

**BUSINESS AND HUMAN RIGHTS
BASELINE STUDY**

CHILE

**KEY FINDINGS AND RECOMMENDATIONS
(Excerpts)**

Judith Schönsteiner, Ph.D.; Fernando Araya, Pablo Soto, Karla Varas

Commissioned and financed by Danish Institute of Human Rights

March 2016

INTRODUCTION	4
1. INTERNATIONAL LAW AND STANDARDS	5
2. CONSTITUTIONAL AND LEGAL RECOGNITION AND THE DUTY TO PROTECT	5
2.1 The Constitution	6
2.2 Non-Discrimination	7
2.3 Labour Law	8
Access to Work	8
Equal Pay	9
Regulation of Contaminant Levels	11
Environmental Policy	11
Spatial Planning	11
Cleaner Production Agreements	11
2.6 Corporate and Business Law and Financial Crime	13
Commerce and Supply Chain	14
Corporate Criminal Law	15
3. BUSINESS AND HUMAN RIGHTS POLICIES AND INITIATIVES	16
3.1 Policy Coordination	16
3.2 Sector Analysis	17
3.2.1 Mining and Energy	17
3.3 Sector Regulation and Protection Gaps	19
3.3.1 Mining and Energy	19
4. PRIVATISED PUBLIC SERVICES: HEALTH, PENSIONS, EDUCATION	21
4.1 Health	21
4.3 Pensions	24
5. SPECIFIC SCHEMES	25
5.1 Foreign Investment, Government Contracting, Economic Agreements	25
Transpacific Partnership (TPP)	26
5.2 Extraterritoriality	27
5.4 State-Owned Enterprises, Bidding and Public Procurement	28
5.4.1 State-Owned Enterprises	28
5.4.2 Bidding and Development Funds	30
5.4.3 Public Procurement	30
5.5 Free, Prior and Informed Consultation (FPIC)	31
5.6 Management and Prevention of Social Conflict: Conditions in Araucanía	32
6. ACCESS TO JUSTICE	36
6.3 Legal and Social Barriers	37
6.4 Alternative Conflict Resolution Mechanisms and Legal Culture	37

7. GENERAL FINDINGS AND RESEARCH NEEDS

38

Introduction

The UN has recognised for some time that corporations are to prevent, mitigate and remediate their human rights impacts, and that States have an equal obligation to protect these rights from corporate infringement. The UN Guiding Principles on Business and Human Rights (UNGPs), adopted in 2011, outline how states and businesses are to implement these rights: Pillar I (States) concerns the duty to protect; pillar II (corporate) concerns the duty to uphold and act diligently, and pillar III (shared) concerns access to justice and remediation.¹ Pillars I and III outline the regulator's obligations regarding the economic and justice systems and state enterprises, under human rights instruments ratified by each State.

This report describes key findings of the first Latin American Baseline on Business and Human Rights, and makes recommendations.² The Baseline is available from the web site of the Diego Portales University Centre for Human Rights.³ To determine compliance, standard international human rights law methodology was used, i.e., data on regulations, policies, good practices and initiatives were assessed against UNGP pillars I and III and the relevant instruments and authoritative interpretations of monitoring bodies (i.e., Inter-American Court and Commission of Human Rights, UN treaty bodies and the International Labour Organisation).

To ensure intersubjective replicability later on in Chile to measure progress, or in other countries to elaborate their own baseline, we constructed this baseline on a blueprint developed by the Danish Institute of Human Rights and ICAR, the International Corporate Accountability Roundtable. In addition, we used two blueprints the UDP Centre for Human Rights developed in-house to identify “all human rights recognised by [Chile]”, as required under UNGP pillar I. The criteria overlap helped identify Chile’s actual obligations, which often depend on the ratification status of human rights instruments (i.e., UN, OAS, ILO) and the applicable case law.⁴ These blueprints, also available from our web site, helped determine concrete cases of noncompliance under international law.

This report addresses the reception of international human rights law in Chile; constitutional, labour, environmental, and corporate law, as well as spatial planning; policy coordination and sectorial policies; privatized services; specific regimes such as extraterritoriality; economic and commercial treaties; state-owned enterprises; bidding and

¹ Human Rights Council, Guiding Principles on Business and Human Rights, A/HRC/17/31. The UNGP were endorsed in HRC resolution 17/4 of 16 June 2011.

² Although the text is a translation, it is not equivalent to the Spanish report, as very municipal issues, which are less relevant outside Chile, have been omitted, and signalled by (...). I am indebted to Patricio Mason for the translation. All mistakes or omissions, regarding content and language, are obviously my own.

³ See www.derechoshumanos.udp.cl.

⁴ International human rights law was interpreted under Arts. 31 and 32 of the Vienna Convention on the Law of Agreements, Art. 29 of the American Convention on Human Rights and similar provisions in other instruments, the evolutive approach, and the pro persona principle, as applicable.

Authoritative interpretations by treaty bodies are deemed part of the jurisprudence; authentic interpretation refers to, for example, interpretation of a standard by all States Party to the resolutions of the UN or OAS general assemblies and is also taken into account.

public procurement; free, prior and informed consultation (FPIC); the social conflict in the Araucanía region; and finally access to justice.

1. International Law and Standards

This Baseline Study reviews empirical business and human rights data in light of the international standards Chile recognises. Findings of State performance under UNGP I are based on the applicable human rights instruments, relevant authoritative interpretations by monitoring bodies (e.g., the Inter-American Court and Commission of Human Rights, the United Nations, the International Labour Organization), and the human rights declarations endorsed by Chile. Ratification status can be reviewed at the UN, ILO and OAS web sites.⁵

Counter to Chile's overall trend in this domain, the study found significant non-compliance with court decisions and settlements,⁶ notably failure to implement the 2014 decision of the Inter-American Court of Human Rights in the Norín Catrimán case, and more seriously, an IACHR-brokered amicable settlement in the Ralco case dating back to 2004. Other pending

matters include constitutional recognition of indigenous peoples and full implementation of ILO Convention 169 (progress made in 2013 was overshadowed by major free, prior and informed consent (FPIC) gaps,⁷ especially as regards resource and land rights).

Concerning Ralco, a major new project was approved in the area despite an undertaking in the above amicable settlement to prevent further hydroelectric development.⁸

Recommendations:

- Comply with all outstanding Inter-American Court of Human Rights decisions and the friendly settlements and recommendations on investment, discrimination, and indigenous issues issued by the IACHR, UN treaty organs and the UPR mechanism.

2. Constitutional and Legal Recognition and the Duty to Protect

In several areas identified by international human rights bodies, Chile is not complying in full or at all with its obligation to regulate business and wide constitutional, legislative and regulatory gaps still remain. Shown below are relevant cases and recommendations intended to encourage public and parliamentary debate with a view to adopting laws and policies that advance both rights implementation and the UNGP.

⁵ For the international blueprints linking Convention standards and monitoring body interpretation, see UDP Centre for Human Rights, available at www.derechoshumanos.udp.cl/derechoshumanos/index.php/quienes-somos#estudio-linea-base.

⁶ Judith Schönsteiner and Javier Couso, "La implementación de las decisiones de los órganos del Sistema Interamericano de Derechos Humanos en Chile: Ensayo de un balance", *Revista de Derecho de la Universidad del Norte*, Vol. 22, No. 2, 2015, pp. 315-355.

⁷ For a review of related Supreme Court jurisprudence, see Nancy Yáñez, "Análisis de la jurisprudencia de los tribunales superiores de justicia respecto a la protección de derechos indígenas en el Sistema de Evaluación de Impacto Ambiental", en DESC, *Informes Académicos*, 27 February 2015.

⁸ The Angostura hydroelectric project. Schönsteiner and Couso, *op. cit.*

2.1 The Constitution

The Chilean Constitution enshrines an economic paradigm which underregulates business and overregulates labour. In a legal system which does not use precedent, where the various branches of government have yet to take full responsibility for human rights (Art. 5.2 of the Constitution),⁹ legislative shortcomings increase the risk of infringement by private actors and, with courts that rule on a case-by-case basis, may lead to investor and business uncertainty.¹⁰

The Constitution (Art. 6.2) is explicit about the horizontal effect of fundamental rights, yet does not adequately define or entrench them. As a result, human rights in business contexts are not always respected or protected. Art. 19 lists fundamental rights, yet most economic, social and cultural rights are not properly safeguarded or defined. The rights to water, housing, education, form labour unions or strike, for example, are not mentioned in the Constitution and cannot be effectively invoked in full (as defined under international human rights law) by discrimination or property right claims, or other alternative means, as is done for example with some right to health claims.

Moreover, although requests for injunctive relief over fundamental rights do not require a lawyer, claimants who can afford counsel tend to be more successful, especially on appeal.¹¹ Lower costs do not remove the hurdles to accessing justice on fundamental rights.

And while the Constitution protects private property rights, the legal system tends to favour claimants represented by counsel, in practice leaving the majority unprotected. This is tantamount to indirect discrimination, in a country that already exhibits extreme income inequality.

In addition, the Constitution has no general provision on discrimination or the prohibited categories recognised in international law. A general equality provision exists but lacks the required guarantees on direct, indirect and structural discrimination.¹² Also lacking is recognition of indigenous peoples and protection of the rights enshrined in ILO Convention 169 and interpreted in the 2007 UN Declaration on the Rights of Indigenous Peoples. These features, owed to the doctrine of a weak state, but operating in a very imperfect market dominated by monopolies, make it difficult for business to know exactly how they should respect human rights, as they do not encounter sufficient legislation or court decisions to guide them.

Recommendations:

- Provide explicit constitutional recognition of economic, social and cultural rights, including the right to strike, per international standards, and the right to effective

⁹See literature in Judith Schönsteiner, “El derecho internacional de los derechos humanos en el Tribunal Constitucional chileno: El mínimo común denominador”, *Revista de Derecho* (Valdivia), Vol. 29, No.1, 2016, forthcoming.

¹⁰See a summary in Luis Cordero, “Corte Suprema y Medio Ambiente. ¿Por qué la Corte está revolucionando la regulación ambiental?”, in Javier Couso, ed., *Anuario de Derecho Público*, Santiago, Ediciones UDP, 2012.

¹¹ INDH Report 2012 or 2013; chapter on injunctive relief and free access motions. In an interview, Justice Ministry officials confirmed that technical admissibility issues preclude filing without legal assistance.

¹² For a summary of the scope of discrimination prohibitions in international law, see ESCR Committee, General Comment 20.

collective bargaining as defined in international human rights law, including access to justice guarantees.

- To effectively protect against discrimination prohibited under international law, introduce a general clause noting positive obligations and recognising all discrimination prohibited under international law, including on other social grounds.
- Enable the Human Rights Institute (INDH) or a similar, autonomous organ, to provide free legal assistance in injunctive relief cases on business and human rights, if they involve complex arguments and evidence. In the interim, require the Legal Aid Service's (CAJ) Human Rights and Labour Defence Offices to represent victims of human rights infringements in business contexts.
- During any constituent process, ensure recognition of human rights ratified by Chile and emphasise a political and economic paradigm that guarantees respect and protection of human rights. According to the Baseline results, this necessitates further regulation of public and private economic activities, including property issues.

2.2 Non-Discrimination

Discrimination is one of the main features of human rights violations in Chile. Structural discrimination is mirrored in legislation and even the Constitution, and legal initiatives, like Law 20.169, have not generated structural change, as proactive and policy measures have not been included in the law with sufficient clarity and efficacy. Furthermore, the law was adopted without teeth, that is, without an implementation mechanism or a type of equality commission. The INDH has only limited faculties with regard to discrimination.¹³ The area of law which exhibits best legislation and institutionality with regard to discrimination, is labour law. (...)

The main grounds for discrimination of business and human rights concern, are socio-economic origin; indigenous ethnicity; previous incarceration; migrant status and disability. Furthermore, gender is a persisting and structural reason for discrimination, both for women and for transgender people (see section 2.3). (...)

As to socio-economic grounds of discrimination, the minimum wage is determined at a level that is not sufficient for basic food, transport, and housing, diminishes the access to health and especially, education; and is replicated in very poor pensions (see section 4.3). Furthermore, there is a very strong debt rate with retail and warehouses, through loans or credits that can be obtained without mayor income guarantees that would be usually required by banks, and therefore charge interest rates of up to 40%, and until recently, were even able to unilaterally restructure loans and payback schemes without considering consumer rights, the interest of their clients, and without providing information at the

¹³ See for an analysis of these issues, Alberto Coddou, Judith Schönsteiner and Tomás Vial, "Ley Antidiscriminación: Avances e insuficiencias en la protección de la igualdad y la no discriminación en Chile", in: Tomás Vial, ed., *Informe anual sobre derechos humanos en Chile*, Santiago, Ediciones Universidad Diego Portales, 2013, pp. 297-298.

moment of offering the credit or later. Regulation against major abuses in the credit card sector has been very recent and is still deficient.¹⁴

Recommendation (besides the ones regarding labour law, see section 2.3)

- Create a non-discrimination institutionality, in the form of an equality commission or enhancing the faculties of the INDH, which can effectively design and implement policies against discrimination in the labour market, and in privatised services.
- Define non-discrimination, including by private actors, as one of the priorities of the new Deputy Ministry of Human Rights.

2.3 Labour Law

Fundamental labour rights enjoy relatively solid protection, including effective oversight and judicial institutions that become competent once an individual is employed (but see work-related discrimination below). Yet, further to wage gaps and discrimination in access to work, two major issues persist: Respect and protection of labour rights, notably the rights to strike and to form labour unions, as well as a poor occupational safety and health record, especially in the systematically neglected informal sector.(...)

Access to Work

According to the ICESCR and the ESCR Committee's authoritative interpretation of ICESCR Art. 6, the right to work refers to the right to "live in dignity".¹⁵ But generally low wages¹⁶ and precarious jobs prevent fulfilment of this right. In Chile, 33% of the gainfully employed earn less than US\$318 a month, 53.5% (accumulated) less than US\$455, and 79% (accumulated) less than US\$760.¹⁷ The minimum wage is currently at 250.000\$ (March 2016); this is not enough to cover minimum expenses of housing, food and transport.¹⁸

The comprehensive unemployment rate stands at 10.75%,¹⁹ nearly double the jobless rate (6.06% in Q4 2015, according to the Social Development Ministry; 5.8% according to the National Statistics Institute). Underemployment is an estimated 50.6%.²⁰ About 68.5% of jobs added over the past five years were precarious in nature, often under subcontractor or outside worker conditions.²¹ Only 53.7% of private-sector jobs fall under the Labour Code,

¹⁴ Servicio Nacional del Consumidor (Sernac), "Ranking del retail segundo semestre 2014: Ministerio de Economía y Sernac presentaron radiografía del comportamiento de los proveedores de tarjetas de crédito no bancarias", 13 July 2015, www.sernac.cl.

¹⁵ ESCR Committee, General Comment 18, ¶ 1.

¹⁶ Fundación Sol, Los verdaderos sueldos de Chile, 2015, see summary at www.24horas.cl/economia/cuales-son-los-verdaderos-sueldos-en-chile-1568841. Figures based on the INE New Complementary Survey of Wages (January 2015).

¹⁷ Dollar amounts based on exchange rate as of 31 December 2015.

¹⁸ See for example, Fundación Sol, Radiografía al Salario Mínimo, 2015, available at <http://www.fundacionsol.cl/2015/07/radiografia-al-salario-minimo-mas-de-un-millon-de-chilenos-recibe-esta-remuneracion-o-menos/>.

¹⁹ The comprehensive unemployment rate factors in open and hidden unemployment, underemployment, and the difference between the economically active population and the number of individuals who have dropped out of the job market. See Fundación Sol, IMCE, 31 Dec. 2015, available at www.fundacionsol.cl.

²⁰ Fundación Sol, IMCE, p. 7.

²¹ Fundación Sol, IMCE, p. 6.

“and only 57.6% [of these] involve open-ended contracts carrying health, social security and unemployment benefits.”²²

Contrary to ILO Convention 111, non-discrimination in recruitment and hiring is not guaranteed. No specific regulations protect against discrimination based on union membership, gender, indigenous status, disability, social background, surname, place of residence, prior incarceration or other prohibited grounds. Labour Code article 485(2) on injunctive relief of fundamental rights allows none of these grounds,²³ which infringes both the right to work and discrimination prohibitions. There are no access to justice or systematic measures addressing these instances of direct and indirect discrimination.²⁴

Equal Pay

In general, with few exceptions, work in Chile is undervalued:²⁵ the minimum wage does not allow a worker and his or her family to enjoy other human rights, especially, ESCR and access to justice. While there are a lot of jobs in precarious conditions, the access to better work conditions is furthermore biased or discriminatory. Thus, the wage gap between men and women is up to 40%, despite legislation which enshrines the principle of equal pay (Art. 62bis of the Labour Code). The definition of "equal pay", however, does not live up to ILO standards, which would require that work that is of distinct nature, but equal value, should be paid the same (CEACR, 2014).

There is also a very important wage gap between indigenous and non-indigenous workers. "A worker who does not belong to an indigenous people, will receive 43,4% more than an indigenous worker (gross wage gap)."²⁶ Even is "we compare two workers who are working the same quantity of hours a week, have the same labour experience, the same schooling, work in a company of the same size, in the same region, and share profession or area of work, a non-indigenous person still earns between 29,8% and 35,4% more. Among men, the gap is between 38% and 49,1%."²⁷ (...) The average monthly income of seasonal farm workers in agriculture is 214.000\$; women are paid less (50% of women and 57% of men in situation of poverty work without contract). (...)

Recommendations:

Collective Rights

²² Fundación Sol, IMCE, p. 7.

²³ No current data on access could be located. The public sector carries data on wage differentials, but not on access. About this, see the interesting report by Bravo, Sanhueza, Urzúa, *An Experimental Study of Labor Market Discrimination: Gender, Social Class and Neighborhood in Chile*, Inter-American Development Bank, *Research Network Working Paper #R-541*, 2008. As to pay, in 2004 socioeconomic variables were three times more decisive than appearance and twice as decisive as gender. See Núñez and Gutiérrez, *Classism, Discrimination and Meritocracy in the Labor Market: The Case of Chile*, Universidad de Chile, 2004.

²⁴ Indirect discrimination happens when, for example, excessively stringent requirements shut out socio-economically disadvantaged job seekers, who tend to have less formal education.

²⁵ Fundación Sol, IMCE.

²⁶ Gonzalo Durán and Marco Kremerman, "Despojo salarial y pueblos originarios", Santiago, Fundación Sol, diciembre de 2015, available at <http://www.fundacionsol.cl/wp-content/uploads/2015/12/Despojo-salarial-y-Pueblos-Originarios-Diciembre-2015.pdf>.

²⁷ Ibid.

- Align the labour strike regime and union rights with ILO standards.²⁸

Occupational Safety and Health (OSH)

- Ratify ILO Conventions 176 and 184 and enact mining safety legislation, especially an occupational safety and health system compatible with international standards and comprising effective oversight mechanisms, incentives and support for SMEs.
- Enact adequate mining safety legislation, not only for workers, but also for communities.
- Hold companies using outsourced services responsible for the full range of OSH, not just protective equipment.

Equal Pay

- Enact effective equal pay legislation and incentives benefitting women, indigenous workers and persons with disabilities.
- Recognise the value of work by increasing the minimum wage and pay levels in general; adopt measures to lower the cost of suing for alleged violations of rights involving basic needs.

Access to Work

- Put in place effective guarantees preventing discrimination in hiring. Adopt measures, including anonymous applications, to reduce discrimination on socio-economic grounds (social grounds like residence, family background, surnames) and other prohibited grounds.
- Introduce a temporary quota systems for historically discriminated groups.
- Adopt and strengthen initiatives promoting formal employment.

Seasonal Farm Workers

- Legislate formal employment and minimum wage guarantees as well as mandatory agricultural chemical labelling, information, protection, and training. Guarantee labour, safety and health rights and increase oversight authority and effectiveness.

2.4 Environmental Law

While a specialised environmental justice system has recently emerged in Chile, the strides made stand in contrast within effective oversight and a dearth of substantive regulation. In view of the range of voluntary tools the State could advance, there is considerable room to further the rights to a clean environment (Constitution Art. 19.8 and ACHR Art. 29.a), health (ICESCR Art. 14 and General Comment 12), and housing (UDHR Art. 25.1, ICESCR Art. 11 and General Comments 4 and 7), all relative to the prohibition of discrimination (ACHR Art. 1.1, ICESCR General Comment 20, Inter-American Court decisions, especially the Norín and Atala cases), and the right to participate.

²⁸See Karla Varas and César Toledo, La huelga: un derecho fundamental, in Tomás Vial (ed.), *Informe Anual sobre Derechos Humanos en Chile*, Santiago, Ediciones UDP 2013, pp. 63-108.

Regulation of Contaminant Levels

Maximum contaminant levels are fixed above WHO levels for air and water; there are no standards for soil pollution. (...)

Environmental Policy

Chile has recently created a new environmental institutionality, with three environmental tribunals; a Ministry of the Environment and an environmental oversight organ, the Superintendency of the Environment. These institutions, however, have not yet adopted policies on resource restraint; effective recycling or biodiversity (the latter is under consideration). The environmental tribunals are considered by some as more preoccupied with polluters' procedural rights than with the environment; also, lack and allegedly lack of will of coordination among oversight organs weakens the possibilities of the environmental oversight organ to effectively scrutinise and sanction private actor violations of the right to a clean environment.

Spatial Planning

Although spatial planning can severely impair enjoyment of human rights, business developments are often authorised without adequate coordination, notably as to proximity to occupied or green spaces and environmental impact mitigation. The lack of an environmental justice perspective²⁹ (e.g., prevention of contaminant overload in industrial areas, and creation of sacrifice zone) and of spatial planning across key industries (i.e., energy, mining, agriculture³⁰) deprives Chile of the tools needed to ensure growth that is both sustainable and compatible with human rights. Indeed, "...the absence of spatial planning effectively allows project emplacement without regard for prior or prospective activities, thus driving up environmental loads".³¹ Local bylaws are limited in scope and are not able to substitute for nationwide spatial planning policy.

The Energy Ministry, which has made significant progress in engaging with communities, was asked about voluntary spatial planning initiatives for energy companies. None exist.³²

Cleaner Production Agreements

Among voluntary good practices and non-binding State initiatives in business and human rights matters, Cleaner Production Agreements (CPAs) and other initiatives of the Council of Cleaner Production constitute a step in the correct direction, although these measures do

²⁹ Dominique Hervé, "Noción y elementos de la justicia ambiental: Directrices para su aplicación en la planificación territorial y en la evaluación ambiental estratégica", *Revista de Derecho (Valdivia)*, Vol. 28, No.1, 2010, pp. 9-36, and Dominique Hervé and Judith Schönsteiner, "Empresas, medio ambiente y derechos humanos: La zona industrial de Quintero-Puchuncaví", in Alberto Coddou, ed., *Informe Anual sobre Derechos Humanos en Chile*, Santiago, Ediciones UDP, 2012.

³⁰ As confirmed in writing by Claudia Carbonell, Director, ODEPA, Ministry of Agriculture, January 2016.

³¹ José Quidel Gajardo, member of the Engagement and Dialogue Unit, Ministry of Energy, November 2015.

³² *Ibid.*

not yet encompass a human rights approach, nor a clear commitment with compliance of those agreements.

Thus, CPAs traditionally have not included human rights or social issues; the Council of Cleaner Production is "opening a door" for institutionalization.³³ A pilot program on Pre-investment Agreements (PIAs) does neither include specific criteria on human rights, but a general reference to the Universal Declaration on Human Rights. In this sense, the Council does not yet take advantage of the capacity of orienting prioritization in agreements, nor is the implementation of agreements guaranteed in such a way as should be expected with regard to agreements that are negotiated under supervision by and with encouragement by the State. Also, there are no criteria for unification or standardization of human rights language in IBAs, PIA, or CPAs. This could bring about problems of coordination, oversight, but more importantly, lack of clarity and digressions of a minimum standard in human rights matters, as not yet all human rights issues are regulated by law.

Furthermore, the coordination of oversight and promotion of CPAs has not been always easy. Especially, it would not be clear which organ would have competence in case a CPA contained a plan of environmental, labour or human rights compliance. (...)

Additionally, there is preoccupation that business could try to influence future regulation through signature of CAPs, indicating that in order to reduce transaction costs and insecurity, the State should regulate in the way they had agreed upon previously.³⁴ Actually, this allegedly happened in the fisheries sector.³⁵ While this kind of undue influence may not occur, CAPs could indicate which types of measures do work out; it could also be used to formalize certain informal sectors like the sale of firewood by small and micro-enterprises.³⁶ Such kind of problems could be avoided if the Council adopted guidelines on human rights issues that each CAP or PIA would have to include. This would not make the agreements obligatory, but would add an obligatory test if parties decided to enter into the negotiation of these private instruments, just as the compliance oversight mechanism by the Council is obligatory.

Recommendations

Environmental Policy

- Coordinate Superintendents' Offices and other oversight bodies; increase funding for the Superintendent of the Environment; train communities to leverage the environmental justice system, and emphasise reporting and oversight with a human rights perspective.

³³ Juan Ladrón de Guevara, Executive Director of the National Council of Cleaner Production, August 2015.

³⁴ La disposición de las empresas a entrar en acuerdos voluntarios se reduce si hay cambios de normativa pendientes; en ese sentido, por ejemplo, la futura Ley de Responsabilidad Extendida del Productor o el atraso en decisiones administrativas o judiciales sobre ciertos proyectos, son factores de incertidumbre en la medida que no se decida de manera rápida y clara, ya que las empresas usualmente buscan adelantar el cumplimiento con una futura norma mediante el APL, y quieren evitar que hagan inversiones en medidas ambientales o sociales que podrían posteriormente ser declarados ilegales o insuficientes.

³⁵ Juan Ladrón de Guevara, Executive Director of the National Council of Cleaner Production, August 2015.

³⁶ Id.

- Propose solutions for environmental damage falling outside the statute of limitations (i.e., who will pay for clean-up).
- Develop policy based on the human rights perspective known in legal doctrine as environmental justice.

Spatial Planning

- Build a human rights and environmental justice approach into city plans and other planning instruments and policies. Require Regional Ministerial Secretariats to interpret spatial planning instruments from a human rights perspective.
- Mainstream a human rights approach across territorial planning instruments. Legislate impact reductions, including restricting industry expansion in overburdened areas if required to effectively protect human rights.

Cleaner Production and Voluntary Pre-investment Agreements (CPA &VPA)

- Require the Cleaner Production Council to promote and encourage due diligence in human rights in all CPA and VPA.
- Require the Council to reject CPA or VPA failing to guarantee basic human rights.
- Foster, and ideally guarantee, community engagement and free, prior and informed consultation in CPA and VPA review, ensuring communities entering an agreement do so on an equal information footing and renounce no rights.
- Ensure that all agreement processes abide by the criteria in UNGP 31.
- Ensure coordination and delimitation of competences between participation of oversight organs in the negotiation of and advice with regard to (voluntary) CPAs, PIAs, and their oversight role itself.

2.5 Land rights and administration of property (...)

2.6 Corporate and Business Law and Financial Crime

The law does not encourage or require corporations to report sustainability or social responsibility practices and policies, except when infringement affects corporate results. Significantly, recent scandals involving Chilean companies came to light only because they trade in foreign markets that conducted investigations.³⁷ Corporations should be required to disclose any such information in their annual reports and as "material facts", defined in Art. 9 of the Securities Act as information that "a reasonable man would consider important to his investment decisions". A comparative review shows related Chilean legislation to be less than effective. In the storied SQM case, for example, SQM acknowledged the amounts involved but did not immediately report this as a material fact, an omission for which SQM board members were fined by the Superintendent of Securities and Insurance (SVS).³⁸

³⁷See investor.empresascopec.cl/wp-content/uploads/2014/01/file_42_arauco_20f_2012.pdf and www.svs.cl/institucional/mercados/entidad.php?mercado=V&rut=93458000&grupo=&tipoentidad=RVEMI&row=AABbBQABwAAAA5TAAX&vig=VI&control=svs&pestanias=32 (2013 Annual Report).

³⁸See SVS, "SVS sanciona a directores de SQM S.A.", 30 September 2015, www.svs.cl.

While legislative shortcomings are partly offset by the regulatory authority in SVS General Regulations 385 and 386 on gender parity in enterprises, and on social responsibility and sustainability, the logic therein has more to do with providing investors with business and financial information than with a rights-based policy approach. Chilean enterprises are not required to disclose past or current contractual links with companies that may have or are infringing human rights, nor are auditors and other examiners required to report the human rights violations they may come across in the performance of their duties.

Recommendations:

- Legally require enterprises subject to SVS oversight to disclose relevant business and human rights information irrespective of impact on financial results, including knowledge of public information on non-compliance by enterprises with which they have a relevant contractual relationship;
- Require external auditors to report human rights infringements they may become aware of in the performance of their duties.

Commerce and Supply Chain

Save for general provisions, the supply chain is generally unregulated, leading to a lack of transparency on domestic standard compliance and foreign primary goods and products, and to a failure to leverage the trickle-down effects of demand. No evidence of policies encouraging respect for human rights in the supply chain was found besides 1st tier control in Codelco, and mostly voluntary 1st tier control in public procurement; other than discrete initiatives by CORFO and SERCOTEC, sustainable products or fair trade are not promoted. Food quality regulations do not adequately protect health rights, and food and nutrition labelling does not effectively disclose potentially harmful substances. There is no human rights impact assessment of genetically modified products; labelling, production and trade are unregulated and wholly non-transparent. Although GM products should be treated under the principle of precaution for their potential health impact, the latter is not contained in the legislation. Lastly, proposed regulations on GM seeds (that would implement UPOV-91) would violate indigenous, peasant, and consumer rights.³⁹

On sustainable commerce, the Santiago Stock Exchange sustainability indicator is long overdue, but public interest groups do not appear to have been consulted over its construction. On investment, no sustainability criteria or standards exist and the government does not encourage banks or other project funders to require social, sustainability, or human rights risk reductions.

Recommendations:

- Require government oversight of the supply chain in order to identify potential human rights infringements.

³⁹ Mewes, op. cit.

- Intellectual and industrial property regulations should limit the scope of product registration and protection in order to guarantee indigenous peoples, peasants and consumers can freely use and trade in natural or ancestral products.
- Require disclosure of GM products and ingredients and potentially harmful substances in consumer products. Introduce a mandatory labelling system reporting potential hazards, chemical content, organic and child labour-free products, etc.
- Ahead of mandatory compliance, introduce voluntary disclosure incentives in the chain of supply, starting with potentially harmful products, child and forced labour, and environmental impact of production.

Corporate Criminal Law

Financial crime remains under-regulated. While there is consensus about preventing collusion,⁴⁰ experts disagree as to whether an exclusively administrative system would be best. Many agree that the substantial number of collusion cases recently uncovered reflect the effectiveness of the Free Competition Tribunal, but remain critical of the treatment of financial vs. common crime.⁴¹

Chilean law does not hold corporations liable for a range of crimes relevant in business and human rights contexts, including collusion, tax fraud, environmental damage,⁴² and complicity in the reckless conduct of chief executives or governing boards.

Recommendations:

- Penalise collusion, especially in connection with staple consumer products.
- Expand the roster of crimes for which corporations can be criminally prosecuted, or increase the efficiency of administrative sanctions.
- Revise the Criminal Code to balance penalties for common and white-collar crime.
- Penalise serious environmental damage as a strict liability crime.

2.7 Tax law

2.8 Whistleblowing mechanisms

2.9 Access to Public Information

⁴⁰See debate in the press, e.g., Elmostrador.cl, “Colusión, regulación y normativa vigente”, 13 January 2016.

⁴¹ Alejandra Mera, “Política criminal y derechos humanos”, in Alberto Coddou, op. cit.; a view echoed by Office of the Public Prosecutor officials, see Emol.com, “Fiscal Nacional: Hay que endurecer las penas por delitos de económicos (sic) y de corrupción”, 18 December 2014 and CiperChile.cl, “Inmovilismo de Impuestos Internos en caso SQM provoca dura protesta de funcionarios”, 31 July 2015.

⁴²Juan Ignacio Piña Rochefort, chairman, State Defence Council, January 2016.

2.10 Consumer Law

2.11 Corruption⁴³

3. Business and Human Rights Policies and Initiatives

3.1 Policy Coordination

Poor coordination among government agencies and ministries is a widespread, long-standing issue with a direct impact on business and human rights. Several government agencies reported that a major hurdle to a National Action Plan in Business and Human Rights (NAP) concern that coordination might limit their authority and prerogatives. Of special note were coordination issues between the Superintendents of the environment and health and overlaps between the Superintendent of Social Security, the Labour Inspectorate and the Superintendent of Health. Coordination issues impacting policy and initiatives, which are only recently being addressed, are reflected in the lack of cross-cutting business and human rights guidelines. The absence of an overarching human rights policy or approach or a national human rights plan means that there is no basic structure into which business and human rights issues can be integrated. Such a plan will be designed once the Deputy Ministry of Human Rights becomes operative in late 2016.

No explicit congressional or presidential commitment to these issues exists, which weakens ministerial coordination. Some ministries, in fact, do not even sit in the Inter-ministerial Working Group designing a Business and Human Rights National Action Plan (NAP). The Foreign Ministry's Human Rights Directorate can promote a NAP but "can't force anyone".⁴⁴ Commendable as it may be, it would a matter for concern if commitment to these issues were dependent on the enthusiasm of individual officials.

It is also unclear if the State has set aside sufficient funds to submit a NAP to public consultation, including the free, prior and informed consultation of indigenous peoples required under international law.

Additionally, no public ombudsman advocates on behalf of communities and individuals whose human rights are infringed by business (and if pending reforms are passed, the National Consumer Protection Service (SERNAC) would cease to act in that capacity too).⁴⁵ An arm's-length human rights institution ought to be tasked with this duty in order to offset the inequality of arms among players.

Recommendations:

⁴³ All these areas can be found in the Spanish version of the report.

⁴⁴ Human Rights Director, Ministry of Foreign Affairs, October 2015.

⁴⁵ See, for example, Ricardo Lillo, "Proyecto de fortalecimiento de los derechos del consumidor, comentarios desde el acceso a la justicia", Academia de Derecho y Consumidor (ADECO), Boletín No.6, July 2015. For other critiques of SERNAC reform, see LyD, Susana Jiménez, SERNAC: ¿En qué estamos?, available at lyd.org/centro-de-prensa/noticias/2015/06/sernac-en-que-estamos/.

- Coordinate policy development with legal departments at key ministries and government agencies.
- Fully fund the public consultation process required under international standards, including the free, prior and informed consultation of indigenous peoples.
- Through regulation or guidelines, introduce cross-cutting standards across the economy. These should be consistent with the UNGP, equal or exceed domestic and international industry standards, and meet the human rights and due diligence obligations of the State of Chile.
- Secure presidential support for the NAP and involve key government ministries, notably Interior, Public Works, Agriculture and Finance. To advance the NPA, strengthen political support for the Social Responsibility Council for Sustainable Development and similar bodies.
- Coordinate the Business and Human Rights NAP with the Deputy Ministry of Human Rights which will the Human Rights Plan of Action.
- Propose concrete annual measures to all stakeholders, including (a) Regulation of spatial planning and oversight; (b) Incentives, particularly in public procurement; (c) Promotion, especially in the export, energy and mining sectors, which tend to be more aware of these issues; and (d) business and industry self-regulation under ISO and GRI standards. Report measures and progress in an accessible format.
- Require Congress to conduct a conventionality review of any proposed legislation and regulatory motions under Art. 5.2 of the Constitution, and the respective international human rights standards, and publish its reports.
- Enable the INDH to represent individuals and communities in order to offset inequality of arms in dealing with businesses or development projects. Coordinate with CONADI, CAJ, and other agencies providing specific support.
- Expanding on this Baseline, the INDH should report on concrete access to justice measures for individuals whose human rights are affected by business.

3.2 Sector Analysis

No sector-wide policy about or using a business and human rights perspective exists, although some sectors have specific initiatives in place.⁴⁶ These are listed and eventually discussed below.

3.2.1 Mining and Energy

- The Ministry of Mines has a Gender Unit promoting women's equality and involvement across operations and production. The Ministry also helps empower communities through tools designed to level the playing field with mining

⁴⁶While other ministries or industries may have additional initiatives in place, these were not reported to us.

companies.⁴⁷ In addition, *Valor Minero*, a public-private sector partnership, is working on community dialogue protocols.

- The Ministry of Mines also has a new Communities Unit whose “biggest challenge” is “to provide communities with the tools and soft and hard skills they needed to hold their own with mining project representatives”.⁴⁸
- The Ministry’s training and technology transfer programme for subsistence miners (PAMMA) provides safety training and encourages a gender perspective.
- A special mining tax⁴⁹ was introduced in 2005 to support innovation and scientific research. If spending decisions were made from a human rights perspective, this tax revenue could indirectly help strengthen enjoyment of human rights, but we do not know for a fact that these funds are actually being spent as required under the enabling legislation.

The Ministry of Mines is also advancing a number of initiatives designed to further environmental sustainability across the industry. These initiatives, which do not question the underlying economic paradigm or its long-term sustainability, include:

- New smelter emission standards: Environment Ministry Decree 28 of 2013 sets a 95% sulphuric acid and arsenic abatement target for 2018, close to the 98% required elsewhere. The Ministry of Mines says that the new smelter emissions standards (Environment Ministry Decree 28 of 2013) are exceptionally tough.⁵⁰
- Sernageomin’s Mining Safety Regulation No. 248 (for workers and contractors).
- Sernageomin’s Tailings Dams Department, created in 2014.⁵¹ In 2015 it released an updated dam inventory from 2010.⁵² A press report notes that nearly 1.5 million tons of tailings are produced each day.⁵³
- The Site Closure Act of 2012 (Law 20.551) requires mining companies requesting new project approval to submit a decommissioning plan. Larger projects are required to post a bond.⁵⁴
- Sernageomin is drafting new physical and chemical stability site closure guidelines.⁵⁵

⁴⁷ Society and Mining advisor, Ministry of Mines, October 2015.

⁴⁸ Environmental Unit Head María de la Luz Vásquez, Ministry of Mines, November 2015.

⁴⁹ Law 20.026.

⁵⁰ Ibid.

⁵¹ Sernageomin, “Sernageomin crea departamento especial sobre relaves mineros”, 26 May 2014, www.sernageomin.cl.

⁵² See www.sernageomin.cl/mineria-relaves.php.

⁵³ Elmostrador.cl, “Sernageomin cifra en casi 1 millón y medio las toneladas de relaves producidas diariamente en Chile”, 29 August 2015.

⁵⁴ The Act: (i) Requires Sernageomin to review and approve closure plans, issue sector guidelines, and oversee compliance with the law; (ii) Sets minimum contents of proposed closure plans, including chemical stability and health and environmental conditions; (iii) Defines liability (although a closure certificate releases a company the refrom); (iv) Requires site closure and follow-up bonds; (v) Requires awareness programmes for adjacent communities; (vi) Requires an audit of closure plans, and (vii) Sets up fines for noncompliance.

⁵⁵ Environmental Unit Head María de la Luz Vásquez, Ministry of Mines, November 2015.

- The Ministry is endorsing tailings reclamation, eventually within the framework of planned legislation.⁵⁶ A particular challenge involves abandoned facilities whose owners only act in response to potential buyers. Even when asking prices act as a disincentive, the State has no authority to compel owners to reclaim.
- A public-private committee is developing a tailings policy.⁵⁷
- Sernageomin and the Chamber of Deputies are both pondering the need to increase post-construction oversight of mining projects.⁵⁸

Most energy savings initiatives implemented in recent years have been shelved, although a National Energy Strategy emphasising non-conventional renewable energy and a degree of community involvement was recently adopted.

3.3 Sector Regulation and Protection Gaps

No sector policy ensuring corporate respect for human rights is in place, and in fact, some legislation actually makes respect more difficult, or impedes that business comply with their responsibility to respect. Below is a review by sector.

3.3.1 Mining and Energy

Our research showed that, exception made of a small Ministry-sponsored pilot project, mining sector policy often lacks civil society and community involvement. Under international law and the UNGP, States are required to empower individuals and communities and effectively protect them from the negative impacts of investment projects, or if impossible although using a preventive approach, guarantee reparations. UNGP 31 further requires States to guarantee due process in negotiations and dialogue.

Regulatory gaps are most evident with regard to hazardous waste. For example, tailings risk assessments are not made public;⁵⁹ all this research found was a summary of 18 abandoned sites categorised as “environmental liabilities” posing “significant risk”.⁶⁰ Other such liabilities are not identified, contrary to international practice. Inventories include site location but not risk potential or whether a site is abandoned. Notwithstanding Chile’s seismic risk, local residents are not always properly informed or offered resettlement.⁶¹ Spatial planners have no experience resettling populations living near deposits and no policy in place to deal with abandoned sites; the northern desert town of Chañaral being a case in point.⁶² Law 20.551 requires a closure bond but only for operations producing 10,000 tonnes a month or more, and it does not apply to abandoned sites. No other

⁵⁶Ibid.

⁵⁷Ibid.

⁵⁸Elmostrador.cl, “Proponen crear nuevas atribuciones ambientales para fiscalizar procesos mineros”, 29 February 2016.

⁵⁹See Chamber of Deputies, *Informe de la comisión investigadora sobre la situación en que se encuentran los depósitos de relaves mineros existentes en el país*, 2010, at <https://www.camara.cl/pdf.aspx?prmID=3950&prmTIPO=INFORMECOMISION>.

⁶⁰See 2.wp.com/www.relaves.org/wp-content/uploads/2015/06/PAM-RIESGO.jpg.

⁶¹ See complaint in Relaves.org, “Caso Las Palmas”, undated.

⁶² Cortés, Manuel, *La muerte gris de Chañaral*, Chadenatur, 2010.

prevention or resettlement policy is in place.⁶³ Codelco's (old) tailings policy is not exemplary in the sense of UNGP 4, and it is not clear whether smelters in fact decline ores from unlicensed sellers, who might not be complying with environmental or safety standards. Even if needed, the State is powerless to intervene in connection with tailings dams located on private property.⁶⁴

While the industry, including Codelco, is making an effort to increase desalinated water use, the government does not seem to be involved in promoting this option.⁶⁵ Moreover, there is no environmental cost-effectiveness assessment in place or policy stating that below certain grades mining becomes *environmentally* unprofitable; only financial costs are considered. This is of course not a *direct* requirement of the Guiding Principles or of international human rights law, but the question is out there whether unlimited growth, due to pollution and use of natural resources, *can* actually and effectively protect human rights, especially, ESCR, in the long run.

Monitoring by Sernageomin is mostly focused on miner safety, yet it fails to effectively prevent high accident rates in small- and medium-scale operations.⁶⁶ In addition, companies are given advance notice of inspections: "Unannounced inspections are pointless"⁶⁷ as the visit has to be planned and would often be somehow leaked, putting in disadvantage those companies who would not try to get the date beforehand. It is unclear whether this technique improves compliance at all. There is also overlap of oversight roles between Sernageomin and the Office of the Superintendent of Social Security (i.e., inspection of dining facilities).

Despite the recent adoption of a National Energy Strategy, new project reviews and community involvement therein remain below human rights standards, generally because of non-compliance with the ILO Convention 169, lack of human rights impact assessment, and inequality of arms in access to and production of information. Moreover, energy prices tend to be higher in generation zones than in other regions which do not sustain the impact of generation. This constitutes both failure to comply with the UNGP and a type of discrimination the State must address. Infringement of indigenous rights (i.e., to land, natural resources, FPIC) by hydroelectric and mining projects is also well-documented.⁶⁸

Recommendations (including for logging and agriculture):

- Assess the human rights impact of sector regulations; include a human rights perspective in energy, mining, fisheries, agriculture and logging policy and strategy.

⁶³ See Las Palmas.

⁶⁴ Environmental Unit Head María de la Luz Vásquez, Ministry of Mines, November 2015.

⁶⁵ Lasegunda.com, "Cochilco: Mineras chilenas casi duplican el uso de agua de mar durante 2014", 16 June 2015.

⁶⁶ Ibid.

⁶⁷ Sernageomin Mining Safety Department official, December 2015.

⁶⁸ See Sara Larraín and Pamela Poo, eds., *Conflictos por el agua en Chile*, Santiago, Programa Chile Sustentable, 2010. More recently, Observatorio Ciudadano, *Empresas y derechos humanos en territorio Mapuche*, 2016, and *Informe de los impactos en derechos humanos de los proyectos de inversión hidroeléctrica en el territorio Mapuche de la región de la Araucanía*, 2016.

- Consult indigenous peoples and communities directly affected by the additional impacts of sector regulation; extend FPIC requirements to all legislation directly affecting indigenous peoples.⁶⁹
- Enact legislation obliging abandoned tailings dam owners to reprocess or cleanup, including eminent domain proceedings in cases of neglect.
- Inspectors: Consider phasing out advance notice of inspection.
- Mining: Disclose risks associated with hazardous deposits and develop policy on environmental liabilities left behind by private or public operators. Encourage use of non-conventional renewable energy and sea water.
- Revise the Fisheries Act due to on revelations of corporate vote-buying in Congress.
- Strengthen fair trade incentives, programmes, and eventually regulations benefitting subsistence fishermen and farmers, through programmes in CORFO, SERCOTEC, SERNAPESCA and Chilecompra.
- Ensure corporate taxes paid by Santiago-based corporations benefit the local populations where impacts occur, and not only the country as a whole. Consider local impact mitigation and compensation programmes.
- Adopt an energy mix policy emphasising equal access and prices for all, regardless of place of residence.
- Logging: Discuss recent proposals on balancing native land rights and industry needs;⁷⁰ boost share of native forest throughout Chile; protect water and groundwater rights; promote fair trade for logging workers; discontinue the subsidies in Decree-Law 701, which have led to unsustainable logging especially in indigenous territories.
- Banking institutions: Discuss ethical investment or regulatory proposals consistent with human rights standards.

4. Privatised Public Services: Health, Pensions, Education

UNGP 5 focuses on firms providing privatised public services. As these services are directly connected to guaranteed rights (i.e., to health, education, and housing) and Chile has one of the world's highest rates of privatisation, this section holds special relevance.

4.1 Health

International law passes no judgment on the merits of public, private, or mixed health systems, emphasising non-discriminatory access to the highest attainable standard of physical and mental health instead. In Chile, however, many quality and readily available health services are a commodity available only to those able to pay. This causes structural

⁶⁹ Barros and Schönsteiner, op. cit.

⁷⁰See, for example, Huenchumilla, op. cit.; contrast with Juan Pablo Lepín: Se debe hacer una revisión de las políticas públicas indígenas llevadas a cabo estos últimos 20 años, in *Revista LyD* 269, January 2016, pp. 5-8.

discrimination, as the public sector, which must carry the poorest users alone, cannot compete while being, at the same time, part of the market system that structures health care. And as Chile is saddled with a minimalist tax policy, redistribution of tax revenue is not enough to fund a common pool that would guarantee equal quality of service. As such, access-to-health regulations fail to guarantee non-discrimination on income level, health status, or like grounds.⁷¹ Discussion of public health services tends to focus on quality, i.e., wait times and quality of care. When the private system was first rolled out, systemic inequality between public and private providers was a deliberate choice designed to shift patients to for-pay services.⁷² In addition, the public and private systems are closely intertwined through care providers who work for both⁷³ and the purchase of private-sector services by the National Health Fund (FONASA).

Based on the health rights criteria set by the ESCR Committee in GC No. 14 and 21, the acceptability of Chile's health services remains substandard for the indigenous population,⁷⁴ persons with disabilities, women, transsexuals, and migrants. Culturally appropriate services in the private sector are even less frequent as no legislation or regulation is in place; there is little recognition of traditional medicine for sick leave, medical prescription and coverage purposes, and there is an urgent need to improve mental health services, an area in which private care policy and regulations are sorely lacking.⁷⁵

As private care is offered by companies driven by a market logic, and as there is no spatial planning in place, service in remote areas or poorer districts of the cities often does not meet the physical accessibility requirements in ESCR Committee General Comment 14. Furthermore, information overload and asymmetry between health companies and patients concerning health plans, prices and medical tests further encumber accessibility and knowledge of the health market, effectively restricting informed decision-making.

The private-public wage gap and a ban on full-time employment in the public sector drive many physicians and patients to private care. In the public sector, which serves the poorest 80% and cannot compete with private providers, budget deficits result in long waiting lists and severely limited access. In addition, although collusion legislation recently helped the Free Competition Tribunal convict a cartel of price-fixing doctors,⁷⁶ it has not sanctioned or deterred drug price fixing by pharmacy chains. The impact of such collusion is especially

⁷¹The Presidential Advisory Commission for Review and Proposal of a New Legal Framework for the Private Health System similarly concluded that a new system would be better equipped to meet Chile's international health rights commitments. Report available at *supra* note 397.

⁷² Fernando Atria, Efectivamente, no hay salud, in: El Mostrador, 29 January 2016, at www.elmostrador.cl/noticias/opinion/2016/01/29/effectivamente-no-hay-health/, and Gerardo Jofré, ¿Nueva Constitución para la Salud? ¡No hay salud!, 31 December 2015, at eliberero.cl/opinion/nueva-constitucion-para-la-salud-no-hay-salud/.

⁷³Deputy Minister of Health Jaime Burrows, August 2015.

⁷⁴Response to query pending, *ibid*.

⁷⁵A draft bill is under study. See review of current system in Ester Valenzuela and Elisa Ansoleaga, "Salud mental y derechos humanos: la salud de segunda categoría", in Tomás Vial, *op. cit.* (2013), pp. 187-221.

⁷⁶Cooperativa.cl, "Las sanciones contra los 25 ginecólogos condenados por colusión en Ñuble", 6 April 2015, confirmed by the Supreme Court. See Antitrust Department, "Corte Suprema ordena disolver gremio que reúne a ginecólogos de Ñuble y confirma multas por colusión contra 25 especialistas", 7 January 2016, www.fne.gob.cl.

hard because drugs account for the bulk of health costs but insurers are not required to include drug plans.

Complementary services required by the public system are directly bought from the private sector by public hospitals. This restricts control of influence peddling, such as referrals based on the personal interest of physicians or administrators, or the deliberate slowing down of care to generate artificial demand for private providers, to be paid at full price.⁷⁷

Concerning privacy rights, patient data protection is quasi non-existent, as private clinics require consent for data sharing as a condition of care. Such as it is, insurer coverage of drugs (in the guise of pharmacy point-of-sale discounts) is also dependent on consent to share data, reinforcing vertical integration of the health market, between insurers, clinics, laboratories, and pharmacies.

As to reparation of human rights violations, a Health Ministry source said that a Ministry resolution setting a range of compensation amounts exists but is seldom used because the courts are mostly unaware of it.⁷⁸ The resolution, however, could not be located.

In line with international standards, Chile is moving toward guaranteeing equitable access to drugs, but if approved without reservations, the intellectual property regime proposed in the Trans-Pacific Partnership (TPP) agreement might prevent follow-through.

Exclusion of health care issues from the National Service for Consumers' (SERNAC) mandate seriously weakens access to justice regarding private health care providers, especially those for which the Superintendent's office is neither responsible.

Recommendations:

- Ensure the health system provides equal access to quality care based on need rather than ability to pay.
- Improve coverage in remote regions or poorer areas through a new concessions system that emphasises underserved areas and restricts overserved areas.
- Deliver plain, well-structured care and price information, thus limiting provider ability to generate an information overload that impedes informed decision-making.
- Regulate the public-sector purchase of private services; improve standards and restrict unnecessary purchases, and draft clinical guidelines for medical tests required. To improve transparency, uniform prices and guarantee comparability. Mandate the Superintendents or SERNAC to oversee care providers.
- Improve working conditions in the public sector to reverse the exodus of talent to the private sector and the quality health access gap. Offer and require full-time employment in the public sector, to reduce redirection of patients to private services that are not covered by insurance, and mean higher health costs for the less well off who do not want or are unable to wait several months to be attended.
- Consider introducing a health funding system with a mandatory risk-pooling component to reduce discrimination based on ability to pay.

⁷⁷Office of the Superintendent of Health, official, September 2015.

⁷⁸Office of the Superintendent of Health, official, September 2015.

- Put in place regulations preventing discrimination of health insurance buyers, on prohibited grounds.
- Guarantee access to drugs regardless of ability to pay, including by entering reservations to intellectual property provisions in international trade and like agreements.

4.2 Primary and Secondary Education (...)

4.3 Pensions

Most pension amounts paid out by the current mandatory personal savings system stand below the poverty line.⁷⁹ Fully 93.8% of female retirees in the private pension fund (AFP) system receive under US\$216,⁸⁰ much less than required for covering basic needs.

The male-female wage gap ranges from 18% to 40%, depending inversely on education level, but lifetime waged work rates stand at 74% for men and 40% for women. In addition to seriously impacting the pension amounts of women, who often also took charge of caregiving, life expectancy differences mean that their pensions are paid out over several more years than for men. The Marcel Commission⁸¹ found that a five-year difference in retirement age cuts women's pensions by 30% to 40%, while the Bravo Commission⁸² found it to be a proven fact that enrolees are not paid the full pension amounts offered. Furthermore, AFP enrolees shoulder all labour market risks prior to retirement and, if opting for a guaranteed income plan after retirement, all capital market risks. AFPs assume only the risk of providing the income. Moreover, information is skewed to the detriment of enrolees.

On human rights issues, at present no incentives or legislation keep AFPs from investing in companies committing serious environmental or labour violations or seriously or repeatedly infringing human rights, including to life and personal integrity, slavery or child labour abroad or in Chile.

Recommendations:

- Institute a pension system consistent with the social security rights recognised in the ICESCR and according to the principles and interpretation contained in the ESCR Committee's General Comment No. 19 on the right to social security.
- Establish non-binding and eventually binding incentives for AFPs not to invest in companies or financial institutions seriously or repeatedly infringing human rights,

⁷⁹ Elisa Ansoleaga and Ester Valenzuela, "Envejecimiento y derechos humanos en Chile: Las personas mayores maltratadas", in Tomás Vial, op. cit. (2015).

⁸⁰Fundación Sol, Porcentaje de jubilados con pensiones menores a \$153.590, por sexo, available at www.fundacionsol.cl/graficos/share-of-jubilados-with-pensions-menores-a-153-590-por-sexo/. Dollar amounts based on exchange rate as of 31 December 2015.

⁸¹Which conducted a review prior to the 2008 pension reform.

⁸² Presidential Advisory Commission on the Pension System ("Bravo Commission"), *Informe Final*, September 2015, p. 55.

including the rights to life and personal integrity, or committing serious environmental or labour violations.

5. Specific Schemes

5.1 Foreign Investment, Government Contracting, Economic Agreements

The Foreign Investment Committee (and the new Foreign Investment Development Agency that will supersede it) can decline unlawful investment but have no discretion to require additional incentives.⁸³ As such, human rights regulations and guarantees are crucial; without them, foreign investment projects can be approved even if not meeting the basic standards to which Chile has committed under international law. No existing policy addresses potential social or human rights conflicts that would render a project non-viable.

No investment or trade accord currently in effect makes explicit reference to human rights. The Foreign Ministry's Directorate General for International Economic Relations (Direcon) says it has no mandate, beyond awareness and training initiatives, to account for at-risk groups in decision-making. Yet, Law 20.169 would allow for adoption of non-discrimination policies, a criteria the Ministry could well apply to export promotion decisions.

Direcon further reports that the Chile-EU framework agreement contains language on democracy, human rights, and fundamental freedoms (Art. 12)⁸⁴. While this is certainly a good sign, a review shows this to apply eventually only to political dialogue. The trade chapter of interest to this study makes no such references, and Art. 17.2c in fact praises privatisation, despite the many issues this system exhibits in its current incarnation (see UNGP 5, and section 4 of this report). The Chile-MERCOSUR economic cooperation agreement contains language about democracy, but makes no mention of human rights. Agreements with Malaysia, Vietnam, Thailand and Hong Kong signed by Chile in recent years contain no language on social responsibility or human rights, and some contain no environmental clauses. The sole exception is the Trans-Pacific Partnership. Also, a new Bilateral Investment Treaty with Malaysia does provide for expanded discretion on stabilization measures:⁸⁵ "Should new laws or regulations be enacted, investors shall not be worse off than at the start of investment" (Protocol (c))." Other agreements do not contain such language. From the standpoint of State capacity to enact new laws to better implement human rights standards it is encouraging that the Malaysia-Chile treaty clause is an exception. Generally, our research could not establish whether Chile took a proactive position on environmental issues or whether it would only go as far as the other party required. We were able to confirm, though, that the inclusion of labour clauses has been an important feature of the Chilean negotiations policy over several years. Thus, the methods

⁸³Ibid.

⁸⁴Written communications from Direcon, November 2015 and February 2016.

⁸⁵ See for standards, IFC/UN Special Representative on Business and Human Rights, Stabilization Clauses and Human Rights, 2009, available at <http://www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES>.

used in this research did not allow establishing which rate of success Direcon had in including social or environmental provisions. We did not find evidence that human rights clauses were *promoted* in negotiations.

Transpacific Partnership (TPP)

The human rights impact of the lifting of trade and investment barriers, especially on vulnerable groups, has not been established. From the standpoint of international human rights law and the UNGP, of special concern is the impact of resulting trade or investment and the potential weakening of the State's ability to regulate, protect, and prevent. Assessing if an agreement meets international obligations requires a proper review of risks and impacts on political, civil, economic, social, and cultural rights. The TPP's human rights risks and impact should therefore be properly assessed *before* ratification.⁸⁶

For example, the TPP's definition of domestic environmental standards excludes resolutions by ministries and regulatory agencies such as Chile's Environmental Impact Assessment Service (SEA). As such, if environmental and economic interests collide, community engagement and free, prior and informed consultation rules, which are not entrenched in legislation, might result in not being explicitly admitted. Although reference is made to the principle of participation, it is in practice defined as the participation of experts rather than communities. From a human rights standpoint, this is not satisfactory.

Furthermore, TPP patent and intellectual property rules would prevent States procuring and delivering low-cost (i.e., generic or bioequivalent) drugs to the population. This violates the right to non-discrimination on social and economic grounds in access to health.

The TPP would further require Chile to endorse UPOV-91, an agreement the application of which remains pending as legislating on plant breeders' rights and the rights of subsistent farmers has been nearly impossible. A related bill, for example, had to be withdrawn in 2014 following withering criticism by civil society and social movements. Chile should not embrace yet another agreement that does not live up to human rights standards.⁸⁷

The TPP chapter on labour is explicitly restricted to four issues cited in the ILO declaration (freedom of association and collective bargaining, forced labour, child labour and non-discrimination). As essential as these are, explicit exclusion of safety and health issues could hamper or impede implementation of ILO and UNGP standards. At the very least, the TPP will miss a chance to build international incentives for compliance with those minimum standards and other human rights protection in the supply chain. And although the TPP contains provisions directly affecting indigenous peoples, ratification of the agreement has not been submitted to a consultation process.

The TPP, while recognising some human rights—to the extent that it speaks of “preventing risk to human life or health” (Art. 20.1) in environmental matters and insofar as the ILO

⁸⁶Appraisal and critique in P. Vargas and J. Schönsteiner, “Respuestas al Cuestionario sobre el Sistema de la Unión Europea para la Evaluación del Impacto Sostenible de las Negociaciones Comerciales”, at www.derechoshumanos.udp.cl/derechoshumanos/images/Vargas_Sch%C3%B6nsteiner_Trade_Sustainability_Impact_Assessment_Handbook_EU.pdf.

⁸⁷ Mewes, op. cit.

Declaration of 1998 entrenches labour rights—still fails to allow Chile enough discretion to meet international human rights commitments.

Recommendations:

- Prior to ratifying the TPP or other trade or investment agreements, assess risks and impacts, especially on economic, social and cultural rights, property rights (especially subsistence), and the right to a clean environment.
- Consult indigenous peoples and encourage community involvement in proposed legislation on genetically modified materials.
- Should the TPP be ratified despite its human rights risks, enter reservations ensuring compliance with the obligation to respect and guarantee environmental, labour and human rights.
- When negotiating agreements, proactively ensure compatibility with human rights. Chile should denounce or decline agreements limiting its ability to meet human rights obligations and renegotiate stabilization clauses restricting its ability to progressively increase protection of human rights and the environment.
- UPOV-91: Guarantee protection of consumer, peasant and indigenous rights; preferably, do not ratify due to its serious human rights implications.
- When renegotiating its Cooperation Agreement with the European Union, Chile should consider its human rights obligations, including the provisions on small and medium-size enterprises in the 2015 EC Communication “Trade for All”.
- Have ProChile and other such agencies ensure that Chilean export products meet human rights standards, including consumer health and traditional or indigenous intellectual property rights.
- Encourage project funders to factor in social, human rights and sustainability issues when assessing credit risk.

5.2 Extraterritoriality

Although the courts might eventually find arts. 5 and 6 of the Code of Court Procedure to apply in this regard, in fact Chile has no general regulations concerning the civil, criminal or administrative liability of local corporations operating abroad. However, the Code has never been interpreted in that sense.

That said, complaints or representations by foreign parties to the National Contact Point (NCP) with jurisdiction over Chilean corporations could be construed to have a “soft” extraterritorial effect.⁸⁸ While NCPs can act separately or jointly with counterparts in the complainants’ country, this method of mediation is hampered by access issues, as foreign petitioners face considerable travel, correspondence, and like costs.

Interviews and an examination of practices and regulations show little local awareness of responsibility for access to justice over human rights issues involving Chilean companies

⁸⁸Written communications from Direcon, November 2015 and February 2016.

abroad. Neither are there incentives or rules for state-owned companies or public procurement from abroad. This is especially worrisome if the investment takes place in countries that have lower standards of justice, or lack rule of law. Other than filing with the local NCP, there is no jurisdiction over the negative impacts of Chilean companies in host countries.

Recommendations:

- Allow Chilean embassies to accept complaints and mediation requests on behalf of the Chilean NCP. Communicate widely (in Chilean regions and abroad) about the OECD Guidelines, increase promotion of their use among stakeholders, arrange for infrastructure, designate an NCP focal point and provide appropriate OECD Guideline training to potentially interested stakeholders and embassies and government agencies involved.
- If personal or community claims for damages by Chilean enterprises operating abroad face denial of justice in the host country, provide access to Chilean courts.

5.4 State-Owned Enterprises, Bidding and Public Procurement

5.4.1 State-Owned Enterprises

Chilean State-Owned Enterprises (SOE) have no consistent, uniform business and human rights policies in place. Approaches range from Codelco, whose sustainability reports mandatorily include, at least since 2012, a chapter on human rights and labour practices identifying compliance gaps.⁸⁹ to the Public Enterprise System (SEP), which has a voluntary Code of Governance inviting enterprises to provide non-mandatory reports on, for example, corporate social responsibility issues.⁹⁰

Impact assessments by Codelco, while a step in the right direction, do not seem to involve a human rights perspective and are not made public. Data obtained at the close of this review show that no overall suggested or mandatory due diligence or human rights policies are in place, despite specific initiatives like a gender-policy, and certain health and safety clauses in contractor contracts. New regulations for SEP enterprises are in preparation but have not yet been approved by the SEP board; it is not clear whether references to human rights would be mandatory or voluntary,⁹¹ as these provisions are reportedly recommendations not complemented by measures ensuring effectiveness.

State-owned mining companies are reviewing initiatives on re-processing tailings material, but have no policies in place on the systematic clean-up of historical environmental damage.

Furthermore, Chile's Classified Copper Law (Law 13.196),⁹² which allocates 10% of Codelco sales to the military mostly for arms procurement, infringes international human

⁸⁹ Codelco, *Reporte de Sustentabilidad 2012*, undated.

⁹⁰ SEP, *Código SEP*, undated, available at www.sepchile.cl/codigo-sep/.

⁹¹ Jorge Avendaño, Sustainability Head, Public Enterprise System (SEP), October 2015.

⁹² This study was closed before the classified law was ordered to be made public (except one article); Codelco had published the sum it paid to the Military for years in its Balance Sheets, certainly a step forward in terms of transparency.

rights law (Art. 2 ICESCR). It is inconsistent with the standing commitment to allocate the “maximum available resources” to ESCR protection and with the obligation to guarantee access to justice (admittedly, one of the costliest rights to implement) and other immediate civil and political rights obligations. Even if no further fraud in the use of these funds by the military occurs,⁹³ the law would still be in breach of international law; moreover, it hurts Codelco’s competitiveness.⁹⁴

Recommendations:

Codelco

- Include human rights risks and due diligence in socio-economic impact assessment. and make these studies public.
- Impose contractual environmental, safety and health requirements on both contractors *and* subcontractors.
- Include social conflict litigation in community relations reports.
- Train other government corporations on the use of GRI-4 standards.
- Adopt the social and environmental standards used in public procurement; adapt as needed to a high-risk, high-impact industry.

Codelco and Ministries

- Increase funding for environmental clean-ups and human rights risk prevention and mitigation.
- Government and Congress: Repeal the Classified Copper Law and release resources for human rights protection, notably ESCR reforms, and clean-up of tailings and historical damage.

SEP Enterprises

- Adopt due diligence measures, especially assessment of risk and impact on human rights and transparency.
- Enterprises that have not yet done so should embrace GRI reporting. SEP Council should issue new directives as required, and consider making these guidelines obligatory.
- Adopt the social and environmental standards used in public procurement.

⁹³For a summary of the facts, see Cooperativa.cl, “Las millonarias defraudaciones con la Ley Reservada del Cobre”, 31 August 2015.

⁹⁴Through September Codelco posted a US\$42-million loss, yet gave US\$639 million or 10% of sales to the military. Codelco would otherwise have posted a profit and improved its financial standing. As former Codelco director Andrés Tagle told Congress in October 2015: “To the company’s risk rating, this is a millstone. It acts as a tax on sales and causes operating issues.” Elmostrador.cl, “Las fuerzas armadas ganan un año más: el gobierno sigue sin enviar proyecto que deroga la ley Reservada del Cobre”, 3 December 2015.

5.4.2 *Bidding and Development Funds*

RFPs and projects by SERCOTEC, CORFO and the Public Works Ministry⁹⁵ do not use a human rights or fair trade approach, but some standards of public procurement.

Recommendations:

- Provide human rights education and training to government agencies, and subsequently for relevant CORFO, SERCOTEC or Public Works programmes.
- Legally or contractually require mandatory respect for human rights by enterprises receiving government support.
- Based on the ChileCompra model, include human rights standards in all Public Works, CORFO and SERCOTEC bidding and calls for tenders. Move toward mandatory compliance of social requirements, and ideally require human rights impact assessments.
- The State should take the initiative to legislate on ingredient, fair trade / working conditions and other product labelling to facilitate supply chain control by micro, small and medium-size enterprises. A public-private partnership between CORFO and SERCOTEC and larger companies experienced in supply-chain control is suggested.

5.4.3 *Public Procurement*

ChileCompra guidelines, while rewarding good business, sustainability, inclusion, anti-corruption, and transparency practice by providers, among others, and therefore constitute a step in the right direction, they do not test for due diligence and make no reference to human rights compliance indicators. Furthermore, all but labour standards⁹⁶ are voluntary for the public organs to incorporate. Some guidelines do de facto cover human rights issues, such as gender, inclusion at the workplace, environmental sustainability, and also reference to international human rights law. However, inclusion of these standards into tenders or provider contracts is voluntary, and subject to a decision by each and any of the government organs. In addition, compliance with a single indicator suffices to earn award points. A more fine-grained system is needed to distinguish one-off-compliance from real sustainability and human rights policies.

While competitors can exercise oversight in public procurement, there is no effective promotion of oversight by civil society. Moreover, incentives cannot be made applicable to foreign suppliers,⁹⁷ if there are no reporting systems in the other country.

Recommendations:

⁹⁵Public Works, CORFO and SERCOTEC did not reply to requests for an interview; see Annex. Late replies, if any, will be posted to www.derechoshumanos.udp.cl.

⁹⁶ A provider that has received administrative sanctions for anti-trade-union practices or violations of individual labour rights, remains excluded from tenders for two years.

⁹⁷ChileCompra Head Trinidad Inostroza and Intersectoral Network Coordinator Elena Mora, October 2015.

- Require ministries to include mandatory labour conditions, including gender, disability, environmental and indigenous rights requirements, in all RFPs and public procurement.
- Apply ChileCompra standards to the entire chain of supply, especially products at high risk for child and forced labour. Find ways to track related foreign sanctions or risks.⁹⁸ Work with foreign embassies based on most favoured treatment policies, and on reciprocity with States having similar standards.
- Require local governments, municipal education departments, Congress, the judiciary and other agencies to use the public procurement platform.
- Train civil society to take part in oversight and reporting mechanisms.

5.5 Free, Prior and Informed Consultation (FPIC)

Chile's indigenous consultation regulations are inconsistent with international law, notably ILO Convention 169.⁹⁹ In the Environmental Impact Assessment (EIA) System, consultation is required only for high-impact projects involving resettlement or seriously affecting the cultural or environmental heritage; others are exempt. Executive Decree 40 allows prospection, exploration and implementation of projects submitted under less stringent Environmental Impact Statement (EIS) provisions, which administrative bodies consistently construe as being exempt from FPIC requirements¹⁰⁰ even if impacting protected areas, populations and/or resources. Contrary to ILO Convention 169, water and other automatically granted rights and concessions (no administrative discretion to not grant the right, not even environmental, sustainability, or human rights reasons, once formal requirements are met) are exempt from EIA review or consultation.

Executive Decree 40 was issued without meaningful community discussion. Warnings that it did not conform to international standards were dismissed. (...)

Recommendations:

- Government agencies granting investment project concessions, licences or permits should, under due diligence standards, trigger an FPIC process whenever indigenous communities or individuals liable “to be directly affected” are involved.¹⁰¹
- Extend community engagement requirements to all projects submitted for EIS review, and including those exempt from presentation, if they directly affect indigenous communities.
- Contemporary or ancestral indigenous titles to native lands should trigger a presumption of infringement by proposed projects, regardless of impact magnitude, and of formal recognition of ancestral titles.
- Require free, prior and informed consent for resettlement or disposal of hazardous materials on native lands or wherever a community is directly affected, according to

⁹⁸Ibid.

⁹⁹ Barros and Schönsteiner, op. cit.

¹⁰⁰Ibid., p. 227.

¹⁰¹If amended per international law, the Energy Ministry's Commitment to Dialogue could be a place to start.

ILO Convention 169 and the 2007 UN Declaration on the Rights of Indigenous Peoples.

- Consistent with ILO Convention 169 standards, require consultation of sector policies directly or distinctly affecting indigenous peoples, including sectorial laws on industry.

5.6 Management and Prevention of Social Conflict: Conditions in Araucanía

The conflict which is pitting Mapuche communities against logging companies and especially, the State, is rooted in historical causes recognised in the 2003 report of the Historical Truth and New Treatment Commission.¹⁰² These hark back to the illegal allocation of native lands south of the Biobío River to Chilean and foreign settlers starting in the 19th century. In this process, Mapuche homes were burnt and entire communities were evicted from ancestral lands, leaving them destitute and obliged to work for the logging industry. At present, a State-subsidised logging industry which intensively plants introduced species has caused serious environmental impacts that include soil degradation and massive loss of the native forest and groundwater resources.

In addition, hydroelectric projects involving large dams have evicted entire communities and flooded vast expanses, including holy places. Run-of-river power stations, albeit smaller, are affecting fishing and tourism. In response, Mapuche groups and communities have launched a land claims drive with media, political and legal components accompanied by peaceful demonstrations and also a growing number of land takeovers.

A minority of indigenous groups are resorting to torching logging and hydroelectric company equipment and machinery. Some have also set forest fires and burned down public facilities and some homes. Responsibility for some incidents was claimed by Coordinadora Arauco-Malleco (CAM), but most culprits remain unidentified.¹⁰³

While the ICSO-UDP opinion poll on the conflict in Araucanía reveals some differences of opinion between indigenous and non-indigenous respondents, most stand squarely against the use of violence. “The only significant difference seems to be in respect of justifying violence involving land claims (Mapuche 71%; non-Mapuche 81%) and demands for better living conditions by the poor (Mapuche 72%; non-Mapuche 80%).”¹⁰⁴

The State has responded by raiding communities and awarding protective measures, both carried out by a massive police presence (mostly anti-riot). The INDH and the courts have verified repeated cases of excessive use of force and even torture, including against children and adolescents. In 2015 lorry drivers, who lost and feared further losses of machinery through arson, launched large-scale protests with support from the Chilean Lumber Corporation, the Industry Confederation of Araucanía, and some local MPs.

Human rights infringements in Araucanía, and to some extent in Bío-Bío and Los Lagos, are characterised below. Information is provided under the premise that international law is

¹⁰²Commission on Historical Truth and New Treatment for Indigenous Peoples, *Informe*, October 2008.

¹⁰³ The latest claim of arson of churches was by a previously unknown group, but occurred after this report was closed.

¹⁰⁴ ISCO-UDP Survey of Public Opinion in Araucanía, Main Results, March 2016.

not concerned with particular events, as long as victims enjoy full access to justice and reparation.

1. Ancestral property, natural resource and water rights. Access to justice: Government land restitution programme the effectiveness of which is described under UNGP in the baseline.¹⁰⁵ Judicial or legal protection: Ancestral land titles do not bestow property rights, but in isolated cases may provide the basis for indigenous consultation.¹⁰⁶
2. Ancestral ownership of natural resources: The logging industry engages in monoculture of introduced species, which depletes soil and groundwater resources of indigenous and non-indigenous communities. Access to justice: Limited; for water claims, non-existent. Current logging regulations contain no effective sustainability policy. A Forestry Policy Council is discussing reforms; the indigenous representative is a CONADI council member representing the urban Mapuche (see Logging in sectorial legislation, section 3). Ancestral water rights are not protected, except for the North, where Law 19.300 bestows such rights to indigenous pastoral communities; access to justice is unavailable unless these water rights are formally registered. The native forest is protected where it still stands; however, there is no reparation of past damage. CONAF undertakes initiatives of reforestation with native species only in regions where the logging industry is not present, or in national reserves.
3. Property rights of private citizens, business people and companies.¹⁰⁷ Access to justice: Protective orders.¹⁰⁸ Evictions and restitution by the Ministry of the Interior (Carabineros, PDI police). Public prosecutors may invoke the Terrorism Act in cases of arson (woodlands, homes, cottages, lorries, equipment). A special prosecutor was appointed in 2015.¹⁰⁹ Some trials of Mapuche community members (IACHR, Norín Catrimán case) were questioned over the lack of due process. Impunity rates for crimes against privately-owned woodlands could not be determined.¹¹⁰ The 2016 budget does not allow “violent” communities to obtain land.¹¹¹ Reparations: Government is considering a plan.¹¹²
4. Infringement of the right to life of four Mapuche community members (in police raids) and two business persons (through, arson). Access to justice: Poor in cases

¹⁰⁵ See also Rivas, Antonia, Informe Anual sobre Derechos Humanos en Chile, Ediciones UDP 2012.

¹⁰⁶ Sanhueza, op. cit.

¹⁰⁷ Incidents surged in 2014-2015. See araucanianoticias.cl, “Hitos 2015 presenta Asociación de Víctimas de Violencia Rural”, 18 December 2015; Libertad y Desarrollo, “Según LyD, 23% han aumentado los hechos delictivos en la Araucanía este año”, 8 June 2015, www.lyd.org. In 2016, self-proclaimed “military group” Coordinadora Arauco-Malleco claimed responsibility for several attacks against property. See Cooperativa.cl, “Coordinadora Arauco-Malleco se atribuyó ataques incendiarios en zona de conflicto”, 26 January 2016.

¹⁰⁸ Carabineros police officer, Araucanía Region, October 2015.

¹⁰⁹ Latercera.com, “Designan fiscal preferente por quema de camiones en La Araucanía”, 3 September 2015.

¹¹⁰ Charges of breach of duty were levied against the State over perceived impunity, see Cooperativa.cl, “Region de La Araucanía: Víctimas de violencia presentan demanda contra el Estado”.

¹¹¹ Juan Pablo Lepín, interview in *Revista LyD* No.269, pp. 5-8, January 2016.

¹¹² Diariofinanciero.cl, “Gobierno elabora plan para víctimas de violencia en La Araucanía”, 18 January 2016.

involving Carabineros police as they are tried in military courts, contrary to international human rights commitments (infringements persist and the Alex Lemún case remains pending in the IACHR); effective in the cases where private citizens are the defendants (defendants found guilty under the Criminal Code are properly tried and sentenced). The investigation in the murder case continues and other suspects have been arrested and indicted.

5. Infringement of the personal integrity rights of Mapuche community members, including children and adolescents, notably during police raids; some incidents have been deemed as tantamount to torture. Access to justice: Reduced, despite criminal charges initiated by the INDH. Military justice applies for police, except when victims are children and adolescents.¹¹³ Reparation of psychosocial harm: Minimal, usually by foreign donors or civil society.¹¹⁴
6. Infringement of the human rights of Mapuche prisoners serving time for crimes connected to the native lands conflict, or in preventive prison, including poor prison conditions and mistreatment during hunger strikes.¹¹⁵ Access to justice: Partial with regard to preventive prison, and prison conditions; there is no indemnization for time spent in prison arbitrarily; special cultural and religious rights measures are available in correctional facilities.
7. Infringement of the right to free, prior and informed consultation. Access to justice: Partial for high-impact developments (see shortcomings in UNGP 3); non-existent for other projects, municipal activities, and sector regulation (Constitutional Court ruled that adoption of laws or regulations did not require FPIC; see UNGP 3). In some cases, companies have initiated private consultations and negotiations with communities. However, such initiatives are very rare in the South of Chile, it is a practice mostly used in the North where no generalized situation of social conflict is present.
8. Infringement of cultural and religious rights. Access to justice: Partial, as registered land title usually overrides ancestral rights to ceremonial land use. That said, some courts have effectively recognised and protected cultural and religious rights through interpretative means.
9. Infringement of the right to a clean environment. Access to justice: Same as elsewhere in Chile (see UNGP 25). Physical accessibility: Average; the nearest

¹¹³For details, see INDH, *Estudio exploratorio. Estado de Chile y pueblo Mapuche: Análisis de tendencias en materia de violencia estatal en la región de La Araucanía*, February 2014, available <http://bibliotecadigital.indh.cl/bitstream/handle/123456789/642/Estado%20y%20%20Pueblo%20Mapuche.pdf?sequence=1>

¹¹⁴See especially DECS, *Uso de la fuerza pública hacia niños/as indígenas en los procedimientos policiales*, in Colección Derecho Indígena, at decs.pjud.cl/index.php/colecciones/71-colecciones/tendencias/indigena/procedimientos-policiales/429-uso-de-la-fuerza-publica-hacia-ninos-as-indigenas-en-los-procedimientos-policiales. See also Fundación Anide et al., *Informe sobre violencia institucional contra la niñez Mapuche en Chile*, Santiago, August 2012; Committee on the Rights of the Child, *Concluding observations on the combined fourth and fifth periodic reports of Chile, CRC/C/CHL/CO/4-5*, 30 October 2015, ¶ 79-80, reiterating recommendation in the 2007 report.

¹¹⁵ Radio U. Chile.cl, “Denuncian torturas a presos mapuche en huelga de hambre y exigen al Gobierno pronunciarse”, 27 August 2010.

court sits in Valdivia. No free legal assistance available for environmental cases. A few NGOs provide free legal assistance.

10. The rights of non-indigenous peasants are partly protected in national or regional government programmes, but these groups resent measures such as Indigenous Law 19300, which provides land and student aid to indigenous community members. As non-natives, those peasants only benefit from general poverty reduction programmes. Araucanía is Chile's poorest region and, along with Los Lagos region, is home to the country's poorest districts. The greatest concern among local residents is joblessness.¹¹⁶

Structural issues found in our investigation include non-existent constitutional and political recognition of indigenous peoples, compounded by State failure to prevent or mitigate the conflict. A land restitution programme implemented by CONADI since 1993¹¹⁷ has been beset by mismanagement, corruption, land speculation, lack of an expropriation vehicle, distribution of land to communities charged with takeovers or property crimes, and lack of an inventory of lands to be returned.¹¹⁸ Moreover, the public safety focus favoured by the State has failed to protect victims of violence, avert escalation, or check or settle the conflict. Alternative proposals submitted by indigenous groups or individuals have been mostly discounted.¹¹⁹ As to economic variables, no effective guarantees of natural resource protection or evidence of diversified, culturally-adapted development plans were found.

Working conditions for indigenous workers, especially in informal or independent logging jobs, are not effectively monitored. (See wage and working conditions in the Labour Law and Discrimination sections.)

As regards safety issues and damage caused by conflicts between logging companies and Mapuche communities, there is no access to compensation for lost machinery, lumber, cattle, property, or homes. In addition, reports of vigilante activity in the region have not been properly investigated. The use of police force is disproportionate and often affects Mapuche children and adolescents. There is a marked sense of injustice over infringement of the rights to life and personal integrity of Mapuche community members who suffer undue violence at the hands of police detachments protecting business concerns.

Sorely missing is dialogue of all the stakeholders based on the various conflict resolution proposals put forward.

Recommendations:

- In addition to dealing with violence, to prevent escalation the State should confront the underlying issues, namely political and constitutional recognition, past and present discrimination and expropriations, poverty and under development, and unfamiliarity with the Mapuche world view and culture.
- Inventory ancestral lands to be returned and consider expropriation mechanisms other than voluntary sale in order to giveback land within a pre-set time frame.

¹¹⁶ ICSO-UDP Survey, *op. cit.*

¹¹⁷ Rivas, *op. cit.*

¹¹⁸ Rivas, *op. cit.*; Lepín *op. cit.*

¹¹⁹ Former Regional Governor Francisco Huenchumilla advanced one such proposal; it cost him his job.

- Guarantee protection of natural resources, especially water and the native forest, across all indigenous, public, and privately-owned lands.
- Guarantee compliance with free, prior and informed consultation standards, especially in connection with proposed conflict resolution plans.
- Ensure proportional use of police force and protect children and adolescents.
- Develop an Impact-Benefit Agreement framework that includes project profit-sharing or co-ownership. Ensure equality of arms in negotiations between communities and companies.
- Monitor the working conditions—i.e., wages, fees, contracts—of indigenous and non-indigenous workers in the logging, aquaculture, and fishing industries.
- Ensure continued access to justice for all victims of violence, whether indigenous or non-indigenous.
- Engage with all stakeholders in discussing the various conflict resolution proposals advanced in recent years. To fully reflect the scope of the human rights issues at stake, ensure the debate is not restricted to public safety issues, but addresses the root causes of the Mapuche claims.

6. Access to Justice

In Chile, reparations and compensation are civil rather than administrative, with direct compensation available only for consumer and labour matters. Non-monetary reparations are reserved for cases of serious discrimination or dismissal while on maternity leave.

With nearly 90% of cases heard by civil courts being collection proceedings brought against consumers in the first three income quintiles, rights claimants find access to civil justice to be almost non-existent.¹²⁰ For victims of human rights infringements, the absence of administrative remedies has considerable consequences on effective access to reparation.

Moreover, such cases tend to become “atomized” into a plethora of components “handled by different institutions and venues”.¹²¹ This can keep highly complex rights violations, as business and human rights cases often are, from being brought to justice.

Generally, damage prevention remedies are few and mostly inaccessible. The justice system often helps “too little, too late”.¹²²

This section examines a range of access issues, including prevention of violations, lack of legal remedies, and social and legal barriers preventing effective access.

Recommendations:

- Ensure effective damage prevention by improving the availability, accessibility and effectiveness of legal and administrative remedies.

¹²⁰See Lillo, *op. cit.*

¹²¹Administration of justice expert, January 2016.

¹²²Access to justice expert, August 2015.

- Guarantee the independence, effectiveness and coordination of oversight bodies. Increase the capacities of oversight agencies and bodies, such as Superintendents' offices, Sernageomin, Sernapesca, SERNAC.
- Require oversight and watchdog agencies to set up coordination mechanisms.
- Train the courts on business and human rights, especially as regards circumstantial evidence and the legal argument concerning the horizontal effects of human rights.
- Ensure effective victim access to compensation for damages, especially to punitive mechanisms and/or alternative measures, including training.
- As part of proposed civil justice system reform, and rather than just collection proceedings, ensure effective access to settlement of small claims and environmental damage claims.
- Require the State Defence Council to prioritise human rights cases.
- Provide free legal representation in cases of business and human rights conflict. Attend complex cases, and cases of high impact first.

6.3 Legal and Social Barriers

(...)

Recommendations:

- Train and educate secondary and university students on human rights and their implementation.
- Provide business and human rights training to judges and oversight agencies.
- Revise evidentiary rules in civil, discrimination and environmental cases to offset the inequality of arms, especially as to who holds the relevant information.
- Provide effective access to justice and to professional, physically accessible, and free or affordable legal assistance for citizens pursuing business and human rights cases.
- Provide free legal assistance by an independent, impartial body to individuals, communities, labour unions and public interest groups concerned with business and human rights, including in cases brought against the State. Exempt staff assigned complex cases from quantitative performance reviews, and introduce qualitative performance reviews.
- Study access to justice issues in representative cases of business and human rights abuses. Offer concrete recommendations for the elimination of practical, social and legal barriers, including those identified in this Baseline Study.

6.4 Alternative Conflict Resolution Mechanisms and Legal Culture

One of Chile's first mediation systems emerged in 2005 with the health reform that introduced the Explicitly Guaranteed Universal Access (AUGE) program. But as reported

by Superintendent of Health staff, the rate of success is not significant.¹²³ Often the parties cannot even come to agreement on a mediator, which is grounds for failure of the mechanism. Further compounding the position of claimants is an inability to access key information, without a court order, as SERNAC does not have faculties with regard to health providers.¹²⁴

No out-of-court mechanisms pursuant to UNGP 31 are available except for the NCP, which lacks the funds required to acquaint parties potentially interested in pursuing infringements of the OECD Guidelines for Multinational Enterprises with the role of the NCP. Despite an increase in the number of specific venues in recent years, the NCP remains little-known among NGOs, communities, labour unions, and civil society at large.

The State does not encourage businesses not directly dealing with consumers to accept claims or grievances.

As to access, most dispute settlement information is available in Spanish only; materials in other languages, including indigenous, are rare. Effective protection of indigenous rights requires a language policy ensuring information is made available in their languages—and eventually in Creole, should the Haitian migrant population keep increasing. Even so, often the main problem is that the language tends to be highly technical and thus inaccessible.

No standardised or obligatory mechanisms offsetting inequality of arms are available for out-of-court settlement of civil matters. No public awareness drives exist and specialised assistance is only offered in labour cases. In addition, human rights defenders are not given any legal recognition or special protection.

As most workers can ill afford lengthy proceedings, labour mediation faces *de facto* pressure to quickly come to a reparation agreement, usually below what would be equitable or ordered by a court. Business, on the other hand, can afford long-drawn-out negotiations. The State has not addressed this inequality of conditions.

Recommendations:

- Enable the INDH to represent claimants in complex business and human rights cases.
- Encourage the INDH to strengthen its new business and human rights line of work, with emphasis on State obligations.
- Strengthen the NCP with the fresh funding and human resources needed to hold sessions, promote and offer mediation services throughout Chile, and where Chilean companies invest abroad.
- Strengthen alternative dispute settlement mechanisms. The State should guarantee equality of conditions.

7. General Findings and Research Needs

This Baseline Study reviewing the economic activities of Chile's public institutions, including state-owned enterprises, ChileCompra, SERCOTEC, social entrepreneurship

¹²³ Staff member of the Office of the Superintendent of Health, September 2015.

¹²⁴ SERNAC, December 2015.

funds such as CORFO, and concessions, is Latin America's first. Most of it assesses the adequacy of human rights regulation of domestic and foreign enterprises operating in Chile and Chilean firms operating abroad. The questions it poses all derive from the 2011 UNGP on Business and Human Rights and the human rights instruments Chile has endorsed.

Significant findings include weak regulation and oversight of business activities, especially in the extractive sector, and the serious impact of the substandard nature of spatial planning. Human rights guarantees in current and pending foreign investment and trade agreements – such as the TPP—are also found wanting. Access to justice and reparation in business and human rights contexts is clearly inadequate, with preventive legal, policy, or administrative remedies notably lacking. Such good practices as do exist should be strengthened and integrated into cross-cutting business and human rights policy.

Most regulation (see UNGP 1) fails to guarantee labour rights, the health rights of communities adjoining investment projects, the right to participate, or the right to free, prior and informed consultation, especially of indigenous communities. Most emission and air quality standards are inconsistent with World Health Organisation standards. There are no soil quality or contamination regulations, or modern refuse recycling and treatment systems. Mining regulations fail to guarantee the safety of tailings dams and other hazardous deposits, with serious consequences in case of human error or natural events. No provision is made for compatibility with current or future undertakings on or near logging sites, and impairment of water resources and subsistence farming is often disregarded. The fisheries and aquaculture industries are not regulated in a way that guarantees the right to work of subsistence fishermen. Chemicals used in agribusinesses impact the health of farm workers and nearby communities, while farm work regulations for seasonal workers, especially on fair pay, labour unions and social security, are inconsistent with international standards.

Although guarantees have improved considerably in recent years, labour regulations remain at odds with international law. Also lacking are effective guarantees against discrimination in employment, namely on social background, income level, union membership, disability, gender, indigenous status and other prohibited grounds. There is no effective mechanism guaranteeing equal pay for women, indigenous workers, or persons with disabilities, especially on access to work discrimination.

Throughout privatised services such as health, education,¹²⁵ public transportation, care of elderly persons, housing, and water and sanitation (see UNGP 5 and ICESCR), regulations are more comprehensive but still substandard. The overarching issue here is diminished public funding and oversight, compounded by lack of authority and coordination. A competition-based structure, which makes the public systems loose quality teachers and health professionals, and compete in less than equal conditions with private providers, keeps the State from providing quality service to the 80% of the population served by the public health system and the over 90% of students enrolled in public or publicly-subsidized schools. In the field of water and sanitation services, including waste disposal, the State is unable to guarantee a preventive focus on external risks, contrary to the human right to drinking water and sanitation. Public transportation services in metropolitan Santiago are

¹²⁵As members of an institution of higher education, the authors refrained from evaluating universities.

considerably better than elsewhere, a feature shared in varying degrees by all privatised services. This and effects of income discrimination is discriminatory under international law.

Despite strides in prevention and reaction to business non-compliance, oversight systems remain extremely deficient (see UNGP 3) due to lack of funds, authority, and coordination. Cases in point include SERNAC's inability to pursue health system violations and lack of preventive oversight of informal care facilities where seniors or disabled persons may be found illegally confined or housed. In fisheries and mining, the oversight function is rendered considerably less effective by policies providing for advance notice of inspection.

On the impact of spatial planning on enjoyment and guarantee of human rights, this study notes no effective harmonization of land use and no spatial planning of energy, mining, logging, or real estate projects. As evidenced in the Campiche (Supreme Court) and Curtido Blas (Constitutional Court) cases, there is no effective access to justice for infringement of environmental, health, or privacy rights, as required under international human rights law. This study also reported that the regime of indigenous and subsistence property, notably lack of access to justice and to free, quality legal assistance (see UNGP 25 and American Convention on Human Rights, Art. 25), as well as poor FPIC regulations.

Existing and planned trade and investment agreements do not undergo human rights review, which tends to limit Chile's policy- and decision-making, as information about possible negative social and environmental impact is lacking. For example, unless Congress requires a reservation, the proposed Trans-Pacific Partnership would force ratification of UPOV-91, an intellectual property agreement that threatens to seriously put at risk the human rights or livelihood of small farmers and indigenous and peasant communities, as the effects of GMOs are scientifically unknown; therefore, the precautionary principle should be applied.

For those unable to afford counsel, access to justice is structurally limited. With minor differences, this holds true across civil, environmental, consumer, constitutional, and economic law. Access issues are most acute in civil matters, which generally is an unsuitable forum for settlement of reparation claims. The Legal Aid Service (CAJ), the sole public institution providing free legal assistance in non-criminal cases, is mostly staffed by articling students, lacks experienced staff, and only works in specific areas of the law, which threatens both service quality and access to justice. Human rights offices, for example, exist only in metropolitan Santiago. While additional support is available for especially vulnerable groups, this is insufficient and generally based on CAJ services, which suffer from the structural issues above. In business and human rights contexts *pro bono* work is nearly non-existent, as many potential participants whose main clients are businesses would see a conflict of interest.

Certain discrete initiatives constituting good sustainability and labour rights practice can be considered a good step in the direction of promoting human rights in business. These generally voluntary initiatives include cleaner production programmes encouraging sustainability agreements between companies and a pilot pre-investment agreement project advancing community engagement in investment processes. While Cleaner Production Agreements do not yet contain human rights language, and the Cleaner Production Council does not yet promote their inclusion, the Energy Ministry guidelines on community involvement do include some human rights standards, and are a commendable effort to be

expanded and deepened. In addition, the Social Development Ministry has conducted several studies on socially inclusive development in private and public-private contexts. Codelco, the state-owned copper company, has a human rights and community relations policy in place which includes indigenous rights and is partly subject to access to information laws (UNGP 4). The Ministry of Mines is looking into a strategy addressing safety issues at hundreds of abandoned tailings dams and deposits. The Office of the Superintendent of Securities and Insurance has adopted a “report or explain” policy on women incorporate boards, executive positions, and the labour force. ChileCompra is encouraging ministries to embrace environmental, labour and social standards in public procurement (see UNGP 6). Labour standards are obligatory; once ministries or other state organs commit to the other standards, these become mandatory for bidders. Finally, Chile has created a National Contact Point for implementation of the OECD Guidelines for Multinational Enterprises, which include a chapter on human rights. Contact points offer significantly more transparent mediation and follow-up services, but in Chile, lack of funding and ministry coordination mean that this mediation mechanism remains mostly unknown to or unused by private players and civil society.

As most initiatives are not part of overarching policy, the efforts of the Foreign and Economy ministries to coordinate through an Inter-Ministerial Working Group is certainly a step in the right direction. Furthermore, the Ministry of Economy have convened a multi-stakeholder Social Responsibility Council for Sustainable Development. Coordination is vital to progress in upholding human rights in business contexts.

Future research needs identified in this study include:

- Work with public interest groups, the Supreme Court Research Department, the NCP and the Business and Human Rights Unit to propose a mechanism that both business and civil society can recognise as facilitating due process in business and human rights negotiations and mediation. The NCP could later on join the broader mechanism.
- Review public investments in financial institutions and instruments: Is the State using due diligence when choosing financial instruments to manage its patrimony? Is it investing funds and reserves in a manner that is both sustainable and upholds human rights?
- Assess informal employment in micro, small and medium-size recycling enterprises with a view to preventing and mitigating impacts and reviewing options for improved working conditions.
- Prior to ratification, examine the TPP’s human rights risks and impact.
- Study the creation of a standardised compensation scheme for Impact Benefit Agreements, and eventually, a common fund for legal aid and mitigation of inequality of arms in negotiations.
- Study an access to justice reform: simplify the access structure and relieve civil courts from small retail (and other debt) claims, so they can actually deal with more complex impact and compensation cases.

This study is intended as an input for the Inter-Ministerial Working Group on Business and

Human Rights that will bring about a National Plan of Action later this year. It is also intended to assist the NAP community dialogues the government intends to convene, and as such, stakeholders are welcome to comment, critique, or complement its findings. A feedback mechanism is available at the homepage of the UDP Human Rights Centre.