**Call for inputs: Extractive sector, just transition and human rights**

My name is Aviva Silburt; my PhD dissertation examined the global complexity of extractive sector conflict in Guatemala, which you can access on my website: <https://asilburt.wixsite.com/mappingcomplexity/resources>

My input to the Working Group is aimed at highlighting some of the practical governance challenges relevant to respecting human rights that emerged as a result of the increased complexity of the extractives sector and its operation and governance.

1. Four intersecting considerations should be kept in mind for states in the development and implementation of human rights compatible energy transition laws and policies that ensure responsible business conduct:

1. States (and external organizations supporting states) must focus attention on strengthening state accountability to the entire population (both in general and in the extractive/energy sector in particular), to build confidence in the state’s ability and willingness to enforce laws and policies developed for this sector. The content of laws and policies will not contribute as much to advancing human rights if the state is not willing or able to enforce them.
2. Laws and policies must be developed through participatory processes that take into consideration the particular interests, needs, and concerns of all sectors of society that may benefit or be adversely impacted by the energy and extractive sector, to ensure that such laws are considered legitimate and representative of society.
3. Laws and policies must pay particular attention to the distribution of both benefits and adverse impacts associated with the energy and extractive, and how this may intersect with pre-existing issues in society. Often adverse impacts fall disproportionately on vulnerable sectors of society and benefits flow mainly to advantaged sectors of society. Laws and policies should aim to achieve an equitable distribution and avoid exacerbating pre-existing issues.
4. States should avoid relying on models that rely on company contributions to society that are voluntary (i.e. the company can choose whether or not to participate/undertake an activity) or company-defined (the company can choose how it will design/implement a particular activity), as companies tend to select and design such initiatives strategically to advance company interests, and it is difficult to ensure equal access or equitable distribution of benefits. This is not to say that states cannot require financial contributions from companies; however, states should always oversee the design and implementation of such initiatives to ensure they are not discriminatory.

2. A myriad of measures have emerged at the national, regional, and international levels to foster business respect for human rights in the extractives sector—from national legislation to international frameworks like the UNGPs, VPs on security and human rights, and OECD guidelines, to internationally-focused RBC policies, to industry-initiatives such as the Mining Association of Canada’s Towards Sustainable Mining framework or ICMM’s Mining Principles, to policies of lending institutions like the World Bank/IFC. These other frameworks have emerged in response to deficiencies in states ability and willingness to protect and respect the human rights of their entire populations. However, the existence of so many different frameworks has contributed to a complex system of governance that dilutes the power and ability of states to oversee compliance or prescribe adequate remedy (since so many other organizations have a role in the system), and ultimately distracts attention from the need to strengthen state capacity and political will to uphold human rights. The system has also given companies considerable discretion to choose which rules they will follow, leading to challenges with consistency and accountability. Many of the frameworks also rely on information provided by the companies, biasing the instruments and creating challenges for other stakeholders to have their perspective and version of the facts heard. Greater work is needed to harmonize the various frameworks, focus attention back on the state’s responsibility to protect human rights and provide remedy, and triangulate information sources.

3. In addition to the general considerations for laws and policies raised in response to question 1., mechanisms and processes for assessing and mitigating adverse impacts on human rights should include at minimum:

* An assessment of environmental impacts and how those impacts by directly and/or indirectly impact other dimensions of the environment, society, the economy, and how those impacts may intersect with the human rights of specific groups.
* Community engagement, and supporting community capacity building, so that affected communities can understand for themselves how they may be impacted by such extractive sector projects.
* The development of a community development and well-being plan, and supporting community capacity building, so that a community can define its own vision of development and well-being, identify mitigation measures for or strategies for realizing benefits associated with such extractive projects.
* A defined state mechanism for reporting and investigating alleged adverse impacts, abuses, and conflict that could arise in the context of such extractive projects and details on the process or method that will be used to investigate those issues.
* A publicly available registry whereby the project-owner must disclose all subcontractors that will be performing work in connection with the project and include details on oversight activities to ensure that subcontractors have complied with human rights obligations.
* Where there is a possibility for transboundary adverse impacts, the state should define mechanisms for coordinating internationally with other affected states on the above-mentioned points prior to approving any project. (The UN could have a role in offering a forum or advice for the development and oversight of such mechanisms).

4. As noted above in response to question 2, many of the frameworks that have emerged to enhance governance in the extractive sector rely on information provided by the companies, which bias the instruments and creating challenges for other stakeholders to have their perspective and version of the facts heard. This has contributed to the circulation of alternate versions of the facts (community version and company version) that over-emphasize certain details and under-emphasize others. The process of circulation of information among different stakeholder groups contributes to information distortions. Thus, it would be important for reporting on project activities, impacts, and compliance to include participation and/or information from multiple sectors of society and independently verify information that is received to help contribute to a common set of information and increase confidence by all stakeholders in that information.

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6. Beyond the fact that only 30 countries (15% of countries) have developed National Action Plans or chapters on business and human rights, more work in needed to develop state capacity and political will to encourage company respect for human rights and mitigate adverse impacts. It is important to note, however, that the extractive sector presents unique challenges for human rights that may require more detailed or specific commitments and guidance. For this sector in particular, an important gap concerns the governance and regulation of water consumption, which will become increasingly important to human rights in the context of human rights. As well, post-project closure activities and community is an area that continues to receive inadequate attention. Finally, as noted above in question 1, a third gap concerns patterns of inequality that may be created or reinforced through extractive projects, relevant to human rights impacts and access to remedy.

7. The policies, programs, plans and activities of one State can have adverse human rights impacts outside of their territory or jurisdiction in at least two respects that require attention. First, decisions related to the extractive sector could have transboundary environmental impacts, relevant to the human rights. The Cerro Blanco mine in Guatemala poses significant risk of adverse transboundary environmental impacts, that could affect El Salvador’s main water supply (and therefore their right to a clean and healthy environment). Although several treaties exist (e.g. the Espoo Convention), neither country is a signatory. As such, assessing and mitigating transboundary environmental impacts remains an underdeveloped area of international relations and governance. Second, policies, programs, plans, and activities of one state can focus on encouraging or promoting business activity in a certain sector, such as clean energy transition or the extractive sector. International funding and technical assistance may be channeled and/or conditioned on development in this sector, which may influence the decisions and activity of another state in ways that may interfere with state decision-making or other domestic processes relevant to this sector. The Canadian Embassy, World Bank/IMF, and other international organizations exerted considerable influence on the Guatemalan government’s adoption and design of policies that encouraged the development of it’s extractive sector and prioritization of extractive projects over respect for the human rights of affected communities.

8. See question 1.

9. Companies can do 3 things: First, businesses in the extractive sector strengthen state capacity to enforce the roles in place. At minimum, companies need to respect the rules in place and avoid trying to negotiate exceptions or alternatives to existing rules, which erodes the integrity of the existing framework. Second, companies need to assess how all aspects of their operations may create or reinforce inequalities and address any imbalances through operating policies and plans. Inequalities are relevant to discrimination in the enjoyment of benefits and other impacts on human rights from e.g. environmental impacts. Third, companies should not be allowed to self-define their contributions to society, including whether or not to participate/undertake an activity or how it will design/implement a particular activity, as companies tend to select and design such initiatives strategically to advance company interests, and it is difficult to ensure equal access or equitable distribution of benefits. This is not to say that states cannot require financial contributions from companies; however, states should always oversee the design and implementation of such initiatives, for sustainability purposes and to ensure equal access and to not politicize the delivery of such programs and services.

10. No. See question 2.

11. My research found that lenders and investors have the largest potential influence over a company’s behaviour. However, I did not see any examples where they successfully achieved the mitigation or remedy of adverse effects through my research. In the context of the Marlin mine, investors required a human rights impact assessment. This was an important action; however, in this particular case, the assessment did not result in conclusive findings or result in any meaningful change in the company’s behaviour. The community continues to pursue action before the Inter-American Commission for Human Rights to compliance with precautionary measures to protect their right to potable water, which has not been fulfilled. Investors are limited by the information they receive about a particular project and its impacts, which is usually what the company chooses to present and share with them. The ability for investors to access information from alternative sources would be important. However, creating additional responsibilities or remedy mechanisms for investors could further dilute the power of states and displace attention from their responsibility to protect human rights.

12. The informal economy contributes to increased inequality and workers are more vulnerable to abuse and exploitation. Although informal economic activities are smaller scale, they too have environmental impacts that can cumulatively impact the local environment and society. The state should focus greater attention on supporting small and medium sized businesses and better support the informal economy to become formalized so that workers are protected from abuse and exploitation.

13. Yes, in the sense that undertaking HRDD is better than not doing so. However, my research identified that the adverse impacts of extractive sector activities are complex and context specific. It is important to ensure that such exercises are not simply a check-box exercise. The considerations identified in question 1 and 3 will be important to keep in mind.

14. The most important contribution to encourage human rights-compatible business practices would be to create space for multi-sector discussion. In my research there is currently significant polarization and differing views between “pro-mining” industry associations and university programs and “anti-mining” civil society organizations and university programs. Although both groups are interested in mitigating and addressing adverse effects in the extractive sector they are currently unwilling and unable to speak to each other. In contexts such as these, any efforts by industry associations and university programs will not get far towards promoting awareness and encouraging responsible practices if those practices are not viewed as appropriate or legitimate by other sectors of society. It will be important to first build consensus on an acceptable model and measures for the extractive sector among all sectors of society, as well as build confidence in the state’s capacity and willingness to respect human rights.

15. At minimum, the following measures and mechanisms relevant to the extractive sector should be introduced—through national legislation—in consistent fashion:

* Requirement for community consultation, paired with a requirement for multi-sector engagement in the design and elaboration of the specific processes and requirements for community consultation.
* Internalization of the costs of adverse environmental and social impacts in extractive projects, to be borne by the company. i.e., extractive companies are to be responsible for repairs/ restoration and related compensation for any damages caused directly or indirectly as a result of the extractive operation. This should be on top of the royalty rate.
* A royalty rate that will include a portion for the national government and a portion for the immediate local community.
* Provisions that articulate expectations for the responsible conduct of companies, such as transparency and/or public reporting requirements, their contribution to local or national development or other plans or strategies, local content, local hiring, etc.
* Provisions that articulate how transboundary issues will be dealt with, including transboundary environmental impacts, and international human rights issues that could arise.
* Provisions that establish the environmental and technical standards that the extractive project will be expected to comply with, including how equivalent international standards will be enforced.

16. Canada has a National Contact Point and a Canadian Ombudsperson for Responsible Enterprise. These are mechanisms by which the “home” state may receive and investigate complaints related to Canadian companies operating abroad. The challenge with these mechanisms is in the potential remedies that they can offer. Canada does not have jurisdiction to prescribe measures that will end the source of human rights abuses, because they cannot revoke an operating license. The potential consequences for non-compliance with the prescribed remedies are also limited. Efforts should focus on national institutions of the “host” state, for example, through coordination with national institutions, to ensure that remedies are appropriate and enforceable.

17. In Guatemala, two foreign-owned mines: Escobal (Zinc) and Fenix (Nickel) mines are considered transition minerals. Both mines have involved significant conflict. Both involved national judicial proceedings challenging the licenses of the projects due to lack of Indigenous consultation. As well, both have involved judicial proceedings in Canada related to violence and death directly involving the companies in British Columbia and Ontario, respectively. In 2019, Pan American Silver (Escobal) reached a settlement with the plaintiffs, closing the case; but the proceedings related to the Fenix mine are ongoing in Ontario.

18. No, due to limitations in jurisdiction. More attention is needed to strengthen national institutions.

19. See responses to questions 1, 3, 15.

20. Same as 19.