakened in the last decades, but in Chile and throughout Latin America the capacity to mobilize several sectors and support new and different ways of social unease persists. Syndicalism has managed to be visible and have an ability to be a political actor, diversifying its actions, setting up new alliances and adding in issues that reflect public opinion, showing an increasing civic sensitivity in issues requiring a systemic and integral treatment, and where the labor world and its workers can play a central role when it comes to correcting inequities generated by asymmetric labor relations. They have a syndical challenge ahead to get major citizen rights, take care of basic human rights and labor rights, without compromising a concern in labor market.

In Statement of Social Justice for a Fairest Globalization, agreed in 97th International Labor Conference, on June, 2008, the ILO promotes once again social dialogue and tripartism as proper methods to turn the economic development in social progress, and social progress in economic development.

In the recent Summit of Americas, which took place in Santiago, Chile, on December 2010, were present employer, government and worker organizations to discuss the most important issues for the labor world. They intensively talked about necessity of strengthening syndical actors to improve their performance in increasingly often crisis situations occurring in the region countries, but also to be a voice informed of all those matters that societies and their actors – particularly those excluded- are demanding to social organizations.

So syndicalism has huge challenges ahead: its strengthening and renewal, it has to get more control over labor market operation aspects (job crisis, woman incorporation in labor market, eradication of child labor, securing major opportunities for young people, social security and dignity, fight against poverty), to extend its alliance policy to link enduring issues that justify its existence to new social challenges (energy, environment, habitat, and so forth), and to deepen social dialogue to get more social cohesion, governance and governability in the region.

It is in this frame that relation between businesses and workers resounds favorably to a major integration. The Decent Job to which calls the ILO permits to extend the spaces of social participation, beyond any action in political and syndical organizations. The social dialogue and access to information extend knowledge for a full exercise of rights and cultural exchange.

Social dialogue as a method of interaction. A contribution from syndicalism

We think it is important to put our focus in this last challenge in order to offer an approaching among new topics in the labor world, the strategic alliances with other civil society's actors, though they were popular classes, which syndicalism has always had a privileged relation with, as with other realities of social organization and territorial order, its influence in human rights promotion, as well as a bigger participation and responsibility of the state in its action toward businesses.

We have observed a paradigm change in business practices and in the way of doing business. The common elements in this changing process are seen in the

necessity of adding economic, social and environmental aspects in the routine practice and operation of businesses, with different actors participating such as businesses, civil society, workers and government.
The Social Dialogue offers syndicalism an instrument that plays a critic role in attaining the aim of promoting equality of opportunities between men and women to get a productive and decent job, under conditions of freedom, security and dignity, and it is a good channel of communication with others. In this sense, lessons taken from the ILO's bipartite and tripartite mechanisms can be a very valuable input to look for ways of dialogue and negotiation between communities and businesses, where a big challenge that we know since syndicalism repeats: inequity of parties in dialogue.
Definition of social dialogue the ILO works with includes in it all kind of negotiation, consultation or a mere exchange of information between government, employer and worker representatives about questions of common interest related to economic and social policy. It can take a shape of a tripartite process where the government is an official part in the dialogue, or it can be a bipartite process between workers and employers, that is, between worker and employer organizations, with or without indirect intervention of government. Coordination can be formal or informal, being very often a mix of both. It can take place at a national, regional or business level. It can be also inter-professional, inter-sectoral or a mix of them.
Social dialogue main objective is making a consensus to be attained and encourage democratic participation of principal actors present in the labor world. Social dialogue structures, just as processes that have worked successfully, have been able to resolve important economic and social questions, have encouraged the good government, progress and social peace, stability, and have driven the economic growth, and can contribute to identify and overcome the management void related to human rights rising from business performance in the global world, essential problem raised by John Ruggie in his report about the human rights and transnational and other commercial enterprises. The social dialogue with a strong syndical and community actor permits to tackle the adverse consequences of actions by businesses, prevent them, make that human rights be respected; human rights for which businesses have a responsibility, and require proper and fair actions to get to a solution.

The case of the energy sector

While the Chilean energy sector has had a huge development in the last 20 years, it is true that its boost is due in part to decisions made by business sector in alliance with governments. This strong sector of the domestic economy has been influenced by an international context marked by fossil sources depletion, particularly oil, the global warming which forces to search for green energies and a bigger ecological awareness that peoples have been acquiring, in which a development compatible with environment is pursued. In the national context, participation and democratic settling generate the opportunity for organized and no-organized citizens to express themselves openly. So we are before a matter of civic interest that interpellates a syndical world in its role relating to demanding businesses to comply with rights. The syndical world understands that debate about energy as a basic raw material is no technical, but political,

related to economic development of the country. Discussing in Chile about energy is doing it about a development style wanted, about foreign investment, participation of national companies, entry of foreign capitals, role and supervision of the state, and the effect that any decision on Energy and Businesses has on labor rights, environmental rights and human rights.
Like in energy sector, the Human Rights and Business area presents a sphere of action for trade unions and workers at least at three levels: national level, regional level and trade union-business level to discuss and establish matters of interest for workers and public.
The national level is where trade union leaders have to agree and pronounce on what country they want to build, what developing model with.
If Energy Development is socially discussed, the syndical world will have to pronounce on the energy main and if it sits in the heart of aims for the future in a country built by consensus, and where people's human rights cannot be compromised. This is the forum that offers a place for syndicalism to express itself -in representation of workers but also of socially excluded people- on what are benefits regarding dignity and the use allotted to the energy in the productive main.
This Social Dialogue requires political abilities, a democratic legitimacy and a vision of future. In this discussing level, operation of institutions in labor market and its role in the energy main, what businesses are benefited from these decisions, how many, and which one, are addressed. If there are negative influences related to human rights violation, including labor rights, poverty and environment, there is a possibility for public and labor establishment to correct them with public and social policies and extend opportunities and strengthen rights of workers and their communities. In Chile the Environment Ministry includes an Advisory Council which counts on government, businessmen and trade union representatives, scholars connected with environmental matters and non-governmental organizations, who express their points of view about all projects and investments related to environment to be carried out in the country. This Advisory Council has a tripartite expression in the country's 15 regions.
At a national level, and with a Social Dialogue, governments, national and transnational enterprises have to guarantee transparence and access to decisions on formulating, carrying out and assessing policies and national and international programs that have an impact on communities' and workers' human rights, on environment, industrial strategies on debate, labor adjustment programs that foreign investment and entry of capitals and new energies bring with them, whom technological transference benefits, and what actors in labor world and communities near to company it affects.
At a national level, the kind of society looked for is discussed, as well as the development model that account for it, wealth distribution in society, tax policy objectives, and how is intended to correct the operation of a globalized market that produces neither equality nor equity. The Decent Job aim, based on mere fulfillment and exercise of universal human rights, offers an array of devices that permit to measure how much the country moves forward to the proposed aim. Workers and trade unions are who will be able to find better formulas to set up a relation among labor establishment, judicial establishment, and environmental establishment, economic policy and roles played by each one of them in protecting and respecting human rights.

At a national level, trade unions have to be aware of link between labor security, human rights, labor rights, sustainable development, where security, in a whole sense, is a basic necessity shared by people, communities, businesses and governments evenly. In this level, it is agreed to recognize that security and respect for human rights can be, and have to be, consistent; at a national plane, workers and their trade unions determine that it is taken for granted that governments have the basic obligation of promoting and protecting human rights, and all parties in a social conflict are obliged to observe international law's rules about human rights. Enacting national laws and promoting ILO agreements are addressed in this level, and they are key partners for a syndical action on this field, their relation with members of parliament, with social organizations and syndical unity.

Regional level offers an opportunity for a social dialogue informed on development opportunities in regions, by linking them to strategic necessities for a territory to attain an economic growth along with opportunities for men and women to have major offers and get a better life. This territorial level, where productive activity by multinational and national enterprises takes place, permits to set up mechanisms of bipartite collaboration (between workers and employers), tripartite (between workers, employers and regional governments) to lay out policies on prevention and promotion of human rights in its entirety.

At a regional level is where the state role can be adjusted and required as a watchdog of territorial and national interests, both in judiciary institutions, in the event of resolving controversies, and in the extensive and informed use of no-judiciary mechanisms (negotiation, joint actions, influence in the government or parliament). At the regional level, it is necessary to consider the effect that business activities can have on local communities, to recognize the value of engagement with civil society, and demand regional, local and foreign governments their contribution to welfare for these communities, as also setting up alleviating actions that can be applied before any possibility of right violation into the context of a social conflict. At a territorial level, trade unions participate with more levels of information from their represented people, by linking business activities to chain of supplying, farming out and associated small- and-middle business services, reaching deals to make businesses comply with labor rights and human rights, and carry out their economic activity in a context socially responsible.

Unity of trade unions around the same productive activity, as also around the social net of actors in territories, will be their main strength to maintain a dialogue and negotiate deals with business world. Laws that guarantee protection for workers and citizens, contribute also to a fruitful dialogue.

At the business-trade union level, the instruments of collective bargaining, labor committees such as joint committees and training committees are very useful to protect, respect and require repairing actions on human rights. Setting up bipartite mechanisms that reduce accidents, injuries, labor diseases, labor abuses, and measures that promote equality of opportunities for men and women in front of contract breaching, is possible into the frame of negotiations. The Collective Bargaining has to watch that workers have at their disposal updated, timely and complete information, in order to subscribe deals that establish the exercise of human rights of workers and their families and communities.

Trade union in its relation with business has to require a risk assessment of activities developing both into the company and on territory where it operates. The capacity to assess risks where a company operates is crucial for worker security, for its action with local communities; for the success of company operations in the short or the long run; and for promoting and protecting human rights. In this task the trade union has to be present and in this sense, it can be a very important actor, by sharing its experience and directly determining a better respect of human rights.
Just as it exits finance audits, trade unions have to actively participate in "human rights" audit, sustainable development audit in work places, as also be informed and active in the assessments of environmental impact.

Conditions that encourage the performance of trade unions

For workers and trade unions to be able of playing their role, governments and employers have to watch their freedom and autonomy, established in the ILO's Basic Agreements.

- The existence of public policies, of a labor relation system and a democratic system can contribute to strengthen syndical performance and vice versa.

- The syndical world is a key ally in creating heads of agreement so it can influence decisively in conception and development of public policies.

- A necessity of strengthening syndicalism and extending coverage of collective bargaining.

- Considering as a public value the syndical action and being prepared to invest all society efforts to increase the number of syndicated workers.

- Promoting a new culture in labor relations, that is, to be willing to invest in strengthening dialogue. This implies resources, methodology, monitoring, strategic projects, suitable stuff, training of all actors, particularly of those who have less access to this resource, responsibility and an ethic of collaborative work. Results will account for a successful investment.

The country and its institutions have to invest all it is needed for workers to be in equal conditions to protect, respect and demand a remedy for business actions and human rights; so syndical training, technical assistance and labor jurisdiction are basic pillars.
In this sense, workers have to receive an enough training to increase their awareness of Human Rights and Businesses and create tools or instruments so that their acting shows results in every field where it occurs, particularly in the most vulnerable sectors.
Governments and businesses should cooperate in assessing necessities of training in human rights for workers into their respective sphere of action. Trade unions, for their part, have to involve in formulating schedules, projects and programs of training for their workers.

Advantages of the Social Dialogue on Human Rights and Businesses

That workers count on proper and enough tools to address various issues – policies, plans or programs- makes inevitable a strengthening process into the organizations that imprint them a bigger cohesion, a representative character and above all autonomy.
A platform shared at all levels of syndical action is available, giving consistency to syndical work.
It offers a field of collaboration outside. The syndical world will have as natural allies in the area of human rights to social organizations, non-governmental organizations, students, townships, where a mutual influence strengthens the syndical role into business as also its regional and national management.
The Social Dialogue in this field promotes territorial cohesion in pursuit of region and community growth, just as productive growth. It makes easier bargaining by sectors and branches.
It introduces new issues to be added in the Collective Bargaining, extending syndical leadership vision. It offers a new agenda with very socially sensitive issues, particularly for the most vulnerable groups.
It proposes a new space to build and humanize social action. The human rights are understood not only as a violation of them in war times, repression, dictatorship or syndical harassment. The ILO's Basic Agreements and the Human Rights offer trade unions a set of indicators to measure progress and development.
Trade unions and workers prepared to collaborate with businesses in promoting and protecting human rights, alleviating the effects that globalization and technological and productive expansion imply.

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Two human rights challenges under the current foreign investment regime

By Alberto Coddou[3]

Introduction

Every developing country faces processes of institutional modernization where they have to deal with attracting foreign capital, in order to obtain that so much cherished goal. The need of a fresh flow of capital to develop new projects changed the predominant speech, which a few decades back claimed for a "permanent sovereignty over natural resources". As Dolzer states, "the dominant debate in third world capitals no longer revolves around sovereignty, but about competition for foreign capital and new technologies, and therefore, about the necessary elements of a national investment policy that is effective in attracting the foreign investor" (2005, 955).

Earlier, in the seventies, the discussion was about control over the EMNs (multinationals) as a way of protecting the countries' sovereignty. Today, the debate about control of EMNs's power happens in the context of the concern about the impact that these can have over the human rights of a country's inhabitants (Zerk 2006). As most specialized literature about this subject shows, the regime of foreign investment protection has given a disproportionate primacy to the investor's interests over the interests and rights of the States receiving this investment to have a regulatory instance open to evolution and development. (Van Harten 2007). In fact, in August 2010, more tan 30 professors highly prestigious in this subject, issued a public statement declaring the lack of legitimacy of the current foreign investment protection regime (Schill 2010).

In short, this international regime, made up of more tan 2.500 Bilateral Investment Treaties (TBIs), and by investment chapters taking part of free trade agreements, gives foreign investors a privileged position in respect of the receiving State, which can have its regulatory space very restricted: its capacity to apply measures as a response to the concern for human development and environmental sustainability. The possibility that a regulatory measure could be disputed by an investor in an international tribunal – discourages the implementation of any pro-development measures.

The arbitration tribunals most frequently used in this context are the ad-hoc arbitral commission, in accordance with CNUDMI's rules, or under the institutional arrangements offered by the CIADI, the International Chamber of Commerce or the Stockholm Court, where States have a high probability of ending up paying multimillion compensations. The number of disputes has been increasing lately, and although our country has only a few causes in the CIADI (just three), nothing can assure us that this jump into development will not go through litigations which will mean a huge economic cost for Chile. Finally,

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sometimes the mere threat of taking a case to the CIADI seems to be enough to change the path to an investment project in Chile.
To get out of the legitimacy crisis, it is stated by many people, that the system should include the preservation of a regulatory instance so that States can take measures that would privilege the public interest, if they are done in good faith, in a transparent way, and taking into account a legitimate purpose. There have been a variety of proposals to reform the system, which range from including a general clause of exemptions to the violation of legitimate expectations from investors contained in the TBIs (Kalderimis 2009), to increasing the chances of participation of the communities affected by investment projects (Ortino 2009), and to creating a new international court of Economic International Rights which would balance the rights of the State and those of the investor (Van Harten 2008). Considering all this, we can conclude, with a certain degree of consensus, that we face a global economic regime that disciplines development possibilities and, unless there is an important reform, it will restrict the sovereign rights for nations themselves to democratically decide and set their development routes (Schneiderman 2008).
The Chilean development model has been a witness, among many other examples, of the difficulty of articulating the economic development policies with the new demands and expectations of a society that is increasingly more aware of its own rights. The main problem is that, as the State desperately tries to compete with a global economy and benefit from an ever larger portion of the global PIB, the non-economical obligations – for example, the ones concerning the protection of the environment or human rights – can be left on the background. This can reveal a tension that will set future conflicts: short-term interest in economic growth could work against the commitments made by the States in order to promote and ensure minimum standards for their people.
The current foreign investments protection regime is a series of legal instruments that allow the investor to go to international tribunals, thus avoiding the domestic jurisdiction, in order to protect its interests against any facts or measures that could affect them. In other words, this regime is designed in such a way that it allows investors to appeal to an impartial resolution of the conflicts that may come up with regards to situations where their investments can be affected, generally, because of administrative measures that States take in exercising their public powers. In general terms, this institutional design does not take into account the participation of the communities directly affected by the investment projects, whose interests can be contradictory with the State's purpose of assuring and strengthening a climate of safe and stable economic investment. That is why it has been pointed out that this protection regime suffers from a "legitimacy crisis", because it doesn't involve the participation of those directly affected by foreign investment projects. Also, the international arbitration regime restrains or makes very difficult in most cases, for third-parties affected by the investment project to gain access to justice or to suitable resources, especially access to preventive resources, despite the general preference for prevention contained in the social and environment Standards of the International Financial Corporation that offers loans to very many foreign investment projects around the world (Schönsteiner 2011).
So far, the attempts to make structural reforms to give voice to these communities within the foreign investment system have not been successful. Considering this scenario, it's crucial to analyze the role that EMNs themselves,

being the main type of foreign investors, can play in obtaining development objectives, fulfilling some minimum standards, and including the participation of this new third actor. In that context, and in what follows, I would like to present two challenges for companies that do business outside the limits of their corporative nationality, challenges that will allow us to understand two things: first, the role that private initiatives can play as immediate solutions for the legitimacy crisis of the foreign investment protection regime; second, the new perspectives that companies will face in a complex global scenario, taking up duties and responsibilities both at national and international level. It's important to emphasize that the two challenges that I'm going to present do not exhaust the discussion, since there are several areas where it is possible to derive multiple and varied challenges that private actors can face in the context of a global economy.

The first challenge tries to strengthen the current private initiatives that look to link multinationals with all the actors involved in collaborative processes of permanent dialogue. This, in order to find possible escape routes to the current 'legitimacy crisis' of the foreign investment protection regime. For this, we'll also try to think about the way in which corporative speeches must have a real effect in the external impacts and the internal organization of a company. Only then we'll be able to take seriously those speeches that, from the corporative web sites, claim to respect every human right that has been internationally recognized.

The second challenge looks at getting companies' commitment at the obligation to comply with certain transparency standards as a precondition, for foreign investors, to access the international arbitration tribunals. This is one of the most important challenges today: transparency. The reason for it is that a transparent attitude from multinationals can help to set some minimum requirements of private conduct as an analytic parameter for any legal forum, whether it is at national or international level.

Both challenges will be illustrated by recent legal examples. Although the analysis can have some technical-legal language, it tries to maintain a speech open to readers who are not experts in legal matters.

Finally, it's relevant to point out in this introduction that all of this discussion is important for Chile not just because as a State it receives investments, but also because many of its most successful companies have started to look at markets in neighbouring countries or in other continents as attractive investment poles. As a general framework, the challenges addressed in this paper look at making visible the ways in which companies can commit themselves to play a privileged role in matters regarding human rights and environmental protection.

Industrial standards (business): initiatives, speech and structure

In principle, it's hard to understand why a company, an industry, or an area of economic activity could voluntarily decide to comply with certain human rights or environmental standards when there is no private profitability, either in the short or long term. That said, there is a variety of studies nowadays which show that CSR generates and improves economic profit. In any event, today it is impossible to deny the negative or positive effect that corporate behaviour can have in society. As well as potentially dangerous agents for community development, companies are perceived by public opinion as players that,

because of their privileged position with regards to knowledge and technological development, and because of their economic capacity, can respect high standards in matters of human rights and environmental protection.

The standards for human rights contained in documents of international law, in their new ways of understanding, seek to build a minimum floor from which public and private players can develop their activities. In other words, it seeks that human rights be the minimum requisites for the treatment of any person, whether it's in relation with the State, a company or with their peers.That regardless of the fact that the main subjects of international obligations are still the States and not the private players.

The attempts to integrate human rights dimensions to the activities of foreign investors succeeded only recently. So, for example, the reference to working or environmental standards or those regarding human rights in bilateral investment treaties is a fairly new topic. As a study for the OECD demonstrates, none of the bilateral investment treaties agreed between 1958 and 1985 had any reference to environmental issues, between 1985 and 2001, only 10% of the agreed treaties had some general reference, the reference to environmental protection matters started in 2002, and only from 2005, more than half of the signed TBIs contain explicit references to the subject, getting to a peak of 80% in 2008 (Gordon & Pohl 2011). Meanwhile, all free commerce treaties that have chapters related to investment, also have more comprehensive references that include working or environmental standards in their wording.

Beyond the international instruments, to which in principle only the States are bound to, private players declare themselves explicitly in favour of meeting some minimum standards, making reference to the national or international law of human rights. However, the challenge is not so much in stating adhesion to certain standards, but in really complying with them. If companies are concerned about their image and their credibility in front of capitalists, clients, society, and the State, the corporate speech cannot be used as an excuse, as a lack of interest to evaluate, prevent and mitigate the effects that private activity has over the fulfillment of minimum rules.

To evaluate the regulatory strength of this standards, the degree of respect that a certain standard can get, it is necessary to look at reality and evaluate which are the ways that will better help corporate behaviour to conform to this standards. So far, it's been understood that State power is best suited to intervene in those cases where free interaction between social forces within a country can generate adverse effects to human rights. That's why it's believed that the State has the necessary degree of authority, enough to regulate and force those who fail to comply with the directives or regulations established. Nevertheless, this traditional way of facing the problem has been complemented by different initiatives claiming to have more or additional effectiveness in the fulfillment and commitment of the private players with the mentioned minimum standards.

This claim is stronger in those areas where issues related to collective action (coordination between the different players involved) get highly complex. Among these initiatives, the CSR is one of the main focus of attention. Next, I am interested in go over some general reflections about the possibility of **integrating** the CSR with the minimum standards, as they have been defined by the international law of human rights.

CSR advocates that fulfillment of standards and codes of conduct adopted voluntarily are an appropriate way of shaping the behaviour of companies with international standards. Somehow, they dispute the traditional idea that law has to be compulsory and that it has to back-up its orders with the threat of a sanction. As a consequence, the mere fulfillment of the law cannot be taken as evidence of an CSR policy. Traditionally, many of the CSR policies have worked base don the concept of "license to operate", which requires taking into account all interest groups involved with a certain business activity (Cunningham 2007). All parts have certain rationality and pursue certain interests, whether they are public or private. So, for example, a company's shareholders look to maximize the profits, and for that they use all their prerogatives to make it happen. In that context, they are generally concerned about the company's accounting and how that could affect the share price, regardless of how those profits were acquired.
On the other hand, the affected communities, by their own initiative or in conjunction with civil society organizations, look to protect the interests of the local communities themselves. The government, through its regulatory bodies, looks to hopefully make effective the rules that it has itself issued, as well as the international commitments it has acquired, generating, obviously, some tensions between its obligations to respect business activity, and protecting its population of harmful effects. This way, and considering the complexity of relationships and interests between a company and the different players involved, the concept of "license to operate" goes beyond what is strictly legal. So, the "license to operate" in a certain country, will depend on the combination of different factors.
In attempting to get some consensus, some shared understanding from which to evaluate the different interests, the standards contained in the international law of human rights help to establish warranties when considering the players involved: communities, workers, owners, investors, banks, international organizations, etc. The current problem is that the vast majority of corporate speeches say they are committed to the fulfillment of certain standards, despite the fact that there is not a cross or uniformed parameter from which to evaluate the degree of consistency of them. In other words, there isn't a tradition and/or an institutionalism, that is to say, common rules that allow us to establish which international companies, beyond their speeches, are effectively fulfilling what they say.
Historically, the opening of new markets for commerce and investment implied that free play of regulatory frames at global level could offer low regulatory costs that could indirectly generate a race to debilitating the minimum humanitarian standards (race to the bottom). Already in the preface of the ILO Constitution, it was considered that the challenge should be faced at international level, because if a nation "didn't adopt a really humane working regime, this omission would constitute an obstacle to the effort of other nations that want to improve the luck of workers in their own countries"; in other words, the low working standards found in exporting countries would affect higher standards in importing countries, prompting a race to reduce the regulatory costs set by labor legislation, issue that could only be solved by international agreements (Howse & Trebilcock 2005, 561).
This way, the need to uniform minimum working standards was considered essential for a fair competition of free markets open to commerce and investment. Despite these efforts, the free flow of capitals kept driving

companies to look for countries where not only labour was comparatively lower, but also regulatory frames were significantly more favorable to maximizing profits. Apart from analyzing if we were actually witnesses of a "race to the bottom", it is evident that the lack of some minimum consensus contradicts our vision of respect for human rights.

The current CSR policies have warily seek to incorporate some minimum standards, but there hasn't been a real will to build shared parameters to create the minimum floor of respect for human rights, and the non-legal mechanisms for solving conflicts in this area. Only after some international organization's initiatives, mainly the UN, there has been a will to commit multinationals to satisfy minimum standards. The work of the Special Representative of the UN Secretary General for the matter of human rights in companies, John Ruggie, has contributed, for example, to a better understanding of this issue.

Beyond the huge fragmentation of private initiatives, there are currently only a few empiric studies that conclude that CSR policies, such as the creation of codes of conduct or good practices, are more effective than traditional methods. In fact, as Neil Cunningham reckons, when analyzing cases where it is the industry itself that self-imposes standards that go beyond what is legally required by domestic law, what the "codes of conduct" reveal constitutes an agreement between the different competitors to set a ceiling, a limit for the evolution of domestic regulation according to the development standards of a country. This way, along with introducing themselves as socially responsible players, competitors within an industry can protect their private interests, avoiding the ongoing modernization of regulatory standards In the developing countries (2007). And that happens because industrial self-regulation through "codes of conduct" or "good practices", most of the times means to establish standards that are weaker than those derived from a correct interpretation of the international law of human rights; that has to be added, sometimes, to an inefficient supervision, subject only to the pressure of peers, credit entities, consumers, or civil society and to the contingency of competitors' power, and the application of secret penalties, so as to not damage the industry's image as a whole (Cunningham 2007).

Considering this, it is hugely important to make efforts to integrate the human rights approach (views) not only in speeches, but in the different corporative architecture of companies, as well as in their daily operations. In that sense, one of the most significant efforts are the UN initiatives, through the United Nations Secretary General's Special Representative 'about the issue of human rights and other commercial businesses', which has been working since 2005 and will be extended this year to a working group of the UN Human Rights Council. The main idea seeks to link the State's duty to regulate according to the public interest, and the obligation of private individuals to abide by the required regulations, in the frame of a broad understanding of human rights, which goes far beyond the ban on child workers, forced work, or no discrimination. The highlight of this effort is the interest to specify the responsibility of private individuals condensed in the standard of due diligence, which means to have a human rights policy, to evaluate the actual or potential impact of the business activity, to integrate this policy within the whole structure of the company, and to establish a monitoring and control process which should be known through regular reports (Ruggie 2010).

In this scenario, the initiatives that arise from the CSR must be carefully evaluated, so that they can be redirected to a better integration of various dimensions: economic, social, environmental, working, etc. In brief, the companies human rights policies must be focused, firstly, in trying to integrate these minimum standards as basic conditions for economic operation, and secondly, in a progressive improvement of these minimums.

One of the most successful approaches of the CSR policies is the collective involvement of all the interested players in a certain economic activity, with due respect to some minimum principles that will guarantee the cooperation (*multi-stakeholder* approach, one that involves all groups interested or affected by one activity). This mechanism will be useful when it comes to evaluate, prevent and mitigate the impact on human rights. Described as collective initiatives among intergovernmental organizations, governments, private sector and civil society organizations, this kind of approach seeks to present itself as an "alternative mode of regulation, and as a possible platform to create democratic accountability in those places where traditional democratic processes and institutions have proven to be weak" (Koechlin & Calland 2009, 84). In other words, they are base don the assumption that law, as a normative discipline that looks to ha van effect on the actions of the regulated bodies, is not always the best way to get the desired results.

These new ways of cooperation, which certainly involve the state agencies, go beyond the traditional democracy, and try to understand and face the new challenges of an economy of transnational productive processes, where the actions of all parties interested have an interdependent relationship. Because of that, private initiatives, even though they start involving only the companies, must be reinforced into a gradual opening towards a dialogue with the other players involved. This kind of initiatives are not a solution to all problems, they just represent a more inclusive and open to dialogue starting point, that will allow to complement the efforts made at public institutional level to international levels by generating minimum evaluating parameters.

Among the principles that guide this multi-stakeholder approach is the idea that all partners in these collaborative processes are equal, and that they are open to non-coercive persuasion. As a consequence of its inclusive and comprehensive character, these approaches are well placed to fill some regulatory loops, overcome apparent dilemmas of trapped policies, and take into account the democratic deficit that, generally, affects global governance regimes, whether they are public or private. A trend that somehow refines this conclusion is the admission of *amicus curiae* sent by civil society to arbitration tribunals on international economic law. At the low responsiveness of the international regime on foreign protection to demands for greater participation of those directly affected, the multi-stakeholder approach or initiatives are a plausible alternative to obtain, by means of building mutual trust, much better results regarding the fulfillment of minimum standards.

Generally, the multi-stakeholder approach starts as a dialogue forum, as a way of enriching the different viewpoints over a controversial subject, to go gradually conforming an institutionalism able to supply voluntary rules or standards that, when implemented, will allow to feedback the process of creation, implementation and monitoring of them. In these processes, however, it is important to balance a certain number of elements that could jeopardize a productive multi-stakeholder dialogue. So, for example, on some economic

activities, the social and economic power of private players can be disproportionately large compared with the rest of the players; domestic regulatory regimes can be weak or too unsophisticated to confront private powers; and changes triggered by economic globalization go too quickly compared to the slowness of the negotiations of standards or binding principles. In these cases, the complexity of the collective action issue must make us look for alternative ways to obtain what we all wish: an improvement in the compliance of minimum standards of human rights from the private players.
In Chile, there are still no initiatives that bind all players involved in an economic activity developed by a certain company or industry. There has been collaboration though, from all sectors of civil society, in the making of the observations of the "Chilean chapter" to the standard ISO 26000 about Social responsibility that has been approved as non-certifiable standard in 2010. Despite this positive experience, there are not, according to our knowledge, multi-stakeholder tables (forums) engaged in discussing the challenges of an specific industry. However, there are incipient initiatives developing in the forest and salmon area. The mining sector policies which involves a large number of foreign investors, is one of the more advanced in adopting CSR policies. Those policies are slowly starting to include dialogues between the company and the government and the communities affected by the mining projects. The Report on Human Rights from the Diego Portales University (2010) has, in its chapter about company responsibility and human rights, a detailed study of the CSR policies of the large Chilean mining. Among other things, it concludes that mining companies, the vast majority being foreign investors, include, roughly, standards on human rights in their RSE policies. Nevertheless, it states the need to comply with the rest of the elements included in the standard of 'due diligence', as it has been recommended by the Special Representative, John Ruggie. One of the most interesting aspects of this study is to highlight the huge diversity of standards, mechanisms of corporate complaint, and initial studies of the impact on human rights that mining companies currently adopt. This diversity generates some difficulties when it comes to carefully evaluate the behaviour and the contrast of the publicly stated policies with the actual conduct.
Of the companies that take part in the Mining Council, four of them have not subscribed to the Global Pact, a voluntary initiative by which companies commit themselves to adjust their policies and operations to at least 10 universally recognized principles in four different theme areas: human rights, labor standards, environment and anticorruption. In any event, some of them have subscribed, and accept to structure their sustainability reports according to the indicators of the Global Reporting Initiative. This initiative, which has more detailed and generally more demanding standards tan the Global Pact, seeks to offer evaluation parameters for the social responsibility or sustainability reports, including an instance of human rights. These standards, whose evaluation means the possibility that the company can use a GRI logo with a certain qualification, favours a transparent attitude and a readiness to be evaluated by external revision processes. In the case of mining in Chile, we can highlight some initiatives from Codelco and AngloAmerican which have incorporated consultation processes with interested groups in order to improve the quality of the social responsibility reports (Schönsteiner 2010).

Adding to the positive impact of these initiatives, it is necessary that dialogue procedures start to gradually incorporate government entities and communities, on equal terms.

To recognize the mediating role of the State, or to guarantee a minimum information symmetry between companies and the affected communities represents one of the great challenges of human rights policies for foreign investors in Chile. Otherwise, this type of initiatives risk turning into an obstacle for the development of modern regulatory entities. In other words, it would be denying the chance for domestic institutions to modernize due to a lack of contact with the people or groups involved in a certain economic activity. Only after dialogues fulfill minimum guarantees of equal participation, giving the State a significant place, can we hope that this kind of initiatives is not taken behind the back of those who have the greater democratic legitimacy to establish regulations of business conduct.

That's why it is necessary, as was recommended in the chapter about companies and human rights of the report from the UDP's Human Rights Center in2010, for "the Chilean Government to promote the effective inclusion of working, environmental and human rights standards in investment and free commerce bilateral agreements, as well as in international contracts subscribed with foreign companies" (Schönsteiner 2010, 435). Equally, it's imperative to adopt dialogue procedures that have been pre-established and are known by all the players involved, where a special place is given to the regulatory entities.

Likewise, it's important to assure the effective incorporation of mechanisms of compliance, complaint and follow-up. However, it's important to remember that many times It's the corporate architecture itself that prevents a proper understanding of the CSR, or reproduces the abusive patterns that are present in civil society, whether it's by ignorance or inexperience. The *Wal-Mart* case against *Dukes*, settled by the United States Supreme Court in 2011, is an example of the need to take seriously the voluntary statements where the companies themselves express their commitment to abide by the minimum standards, in this case, no discrimination because of gender conditions. Although the legal case is based on a law, the Civil Rights Act, and not on a company's policy, it makes explicit reference to non-discrimination standards that the company had committed to for all its operations.

Here, then, is the last challenge for the investor: to make sure that its corporate architecture, the design of its corporate government, matches its stated CSR policies, so that the structuring of the first one allows the operation of the second ones (Muchlinski 2008). In other words, it's not enough to declare to be in favour of some minimum standards and go on to create a department specialized in human rights matters, or, what is more frequent, to incorporate some concern about human rights in the job description of the person in charge of CSR policies or public affairs. It's important to emphasize that the company must be structured in such a way that it can articulate all the different dimensions involved in an economic activity. This transversality should then be reflected with regards to strategic decisions, acquisitions, outsourcing, finance, human relations, etc. (Schönsteiner 2010). So, the corporate government' s discipline must start to reflect about the ways in which the business organization, the corporate structure, can generate potentially negative impacts, whether to its own staff or to the community directly affected by the activity.

Transparency Liability: Bilateral Investment Agreements and Foreign Investment Contracts

Foreign investment looks to give benefits to the investment's recipient country that go far beyond the mere economic dimension. So, for example, many investments generate positive impacts on clean technology transfer, on human capital development, or in building a business culture respectful of human rights. However, none of these positive effects has been traditionally incorporated as an explicit reference on bilateral investment treaties or in the contracts subscribed between the foreign investor and the recipient State. Just as we witness a surge in the right to development, that is to say, the right of developing countries to define their own patterns of evolution or modernization, we must meditate about the traditional lack of consideration of the non-economic dimensions in the legal instruments we are going to discuss.

In this context, the possibility of incorporating codes of conduct for transnational companies as a way of improving the social or environmental dimension of the legal instruments - agreements or contracts – that protect the foreign investor in a country, becomes relevant. So, next, I will focus on one of the emphasis that this codes of conduct stresses, and which requires companies favored by this privileged legal position, at national or international level, to conduct their business(es) in a transparent way. By doing this, I will argue, according to some fairly advanced literature for our times, about the need for a transparent conduct to be a precondition to activate the foreign investment protection mechanisms that are present on international agreements or domestic contracts. For that, I will explain the different dimensions in which we can incorporate the transnational's transparency as a minimum requirement of their conduct in the recipient States of their investments.

The problem is, as we said earlier, that bilateral investment agreements, by general rule, don't mention the liabilities on human rights that could be in contradiction with the liabilities that the State has with the foreign investor. Likewise, the arbitral tribunals that decide over the disputes between investors and the recipient States don't take into account this possible contradiction (Davarnejad 2008, 9). Therefore, at the moment it is considered that one of the best ways to bring under control the multinationals' conducts would be to include codes of conduct in the legal documents that protect the foreign investor, so that it would be forced to be transparent. That, it is argued, would be the best way to balance the rights of the State and those of the investors.

It's interesting to note that OCDE (Organization for Economic Co-operation and Development –OECD)'s directives for multinationals require their signatories (States) to guarantee that companies that operate in their territories should follow the standards set on them, so that they can be matched to the public policies, programs or regulations addressed to business activity. But we could take our ideas a step further: If investors should comply with domestic regulations as a requirement to access legal international arbitration, and if according to domestic regulations companies should fulfill certain minimum transparency standards, only then the investment protection regime could begin to be considered as establishing obligations not only for the State but also for the foreign investor. This would benefit the investor's conduct examination by the investment arbitral tribunals, who would be forced to weigh the interests at stake on each dispute. It wouldn't mean to turn the arbitral tribunals into human

rights forums, but to establish some preconditions fr investors to gain access to initiating actions to protect their investments, as it is pointed out in one of the reports of the High Commissioner for Human Rights of the Economic and Social Council. As the old common law principle of maximum equity says: " One who comes to equity must come with clean hands", which means that one who asks for a legal resource under this law area, should not himself have violated the law.

Now, I would like to consider the responsibility that weighs over companies to reveal information regarding their legal personality and the project they intend to develop, in the context of Chilean institutions about foreign investment. The study of these institutions will be very relevant because it will imply to consider that, nowadays in Chile, there are good reasons to argue that there should be some obligations for foreign investors in relation to the need to reveal information considered to be in the public interest. For this, I will analyze the case of *Claude Reyes,* settled by the Inter-American Court of Human Rights, whose jurisdiction has been recognized by the Chilean Government.

85 Véase, por ejemplo, el Modelo de Tratado de Inversión propuesto por el Instituto Internacional del Desarrollo Sustentable (disponible en www.iisd.org).

86Alto Comisionado para los Derechos Humanos del Consejo Económico y Social, de Derechos Humanos, Comercio e Inversión (E/CN.4/Sub.2/2003/9).

The industrial project Rio Condor originally consisted in building a forest plant in the south of Chile. The Foreign Investments Committee (CIE – Comité de Inversiones Extranjeras), a State entity, approved the investment by signing a contract with the foreign investor in December 1991. As it was to be expected, that caused public interest concerns, which promptly triggered a social mobilization during the first years of the newly recovered Chilean democracy. A few years later, Marcel Claude Reyes, who by then was Fundacion Terram's director (a non- governmental organization focused in environmental issues), made an information request to the CIE, with the intention of doing his own evaluations over the economic and social impact of the project, as well as the effects over the environment. Claude asked about the identity of foreign and national investors involved in the project, about the total amount of investment approved, about any related information that the CIE could have considered when taking the decision, and about information which CIE could have regarding the obligations of the companies involved in the project. The CIE's administrative entity (the Executive Vice-President) provided the information about the investors' names and the amount involved, but refused to surrender more information, without any justification. Action before the Superior Court to reveal this information was also unsuccessful.

Having exhausted the local authorities, and along with a deputy (Arturo Longton) and a representative of another ONG (non-governmental organization) (Sebastian Cox), Claude Reyes made a request to the Interamerican Comission on Human Rights, claiming the violation, by the Chilean State, of the rights to access public information and legal protection, established in articles 13 and 25 of the American Convention on Human Rights, respectively. After some negotiations and the provision of certain recommendations by the Commission, it decided to take the case to the Interamerican Court on Human Rights in July 2005. During the legal stage of procedures, various *amicus curiae* were brought in by different civil society organizations. In September 2006, the Interamerican Court published its sentence, declaring, unanimously, that the State violated the

right to freedom of thought and expression contained in article 13 of the American Convention on Human Rights in relation to the general obligations to respect and guarantee liberties and adopt the necessary measures for its protection (párr. 174).In 2008, the Interamerican Court declare that by adopting Law 20.285 (Transparency Law), Chile had complied with the court ruling (resolution of 24 November 2008).

Generally, this case has been analyzed only in relation to human rights, because of its importance in stating that freedom of expression includes the right to access public information. However, the facts on this case show that there are many other aspects which are directly related to the institutional frame that the Chilean government has created to promote foreign investment, mainly the CIE. Created during Pinochet's dictatorship through a decree law (No 600), it's the only competent agency to approve, in the name of the State, the incoming foreign capital and to establish the terms and conditions of the investment contracts.

It's conformed by the ministers of the Economy, Finances, Foreign minister, Planning and Cooperation minister, and the President of the Central Bank, the administrative functions are done by its Executive Vice-President. Among its duties, this entity must examine the applications, prepare the relevant documents and studies, collect information, coordinate public organizations related to the project and check out in Chile or abroad the veracity and likelihood of the information given by the investor.

In the case we are considering, it's relevant to point out that the CIE's institutional design, especially the way it's conformed, seems to show the country's commitment to a developing model that places foreign investment as one of its main priorities. However, the actual work is done by its Executive Vice-President and its administrative staff. They are the ones that collect the information provided by the foreign investor, in order to investigate the data submitted and approve the import of capital. During the 90s, this administrative entity adopted the practice of guarantee the foreign investor with a high degree of confidentiality regarding not only the financial information, but also their economic activities abroad and the details of the project in study. As an ex CIE's legal advisor declare at the Interamerican Court, "the significant expansion of many of the productive sectors of the country would not had been possible if the CIE hadn't been cautious with regards to the way it handles technical, financial and economic information related to the foreign investment projects". In other words, ex CIE's officials recognized that confidentiality was justified, because providing information would be contrary to public interest, which is interpreted, ultimately, as the country's economic development (parras. 48, 49).

The analysis of this situation highlights the fact that the foreign investor is allowed to bring in capital even before getting the permits and authorizations of domestic authorities, according to the type of project planned. In the case of projects which have environmental impact, the investor must have a resolution of environmental rating. In this case, of an initial authorization for $ 180 million dollars, $ 33 millions had been imported before there was a resolution of environmental rating. The foreign investors, as this case shows, were authorized to keep their information and the details of the project isolated from the public opinion's eyes. While they were transferring capital nationwide, they were helped by the Executive Vice-President, in charge of carrying out and

facilitate the necessary procedures with the different administrative entities that had to deal with the project. In other words, the foreign investors are 'sponsored' by the CIE, conformed by some of the higher State authorities, whom later have to approve the relevant projects, guaranteeing an important degree of confidentiality even before the administrative procedures which puts the project's details up for discussion with the civil society (in our case, the process of evaluating the environmental impact)

For some academics, the rules of the international regime for foreign investment would not be an obstacle, but a contribution to 'good governance practices', especially regarding the transparency principles and the respect for a due process (Newcombe 2007; Kingsbury and Schill 2009). This way, they say, the international investments regime could contribute to make the State's conduct transparent to the foreign investor, whose legitimate expectations could be assured with public and transparent measures. This argument, though, usually refers to States with a high degree of corruption which damages the competition between the investors. Equally, it doesn't take into account the rights of third parties, as the communities are. In this case, the investment rules were administered by domestic administrative authorities, who guaranteed the investor a high degree of confidentiality, thus illustrating the pattern of conduct in developing countries that compete to attract foreign capital, an issue that challenges the high standards of transparency that international regimes promise. Sometimes, and as it was highlighted by the CIE's officials, the transparency standard may not be the crucial factor to get the most efficient economic result, at least from the point of view of the parties negotiating the investment contract. Despite the increasing demands for more transparency, especially by civil society groups (IISD 2010; Van Harten 2008), transparency can be a pretty uncomfortable standard, both for the recipient State and the foreign investor.

As Jose Alvarez says, "it is not quite clear if those involved in the regime want more transparency" (2010). There is an economic rationality behind this reason: governments may want to give foreign investors a privileged treatment, even when they do not have a positive support in their countries of origin; they may also want to keep the projects away from civil society or the environmental activists that could jeopardize the development of a project.

The doubts about the new standards are present not only at domestic level, but also at international level. States and investors may want to avoid litigations which happen in conflictive contexts, or perhaps they want to keep their conduct away from civil society, especially the NGOs (ONGs) that participate in these processes as *amicus curiae*. The different options available to arbitrate this type of disputes, are a clear example of the varied degrees of confidentiality demanded by these parties; the different arbitration rules that operate under the regime of UNCITRAL, CIADI, the Arbitral Institute of the Chamber of Commerce in Stockholm, and the International Chamber of Commerce, show the different standards of transparency and openness available in the 'market' of resolution procedures in disputes between investors and recipient States (Ortino 2008). Although these rules "have evolved in the context of commercial arbitration, the same dynamics that favor transparency only when the parties in dispute agree (as many of these rules establish) can continue to prevail in some forums alien to the CIADI. Nobody should be surprised if some of these arbitration rules

continue to resist transparency – in order to answer to the needs of those who have created these same rules (Alvarez 2010).

In Claude Reyes case, the Interamerican Court highlighted the value of transparency regarding past and future conduct of the foreign investor in relation to public concerns from civil society that will be affected by a particular project. Surely, the Court was only examining the State's conduct, but it was also indirectly concerned with the foreign investor's conduct, who can be forced by internal law, or by voluntary commitments, to declassify certain information it provides to the CIE even before he asks for the administrative permits (Muchlinski 2006, 535). Here, the foreign investor's duties come from outside the foreign investors' regime, illustrating the lack of 'publicity' and 'openness' of this regime. Other regimes seem to be better informed that, frequently, investments disputes involved third parties that can have direct interest in the case. The Court determined that the duty of declassifying information or opening its books to public scrutiny, may be the first obligation that any investor should comply with when he decides to import foreign capital into Chilean territory. If the standard of treatment that requires from states a 'just and fair' conduct, also demands from officials a transparent conduct, free from ambiguity or uncertainty (Tecmed, parr. 164), this case, indirectly, demands more transparency from private players about data that is of public interest. It is important to remember that, in this case, the citizens concerned by the social and environmental impacts of the project tried to use the domestic courts to obtain the information they wanted. As a last resort, they went to international instances, alleging that their claims had not been considered by the State. This shows us that an investment not only has to deal with the economic interests of the recipient State, but usually with all shorts of interests from the parties directly affected by the projects.

Lastly, it's important to emphasize the need for the companies themselves to make the information available to civil society. One of the most emblematic cases in this context is that of the British Petroleum (BP) company, which made available to public opinion the foreign investment contracts signed with different states in which it operated. Only by doing this it was possible to learn of the existence of stabilization clauses that avoid the evolution of domestic regulations, turning into real 'freezing clauses'. Thanks to BP's attitude, nowadays there are a series of initiatives that seek to commit companies in active transparency processes, which would force them to publish the investment contracts. Likewise, this helps those who are engaged in the investigation and evaluation of the investments protection regime, who have seen their trade hindered by bureaucratic ties from governments and private players (Shemberg 2008). Currently, there is almost no knowledge of the details of investment contracts, legal instruments held in the exercise of public powers. Because this is information of public interest, it's imperative to make available to society the details of the investment projects that are planned to be done in a country. It's true that necessary precautions should be taken to make sure that free competence is not affected by this need, but that doesn't mean to give up on gradually improving the information asymmetry that currently exist among the multinationals and the communities directly affected.

Nowadays, it is necessary to go through a huge effort in order to know about the investment contracts that the Chilean state signs with investors. Also, the CIE doesn't even have the TBIs published in their website. We can hardly be

able to go forward on improving the quality of our dialogue if we just have minimal information. Here there is also a challenge for our governments.

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Design of Public Policies and citizens' participation: The energy sector case in Chile

By Andrés Romero Celedón[4] & Andrea Olea[5]

The development of contemporaneous societies demands a deepening of their democratic systems, particularly, a supplement to representative democratic system, understanding that this implies an increase of the civic activism and an improvement of public management.
From this point of view, we understand that the bigger the civic activism is, the bigger the efficiency of public services and legitimacy of their decisions will be, since programs and projects will not be made or implemented by outside agents, but by their protagonists, incorporating their interests in public issues.
Hence the message on the bill that gave rise to Law 20.500, published early this year in our country: "It is evident that associations play a basic role in many spheres of social and public activity, since they contribute to active exercise of citizens and the strengthening of an advanced democracy, representing public interests before public authorities, watching over transparence and probity of public decisions, and developing a basic and indispensable work regarding design and execution of policies on development, environment, poverty overcoming, human rights promotion, young people, health care, culture, employment and other of the kind". (Message by the Executive; law 20.500 about associations and civic activism in public management).

Regulatory Framework

On June, 2009, in Lisbon, Portugal, the Inter American Charter for Civic Activism in Public Management was approved of, where civic activism is understood as "a process of public policy social construction that, according to common interest of democratic society, channels, gives reply to or enlarges people's economic, social, cultural, political and civil rights, and organizations' and groups' rights that they integrate, as well as communities' and native peoples' rights; and affirms that "Ibero- American states will have to guarantee the civic activism in public management in all sectors and territorial levels".
However, before publication of Law 20.500 on February 16, 2011, the civic activism in public management was not specifically regulated and there was a bigger progress about it in township sector. In effect, the Township Basic Law considered a Community Social and Economic Council (CESCO), Public Hearings, Claim Office and Community Referendums.
As for energy sector, there is no a particular legal regulation including an active civic activism in the management and implementation of public policies. The background in this situation is that the idea of highly "technical" issues is seated, so a citizen can make remarks or claims, ex post, just as a consumer. But today, issues such as energy main composition, real costs of generation, and electric market are issues increasingly interesting for citizens, and as they get attention they will help to bring about any proposal supplementing and improving initiatives related to Energy Policy of our country.

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The only participation forum included in the electric law is contained in law 19.940, in General Law of Electric Services' article 85, which considers a possibility for users and interested institutions, previous registration, to be able to have accessibility to tariff planning study 's data and results, and make their respective questions.
As for a general regulation for the whole civil service, on June 8, 2004, the government sent a message to begin a proceeding that will become the Law 20.500, about associations and civic activism in public management, and whose main objectives are:
1.- Fixing a legal frame being common to all associations no in charge of a special juridical statute;
2.- Encouraging creation of public interest associations;
3.- Establishing a basic regulation for the volunteering work; and
4.- A modification to various legal bodies in order to strengthen the participation of citizens in the public management.
One of the main modifications the above mentioned law states is incorporating a new title about "Civic activism in public management" in Law 18.585, the Constitutional Basic Law for the State Administration General Bases, and therefore applicable to Ministry of Energy and National Energy Commission. In this sense, it states that people are recognized to the right to participate in policies, plans, programs and actions of bodies into the State Administration, which will have to decide formal and specific ways of participation on which people and organizations will count in the context of their jurisdiction. It states that each state's body will have to let publicly know that information considering relevant to its policies, plans, programs, actions and budgets, making sure that it will be well-timed, complete and very accessible. It mandates that the government's bodies give a participative public account to public of their policy, plan, program, action management and their budgetary work, permitting citizens to make their remarks, proposals and consultations. Finally, it says that civil society councils, of consultative order, will have to be set up, and they will be made up in a diverse, representative and pluralist way by members of non-profit associations that will have to do with the respective body jurisdiction.

Implementation of Law 20.500 in the energy sector

The National Energy Commission (CNE).
As a result of the Law 20.500 promulgating, the CNE's executive secretary issues the Exempt Resolution No. 440 on August 8, 2011, National Energy Commission's General Regulation for Civic Activism. Its aim is setting up formal and specific mechanisms of participation, among which stand out:

- Publishing on the institution's web site the information it considers relevant to its policies, plans, programs, actions and budgets.
- The Participative Public Account on management of its policies, plans, programs, actions and on budgetary work. Its publication on institution's web site will have to take place before the end of next year's first quarter mentioned in the Account, fixing a less of 15 straight day period, from consultation period closure, so CNE can give its replies.

- A possibility for the Departmental Manager, through a well-grounded resolution, to count on Processes of Civic Consultation about policies, plans, programs and/or projects it develops.
- Setting up of a National Energy Commission's Civil Society Council that will have a diverse, pluralist and representative composition, made up by non-profit associations that have a relation with CNE jurisdiction and with, at least, a representative of the energy market consumers.

The Ministry of Energy
As far as it is concerned, the Ministry of Energy, through Exempt Resolution No. 463 on August 16, 2011, issues the Ministry of Energy's General Regulation of Civic Activism, whose aim is regulating how civil society's people and organizations will be able to influence on development of policies belonging to ministry sphere and whose mechanisms are:

- Access to relevant information. It is stated that the Ministry will make available to citizens the information it considers relevant to its policies, plans, programs, actions and budgets. The latter, through publication on institution's web site, through direct consulting included in Law 20.285, about Access to Public Information, and through a form for all those consultations not included in the last law above mentioned. (V.gr. suggestions and claims).
- The Participative Public Account. Annually, the higher authority in the Ministry will give, in person, the Public Account. This, in turn, will have to be published on the institution's portal web available to be read and in a video format. After its publication, there will be a period of 15 working days for citizens to make consultations, and a period of 60 days extensible to 10 days for the Ministry to reply.
- Civic consultation. It states that the Ministry, at least once a year, by official letter or upon a petition by one of the parties, will point out issues of civic interest about which public opinion is needed. This mechanism specifically considers a period of "Opening" over which the process will be spread, a period of "Collection", in which the Ministry will have to choose at least two out of proposed issues (including always the budget by the Ministry and that one more repeated over Opening period), and a period of "Consolidation and Reply", in which the issues proposed by citizens are collected and their respective replies are worked out.
- The Civil Society Council. It states that the Ministry will set up these councils, which will have a consultative character and be made up by non-profit associations related to the Ministry jurisdiction.

In addition, over 2010 the Ministry implemented among other mechanisms of civic activism:

- Measurement of fulfillment and assessment of selfgenerating rural electrification system, so it made a survey on townships involved, but results of such a survey are not available on institution's web site, and it

is not mentioned either that in that survey had actively participated citizens, since it is said that to participate is necessary to be a township representative.

- The Energy Efficiency Regional Committees were implemented in six regions of the country in order to encourage capacities in energy efficiency and identify potentials for action development in pursuit of them. Here, entities related to regional government, environmental agencies, representatives of businesses involved in energy sector, and scholars take part regularly. In the institution's web site the information and projects of each one of the committees are available.

Practical implementation and critical analysis

Both agencies in the State Administration, the Ministry of Energy and National Energy Commission, have complied formally with the law 20.500 mandate in order to set up ways of participation on which people and organizations will count in the sphere of each one of their jurisdictions.
Notwithstanding, we understand that the purpose of law was implementing principles of the Inter American Charter of Civic Activism in Public Management, which describe civic activism as "the process of public policy social construction that, according to democratic society general interest, channels, gives a reply or enlarges people's economic, social, cultural, political and civil rights, and organizations' or groups' rights they integrate, just as communities' and native people's rights. From this point of view, the participation model implemented by the Ministry of Energy into the frame of law 20.500 is a model that does not make easy any incidence on decision-making by citizens about issues in electric sector.
Instances raised by the Ministry of Energy understand the civic activism as a quicker access to information, as a complement to that not covered by the law 20.285 (Law of transparence), as the Administration Agencies are mandated to reply to civic consultations, which it cannot be understood as a real civic interference in implementing public policies.
On the other hand, the administration agencies just are obliged to listen to civic proposals, since they are not binding, as are either the Civil Society Councils. Thus, the civic activism, through the law 20.500 mechanisms, will not always influence decision-making, neither in implementing nor assessing public policies.
In addition, the Ministry itself has failed to comply with its own mandate, by setting up an "Advisory Commission for Electric Development", mechanism that is not considered in the Exempt Resolution No. 463/2011 (Ministry of Energy's General Regulation of Civic Activism), whose general objective is "creating a cross-technical instance validated by different sectors of society that brings about recommendations, general outline, a guidance in the long run, that proposes the needed incentives for a national electric system development, in a sustainable, competitive, diversified and reliable way, permitting to attain development and defeat the extreme poverty".
Thus, the Ministry itself has failed to set up a "Civil Society Council" to bring about recommendations for a new model of electric development in Chile, but it

has set up a commission ad hoc far away to model implemented under the terms of the law 20.500. On the contrary, commission design does not reflect civil society, but it includes experts on electric sector, with many of them having been part of the design of current model. None of the commission's expositions or documents is available, to September, 2011, on Ministry of Energy's web site, generating a transparence problem in the discussion of such a commission.

In front of this situation, members of parliament, from government party or opposite party, call to create a "civic-parliamentarian committee for the electric development" made up by scholars, technical experts, non-governmental organizations and members of parliament. Its purpose is generating a space other than to that one considered by the Executive.

Thus, the objectives raised by the law 20.500 are not properly institutionalized in regulations of execution promulgated by the Ministry of Energy, and are not fulfilled either by this entity.

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