CANADIAN MINING PROJECTS IN THE TERRITORY OF THE DIAGUITAS HUASCO ALTINOS AGRICULTURAL COMMUNITY IN CHILE

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EXECUTIVE SUMMARY

This report examines the human rights impacts of two mining projects in the territory of the Diaguitas Huasco Altinos Agricultural Community (known in Spanish as the Comunidad Agrícola de Los Diaguitas Huasco Altinos [CADHA]), an indigenous community settled in Huasco Province, in the Atacama region of Chile. The two mining projects are Pascua Lama, of Barrick Gold Corporation, and El Morro (which became Corredor following a merger in 2014 and is currently called New Union, or Nueva Unión), of Goldcorp and Teck Resources Ltd., all Canadian companies.

The impact that these mining projects have had, or could have in the future, on this indigenous community is evaluated using the Human Rights Impact Assessment (HRIA) methodology, an approach based on the active participation of the affected communities that is particularly relevant in the context of investment projects that potentially adversely affect human rights. In HRias, communities take the lead in identifying and analyzing the main human rights impacts caused by investment projects in their territories. The rights assessed include those that have been recognized by both national and international law applicable to indigenous people and to investment projects.

The HRIA methodology employs a tool called Getting it Right, which was designed by the Canadian organization Rights & Democracy for this purpose. As specified by the International Federation for Human Rights (FIDH), which promotes the use of this tool, Getting it Right has been used for over a decade by various entities including human rights and financial organizations and by corporations themselves, globally, to identify the differences between the commitments made by the state (human rights in principle) and the possibility of enjoying those rights within the country's actual situation (human rights in practice). Getting it Right guides communities and nongovernmental organizations (NGOs)
step by step in measuring the actual or potential impact of an investment project on human rights. It outlines the preparation of a final report and the formulation of recommendations that can serve as a basis for promoting dialogue between the community and public and private stakeholders involved in the project.

To represent the perspectives of all stakeholders and to follow the implemented HRIA methodology, interviews were carried out with community members and with representatives of social organizations, businesses, and government. This report focuses on the impacts on the CADHA because this indigenous organization has the legal and ancestral ownership of the territory where the mining projects being analyzed are located.

**STAKEHOLDERS MAP**

- **CHILEAN GOVERNMENT**
  - MINISTRY OF ENVIRONMENT
  - CONADI
  - NATIONAL WATER BUREAU
  - ALTO DEL CARMEN MUNICIPALITY

- **PASCUA LAMA MINING PROJECT**
  - CMN NEVADA SUBSIDIARY
  - BARRICK GOLD CORPORATION

- **DIAGUITAS HUASCO ALTINOS AGRICULTURAL COMMUNITY (CADHA)**

- **AGRICULTURAL INDUSTRIES**

- **NGOs:**
  - OBSERVATORIO LATINOAMERICANO DE CONFLICTOS AMBIENTALES (OLCA)
  - OBSERVATORIO CIUDADANO

- **DIAGUITAS INDIGENOUS COMMUNITIES (LAW 19,253)**
  - SURVEILLANCE BOARD OF THE HUASCO RIVER BASIN

- **EL MORRO – CORREDO MINING PROJECT (PRESENTLY NUEVA UNION)**
  - GOLDCORP AND TECK RESOURCES

- **CANADIAN GOVERNMENT**
As noted, the subject of this HRIA is a community of Diaguita people, one of the nine indigenous peoples that inhabit in Chile, whose population totaled about 50,000 people in 2013 (about 3.2 percent of Chile’s indigenous population). Although the Diaguita were only recognized by law as an “ethnic group” in 2006, they have inhabited northern Chile since time immemorial. This group includes people who live in the territorial space of Huasco Alto; their settlement of the area is recorded in 17th-century colonial documents. This Huasco Alto community, now consisting of 262 families, preserves cultural and spiritual practices, their cosmovision (worldview), and customs inherited from their ancestors, as well as their agricultural and livestock production methods and craft activities, all of which determine their way of life. The CADHA is the only Diaguita organization that preserves ancestral lands in communal ownership.

In fact, the community owns the Estancia Huascoaltinos, a property registered in its favor in the early 20th century and regularized in 1997 through Chilean legislation relating to agricultural communities. The regularization of the property, however, determined the individualization of the property and excluded important areas of the community’s territory, consolidating land usurpation processes through sales and other irregular forms of appropriation by private parties. As a result of these events, the surface area of the community land currently amounts to only 239,000 hectares.

In the past two decades several mining projects have been pushed forward and/or planned in the CADHA territory. As noted, this HRIA addresses two: Pascua Lama and El Morro.

**Pascua Lama**

Pascua Lama is a mining project of the Nevada Mining Company (Compañía Minera Nevada SpA), a subsidiary of Barrick Gold in Chile, incorporated in Canada. Pascua Lama is an open-pit gold and silver mine, located at more than 4,000 meters of elevation on the border of Chile and Argentina. In Chile, Pascua is in Huasco Province, in the Atacama region; Lama is situated in Argentina’s San Juan Province.

The project in Chile is located at the headwaters of the El Estrecho and El Toro Rivers, and it involves the exploitation of a mineral deposit existing under the glaciers that sustain the Huasco Valley hydrological system. These glaciers irrigate ancestral territory of the CADHA, a territory usurped through legal loopholes in the early 20th century and purchased by the Compañía Minera Nevada for the implementation of the Pascua Lama project. In its original formulation, the project included the removal of 13 hectares of ice from three
glaciers—Esperanza, Toro 1, and Toro 2—and the deposit of the removed ice onto the nearby Guanaco glacier.

The project’s objective is the exploitation of mineral deposits of gold, silver, and copper and the construction of a plant in Argentina to produce doré metal (a gold-silver alloy). Geological and engineering work after 2001 identified major mineral reserves. These reserves were incorporated into the design of the original project to increase the capacity of mineral exploitation and processing from 37,000 tons per day to 48,800 tons per day. Despite these modifications, this project received a favorable environmental qualification by the Atacama Regional Environmental Commission, through Exempt Resolution No. 039 of 2001, subsequently amended by Exempt Resolution No. 059 of 2001. The further expansion of mining was approved by Exempt Resolution No. 24 of 2006. To facilitate the implementation of Pascua Lama, the Chilean and Argentine governments signed a series of agreements and specific protocols in 2007 that were added to the Mining Integration and Complementation Treaty signed in 1999 to facilitate cross-border mining.

Although the project is situated on the ancestral territory of the CADHA, the community was not consulted before operations began. This human rights violation, along with other human rights impacts listed in the American Convention on Human Rights, led the CADHA to file a complaint to the Inter-American Commission on Human Rights; this complaint was declared admissible in 2009. Furthermore, in addition to the Pascua Lama mining project’s violation of the fundamental right of consultation and the other human rights violations noted, it has failed to fulfill the environmental requirements of Chile’s Environmental Qualification Resolution (the Resolución de Calificación Ambiental [RCA]).

On October 19, 2015, after several years of mining work that have directly impacted the glaciers, the waters (the Estrecho and Chollay Rivers), and the high Andean wetlands (water meadows and bogs), Pascua Lama suspended operations and announced a partial temporary closure plan in all its activities associated with the construction phase. This decision was made in compliance with the provisions of Exempt Resolution No. 477, dated May 24, 2013, of the Superintendence of the Environment. Among other actions, the Superintendence ordered the adoption of a series of urgent and transitional measures to mitigate the environmental impacts of the project, maintaining the suspension of the project until the Water Management System is carried out in the manner provided in Environmental Qualification Resolution No. 24 of 2006, considering that the greatest impacts of the project relate to the water and natural reservoirs that provide water.
Through the media, Barrick Gold in July 2016 announced that it was studying the development of a new modular project for Pascua Lama that could make it viable and that it was considering options for operating a smaller open-pit mine on the Chilean side of the project and then another underground mine on the Argentine side. The mining company did not indicate whether this change affects the project’s impacts and/or complies with the requirements imposed by the environmental authority—or considers the Diaguita people and citizens in general. The company also did not refer to the way it will comply with the obligation of consulting the Diaguita people, particularly the CADHA, on whose ancestral territory the project is located.

**El Morro**

The second project under study is the El Morro mining project, originally owned by Goldcorp Inc., also headquartered in Canada. The project involves the exploitation of an open-pit gold and silver mine, which contains proven and probable reserves of 8.9 million ounces of gold and 6.5 billion pounds of copper at the close of December 2014. El Morro’s worksites, located in Huasco and Copiapó Provinces, cover an area of approximately 2,460 hectares, out of which 1,420 hectares correspond to legally registered territory of the CADHA.

In 2008, the Sociedad Contractual Minera El Morro submitted an environmental impact assessment (EIA) to the Regional Environmental Committee of the Atacama region, thereby presenting the “El Morro Project” to the Environmental Impact Assessment System. After a series of addenda, the project was approved by Exempt Resolution 049 of 2011.

Soon thereafter, judicial actions were filed against the El Morro project for violation of constitutional guarantees, in particular because the indigenous consultation was not performed as established in the International Labour Organization Convention 169 on Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169), ratified by Chile and in force since 2009. These actions found acceptance in the courts, which ordered the annulment of the Exempt Resolution. Owing to this judicial decision, the company decided to temporarily withdraw the project from the Environmental Impact Assessment System and to indefinitely suspend its execution. Nevertheless, in 2015, Goldcorp, with Teck Resources, a company also based in Canada, announced their intention to amend the

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original project to give rise to the Corredor project that combines the El Morro mining project with another adjacent project called Relincho. The combined project was later named New Union, or Nueva Unión, in reference to this merger. As in the case of Pascua Lama, the Nueva Unión project has not publicly stated whether this modification substantially affects the impacts of the project and/or allows compliance with the requirements imposed by the Diaguita people and citizens. In addition, the indigenous consultation is still pending.

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These mining projects are analyzed in this HRIA in light of national and international human rights regulations applicable to indigenous peoples. As detailed in this report, the legal framework for indigenous peoples in Chile grants the Diaguita and the CADHA, as part of this indigenous group, protection against initiatives such as these mining projects. Indeed, under Law 19,253 of 1993 on “promotion, protection and development of indigenous peoples,” amended in 2006 to recognize the Diaguita as an ethnic group, the Chilean State recognizes indigenous individuals, ethnic groups, and their communities, and undertakes to respect, protect, and promote their development, cultures, families, and communities and to protect their land. More importantly, the human rights recognized in ILO Convention 169 ratified by Chile in 2008, in accordance with Article 5, paragraph 2, of Chile’s Constitution, must be respected and promoted by state bodies. According to ILO Convention 169, indigenous peoples have, among other rights applicable to projects such as those proposed in Diaguita territory that are under analysis in this HRIA, the right to respect of their cultures, ways of life, and traditional institutions; to ownership and possession of their traditionally occupied lands; and to consultation and effective participation in decisions that affect them. Consultation, especially prior to undertaking or permitting programs for the exploration or exploitation of resources existing on their lands, is a fundamental right of the Diaguita people. In the same way, they are entitled to participate in the benefits of such activities, and to receive fair compensation for any damage they may suffer as a result of such activities.

Also applicable to indigenous peoples are rights that have been recognized through various international human rights instruments. Equally relevant for the implementation of these rights is their interpretation by the bodies responsible for their supervision: the treaty bodies of the United Nations, the Inter-American Commission on Human Rights (IACHR), and the Inter-American Court of Human Rights.
Highlighted among the rights that assist indigenous peoples that are applicable to the Diaguita people and to the CADHA and that are evaluated in this HRIA, are the following:

- The right to equality and nondiscrimination, which includes the right not to be discriminated against for ethnic or cultural identity reasons, a right that not only assists the Diaguita as individuals who are members of the CADHA but also as collective subjects.

- The right to self-determination, autonomy, and self-government; to maintain and strengthen their own political, legal, economic, social, and cultural institutions; and to decide their own priorities for the process of development. These rights are recognized by the UN Declaration on the Rights of Indigenous Peoples of 2007, a declaration adopted by Chile.

- The indigenous peoples’ right to ownership of their lands, territories, and natural resources, including the right to own, use, develop, and control the lands, territories, and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those they have acquired otherwise.

- The right to consultation regarding measures that may affect them directly with the objective of achieving agreement or consent. In accordance with applicable international standards of such consultations, which constitute a duty or obligation of the state, these consultations must be prior, free, informed, and in good faith. They must also be enacted through culturally appropriate procedures.

- Finally, the right to prior, free, and informed consent, particularly in the case of relocation, of storage of hazardous materials in lands and territories of indigenous peoples, or of large-scale investment projects that would have great impact, such as the impacts that mining projects usually have within the territory or community of indigenous people, including those analyzed in this study.

As discussed in this HRIA, there is also a growing recognition in international law of the responsibility of states to respect and ensure human rights. This responsibility is required not only for the actions of the states and their agents, but also for acts committed by private persons or entities domiciled in these states. In the same way, there is consensus, expressed in the 2011 UN Guiding Principles on Business and Human Rights, that ensuring the observance of human rights in the context of business activity requires the participation of state and business enterprises. The Guiding
Principles are organized into three “pillars” outlining state and business responsibilities:

- Pillar 1: The state should provide protection against human rights abuses committed by third parties, including businesses, through appropriate measures, regulatory activities, and the submittal to justice.

- Pillar 2: The companies have the duty to respect human rights, which implies the duty to avoid infringing on the rights of people and includes pursuing due diligence processes on human rights matters and redressing the negative consequences of their activities.

- Pillar 3: Effective repair mechanisms must be established, and states and business enterprises must ensure that victims of human rights abuses by companies have access to effective judicial and extrajudicial remedy mechanisms.

Also relevant to this HRIA is the growing recognition by international law of the responsibility of states to ensure the protection of human rights, not only within their territories but also outside their borders, when human rights are affected by the activities of companies domiciled in them. Extraterritorial obligations (ETOs) of states—in relation to the rights of indigenous peoples often affected by the actions of transnational corporations domiciled outside the territories in which they operate—have been the special subject of concern of UN treaty bodies and the inter-American human rights system, and therefore are also analyzed in this HRIA. Specifically, this report focuses on Canada, the country of origin of the businesses that own the projects under assessment.

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This HRIA found that the mining projects imposed or projected in the territory of the CADHA have had a series of impacts on the human rights of the community. A fundamental right that has been violated in this case is the right to equality and nondiscrimination. This violation is seen in the preferential ownership right granted to the mining concession to impose easements on the owners of the land, even when the land is owned by indigenous communities; the actions of the Environmental Qualification Resolution that approved the project; and related to the latter, the refusal of the state to acknowledge the indigenous status of the CADHA.
Along with this violation to equality and nondiscrimination, the community’s right to self-determination, autonomy, and self-government, to preserve their own institutions in the various fields of cultural life, and, consequently, to decide their priorities for development have also been violated.

The Pascua Lama and El Morro projects also violated the rights of the CADHA over the community’s lands, territories, and natural resources. This violation is the consequence of the state’s historical lack of protection of these ancestral lands, which has resulted in their usurpation by private parties. Specifically, the state’s refusal to recognize the indigenous status of these lands has meant that these lands have been excluded from the special protection provided by Chilean law for lands registered as indigenous. Through their actions, the state and the companies have obviated the irreplaceable relationship that this indigenous group has with its territory, which constitutes the foundation of their way of life and customs and gives them an ethnic identity.

In the case of large projects that could cause significant impact on the way of life and customs of the CADHA, and pursuant to applicable law, the state also evaded its obligation to obtain free, prior, and informed consent from the community for these projects. Moreover, the state has not ensured the participation of the CADHA in the benefits of these projects, beyond the compensations paid by Barrick Gold in the case of Pascua Lama, which, as explained in this report, have been aimed at achieving the adhesion of some groups affected by the project that do not hold rights over ancestral territory and have also resulted in breaking the social fabric of the Diaguita people.

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Following the UN Guiding Principles on Business and Human Rights that have been taken into consideration in the development of this HRIA concerning the CADHA’s rights, this research found a fundamental responsibility of the governments and the business owners of these projects.

In relation to the State of Chile, this study concluded that it has not complied with its obligation to protect against human rights abuses committed by third parties, in this case by companies. In fact, the state did not comply with domestic and international laws, such as Chilean Law 19,253, and ILO Convention 169, which ensure respect for the rights of the CADHA and its members in the face of these mining projects. For example, the State of
Chile has refused to recognize the lands of the CADHA as indigenous lands to date, and, as a result, provide the protection that Law 19,253 grants to these lands.

Nor did the Chilean government evaluate other in-force legislation, such as the Mining Code, the Water Code, and environmental legislation and its regulations referring to the environmental impact assessment of projects such as those discussed in this HRIA, to see whether they adequately protected the human rights of the CADHA. Had the government done so, it could have overcome deficits and omissions in these matters. Likewise, it did not submit to the justice system the projects owners companies whose activities resulted in the violation of human rights of this community.

Moreover, the Chilean government signed agreements with the Argentine government to facilitate cross-border mining, as well as reached a trade agreement with Canada. These agreements were instrumental in facilitating the Canadian mining investments without ensuring proper adherence to their international commitments on human rights and without performing an assessment of their impact on those rights. It is also evident that the Chilean State did not regulate the companies that own the projects analyzed in this HRIA, by imposing the pro homine principle of respecting human rights in their activities, and by insisting that they prevent and/or remedy the impact of their activities on human rights. Finally, the Chilean government did not ensure effective access to judicial or administrative mechanisms of redress against violations of human rights of this community committed by the owners of these mining projects, nor did it facilitate access to nonstate complaint mechanisms.

This work also found that the State of Canada contributed to the impact on the human rights of the Diaguitas Huasco Altinos Agricultural Community in the context of the mining projects. In fact, the Canadian government has actively promoted investments in the extractive industry located in territories beyond its borders. It has signed numerous trade agreements with different states, including with the Chilean State, to promote and protect investments abroad in companies domiciled in Canada. It has also granted loans to these companies through state agencies, without safeguarding the human rights of the supported investments. The responsibility of Canada is also a result of the refusal of its government to accept the recommendations of international human rights organizations, which have urged it to adopt legislative and policy measures to meet its extraterritorial obligations for the violation of human rights by companies domiciled in Canada acting outside the country to prevent, remedy, and sanction such violations. Canada is also responsible for the support it has granted to the mining projects of this HRIA without having heard the complaints from affected communities and civil society organizations.
The Canadian authorities cannot ignore these human rights claims, which were formalized through presentations to its embassy in Chile and reports submitted to international bodies such as the IACHR.

Finally, the companies involved in these projects, Barrick Gold and its subsidiary in Chile, Compañía Minera Nevada, in the case of the Pascua Lama project, and Goldcorp in the case of the El Morro project, in turn, did not fulfill their obligation to respect the human rights of the Diaguita Huasco Altinos people. In fact, in contrast to the statements made by representatives in Chile and to the institutional principles appearing in its websites in which both companies express a commitment to human rights, in general, and to the rights of indigenous peoples, in particular, they have not met their responsibility to prevent and mitigate the impacts of their activities on human rights in its operations and plans in the territory of the CADHA. Nor have these companies avoided the violation of individual rights of its members and community groups, or remedied the negative consequences of their activities, as established in the UN Guiding Principles on Business and Human Rights. Even more importantly, the companies did not respect the right of the CADHA to express, or not, its free, prior, and informed consent for the projects referred to in this report, a right that both companies—as member parties of the International Council on Mining and Metals (ICMM)—recognize when indigenous peoples are directly affected by their operations.

In the case of Barrick Gold, the mining project was located in the territory that CADHA claimed as ancestral. In addition, the environmental impact studies developed by the company for this project did not include human rights criteria nor were they focused on measures to prevent possible negative impacts of the planned activities on the environment and on the economic, social, and cultural life of the CADHA. Such impacts, including damage to the glaciers that feed the tributaries of the Chollay River and damage relating to pollution of water resources and to the ways of life and customs of the land's inhabitants, were also not considered in the case of Pascua Lama. The lack of due diligence of the company was also manifested in the closure of access roads to the mountain range that has traditionally been used for the community's pastoral activities.

Similarly, this HRIA found that Barrick Gold's corporate practices destabilized the organizations of the Diaguita people and contributed to disintegrating their social cohesion. This destabilization was achieved through negotiations aimed at co-opting organizations, such as those negotiations carried out with Diaguitas communities constituted according to Law 19,253 and other organizations such as the Supervisory Board, and individuals, including members of the CADHA. Through these negotiations, the company agreed to
compensate for damage to land, water, and natural resources located within the community property whose owner is the CADHA, without the community’s consent.

Goldcorp showed similar shortcomings with regard to respect for human rights of the CADHA. As in the case of Pascua Lama, the El Morro project was located in an area that overlaps the territory of the CADHA and is legally registered in its name. The lack of due diligence of Goldcorp to identify and prevent the negative consequences of the project on this indigenous community was evident in its environmental impact study, which did not adequately consider the impacts that the project would have on this community. In 2012, this situation led the courts to nullify the environmental rating of this project because it violates constitutional guarantees of the legal right to equality and the right of territory ownership of the CADHA. The rating is nullified until completion and inclusion of a baseline study that takes the project’s impacts on the community’s right to communal property and their traditional way of life and customs.

The same lack of due diligence was seen in the community consultation process of the El Morro project, a process contested by the courts in 2014 for not considering the CADHA. The company did not hold dialogues with the community relating to the study of social impacts, to the adoption of compensation measures for damages caused by the project, or to the method of profit sharing.

In addition, both companies failed to establish effective mechanisms for complaint and redress for the adverse impacts of their investments, as mandated by the UN Guiding Principles on Business and Human Rights.

As for Teck Resources, a company also headquartered in Canada, which owns the Relincho project located 40 kilometers away from El Morro, and which entered into an agreement in 2015 to merge the two projects into one (initially called Corredor and now New Union, or Nueva Unión), this company has manifested in various ways its commitment to human rights in general and to the rights of indigenous peoples, including those recognized in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). The merger of its mining project with El Morro on land legally owned by the CADHA, however, is not a positive sign; it remains to be seen whether Teck upholds its previous human rights commitments as the proposed mining project progresses.
RECOMMENDATIONS

Considering the information gathered in this HRIA, and bearing in mind the guidelines of national law and, in particular, international law on human rights applicable to indigenous peoples, the international obligations contracted by the states involved, as well as the aforementioned UN Guiding Principles, this work submits the following recommendations to the State of Chile, to the State of Canada, and to the companies responsible for these projects, as well as to the international human rights treaties bodies with jurisdictional capacity in the matters addressed:

TO THE CHILEAN GOVERNMENT:

• Protect the rights of the CADHA to the community’s land and territory through the recognition and subsequent registry of their land as indigenous lands under national and international law, and establish mechanisms to restore community lands that have been usurped by private parties and through the exemption on the payment of land tax.

• Recognize the CADHA as a representative institution of the Diaguita people, granting it the rights that national legislation establishes for indigenous communities and refraining from promoting the creation of other communities that fragment this institution.

• Respect and protect the right of the CADHA to define community priorities for development, granting legal recognition and protection to the initiative of indigenous and community conservation that these territories be deemed a natural and cultural reserve, as the CADHA has promoted for the past decade.
• Take an active role in protecting the human rights of the CADHA in the face of violations and abuses of these rights committed by transnational mining companies (in this case, Canadian), which intervene in their territory without consultation and against the will of those affected, damaging the environment and natural resources and undermining the internal cohesion of the community. This role should include the adoption of effective measures to prevent, investigate, punish, and remedy these violations and abuses.

• Enforce national laws aimed at protecting the rights of indigenous peoples, particularly the pertinent provisions of Law 19,253 of 1993 regarding the protection, promotion, and development of indigenous people.

• Make effective the human rights obligations assumed under the ratification of international treaties applicable to the CADHA, including ILO Convention 169, the UN International Convention on the Elimination of All Forms of Racial Discrimination, the UN International Covenant on Civil and Political Rights, and the American Convention on Human Rights, bearing in mind the interpretation of the meaning and scope of the provisions issued by the treaty bodies.

• Make effective the human rights commitments considered in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) approved in 2007 with the support of Chile.

• Review and adapt, through the co-legislator bodies (executive and legislative), the following: the Constitution, the laws and regulations that may affect members of the community relating to natural resources and human rights (including legislation relating to rights over natural resources such as water, subsurface resources, and glaciers that are found on the CADHA lands, and legislation referring to the right of consultation of indigenous peoples in the face of legislative and administrative measures), and the environmental legislation such as Law 19,300 of 1994 amended by Law 2,417 of 2010, including Executive Decree 40 of 2013, which regulates the Environmental Impact Assessment System, so as to provide effective protection to the Diaguitas Huasco Altinos from activities that companies carry out or intend to carry out in their lands and territories affecting their rights. Also, the Chilean government should ensure that consultation is implemented throughout the entire project process—including the granting of concessions of both exploration and exploitation—until mine closure.

• Recognize in said legislation and regulations the right of indigenous peoples to free, prior, and informed consent in the face of investment projects or large-scale
development, such as the projects under analysis in this HRIA, that have a large impact in their territory, in accordance with the guidelines of applicable international law.

- Review and adapt existing legal and administrative mechanisms in the legal system so as to ensure that they allow for effective protection of the rights of indigenous peoples in the context of business activities, and allow remedying violations of those rights when they take place.

- Ensure the coherency of its public policy so as to ensure that free trade agreements and bilateral investment agreements signed by the state, such as the free trade agreement signed with Canada or mining agreements signed with Argentina, do not limit the possibilities of indigenous peoples to exercise the human rights that have been granted to them by national and international law.

- Establish human rights requirements as a condition for granting authorization for foreign investment in projects on indigenous lands and territories, identifying mechanisms to monitor compliance with these requirements.

- Incorporate into the National Action Plan on Business and Human Rights, under development by the current government of Chile, an analysis of the legal and political factors that enable the impact on or abuses of the rights of indigenous peoples by investment projects, such as those generated by the projects object of this HRIA in the CADHA, as well as include specific recommendations on how to prevent these impacts and how to remedy these abuses when they occur.

- Provide public resources to finance more HRIAs.

- Finally, the National Institute of Human Rights (INDH) should perform an observation mission to gather information on the current status of the mining projects addressed in this HRIA to identify the potential impacts that the resumption of the Pascua Lama project or the approval of the El Morro project, now known as Nueva Unión, may signify for the human rights of the CADHA, proposing recommendations to the various organs of the State of Chile to prevent such impacts.
TO THE CANADIAN GOVERNMENT (WHERE THE COMPANIES THAT HAVE OPERATIONS ON THE LANDS AND TERRITORIES OF THE CADHA ARE DOMICILED):

• Assume extraterritorial obligations on human rights, ensuring, through the adoption of legislation and administrative measures, that companies based in Canada that operate abroad do not negatively impact the human rights of communities affected by their investment projects, in particular the rights of indigenous peoples.

• Establish legal and administrative mechanisms, including an ombudsman specialized in extraterritorial obligations of Canada on human rights, to claim responsibility for companies domiciled in Canada that violate human rights outside of the country, and when this occurs, to ensure justice and redress.

• Ensure that trade agreements, including free trade agreements and bilateral investment agreements signed with other states, do not contain provisions that may result in the restriction of human rights of indigenous peoples.

• Refrain from giving support, through its funding agencies (Export Development Canada) and its embassy in Chile, to mining projects that have been identified in this HRIA.

• Develop an exit strategy together with the CADHA in the case that the two Canadian companies have to close their operations, particularly to reverse damage to the social fabric and to the environment, pledging to strengthen the CADHA life plans, particularly in the implementation of a community protected area.

TO THE COMPANIES OWNING INVESTMENT PROJECTS:

• Refrain from continuing to infringe upon the human rights of the CADHA indigenous community recognized by national and international law referred to in this HRIA through both the actions of their headquarters in Canada and their subsidiaries in Chile.

• Respect the will of the community in relation to investment projects on community lands and territories and their life plans expressed in a prior, free, and informed manner through their own institutions, refraining from continuing to fragment the Diaguita community and its members in order to carry the projects out.
• Effectively repair the adverse impacts that their actions have had on the rights of the community to date, specifically, the rights to community lands and territories, rights over natural resources, including water, and the right to environment.

• Carry out due diligence processes prior to their investments, making assessments of the actual and potential impacts of their activities on the human rights of the community, safeguarding the human rights of the CADHA and refraining from activities that could generate such impact, promising to act only with the free, prior, and informed consent of the CADHA.

• Establish internal mechanisms to address and process claims of the community and its members for violations of human rights, through which the community can seek redress in face of the abuses of these rights, either directly or indirectly.

• In the event that the affected communities express their prior, free, and informed consent to such projects through appropriate processes, ensure that the CADHA participates in the profits generated and that the community benefits as a form of compliance of a right, not as a charitable concession seeking social support of the project or to minimize conflicts.

TO INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS:

To the Inter-American Commission on Human Rights

• Request information from the State of Chile in relation to the situation of the rights of the CADHA affected by the activities of the Canadian companies that are owners of the investment projects subject to this HRIA.

• Urge the State of Chile to carry out new consultation processes with the CADHA to be directly affected by the administrative measures taken or to be taken that involve investment projects of companies located on their lands and territories, and ensure that these companies comply with human rights standards applicable to them according to the jurisprudence of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights on the matter.

• Prepare the background report on the petition filed with the Inter-American Commission on Human Rights by the CADHA in 2007 (Case 12,741) for the violation by the State of Chile of their human rights as a result of the Pascua Lama project.
Monitor compliance with the recommendations of the Inter-American Commission on Human Rights’ recent reports on indigenous peoples, communities, Afro-descendants, and extractive industries, particularly those related to state human rights obligations of extractive activities, exploitation, and development, and the specific obligations concerning indigenous peoples.

To the United Nations system:

- To the treaty bodies that have ruled on the responsibility of the State of Canada: Adopt legislation and administrative measures to prevent the negative impact on human rights by companies domiciled in that country acting outside its borders, and monitor the compliance with these recommendations by the Canadian government.

- To the UN Working Group on Business and Human Rights, established in 2011 as a special procedure to promote the UN Guiding Principles on Business and Human Rights: Visit Chile to observe the impact on the human rights of indigenous peoples as a consequence of mining projects that are currently located on indigenous lands and territories, and in particular the impact on human rights of the CADHA affected by the projects referred to in this HRIA.

- To the Special Rapporteur of the UN on rights of indigenous peoples, Victoria Tauli Corpuz: Incorporate into the analysis that she is currently developing on trade agreements and human rights an analysis of the implications of the Canada-Chile free trade agreement on the infringement of human rights of indigenous peoples as a consequence of Canadian mining investments promoted by said trade agreement.

- To the Human Rights Council: Provide support and accelerate the work initiated by the intergovernmental panel established by resolution in June 2014, so that it promptly develops a legally binding instrument on transnational corporations and other companies and human rights.
INTRODUCTION

This report is a Human Rights Impact Assessment (HRIA) of the Pascua Lama and El Morro (later Corredor, and currently New Union, or Nueva Unión)² mining projects implemented or planned in the territory located in the Atacama region, in northern Chile, of the Diaguitas Huasco Altinos Agricultural Community (CADHA),³ and who identify themselves as belonging to the Diaguita people.

This HRIA seeks to identify the impact that these mining projects are having or have had on the territory of the Diaguita Huasco Altinos—on their habitat and on their way of life and customs. To carry out this study, the Getting it Right methodology was used to identify the impacts caused by these mining projects, taking the UN Guiding Principles on Business and Human Rights as a reference. The study is based on research focused on the participation of affected communities. Along with the participation of communities, it has tried to gather, through interviews, the vision that other stakeholders—the states and companies involved—have about these projects and their impacts on human rights. Additional information has also been gathered from available literature sources referring to the mining projects assessed and to the national and international legal framework applicable to indigenous peoples’ rights.

This HRIA was conducted from March 2015 to April 2016 by a team made up of Isabel Madariaga, as an external consultant and foremost investigator, and Nancy Yanez and José Aylwin from the Observatorio Ciudadano (Citizen Watch), and included the active participation of members of the CADHA. The responsibility for the contents of this report rests solely with Observatorio Ciudadano. We thank Isabel Madariaga for the diligent

² Information provided to the CADHA by the project team in May 2016.
³ Comunidad Agrícola de Los Diaguitas Huasco Altinos in its denomination in Spanish.
We thank the CADHA for the support granted by its leaders and its members without whom this study would not have been possible. We also thank Terry Mitchell, a professor at Wilfrid Laurier University, and Charis Enns, a doctoral student at the same university, who enthusiastically collaborated from Canada by gathering information on the human rights policies of these companies, and who tried, unsuccessfully, to interview representatives from these companies’ headquarters in Toronto and Vancouver. We finally thank Katherine Kunhardt for her support in the translation of this report into English.

The report has the following structure: this introduction; Chapter 1, which summarizes the methodology used in developing the HRIA; Chapter 2, which provides demographic, social, cultural, and historical information regarding the Diaguita peoples and the CADHA; Chapter 3, which provides information on the Pascua Lama and El Morro (later Corredor, and currently Nueva Unión) mining projects that are located in the territory of the CADHA and the vision of the communities about these projects and their implications for their human rights; Chapter 4, which analyzes national and international regulations related to indigenous peoples and investment projects, and which includes an analysis of the UN Guiding Principles on Business and Human Rights and of the extraterritorial obligations of states from which the investment companies come regarding human rights; and finally, Chapter 5, on the impacts of the mining projects analyzed here on human rights and the responsibility that falls on the states and the project owners.

This study was made possible thanks to Oxfam America. We thank Oxfam America for its support in the preparation of this report, both for advice in the use of the HRIA methodology and for facilitation of resources that made possible this report’s development and publication. We also appreciate the support provided for the implementation of the HRIA by the Social Sciences and Humanities Research Council (SSHRC) of Canada through a project coordinated by Terry Mitchell from Wilfrid Laurier University. Finally, we express our gratitude to the International Work Group for Indigenous Affairs (IWGIA) and to the Ford Foundation for the institutional support given to the Observatorio Ciudadano, which also made possible the implementation of this research project.

We hope that this study provides information in relation to the mining projects analyzed for decision-makers, including the governments and companies involved, in order to remedy the serious consequences that the projects have had and to prevent further impacts on the human rights of the Diaguitas Huasco Altinos and their territory. We also hope that the study will be useful to that community as a tool to defend their rights—those already violated and those threatened.
I. METHODOLOGY

A Human Rights Impact Assessment (HRIA) is a process that measures the difference between the commitments made by a state (human rights in principle) and the actual possibility of enjoying those rights within a country’s situation (human rights in practice). For this study, an adaptation of the methodological guide Getting it Right prepared in 2004 by the organization Rights & Democracy for these specific purposes was conducted. The methodological guide was subsequently implemented by Oxfam America and the International Federation for Human Rights (FIDH), and the lessons learned were included in the edition of the final guide. Getting it Right instructs communities and nongovernmental organizations (NGOs) step by step in measuring the actual or potential impact of an investment project on human rights, and aids the preparation of a final report and recommendations that can serve as a basis for promoting dialogue between the community and public and private stakeholders involved in the investment project.

The HRIA is conceived as a participatory process that allows “communities affected by investment projects not only to assess impacts [on human rights], but also to participate

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4 Rights & Democracy was a Canadian institution created by Canada’s Parliament in 1988 for the purpose of promoting democracy and supporting and defending the human rights contained in the UN Universal Declaration of Human Rights. Rights & Democracy ceased operations in 2012.


6 Oxfam America was founded in 1995 by a group of independent nongovernmental organizations (NGOs) with the objective of working together to achieve a greater impact in the international struggle to reduce poverty and injustice.

7 The International Federation for Human Rights (FIDH), an international NGO founded in 1922 and now representing 178 organizations from 120 countries, defends the civil, political, economic, social, and cultural human rights established in the Universal Declaration of Human Rights.

in the decisions that affect them.” 9 The methodology has been used in Argentina, the Philippines, the Democratic Republic of Congo, Tibet, Bolivia, Cameroon, Ecuador, and the United States, among other countries. 10

The purpose of this study, as noted earlier, is to develop an HRIA of the Diaguitas Huasco Altinos Agricultural Community (CADHA) and its members, generated as a result of the Pascua Lama and El Morro (later Corredor, and presently New Union, or Nueva Unión) mining projects, which have operated on their ancestral territory. The project owners are the companies Barrick Gold Corporation in the first case, and Goldcorp and Teck Resources Ltd. in the second, all companies domiciled in Canada.

To prepare the study, interviews were conducted in the Alto del Carmen district, Valle del Río Tránsito sector, especially in the sectors of Chollay, Corral, Los Tambos, Valeriano, Colpe, Angostura, Pinte, Chancoquin, Tránsito, Conay, Marquesa, El Terrón, Punta Negra, and Las Animas. Interviews were carried out with leaders of the Diaguitas Huasco Altinos Agricultural Community, as well as with their offspring. Some interviews were also done with inhabitants of Alto del Carmen who do not belong to the community. The total number of interviews was 48; of those, 17 were with women and 29 were with members of the CADHA. Most interviews were conducted in the homes of the respondents. The community decided that the names of members interviewed should be kept confidential.

In addition, interviews were held with 15 officials in Chile from the following services: Human Rights Directorate of the Ministry of Foreign Affairs; Foreign Investment Committee (CIE Chile); National Directorate of the National Corporation for Indigenous Development (Corporación Nacional de Desarrollo Indígena, or CONADI); CONADI of Atacama; Regional Ministerial Secretariat of Atacama Mining; Environmental Assessment Service (SEA); Atacama Regional Office of the General Directorate of Water (DGA); and the National Office of the DGA. (Annex 1 lists these interviewees.)

Efforts to meet with Canadian government representatives in Chile and in Ottawa to obtain the Canadian government’s view about these mining projects operated by companies domiciled in Canada, as well as their implications for human rights, were unsuccessful. The exception was a meeting held in Ottawa in September 2015 with Jeffrey Davidson, Extractive Sector Corporate Social Responsibility Counsellor. (See Annex 2.)

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In addition, an interview was held with representatives of the El Morro (later Corredor, and presently New Union, or Nueva Unión) mining project in Chile, who also responded in writing to a questionnaire sent to them. The representatives of the Pascua Lama mining project did not grant the personal interview (and did not answer the questionnaire also provided), but delivered a declaratory note. Through counterparts in Canada,¹¹ efforts were made, without success, to interview representatives of the parent companies Barrick Gold, in charge of the Pascua Lama Project, and Goldcorp and Teck Resources, in charge of the project currently called Nueva Unión, in that country. (See Annex 3.)

As required by the HRIA methodology applied in this report, the interviews focused on the impacts produced by the Pascua Lama and El Morro mining projects on the CADHA. A few notes about the interviews:

- The interviews were semi-structured and were generally individual, although some were conducted with two people simultaneously, usually when respondents were married and requested being interviewed together.
- The interview questions were adapted to the specificities of the respondents (community member, company representative, or government official).
- In addition to the interview, company representatives were given a questionnaire to be answered after the interview. (As noted, representatives of Pascua Lama did not agree to the interview and did not complete the questionnaire.)
- The semi-structured questions included in the guide were adapted to each situation and made more flexible as required for the target group(s).
- The gender variable in the methodology was applied for the purposes of defining which members of the community to interview, emphasizing the need to interview women in the community.
- The community’s direct participation was guaranteed through an intercultural facilitator. The fact that this intercultural facilitator was the president of the CADHA (Sergio Campusano) facilitated the process because he generated confidence in the respondents. This confidence was critical, given the high degree of mistrust and the climate of division that the mining projects have generated in the social fabric in the territory of the CADHA. Without his participation, it would have been very difficult to carry out the interviews.

¹¹ Such as Terry Mitchell, a professor at Wilfrid Laurier University, in Waterloo, Ontario.
However, his participation may also have hindered the process with respect to those who may have a position in favor of the mining projects. Notwithstanding the latter, the respondents, without exception, agreed on the negative effects of the mining projects in the territory of the CADHA, whether they reject them or agree with their implementation. Those who approve the projects see them as job opportunities, but agree that there are risks of contamination and verifiable negative impacts on social peace.

With regard to how informants/respondents were defined (community members, company representatives, and government officials), it should be noted that they were determined in an HRIA team meeting, held in the territory of the community in May 2015:

• Community members: Based on the natural division of the community’s territory into high, medium, and low elevation sectors, the research intended to go to each sector to visit the community residents (who would be interviewed in their respective houses). Visits to each one of the community sectors were made in the company of the president of the CADHA, and the villagers to be interviewed were defined based on the president’s proposal and the availability of these community members.

• Company representatives: Representatives of companies to be interviewed were determined based on the objective of the HRIA.

• Government officials: Government officials to be interviewed were determined based on the interference, relationship, or impact of the respective public services, whether in the authorization or supervision of the mining projects carried out in the territory of the community or on their resources (land, water, environment, natural resources, social fabric, and road infrastructure). Government officials from public institutions in charge of implementing indigenous policy in Chile were also chosen to be interviewed.

In addition to the information gathered in the interviews, this work included a review of documentation, legislation, and specific case law with respect to the community and the aforementioned mining projects, as well as on human rights and indigenous peoples’ rights. The HRIA was based on the human rights standards with emphasis on the rights to equality and nondiscrimination; self-determination; ownership or territory, land, and natural resources; and consultation and free, prior, and informed consent.
The HRIA was also based on the UN Guiding Principles on Business and Human Rights, which emphasize the duty of states to protect human rights in the context of business activity; the duty of companies to respect human rights and to proceed with due diligence on human rights issues in order to identify, prevent, and respond to the negative consequences of their activities on human rights; and the existence of a complaint and redress mechanism in the face of violation of human rights.
II. BACKGROUND INFORMATION

1. DEMOGRAPHICS OF INDIGENOUS PEOPLES IN CHILE

Although the first census in Chile was in 1831, the 1992 census was the first to incorporate a question to identify the country’s indigenous population. Possible answers to the question were limited to three: Mapuche, Aymara, and Rapanui people. In that year, “10.3 percent of the Chilean population identified themselves as Mapuche, Aymara, or Rapanui, representing nearly one million individuals.”

Ten years later, in the 2002 census, the question was reformulated with a criterion of belonging to any of the following cultures recognized by Chilean law as of 1993: Mapuche, Aymara, Rapanui, Atacama, Quechua, Colla, Kawashkar, and Yámana (or Yagán). In the 2002 census, 4.6 percent of the population

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14 IDB, Contando la Población Indígena de Chile.
15 The question asked in the 2002 census was: “Do you belong to any of the following native or indigenous peoples? Alacaluf (Kawaskar), Atacameño, Aymara, Colla, Mapuche, Quechua, Rapanui, Yámana (Yagán), none of the above.” INE, Censo 2002, 7–8.
16 Law 19,253, Article 1, established: “The State recognizes the following as Chile’s main indigenous ethnic groups: the Mapuche, Aimara, Rapa Nui or Easter Islanders, the Atacameñas, Quechus, Collas Communities from northern Chile, the Kawashkar or Alacalufe and Yámana
self-identified as belonging to one of the eight ethnic groups considered in the question; of these, the Mapuche represented 87.3 percent of all indigenous people.\textsuperscript{17}

The Diaguitas were not registered in 2002. Until a few years ago, as noted in the \textit{Informe de la Comisión Verdad Histórica y Nuevo Trato con los Pueblos Indígena} \textit{(Report of the Historical Truth and New Deal with Indigenous Peoples Commission [2003])},\textsuperscript{18} the Diaguitas were considered a “nonexistent people” owing to acculturation and miscegenation. It was not until 2006 that they were recognized by the Chilean State and incorporated in Law 19,253 (which provides standards on protection, promotion, and development of indigenous peoples, and which created the National Indigenous Development Corporation) as an indigenous “ethnic group.”\textsuperscript{19}

The most recent census, in 2012, has been deemed not reliable following national and international audits, so the official number of Diaguita people will not be known until the next census, in 2017. In that 2012 census, however, 11.1 percent of the total population—corresponding to 16.6 million inhabitants—considered themselves as belonging to an indigenous ethnic group.\textsuperscript{20} About one-fifth of these indigenous people, 2.5 percent, identified as members of the Diaguita people.

According to the last three censuses conducted in Chile, the indigenous population has varied from 10.3 percent of the Chilean population (1992 census) to 4.6 percent (2002...
census), then up to 11.1 percent in the 2012 census, as noted. Currently, the official number of indigenous people in Chile, until the 2017 census\textsuperscript{21} is performed, is based on the 2002 census: 4.6 percent.

The variation in the percentage of the population considered indigenous in Chile is evident in the information derived from the National Socioeconomic Survey (CASEN)\textsuperscript{22} of 2013. According to that survey, the population belonging to indigenous peoples in Chile in the year 2006 corresponded to 6.6 percent of the total population; in 2009, it corresponded to 6.9 percent; in 2011 to 8.1 percent; and in 2013 to 9.1 percent. CASEN 2013 states that during the same period, the percentage of Diaguita people in relation to the national population was 0.8 percent in 2006 (8,476 people); 1.3 percent in 2009 (15,227 people); 2.5 percent in 2011 (34,689 people); and 3.2 percent in 2013 (50,653).\textsuperscript{23}

2. THE DIAGUITA

2.1 Historical information

As explained in the preceding section, the Diaguita\textsuperscript{24} were not recognized by the Chilean State until 2006, despite inhabiting the so-called Norte Chico area since time immemorial. Currently, many families from Copiapó and Huasco and from the Elqui and Limari valleys identify themselves as descendants of the Diaguita people, based on their “family and local history, on their family names and lineages, and on the territory historically occupied by them.”\textsuperscript{25}

\textsuperscript{21} INE, Censo 2017, Todos Contamos.
\textsuperscript{22} CASEN is a survey periodically carried out by the Ministry of Social Development/Ministerio de Desarrollo Social to assess the situation of households and the population, especially those in poverty and those groups defined as priority by social policy, in relation to demographic, education, health, housing, work, and income. It also assesses the impact of social policy. See the ministry’s website for more: http://observatorio.ministeriodesarrollosocial.gob.cl/casen/casen_obj.php.
\textsuperscript{24} The denomination “Diaguita” used by archaeological and historical sciences corresponds to a convention established by Ricardo Latcham, who proposed in the first decades of the 20th century, pursuant to a comparative study with the Argentine Diaguitas and of archaeological, historical, and linguistic records, that the inhabitants of the valleys located between Copiapó and Choapa be called Chilean Diaguitas. From that time, archaeological and historical studies assumed this denomination. However, there are historical antecedents that the Diaguita ethnonym was used during the conquest, in colonial times, and during the republic to name the indigenous population of the Norte Chico. See Informe de la Comisión Verdad Histórica y Nuevo Trato con los Pueblos Indígenas.
During the conquest in the mid-16th century, the lands of indigenous peoples were declared patrimony of the king of Spain and divided in his name among the conquerors. This process allowed Spain to “seize extensive areas of valleys and mountains and build their farms and ranches there, as took place in the Norte Chico valleys,” although the monarch had the power to allocate land to the Indians, in the form of usufruct rights.26 The legal mechanism used by the Spanish crown to reduce the indigenous ancestral lands to small portions of land in the Norte Chico was the establishment of Indian pueblos or villages.27 In the Huasco Valley, the Indian villages of Huasco Bajo, Paitanaza, and Huasco Alto28 were founded.

With the creation of the republic in 1818, indigenous territories were subject to new usurpation processes.29 Under laws dated June 10, 1823, and June 28, 1830, the measurement of the Indian pueblos was ordered to “determine the indigenous possessions in these villages and the rest was declared as state property and then, later, was auctioned off to private parties. At the end of this measurement process, the republic imposed the idea of a ‘Chile without Indians’ between Copiapó and Bío Bío,”30 resulting in the loss of most of the Diaguita lands. An exception was the case of the Huasco Alto Diaguitas, today organized under the legal concept of CADHA.

What was then known as the Huasco Alto Indian pueblo maintained its territorial integrity because “despite the material possession of the families who inhabited this village being measured and recognized in an area that extended from the Sierra de Tatul to the high mountain lagoons, and including the neighboring watersheds, in work done in the mid-eighteenth century, specifically in 1750, no ordinance was issued to give formal status to the Huasco Alto Indian People in colonial times, nor during the Republic.”31

26 Molina Otárola et al., Diagnóstico Sociocultural de la Etnia Diaguita, 16.
27 Molina Otárola et al., Diagnóstico Sociocultural de la Etnia Diaguita, 17.
28 “In the Huasco valley, at the end of colonial times, the lands that the Indian Peoples of Huasco Bajo and Paisanaza preserved were a few, as the majority had been lost in trials with the Spaniards who usurped them. An exception to this was Huasco Alto, in which the indigenous people maintained a social and territorial resistance, preventing the establishment of the ‘Indian village’ in the 1750s, a concept with which it was sought to reduce them to the territory between the Tatul and La Angostura.” See Molina Otarola et al., Diagnóstico Sociocultural de la Etnia Diaguita, 18–19.
29 In 1813, the first Chilean government attempted to establish new Indian villages that would regroup the entire indigenous population, including the Diaguitas, in a few settlements in order to achieve social discipline and indoctrination under the new postulates of the republic. Molina Otarola et al., Diagnóstico Sociocultural de la Etnia Diaguita, 19.
30 Molina Otarola et al., Diagnóstico Sociocultural de la Etnia Diaguita, 19.
31 Molina Otarola et al., Diagnóstico Sociocultural de la Etnia Diaguita, 21.
2.2 From Estancia de los Huascoaltinos to Diaguitas Huasco Altinos Agricultural Community (CADHA)

2.2.1 Origin of the Estancia Los Huascoaltinos Estate

The authors of the study *El Valle de los Naturales: Una mirada histórica al pueblo Diaguita Huascoaltino* point out that the Estancia Los Huascoaltinos corresponds to a conception of territorial space used and occupied in a communitarian manner that was “an inheritance of the colonial period and of the Huasco Alto Indian territory, which was defined as an estancia territory by the bishops and administrators of the bureaucracy in the colonial centuries.”

In 1902, the Vallenar Court of First Instance declared the acquisitive prescription in favor of those who had owned the area known as Estancia Los Huascoaltinos from time immemorial. The community members identified in the ruling included 118 people. It was the first inscription for the court, so it ordered that the formalities of Article 58 of the Regulations of the Recorder of Deeds be complied with. The registry of the property in the county...

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32 Iván Pizarro et al., in *El Valle de los Naturales: Una mirada histórica al pueblo Diaguita Huascoaltino* (2006), write: “On the recognition of the territory of the Estancia Los Huascoaltinos, according to the Registries of the Captaincy General of the Kingdom of Chile, there was a lawsuit filed by the ‘general protector of Indians, who appealed in defense of the Indians of the Huasco Alto Peoples, a lawsuit which was accepted by ordering the measurement of the lands by the Royal Audience which was done on April 27, 1750,’” 139. See also Observatorio Ciudadano/Citizen Watch, *Informe en Derecho: Documentación Estrategia Legal Comunidad Agrícola Diaguita de los Huascoaltinos. Antecedentes judiciales referidos a los Proyectos Mineros “Pascua Lama” y “El Morro”* (2015).

33 For the number of community members, see Pizarro et al., *El Valle de los Naturales*, 141.

34 For more information on the Diaguita people, see Molina Otárola et al., *Diagnóstico Sociocultural de la Etnia Diaguita*: “Those who give rise to this title are the families of the different sectors of Huasco Alto, who ancestrally occupy or possess small individual properties under irrigation and that combine their efforts to register the grazing lands they have occupied since time immemorial under the legal figure of the Community Estate,” 73.

35 Pizarro et al. point out that according to press reports and the story of a comunero, a deed of the Estancia Los Huascoaltinos from the year 1882 included a greater number of comuneros as well as the water rights of the estancia. Pizarro et al., *El Valle de los Naturales*, 143.

36 Regulations of the Registry of Deeds, Article 58, states: “In order to register the transfer by donation or contract between living persons of a farm that has not previously been registered, the Land Deed Registrar shall require proof of having notified such transfer to the public by a regional newspaper, if any, and by signs that have been put up in three of the most frequented places of the region, with the designations relating to the persons who are transferring and the boundaries and name of the property, subject of the contract. The putting up of signs shall be recorded at the Registry of Deeds by certificates of the clerk or judge of the place, placed at the foot of said signs, so that, in this way, it is also recorded that there has been the necessary accuracy in their content. … The registry may not be done until 30 days after the notification.”
land records was made in 1903,\textsuperscript{37} with the following boundaries: the Jarilla and Ramadilla Estancias to the north; the Andes Cordillera to the south; Estancia de Copiapó to the east; and the range of hills that divides the Tránsito River from the Carmen River to the west.\textsuperscript{38} The surface area of the title of domain of 1902 corresponded to approximately 395,000 hectares.

### 2.2.2 Usurpation of land from the Estancia Los Huascoaltinos

According to studies on the Estancia Los Huascoaltinos, after the registration of 1903, a series of usurpations of great extensions of land from the community territory took place,\textsuperscript{39} largely by irregular or illegal registration of domain titles. These were authorized by the Vallenar Registry of Deeds and applied to extensions of land that formed part of the territory of the Estancia Los Huascoaltinos,\textsuperscript{40} as it was recorded in the 1903 domain registry. According to the aforementioned study on a historical view of the Diaguitas Huasco Altinos people, one of the fundamental functions of the management of Estancia Los Huascoaltinos was to “anticipate possible fraudulent inscriptions and thus prevent the loss of their territorial rights.”\textsuperscript{41}

Some of the properties constituted irregularly or illegally were Estancia Valeriano and Los Colorados and Estancia Chañarcillo and Chollay.\textsuperscript{42} The first inscription of the property known as Chañarcillo, owned by the Estancia Los Huascoaltinos, is dated 1926. At that time, the Vallenar Recorder of Deeds registered a contract through which a Huascoaltino community member sold the Chañarcillo, or Chollay, estate to a third party. According to one account:

\textsuperscript{37} The registry of domain consists in the 1903 property registry of the Vallenar Registry of Deeds on page 31, no. 49.

\textsuperscript{38} Molina Otarola et al., \textit{Diagnóstico Sociocultural de la Etnia Diaguita}, 73.

\textsuperscript{39} Molina Otarola et al., \textit{Diagnóstico Sociocultural de la Etnia Diaguita}, 74.

\textsuperscript{40} The mechanism involved “the appropriation of large tracts of land through the purchase of shares and rights. In both cases private people or other comuneros acquired ‘estate rights,’ which were registered as a certain species or body giving rise to a property having domain and existence consolidated by the prescription.” See Molina Otarola et al., \textit{Diagnóstico Sociocultural de la Etnia Diaguita}, 74. See also Pizarro et al., \textit{El Valle de los Naturales}, 149–50.

\textsuperscript{41} Pizarro et al., \textit{El Valle de los Naturales}.

\textsuperscript{42} “These titles have been questioned by the Huasco Altinos Community from its origin to date, as these land encroachments overlapped almost 45 percent of its territory, causing serious patrimonial and economic damages to the traditional economy of the Huasco Alto Diaguita population.” See Molina Otarola et al., \textit{Diagnóstico Sociocultural de la Etnia Diaguita}, 73.
The Hacienda Chañarcillo was the result of a request for land, since Jose Dolores Seriche, who lived in La Angostura, simply requested these agricultural lands and got a lawyer and became the owner of it all.\textsuperscript{43}

This property, after a series of sales, successions, and unification of titles, was acquired in 1998 by the Compañía Minera Nevada, owner of the Pascua Lama mining project, which bought the properties that make up the Estancias Chañarcillo and Chollay.\textsuperscript{44}

2.2.3 Danger of losing Estancia Los Huascoaltinos to an auction

In the 1990s, the Estancia Los Huascoaltinos was in the process of being auctioned by the General Treasury of the Republic, due to an accumulated debt for real estate taxes. The community members organized to collect 5,000 pesos to prevent the auction,\textsuperscript{45} and they undertook various transactions with the authorities to prevent the Estancia from being auctioned.\textsuperscript{46}

2.2.4 Regularization of the Estancia Los Huascoaltinos

In addition, by the 1990s several comuneros who were listed in the domain title of 1903 had passed away. Therefore, those living there had “to take many legal steps” to be recognized as having rights to the estancia. Regularization was achieved via the 1968 Decree with Force of Law 5 (DFL 5), “which regulates historical communal properties, under the concept of Agricultural Communities,” understood as “the group of owners of common rural land who use, exploit, or cultivate such land.”\textsuperscript{47} According to the Ministry of National Assets, “Agricultural Communities have their origin in the issuance of land grants to the conquerors during Colonial times, which were passed from generation to generation to their inhabitants, remaining united through customs and traditions linked to the environment in which they were developed.”\textsuperscript{48} DFL 5 establishes that the constitution of

\textsuperscript{43} Molina Otarola et al., \textit{Diagnóstico Sociocultural de la Etnia Diaguita}, 77.
\textsuperscript{44} Molina Otarola et al., \textit{Diagnóstico Sociocultural de la Etnia Diaguita}, 78. Also see Pizarro et al., \textit{El Valle de los Naturales}, 150.
\textsuperscript{45} Pizarro et al., \textit{El Valle de los Naturales}, 152–55.
\textsuperscript{46} Pizarro et al., \textit{El Valle de los Naturales}, 152.
\textsuperscript{47} Pizarro et al., \textit{El Valle de los Naturales}, 160.
\textsuperscript{48} The Ministry of National Assets/Ministerio de Bienes Nacionales points out: “This situation must have been recognized by the State and that is why in the 1960s they were granted legal recognition,
agricultural communities, the reorganization of their ownership titles, and their organization are carried out with the intervention of the Ministry of National Assets’ Division for the Constitution of Land Ownership. DFL 5 adds that these communities “may not receive technical or credit assistance from fiscal, semifiscal, and autonomous administration offices, or from institutions or companies created by law in which the State has participation or representation” until they are constituted and organized as “Agricultural Communities” or regularize their titles of dominion according to the procedure established in the DFL 5 of 1968.  

The process of regularization through the aforementioned DFL 5 of 1968 was carried out by the consulting company INAS, with technical advice from the Ministry of National Assets. The domain title of the “Los Huasco Altinos Agricultural Community” was registered on page 1083, no. 929, of the Land Records at the Vallenar Recorder of Deeds in 1997. In accordance with the procedure provided DFL 5, the property was acquired by judicial ruling issued by the Second Civil Court of Vallenar, in non-contentious management, Rule No. 9,525, dated August 4, 1997, and the persons identified in the judicial ruling filed together with the ownership title were registered as community members.

The report by the Historical Truth and New Deal Commission for Indigenous Peoples notes that in 1997 the Chilean government recognized an area of 395,000 hectares “for several families descended from the ancient indigenous peoples”:

Recently, in 1997, the Chilean State has recognized the ownership of land for several families descended from the ancient indigenous people, who after many years have regularized the territorial property of 395,000 hectares including three mountain estates called Los Huascoaltinos, Chollay, and


Ministry of Agriculture/Ministerio de Agrícola, [Decree with Force of Law 5 (DFL 5)] (1968), Articles 1, 2, and 3.

Pizarro et al., El Valle de los Naturales, 161.

“Pursuant to this ruling, the ownership of the community property was recognized for all persons who are members of the Huasco Altinos Agricultural Community, a list which, in an authorized copy, was filed at the end of the Property Registry of 1997 under No. 894 to 907. An authorized copy of Plan No. III of the Community Statutes and of the compendium which records the First Board of the latter, were also filed. These documents are filed in the Property Register of 1997 under No. 908 to 923.” Molina Otarola et al., Diagnóstico Sociocultural de la Etnia Diaguita, 78.
Valeriano, which their inhabitants possessed as regular domain and were registered since the beginning of the century. These lands cover the entire Tránsito river basin and its tributaries, the Conay, Chollay and Valeriano Rivers, from the confluence area in the Río del Carmen to the border with the Argentine Republic, corresponding to a territory and that constituted an ancient settlement of the Pre-Colombian El Molle culture; the early Diaguita Las Ánimas complex; and the reducto [territory] of Diaguita Indians, known as Huascoalto since colonial times.

The process carried out through DFL 5 of 1968 ordered the regularization of the ownership/property of the Los Huascoaltinos community. However, it also had several consequences for indigenous land from ancient times, the effects of which are evident to date and relate, at least, to the following:

- The identification of the community members has been controversial. The Historical Truth and New Deal with Indigenous Peoples Commission notes:

  The decision of the leaders of the time was to recognize all those who had given money to stop the auction as owners of community rights. [As a result of this approach], many conflicts were generated, since several people, to this day, demand their community rights, both because their parents and grandparents were subject to these rights, and also because they say they paid the $5,000 pesos at the time of the auction.

- The exclusion of large areas from the original territory by the Ministry of National Assets during the regularization process meant that many properties, including villages and hamlets for the Los Huascaltinos Community, are not included in

52 Regarding the concept of indigenous reducto, or territory, the Informe de la Comisión Verdad Histórica y Nuevo Trato con los Pueblos Indígenas indicates that: “When one speaks of indigenous reducto, one is saying that it is not an autarkic or closed territory, but rather according to the documentary and testimonial antecedents, it indicates that from very early times this indigenous reducto has been articulated and connected in different directions with different ecological floors and intraregional and interregional areas of exchange, which explains in part the historical permanence as an indigenous reducto. Some Huascoaltinos still remember the long trips made in the last century to bring cattle from Argentina, to take dry fish from Paposo, or to travel to the annual Huari fairs in Bolivia.” Informe de la Comisión Verdad Histórica y Nuevo Trato con los Pueblos Indígenas, 218.

53 Informe de la Comisión Verdad Histórica y Nuevo Trato con los Pueblos Indígenas, 217.

54 Pizarro et al., El Valle de los Naturales, 161.
the Estancia Los Huascoaltinos. This topic is discussed further in the following paragraphs.

- The protection provided by Law 12,953 to indigenous lands was denied. This ruling is discussed later in this section.
- These territories were excluded from state programs that benefit indigenous lands.
- The CADHA is required to pay property taxes.

Exclusion of large surface areas from original territory:

Only three years before the arrival of the new century, the Los Huascoaltinos Agricultural Community was established, giving rise to the same process, the regularization of its territorial property conducted by the Ministry of National Assets, which meant the immediate deprivation of large tracts of land in the mountain ranges, and in the future, the instability of their ownership rights, due to the permanence of the usurpation strategy that generated large dividends for the landholders in the twentieth century.55

In fact, in the title of domain of the “Los Huascoaltinos Agricultural Community,” all land that “fell within the general boundaries of the common property, which was regularized or registered in the name of natural or legal persons, public or private,”56 was excluded from the common property.

As mentioned, usurpations of the community territory took place after the 1903 registration through irregular registrations of domain titles authorized by the Vallenar Recorder of Deeds. It is not known whether, in the aforementioned regularization process, the Ministry of National Assets, the judicial authority, or the Recorder of Deeds verified the “legally sound” status of the land that was inside the territory of the Los Huascoaltinos Community. What can be observed is that “within the general boundaries of the Estancia de los Huascoaltinos they proceeded to measure, in favor of private individuals, the lands usurped in the cordillera, the Valeriano and Chañarcillos and Chollay Estates, as well as the extension of the latter by instruction of the Ministry of National Assets, which recognized the proposals of the private individuals as valid based on a title study carried out by the lawyer Jaime Mulet and the indications made in the field by the same owners, who accompanied

55 Pizarro et al., El Valle de los Naturales, 159.
the measurement team, and indicated the boundaries of the lands that formed part of the ancient ‘Pueblo de Indios’ and now of its successor, the Estancia de los Huascoaltinos.”

Moreover, the following towns or villages were excluded from the common property of the community: Juntas del Carmen, Ramadilla, El Tabaco, Punta Negra, El Terrón, Las Placetas, Las Marquesas, El Olivo, Chiquinto, Las Pircas, Los Perales (Alto and Bajo), Chancochoín Chico, Chancochoín Grande, El Tránsito, La Fragua, La Arena Alta and Baja, Pinte; La Angostura, La Pampa, El Parral, La Plata, Los Tambos, Quebrada de Colpes, Conay, Chollay, Pachuy, Albaricoque, Malaguín, El Corral, and Juntas de Valeriano.

Regarding the exclusion of towns or villages from the property of the Diaguitas Huasco Altinos Agricultural Community (CADHA), it is not stated in the ruling or in the title of domain that the State carried out any prior process, for example, of expropriation that would authorize such exclusion. In this regard, it is necessary to bear in mind that Article 24, paragraph 3, of the Chilean Constitution establishes that “In no case may anyone be deprived of his property, of the assets affected or any of the essential faculties or powers of ownership, except by virtue of a general or a special law that authorizes expropriation for the public benefit or the national interest, duly qualified by the legislator.” This article involves a right that, as stated in Chapter 4 of this HRIA, is also protected by Article 21.2 of the American Convention on Human Rights, which states that “No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.”

As a result of the regularization process of the title deeds, the topographic records, and the Internal Revenue Service certificate, the Los Huascoaltinos Community holds an area of 395,000 hectares, with the following specific delineations, as reported by INAS, the consulting company:

North: It limits with the Estancia Jarillas, in a first part and then with the confines of the valley of the Manflas River and its tributaries, or with the same Limit that divides the Province of Huasco from the Province of Copiapó. Or as above, it has the following northern boundary, following the above indicated points of reference, from the Cordillera de los Andes towards the Chilean sea, it starts in the Hito Paso of Macho Muerto, it continues along

57 Molina Otarola et al., Diagnóstico Sociocultural de la Etnia Diaguita, 79.
the dividing line between the Huasco and Copiapó Provinces, passing over the Portezuelo de Cantarito pass until reaching Cerro Colorado and then to the Portezuelo de la Cruz pass, then it connects with the Portezuelo el Gaucho and continues to delimit with the Southern Limit of Estancia Jarilla to Cerro Placetón.

East: It limits with the Cordillera of the Andes, with the same border that divides the Republic of Chile from the Republic of Argentina.

South: Starting at the west or southwest, it limits with the Estancia Torres y Paez, or in the same way, with the Sierra de Tatul or Sierra del Medio that is the range of very high hills that divides the Transit Valley River with the El Carmen River Valley. This delineation begins in the west, where the El Tránsito River meets the El Carmen River, following the highest summits of the Sierra El Talul, which divides the waters toward one and the other river, until reaching the IGM Guanaquero vertex and from there to the mountain of 5,593 meters above sea level located on the same border that separates the Republic of Chile from the Republic of Argentina.

West: [It] limits on the West, partly with the Sierra de Tatul or Sierra del Medio, in the southern sector. The rest of the western boundary corresponds to its delineation with the Estancia el Molle, that is to say, with the Quebrada de Chancoquin, Quebrada de la Totora, and with the Quebrada Seca, these ravines belonging to the Estancia de Los Huascoaltinos, from where they start, near Cerro el Placetón, to the mouth of the El Tránsito River. [59]

As a result of these exclusions, both in the declaratory ruling and in the title of domain, the surface area of the community property of the Estancia de Los Huascoaltinos would not be 395,000 hectares, but rather just under 239,919 hectares, approximately 60 percent of the original area.

Denial of the special protection provided by Law 12,953 to indigenous lands:

On September 7, 2006, just days after the enactment of Law 20,117, which recognized the existence of the Diaguitas in Chile and one day before the law’s publication in the Diario Oficial de la Republica de Chile (in English, the Official Gazette, in which Chile’s

laws are published) the Diaguitas Huasco Altinos Agricultural Community requested that
the National Corporation for Indigenous Development (CONADI), a state entity in charge
of indigenous policy, register the community’s land, corresponding to 390,000 hectares, in
the Public Registry of Indigenous Lands, in accordance with the provisions of Law 19,253;
with Executive Decree No. 150 of the Chilean Ministry of Planning and Cooperation
corresponding to the “Regulation on Organization and Operation of the Public Registry
of Indigenous Lands”; and with Law 20,117, published on September 8, 2006, which
“recognizes the existence and attributes of the Diaguita ethnic group and their distinct
status as indigenous Diaguita.”

The decision to request the registration of lands in the Public Registry of Indigenous Lands
was made by the general meeting of the community:

The General Meeting of Comuneros proceeded to vote in order to approve
that the lands of the so-called Estancia de Los Huascoaltinos be inscribed in
the Registry of Indigenous Lands, in order to receive the special protection
granted by Indigenous Law to ancestral peoples, in particularly the
protection of the Diaguita ethnic group, which was unanimously approved
by the community members with the right to vote; the vote was carried out
by a show of hands according to the provisions of the community bylaws.

In the application, the community indicated that it consisted of 262 families, living in 22
hamlets in the Valle del Tránsito, all of them “Diaguitas and of indigenous descent.” The
application affirmed that “[a]ll our members are Diaguitas and recognize themselves as
part of this ethnic group of Chile.” It added:

The application for the recognition of our land as indigenous territory is
based on the demand of all Huascoaltinos comuneros, who, in a historic and
unanimous vote in an Extraordinary Assembly on Sunday, August 20, this
year, gave their authorization to process this petition and to demand that our

60 Request dated September 7, 2006, addressed to the national subdirector of CONADI, northern
jurisdiction, undersigned by Sergio Campusano, in his position as president of the CADHA.

61 Pertinent part of the Minutes 46 of the Extraordinary Board Meeting of the Comunidad Agrícola
Los Huasco Altinos, dated August 20, 2006, reduced to public deed, where the following
assembly agreement was recorded.

62 Request dated September 7, 2006, addressed to the national subdirector of CONADI, northern
jurisdiction, undersigned by Sergio Campusano, in his position as president of the CADHA.
territory be respected and that our people be taken into consideration when
decisions are made that concern our ancestral and legal property.\textsuperscript{63}

The community submitted the following to CONADI: (1) The community asserted that it
is the only Diaguita organization that possesses ancestral territory where “the traditions,
ways of life, and customs of our ancestors are preserved and developed on a daily basis.
For centuries we have defended Diaguita lands, culture, dignity, and identity in the Tránsito
valley and with this objective we want to submit our ancestral community territory to the
protection established by the Indigenous Law No. 19,253”; and (2) the community stated
that it wishes to preserve the organization that coresponds to the agricultural community
structure, “organized based on the administration and use of a common territory. Our
communal property (of the Agricultural Community) is operative with our socio-productive
regime, mainly silvopastoral and agricultural, and demands the integrity of our territory
to make the transhumance of Diaguita livestock farmers viable.” The community added
that “[t]his land ownership regime is not compatible with the structure of indigenous
communities established in the Indigenous Law, which allows the constitution of more than
one community in the original territories, resulting in the fragmentation thereof.”\textsuperscript{64}

In 2004, prior to the application for registration of the community lands in the Public
Registry of Indigenous Lands of CONADI, members of the “Los Huasco Altinos Agricultural
Community” decided to add the words “Indigenous” and “Diaguita” to the name of the
community.

On October 26, 2006, the national deputy director of CONADI, northern jurisdiction,
rejected CADHA’s request, based on the fact that CADHA was an organization that had
not been constituted in accordance with the procedure established by Law 19,253 on
protection and development of indigenous people.

The authority informed the president of the community that the response to the application
was contained in Exempt Resolution 1179 dated October 24, 2006. This resolution states
that “Article 12, second paragraph, of Law 19,253 establishes that the ownership of the
indigenous lands to which said resolution refers shall be held by the indigenous persons or
the indigenous community defined by that law.” The resolution added:

\textsuperscript{63} Request dated September 7, 2006, addressed to the national subdirector of CONADI, northern
jurisdiction, undersigned by Sergio Campusano, in his position as president of the CADHA.

\textsuperscript{64} Request dated September 7, 2006, addressed to the national subdirector of CONADI, northern
jurisdiction, undersigned by Sergio Campusano, in his position as president of the CADHA.
The legal report dated October 20, issued by the Legal Unit of the CONADI, which states that, notwithstanding the fact that all the information indicated by the petitioner can be corroborated in regard to the history of the land and the origins of its human settlements in the attached information, in particular, the current certificate of domain from the Vallenar Recorder of Deeds, it appears that the owner of the property or lands which registration is requested in the Registry of Indigenous Lands of the Corporation, is the Los Huasco Altinos Agricultural Community, a legal entity which legal status is that of an agricultural community constituted and governed according to DFL No. 5 in such a way that it does not correspond to any of the ownerships or entitlements that Article 12 of Law 19,253 permits and indicates, that is, indigenous persons or communities, so its registration is not legally appropriate, under the terms requested.\footnote{Exempt Resolution 1179 of the national subdirector of CONADI, northern jurisdiction, dated October 24, 2006.}

In view of the above, the aforementioned CONADI authority resolved “to deny the application for registration in the Public Land Registry of the property called Estancia Los Huasco Altinos, requested by Mr. Sergio Campusano Vilches, in his role as president and in representation of the Los Huasco Altinos Agricultural Community.”\footnote{Exempt Resolution 1179.}

Thus, CONADI, although recognizing that the property that was applying for registry corresponded to an ancestral territory of a Diaguita community, legally inscribed in the Recorder of Deeds, denied its registration in the Public Registry of Indigenous Lands because ownership of the property belonged to an agricultural community, a legal entity that, although not established in Law 19,253, was constituted as the result of a regularization process carried out by the State itself. CONADI also determined that CADHA was not an indigenous community as defined in Law 19,253—even though the community complied with all the requirements stipulated in Article 9, which states the following:

For the purposes of this law, “Indigenous Community” shall be understood as any group of persons belonging to the same indigenous ethnic group and which is in one or more of the following situations:

- They come from the same family tree;
- They recognize a traditional leadership;
- They own or have owned indigenous lands in common, and
- They come from the same ancestral territory.
It is clear that the CONADI resolution was arbitrary: it was issued after the State, although belatedly, had recognized the Diaguitas as one of the “indigenous groups of Chile,” and, therefore, it had to consider that the aforementioned Article 12, upon which it based its denial, establishes that indigenous lands are those that the indigenous people or communities currently occupy in ownership or possession in some form “that the State has used to cede, regularize, deliver, or assign lands to Indigenous people.”  

It should be remembered that it was the State that regularized the community lands through DFL 5, having no other mechanism available to effect the regularization.

It is observed that the legislature included the “Diaguita ethnic group” in the first article of Law 19,253 (through Law 20,117), which refers to the recognition that the State makes to its existence as one of the main ethnicities of the country. It is also observed that the “Diaguita ethnic group” was not expressly included in other articles of Law 19,253, such as Article 12, no. 2, on indigenous lands, nor in the chapter on “specific complementary provisions for the Aymara, Atacameños, and other Indigenous communities of northern Chile” (Articles 62 to 65), which prescribes the duty of special protection of the waters of the indigenous communities of northern Chile.

However, the inclusion of the Diaguita people in the first article signifies their legal recognition (in a belated manner), and therefore, the application in their favor of all the regulations provided by Law 19,253. In addition, bearing in mind the text of the law that indicates, for example, in Articles 62 to 65, that such “provisions shall apply to other indigenous communities in northern Chile, such as Quechuas and Collas.”  

That is, it is not exhaustive—and therefore includes Diaguita communities.

So, CONADI could have based the protection of the territory of the CADHA in Article 12, no. 2, because it is an ancestral Diaguita organization that occupies its ancestral territory. This article defines indigenous lands as:

Those which have been historically occupied and possessed by the Mapuche, Aymara, Rapanui or Easter Islanders, Atacameñas, Quechuas, Collas, Kawashkar, and Yámana people or communities, provided that their rights are recorded in the Indigenous Land Registry created by this law, at the request of the respective communities or indigenous owners of the property.

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67 Law 19,253, Art. 12, no.1, d.
68 Law 19,253, Art. 62, second paragraph.
Regarding CONADI’s reasons to deny protection to the lands of the Los Huascoaltinos Community, because it was not an indigenous community constituted in accordance with Law 19,253, it should be noted that Article 4 of Convention 169 of the International Labour Organization (ILO) on Indigenous and Tribal Peoples in Independent Countries (hereinafter ILO Convention 169) establishes that states should take special measures to safeguard the institutions and cultures of indigenous and tribal peoples and that these measures should not be contrary to the wishes of these people.\(^{69}\) It should also be recalled that the community made it clear to CONADI that members wanted to preserve the structure of an agricultural community because it was functional with their socio-productive regime, which required the integrity of the territory to make the transhumance of Diaguita ranchers viable. In addition, the community stressed that the land ownership approach was not compatible with the structure of indigenous communities established in the Law 19,253, because this structure produced the fragmentation of indigenous territories.\(^{70}\)

With this decision, the State deprived the CADHA of the special protection provided by Law 19,253, specifically, that protection established in Article 13, which states that indigenous lands, “due to national interest, will enjoy the protection of this Law and cannot be transferred, embarged, encumbered or acquired by prescription, except between communities or indigenous people of the same ethnic group.”\(^{71}\) This decision also allowed continuing with registrations of irregular domain by third parties of properties within the estate of the community and for the State itself, through the application of Decree Law 2,695 to grant individual domain titles within the community property without prior consultation or authorization of the community members.

In addition, it allowed the owners of the mining projects to be exempt from the legal obligations imposed on the execution of extractive projects of natural resources, particularly mining, on indigenous lands. This situation, as this HRIA found, was used by the owners of the El Morro (later Corredor, now Nueva Unión) project through the environmental impact assessment process and by the State of Chile when facing the Inter-American Commission on Human Rights (Case 12,741) to abstain from complying with its international obligations.

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\(^{69}\) ILO Convention 169, Article 4, reads: “1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned. 2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned. 3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures.”

\(^{70}\) Request dated September 7, 2006, addressed to the national subdirector of CONADI, northern jurisdiction, undersigned by Sergio Campusano, in his position as president of the CADHA.

\(^{71}\) Law 10, 253, Article 13, first paragraph.
and to justify violations of the human rights of the CADHA committed in the environmental impact assessment process of the Pascua Lama project.

It also deprived the community of the tax exemption established by Law 19,253, Article 12, third paragraph, in favor of indigenous lands. In effect, at the Internal Revenue Service, the Huascoaltinos Ranch appears with a surface area of 380,993.01 hectares, according to Property No. 00903–00049, and pays taxes. These taxes in 2016 exceed 8.5 million pesos per year, according to a document issued by the General Treasury of the Republic. It should also be noted that the CADHA pays taxes for the Estancia Chañarcillo, or Chollay, owned by Compañía Minera Nevada, subsidiary of Barrick Gold, where the Pascua Lama mining project is carried out, and for the lands where the El Morro (later Corredor, now Nueva Unión) mining project is located, owned by Goldcorp and Teck Resources.

If CONADI had recognized the community as an Indigenous Community and its lands as indigenous, at least since the year of the application (that is, 2006), the community would not be obliged to pay taxes. In addition, the CADHA pays taxes for an area larger than that actually recognized, due to the exclusions made in the adjudicatory ruling and in the domain title of 1997.

3. CURRENT SITUATION OF THE DIAGUITAS HUASCO ALTINOS AGRICULTURAL COMMUNITY (CADHA)

As indicated, the CADHA, located in the Valle del Tránsito, Alto del Carmen district, is composed of 262 families, all “Diaguitas and of indigenous descent.” The current territory of the community comprises approximately 240,000 hectares, although, as it was observed, until a few years ago it had 395,000 hectares. In their lands, individual properties and family estates dedicated to agriculture coexist with communitarian lands dedicated to grazing. Twenty-two hamlets in the community lands are also identified.

Although several of the problems that currently affect the territory of the CADHA are longstanding, their continuity, summation, and dimension threaten the existence of the

73 Receipt of taxes that the Estancia Los Huascoaltinos must pay to the General Treasury of the Republic during the first half of 2016.
74 Request dated September 7, 2006, addressed to the national subdirector of CONADI, northern jurisdiction, undersigned by Sergio Campusano, in his position as president of the CADHA.
community. Some problems are caused by nature itself. For example, periods of drought or floods, such as the floods that occurred in 2015, have resulted in loss of human life and the total or partial destruction of homes, schools, roads, crops, plantations, animals, and household goods.

However, most of these problems come from the action of third parties (private or public), accentuated by the lack of protection from the State. The continuity of land encroachment;\textsuperscript{75} the use of Decree Law 2,695 of 1979 by the Ministry of National Assets to regularize properties for third parties within the community’s territory (despite having this title of domain registered and in force and without its authorization or acquiescence);\textsuperscript{76} the impact on its waters by agro-industrial projects; the extraction of aggregates and marble and other natural resources, without the community’s authorization; and the concession of explorations and mining operations in the ancestral territory, without prior consultation are all impacts addressed in this HRIA that have forced the community and its leaders to allocate a significant part of their human and economic resources to defend their rights.

Given the State’s lack of protection and as a way of protecting and preserving its territory, in 1997, after it had been constituted as an agricultural community, the CADHA (as it later became known) requested that the National Forestry Corporation (CONAF), a private law entity under the Ministry of Agriculture (whose functions include “the conservation of biological diversity through the National System of Protected Wild Areas”), declare its territory as a Private Protected Wild Area. Although the General Environmental Law (1994) provides for the creation of protected wilderness areas on private property, CONAF’s response was that it was not possible to declare the territory a Private Protected Wild Area because it was a private property. The same response was reiterated in 2001 and 2004. The norms on Private Protected Wild Areas on private property became operative 10 years after they were issued, with the issuance of the Regulations of Private Protected Wild Areas in 2004.\textsuperscript{77}

\textsuperscript{75} The CADHA, as noted, has long been affected by usurpation processes that have not been stopped to date. The sale of estate rights to persons outside the community continues, and such sales are used to regularize a title of domain before the administrative and judicial authority. Likewise, frequently, people fence community lands and then claim ownership over the land. For example, during 2015, the Second Court of Vallenar ordered the defendant to return to the CADHA 17,9126 hectares of land owned by the community, which had been fenced by the defendant. See the ruling on the Las Pircas case, issued by the Second Court of Letters of Vallenar on October 30, 2015, in Case C-11.923-2010 of the Los Huasco Altinos Agricultural Community against Campillay Rojas, Omar, http://civil.poderjudicial.cl/CIVILPORWEB/.

\textsuperscript{76} Certificate of domain in force, issued by the Vallenar Registry of Deeds.

\textsuperscript{77} Pizarro et al., \textit{El Valle de los Naturales}, 179–85.
In view of these setbacks, the CADHA accessed funds from the regional government through the Chile Emprende Program, advised by the Region of Atacama CONAF, to finance a study titled “Feasibility of the Creation of a Protected Wild Area Owned by Small Producers in the Alto del Carmen District,” which concluded that the “Estancia de los Huascoaltinos possessed sufficient requirements to be classified as a Protected Wild Area.” However, despite these new efforts, CADHA did not obtain government support to establish a large part of the community’s territory as a Private Protected Wild Area, according to Article 35 of the General Environmental Law:

For the same purpose as stated in the preceding article [to ensure biological diversity, protect nature conservation and preserve environmental patrimony], the State shall encourage and promote the creation of privately owned protected wilderness areas, which shall be subject to the same treatment regarding taxes, rights, obligations, and charges as those that belong to the National System of Protected Wild Areas of the State.

In view of the above, in 2005 the community decided to ensure the protection and care of its territory “sustained by its own initiative and with its own resources” and defined its territory as a natural and cultural reserve. It is now part of the Network of Private Protected Areas (RAPP), created in 1997 by the NGO National Committee for the Defense of Flora and Fauna of Chile (Codeff). The Huascoaltinos Private Nature Reserve (RNP) is currently the only unit of the Network of Private Protected Areas in the Atacama region. RAPPs are not recognized by the State of Chile. In fact, CONAF determined that the community territory could not be considered as a protected wild area from a legal standpoint:

This Service considers that the area occupied by the Huascoaltinos community, although it is true, is nominally denominated as a Private Protected Wild Area, since it belongs to the RAAP (Private Protected Areas Network), an initiative led by CODEFF, it cannot be considered as such, from a legal point of view, since the legal instruments are not consolidated.”

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78 Pizarro et al., El Valle de los Naturales, 180.
79 Pizarro et al., El Valle de los Naturales, 180.
80 General Environmental Law, Art. 35.
81 Pizarro et al., El Valle de los Naturales, 181.
As can be seen, the CADHA’s attempts to have the State protect its territory have been unsuccessful. As noted, the community was denied the possibility of registering its territory in the Indigenous Land Registry of CONADI and thereby obtain the special protection granted by Law 19,253 to indigenous lands, and CADHA was also unable to obtain the special protection granted by Law 19,300 to Private Protected Wild Areas, even though the community complies with the requirements required by law to do so.

This lack of protection has weakened the territorial rights of the CADHA in the face of the threats from the extractive industry in its territories, in particular the mining projects addressed in this HRIA.
Map 1: Referential map of location of the Diaguitas Huasco Altinos Agricultural Community
Photo 2: Cattle in Quebrada El Corral, the Diaguitas Huasco Altinos Agricultural Community.

Photo 3: Quebrada de Colpe, the Diaguitas Huasco Altinos Agricultural Community.
III. THE PASCUA LAMA AND EL MORRO (NUEVA UNIÓN) MINING PROJECTS AND THE VISION OF THE COMMUNITIES

This chapter provides information on the emergence, characteristics, and current state of the Pascua Lama and El Morro (later Corredor, now Nueva Unión) mining projects being developed or projected in the territory of the Diaguitas Huasco Altinos Agricultural Community (CADHA). It also presents the vision the communities affected hold for these projects—and describes the effects of these projects on the human rights and general ways of life of these communities.

1. THE MINING PROJECTS

1.1. Pascua Lama

Pascua Lama is an open-pit gold and silver mine, located more than 4,000 meters above sea level on the Chilean-Argentine border. In Chile, Pascua is located in the province of Huasco, in the Atacama region; Lama is located in Argentina’s San Juan Province. The company that owns the Pascua Lama project is Compañía Minera Nevada, a subsidiary of the Canadian company Barrick Gold.

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84 In addition to operating Pascua Lama in Chile/Argentina, Barrick Gold has mines operating in Argentina (Veladero), Australia, Canada, Chile (Zaldivar 50 percent), Dominican Republic (Pueblo Viejo 60 percent), Papua New Guinea, Peru (Laguna Norte and Pierina), Saudi Arabia, United States, and Zambia. More than 75 percent of the gold the company extracts comes from the Americas. See Barrick Gold’s website, http://www.barrick.com/company/default.aspx.
More specifically in Chile, Pascua Lama is located in the Alto del Carmen district of Huasco Province. It operates in the headwaters of the Del Estrecho and El Toro Rivers and considers the exploitation of a mining deposit located under the glaciers that sustain the Huasco Valley hydrological system. In its original plan, Pascua Lama included the removal of 13 hectares of ice from the Esperanza, Toro 1, and Toro 2 glaciers, and the disposal of this ice on the Guanaco glacier.

The project was driven by Barrick Gold in the late 1990s, and was environmentally qualified by the Atacama Regional Environmental Commission, through Exempt Resolution No. 039 in 2001, later modified by Exempt Resolution No. 059 in 2001. The modification that includes the expansion of the mining exploitation was approved by Exempt Resolution No. 24 in 2006.

The main objective of the original project was the exploitation of gold, silver, and copper mineral deposits, and the construction of a plant in Argentina to produce doré metal (a gold-silver alloy). Geological and engineering works after 2001 made it possible to identify larger mineral reserves, which is why the project incorporated the ability to increase mineral exploitation and treatment capacity into the design of the original project.

The set of modifications identified in the environmental impact study approved by the Environmental Qualification Resolution (the Resolución de Calificación Ambiental, or RCA) No. 24/2006 included the operation of a new deposit called Penelope, located about 2.5 kilometers southeast of the main site, in Argentine territory; an increase in the ore extraction rate from 37,000 tons per day to 48,800 tons per day; an increase in the processing rate as of the fourth year, from 33,000 tons per day to 44,000 tons per day; the modification of the water catchment point in the Del Estrecho River; the relocation of the drainage management and treatment system from the waste rock or slag deposit to ensure a gravitational flow; and the expansion of the camp located in Chile. The flow of water collection, the flow of vehicles from Chile, and the quantity and quality of drainage to be handled and treated have not changed.

The total labor requirement (covering both countries) will reach an estimated maximum of 6,000 people in the construction stage, and will be 1,660 people in the operation stage. The camp in Chile will have a capacity of 750 people in the construction phase and 500 to 600 people in the operation stage.

As noted, the environmental impact study approved by RCA 24/2006 mentions mitigation measures related to water resources. These measures basically consist in the reduction of...
freshwater catchment in the Del Estrecho River from 42 to 31 liters per second during the dry season of a very dry year to help maintain an ecological flow in the Del Estrecho River, and to operate the water catchments according to what is established in the bylaws of the Board of Surveillance of the Huasco River and its tributaries in order to not affect other users.

The project located on the Chilean side is in the territory that the CADHA claims as ancestral (Estancias Chañarcillo and Chollay), which, as indicated, was usurped by legal loopholes at the beginning of the 20th century and was eventually acquired by the Compañía Minera Nevada for the Pascua Lama project.

In the project area corresponding to the Chollay River sub-basin, the NGO Observatorio Ciudadano (Citizen Watch) has written that “12 glacier systems have been identified, … with a total surface area of 252 hectared, which feed the tributaries of the Chollay River. Out of these tributaries, the most important are the Pachuy, Blanc, Del Estrecho, and El Toro Rivers, whose headwaters are located at the Pascua Lama Operations site.”

The explorations began in Chile in 1977 by the Compañía Minera San José, a subsidiary of St. Joe Minerals, and by the 1990s had spread to Argentina, “until, at the end of the decade, it became one of the largest gold projects in the world” and “was named Pascua-Lama, to recognize its bi-national character.”

The governments of Chile and Argentina signed a series of treaties and protocols to facilitate the implementation of the Pascua Lama mining project. On June 4, 1997, Executive Decree 322 of the Ministry of Foreign Affairs was published in Chile’s Diario Oficial; it promulgated the Twentieth Additional Protocol to the Economic Complementation Agreement with Argentina to Facilitate the Execution of the Mining Project called “Pascua Lama,” and was signed by the governments of Chile and Argentina on January 29, 1997. In addition, Chile and Argentina signed on December 29, 1997, a treaty of integration and mining complementation containing two annexes; on August 20, 1999, the two governments signed a supplementary protocol to that treaty and, by exchange of notes dated August 31, 1999, adopted an agreement correcting the supplementary protocol.

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85 Observatorio Ciudadano, *Informe en Derecho*.
86 In 1987, the Australian company Bond Gold International acquired the Compañía Minera San José. Two years later the assets were transferred to the Canadian company LAC Minerals, assets that were acquired in 1994 by Barrick Gold. For more, see Barrick Gold’s website about Pascua Lama: http://barricklatam.com/pascua-lama.
88 Promulgated on March 7, 1997.
This set of instruments were approved by the Chilean National Congress on August 30, 2000, with the exchange of instruments of ratification in San Pedro de Atacama, Chile, on December 20, 2000, the date on which they were promulgated through Executive Decree 2,275 of the Ministry of Foreign Affairs. On February 7, 2001, the treaty, its annexes, and its protocol were published in the Diario Oficial of Chile. According to Barrick Gold, these instruments “set the legal framework for the development of across the border mining.”

Subsequently, in August 2004, Chile and Argentina signed a Specific Additional Protocol to the Treaty of Integration and Mining Complementation for the Pascua Lama Project, which defines the area where its provisions are applicable (known as the “operations area,” or “protocol area.”) According to these bases, a border control post was to be set up in each country to access these areas.

In Chile, as noted in the preceding paragraphs, the environmental authority granted permission to the Pascua Lama Project on two occasions: first, on April 25, 2001, through Exempt Resolution No. 39, the Regional Environmental Commission of the Atacama Region qualified the project on a favorable basis; and, second, on February 15, 2006, through Exempt Resolution No. 24, the same agency authorized the expansion project in “Modifications to the Pascua Lama Project.” Meanwhile, the Argentine authorities approved an Environmental Impact Report (IIA) on December 5, 2006.

During the fourth quarter of 2013, Barrick Gold announced the temporary deceleration of the construction of its Pascua Lama project. On October 19, 2015, and after several years of work, including on the glaciers, the company reported the temporary suspension of the project with a partial temporary closure plan “in all its activities associated with the construction phase, in compliance with the Order by Exempt Resolution No. 477, dated May 24, 2013, from the Superintendence of the Environment, … which, inter alia, ordered the adoption of a series of urgent and transitory measures, maintaining the shutdown until the Water Management System is executed, as provided in the Environmental Qualification Resolution.”

According to Barrick Gold, “the decision to restart the pace of construction will depend on a better economy and less uncertainty regarding the legal and regulatory requirements.

in Chile. The remaining development will take place at different stages with specific work programs and budgets. This approach will facilitate more efficient planning and execution and better cost control. In the meantime, Barrick will seek opportunities to improve the project’s risk-adjusted returns, which include strategic alliances or royalties or revenue-generating agreements.”

The Pascua Lama project has been questioned and has generated controversy since its inception. The main concern has been the expected negative environmental impact of the project, especially because the reserves are located exactly below and on the periphery of the glaciers that form part of the basin that feeds the rivers of one of the most fertile transversal valleys of Chile, the Huasco Valley.

Since the Pascua Lama project began operating, the Diaguitas Huasco Altinos Agricultural Community has filed a series of actions against it. At the international level, the CADHA filed a complaint with the Inter-American Commission on Human Rights (IACHR), which was declared admissible on December 30, 2009. In its report on admissibility, the IACHR concluded that it had jurisdiction to hear the complaint and that the petition was admissible in accordance with Articles 46 and 47 of the American Convention on Human Rights, for the alleged violation of Articles 21 (right to property), 8 (right to judicial guarantees), and 25 (right to judicial protection) of the aforementioned American Convention, in connection with Articles 1.1 (obligation to respect rights) and 2 (duty to adopt provisions of domestic rights) of the same instrument. In addition, the IACHR decided that it would analyze, in the substantive stage, the possible application of Articles 13 (freedom of thought and expression), 23 (political rights), and 24 (equality before the law) of the American Convention on Human Rights.

95 Adrienne Wiebe, Un Proceso Defectuoso: El Memorándum de Entendimiento de Barrick Gold con las comunidades Diaguitas de Chile (MiningWatch Canada and Observatorio Latinoamericano de Conflictos Ambientales/Observatory of Latin American Environmental Conflicts [OLCA], 2015).
At the national level, in addition to the CADHA, other organizations, farmers, ranchers, and private individuals filed complaints against the Pascua Lama project. These complaints include one filed on June 27, 2013, to the Environmental Court by small-scale farmers and ranchers of the Alto del Carmen district and surrounding areas and the Observatorio Latinoamericano de Conflictos Ambientales (Observatory of Latin American Environmental Conflicts, or OLCA) against Compañía Minera Nevada, for environmental damage. In the lawsuit, the plaintiffs argued significant harm or damage to the Toro 1, Toro 2, and Esperanza glaciers and, “by extension, to the El Toro River basin, which is where the waters of these glaciers runs into.” The court rejected the lawsuit for reparation of environmental damage because it determined that there would be “a multiplicity of mutually concordant evidentiary antecedents which, when seen according to the rules of sound criticism ... allow proving that the historical tendency of the loss of mass of the bodies of ice in the Project’s area of influence has not been altered.”

In addition, the environmental authority imposed several punitive procedures before and after Law 20,417 took effect. In response, on January 22, 2013, Compañía Minera Nevada

97 Some of these are the protection lawsuit “Sergio Campusanos Vilches with Barrick Gold Corporation,” Copiapó Appeals Court RIC 40-2005; protection lawsuit “Campusanos Vilches Sergio Fernando with the National Environmental Commission,” Santiago Court of Appeals RIC 3308-2006; protection lawsuit “Castillo Sánchez with COREMA III Region,” Copiapó Court of Appeals RIC 95-2006; protection lawsuit “Solange Bordones Cartagena and Others with Compañía Minera Nevada Spa and Other,” Copiapó Court of Appeals RIC 300-2012, Supreme Court Rol 5339-2013; protection lawsuit “Mario Vallablanca Páez and Others with Compañía Minera Nevada Spa and Other,” Copiapó Court of Appeals RIC 325-2012; protection lawsuit “Bárbara Salinas Acuña with Minera Nevada SpA,” Copiapó Court of Appeals RIC 318-2013 (issued to the Antofogasta Court of Appeals Case RIC 1639-2013). See Observatorio Ciudadano, Informe en Derecho.


99 Tribunal Ambiental, “No se acreditó daño a glaciares.”

100 Tribunal Ambiental, “No se acreditó daño a glaciares.”

101 Environmental punitive administrative procedures verified prior to the entry into force of Law 20,417: Resolution No. 085, dated April 27, 2007, COREMA Atacama Region: It is proposed to sanction the Compañía Minera Nevada Ltda., with a fine of 300 UTM for non-compliance with the conditions contained in Exempt Resolution No. 039/2001”; Resolution No. 022, dated February 1, 2011, of the Evaluation Commission: “The Compañía Minera Nevada Ltda. is hereby fined, with a fine of 300 monthly tax units, UTM, for non-compliance with the conditions contained in Exempt Resolution No. 039/2001 and Exempt Resolution No. 024/2006”; Resolution No. 65 dated March 19, 2012, of the Evaluation Commission: “It is proposed to sanction the Compañía Minera Nevada SpA, with a fine of 300 UTM, for non-compliance with the conditions contained in Exempt Resolution No. 024/2006”; Resolution No. 46 dated February 25, 2013, of the
Nevada submitted a self-report\textsuperscript{102} to the Superintendence of the Environment in which it acknowledged that it had violated Exempt Resolution No. 24, dated February 15, 2006, which favorably qualified the “Modification to Pascua Lama” project. The self-report was declared “inadmissible” by Resolution No. 105 of January 31, 2013. On the same date, by means of Exempt Resolution 107, the environmental authority decreed provisional measures because a situation of imminent environmental damage to the water resources of the Rio del Estrecho had been generated: “Given that the acid waters and water meadows management system had not been implemented as indicated in the Environmental Qualification Resolution due to potential events of massive ice removal that could expand the area of impact.”\textsuperscript{103}

The punitive administrative process began with the formulation of charges by the Superintendence of the Environment, where a total of 23 facts, acts, or omissions were considered; 22 of these infractions were accepted by Barrick Gold in its response dated April 29, 2013, which is why the sanctioning agency deemed that it was not necessary to open a probationary period. This process culminated in Exempt Resolution No. 477, dated May 24, 2013, which imposed a fine of 16,000 annual tax units (Unidades Tributarias Anuales, or UTA)\textsuperscript{104} on the company and required three “urgent and transitional measures“: (1) the total stoppage of the construction phase activities of the Pascua Lama project, as long as the water management system was not implemented as provided in the Environmental Qualification Resolution (RCA); (2) the transitional construction of works of capture, transport, and discharge to the north sedimentation pond, which could operate exclusively during the period necessary to implement the definitive works that would fully comply with the conditions established in the RCA; and (3) the monitoring of the

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\textsuperscript{102} Nevada submitted a self-report to the Superintendence of the Environment in which it acknowledged that it had violated Exempt Resolution No. 24, dated February 15, 2006, which favorably qualified the “Modification to Pascua Lama” project. The self-report was declared “inadmissible” by Resolution No. 105 of January 31, 2013. On the same date, by means of Exempt Resolution 107, the environmental authority decreed provisional measures because a situation of imminent environmental damage to the water resources of the Rio del Estrecho had been generated: “Given that the acid waters and water meadows management system had not been implemented as indicated in the Environmental Qualification Resolution due to potential events of massive ice removal that could expand the area of impact.”

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\textsuperscript{104} The fine was incurred for five infractions—four of them considered serious and one very serious. For such infractions, the Superintendence of the Environment can apply as a sanction (1) the revocation of the resolution of environmental qualification, (2) closure, or (3) a fine (ranging from 5,000 to 10,000 annual tax units). See Observatorio Ciudadano, *Informe en Derecho*.\textsuperscript{105}
environmental variables included in the RCA, being authorized to build all the associated
and necessary works to carry out such monitoring.\textsuperscript{105}

On May 29, 2013, Compañía Minera Nevada paid the fine in the General Treasury of the
Republic, and on June 11 of that same year it submitted to the Environmental Court the
first of three claims against Exempt Resolution No. 477. Nearly a year later, on March
3, 2014, the Second Environmental Court annulled Exempt Resolution No. 477, with the
exception of two of the three measures contained in the second paragraph: the stoppage
of the construction phase activities of the Pascua Lama project and the obligation to build
the temporary works. Compañía Minera Nevada responded by filing a cassation appeal to
the Supreme Court (Case No. 11.600-2014); on December 30, 2014, the Supreme Court
failed to rule on the appeal for a procedural reason.\textsuperscript{106}

On April 22, 2015, the Superintendence of the Environment “by order of the Second
Environmental Court, reopened the punitive proceedings Case A-002-2013, filed against
Compañía Minera Nevada SpA, owner of the ‘Pascua Lama’ (RCA No. 39/2001) and ‘Pascua
Lama Project Modifications’ (RCA No. 24/2006) projects, in order to issue a new punitive
resolution.” As noted, in May 2013 the Superintendence of the Environment had applied a
fine of 16,000 annual tax units for various environmental violations, and at the same time,
ordered the project to be halted. With the resolution that ordered the reopening, the
punitive proceedings went back to the last useful step contained in the file, prior to the
ruling. “After this, the SMA [Superintendence of the Environment] must issue a new ruling
and a new punitive resolution, which corrects those aspects of the procedures/proceedings
that the Environmental Court has ordered it to remedy.” The procedures are still pending.\textsuperscript{107}

On the same day, April 22, 2015, in parallel to the resumption of the 2013 proceedings,
the Superintendence of the Environment filed new charges against Compañía Minera
Nevada.\textsuperscript{108} These new charges were “due to new breaches of environmental regulations”

\textsuperscript{105} Observatorio Ciudadano, \textit{Informe en Derecho}
\textsuperscript{106} Observatorio Ciudadano, \textit{Informe en Derecho}.
\textsuperscript{107} For more on the Superintendence of the Environment’s filing of new charges against Compañía
Minera Nevada, see “SMA reabre proceso sancionatorio contra Pascua Lama y formula nuevos
cargos contra la empresa” [SMA reopens punitive processes against Pascua Lama and files new
cargos against the company], Superintendencia del Medio Ambiente (SMA)/Superintendence
gob.cl/v2/Sancionatorio/Resultado.
at Pascua Lama found during inspections—both scheduled and in response to complaints filed by third parties—in 2013 and 2015. In this second process, the Superintendence of the Environment formulated 10 charges against the project owner, one of them for a very serious violation, two for serious ones, and seven for minor breaches. These charges are related to noncompliance with the obligations established in the Environmental Qualification Resolution of the project regarding flora and vegetation, social monitoring, and monitoring of glaciers, among other obligations.\textsuperscript{109}

The second sanction is the result of environmental inspection activities that led us to detect breaches occurring after the resolution of May 2013. These are, therefore, new breaches, one of them very serious with the lack of continuity in monitoring obligations that had been established.

As a result of this pending proceeding,\textsuperscript{110} the executive director of Barrick Gold in Chile acknowledged that “in the past Pascua-Lama has made mistakes and errors.” He added that the company is willing “to restart a new process that complies with current regulations, and social and environmental commitments.”\textsuperscript{111}

For now, the Pascua Lama Project is halted on the Chilean side. In the United States, Barrick Gold also faces a class action lawsuit filed by shareholders who purchased shares of the company between May 7, 2009, and May 1, 2013.

In a written response to the questionnaire submitted for the purpose of this HRIA, Barrick Gold reported that it respected human rights in each area of its business and said it adhered to a number of international commitments and principles that protect human rights. It also pointed out that the company makes “significant” efforts consistent with the “highest” industry standards, including the UN Guiding Principles on Business and Human Rights.\textsuperscript{112}

\textsuperscript{109} “SMA reabre proceso sancionatorio contra Pascua Lama.”
\textsuperscript{110} In the words of Rubén Cruz, spokesperson for the Assembly for Huasco Alto Water: “We want the Pascua-Lama project to be closed definitively. This is a project that, although all the executives and those who run the company change, they finally end up incurring in the same thing, because the initiative has a structural failure, and this is nothing more or nothing less than the fact that this project is unfeasible in this location.” See “Tras nuevos cargos contra Pascua-Lama Comunidad del Huasco y ambientalistas exigen su cierre definitivo,” \textit{El Dinamo}, April 24, 2015, http://www.eldinamo.cl/ambiente/2015/04/24/tras-nuevos-cargos-contra-pascua-lama-comunidad-del-huasco-y-ambientalistas-exigen-su-cierre-definitivo/.
\textsuperscript{112} Written response of Barrick to the questionnaire formulated for this HRIA.
Despite these statements, this HRIA, as discussed in the following section, found that in the case of the mining concessions that gave rise to the Pascua Lama project in the territory of the CADHA, the CADHA was not consulted in a free and informed manner, nor was CADHA consulted regarding the agreements signed between the Chilean and Argentine States for the implementation of the project. Likewise, the CADHA was not consulted before the mining company began its activities in its territory, nor before or during the environmental assessment process.

Although the project is temporarily suspended, environmental damage classified by the environmental authority as serious and very serious has occurred, and there have been serious social impacts with respect to the ancestral property of the CADHA on the lands where the project is located—lands that have been usurped from the indigenous domain without consent, as noted.

1.2 El Morro/Corredor/Nueva Unión

The El Morro mining project, owned by Goldcorp,113 is an open-pit gold and silver mine, located in the Huasco and Copiapó Provinces. The project contains proven and probable reserves of 8.9 million ounces of gold and 6.5 billion pounds of copper (as of December 31, 2014),114 and it covers an area of approximately 2,460 hectares, 1,420 of them corresponding to the territory of the CADHA and legally registered in the community’s name.

On November 17, 2008, the Sociedad Contractual Minera El Morro, through the presentation of an environmental impact study (EIA) to the Regional Environmental Commission of the Atacama, submitted the “El Morro Project”115 to the Environmental Impact Assessment System. After a series of addenda, the project was approved through Resolution of Exempt Qualification 049/2011.

113 Goldcorp is a Canadian company based in Vancouver, British Columbia, dedicated to the extraction of gold. Goldcorp’s operating assets include four mines in Canada, three mines in Mexico (Peñasquito, Los Filos, and El Sausal), one in Guatemala (Marlin), one in the Dominican Republic (Pueblo Viejo), and two in Argentina (Alumbrera and Cerro Negro). Goldcorp’s portfolio of projects includes the Cochenour project in Ontario, and the El Morro project (later Corredor, and now New Union/Nueva Unión) in Chile. See http://www.goldcorp.com/Spanish/acerca-de/default.aspx.


115 Observatorio Ciudadano, Informe en Derecho.
Almost immediately, protection actions were filed against the El Morro project, pursuant to Article 20 of Chile’s Constitution.\textsuperscript{116}

In February 2012, the Antofagasta Court of Appeals (Case No. 618-2011) rendered ineffective the Environmental Qualification Resolution (because it violated the constitutional guarantees of the right to equality before the law and the right of the CADHA to its property) until the deficiencies of the environmental process related to the characteristics and circumstances noted in Article 11c of Law 19,300, were remedied. Article 11c addresses the resettlement or significant alteration of the life system or customs of human groups. By means of Exempt Resolution No. 134, dated June 22, 2012, the environmental assessment of the El Morro project was taken back to the stage of preparing the Consolidated Report requesting Clarifications, Rectifications, and/or Expansions (ICSARA) No. 5, in order to remedy the deficiencies observed in the 11th point of the ruling of the Antofagasta Court of Appeals: that the environmental impact study should include a baseline that considers the CADHA as indigenous and that considers the project’s impacts, especially in regard to the CADHA’s right to communal property.

In addition, in the Antofagasta Court of Appeals case no. 681-2011, ratified by the Supreme Court in the ruling of April 27, 2012, case no. 2211-2012, rendered invalid Exempt Resolution No. 049/2011 “El Morro Project Environmental Impact Study,” concluding that it discriminated against the CADHA and its members by omitting their status as indigenous people in circumstances where their Diaguita ancestry was proven. It also violated their right to property in the Los Huasco Altinos Estate. The case also recognized the indigenous character of these lands, which “requires special treatment,” and thus stated that rights recognized in Article 19, No. 2, and Article 24 of the Constitution, the ILO Convention 169,

and Articles 26 and 27 of the International Covenant on Civil and Political Rights had been violated.

Nonetheless, on October 22, 2013, the Atacama Region Environmental Assessment Commission once again favorably qualified the El Morro project by means of Exempt Resolution No. 232. This qualification occurred despite the magnitude of the impacts that the project would generate, including:

- The mine plant area, which corresponds to the mine’s worksite, its concentrator plant, and sectors of waste rock and tailings deposits (as stated in RCA 232/2013, paragraph 4.1.1), is located in the El Morro sector, specifically in the watershed of the Larga and Piuquenes gorges, both tributaries of the Cazadero River basin, which flows into the Conay River, tributary of the Transito River—lands owned by the CADHA, approximately 72 kilometers northeast of the town of Chanchoquín, a village that is part of the Huasco Altinos settlements, and 144 kilometers east of the city of Vallenar, as stated in Plan 2.2, attached to the RCA 232/2013.

- According to the RCA, the waste rock deposit would be located south of the open pit, in the Quebrada Larga watershed, and it is estimated that at the end of the useful life of the El Morro project, the waste rock deposit would amount to a surface area of 595 hectares and a height of about 300 meters. The deposit would have an approximate capacity of 1.6 billion tons of waste rock material (4.2.1.1.b).

- This watershed would also house the disposal of the tailings from the mining process in a reservoir located in the lower part of the Quebrada Larga basin, downstream from the site of the open pit and waste rock deposit, as detailed in Plan 2.2 of Addendum No.1 (4.2.1.1.f).

- The tailings depository projects the disposal of 33 million tons of tailings per year over a 14-year useful life span, accumulating approximately 450 million tons of tailings. The complete tailings deposit would cover an approximate surface area of 470 hectares, with a retaining wall constructed in five stages to be developed in years 0, 3, 6, 9, and 12.

In April 2014, the Copiapó Court of Appeals rejected the legal actions filed against the RCA by the CADHA and others.
On October 7, 2014, the Supreme Court halted the El Morro project by accepting the 436-2013 protection action filed by the Diaguita communities and the 437-2013 protection action filed by the Diaguitas Huasco Altinos Agricultural Community against the decision of the Atacama Region Environmental Assessment Commission. The Supreme Court considered that the resolution that approved the environmental impact study was flawed because the National Corporation for Indigenous Development (CONADI) had not consulted with the appealing communities. In addition, the Supreme Court ordered “to render ineffective the Conadi Reports contained in the official documents No. 00 and 564 of 2013 in which [CONADI] expresses its agreement with the El Morro Project’s Environmental Impact Study and Environmental Qualification Resolution No. 232 of October 22, 2013, that favorably qualifies the aforementioned Environmental Impact Study.”

It should be noted that in this case the state authority suspended the indigenous consultation in arguing that the CADHA had acted in bad faith by publicly expressing its rejection of the project and requesting the authority grant longer deadlines for ruling on the consultation procedure, which was considered a delaying strategy. Aware of these facts, the Supreme Court ordered that “the Region of Atacama Environmental Assessment Commission should request new reports from Conadi, in which they justifiably present their criterion as to the pertinence of canceling the Indigenous Consultation process provided in Resolution No. 69/2013 and upon not performing it with respect to the appellants identified in the third point of this ruling, and once they are evacuated, proceed to issue a new Environmental Qualification Resolution of the Environmental Impact Study on the El Morro project in which this one is environmentally qualified according to the merit of the information and according to the procedure contemplated in Law No. 19,300.”

In reaction to the Supreme Court’s ruling, the CADHA stated:

The rule of law has been restored. The highest court of the nation shows that the actions of state authorities in the environmental assessment process of the El Morro mining project, in particular the National Corporation for Indigenous Development and the environmental authority, are illegal, because they suspended the indigenous consultation without grounds, that is to say, in an arbitrary manner, and even more seriously, without protecting indigenous rights.

This is stated by the ruling in its twenty-sixth point. There is no basis, in terms of the facts and the right, which approaches a minimum standard allowing the interested parties, that is to say, the indigenous people affected, to know
the reasons why the continuity of the consultation process was not justified. The obligation that requires consultations to be carried out in good faith and in a manner appropriate to the circumstances is not complied with. The requirement imposed on the State by Convention 169 to consult indigenous peoples for the purpose of reaching an agreement or obtaining consent on the proposed measures, especially prior to authorizing a prospection or exploitation of minerals on their territories, is omitted in this way.

We commend the justice of this ruling that finally orders: “To render ineffective the Conadi Reports contained in Official documents No. 00 and 564 of 2013 in which the Corporation expresses its agreement with the Environmental Impact Study of the El Morro Project, and the Environmental Qualification Resolution No. 232 of October 22, 2013, that qualifies the latter Environmental Impact Study.”

Furthermore, the CADHA stated:

This ruling constitutes a historic milestone for the protection of the lands of the Diaguita Huasco Altinos Community and the rights of the members of this indigenous organization of ancestral base, constituted by 260 families who have preserved these lands and their system of life and customs since time immemorial to date.

We call on the authorities to rectify their policy in order to prevent arbitrary and illegal acts such as those that have characterized their actions in this case [from being] repeated and [to] commit to fully complying with this ruling in accordance with the standards of Convention 169, as provided by the Supreme Court. We hope that, according to these guidelines, the ruling we are celebrating today constitutes a precedent standard for the action of State organs in relation to extractive natural resource projects in indigenous territories.


After the Supreme Court ordered the El Morro project to be halted, Goldcorp decided to explore other options. On August 27, 2015, Goldcorp and Teck Resources, the latter being the owner of the Relincho mining project, announced in a press release “an agreement to combine their respective El Morro and Relincho projects into one single project, located approximately 40 kilometers away from each other, in the Huasco Province in the Atacama Region of Chile.” The combined project was to be called “Corredor.”

In the press release, the companies indicated that “in regard to the mineral reserves as of December 31, 2014, reported by Goldcorp with respect to El Morro and by Teck with respect to Relincho, the proven and probable reserves of the Corredor Project would contain approximately 16.6 billion pounds of copper, 8.9 billion ounces of gold, and 464 million pounds of molybdenum.”

The Corredor project would include a 40-kilometer conveyor belt to transfer ore from the El Morro site to a single line mill at the Relincho site; both the processing plant and the tailings pond would be in the Relincho sector. With the combination of projects, the mining companies hoped to produce a lower environmental footprint; optimize the mining plan; lower costs and create better capital efficiency; and provide better community benefits.

In regard to the “better community benefits” discussed in this press release, Goldcorp and Teck Resources reported that they would initiate “a far-reaching relationship with the communities, indigenous peoples, and other stakeholders to help guide the project development.” They also said that “over the next few months, the project team will meet with the community and indigenous peoples to explain the concept of the Corredor Project and will work collaboratively to define their relationship model. This process will be facilitated by two independent organizations with experience in community relationships and knowledge about processes to improve social performance and achieve socially sustainable results in natural resource projects. In combination with the community consultation, a pre-feasibility study is expected to begin in early 2016, which is expected to be completed within 12 to 18 months. Assuming a positive pre-feasibility study, the feasibility study will begin.”

Regarding the El Morro project, the two companies said that intention is to start with dialogue and to reach an agreement with the affected communities, giving priority to social

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119 The Relincho project is for extraction of copper and molybdenum and is located in the Vallenar district, Atacama region, at an altitude of between 1,500 and 2,200 meters above sea level.
120 Goldcorp, “Goldcorp and Teck Combine.”
121 Goldcorp, “Goldcorp and Teck Combine.”
122 Goldcorp, “Goldcorp and Teck Combine.”
responsibility. They noted that they know that the state must execute the consultation process and that they only intend to build relationships with the communities.

In Goldcorp’s response to the questionnaire sent to the company as part of this HRIA, the company referred almost exclusively to the Corredor project, stating that this project would be “committed to ongoing dialogue with the CADHA and other communities, and to improve past relations, with the purpose of building, in partnership with the communities, a current and future relationship that is participatory, inclusive, transparent, and associative.” Goldcorp added that “the commitment of the Corredor Project, and its owners Goldcorp and Teck, is to respect and comply with all human rights, as expressed in the UN Universal Declaration of Human Rights, the UN Guiding Principles, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the fundamental conventions of the ILO.”

Representatives of the former El Morro project indicated that they repeatedly expressed interest in communicating with the CADHA, but said they were unsuccessful. However, it seems that communication with the Diaguita indigenous communities, constituted according to the Law 19,253, did occur: CADHA’s sole objection to the project was the location of the tailings. In this regard, El Morro representatives consider that it was more a matter of perception because its installation was technically adequate.

Regarding the assertion that representatives of the former El Morro had not achieved communication with the Los Diaguitas Huasco Altinos Agricultural Community, a series of letters sent by the CADHA to the executives of the El Morro project are on record. They show that the community made it clear that the project was carried out within the territory of the community; that the community requested information from the company at least since 2005, and that in 2006 CADHA informed Goldcorp of the unanimous agreement of the CADHA not to authorize the tailings deposit and the waste rock deposit from the El Morro project in the community’s territory. Likewise, the CADHA indicated to the company that, in view of the omissions observed in the Pascua Lama project, the community wanted to guarantee effective participation in the evaluation process that would allow determining “the real impacts of these projects on the customs and ways of life of our Community and on our environment” (letter dated March 2007). In order to do so, the CADHA requested that the environmental impact study be sent six months in advance of their entry into the

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123  Response of Goldcorp to the questionnaire sent in the context of this study.
Environmental Assessment System, in sufficient copies so that each family could access this information for its analysis and eventual response, and that it be presented in an easy-to-understand manner. In addition, the CADHA requested that a socioeconomic and cultural impact study be carried out, and, because the project involved a situation of external impact, the community demanded having a professional technical support team, with the confidence of the local population, “to provide the technical arguments that support the citizens’ observations of the Transit River Valley.”

In subsequent letters, the CADHA informed the directors of the El Morro project that, in the execution of the project, the community would demand international standards on the issues contemplated in ILO Convention 169. In addition, the CADHA detailed a series of impacts produced by the development of the project on the community’s natural heritage, as well as the negative effects at the community level:

Negative impact on local flora and fauna, on native species; impact on our landscapes and scenery, they steal our Natural Heritage, treat us with arrogance, do not comply with commitments established by the mining company, and insist on treating us individually and not as a Community, etc.

In a letter in November 2009, the CADHA indicated to the company responsible for the El Morro project that the community is not just a simple agricultural community, “but we have also manifested our indigenous ascription, identifying ourselves as Diaguitas.” The letter added:

With that status as indigenous people, we have demanded respect from the State of Chile, and from those who work in the private world.

Recognizing ourselves as indigenous Diaguitas leads to the claim for respect of certain rights, which have the quality of human rights, recognized both

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125 On November 24, 2008, one week after the environmental impact study of the El Morro project had entered the Environmental Assessment System, the CADHA requested 20 copies of the study to work in a sectorial manner from the intendant, at that time, of the Atacama region, “thereby exercising our right as an indigenous people to form a free and informed opinion about the project.” It was stated in the letter that such a request had been made to the company responsible for the project, but there had been no response. See CADHA to the intendant of the Atacama region, letter, 24 November 2008.

126 CADHA to the directors of the El Morro project, letter, November 2007.

127 CADHA to the directors of the El Morro project, letters, April 2009.
nationally and internationally and the possibility of enforcing these rights in both individual and collective entitlement.

The ILO Convention 169 and the UN Declaration on Indigenous Peoples recognize, inter alia, the right to development and the right to self-determination; we are also entitled to the right to protection and use of natural resources in our territory. The most destructive and frequent violations of the rights of indigenous peoples are a direct consequence of development strategies that do not respect the fundamental right to self-determination.

For several years we have expressed our systematic and uniform rejection of the El Morro project, since it is incompatible with the development strategy chosen freely by the Huascoaltina Community and that will bring a series of damages not only for our Community and territories but also for all inhabitants of the Huasco Valley, as we made clear in our observations to the Environmental Impact Study.\footnote{128 CADHA to the directors of the El Morro project, letters, April 2009.}

The mining concessions that gave rise to the El Morro project (as noted, the name later changed to Corredor and is now Nueva Unión),\footnote{129 Information provided to the CADHA in May 2016 by the owners of the Corredor project.} like the Pascua Lama project, did not involve consulting the CADHA or other affected indigenous communities in a prior, free, and informed way. Moreover, the CADHA and other affected indigenous communities were not consulted before the mining company began activities in the area, nor before or during the environmental assessment process. The community was also not consulted regarding the announced Corredor project, which is mostly located within the registered territory of the CADHA.

2. **THE COMMUNITY’S VISION ON THE PASCUA LAMA AND EL MORRO (NOW NUEVA UNIÓN) MINING PROJECTS**

Interviews carried out with members of the CADHA identified their views on the most serious impacts that these projects generate. These impacts fall into four key themes: lack of consultation and information; imposition of a mining model without the community’s
2.1. Lack of consultation and information on the granting of mining concessions in the community territory

As has been pointed out in this HRIA, the Chilean State has delivered numerous exploration and exploitation concessions; measurement requests; statements of discovery; and mining permits within the territory of the CADHA. According to the information provided by the community, the CADHA was not consulted on any of these measures—all of which depend on the state for their granting. All the people interviewed for this study agreed that the State did not inform or consult the community or its members for any of the hundreds of mining concessions granted within the territory of the CADHA, or for any of the actions carried out by the state or by third parties in the territory of the community.

The CADHA was not consulted regarding the series of mining concessions granted by the Chilean State to companies or private individuals that gave rise to the Pascua Lama and El Morro projects. Both projects, authorized by the state, have had significant impacts on the communities that inhabit the area of influence of the mines, both socially and environmentally.

All of the interviewees in the Transit Valley agreed that the state did not inform or consult the community about the mining concessions acquired for the Pascua Lama and El Morro mining projects—projects that were to be executed in the territory of the community and in the territory claimed by the community as ancestral.

- “The authorities never came to tell us that there would be mining operations.”
- “The government never came.”
- “The state never showed up.”
- “I think it was a lack of respect on the part of the authorities because they should have asked if the Huasco Altinos agreed with it.”

Likewise, most of the interviewees learned of the projects when they saw mining vehicles traveling to the high sectors of the valley.
“We found out because we grazed our animals near El Morro and my brother did drilling/exploration work.”
“We found out about the mining companies once they started working.”
“We found out when they began working and four-wheel-drive vehicles and helicopters came.”
“When Nevada came we thought it was going to be a small mine and they were going to work with pickaxes.”

2.2 Imposition of a mining model without the consent of the community

The mining companies responsible for Pascua Lama and El Morro began operating in the field several years before the environmental authority authorized the two projects. For example, the Canadian mining company Noranda (predecessor of the Strata company [US] and then of Goldcorp) began exploration in the territory of Huasco Alto in 1999, covering an area of approximately 10,190 hectares. In that year, the CADHA directors granted Noranda an easement for mining exploration for the amount of 1.2 million Chilean pesos (equivalent to approximately $2,400 at that time), “taking advantage of the ignorance that the leaders had at that time on the subject, and omitting the principles of current international law, such as … explaining the purposes of the project and sharing the benefits thereof [beforehand], without prejudice to fair compensation for local and/or indigenous communities.”

In 2004, the prospecting caused a series of damages, also caused by pirquineros, or artisanal miners, who had easier access to the area because of the trenches opened up by the mining company. The CADHA reported this situation in detail, as stated in a letter dated November 27, 2007, sent to the project managers.

The mining companies prevented the comuneros from entering the area of the projects, including those whose main activity was grazing animals.

“The mining companies prohibited us from entering the project area.”

130 Pizarro et al., El Valle de los Naturales, 167.
131 Pizarro et al., El Valle de los Naturales, 167.
2.3 Strategies of co-optation, corruption, and disintegration of the social fabric

In the Transit Valley, the miners visited the homes of the comuneros, gave talks on projects, offered jobs, financed projects, and provided economic resources to individuals, cultural centers, indigenous associations and communities, neighborhood associations, schools, drinking water committees, and/or to the municipality of Alto del Carmen.

- “[Pascua Lama] tricked us; they didn’t do what they said. They gave us stuff that was useless.”
- “[The mining companies] use technical words; we are farmers and don’t understand.”
- “The mining companies came several times. The first time people listened to them but never again.”
- “The mining company people came many times to meetings and offered jobs; later the people realized there would be contamination, and began to oppose it.”
- “When Nevada came in they said they would give jobs to everyone.”
- “The talks were given by the mining companies.”
- “Barrick’s strategy included the story about corporate social responsibility.”
- “They make the people believe that they won’t do any damage. They give them money and the people get enthusiastic. That is called ‘selling out the valley.’”
- “A month or two ago they came from El Morro to say they had done everything badly and now they want to do everything right.”

Barrick Gold and its subsidiary Compañía Minera Nevada implemented a series of strategies in order to obtain the approval of communities possibly affected by the project. Given the clear opposition of the CADHA, the strategies seem to have focused on the “rescue” of identity and Diaguita culture. To this end, and in connection with the “re-ethnification” process generated following the recognition by the State of Chile in 2006 of the existence of the Diaguitas, Compañía Minera Nevada encouraged the establishment of Diaguita indigenous cultural centers, communities, and associations, the latter under the scope of the Law 19,253.

Once the Diaguita ethnic group was legitimized in the Huasco Valley, the transnational company uses this fact in its favor, turning [ethnic group support] into another co-opting strategy. In the words of Corporate Affairs
Manager Rodrigo Rivas (2009): “Barrick’s strategy and objective is to support this political process and thereby solidify a social base of support within the ethnic group for the start-up and implementation of the Pascua project.”

Since its arrival in the region, Barrick has established public-private partnerships (PPPs) or associations with state administrations as part of its social responsibility program. Within the framework of the PPPs, Barrick was “the source of funding for many local development and infrastructure projects traditionally allocated to the state.” As part of this agreement, Barrick supported the development of Diaguitas cultural centers. These centers “received, since their creation in early 2000, the support of CONADI in [gaining legal recognition]. After their recognition by the Indigenous Law in 2006, these cultural centers were considered by the state as the legitimate representatives of the ‘ethnic group.’”

The interviewees indicated that some indigenous communities were constituted according to Law 19,253, by stimulus of the Pascua Lama Project.

- “When Barrick came in, they started forming indigenous communities.”
- “These communities were created to negotiate with the mining company; they are tailored to the needs of the company.”

In April 2014, Compañía Minera Nevada signed a memorandum of understanding with 15 of 18 Diaguitas communities of the Huasco Valley conformed according to Law 19,253 to inform them of the main impacts of the mining project, as well as its control and mitigation measures, for which the company would provide financial and material resources. An article in Minería Chilena magazine pointed out that the president of the Diaguita Huasco Alto Community Council, Solange Bordones, indicated that this process was not “an agreement, nor a dialogue; it is a covenant in which the company has agreed to provide all the information that we require and the specialists to help us process it. This does not

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134 Wiebe, Un proceso defectuoso.

mean that we will have a dialogue with them or reach an agreement. We do not trust the company at this point.”

This memorandum of understanding, which has been questioned even by members of the indigenous communities that signed it, has been used by Barrick Gold to create an image that the Diaguitas support the Pascua Lama project. For the CADHA, this process “demonstrates, once again, the immoral actions of the Nevada Mining Company (Barrick Gold subsidiary) to impose its project without respect for the fundamental rights to the recognized indigenous people.”

Other alleged actions of Barrick Gold were contributing to political campaigns and giving millions of dollars to the Surveillance Board of the Huasco River Basin and Its Tributaries.

One of the first agreements Barrick negotiated in the valley was with the Surveillance Board [of the Huasco River Basin and Its Tributaries] in 2005–2006. In this agreement, Barrick pledged to pay the Board US$60 million

136 “Acuerdo entre Barrick Gold y Diaguitas.”


141 This action is described in Weibe, Un Proceso Defectuoso: “Within the Assembly, members have the right to vote according to the number of water shares they hold. One member points out that 3 percent of members control 70 percent of the vote because there are large landowners who hold many water shares, especially in the lower parts of the Valley. This situation has created deep disagreements among the small landowners who live near the mine and are very concerned about possible pollution, and the large landowners who are more concerned about the profitability of their business, not the land,” 16.
over the next 20 years, at a rate of US$3 million per year. In exchange, the Association agreed to direct any concerns or complaints directly to the company and not through the environmental assessment process that was in progress at the time. As can be imagined with this amount of money involved, the agreement has been the source of many conflicts within the organization and the population in general, and [it] has created a serious crisis of representation of some leaders accused of mishandling or misusing the money.\textsuperscript{142}

The installation of the mining projects in the area appears to have generated serious divisions, rupture of the social fabric, and family and community fragmentation. In the valley, interviewees reported that they felt the tension in relationships. People speak about “the others,” “the Diaguitas,” or “Neo Diaguitas” to refer to those who are part of indigenous communities that support mining and that were constituted according to the procedure established by Law 19,253. The Huasco Altinos comuneros are recognized as Diaguitas, but some object that the state forces them to accredit this group with a credential granted by CONADI.

\begin{itemize}
  \item “I am Diaguita but I don’t have any identification that says so. The government can’t oblige me to get a credential that certifies that I am Diaguita.”
  \item “To be or not to be Diaguita? It is absurd. We are all from here.”
  \item “I am Diaguita. We got the certificate. I got it because it could be useful.”
\end{itemize}

All of the interviewees in the Transit Valley agreed that the actions of the mining companies and the state caused serious damage to the social fabric.

\begin{itemize}
  \item “Another thing that affects us is coexistence with other neighbors: people fight; there is discord.”
  \item “They have damaged the social fabric badly.”
  \item “The miners have changed the way we live. Because they have taken away our source of labor, they have taken our sons away.”
  \item “The people in the valley have been fighting.”
  \item “There is a lot of community division.”
  \item “The miners came to change our lives; they came to impose another way of life on us, so there is a lot of division.”
\end{itemize}

\textsuperscript{142} Wiebe, Un Proceso Defectuoso, p. 17.
- “As a woman, it is hard on me because we want to live in peace. There is a family reunion and someone always fights. I avoid it and change the subject. My family has been divided by the miners.”
- “There is no community work now because people want to be given everything.”
- “I come from a family divided by the mining project; they do not speak with each other.”
- “The people are divided.”
- “There are community members who want to negotiate with the miners. The miners work with this system of dividing people.”
- “They offer money. When they talk about money the people feel despair.”
- “With the arrival of the miners, people got ambitious, the divisions began.”

It should be mentioned that indigenous communities protected by Law 19,253 were also set up as tools to fight against the mining companies, such as the Patay Co Indigenous Community, whose objective is to safeguard the life and biodiversity of its territory. It established in its statutes that it will not participate in any mining project or benefit from any mining project.

From the interviews in the Transit Valley, it is clear that the CADHA members received clear and comprehensive information about the scope of the Pascua Lama and El Morro mining projects in their own organization only, that is, in the CADHA.

### 2.4 Contamination of waters and damage to the ecosystem

With regard to possible contamination of the valley waters as a consequence of the mining projects, all interviewees in the Transit Valley agreed that such pollution would mean destruction to their way of life.

- “It would be like a candle that goes out.”
- “If El Morro is able to work, they will contaminate the valley. They say they will not pollute, but the waters spring from there.”
- “Lose a valley for a mining company? No.”
- “They [Pascua Lama] recognized that the water is polluted.”
- “There has already been an effect on the water; it’s full of sediment.”
- “The change in the glaciers is tremendous.”
“El Morro tell us a beautiful story; they tell us that the water will not be dirty, but the valley is already dry. The little water that exists is for the vineyards and for the miners. The vineyards poison the water.”

“Water has changed since the mining started.”

“If the water is contaminated, the only thing left for us is to die.”

Likewise, everyone agreed that if the valley is destroyed, the way of life of the comuneros will be destroyed.

“Water and earth is our life.”

“If this valley is destroyed where are we going to go?”

“We learned about the projects too late. Before the miners settled, no one from the state ever came here.”

“Since the time of our grandparents, we love this valley.”

“To be Huascoaltino means to defend the earth.”

“After the installation of the El Morro mining company, people came to work for the mining company to talk to the Valeriano Neighbors Committee. Everything they presented is false. They said they were going to move the water meadows. That is impossible. These projects are harmful to health, our food, even to our psychology because now people are divided.”

Two of the people interviewed said that if there was a fair compensation for the damage, the mining companies could be authorized.

“If the miners are able to work they should compensate us.”

“If they want to work, they should work, but they shouldn’t pollute the water.”

**2.5 Synthesis of the opinions expressed by the interviewees**

From the interviews carried out with CADHA members for this HRIA, a series of observations can be drawn:

- **The CADHA was not been consulted in a prior, free, and informed manner—or in any way—about the mining concessions granted by the state within its territory.**
recorded in the Registry of Deeds or within the portion of the territory claimed as ancestral.

- The CADHA was not consulted by the state in a prior, free, and informed manner—or in any way—on the Pascua Lama and El Morro mining projects.

- The exploration activities that gave rise to the Pascua Lama and El Morro mining projects began several years before the respective environmental impact studies were entered into the Environmental Assessment System.

- The activities that preceded Pascua Lama began at least in 1977, and those of El Morro, as artisanal mining, at the beginning of the 21st century. Such activities were carried out before obtaining authorization from the environmental authority and caused negative impacts at environmental and community levels.

- Once both projects were authorized by the environmental authority (Pascua Lama in 2001 and El Morro in 2011), whether due to noncompliance with the environmental regulations or through vitiated procedures, both projects were halted.

- The activities carried out in both projects until their respective stoppages also caused serious and profound impacts on the environment and in the social and community fabric of the Huasco Valley.

- The environmental impacts of large-scale mining, in particular the impacts to the hydrological system of the CADHA territory, show that this activity is incompatible with the agricultural and livestock activities that characterize the productive system of the CADHA and that have been carried out from time immemorial to the present.

- The attempts of the CADHA to obtain the protection of the state for the preservation of its territory have been unsuccessful.

- The mining projects affect a significant area of CADHA’s ancestral territory, including titled lands (Estancia Los Huascoaltinos, in the case of El Morro) and those under the claiming process (Estancia Chañarcillo, or Chollay, in the case of Pascua Lama).
Map 2: Mining concessions at July 2015 inside the territory of the CADHA.

Map prepared by the Environmental Department of the CADHA with information on concessions at July 2015.
Photo 4: Overturned truck in Pascua Lama Camp, autumn 2016. (Photo by the CADHA Communications Department)

Photo 5: Station installed without the consent of the CADHA by the El Morro Mining Project in Huasco Altino Territory, Quebrada La Totora, km. 26..
Photo 6: Exploration tunnel in the El Morro mining site.

Photo 7: Miners leaving work in Barriales Camp, Pascua Lama Project.
Photo 8: Presentation of HRIA methodology. General assembly of the CADHA, May 2015.

Photo 9: Workshop held with indigenous women in Conay, in the framework of the HRIA, Diaguitas Huasco Altinos Agricultural Community, October 2015.
Photo 10: President of the CADHA, Sergio Campusano, outside the Barrick Shareholders Meeting, Toronto, 2015. (Photo: Allan Lissner)
IV. LEGAL FRAMEWORK APPLICABLE TO INDIGENOUS PEOPLES AND THEIR RIGHTS IN THE FACE OF INVESTMENT PROJECTS

To identify the impacts of the mining projects covered by this HRIA on the human rights of the Diaguitas Huasco Altinos Agricultural Community, this chapter analyzes the legal frameworks—both domestic and international—applicable to indigenous peoples in Chile. It should be noted that, once ratified, the international legal framework (including ILO Convention 169) becomes an integral part of the domestic legal framework.

This chapter focuses on the legal framework relating to the rights of native peoples in the face of extractive investment projects, such as the mining projects in question. The text also discusses the evolution of international law on human rights and business activities, including the obligations both of national states and of businesses to protect and comply with human rights. Finally, the extraterritorial obligations (ETOs) of national states—that is, a state’s obligations to ensure the human rights of people living in other countries who are affected by companies from that state—are analyzed.

1. LEGAL FRAMEWORK APPLICABLE TO INDIGENOUS PEOPLES IN CHILE

1.1. Constitution

The Chilean Constitution adopted in 1980 during the military dictatorship has no provisions that recognize the existence of indigenous peoples or their rights. Although
the Constitution has been subjected to several reforms, all efforts made to incorporate recognition of native peoples have been unsuccessful.\textsuperscript{144}

1.2 ILO Convention 169

The Chilean Constitution does not explicitly define the order of precedence of international treaties, except in relation to fundamental rights inherent in human nature—human rights.

Article 5 of the Chilean Constitution states that sovereignty resides essentially in the nation and that the exercise of sovereignty is limited only by the fundamental rights inherent in human nature. Subsection 2 states that it is the duty of state institutions to respect and promote the rights guaranteed by the Constitution, as well as those of international treaties ratified by Chile that are currently in force.\textsuperscript{145} In other words, the state is obliged to respect and promote the human rights guaranteed by the Constitution and by international treaties ratified by Chile.

\textsuperscript{143} In 2003, UN Special Rapporteur Rodolfo Stavenhagen made an “urgent call to the Chilean Congress to approve constitutional recognition of indigenous peoples and their rights.” In relation to a possible constitutional reform, Stavenhagen said that “the right of native peoples to self-determination—which is a universal human right (as established by Article 1 of both international human rights agreements ratified by Chile)—is applicable to all peoples, including indigenous peoples, as reaffirmed by ILO Convention 169 and other international agreements.” Similarly, Stavenhagen said that “the constitutional reforms undertaken by several countries over the last two decades are not aimed at limiting or circumscribing this basic human right, but at establishing the conditions for their application taking into account the specific characteristics of each country. Thus, the new relationship between the Chilean State and native peoples might include a definition of the modalities under which these rights will be exercised, based on a democratic consensus and effective participation of native peoples, without violating the principle of this universal right.” See Report of the Special Rapporteur Rodolfo Stavenhagen on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Chile Mission, November 2003, paras. 42, 43, and 44, http://www.ohchr.org/SP/Issues/IPeoples/SRIndigenousPeoples/Pages/CountryReports.aspx.

\textsuperscript{144} In April 2009, UN Special Rapporteur James Anaya visited Chile following the recommendations made by Stavenhagen in 2003, and Anaya concluded that the constitutional reform required for recognizing the existence and rights of indigenous peoples still had not been made. In this regard, on April 24, 2009, Anaya submitted to the government of Chile a report titled “International Principles Applicable to Consultations on Constitutional Reform Relating to the Rights of Indigenous Peoples in Chile,” including relevant international regulations and criteria on the consultation process regarding such a constitutional reform. See [Report of the Special Rapporteur James Anaya on the situation of human rights and fundamental freedoms of indigenous people, Chile Mission] (2009), para. 1, http://www.ohchr.org/SP/Issues/IPeoples/SRIndigenousPeoples/Pages/CountryReports.aspx.

\textsuperscript{145} Chilean Constitution, Art. 5, subpara. 2: “The exercise of sovereignty is limited only by the fundamental rights inherent in human nature. It is the duty of the state’s institutions to respect and promote the rights guaranteed by the Constitution, as well as those international treaties ratified by Chile currently in force.”
In this respect, because ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries is “the most relevant and specific international legal instrument on the Human Rights of Indigenous Peoples”\textsuperscript{146} and because it “represents, without a doubt, the most complete binding international legal instrument for the protection of indigenous and tribal peoples, and its adoption constitutes a transcendental achievement of the international legal framework,”\textsuperscript{147} the Chilean State is obliged to respect and promote its terms.

ILO Convention 169 was ratified by Chile on September 15, 2008, and, in accordance with Article 38, paragraph 3, the Convention became effective in Chile on September 15, 2009.\textsuperscript{148}

According to the ILO, the two basic tenets of Convention 169 are respect for the culture, way of life, and traditional institutions of indigenous peoples; and effective consultation and participation of these peoples in the decisions that affect them.\textsuperscript{149}

Shortly before ILO Convention 169 came into effect, the Chilean State enacted Executive Decree 124 of the Ministry of Planning (now called Ministry of Social Development) on September 4, 2009. The decree was conceived as a transitional statute, based on the supposition that it would trigger “a process of consultation of indigenous peoples at the national scale about the required procedures for the consultation process in line with the terms of Articles 6, No 1, letter a) and No 2, and 7 No 1, second sentence, of ILO Convention No 169.” In light of the above, “a mechanism had to be defined and adopted for regulating the process of consultation and participation of indigenous peoples, having clear, transparent and systematic procedures in order to achieve adequate implementation of the respective guidelines of ILO Convention 169.”\textsuperscript{150} Recital 8 of the executive decree states that once Convention 169 comes into force, Articles 6, No. 1a, and No. 2, and Article 7, No. 1, second sentence of the Convention would become “part of legislation in force.


\textsuperscript{148} ILO Convention 169 was enacted by means of Decree 236 of the Chilean Ministry of Foreign Affairs on October 2, 2008, and was published in the Diario Oficial on October, 14, 2008.

\textsuperscript{149} ILO Convention 169, 9.

\textsuperscript{150} Ministry of Planning, Executive Decree 124, Recitals 10 and 11, enacted on September 4, 2009, and published in the Diario Oficial on September 25, 2009.
because the content and the precision of these statutes are such that they may be used, without further formality, as a valid source of domestic law.”\textsuperscript{151}

Executive Decree 124 of 2009 was called into question by Chilean and international human rights organizations and academics, and by native peoples’ organizations on the grounds that the decree did not meet basic human rights standards.\textsuperscript{152}

The justification for the transitional nature of Decree No. 124 was the need to establish procedures for a consultation process regarding the obligations defined in ILO Convention 169, as required by the terms of the Convention. However, the language and the content of the decree did not reflect its provisional nature, and the Decree was in force for almost three years and was actually applied on various occasions. In fact, this statute was so flawed that instead of helping implement Convention 169, the opposite has been the case. Furthermore, there was no participation of native peoples in drafting the decree, leading to complaints from indigenous peoples’ organizations and to criticism from many experts and from civil society.\textsuperscript{153}

Executive Decree No. 66 of the Ministry of Social Development was enacted on November 15, 2013, approving “the bylaws regulating the indigenous peoples’ consultation process

\textsuperscript{151} Ministry of Planning, Executive Decree No. 124, Recital 8.

\textsuperscript{152} In its annual report for 2010, the National Human Rights Institute/Instituto Nacional de Derechos Humanos (INDH), an autonomous, independent public institution created by Law 20,405 for the purpose of promoting and protecting the human rights of all persons living in Chile, said, in relation to Executive Decree 124 from the Ministry of Planning, that “criticism has been expressed about the fact that no formal prior and informed consultation process was conducted and that [it] does not comply with the minimum requirements for real consultation and participation.” The INDH report adds: “Executive Decree 124 seriously restricts the types of measures and topics that may be included for consultation, while the time frame for the consultation process is hardly sufficient in light of the nature and scope of the matters to be considered by the indigenous communities. The specific exclusion of investment projects constitutes a grave omission, especially because most cases of conflict with indigenous communities are due to the expansion of energy, mining, fish-farming, and forestry mega-projects. These mega-projects are subject to the specific consultation processes established by sectorial regulations, and the sectorial authorities conducting said consultation process may opt to waive the consultation procedures indicated in the Supreme Decree.” See INDH, “Indigenous Peoples,” chap. 2 in 2010 Annual Report (2010), 101, http://www.indh.cl/wpcontent/uploads/2010/12/Informe_Final_Corregido1.pdf.

by virtue of Article 6 No. 1 Letter a) and No. 2 of ILO Convention No. 169” and abrogating Executive Decree 124.

Executive Decree No. 66 was published on March 4, 2014, and the state has applied it since then in a number of consultation processes concerning indigenous peoples and communities, despite the objections raised by native peoples’ groups, civil society organizations,154 and international bodies in whose view the new decree also fails to comply with international standards on the matter.155

The objections to this second statute have to do not only with the decree’s contents but also the manner in which it was adopted. The principal objections to the content include the following: the definition, on the part of the state, of the words “directly affected”; the restricted number of administrative measures that may be put to consultation;156 the way in which the subject of the consultation is determined; the restrictions placed on the justiciability of the right to consultation;157 and the exclusion of investment projects, which will not be subject to prior consultation (they will be subject to consultation only after the project is submitted to the Environmental Impact Evaluation System, which is governed by a different set of regulations that were not adequately put to the consultation of indigenous peoples).

The Chilean State has acknowledged before international human rights bodies that Executive Decree 66 requires modification to bring it into line with international standards. In a public hearing held on March 27, 2014, by the Inter-American Commission on Human Rights on the subject of “the right to prior consultation of indigenous peoples in Chile,” the following was stated:

154 As noted in Fundación para el Debido Proceso, Derecho a la Consulta: “This Decree has also been criticized by native peoples’ organizations and by civil society, not only for the manner in which it was approved, but also for substantive issues. The main objections are that additional requirements have been added for the consultation to take place that are not established by ILO Convention 169, and that the scope of the consultation is too restrictive,” 27.


Similarly, the IACHR has received disturbing information concerning the implementation of the right to consultation, and relating to consent on the part of the indigenous peoples in Chile. According to this information, some efforts had been made to establish a consultation mechanism, but the resulting Executive Decree 66 will constrain the rights of indigenous peoples. These constraints include the arbitrary exclusion of some topics from the consultation process, which community groups may be consulted, etc. Also, some regulations governing the consultation process on measures that affect the indigenous peoples were adopted without consultation, meaning that major difficulties will be faced when implementing the right to consultation. The Commission is very pleased that the Chilean State has expressed its willingness to modify its regulatory framework to bring it into line with international standards on the matter. In this regard, the IACHR invites the Chilean state to undertake resolute actions aimed at ensuring that, in regulatory and practical terms, the indigenous peoples in Chile can make effective use of their right to free, prior and informed consent in accordance with the standards of the inter-American system.\footnote{IACHR, 35A/14, Report on Session No. 150, www.cidh.org.}

It should be kept in mind that in Chile, not only laws but also regulations are subordinate to Article 5 of the Chilean Constitution. In other words, when regulations are enacted by state bodies, they must respect the human rights guaranteed by the Constitution and the international treaties ratified by Chile. Consequently, the new regulation on free, prior, and informed consent, which the government has promised to enact, must comply with the international standards of ILO Convention 169.

1.3 Law 19,253 of 1993 on Promotion and Development of Indigenous Peoples and other statutes that affect the forms of organization of indigenous peoples, as well as their land, territories, and natural resources

The main legislation specific to indigenous peoples in Chile, apart from Executive Decree No. 66, is contained in Article 1 of Law 19,253 on promotion and development of indigenous peoples,\footnote{Also, Law 20,249, published in 2008, “[c]reates the coastal and marine spaces of indigenous peoples.”} by virtue of which the Chilean State:
Recognizes that indigenous peoples are descendants of pre-Columbian populations
Recognizes that indigenous peoples maintain ethnic and cultural manifestations
Recognizes that the land is the main foundation of the existence and culture of indigenous peoples
Recognizes the principal indigenous ethnic groups, and deeply respects them
Undertakes the commitment to respect, protect, and promote their cultures, families, and communities
Undertakes the commitment to protect their land

When Law 19,253 was enacted in 1993, it constituted an important acknowledgment of indigenous peoples’ rights. However, this law needs to be aligned with international standards and case law relative to indigenous peoples, which has evolved significantly over the past few decades. ILO Convention 169, which, as mentioned, has been ratified and incorporated into the domestic legal framework, means that existing legislation must be harmonized with the UN Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly on September 13, 2007, with the favorable vote of Chile. International case law has also moved in this direction, especially the Inter-American Court of Human Rights system, which is based on several international conventions ratified by Chile and currently in force, such as the American Convention on Human Rights, and the UN human rights covenants and treaties, among others.

Although Article 1 of Law 19,253 recognizes indigenous peoples (or “ethnic groups”) in various ways and also acknowledges that the Chilean State has various obligations toward said peoples, it should be pointed out that this law is part of a larger legal framework based on an economic conception of man, wherein recognitions and obligations are not necessarily translated into practical respect and promotion of indigenous peoples. For example,

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numerous pieces of legislation, including Law 19,253, have a direct bearing on the forms of organization of indigenous peoples, and also on their land, territories, and natural resources, but this legislation has not been brought into line with the recognition and the obligations established in Article 1 of Law 19,253, nor with pertinent international standards and case law. This situation is true for most legislation relative to mining, water management, forestry, geothermal concessions, fisheries and fish-farming, and the environment.

1.4 Other regulations that have implications in terms of the forms of organization of indigenous peoples, and that affect their land, territories, and natural resources

The Chilean Constitution effectively privatized water resources in Chile. Although the Chilean Civil Code states that water is a national asset for public use and the Water Code of 1981 states that “water is a national asset for public use,” the Constitution says, in Article 19, No. 24, subparagraph 11, that “the rights of private parties over water resources, whether recognized or formally constituted in accordance with the Law, will be tantamount to ownership of said water resources.” This constitutional statute, as well as the Water Code of 1981, considers water to be a commodity that may be traded.

Under the Chilean legal system, the concession of water rights has the characteristic of being a perpetual right in rem that can be freely traded in the marketplace of goods and services, and which, in general, is free of charge, except when the concessionaire fails to make productive use of the resource, in which case there is a fee for “non-use.” Thus, the Chilean water rights system has evolved from a conditional administrative grant subject to possible expiry (in order to safeguard the public good) to a system where the granting and the redistribution of water resources is determined by the marketplace in such a manner that its former condition as a “national asset for public use” has lost its legal substance.

In 2005 the Water Code of 1981 was reformed. The purpose of the reform was to regulate water rights, for example, by levying penalties for “non-use” of the water so as to prevent or discourage monopolistic or speculative practices, or by ordering the water rights-

161 Civil Code, Art. 595: “All water resources are national assets for public use.”
162 Water Code, Art. 5: “Water resources are national assets for public use, and private parties are granted the right to use them, in accordance with the present Code.”
163 José Aylwin et al., Los pueblos indígenas y el derecho (2013), 199.
petitioners to declare the intended uses of the water. However, the basic nature of the (economic) model inherent in the Constitution of 1980 continues unchanged.\textsuperscript{164} On the subject of the current process of reform of the Water Code and its effects on the indigenous peoples, the Inter-American Commission on Human Rights (IACHR) has said that although a reform of the water code is underway in Chile, “the participation of indigenous peoples in that process has been limited.”\textsuperscript{165}

In relation to mining legislation, a series of decree laws\textsuperscript{166} were issued starting in 1974 with a view to attracting foreign investment in this industrial sector by granting water concessions, and this trend was consolidated by the Constitution of 1980, which gave constitutional protection to these concessions. In fact, the Constitution establishes that the Chilean State has absolute, exclusive, inalienable, and imprescriptible ownership of all mines, including guano deposits, metal-bearing sands, salt flats, coal seams, hydrocarbon deposits, and other fossil minerals with the exception of shallow clay deposits, regardless of whether any person has legal ownership of the land under which the mineral deposits are located.\textsuperscript{167} The Constitution further establishes that ownership of a mining concession is protected by the constitutional guarantees relating to property.\textsuperscript{168} Like the legal regime on water resources, the model applied to the mining sector is based on economic stimulus and legal protection: mining concessions are constitutionally protected, regardless of indigenous communities’ ancestral rights over their territories.

Regarding environmental legislation, the Constitution of 1980 explicitly states that all persons have the right to live in a pollution-free environment. However, the legislation

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  \item \textsuperscript{164} According to the World Bank, the reform made to the Water Code by means of Law 20,017 of 2005 “reaffirmed the essence of the model institutionalized by the Water Code, which is embodied, among others, in the right to ownership over the water resources and their use.” See World Bank, Department of the Environment and Sustainable Development, Latin America and the Caribbean, \textit{Chile: Diagnóstico de la gestión de los recursos hídricos} (March 2011), http://www.dga.cl/eventos/Diagnostico\ percent20gestion\ percent20de\ percent20recursos\ percent20hidricos\ percent20en\ percent20Chile_Banco\ percent20Mundial.pdf.
  \item \textsuperscript{165} IACHR, \textit{Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities} (Organization of American States [OAS], 2015), para. 293.
  \item \textsuperscript{166} According to the legal glossary of the Chilean National Congress, a \textit{decree law} is the result of legislative activity on the the part of a government during times of constitutional crisis, and it consists of a regulation dictated by the executive branch on matters that would normally be covered by a law, and without participation of the legislative branch. Decree laws were used from 1973 to 1981 by the military government that was in power from 1973 to 1990.
  \item \textsuperscript{167} Chilean Constitution, Art. 19, No. 24, subpara. 6.
  \item \textsuperscript{168} Chilean Constitution, Art. 19, No. 24, subpara. 9.
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that requires the state to ensure that this right is respected and that the environment is protected is relatively recent and is subject to criticism on several grounds.

The Constitution guarantees the following: All people have the right to live in a pollution-free environment. It is the duty of the State to ensure that this right is not violated, and to protect the natural environment.

The Law may enact provisions establishing specific restrictions on the exercise of certain rights or freedoms, in order to protect or preserve the environment.\(^{169}\)

Law 19,300 on Bases of the Environment was enacted in 1993 and modified by Law 20,417 of 2010, which abolished the existing institutional framework and created the Ministry of the Environment and the Superintendence of the Environment, as well as the Environmental Assessment Service, which is responsible for evaluating the projects that are submitted to the Environmental Impact Assessment System (SEIA). In 2012, the environmental courts were created by virtue of Law 20,600. The Regulations of the Environmental Impact Assessment System were approved by Executive Decree No. 40 of the Ministry of the Environment, published in the Diario Oficial on August 12, 2013.

The issuing of environmental regulations represents progress in terms of environmental protection; however, the regulations have certain flaws that affect their capacity to protect the environment, and they are also severely flawed in relation to the rights of indigenous peoples. Native peoples’ organizations, as well as civil society and international bodies, have questioned and objected to the Regulations of the Environmental Impact Assessment System (Executive Decree No. 40), mainly regarding the manner in which the regulations were adopted, but also their content.

In terms of indigenous peoples’ rights, the Regulations of the Environmental Impact Assessment System do not comply with corresponding international standards. Apart from the flawed consultation process that took place prior to the enactment of the regulations, their content is not in line with international standards on free, prior, and informed consent, as becomes evident in Article 85, which establishes that the consultation process (in the case of indigenous peoples affected by investment projects) will not be “prior,” because the consultation is to be held after the project is submitted to the Environmental Impact Assessment System. Similarly, the regulations limit the holding of a consultation process to

\(^{169}\) Chilean Constitution, Art. 19, no. 8.
projects of “high” environmental impact, and it is up to the environmental authorities to decide what the purpose of the consultation process is to be.\textsuperscript{170} “Only those indigenous peoples who are directly affected may take part in the consultation process mentioned in the above subparagraph, and it [the consultation process] shall be carried out for the explicit purpose of reaching an agreement or obtaining consent. However, failure to achieve said objectives shall not affect [indigenous peoples’] right to be consulted.”\textsuperscript{171}

The IACHR has also expressed concerns about the Regulations of the Environmental Impact Assessment System’s protection of human rights in the context of extractive or similar activities:

The Commission notes that one of the main concerns relating to Executive Decree 40—which is applicable to activities requiring a formal Environmental Impact Assessment—is that it seriously restricts the possibility of holding consultation processes, by means of incorporating an exhaustive list of exceptional conditions that must be met for implementing the right to consultation. The Commission has noticed that, according to Article 85 of the Decree in question, the consultation may be held only in case of projects or activities that lead to one of the conditions listed in Articles 7, 8 and 10, and then only “to the extent that one or more human groups belonging to the indigenous peoples is directly affected.” These articles refer to: resettlement of human communities (Article 7), significant disruption of the life systems and habits of human groups (Article 7), project siting in or near indigenous peoples’ territories and environmental value of the territory (Article 8), and alteration of the cultural heritage (Article 10). The above conditions and requirements are in contradiction to the terms of Article 6 of ILO Convention 169, which makes it mandatory to proceed with consultation “every time that new legislative or administrative measures are being considered which might directly affect the indigenous peoples,” regardless of the scope or expected impact of the project.\textsuperscript{172}

In terms of environmental impact, as of 2016 several important aspects of nature are not protected by specific legislation. Glaciers, for example, despite extending over an area of

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\item[\textsuperscript{170}] Observatorio Ciudadano, \textit{El Derecho a la Consulta de los Pueblos Indígenas}, 39–45.
\item[\textsuperscript{171}] Ministry of the Environment, Executive Decree No. 40, Art. 85, subparagraph 2, published in Diario Oficial on August 12, 2013.
\item[\textsuperscript{172}] IACHR, \textit{Indigenous Peoples, Afro-Descendent Communities, and Natural Resources}, para. 173.
\end{itemize}
\end{footnotesize}
approximately 24,000 square kilometers of Chilean territory, are not covered by specific environmental legislation. This state of affairs violates Article 11 of the General Bases of the Environment Law, which asserts that environmental impact studies must specifically examine and rule on cases of impact on glaciers:

The projects or activities listed in the preceding Article shall require an Environmental Impact Study to be prepared, if they create or involve at least one of the following effects, characteristics or circumstances: d) Project location in or near human populations, protected areas or resources, priority sites for conservation, protected wetlands or glaciers which might be affected, as well as (possible effects on) the environmental value of the territory where the project is to be sited.\(^{173}\)

2. RIGHTS OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW ON HUMAN RIGHTS

Following are some of the principal rights recognized by international law on the Human Rights of indigenous peoples:

2.1 Right to equal treatment and nondiscrimination, and respect for diversity

Non-discrimination, along with equality before the law and equal treatment for all, constitutes a basic general Human Rights principle.\(^{174}\)

Equality and nondiscrimination are basic principles of international law on human rights. These principles are based on the premise that all human beings are born free and equal in dignity and rights\(^{175}\) and that all people are entitled to the rights and freedoms listed in the UN Universal Declaration of Human Rights and other international legal instruments, without distinction of any kind, such as race, skin color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.\(^{176}\)

\(^{173}\) Law on the General Bases of the Environment, Art. 11, d.


\(^{175}\) UN Universal Declaration of Human Rights (1948), Art. 1.

\(^{176}\) UN Universal Declaration of Human Rights, Art. 2.
The principles of equality and nondiscrimination are established in several international legal instruments, including the following: the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man, the International Convention on the Elimination of All Forms of Racial Discrimination, the UN International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the American Convention on Human Rights, the Inter-American Democratic Charter, the Inter-American Convention against Racism and All Forms of Discrimination and Intolerance, and the Inter-American Convention against Racism, Racial Discrimination and Related Intolerance.

The International Convention on the Elimination of All Forms of Racial Discrimination (1965) defines discrimination as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.” It also states: “Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.”

One of the most recent inter-American human rights conventions—the Inter-American Convention against Racism and All Forms of Discrimination and Intolerance—defines discrimination in the following manner: “Racial discrimination shall mean any distinction, exclusion, restriction, or preference, in any area of public or private life, the purpose or effect of which is to nullify or curtail the equal recognition, enjoyment, or exercise of one or more human rights and fundamental freedoms enshrined in the international instruments

177 UN Universal Declaration of Human Rights, Arts. 1 and 2.
178 OAS, American Declaration of the Rights and Duties of Man (1948), preamble and Art. 2.
180 UN International Covenant on Civil and Political Rights (1966), Art. 2.
181 UN International Covenant on Economic, Social and Cultural Rights (1966), Art. 2.
184 OAS, Inter-American Convention against Racism and All Forms of Discrimination and Intolerance (2013), Arts. 1 and 2.
185 OAS, Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance (2013), Arts. 1 and 2.
applicable to the States Parties.” The convention adds: “Racial discrimination may be based on nationality; age; sex; sexual orientation; gender identity and expression; language; religion; cultural identity; political opinions or opinions of any kind; social origin; socioeconomic status; educational level; migrant, refugee, repatriate, stateless or internally displaced status; disability; genetic trait; mental or physical health condition, including infectious-contagious condition and debilitating psychological condition; or any other condition.” 188 By virtue of this Convention, the member states undertake the commitment to prevent, eliminate, prohibit, and punish, in accordance with their constitutional norms and the provisions of this Convention, all acts and manifestations of discrimination and intolerance. 189

Similarly, it is stated that every human being has the right to the equal recognition, enjoyment, exercise, and protection, at both the individual and collective levels, of all human rights and fundamental freedoms enshrined in domestic law and in the international instruments applicable to the states parties. 190

Further, the Inter-American Court of Human Rights has ruled that Article 1.1 of the American Convention on Human Rights, 191 which enshrines the obligation to respect rights and liberties without discrimination, “is part of general legislation, whose content covers all the terms of the Treaty, and includes the obligation, on the part of States Parties to respect and guarantee the full and free exercise of the rights and liberties indicated therein ‘without discrimination of any kind.’ In other words, any treatment—regardless of whatever origin or form it may take—which might be considered discriminatory in terms of the exercise of any of the rights covered by the Convention is per se incompatible with the Convention.” 192

a) Explicit prohibition of discrimination due to ethnicity or cultural identity

As mentioned, discrimination related to ethnic origin or cultural identity is expressly prohibited by the international human rights legal instruments. The right—whether

188 OAS, Inter-American Convention against All Forms of Discrimination and Intolerance, Art. 1.
189 OAS, Inter-American Convention against All Forms of Discrimination and Intolerance, Art. 4.
190 OAS, Inter-American Convention against All Forms of Discrimination and Intolerance, Art. 3.
191 OAS, American Convention on Human Rights, Art. 1.1: “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”
192 Inter-American Court of Human Rights, Xákmok Kásek Indigenous Community v. Paraguay, para. 268; and Inter-American Court of Human Rights, Atala Riffo and Daughters v. Chile, Merits, Reparations and Costs, Series C, No. 239 (2012), para. 78.
individual or collective—not to be discriminated against for such reasons is one of the specific aspects of the right to equal treatment. This type of discrimination is an offense to the equality and human dignity of all human beings and has been unanimously condemned by the international community.¹⁹³

Collectively and individually, indigenous peoples have the internationally recognized and protected fundamental right to be effectively treated with equality, in accordance with universal human rights, and not to be discriminated against in the exercise of said rights by reason of their ethnic origin. Article 2 of the UN Declaration on the Rights of Indigenous Peoples states that “indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination in the exercise of their rights, in particular that based on their indigenous origin or identity.”¹⁹⁴ The Committee on the Elimination of Racial Discrimination has called upon the member states to “[e]nsure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity.”¹⁹⁵

At the inter-American level, the Inter-American Court of Human Rights has repeatedly pointed out that, in accordance with Articles 24 (equality before the Law) and 1.1 (obligation to respect rights) of the American Convention on Human Rights, the states must ensure, under conditions of equality, that indigenous peoples can effectively exercise their rights.¹⁹⁶

b) Recognition of diversity

In order to effectively ensure that indigenous peoples can fully exercise their rights, the member states must take into account the specific characteristics of the indigenous

¹⁹³ “Discrimination between human beings on the ground of race, colour or ethnic origin is an offence to human dignity and shall be condemned as a denial of the principles of the Charter of the United Nations, as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights, as an obstacle to friendly and peaceful relations among nations and as a fact capable of disturbing peace and security among peoples.” UN International Convention on the Elimination of All Forms of Racial Discrimination (1963), Resolution 1904 (XVIII) of the General Assembly, Art. 1.

¹⁹⁴ UN Declaration on the Rights of Indigenous Peoples, Art. 2.


¹⁹⁶ See the following Inter-American Court of Human Rights cases: Yakye Axa Indigenous Community v. Paraguay; Sawhoyamaxa Indigenous Community v. Paraguay, para. 59; Kichwa Indigenous People of Sarayaku v. Ecuador.
peoples that make them different from the general population and that constitute their cultural identity.\textsuperscript{197}

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.\textsuperscript{198}

c) Collective subjects

Article 1 of the UN Declaration on the Rights of Indigenous Peoples states: “Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.” Similarly, the first part of Article 3.1 of ILO Convention 169 states: “Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.”

The international legal framework on indigenous peoples and tribal communities recognizes their rights as collective subjects of international law, not simply as individuals.\textsuperscript{199} Given that indigenous or tribal communities and peoples united by their particular ways of life and identity exercise certain rights recognized by the convention on a collective basis, the Court points out that the legal considerations expressed or issued in this judgment should be understood from that collective perspective.\textsuperscript{200}

\textsuperscript{197} See the following Inter-American Court of Human Rights cases: Yakye Axa Indigenous Community v. Paraguay, Sawhoyamaxa Indigenous Community v. Paraguay, Kichwa Indigenous People of Sarayaku v. Ecuador.

\textsuperscript{198} UN Declaration on the Rights of Indigenous Peoples, Art. 5.1.

\textsuperscript{199} Similarly, the Committee of the CESCR expressly stated—in General Comment 17 of 2005—that the right to protect their scientific, literary, or artistic expressions and products is to be enjoyed not only by indigenous individuals but also collectively (i.e., by indigenous peoples as a group) (pars. 7, 8, and 32). Similarly, in General Comment No. 21 of 2009, the committee interpreted that the expression “all persons” included in Article 15.1.a of the covenant “refers both to individual and to collective subjects. In other words, a person may exercise their cultural right: a) as an individual; b) in association with others; or c) as part of a community or group” (para. 8). Furthermore, other legal instruments—such as the African Charter on Human and Peoples’ Rights of 1986—have established special protection for certain rights of tribal peoples, which may be exercised as collective rights. See, for example, the articles of the African Charter on Human and Peoples’ Rights: Article 20, which protects people’s collective right to existence and self-determination; Article 21, which protects the right to ownership of their natural resources and their land; and Article 22, which guarantees their right to development.

\textsuperscript{200} Inter-American Court of Human Rights, Kichwa Indigenous People of Sarayaku v. Ecuador, para. 231.
2.2 Special measures to ensure the rights of indigenous peoples

It is the duty of states to guarantee that indigenous peoples—both as collective subjects and as individuals—are free and equal in dignity and rights, as well as free from any type of discrimination, and that their diversity is recognized. This duty requires special measures on the part of the states, because indigenous peoples are more vulnerable as a result of the marginalization and discrimination they have experienced, and as a consequence of the frequent violations of their human rights:

Indigenous peoples have historically been subjected to injustices due to the fact that they were colonized, and that their land, territories and natural resources were taken away from them. This has prevented them from exercising their right to development in accordance with their needs and interests.

The UN Committee on the Elimination of Racial Discrimination has noted that “in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular ... they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized.”

Similarly, states are required to adopt special measures to ensure indigenous peoples’ rights including the right to self-determination, to freely decide and pursue their own priorities for development, to have autonomy or self-government, to retain and preserve their own institutions, and to maintain their customs or customary laws.

201 IACHR, Preliminary Observations of the Inter-American Commission on Human Rights on Its Visit to Honduras, May 15 to 18, 2010 (June 3, 2010), para. 26, recommendation 11: “This obligation of the state to adopt special measures is especially urgent in the case of indigenous children and/or women, because the vulnerability is even greater.” See also IACHR, Indigenous and Tribal Peoples’ Rights over Their Ancestral Lands and Natural Resources, para. 49.

202 UN, Declaration on the Rights of Indigenous Peoples, preamble.


204 UN, Declaration on the Rights of Indigenous Peoples, Art. 3.

205 ILO Convention 169, Art. 7; UN, Declaration on the Rights of Indigenous Peoples, Art. 3.

206 UN, Declaration on the Rights of Indigenous Peoples, Art. 4.

207 ILO Convention 169, Recital 5 of the preamble.

208 ILO Convention 169, Art. 8 and on; UN, Declaration on the Rights of Indigenous Peoples, Art. 34.
The obligation to adopt special measures has become part of international legal instruments and is enshrined in international human rights jurisprudence and standards. In 1972, the IACHR ruled that “both for historical reasons and because of moral and humanitarian principles, special protection of indigenous peoples constitutes a sacred commitment of all States.”

ILO Convention 169 addresses this topic: “Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.” The convention also establishes that “Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.” In this regard, the IACHR has stressed that Convention 169 requires states “to take special measures to guarantee [that] indigenous peoples may effectively exercise their human rights and fundamental freedoms, without restrictions, and also to include measures aimed at promoting the real exercise of their social, economic, and cultural rights, while respecting their social and cultural identity, their customs, traditions and institutions.”

Similarly, the Inter-American Court of Human Rights has stated, based on Article 1.1 of the American Convention on Human Rights, that “indigenous and tribal peoples require certain special measures in order to guarantee the full exercise of their rights, especially in terms of their right to own property, so that they may survive both physically and culturally” in accordance with their traditions and customs. The special measures adopted by the states must respect the social and cultural identity, the customary law, and the traditional institutions of indigenous and tribal peoples. Thus, the Inter-American Court of Human Rights has stated the following:

210 ILO Convention 169, Art. 2.1.
211 ILO Convention 169, Art. 4.1.
213 Inter-American Court of Human Rights, Mayagna (Sumo) Awas Tingni Community v. Nicaragua (2001) paras. 148, 149, and 151; Inter-American Court of Human Rights, Sawhoyamaxa Indigenous Community v. Paraguay, paras. 118–121 and 131; Inter-American Court of Human Rights, Yakye Axa Indigenous Community v. Paraguay, paras. 124, 131, 135–37, and 154; Inter-American Court of Human Rights, Saramaka People v. Suriname, para. 85.
In respect to indigenous peoples, it is essential that the States ensure effective protection that takes into account their specific economic and social characteristics, as well as their special vulnerability, their customary law, values, uses and customs.\textsuperscript{215}

The 2007 UN Declaration on the Rights of Indigenous Peoples recognizes a number of rights of indigenous peoples, both as collective and as individual subjects, including the recognition of their right to self-determination, the right to determine and develop their priorities and strategies for development, and the right to freely use their land or territories and other resources. For this recognition to be effective, states must, in consultation and collaboration with indigenous peoples, adopt suitable measures, including legislative measures, to achieve the objectives of the declaration.\textsuperscript{216} Similarly, there are, throughout the text of the declaration, a number of articles that specifically establish the obligation of states to adopt effective measures that will guarantee certain rights enshrined in the declaration.\textsuperscript{217}

It should be noted that the special measures to be adopted by the states to guarantee the rights of indigenous peoples do not constitute an act of discrimination against the rest of the population\textsuperscript{218} because “it is an established principle of international law that unequal treatment of persons subject to unequal conditions does not necessarily constitute discrimination. ... Therefore, legislation which recognizes said differences is not necessarily discriminatory.”\textsuperscript{219} As pointed out by the European Court of Human Rights, such distinctions are discriminatory only when “lacking in objective and reasonable justification.”\textsuperscript{220}

In this regard, the Inter-American Court of Human Rights has said:

\textsuperscript{215} Inter-American Court of Human Rights, Yakye Axa Indigenous Community v. Paraguay, para. 63.
\textsuperscript{216} UN Declaration on Rights of Indigenous Peoples, Art. 38.
\textsuperscript{217} UN Declaration on Rights of Indigenous Peoples, Art. 38, and also see Arts. 13, 14, 16, 29, 31, and 32, among others.
\textsuperscript{218} Inter-American Court of Human Rights, Proposals to Modify the Political Constitution of Costa Rica in Relation to Naturalization, Advisory Opinion OC-4/84 (1984), Series A, No. 4, paras. 57–60; Legal Status and Human Rights of Children, Advisory Opinion OC-17/02 (2002), Series A, No. 17, para. 55; and IACHR, Indigenous and Tribal Peoples’ Rights over Their Ancestral Lands and Natural Resources, para. 53.
\textsuperscript{219} Inter-American Court of Human Rights, Saramaka People v. Suriname, para. 103; and IACHR, Indigenous and Tribal Peoples’s Rights over Their Ancestral Lands and Natural Resources, para. 53.
\textsuperscript{220} Mentioned in Inter-American Court of Human Rights, Proposals to Modify the Political Constitution of Costa Rica in Relation to Naturalization, para. 56; also in Inter-American Court of Human Rights, Legal Status and Rights of Undocumented Migrants, Advisory Opinion OC-18/03 (2003), para. 89.
In relation to individuals belonging to indigenous and tribal peoples, this Court has already ruled that it is necessary to adopt special measures in order to guarantee their survival in accordance with their traditions and customs.221

2.3 The right of indigenous peoples to self-determination; to autonomy; to self-government; to retain and strengthen their own political, legal, economic, social, and cultural institutions; and to decide their own priorities for development

Articles 3, 4, and 5 of the UN Declaration on the Rights of Indigenous Peoples expressly recognize the right of indigenous peoples to self-determination and autonomy—and to retain their own political, legal, economic, social, and cultural institutions.

Article 3: Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.

Article 4: Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as enjoy the ways and means to finance their autonomous functions.

Article 5: Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social, and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social, and cultural life of the State.222

Although the UN Declaration on the Rights of Indigenous Peoples was adopted in 2007, these concepts and rights were already implicit in ILO Convention 169:

Convention No. 169 is based on two fundamental premises: the right of indigenous peoples to retain and strengthen their own culture, ways of life and institutions, and their right to effectively take part in those decisions that affect them. These premises constitute the foundation based on which the terms of the Convention must be interpreted.

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221 Inter-American Court of Human Rights, Saramaka People v. Suriname, para. 103.
222 UN Declaration on the Rights of Indigenous Peoples, Arts. 3, 4, and 5. Article 3 states that indigenous peoples have the right to self-determination.
The Convention also guarantees the right of indigenous and tribal peoples to decide their own priorities for the process of development, to the extent that such development affects their lives, beliefs, institutions and spiritual well-being, as well as their ownership of the land they occupy or use in any way, and to control, as much as possible, their own economic, social, and cultural development. …

On September 13, 2007, Convention No. 169 was bolstered by the UN Declaration on the Rights of Indigenous peoples, which was adopted by a great majority in the General Assembly of the United Nations. The adoption of this Declaration was the crowning moment of more than two decades of efforts on the part of organizations representing indigenous peoples.223

Article 4 of ILO Convention 169 says that the states must adopt special measures to safeguard the institutions and culture of indigenous and tribal peoples. Such measures must not be contrary to the freely expressed wishes of these peoples. Similarly, Article 5 of ILO Convention 169 establishes the obligation of the state to recognize and protect indigenous peoples’ own values and social, cultural, religious, and spiritual practices and customs, and to respect the integrity of their values, customs, and institutions.

As can be seen, the requirement made to CADHA by the Chilean agency CONADI to create a certain type of organization as a condition for recognition and protection of their rights is contrary to international law. In this regard, the Inter-American Court of Human Rights, in the case Yakye Axa Indigenous Community v. Paraguay, ruled that the rights of indigenous communities belong to the indigenous community itself, and not to the legal person created through a legal formality.

The purpose of granting a juridical personality is to make indigenous communities’ pre-existing rights operational. These rights have been historically exercised and are not created by the juridical personality. Their systems of political, social, economic, cultural and religious organization, and the rights implicit in these systems, i.e., the designation of their own leaders and the right to claim ownership and use of their traditional land, are recognized not to the juridical personality that is required by a legal formality, but to community itself.224


224 Inter-American Court of Human Rights, Yakye Axa Indigenous Community v. Paraguay, para. 82.
Furthermore, although the case YATAMA v. Nicaragua deals with political rights, it should be noted that the Inter-American Court of Human Rights ruled that the state had violated the American Convention on Human Rights because it forced the leadership candidates of an indigenous peoples’ organization to adopt a form of organization that was “extraneous to their uses, customs and traditions” as a prerequisite:

The requirement of having to participate through a political party forces the candidates proposed by YATAMA to adopt a form of organization that is extraneous to their uses, customs and traditions, as a pre-requisite to exercising the right to political participation, in violation of the domestic legislation that requires the state to respect the forms of organization of the communities in the Atlantic Coast, and negatively affected the electoral participation of these candidates in the municipal elections of 2000.225

Article 7.1 of ILO Convention 169 expressly establishes the right of indigenous peoples to decide their own priorities for the process of development:

The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social, and cultural development. In addition, they shall participate in the formulation, implementation, and evaluation of plans and programmes for national and regional development which may affect them directly.

2.4 Right to property (land, territory, and natural resources)

a) Right to property, in the Universal Declaration of Human Rights and in the American Convention on Human Rights

Article 17 of the UN Universal Declaration of Human Rights establishes that everyone has the right to own property alone as well as in association with others, and that no one shall be arbitrarily deprived of his property. On the right to private property, Article 21 of the American Convention on Human Rights establishes that (1) Everyone has the right to

the use and enjoyment of his property, though the law may subordinate such use and enjoyment to the interest of society; and (2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

b) Indigenous peoples’ right to property over their land, territories, and natural resources, in ILO Convention 169 and in the UN Declaration on the Rights of Indigenous peoples

ILO Convention 169 establishes (in Part II relating to land, Articles 13 to 19), that governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.\(^{226}\) The convention also states that, for the effects of Articles 15 and 16, “the use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.”\(^{227}\)

ILO Convention 169 establishes the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy.\(^{228}\) In addition, measures shall be taken by the state in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.”\(^{229}\)

In this regard, Article 25 of the UN Declaration on the Rights of Indigenous Peoples says that the indigenous peoples have the right to retain and strengthen their own spiritual relation with the land, territories, waters, coastal waters, and other resources they have traditionally owned or occupied and used, and to undertake the responsibility to safeguard these assets for future generations.

Article 26 of the Declaration establishes that indigenous peoples have the right to the land, territories, and resources they have traditionally owned, or occupied and used, or acquired.\(^{230}\) Similarly, they have the right to own, use, develop, and control the land,

\(^{226}\) ILO Convention 169, Article 13.
\(^{227}\) ILO Convention 169, Article 13.
\(^{228}\) ILO Convention 169, Article 14.
\(^{229}\) ILO Convention 169, Article 14.
territories, and resources they own by virtue of traditional use or other type of traditional occupation, as well as those which they have otherwise acquired.\textsuperscript{231}

c) The duty of states to identify the lands, territories, and natural resources of indigenous peoples and to guarantee their protection

ILO Convention 169 mandates that governments should take the necessary measures to identify the lands that the peoples concerned traditionally occupy and to guarantee the effective protection of their rights of ownership and possession.\textsuperscript{232} Likewise, adequate procedures should be instituted within the national legal system to resolve land claims formulated by indigenous and tribal peoples.\textsuperscript{233}

Article 15 establishes that states should especially protect the rights of indigenous peoples to natural resources on their lands,\textsuperscript{234} including “the right to participate in the use, management, and conservation of these resources.”\textsuperscript{235}

It also declares that states must prevent persons who do not belong to indigenous and tribal peoples from taking advantage of their customs or their lack of understanding of the laws by their members to secure ownership, possession, or use of the lands belonging to them.\textsuperscript{236} Likewise, the law should provide for appropriate penalties against any unauthorized intrusion upon, or use of, the lands of the peoples concerned by persons not belonging to these peoples, and governments should take measures to prevent such offences.\textsuperscript{237}

For its part, the UN Declaration on the Rights of Indigenous Peoples determines that states must ensure the legal recognition and protection of lands, territories, and resources of indigenous peoples.\textsuperscript{238} It adds that such recognition must respect “the customs, traditions and land tenure systems of the indigenous peoples concerned.”\textsuperscript{239}

\textsuperscript{231} UN Declaration on the Rights of Indigenous Peoples, Art. 26.2.
\textsuperscript{232} ILO Convention 169, Art. 14.2.
\textsuperscript{233} ILO Convention 169, Art. 14.3.
\textsuperscript{234} ILO Convention 169, Art. 15.
\textsuperscript{235} ILO Convention 169, Art. 15.
\textsuperscript{236} ILO Convention 169, Art. 17.3.
\textsuperscript{237} ILO Convention 169, Art. 18.
\textsuperscript{238} UN Declaration on the Rights of Indigenous Peoples, Art. 26.3.
\textsuperscript{239} UN Declaration on the Rights of Indigenous Peoples, Art. 26.3.
Article 29 provides that indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. Therefore, states should establish and implement assistance programs for indigenous peoples to ensure such conservation and protection, without discrimination.

Article 29 adds that states must take effective measures to ensure that hazardous materials are not stored or disposed of in the lands or territories of indigenous peoples without their free, prior, and informed consent.

At the regional level, the organs of the inter-American system (the IACHR and the Inter-American Court of Human Rights) have made an evolutionary interpretation of international human rights instruments, especially with regard to property rights, in relation to the rights of indigenous peoples.

Since the 1980s, the IACHR has noted with concern the situation of indigenous peoples in the Americas and has systematically pronounced on their rights in case, country, and thematic reports, in precautionary measures; in press releases; and in decisions in matters submitted to the Inter-American Court of Human Rights, among others. And an IACHR press release dated August 10, 2012, reports on the IACHR's view on the duty of states to protect the lands, territories, and natural resources of indigenous peoples:

240 UN Declaration on the Rights of Indigenous Peoples, Art. 29.1.


242 The actions and decisions of the IACHR on the rights of indigenous peoples are available on its website, http://www.oas.org/es/IACHR/indigenas/default.asp.
The IACHR calls on the member States of the OAS to ensure respect for and guarantee of the human rights of indigenous peoples, especially their rights to protect the lands they have historically occupied and the natural resources of those territories, as well as their right to prior, free and informed consultation with respect to decisions that may affect them. ... 

The protection of indigenous peoples’ right to ownership over their ancestral territories is a matter of particular importance to the IACHR. This is because the effective enjoyment of this right implies not only the protection of an economic unit but also the human rights of a collective community that bases its economic, social, and cultural development on the relationship with the land.

The IACHR considers that for the effective enjoyment of the right to communal ownership of indigenous and tribal peoples over lands they have traditionally used and occupied, it is essential that states guarantee the right of indigenous and tribal peoples to free, prior, and informed consultation with respect to the administrative or legislative measures likely to affect them, implemented according to their customs and traditions. As the IACHR has explained in its Report on the Rights of Indigenous and Tribal Peoples over their ancestral lands and natural resources, the right to consultation is linked to multiple individual and collective human rights, such as the right to participation and cultural identity.

In turn, the IACHR observes with concern the various social conflicts that arise due to the interests of third parties in the natural resources found in indigenous territories. The IACHR notes that such situations, often expressed in acts of social protest, would be linked to the lack of adequate measures to enforce the rights of indigenous peoples.

The IACHR calls on the States of the Americas to put legal and institutional mechanisms in place to effectively protect the territories and natural resources historically occupied by indigenous peoples, through the recognition, titling, demarcation, and delimitation of lands owned collectively. It also calls for effective compliance with the standards of the inter-American human rights system regarding the right to prior, free, and informed consultation regarding
decisions that affect them, through culturally appropriate procedures, and taking into account their traditional methods of decision-making.\footnote{IACHR/CIDH, “CIDH urge a Estados Miembros a velar por respeto y garantía de los derechos de los pueblos indígenas” [IACHR Urges Member States to Ensure Respect and Guarantee of the Rights of Ingenous Peoples], 103/12 (August 10, 2012).}

The Inter-American Court of Human Rights has also had the opportunity to rule on the right of indigenous peoples to their lands, territories, and natural resources in several instances.\footnote{See, for example, the following Inter-American Court of Human Rights cases: Mayagna (Sumo) Awas Tingni Community v. Nicaragua; Yakye Axa Indigenous Community v. Paraguay; Sawhoyamaxa Indigenous Community v. Paraguay; Saramaka People v. Suriname, para. 103; Xákmok Kásek Indigenous Community v. Paraguay; Kichwa Indigenous People of Sarayaku v. Ecuador; Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayno and Their Members v. Panamá; Garífuna Community of “Triunfo de la Cruz” and Its Members v. Honduras; Garífuna de Punta Piedra Community and Its Members v. Honduras; Kaliña and Lokono Peoples v. Suriname.} Since \textit{Mayagna (Sumo) Awas Tingni Community v. Nicaragua} in 2001, the Inter-American Court of Human Rights has developed its jurisprudence based on an evolutionary interpretation of international human rights instruments,\footnote{As stated in the judgment of the Inter-American Court of Human Rights: “Through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to Article 29b of the Convention—which precludes a restrictive interpretation of rights—, it is the opinion of this Court that Article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property.” See Inter-American Court of Human Rights, Mayagna (Sumo) Awas Tingni Community v. Nicaragua, para. 148.} supported by documentary, expert, and testimonial evidence, which has illustrated the meaning and scope of the land, the territory, and its resources for indigenous peoples. As the Court stated in its decision on \textit{Mayagna (Sumo) Awas Tingni Community v. Nicaragua}:

Through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to Article 29b of the Convention—which precludes a restrictive interpretation of rights—, it is the opinion of this Court that Article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property.\footnote{Inter-American Court of Human Rights, Mayagna (Sumo) Awas Tingni Community v. Nicaragua, para. 148.}
protection of Article 21 of the American Convention.” It also pointed out that ignoring “the specific versions of the right to use and enjoy the property, given by the culture, uses, customs, and beliefs of each people, would be to maintain that there is only one way to use and dispose of property, which, in turn, would make the protection of such provision to these groups illusory.”

Based on this finding, the Inter-American Court of Human Rights “has repeatedly recognized the right to property of indigenous peoples over their traditional territories and the duty of protection emanating from Article 21 of the American Convention in light of the provisions of the ILO Convention 169, the UN Declaration on the Rights of Indigenous Peoples, as well as the rights recognized by states in their domestic laws or other international instruments and decisions, thus forming a corpus juris defining the obligations of States Parties of the American Convention, in relation to the protection of indigenous property rights.”

The Inter-American Court of Human Rights has laid the foundations for the recognition of indigenous peoples’ property rights over their traditional territories and for the corresponding duty of protection by states, which in terms of the Inter-American Court of Human Rights itself can be summarized as follows:

- Article 21 of the American Convention on Human Rights protects the right to property in a sense that includes the rights of members of indigenous communities within the framework of communal property.

- Article 21 of the American Convention on Human Rights protects the close bond that indigenous peoples have with their lands, as well as with their natural resources and the immaterial elements that emanate from them.

247 See, for example, the following cases of the Inter-American Court of Human Rights: Sawhoyamaxa Indigenous Community v. Paraguay, para. 120; Kuna Indigenous People of Madungandi and the Emberá Indigenous People of Bayno and Their Members v. Panamá, para. 111; Inter-American Court of Human Rights, Garífuna Community of “Triunfo de la Cruz” and Its Members v. Honduras, para. 100.

248 See, for example, the following cases of the Inter-American Court of Human Rights: Yakye Axa Indigenous Community v. Paraguay, paras. 127 and 128; Kichwa Indigenous People of Sarayaku, para. 164; Kuna Indigenous People of Madungandi and the Emberá Indigenous People of Bayno and Their Members v. Panamá, paras. 118 and 142; Garífuna Community of “Triunfo de la Cruz” and Its Members v. Honduras, para. 103.

249 Inter-American Court of Human Rights, Mayagna (Sumo) Awas Tingni Community v. Nicaragua, para. 148.

250 Inter-American Court of Human Rights, Kuna Indigenous People of Madungandi and the Emberá Indigenous People of Bayno and Their Members v. Panamá, para. 111.
• Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community.251

• Indigenous people, by the fact of their very existence, have the right to live freely in their own territory.252

• The close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic system. Moreover, this is a basis for their economic survival and for their transmission to future generations.253

• For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element that they must fully enjoy, to preserve their cultural legacy and transmit it to future generations.254

• The culture of members of indigenous communities directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and natural resources, not only because these are their main means of subsistence, but also because they constitute an integral part of their cosmovision, their worldview, their religiousness, and, therefore, of their cultural identity.255

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251 Inter-American Court of Human Rights, Mayagna (Sumo) Awas Tingni Community v. Nicaragua, paras. 148 and 149; Kuna Indigenous People of Madungandi and the Emberá Indigenous People of Bayno and Their Members v. Panamá, para. 111.

252 Inter-American Court of Human Rights, Mayagna (Sumo) Awas Tingni Community v. Nicaragua, para. 149; and Inter-American Court of Human Rights, Garífuna Community of “Triunfo de la Cruz” and Its Members v. Honduras, para. 101.


254 Inter-American Court of Human Rights, Mayagna (Sumo) Awas Tingni Community v. Nicaragua, para. 149; and Inter-American Court of Human Rights, Xákmok Kásek Indigenous Community v. Paraguay, para. 86; and Garífuna Community of “Triunfo de la Cruz” and Its Members v. Honduras, para. 101.

255 See the following Inter-American Court of Human Rights cases: Yakye Axa Indigenous Community v. Paraguay, para. 135; Xákmok Kásek Indigenous Community v. Paraguay, para. 174; and Garífuna Community of “Triunfo de la Cruz” and Its Members v. Honduras, para. 101.
• The traditional possession of ancestral territories by indigenous peoples has effects equivalent to those of state-issued full ownership property titles.\textsuperscript{256}

• Traditional possession gives indigenous and tribal peoples the right to official recognition of their property and its registration.\textsuperscript{257}

• The duty of states to adopt appropriate measures to ensure indigenous peoples’ right to property necessarily implies, in accordance with the principle of legal security, that the state must delimit, demarcate, and issue land titles to the territories of indigenous and tribal communities.\textsuperscript{258}

• It is necessary to materialize the territorial rights of indigenous peoples through the adoption of the legislative and administrative measures necessary to create an effective delimitation, demarcation, and titling mechanism that recognizes these rights in practice,\textsuperscript{259} a process that must be in line with the customary law, values, uses, and customs of indigenous peoples and communities.

• Recognition of indigenous communal property rights must be guaranteed through the granting of a formal property title, or other similar form of state recognition, that provides legal security to indigenous land tenure against the action of third parties or the agents of the state itself, because merely abstract or legal recognition of indigenous lands, territories, or resources is practically meaningless if the property is not physically established, delimited, and demarcated.\textsuperscript{260}

\textsuperscript{256} Inter-American Court of Human Rights, Mayagna (Sumo) Awas Tingni Community v. Nicaragua, para. 151; and Inter-American Court of Human Rights, Garífuna Community of “Triunfo de la Cruz” and Its Members v. Honduras, para. 105.

\textsuperscript{257} Inter-American Court of Human Rights, Garífuna Community of “Triunfo de la Cruz” and Its Members v. Honduras, para. 105.

\textsuperscript{258} Inter-American Court of Human Rights: Garífuna Community of “Triunfo de la Cruz” and Its Members v. Honduras para. 104.

\textsuperscript{259} Inter-American Court of Human Rights, Mayagna (Sumo) Awas Tingni Community v. Nicaragua, paras. 153 and 164; Inter-American Court of Human Rights, Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayno and Their Members v. Panamá, paras. 119 and 166; and Inter-American Court of Human Rights, Garífuna Community of “Triunfo de la Cruz” and Its Members v. Honduras, para. 104.

\textsuperscript{260} See the following Inter-American Court of Human Rights cases: Yakye Axa Indigenous Community v. Paraguay, para. 143; Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayno and Their Members v. Panamá, para. 135.
• Given the intrinsic connection that members of indigenous and tribal peoples have with their territory, the protection of the right to property, its use, and its enjoyment is necessary to ensure its survival.\textsuperscript{261}

• This connection between the territory and the natural resources traditionally used by indigenous and tribal peoples and that are necessary for their physical and cultural survival, as well as the development and continuation of their worldview, must be protected under Article 21 of the American Convention on Human Rights to ensure that indigenous peoples can continue their traditional way of living and that their distinctive cultural identity, social structure, economic system, customs, beliefs, and traditions will be respected, guaranteed, and protected by the states.\textsuperscript{262}

• Any denial of the enjoyment or exercise of territorial rights entails the loss of highly representative values for members of indigenous and tribal peoples who are at risk of losing or suffering irreparable damage to their lives and identities and to the cultural heritage to be transmitted to future generations.\textsuperscript{263}

Pursuant to the special duty of states to protect indigenous peoples’ lands, territories, and natural resources, the Inter-American Court of Human Rights has pointed out that when states impose limitations or restrictions on the exercise of the rights of indigenous peoples to the ownership of their lands, territories, and natural resources, certain guidelines must be respected. Thus, when indigenous communal property and individual private property enter into real or apparent conflict, the American Convention on Human Rights and the jurisprudence of the court provide guidelines to define admissible restrictions, which must be established by law, be necessary, proportionate, and aimed at achieving a legitimate objective in a democratic society without denying the right of indigenous people to exist as a people. The Court also stated that, in cases concerning natural resources found on the territory of an indigenous community, in addition to the above-mentioned criteria, the state

\textsuperscript{261} Inter-American Court of Human Rights, Garífuna Community of “Triunfo de la Cruz” and Its Members v. Honduras, para. 102.

\textsuperscript{262} See the following Inter-American Court of Human Rights cases: Yakye Axa Indigenous Community v. Paraguay, paras. 124, 135, and 137; Kuna Indigenous People of Madungandi and the Emberá Indigenous People of Bayno and Their Members v. Panamá, para. 112; and Garífuna Community of “Triunfo de la Cruz” and Its Members v. Honduras, para. 102.

\textsuperscript{263} Inter-American Court of Human Rights, Sawhoyamaxa Indigenous Community v. Paraguay, para. 222.
must verify that these restrictions do not entail a denial of the survival of the indigenous people themselves.\textsuperscript{264}

In order to ensure that the exploration or extraction of natural resources in ancestral territories does not entail a negation of the survival of the indigenous people as such, the Inter-American Court of Human Rights asserts that the state must comply with the following safeguards:

1. Conduct an appropriate and participatory process that guarantees the right to consultation, particularly with regard to development or large-scale investment plans.
2. Conduct an environmental impact assessment.
3. As appropriate, reasonably share the benefits produced by the exploitation of natural resources (as a form of just compensation required by Article 21 of the American Convention on Human Rights), with the community itself determining and deciding who the beneficiaries of this compensation should be, according to the community’s customs and traditions.\textsuperscript{265}

2.5 Adequate and participatory process: Right to consultation

Article 6 of ILO Convention 169 states that in applying the provisions of the convention, governments shall consult with the indigenous and tribal peoples concerned through appropriate procedures and in particular through their representative institutions whenever consideration is being given to legislative or administrative measures that may affect them directly. Moreover, Article 6 states that the consultations shall be undertaken in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.\textsuperscript{266}

In recognition of the right of indigenous peoples to self-determination, the UN Declaration on the Rights of Indigenous Peoples provides in its Article 32 that indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.\textsuperscript{267}

\textsuperscript{264} Inter-American Court of Human Rights, Kichwa Indigenous People of Sarayaku v. Ecuador, para. 156.
\textsuperscript{265} Inter-American Court of Human Rights, Saramaka People v. Suriname, para. 129; and Inter-American Court of Human Rights, Kichwa Indigenous People of Sarayaku v. Ecuador, para. 157.
\textsuperscript{266} ILO Convention 169, Art. 6.
\textsuperscript{267} UN Declaration on the Rights of Indigenous Peoples, Art. 32.1.
The UN Declaration on the Rights of Indigenous Peoples provides in Article 19 that states shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior, and informed consent before adopting and implementing legislative or administrative measures that may affect them.\(^\text{268}\)

At the regional level, both the IACHR and the Inter-American Court of Human Rights have ruled on the duty of states to consult indigenous peoples—and the peoples’ corresponding right to consultation. The IACHR has argued that the right to consultation includes the positive duty of states to provide appropriate and effective mechanisms to obtain prior, free, and informed consent before engaging in activities that impact the interests of indigenous peoples or that may affect rights over indigenous peoples’ land, territory, or natural resources. This is because the states have a duty to consult indigenous peoples with respect to any activity or project affecting their lands and natural resources.\(^\text{269}\) The Inter-American Commission on Human Rights, in *Maya Indigenous Communities of the Toledo District*, determined that the states should conduct effective and fully informed consultations with indigenous communities regarding events or decisions that could affect their traditional territories. In this case, the IACHR determined that a procedure with “full and informed consent” requires “at least, that all members of the community be fully aware of the nature and consequences of the process and that they have an effective opportunity to participate in an individual or collective manner.”\(^\text{270}\)

In turn, the Inter-American Court of Human Rights, in *Saramaka People v. Suriname* (2007), established that in order to guarantee the effective participation of the members of an indigenous or tribal people or community in plans of development or investment within its territory, the state has the duty to consult, actively, according to the customs and traditions of the people or community consulted. The Inter-American Court of Human Rights indicates that this duty requires that the state accept and provide information, and it implies constant communication between the parties. The court also indicates that

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\(^{268}\) UN Declaration on the Rights of Indigenous Peoples, Art. 19.


\(^{270}\) IACHR, Report 40/04, Case 12,052, *Indigenous Maya Communities in the Toledo District (Belize)*, para. 142.
consultations must be conducted in good faith, through culturally appropriate procedures, and that such consultation should aim to reach an agreement. The court adds that the indigenous or tribal people or community should be consulted, in accordance with the peoples’ own traditions, in the early stages of the development or investment plan and not only when there is a need to obtain community approval, if this should be the case. It declares that early warning provides time for internal discussion within communities and allows for an adequate time to respond to the state. The court further establishes that the state must ensure that members of the indigenous or tribal community are aware of the possible risks, including environmental and health risks, in order to accept the proposed development or investment plan with knowledge and in a voluntary manner. Finally, the court indicates that the consultation should take into account the traditional methods of the indigenous people or tribal community for decision-making.271

The IACHR has also pointed out that the obligation to consult indigenous and tribal communities and peoples on any administrative or legislative measures that affect their rights recognized in national and international regulations—as well as the obligation to ensure the rights of indigenous peoples to participation in the decisions of matters concerning their interests—is directly related to the general obligation to guarantee the free and full exercise of the rights recognized in the ILO Convention 169, Article 1.1. This obligation implies the duty to organize the entire governmental apparatus properly and, in general, to configure all the structures through which the exercise of public power is manifested in such a way that they are able to legally assure the free and full exercise of those rights. Furthermore, states need to structure their regulations and institutions in such a way that the consultation of indigenous, native, or tribal communities can be carried out effectively, in accordance with international standards in this area.272 In this way, states must incorporate these standards into the processes of prior consultation, in order to generate

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271 Inter-American Court of Human Rights, Saramaka People v. Suriname, para. 133.

272 In this regard, Article 6.1 of ILO Convention 169 provides that “[i]n applying the provisions of this Convention, governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly; and (b) establish means by which these peoples can freely participate, … at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them.” Likewise, Article 36.2 of the UN Declaration on the Rights of Indigenous Peoples sets forth that “the States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.” Article 38 of the same instrument provides that “States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.”
channels of sustained, effective, and trustworthy dialogue with indigenous peoples in the consultation procedures and in the participation through their representative institutions.273

### 2.5.1 Minimum guarantees of the right to consultation

Below are the contents of these minimum guarantees regarding the right to consultation of indigenous peoples:

a) The obligation to consult is the responsibility of the state

Both ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples are clear in establishing that consultation is a duty or obligation of the states. In this regard, the IACHR and the Inter-American Court of Human Rights have been clear in pointing out that the obligation to consult is the responsibility of the state, so the planning and implementation of the consultation process is not a duty that can be circumvented by delegating it to a private company or to third parties, much less to the same company interested in the exploitation of the resources in the territory of the community subject to the consultation.274 As the IACHR points out, the Inter-American Court of Human Rights has emphasized that the “socialization” and “understanding” processes carried out by interested companies or third parties with indigenous peoples on certain projects should not be confused with the consultation processes that must be carried out by the state.275

b) The consultation must be prior

For the Inter-American Court of Human Rights, prior consultation means that consultation must be carried out “from the earliest stages of the elaboration or planning of the proposed measure, so that indigenous peoples can truly participate and influence the decision-making process.”276

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273 Inter-American Court of Human Rights, Kichwa Indigenous People of Sarayaku v. Ecuador, para. 166.
274 Inter-American Court of Human Rights, Kichwa Indigenous People of Sarayaku v. Ecuador, para. 187.
275 IACHR, Indigenous Peoples, Afro-Descendent Communities, and Natural Resources, para. 178.
276 Inter-American Court of Human Rights, Kichwa Indigenous People of Sarayaku v. Ecuador, para. 167 and paras. 180–82; and Inter-American Court of Human Rights, Saramaka People v. Suriname, para. 133.
c) The consultation must be free

The consultation or consultation process must be free of manipulation, intimidation, or coercion. According to the Inter-American Court of Human Rights, a consultation in good faith is incompatible with practices such as attempts to disintegrate the social cohesion of affected communities, whether through the corruption of community leaders or the establishment of parallel leadership, or through means of negotiations with individual members of communities that are contrary to international standards.277

d) The consultation must be informed

The Inter-American Court of Human Rights determines that the consultation must be informed in the sense that indigenous peoples are aware of the potential risks of the proposed development or investment plan, including environmental and health risks. In that regard, prior consultation requires that the state accept and provide information and implies constant communication between the parties.278

e) The consultation must be in good faith

For the Inter-American Court of Human Rights, consultations carried out in good faith mean that they should not be perceived merely as a formal procedure, but rather be conceived as a true instrument of participation, “which must respond to the ultimate goal of establishing a dialogue between the parties based on principles of mutual trust and respect, and with a view to reaching a consensus among them.”279 In that regard, the Inter-American Court of Human Rights emphasizes that establishing a climate of mutual trust and good faith is inherent in all consultations with indigenous communities and requires the absence of any coercion by the state or agents or third parties acting with their authorization or acquiescence.280

f) The consultation must be performed through culturally appropriate procedures

According to UN Special Rapporteur James Anaya regarding the situation of human rights and the fundamental freedoms of indigenous peoples, the appropriate or inappropriate

277 Inter-American Court of Human Rights, Kichwa Indigenous People of Sarayaku v. Ecuador, para. 186.
278 Inter-American Court of Human Rights, Kichwa Indigenous People of Sarayaku v. Ecuador, para. 208.
279 Inter-American Court of Human Rights, Kichwa Indigenous People of Sarayaku v. Ecuador, para. 186.
280 Inter-American Court of Human Rights, Kichwa Indigenous People of Sarayaku v. Ecuador, para. 186.
nature of the consultation of indigenous peoples through their representative institutions does not respond to a single formula; rather, it depends to a large extent on the area or scope of the specific measure that is the subject to the consultation and the purpose thereof.  

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282 ILO Convention 169, Art. 16.2: “Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.” UN, Declaration on the Rights of Indigenous Peoples, Art. 10: “No relocation shall take place without the free, prior, and informed consent of the indigenous peoples concerned.”

283 UN, Declaration on the Rights of Indigenous Peoples, Art. 29.2: “States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.”

284 UN Committee on the Elimination of Racial Discrimination (CERD), Considerations of Reports Submitted by State Parties under Article 9 of the Convention: Final Observations on Ecuador (Session 62), CERD/C/62/CO/2 (2003), para. 16: “With regard to the exploitation of resources lying underground in traditional lands of indigenous communities, the Committee observed that the mere consultation with these communities is not sufficient to meet the requirements established by the Committee in its general recommendations XXIII on Rights of indigenous peoples. The Committee, therefore, recommends that the prior and informed consent of those communities be obtained.” para. 66: “Free, prior and informed consent is essential for the protection of human rights of indigenous peoples in relation to major development projects.” Inter-American Court of Human Rights, Saramaka People v. Suriname, para. 134: “Regarding large-scale development or investment projects that would have a major impact within Saramaka

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Notwithstanding the foregoing circumstances, it is important to consider that the consultation process is aimed at achieving agreement or obtaining the consent of an indigenous people to whom, as has been pointed out, international law has recognized, among other rights, the right to self-determination, to define their development priorities, and to live freely in their territories. If the consultation ends up being a mere procedure, either because the decision of the consulted people is not considered in practice, or because the law itself does not assign it value, as is the case of Executive Decree 40 in environmental matters, then the state is not fulfilling its human rights obligations.

2.5.2 Consultation for projects that affect lands, territories, and natural resources

ILO Convention 169 provides that, in cases where the minerals or subsoil resources belong to the state, or the state has rights over other existing resources on the lands, the government should establish or maintain procedures with a view to consulting the affected peoples in order to determine whether, and to what extent, the interests of those peoples would be harmed before undertaking or authorizing any program for exploring or exploiting the resources on their lands. The convention adds that the affected peoples should participate whenever possible in the benefits of such activities and receive equitable compensation for any damage or harm they may suffer as a result of such activities.  

In this regard, the UN Declaration on the Rights of Indigenous Peoples provides in Article 32.2 that states shall consult and cooperate in good faith with the indigenous peoples involved through their own representative institutions in order to obtain their free and informed consent before approving any project that affects their lands or territories and other resources, particularly in relation to the development, use, or exploitation of minerals, water, or other resources. It adds that the states should provide effective mechanisms for fair and equitable redress for any activity affecting indigenous peoples’ lands or territories and other resources, and take appropriate measures to mitigate harmful environmental, economic, social, cultural, or spiritual consequences.

The state must guarantee these rights to consultation and participation in all phases of planning and development of a project that may affect the territory on which an indigenous

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285 ILO Convention 169, Art. 15.2.
286 UN, Declaration on Rights of Indigenous Peoples, Art. 32.2.
287 UN, Declaration on Rights of Indigenous Peoples, Art. 32.3.
or tribal community is settled, or that may affect other rights essential for their survival as a people. These dialogue processes and the search for agreements should be made from the early stages of the elaboration or planning of the proposed measure so that indigenous peoples can truly participate and influence the decision-making process in accordance with relevant international standards. The state must ensure that the rights of indigenous peoples are not ignored in any other activity or agreement it makes with private third parties or in the context of decisions of the public power that would affect their rights and interests. For this reason, it is also the responsibility of the state to carry out control and enforcement tasks in its application, and to deploy, where appropriate, forms of effective protection of that right through the corresponding judicial bodies.  

The indigenous way of life must be taken into account by the state upon adopting these measures to protect the human rights of indigenous populations. In the words of the Inter-American Court of Human Rights, “as far as indigenous peoples are concerned, it is indispensable for States to provide effective protection that takes into account their particular nature, their economic and social characteristics, as well as their special situation of vulnerability, their habitual law, values, uses, and customs.” This obligation applies both to internal implementation and to implementation of inter-American human rights instruments. This duty of specificity means that state measures aimed at protecting the human rights of indigenous peoples are based on the full diagnosis of the serious human rights violations to which these historically excluded groups have been subjected.

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288 Inter-American Court of Human Rights, Kichwa Indigenous People of Sarayaku v. Ecuador, para. 187.
289 Inter-American Court of Human Rights, Yakye Axa Indigenous Community v. Paraguay, paras. 51 and 163; Inter-American Court of Human Rights, Sawhoyamaxa Indigenous Community v. Paraguay, para. 59; and IACHR, Indigenous and Tribal Peoples’ Rights over Their Ancestral Lands and Natural Resources, para. 54.
290 Inter-American Court of Human Rights, Yakye Axa Indigenous Community v. Paraguay, para. 63; and IACHR, Indigenous and Tribal Peoples’ Rights over Their Ancestral Lands and Natural Resources, para. 54.
291 Inter-American Court of Human Rights, Yakye Axa Indigenous Community v. Paraguay, para. 51; and IACHR, Indigenous and Tribal Peoples’ Rights over Their Ancestral Lands and Natural Resources, para. 54.
2.6 Responsibility of the state for acts of third parties: Business enterprises and human rights, extractive industries and indigenous peoples

The general obligations of states in regard to human rights are to respect and guarantee them. Therefore, “any circumstance in which a body or officer of the State or of an institution of public character improperly injures one of these rights … is a case of non-observance of the duty of respect.” To guarantee these rights, states must “organize the entire governmental apparatus and, in general, all the structures through which the exercise of public power is manifested, so as to be able to legally secure the free and full exercise of human rights.”

Moreover, the organs of the inter-American human rights system “have repeatedly recognized that, in certain circumstances, the State may be responsible internationally for the attribution to the latter of human rights violations committed by individuals, which clearly includes private companies.” The United Nations has pointed out that:

The positive obligations of States to ensure the rights of the Covenant will only be fully carried out if individuals are protected by the State, not only against violations of the Covenant rights by its agents, but also against acts committed by persons or private entities that would hinder the enjoyment of the Covenant’s rights in the measure that they are applicable to private persons or entities.

2.6.1 Business enterprises and human rights

The United Nations system and the inter-American system of human rights have been addressing the issue of business enterprises and human rights for years.
In 2005, the UN Commission on Human Rights established a mandate for a “special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises.” The secretary-general appointed John Ruggie to this position, and in 2010, Ruggie presented the report *Guiding Principles on Business and Human Rights for Implementing the UN “Protect, Respect and Remedy” Framework* to the Human Rights Council. These Guiding Principles were endorsed by the Human Rights Council in Resolution 17/4 on June 16, 2011.

The UN Guiding Principles are based on three fundamental pillars:

- **Pillar 1:** The obligation of the state to protect against human rights abuses committed by third parties, including business enterprises, through appropriate measures, regulatory activities, and submission to justice.
- **Pillar 2:** The obligation and responsibility of business enterprises to respect human rights, which implies a duty to avoid violating the rights of persons and repairing the negative consequences of their activities.
- **Pillar 3:** The need to establish effective reparation mechanisms, which implies that both states and companies must ensure that victims of human rights abuses by companies have access to effective mechanisms for redress, both judicial and extrajudicial.

According to the Guiding Principles, states should “(a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps; (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights; (c) Provide effective guidance to business enterprises on how to respect human rights throughout...”

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their operations; (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts."\(^{299}\)

In compliance with their obligation to respect human rights (Pillar 2), business enterprises “should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”\(^{300}\)

Corporate responsibility, according to the Guiding Principles, refers to “internationally recognized human rights—understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.”\(^{301}\)

According to the same Guiding Principles, the responsibility of companies also obliges them to “(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; [and] (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”\(^{302}\)

In order to identify, prevent, mitigate, and respond to the negative impacts of their activities on human rights, business enterprises should also proceed with due diligence in the area of human rights. Such due diligence should include “an assessment of the actual and potential impact of activities on human rights, integration of findings, and actions taken in this regard; the monitoring of the responses and the communication of the way in which the negative consequences are dealt with.” These consequences involve, according to the Guiding Principles, “adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships.”\(^{303}\) In addition, the Guiding Principles state that if companies have caused or contributed to adverse impacts, they “should provide for or cooperate in their remediation through legitimate processes.”\(^{304}\)

\(^{299}\) UN, Guiding Principles on Business and Human Rights, Principle 3.
\(^{300}\) UN, Guiding Principles on Business and Human Rights, Principle 11.
\(^{301}\) UN, Guiding Principles on Business and Human Rights, Principle 12.
\(^{303}\) UN, Guiding Principles on Business and Human Rights, Principle 17.
\(^{304}\) UN, Guiding Principles on Business and Human Rights, Principle 22.
Finally, regarding redress mechanisms (Pillar 3), the UN Guiding Principles provide that, as part of their duty to protect against business-related human rights abuse, “[s]tates must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.” 305 In addition, states should facilitate access to effective nonstate-based grievance mechanisms. 306 Finally, business enterprises “should ensure that effective grievance mechanisms are available.” 307

It should be noted that the Chilean State has expressed its commitment to the UN Guiding Principles. Following the recommendations of the UN Working Group on Business and Human Rights created by the United Nations in 2011, the government of Chile announced the drafting of a National Plan of Action for Business and Human Rights in order to implement the Guiding Principles on these issues, coordinated by the Ministry of Foreign Affairs. 308

### 2.6.2 Business enterprises and human rights of indigenous peoples

The adverse implications of business activity on indigenous peoples are a concern in the United Nations system. It is no coincidence that the UN Working Group on Business and Human Rights, established in 2011 to promote the Guiding Principles, has prepared one of its first thematic reports on the implications of these Guiding Principles for indigenous peoples. 309 In that report, recognizing that these peoples are among the groups most severely affected by the activities of the extractive, agro-industrial, and energy sectors (paragraph 1), the working group sets forth that, in accordance with the UN Declaration on the Rights of Indigenous Peoples, “[s]tates shall have the obligation to consult and cooperate in good faith with the indigenous peoples concerned in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them (art. 19 of the UN Declaration) and prior to implementing any project affecting the rights of indigenous peoples over lands, or

305 UN, Guiding Principles on Business and Human Rights, Principle 25.
territories and resources, particularly the extraction of minerals and the use and exploitation of other resources” (Articles 19 and 32 of the UN Declaration on the Rights of Indigenous Peoples). The working group adds in its report that “in certain circumstances, there is an obligation to obtain the consent of the indigenous peoples concerned, apart from the general obligation for the consultations to seek consent” (Articles 10 and 29 of the UN Declaration on the Rights of Indigenous Peoples).310

In this report the UN Working Group on Business and Human Rights also develops the concept of due diligence when it is applied to vulnerable groups such as indigenous peoples. The working group indicates that, taking into account the specificities of these peoples, environmental impact assessments are not sufficient to determine the impacts on their rights, in particular on collective rights such as land and self-determination. The working group argues that “substantive consultations with indigenous peoples in the human rights due diligence process are particularly important so that companies can identify the full range of actual and potential consequences and, in particular, to determine and address the gender-differentiated impacts.”311 It adds that companies must ensure that impact assessments “are deep enough to detect the differentiated effects on potentially vulnerable groups and susceptible to suffering the most adverse consequences of the same activity because of economic or social marginalization within the indigenous community.”312

In a similar vein, in the 2010 Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, former UN Special Rapporteur James Anaya, employing the conceptual framework of the Guiding Principles, attempted to establish the scope of due diligence of businesses in relation to the duty to respect the rights of indigenous peoples.313 Anaya determined that in relation to the rights of these peoples over their lands, territories, and resources, companies cannot consider the absence of official recognition of indigenous property as an excuse for its disregard; he stated that the mere existence of these groups in the geographical areas where companies intend to develop their activities should be assumed as a strong indication that they have some sort of rights over them.314 Anaya added that the duty to consult with indigenous

peoples prior to the adoption of measures likely to affect them, in accordance with applicable international standards, requires in some cases the consent of the affected peoples. He clarified that acquiring this consent is a fundamental obligation of the state, and that companies, even acting in good faith, lack the appropriate knowledge for the development of these consultations. Nevertheless, he argued that companies can, with the supervision of the state, promote dialogues with affected communities, especially in relation to carrying out social impact studies, the adoption of compensation measures, and the sharing of benefits derived from the projects.\(^{315}\)

Regarding impact studies, Anaya said that these should be based on human rights criteria and be focused on taking all measures to prevent the possible negative impacts of planned activities on the environment and on the economic, social, and cultural life of indigenous peoples.\(^{316}\) In terms of benefit sharing, as a consequence of limitations or deprivation of indigenous communal ownership of land and resources, Anaya pointed out that benefits should be fair and equitable and that they should be understood as a means of complying with a right, and not as a charitable award or favor granted by the company to secure social support of the project or to minimize potential conflicts. Finally, Anaya proposed the need to go beyond approaches based solely on monetary payments, which may be negative and have adverse implications for these peoples, and to explore other benefit-sharing mechanisms that develop the capacity of indigenous peoples to strengthen their institutions and development priorities.\(^{317}\)

In Anaya’s last report as UN Special Rapporteur (2013), which deals with extractive industries and indigenous peoples, he elaborates on this matter by pointing out that, as a consequence of indigenous peoples’ right to self-determination, the general rule is that extractive projects by third parties on indigenous peoples territories may not be developed without the free, prior, and informed consent of the indigenous populations. He further argues that the consultation and negotiation processes, when there is consent, must be fair and adequate, and that, in the event of agreements, they must result in genuine partnership and benefit-sharing.\(^{318}\)

Concern over the same issue in the Inter-American human rights system recently led the Inter-American Commission on Human Rights to present a report on the rights of

\(^{315}\) UN Human Rights Council, Report of the Special Rapporteur, A/HRC/15/37, paras. 60–70.


indigenous peoples and Afro-descendant communities affected by extractive activities, in which it analyzes the guidelines of the system on the subject. According to the IACHR, the violation of these rights “reflects the reality of the region, where most of the projects of this nature take place on lands and territories traditionally occupied by these peoples, and as a result of the natural resources present therein or their strategic location.”

In view of this situation, the IACHR has processed denunciations, filed cases before the Inter-American Court of Human Rights, granted precautionary measures, and prepared country and thematic reports on a number of situations that relate to human rights violations of indigenous and tribal peoples as a result of investment, development, or exploitation projects carried out in their territories by the state or by national or transnational companies. The report on the above-mentioned subject “seeks to highlight the breadth and complexity of the problems caused by extractive and development activities in the region, and to set forth a comprehensive framework of Inter-American human rights standards on the subject.” According to the IACHR:

Extractive, exploitation, and development activities, which are increasing in the hemisphere, are generally implemented in lands and territories historically occupied by indigenous and Afro-descendant communities, which host a great wealth of natural resources. The Commission does not discourage these projects and recognizes the importance of these initiatives for the economic development of countries in the Americas. However, economic development of Member States cannot be undertaken in disregard of their ineluctable obligations to respect and guarantee human rights.

According to the IACHR, states, in addition to their general human rights obligations (to respect and guarantee them), have specific obligations regarding the execution of

319 IACHR, Indigenous Peoples, Afro-Descendent Communities, and Natural Resources, para. 50. See, for example, the following public hearings before the IACHR: Impact of Extractive Industries on Sacred Sites of Indigenous Peoples in the United States (156th Session); Human Rights Situation of Indigenous Peoples in the Context of the Activities of the Palm Oil Industry in Guatemala (155th Session); Extractive Industries and Human Rights of the Mapuche People in Chile (154th Session); Business, Human Rights and Prior Consultation in the Americas (154th Session); Complaints Regarding the Destruction of Mexico’s Bio Cultural Heritage Due to the Construction of Mega Development Projects in Mexico (153rd Session); Impact of the Activities of Canadian Mining Companies on Human Rights in Latin America (153rd Session); Human Rights Situation of Persons Affected by Extractive Industries in the Americas (144th Session).

320 IACHR, Indigenous Peoples, Afro-Descendent Communities, and Natural Resources, para. 50.

extraction, exploitation, and development activities by public, private, or mixed companies, whether national or foreign. These state obligations include the following:

- The duty to design, implement, and effectively apply appropriate domestic legislation.\(^{322}\)
- The duty to adopt a legal framework that adequately addresses foreign companies.\(^{323}\)
- The duty to prevent, mitigate, and suspend negative impacts on human rights.\(^{324}\)
- The duty to supervise and control activities related to extractive, exploitation, and development activities.\(^{325}\)
- The duty to ensure mechanisms for effective participation and access to information.
- The duty to prevent illegal activities and forms of violence against the population in areas affected by extractive, exploitation, or development activities.
- The duty to guarantee access to justice: to investigate, sanction, and redress human rights violations.\(^{326}\)

In the case of business enterprises (public, private, or mixed) engaging in extraction, exploitation, or development activities in territories of indigenous or tribal peoples, the specific obligations of states are to ensure the physical and cultural survival of the people or community and the rights referring to consultation and consent:

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\(^{322}\) According to IACHR, this obligation includes the adoption of the appropriate domestic legislation to protect the most relevant human rights in the field of extractive and development activities, the repeal of legislation that is incompatible with the rights enshrined in the inter-American instruments, and the rejection of legislation contrary to these rights. IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources*, para. 67.

\(^{323}\) IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources*, para. 79.

\(^{324}\) The IACHR emphasizes that this obligation to prevent is enforceable prior to the authorization of the activity or the granting of the necessary permits, as well as during the implementation and the life cycle of the project, via supervision and oversight methods. IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources*, para. 86.

\(^{325}\) In this regard, the IACHR indicates that “[t]o be compatible with the special obligations concerning indigenous peoples and Afro-descendent communities, supervision and control mechanisms must incorporate guarantees to ensure their specific rights.” IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources*, para. 102.

\(^{326}\) IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources*, para. 144.
• The duty to ensure that restrictions on the use and enjoyment of indigenous peoples’ lands, territories, and natural resources do not imply a denial of their physical and cultural survival.\(^{327}\)

• The obligation to ensure effective participation, to undertake socioenvironmental impact studies, and to devise shared benefits.

• The responsibility to ensure the right to consultation and prior, free, and informed consent.

• The duty to review previous studies of environmental and social impact.

• The obligation to ensure the right to reasonable participation in project benefits.

2.7 Extraterritorial obligations of states in the issue of human rights and their implications for the actions of business enterprises

International law recognizes that states are obliged to comply with their international legal obligations outside their own territory. These obligations include respecting, protecting, and complying with human rights. The extraterritorial obligations (ETOs) of states in the field of human rights arise from the international cooperation obligations considered in international law since the formation of the UN itself.\(^{328}\) These laws and obligations have been strengthened over time through the various human rights treaties that are now part of international human rights law developed by this entity.\(^{329}\)

\(^{327}\) The IACHR writes: “In the opinion of the IACHR, infrastructure and economic exploitation plans and projects imposed and implemented within indigenous and tribal peoples’ territories constitute one of the greatest risks to their physical and cultural survival. It is a special concern that the reported cases indicate that the implementation of extractive or development projects endanger their physical and cultural existence as peoples, depriving them of the option to continue their life plans, rendering them impossible.” IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources*, para. 167.

\(^{328}\) The charter of the United Nations provides that “[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55” of the charter (Article 56). These purposes include “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion” (Article 55c). Likewise, the United Nations Universal Declaration of Human Rights sets forth in its Article 22: “Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.” Article 28 of the Universal Declaration provides that “[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”

\(^{329}\) The extraterritorial human rights obligations of states are further grounded in instruments such as the Declaration on the Right to Development of 1986 and other specialized human rights instruments, such as the Convention on the Rights of Persons with Disabilities, the International
For example, the International Covenant on Civil and Political Rights (ICCPR) Article 2.1, sets forth: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.” The scope of this provision was explained in the preparatory work for the ICCPR by stating: “in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory.”

Consistent with this statement, UN treaty bodies have developed important jurisprudence related to human rights ETOs of states on human rights in various reports, declarations, general observations, contributing to a conceptual definition of those obligations, to define their scope and application to their actions and omissions. According to the International Network for Economic, Social and Cultural Rights (ESCR-Net), in the seven years prior to 2014, UN bodies dealt with the extraterritorial obligations of states in human rights issues on 26 occasions in their concluding observations, including references to rights such as the right to social security, the right to food, the right not to be tortured, the right to housing and water, and the right to effective remedy and reparations.

One of the areas in which the extraterritorial obligations of states in the area of human rights have been developed by treaty bodies is that of the implications of corporate action. For example, the UN Committee on Economic, Social and Cultural Rights has expressed its concern to states about the lack of control of corporations domiciled abroad that have a negative impact on human rights. It underscored the obligation of states to regulate the activity of corporations that have their headquarters under their jurisdiction to prevent these violations of human rights, including through the enactment of laws. Such concerns and recommendations are consistent with those expressed to various states in recent years.

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Covenante de derechos económicos, sociales y culturales, y el Acuerdo de las Naciones Unidas sobre los Derechos Civiles y Políticos, ambas con elementos extraterritoriales para la realización de los derechos humanos. Ver Olivier de Schutter et al., Comentarios a los Principios de Maastricht sobre las Obligaciones Extraterritoriales de los Estados en los Áreas de Derechos Económicos, Sociales y Culturales (2016), http://biblio.juridicas.unam.mx/libros/libro.htm?id=4228.


by, among others, the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, and the UN Committee on the Rights of the Child.

The observations of these bodies regarding the need for States to investigate and provide legal remedies and reparation against the violation of human rights by companies with extraterritorial action are of special interest. Thus, a comment on a relevant report by the Committee on the Rights of the Child declares:

States should enable access to effective judicial and non-judicial mechanisms to provide remedy for children and their families whose rights have been violated by business enterprises extraterritorially when there is a reasonable link between the State and the conduct concerned. Furthermore, States should provide international assistance and cooperation with investigations and enforcement of proceedings in other States. \(^{334}\)

Similarly, the Committee on the Elimination of Racial Discrimination (CERD) recommended that the state party should ensure that “no obstacles are introduced in the law that prevent the holding of such transnational corporations accountable in the State party’s courts when such violations are committed outside the State party.” \(^{335}\) The UN Human Rights Committee also recommended that states “take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.” \(^{336}\)

The ETOs of states in relation to indigenous peoples’ rights, often affected by the actions of transnational corporations domiciled outside the territories in which they operate, have also been a matter of concern to the treaty bodies of the UN. In particular, the CERD in its observations in recent years has drawn attention to many states, in particular the global north states, for their omissions and responsibilities to prevent the violation of the rights of these peoples by activities of companies registered in such states and to enable justice and

\(^{334}\) CRC, *State Obligations Regarding the Impact of the Business Sector on Children’s Rights*.


redress in the face of such violations. Examples include the observations made to Australia in 2010,337 to the UK in 2011,338 and to Canada in 2012.339

The ETOs of states in the area of human rights have also been a concern of the inter-American human rights system in recent years. This is reflected in the jurisprudence of both the IACHR and the Inter-American Court of Human Rights. As a general principle, and as noted above in reference to the recent report of the IACHR on indigenous peoples, Afro-descendant communities, and natural resources, both bodies have pointed out that, in certain circumstances, states may be held internationally responsible for human rights violations committed by persons, including private corporations.340

Thus, in relation to the states’ ETOs in the area of human rights, the IACHR reports on the need to design a regulatory framework that adequately addresses the actions of foreign

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337 UN CERD, Australia, CERD/C/AUS/CO/15-17 (2010), para. 13:
The Committee notes with concern the absence of a legal framework regulating the obligation of Australian corporations, at home and overseas, whose activities, notably in the extractive sector, when carried out on the traditional territories of indigenous peoples, have had a negative impact on indigenous peoples’ rights to land, health, living environment and livelihoods (arts. 2, 4 and 5). In the light of the Committee’s general recommendation No. 23 (1997) on the rights of indigenous peoples, the Committee encourages the State party to take appropriate legislative or administrative measures to prevent acts by Australian corporations which negatively impact on the enjoyment of rights of indigenous peoples domestically and overseas and to regulate the extraterritorial activities of Australian corporations abroad. The Committee also encourages the State party to fulfil its commitments under the different international initiatives it supports to advance responsible corporate citizenship.

338 UN CERD, United Kingdom, para. 29:
The Committee is concerned at reports of adverse effects of operations by transnational corporations registered in the State party but conducted outside the territory of the State party that affect the rights of indigenous peoples to land, health, environment and an adequate standard of living. The Committee further regrets the introduction of a legislative bill in the State party which, if passed, will restrict the rights of foreign claimants seeking redress in the State party’s courts against such transnational corporations (arts. 2, 5 and 6). Recalling its general recommendation No. 23 (1997) on the rights of indigenous peoples, the Committee encourages the State party to take appropriate legislative and administrative measures to ensure that acts of transnational corporations registered in the State party comply with the provisions of the Convention. In this regard, the Committee recommends that the State party should ensure that no obstacles are introduced in the law that prevent the holding of such transnational corporations accountable in the State party's courts when such violations are committed outside the State party. The Committee reminds the State party to sensitize corporations registered in its territory to their social responsibilities in the places where they operate.

339 UN CERD, Canada, CERD/C/CAN/CO/19-20 (2012). This text refers to these observations when dealing with the responsibilities of Canada in the context of the mining projects under study.

340 IACHR, Indigenous Peoples, Afro-Descendent Communities, and Natural Resources, para. 46 and on.
companies within the jurisdiction of states, given the preponderance that they have acquired in recent years in the region and the impact they are having on human rights.\footnote{IACHR, \textit{Indigenous Peoples, Afro-Descendent Communities, and Natural Resources}, para. 76.}

The IACHR also expresses its concern at the fact that many development projects are implemented by foreign companies headquartered in another country, often with the approval and express encouragement of the host state. The IACHR also notes that in recent years, as reported in its hearings, country visits, petitions, and other means, vulnerable populations such as indigenous peoples and Afro-descendant communities have become victims of human rights violations as a result of the actions or inaction of companies and the inability or unwillingness of the host state to protect these populations for fear that regulation will encourage companies to leave the country. In fact, numerous complaints have been received that in conflicts over land and natural resources, law enforcement personnel appear to protect foreign business and not the alleged victims.\footnote{IACHR, \textit{Indigenous Peoples, Afro-Descendent Communities, and Natural Resources}, para. 77.}

Coinciding with the treaty bodies of the UN, the IACHR concludes that the extraterritorial obligations of states in the field of human rights exist. That is to say, it is “jurisprudentially sound to understand that a State may be accountable under international human rights law for conduct that takes place in another country when the first State’s acts or omissions cause human rights violations and the State in which the conduct has taken place is unable to protect or enforce the human rights in question.”\footnote{IACHR, \textit{Indigenous Peoples, Afro-Descendent Communities, and Natural Resources}, para. 79.}

Due to this conclusion, and as a way to prevent human rights violations in the context of transnational business activity, the IACHR encourages foreign states of origin to establish mechanisms to ensure better human rights practices of their corporate citizens abroad.\footnote{IACHR, \textit{Indigenous Peoples, Afro-Descendent Communities, and Natural Resources}, para. 80.} Accordingly, in the case of violations of human rights attributable to foreign companies, the following is recommended: “[T]he adoption of measures to ensure the investigation and, where appropriate, the application of criminal and administrative sanctions to the people in the public or private sphere, and companies responsible for human rights violations. With regard to foreign or transnational corporations, the latter implies action by both the host State and the State of origin.”\footnote{IACHR, \textit{Indigenous Peoples, Afro-Descendent Communities, and Natural Resources}, para. 144.}
V. THE IMPACTS OF MINING PROJECTS ON HUMAN RIGHTS AND THE RESPONSIBILITY OF STAKEHOLDERS

This chapter identifies the main rights violated as a consequence of the mining projects analyzed (Pascua Lama) or projects to be developed (El Morro, presently called Nueva Unión) in the territory of the Diaguitas Huasco Altinos Agricultural Community.

This chapter also analyzes the responsibility of the involved states—according to domestic law and international guidelines on human rights and indigenous peoples’ rights: Chile, as the country in which these projects are located, and Canada, the country where the companies that carry out or propose these projects are domiciled. Finally, this chapter examines, under the same guidelines, the responsibility of the Canadian companies involved in the mining projects subject to this HRIA.

1. VIOLATED AND/OR THREATENED RIGHTS

According to the Inter-American Commission on Human Rights (IACHR), “Infrastructure or development mega-projects, such as roads, canals, dams, ports or the like, as well as concessions for the exploration or exploitation of natural resources in ancestral territories, may affect indigenous populations with particularly serious consequences, given that they imperil their territories and the ecosystems within, for which reason they represent a mortal
danger to their survival as peoples, especially in cases where the ecological fragility of their territories coincides with their demographic weakness.”

This HRIA identified a number of human rights impacts on CADHA as a result of the Pascua Lama mining project, implemented in the territory claimed as ancestral by the community, and of the El Morro (Nueva Unión) mining project, implemented in a portion of CADHA territory with registry of current domain.

A fundamental right that has been violated is that of equality and nondiscrimination: the mechanism of granting mining concessions in Chile gives a preferential right to the mining concessionaire to impose easements on landowners, even when the land is owned by indigenous communities.

Similarly, Chilean law grants the mining concessionaire a preferential right to use the waters found during mining operations, and grants the right to use these waters without restrictions, without requiring justification of that use or the sustainability of the extraction, and without requiring that the concession inform the authority or other users about the volume of water being extracted. The situation is particularly complex in the case of the Pascua Lama project, which is located on glaciers that are vital sources of fresh water for the hydrological system of the CADHA territory because their melt flows into the Del Estrecho and Chollay Rivers. In the case of the El Morro (Nueva Unión) mining project, there is no information regarding the waters impacted by the project.

The Environmental Impact Assessment System, as has been pointed out in this HRIA, also imposes discriminatory treatment in that environmental impact studies are carried out by the companies themselves and only grant the community 60 days to make observations, while companies have all the time they need to perform these studies and then answer the observations made. The system merely requires informing citizens, without effective mechanisms for actual citizen participation. Also, in the cases that have been studied, indigenous consultation was arbitrarily denied.

Another form of unequal and discriminatory treatment in the cases analyzed is shown by the government’s ignorance of the indigenous status of the CADHA, an ignorance that denies the community the right to free, prior, and informed consultation regarding projects.
on its lands, as seen at the Pascua Lama project. Such treatment is also seen in the El Morro project, in which the state was absolutely compliant with the company’s proposals claiming that the CADHA was not indigenous and, therefore, that no indigenous rights were involved. Unequal and discriminatory treatment is also evidenced by the fact that the CADHA’s letters to the government requesting recognition as an indigenous community and requesting to participate in the project’s environmental assessment process were not answered by the authority.

The discrimination and unequal treatment by the Chilean State toward the Diaguita people is long-standing, and most of the problems affecting the CADHA are derived from their lack of recognition. In fact, it was not until 10 years ago that these people, who have inhabited that territory since ancient times—long before the creation of the Chilean State—were declared as “existing” and recognized in domestic legislation through Law 20,117 of 2006.

The imposition of mega-mining projects in the territory of the CADHA has also violated their right to self-determination, autonomy, and self-government; their right to preserve their own institutions in the various areas of their cultural life; and, consequently, their right to decide their own development priorities.

These same projects have generated serious impacts on the social fabric, the territory, and the environment, putting at serious risk the ways of life and customs of the CADHA and its members.

The agricultural and livestock economy that constitutes the Diaguitas Huasco Altinos Agricultural Community’s way of life is at risk from the installation of mining operations on these high-Andean ecosystems due to several factors: potential water pollution; loss of territory; hindered access to pasture areas by closed roads, making it impossible to access natural pastures for feeding the CADHA livestock; and the drying up of meadows and wetlands, which are irreplaceable in preserving the traditional production system.

In addition, the denial of prior, free, and informed consultation precludes the exercise of indigenous self-determination. The CADHA and its members have not had the chance to present to the state authorities the ways in which these projects impact their lifestyles and customs and their own priorities for development.

348 These letters include the following: CADHA to the intendant of the Atacama region, 24 November 2008; CADHA to the directors of the El Morro project, November 2007; and CADHA to the directors of the El Morro project, April 2009.
The projects analyzed in this HRIA also infringed on the rights of the CADHA over their lands, territories, and natural resources. As a consequence of the state’s refusal to recognize the CADHA’s lands as indigenous, these lands have not received the special protection provided by Chilean law for lands registered as indigenous. In addition to not receiving this protection, the CADHA is obliged to pay a high property tax to the State of Chile—another grounds for claiming discrimination and unequal treatment.

The lack of protections afforded the CADHA’s territory has resulted in land usurpation, a consequence that the state has not taken effective steps to prevent or stop. As mentioned, in the early 20th century, the CADHA obtained the recognition of an important part of its ancestral territory in communal property by court order, but this recognition was substantially reduced by the state through the Ministry of National Assets, a body that constituted the CADHA as “agricultural” and thus regularized the communal property in 1997, therefore consolidating the usurpation processes that had already taken place.

These usurpation processes have meant the loss of approximately 40 percent of the territory that was recognized as belonging to the CADHA by court order in 1902. The processes have been confirmed by notary publics and land registry offices, and even, as noted above, by the Ministry of National Assets. These entities have privatized and transferred much of the property—without the consent of the community—as in the case of Estancia Chañarcillo (Chollay), now owned by Barrick Gold.

These usurpation processes, as observed in this HRIA, have continued, and they oblige the community to allocate time and resources for the ongoing defense of its territory. As indicated in this HRIA, Goldcorp has made offers to buy private land usurped inside the territory of the CADHA to compensate for the territorial impacts generated by the El Morro (Nueva Unión) mining project.

Likewise, the lack of protection by the state has resulted in the granting of hundreds of mining concessions in the community’s territory, both registered and claimed, without prior, free, and informed consultation, among which are those concessions granted to the companies which own the Pascua Lama and El Morro (Nueva Unión) mining projects.

These incidents lead to the conclusion that, in this case, the right to ownership that indigenous peoples hold over their territories, lands, and natural resources has been violated. The State of Chile and the companies involved have ignored the fact that the CADHA, as all indigenous people, have an irreplaceable relationship with their territory,
which is a fundamental basis for their way of life and customs and provides them ethnic identity.

In addition, this report found that the granting of concessions, authorizations, and permits of all kinds to the executors of the Pascua Lama and El Morro (Nueva Unión) mining projects were made without complying with the right to consultation and, even though these involve mega-projects, they did not guarantee the prior, free, and informed consent of the CADHA, in accordance with international standards.\textsuperscript{349}

The government’s granting of such concessions has promoted the Pascua Lama and El Morro (Nueva Unión) mining projects, which have carried out work and activities with the consent of the State, long before obtaining the environmental authorization from the latter, all without a process of free, prior, and informed consultation, according to the standards of international law.

Although the Pascua Lama and El Morro (Nueva Unión) mining projects have been suspended or withdrawn, during the time they were active they caused severe damage to the environment and to the social fabric in the families and community of the Diaguita people in this area.

The adverse impacts that these projects have provoked in the CADHA have been enormous, essentially the result of the absence of adequate protection by the state, given its noncompliance with its obligations on human rights; its lack of proper regulation; and its imposition of legislation granting preferential rights that allow mining concessions to exploit natural resources found in indigenous territories. In addition, as discussed later in this chapter, the poor practices of the Canadian companies Barrick Gold and Goldcorp, owners of the Pascua Lama and El Morro (Nueva Unión) mining projects, respectively, have also contributed.

2. RESPONSIBILITY OF THE STATES INVOLVED

As discussed, international law, and, in particular, the UN Guiding Principles on Business and Human Rights, requires that states protect human rights against abuses by third parties, including businesses, through appropriate measures, legislative regulations, and submittal

\textsuperscript{349} IACHR, \textit{Indigenous Peoples, Afro-Descendent Communities, and Natural Resources}.
to the legal system. Governments also have the responsibility to ensure the protection of human rights not only within their own territory, but also outside their borders, when human rights are affected by the activities of companies domiciled in their countries. For this reason, the States of Chile and Canada are responsible for the impacts on the human rights of the Huasco Alto Diaguita people by the Pascua Lama and El Morro (Nueva Unión) mining projects.

2.1 Responsibility of the Chilean government

Following the UN Guiding Principles on Business and Human Rights, the State of Chile holds a central responsibility for the violation of the rights of the CADHA in the framework of the mining projects that have been analyzed in this HRIA.

Indeed, the State of Chile failed to meet its obligation to protect the community against human rights abuses committed by third parties, in this case by companies.

Moreover, the State granted mining concessions to these companies without considering the impact on the CADHA nor their right to define their own development priorities. Subsequently, through the Chilean State’s environmental authority, the state granted permission to the Pascua Lama project on two occasions, first in 2001, and then in 2006, authorizing its expansion in that year, despite obvious environmental and social implications. In the same way, the State of Chile granted environmental approval to the El Morro project in 2011.

In addition, the Chilean government did not enforce domestic laws, such as Law 19,253, or international agreements, such as ILO Convention 169, which would have ensured respect for the rights of the CADHA and of its members, in the face of these mining projects. Such legislation, as noted earlier, protects the rights of indigenous peoples to nondiscrimination; to their lands, territories, and natural resources; and to their environment. These laws and treaties also ensure that indigenous peoples are able to define their own priorities for development through participation and consultation processes—processes that were not properly performed by the Chilean State in the case of the investment projects under analysis. Particularly serious was the state’s refusal to recognize the lands of the CADHA as indigenous lands, and as a result, its failure to provide the CADHA the protection that Law 19,253 grants to these lands.
Moreover, the Chilean government did not evaluate other legislation applicable to these projects, such as the Water Code of 1981 or the Environmental General Bases Law of 1993 (amended in 2010), and its regulations (Executive Decree 40 that regulates the Environmental Impact Assessment System) to see if these proved adequate to protect human rights or remedy deficiencies in human rights issues, in general, and indigenous peoples rights, in particular. The Chilean government neglected these actions despite the fact that various international bodies, including UN treaty bodies, UN Special Rapporteurs, and the ILO, have been recommending to the Chilean State, since the entry into force of ILO Convention 169, the adaptation of its internal regulations to international standards.

Likewise, the government did not submit the project owner companies to the legal system, and these companies’ activities resulted in the violation of human rights of this community.

Moreover, the Chilean government signed a mining agreement with Argentina and another trade agreement with Canada, which facilitated the Canadian mining investments—without ensuring the due coherence that, according to the UN Guiding Principles on Business and Human Rights, such trade agreements must have with the international human rights treaties the state has signed, so as not to affect the compliance with the obligations that the state has contracted through such treaties. The Chilean government did not perform an assessment of the potential impact of these trade agreements on human rights. It is also evident that the Chilean State did not advise the company owners on how to respect human rights in their activities, nor did the state encourage, require, or explain to the companies that they must address the impact of their activities on human rights, in this case, on the human rights of the Diaguita Huasco Altinos.

Finally, from the analysis performed in this HRIA, it appears that the Chilean State has not always ensured effective access to judicial or administrative mechanisms of redress in the face of human rights violations committed by these mining companies. Nor has the state facilitated access to mechanisms of nonstate claims. In fact, in the case of the Pascua Lama project, the lawsuits initially filed by the CADHA to defend their rights were rejected. This rejection led the CADHA, as noted, to file a complaint with the Inter-American Commission on Human Rights for the violation of the community's human rights recognized in the American Convention on Human Rights—a complaint determined admissible by the Commission. Although the legal actions filed to administrative bodies and to environmental courts by the CADHA and other organizations affected by the project were accepted, thereby achieving the application of sanctions and ultimately the suspension of this project, ecological and social damage caused by this mining project had already taken place.
The El Morro (Nueva Unión) project, notwithstanding the administrative actions filed in the framework of the environmental impact assessment by the community and other actors, was approved by the state through an environmental resolution. However, it should be noted that, in the case of this project, the constitutional appeals filed by the community against this resolution were accepted once the Supreme Court ruled that said resolution was vitiated by having failed to conduct the consultation to the appealing communities by the National Corporation for Indigenous Development (CONADI).

The above conclusions were corroborated by interviews, that, as mentioned at the beginning of this HRIA, were held with officials of different public services. From these interviews with Chilean government officials, the following conclusions can be drawn:

- With few exceptions, state officials have no knowledge or training on international human rights law concerning the rights of indigenous peoples, or on the obligations that this law entails of the State of Chile. Nor do they have knowledge about the UN Guiding Principles on Business and Human Rights.

- This lack of awareness is reflected in the fact that state agencies apply domestic law in a literal sense, without incorporating international human rights law in its interpretation, including human rights laws related to indigenous peoples. In fact, these agencies do not compare, harmonize, or integrate Chile’s specific legislation on indigenous peoples, which is the main objective in their respective bodies. As one official interviewed put it, “When it involves a public institution, we must abide by our rules.”

- Public officers acknowledge that the courts have “been paving the path” in terms of incorporating international law on human rights in their decisions. In this regard, they have observed that the courts “show us the way” when investment projects have been developing for several years, as in the case of the Pascua Lama and El Morro projects.

- Public officers feel obliged to apply the rules in the context of the economic system prevailing in the country, where everything is negotiable. As another official interviewed stated: “In the water market there is no difference between one participant and another.”

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350 The interviews were requested to address the role of the respective state institution on the rights of indigenous peoples and, specifically, in relation to the Pascua Lama and El Morro mining projects, particularly in light of national legislation and international human rights standards and bearing in mind the UN Guiding Principles on Business and Human Rights.
• There is no state agency to coordinate indigenous consultation. Each public service, should it have to consult on any matter, does so according to its own knowledge and resources.

• In terms of investment projects, the Environmental Assessment Service (SEA) does the consultation, and CONADI may only intervene at the request of the SEA. CONADI cannot evaluate the content or the form of the consultation.

• According to the environmental authorities, for investment projects that could affect indigenous peoples, a specific consultation process is applied as established in the Environmental Impact Assessment System regulations (Executive Decree No. 40), which only requires consent when the transfer or relocation of the affected indigenous people takes place.

• The functions of the Human Rights Division of the Ministry of Foreign Affairs\(^{351}\) include “encouraging a direct and fluid relationship with various bodies of the Executive, Legislative and Judicial Branches, to disseminate the obligations of international human rights law … and get them involved in the tasks arising from the compliance with these commitments.”\(^{352}\) Regarding the obligations of the State of Chile on the rights of indigenous peoples, the Ministry of Foreign Affairs says that it acts “as a bridge” because it transmits relevant information to CONADI only.

• To date, the Foreign Investment Committee, tasked with representing the State of Chile in its dealings with foreign investors and with promoting foreign investment in Chile\(^{353}\), does not inform potential investors that indigenous people live in Chile and that legislation includes specific regulations on consultation, in case any project is to be developed in indigenous territories.

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\(^{351}\) The Human Rights Division of the Ministry of Foreign Affairs/Ministerio de Relaciones Exteriores de Chile coordinates Chile’s international action on human rights, which refers to presenting Chile’s stance at international fora on protection and promotion of human rights and encouraging compliance with international commitments in this regard. According to the policies and priorities defined by the government, the division is responsible for the promotion and protection of civil, political, economic, social, and cultural human rights as well as those of women, children, indigenous peoples, minorities, and other vulnerable groups. See the Human Rights webpage on the ministry’s website, “Derechos Humanos,” http://www.minrel.gov.cl/minrel/site/edic/base/port/derechos_humanos.html.

\(^{352}\) Ministry of Foreign Affairs, “Derechos Humanos.”

\(^{353}\) The Foreign Investment Committee also supports the status of Chile as a highly attractive destination for foreign investment and international business acting in matters relating to the management and dissemination of relevant legislation, the development of various types of promotional activities, and the development of relevant information on foreign investment issues for foreign investors and potential investors.
2.2 Responsibility of Canada

International human rights law relating to the extraterritorial obligations of states asserts that states must prevent and punish violations of human rights committed outside their borders by private actors domiciled in them. Because the companies involved in the mining projects in the territory of the CADHA are domiciled in Canada, this HRIA undertook to analyze Canada’s responsibility regarding the impact on human rights caused by these projects.

For these purposes, and as noted in this HRIA’s introduction, efforts were made to elicit the view of representatives of the Canadian government on the mining projects examined in this study, the laws and policies of the Canadian government that regulate the activities of companies domiciled in Canada acting outside its borders, and the way in which Canada prevents and/or sanctions potential adverse impacts of these companies on the human rights of individuals and communities in places where they perform their activities.

In September 2015, Jeffrey Davidson, Canada’s counsellor for corporate social responsibility in regard to the extractive industry, was interviewed in Ottawa. On the same occasion an unsuccessful effort was made to interview representatives of Canada’s Ministry of Foreign Affairs. In addition, in October 2015 the Canadian Embassy in Chile was contacted to request an interview to learn the embassy’s views on the human rights implications of the projects that are the subject of this HRIA. Although initially the trade officer of the Canadian Embassy agreed to grant the interview, she subsequently declined, arguing that given the change of government in Canada and the lack of information about new guidelines in the matter, an interview would not be possible.

2.2.1 The impacts of Canadian companies on human rights internationally

In the absence of a direct vision from Canadian representatives on the subject, literature that discusses the issue of human rights affected by companies domiciled in Canada but

354 Meeting held in Ottawa, on September 17, 2015, which involved an entity (Office of the Extractive Sector Corporate Social Responsibility [CSR] Counsellor) created by Canada, oriented to the mediation with companies facing allegations of CSR violations. See http://www.international.gc.ca/csr_counsellor-conseiller_rse/index.aspx?lang=eng. The person in charge of this office, Jeffrey Davidson, appointed in May 2015, was not familiar with the Pascua Lama and El Morro projects in Diaguita territory. His office had not received complaints about their performance. When asked about his vision regarding the Canadian government’s responsibility in relation to its extraterritorial obligations on human rights issues, such as in the case of Canadian mining projects in Chile, he indicated that his mandate did not include that dimension.

355 Margot Edwards, trade officer of the Canadian Embassy in Chile, email message to author, November 6, 2015.
operating outside the country was reviewed. This issue has been the subject of extensive documentation, given the proliferation in recent years of such activities by Canadian companies, particularly extractive companies outside that country, and the numerous allegations of human rights violations committed in the context of their activities, many of which have gone unpunished.

Indeed, in recent years, Canada has become an increasingly important participant in the extractive industry area, particularly in mining. A study done by the Working Group on Mining and Human Rights in Latin America on the impact of Canadian mining in Latin America and the responsibility of Canada indicates that, by 2012, 57 percent of mining companies at a global level were listed on the Toronto Stock Exchange. About half of the companies listed were developing investment projects outside Canada. Out of the 4,322 projects carried out by these companies outside Canada, 1,526 were in Latin America. By 2013, the Latin American countries where Canadian companies were the most active were Mexico ($20 billion) and Chile ($19 billion).

The same study discussed the conflicts generated by these mining projects in Latin America and the impact these projects had on human rights, including the environment, and on indigenous peoples. According to the Observatory of Mining Conflicts in Latin America (OCMAL), in 2013 nearly 198 active conflicts caused by mega-mining were reported in the region: 26 in Argentina, 20 in Brazil, 34 in Chile, 12 in Colombia, 29 in Mexico, and 34 in Peru.

356 Working Group on Mining and Human Rights in Latin America/Grupo de Trabajo sobre Minería y Derechos Humanos en América Latina, El impacto de la minería canadiense en América latina y la responsabilidad de Canadá (2013), http://www.dplf.org/sites/default/files/informe_canada_resumen_ejecutivo.pdf. According to this report, the impacts caused by the activities of Canadian mining companies in the region include environmental degradation, adverse health effects, forced displacement of communities, economic impacts on local communities, and acquisition and undue expropriation of land. The report was presented in a thematic hearing before the Human Rights Impact Commission in April 2014. The executive summary of this report was presented to the Inter-American Commission on Human Rights. The Working Group on Mining and Human Rights in Latin American consists of representatives of the Observatorio Latinoamericano de Conflictos Ambientales (OLCA) in Chile, the Colectivo de Abogados José Alvear Restrepo (CAJAR) in Colombia, the Fundación para el Devido Proceso (DPLF), the Centro Hondureño de Promoción para el Desarrollo Comunitario (CEHPRODEC) in Honduras, the Asamblea Nacional de Afectados Ambientales (ANAA) in Mexico, the Asociación Marianista de Acción Social in Peru, and the Red Muqui, also in Peru.

357 Working Group on Mining and Human Rights in Latin America, El impacto de la minería canadiense, 3.

358 Working Group on Mining and Human Rights in Latin America, El impacto de la minería canadiense, 3.
Given this reality and the concern of Canadian civil society, a debate has been taking place in Canada for more than a decade over the regulation of the activities of Canadian companies outside Canada. Thus, in 2005, the federal government, echoing this concern, convened a roundtable of different actors, including business, civil society, and indigenous peoples, to analyze the corporate social responsibility of Canadian extractive industries in developing countries. One of the recommendations at that time was the establishment of an independent ombudsman to investigate and report complaints and the creation of a compliance review committee that would make recommendations regarding actions to be taken in the cases investigated—actions that could include the withdrawal of financial services by the Canadian government in the face of serious cases of noncompliance.\textsuperscript{359}

In that context, in 2007 the UN Committee on the Elimination of Racial Discrimination (CERD) announced its concern regarding the matter, urging Canada to adopt legislative or administrative measures to prevent the negative impact on indigenous rights by transnational companies domiciled in Canada but operating outside the country, recommending, in particular, that Canada consider ways to effectively establish responsibility for human rights impacts.\textsuperscript{360}

The recommendations of the roundtable were never implemented. The Canadian government, however, in 2009 launched an initiative aimed at improving the competitiveness of Canadian extractive companies that operate internationally by enhancing their ability to manage social conflicts and environmental risks. Among the actions of this government initiative was the promotion of international CSR standards and the establishment of a Councillor of Corporate Social Responsibility for the extractive sector to assist key stakeholders involved in the activities of Canadian companies outside Canada.\textsuperscript{361} The resulting Councillor, however, has a limited mandate and does not provide incentives for companies to change their behavior; it only reviews but does not investigate complaints, and even then only with the consent of the companies involved.\textsuperscript{362}

\begin{itemize}
\item \textsuperscript{359} Advisory Group Report, \textit{National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries} (2007), http://www.mining.ca/www/media_lib/MAC_Documents/Publications/CSRENG.pdf.
\item \textsuperscript{362} Viviane Weitzner, \textit{Tipping the Power Balance: Making Free, Prior and Informed Consent Work} (North-South Institute, 2011).
\end{itemize}
Given the limitations of this policy, in 2010, a member of the Canadian House of Commons proposed a Corporate Accountability of Mining, Oil and Gas Corporations in Developing Countries bill. The initiative, known as Bill C-300, would establish a complaints mechanism that allowed the government to determine sanctions, such as the withdrawal of public and financial support for Canadian companies that violate CSR. By a narrow margin, this initiative was not approved by the Canadian Parliament.

The Canadian government’s absence of legislation and public policy to address the effects of Canadian companies on human rights, including the rights of indigenous peoples, in other countries has attracted the concern of international human rights organizations. The UN Committee on the Elimination of Racial Discrimination made the following observation in 2012 to the State of Canada:

While noting that the State party has enacted a Corporate Responsibility Strategy, the Committee is concerned that the State party has not yet adopted measures with regard to transnational corporations, registered in Canada, whose activities negatively impact the rights of indigenous people outside of Canada, in particular in mining activities (art. 5).

The Committee recommends that the State party take appropriate legislative measures to prevent transnational corporations registered in Canada from carrying out activities that negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada, and hold them accountable.

As a result of the hearing before the Inter-American Commission on Human Rights (IACHR) in April 2014, in which the Working Group on Mining and Human Rights in Latin America presented a report on the human rights impacts of Canadian mining in the region, the IACHR observed that the State of Canada had publicly acknowledged that it intends to voluntarily strengthen its corporate social responsibility rules applicable to Canadian companies operating abroad. The IACHR, however, noted that these rules do not include

364 The rejection of this initiative was affected by the strong lobby of mining companies. See Jennifer Moore, Mining Watch Canada, personal communication.
the establishment of specific mechanisms that can be used to monitor corporate operations abroad.\textsuperscript{366}

In the absence of effective administrative mechanisms for receiving and processing claims for human rights violations committed by Canadian companies outside Canada, lawsuits filed to the Canadian courts regarding such situations have proliferated in recent years. By 2016 eight lawsuits had been filed for abuses of human and environmental rights in the context of Canadian extractive companies’ operations abroad, though the foreign plaintiffs have not been successful in any of these cases to date. Among the challenges facing these plaintiffs is the fact that, in order for a case to be heard, the plaintiff must establish the jurisdiction of the Canadian court by demonstrating that there is a substantial connection between the case and the province or territory over which the court or federal court presides. Even if the court has jurisdiction to hear the case, it can dismiss the complaint if it determines that there is another, more appropriate forum to try the case (\textit{forum non conveniens}). In addition, the legal structure of multinational enterprises constitutes another challenge for foreign plaintiffs, as the parent company and its subsidiaries are considered as separate entities, thus preventing legal responsibility from being allocated to the parent company for activities of its subsidiaries. A work-around to this challenge is to directly accuse the parent company for its own actions and omissions related to operations abroad. This strategy is being tested in the five transnational cases currently underway in Canadian courts.\textsuperscript{367}

Moreover, in one of these cases an important precedent has been created. It involves three lawsuits filed by Guatemalan citizens to the Superior Court of Ontario against the Canadian mining company HudBay Minerals Inc. in which it is alleged that, between 2007 and 2009, security personnel hired by the company in its nickel mine, Fénix, killed a community leader, seriously injured a villager, and raped 11 women. In 2013, the Ontario Superior Court ruled in favor of the plaintiffs and rejected the appeals of the company. The judge ruled that the plaintiffs’ claims are based on the direct negligence of the parent company, which, according to the plaintiffs is responsible for the acts and omissions of its subsidiaries. The court ruling is the first case in Canada involving foreign plaintiffs who claim to have been harmed by the operations of a Canadian company abroad, and it sets a precedent regarding the legal responsibility of the parent company.

\textsuperscript{366} IACHR, \textit{Indigenous Peoples, Afro-Descendent Communities, and Natural Resources.}

\textsuperscript{367} Above Ground, lawsuits against extractive companies filed in Canada: Advances in transnational civil litigation, 1997-2016.
It is not surprising that in 2015 the UN Human Rights Committee recommended that Canada “develop a legal framework that affords legal remedies to people who have been victims of activities of such corporations operating abroad.”\textsuperscript{368} Similarly, in March 2016, the UN Committee on Economic, Social and Cultural Rights recommended that Canada “introduce effective mechanisms to investigate complaints filed against these companies [registered or domiciled in its jurisdiction] and take the necessary legislative measures to facilitate access to justice before national courts for victims of the activities of these companies.”\textsuperscript{369}

The new administration of Prime Minister Justin Trudeau, who took office in 2015, has raised expectations of changes in international politics, with the inclusion of human rights and environmental sustainability as a central part of its international agenda. The new government’s adoption, in May 2016, of the UN Declaration on the Rights of Indigenous Peoples, without reservation, in contrast to the conditionality of the previous administration’s adoption, also marks a change. It still remains to be seen how the new government of Canada will assume the recommendations of treaty bodies, in relation to the responsibility of the Canadian government in the face of impacts of mining companies domiciled in Canada on human rights outside Canada.

### 2.2.2 The responsibility of the State of Canada in the case of the mining projects examined in this HRIA

According to all available information, the Canadian government has given its full support to the mining projects studied in this HRIA. This support has been granted despite the concerns of the CADHA and other nongovernmental and human rights organizations, particularly in the case of the Pascua Lama project.

The expansion of Canadian mining investment abroad has long been part of the Canadian government’s foreign policy. This objective seems to have been strengthened under Prime Minister Stephen Harper’s administration (2006–2015). Canada has signed numerous free trade agreements (FTAs) to promote trade and investment abroad, mainly linked to the extraction of natural resources. In the case of Latin America, after signing the North American Free Trade Agreement (NAFTA) with the United States and Mexico in 1992, Canada signed in 1997 a FTA with Chile; a FTA with Costa Rica (CCRFTA), which entered


\textsuperscript{369} UN Committee on Economic, Social and Cultural Rights, E/C.12/CAN/CO/6 (2016).
into force in 2002; and a FTA with Peru (PCFTA), which came into force in 2009. Additional agreements were signed by Canada with Colombia in 2008, which came into force in 2011, and with Panama in 2010. Except for the treaty with Colombia, which has a component referring to human rights and requires annual assessments by the subscribing governments in this area, these treaties did not incorporate this dimension in their provisions. This omission should be highlighted, given that the UN Guiding Principles on Business and Human Rights require that states ensure compliance with their obligations on human rights when signing commercial agreements.\(^{370}\)

As a direct consequence of such agreements promoted by Canada, by the end 2014, direct investment by that country in Chile reached almost CA$18.3 billion, making Chile the leading country destination of Canadian investment in South America and Central America, and the seventh-leading destination worldwide. In the past decade, Canada has also been the main source of new foreign investment in Chile, with Canadian investors present mainly in mining, with 38 companies having major investments in the country.\(^{371}\)

Various Canadian institutions have contributed to the presence of Canadian mining in South and Central America, including Export Development Canada, which provides credit to mining companies operating in the region. In the case of the projects subject to this HRIA, however, there is no information that Export Development Canada has granted credit to either Barrick Gold or Goldcorp. That said, Barrick Gold requested a loan for the Pascua Lama project in 2006 and 2012, and Export Development Canada granted a loan to Barrick Gold for the Veladero mining project, located on the Argentina side of the Andes just a few kilometers away from the Pascua Lama project operations and therefore clearly related.\(^{372}\)

Although this Canadian loan institution bases its operations on performance standards of the World Bank’s International Finance Corporation and the Equator Principles, information exists that it does not always meet the aforementioned standards. For example, on a visit

\(^{370}\) As stated in the UN’s Guiding Principles on Business and Human Rights, HR/PUB/11/04 (2011), Principle 9: “States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.”


to Chile as part of its obligation of due diligence to verify the accuracy of the information from Barrick Gold for its Pascua Lama project, Export Development Canada failed to meet with representatives of affected communities and civil society organizations. Interviews with individuals in the communities were organized by Barrick Gold, and were held at the company offices.\textsuperscript{373}

The role of Canadian embassies in promoting mining investment in the region has been confirmed by the IACHR. As noted by the IACHR in its report on extractive industries and the rights of indigenous peoples and Afro-descendants, “[T]he Commission has been informed in hearings, for example, that Canadian embassies are directly involved in seeking such investment, called economic diplomacy, deepening the state connections required for a framework of accountability from foreign countries.”\textsuperscript{374} The Canadian Embassy in Chile has been no exception in this regard. Canadian investments in the country are highlighted as an achievement on the embassy website. Representatives of civil society and communities affected by mining, including Observatorio Ciudadano and the CADHA, have held meetings with the Canadian Embassy in Chile to express their concern about the impact of the Pascua Lama mining project on human rights, but their observations appear to not have had an impact on the Embassy’s support of such investments.\textsuperscript{375}

In recent years, the Canadian Embassy has also promoted the visit of several delegations of indigenous representatives from Canada who have reached agreements with companies in their territories, including mining and hydroelectric companies, as a way to encourage partnership and business models existing in Canada in the case of Chile.

It should be noted that the model of extractive investments in indigenous territories in Canada, often managed in that country by the same companies present in Latin America, differs substantially from the model prevailing in Chile. In fact various factors, including the Canadian constitutional and legal framework and the litigation of indigenous peoples in the Canadian courts, have resulted in the practice of the Impact and Benefit Agreements (IBAs), which are understood as agreements negotiated between mining companies and indigenous communities to address the impacts, both socioeconomic as well as environmental, that can arise from a mining project. Among the topics most frequently


\textsuperscript{374} IACHR, Indigenous Peoples, Afro-Descendent Communities, and Natural Resources, para. 79.

\textsuperscript{375} In 2014, organizational members of the Working Group on Mining and Human Rights in Latin America, including OLCA, submitted to the Canadian Embassy in Chile the report The Impact of Canadian Mining in Latin America and Canada’s Responsibility.
addressed in these agreements are the financial benefits provided by companies to indigenous communities impacted by their activities, as compensation for the socio-environmental and cultural damage these activities cause, and owing to the fact that, in many cases, the indigenous peoples are the owners of the land and sometimes owners of the subsoil resources, where these projects are developed.\textsuperscript{376} Also, the jurisprudence issued by Canadian courts in relation to the rights of indigenous peoples is fundamental in the standards of the extractive investments in indigenous territories, which makes essential today, not only the consultation, but also the free, prior, and informed consent of communities whose lands are affected, as well as their participation in the profits generated by the latter projects.\textsuperscript{377}

Notwithstanding the installation of a new government in Canada in 2015, and the expectations for changes in its policies on investments of Canadian companies operating abroad, the Canadian State has not adopted the recommendations made by the aforementioned international human rights bodies to date, including the UN Committee on the Elimination of Racial Discrimination (CERD), the Human Rights Committee (HRC), and the Committee on Economic, Social and Cultural Rights (CESCR). Thus, Canada continues investing internationally without adopting legislation that will help ensure that the investments of companies domiciled in that country do not violate human rights outside of it, in particular, the rights of indigenous peoples. Therefore, Canada has still not assumed the extraterritorial obligations on human rights, which, according to the currently prevailing interpretation in international law, makes it liable for acts of third parties that violate human rights, not only within its borders but also outside them.

In 2014, a broad coalition of civil society organizations called on the Canadian government to create an independent ombudsman who would have the authority to hear complaints from communities of the global south—communities that have had their human rights

\textsuperscript{376} Ginger Gibson and Ciaran O’Faircheallaigh, \textit{IBA Community Toolkit: Negotiation and Implementation of Impact benefit Agreements} (2010).

\textsuperscript{377} In the case Delgamuukw v. British Columbia (1997), the Canadian Supreme Court, along with confirming the right of indigenous peoples to aboriginal title of lands ceded by treaty, established that the Crown had the obligation not only to consult but also to accommodate their interests in the context of the affectation of the aboriginal title. In the case of Taku River Tlingit v. British Columbia (2004) the Supreme Court added that in cases of affectation of the aboriginal title, it was necessary to take measures to prevent an impact, minimize or mitigate it, and, as an alternative, compensate for it. In a 2014 ruling in the Tsilhqot’in Nation v. British Columbia case, the same court recognized the Tsilhqot’in First Nation’s right to original title of 1,700 square kilometers on the basis of the Tsilhqot’in traditional, continuous, and exclusive occupation of the area. The court also established the tribe’s right to control the territory, including the right to use and benefit from it, stating that the development of initiatives in the area by the State of Canada requires the consent of the First Nations, as well as the compliance of the state of its fiduciary obligations to indigenous peoples.
affected by the Canadian extractive industries—and to ensure justice and provide redress for them. The call of civil society had an impact on a new legislative proposal, Bill C-584, for the creation of this entity. As with Bill C-300, C-584 was also rejected by Parliament. Recently, the idea of strengthening the regulation and supervision of Canadian companies operating outside the country, and even to impose sanctions on those that violate human rights as well as create an autonomous and independent institution, such as an ombudsman, to monitor Canadian companies operating outside that state, was proposed in an open letter to Trudeau. The letter requests that the government of Canada:

Create objective and impartial mechanisms to effectively monitor and investigate complaints of individual and collective human rights violations in connection with Canadian mining companies abroad. These mechanisms should be designed in conformity with the Paris Principles regarding the status and functions of national human rights institutions.

Were these proposals and recommendations to be accepted by Trudeau’s new government, they would help reverse the prevailing trend in the Canadian state that has decisively contributed to the human rights violations observed in mining projects subject to this HRIA. In summary, the State of Canada has contributed to the negative impact on the human rights of the Diaguita Huasco Altinos Agricultural Community in the context of mining projects subject to this HRIA, mainly through the following acts:

- The promotion of investments in extractive industry companies domiciled in Canada working outside its borders both through free trade agreements and through the granting of loans via state agencies, without regard to human rights.

- The refusal to accept the recommendations of international human rights organizations that have repeatedly urged the government to adopt legislative measures and policies to meet its extraterritorial obligations regarding the violation of human rights by companies domiciled in Canada acting outside that country, to prevent, redress, and penalize such violations.

- The support granted to the mining projects examined in this HRIA, particularly the Pascua Lama project, without having heard the complaints of the affected


379 Lapalme, “Once Again.”
communities and civil society organizations, which have alerted the Canadian embassy in Chile and submitted reports to international bodies, such as the IACHR, about the project’s negative impact on human rights.

3. THE RESPONSIBILITY OF MINING PROJECT COMPANIES OPERATING IN THE TERRITORY OF THE DIAGUITA HUASCO ALTINOS AGRICULTURAL COMMUNITY

Finally, the companies involved in these projects did not meet with their obligation to respect the internationally recognized human rights of indigenous peoples. Far from having abstained from violating the collective rights of the CADHA and far from preventing their activities from harming those rights, these companies did not perform the due diligence that is required for these effects, thereby severely harmed them. In the case of the Pascua Lama project, the companies have not remedied the negative impact their activities have had on the human rights of the CADHA.

In fact, the Pascua Lama project belonging to Barrick Gold and its subsidiary in Chile, Compañía Minera Nevada, was located in the territory that the CADHA claimed as ancestral (Estancias Chañarcillo and Chollay), which was usurped by means of legal loopholes in the early 20th century and was subsequently purchased by Compañía Minera Nevada for the implementation of the Pascua Lama project. This claim is certainly one that Barrick Gold and its subsidiary in Chile knew of; however, they went ahead with the project.

The environmental impact studies developed by the company for this project did not include human rights criteria and were not focused on taking the necessary measures to prevent possible negative impacts of planned activities on the environment and on the economic, social, and cultural life of the CADHA. Indeed, they did not consider or minimize the impacts the project would have on the community, impacts which later became evident during the project’s operation. These impacts not only affected community lands, but they also had implications for the glacier system that feeds the tributaries of the Chollay River, with serious consequences on the ways of life and customs of the CADHA members. Moreover, these studies did not adequately consider the adverse impacts of pollution of the territory’s water resources as a result of the management of waste from mining operations, which ultimately determined the penalty—a fine and shutdown of activities—imposed by the environmental authority to the company.
Likewise, as indicated by the former UN Special Rapporteur on indigenous rights, James Anaya, even when consultation is a duty of the state, the company could have carried out, in the case of this project, under the state’s supervision, dialogues with the affected community regarding the development of social impact studies, the adoption of compensation measures against damages from the project, or some method of profit sharing. The company did not engage in any such dialogue, which also demonstrates its failure to perform due diligence on human rights issues.

Among the events that demonstrate the company’s lack of due diligence is the closure of access roads to the mountain range that have traditionally been used for the community’s pastoral activities. Indeed, Barrick closed the public road that gives access to the mountains, and only allowed exclusive transit for its workers, violating RCA 39/2001, which ordered it to open that road. The environmental authority did not make it fulfill this obligation.

The company, far from allowing the community to participate in the benefits that its Pascua Lama project has generated, has used the money as a way to destabilize organizations of the Diaguita people and to undermine the cohesion of their social fabric. Indeed, Barrick Gold generated negotiation processes outside the Environmental Impact Assessment System with certain actors who gave it “social license” in the face of negative impacts on water. In this way, the company made a protocol agreement with the the Huasco River Valley Supervisory Board and promised compensation of $60 million that primarily favored the agro-industries of the area to the detriment of minority water rights holders, mostly members of the CADHA. These actions were taken without consideration of the environmental functions of water to ensure the sustainability of the community’s habitat. In addition, Barrick Gold generated instances of negotiation with Diaguita communities created under Law 19,253—communities that do not hold property ownership rights in the territory of the CADHA—and agreed with them on compensation for environmental and sociocultural impacts that impinged on the territory of the CADHA. These negotiations occurred without the consent of the ancestral indigenous organization that is the owner of the communal property where the project is located.

It should be recalled that the participation in profits is the result of the right to limitation or privation of indigenous ownership of land and resources. By the same token, such profit sharing, as well as being fair and equitable, should be understood as a form of compliance of a right and not as a charitable concession that seeks social support of the project or to minimize its conflicts, as happened in this case.
Finally, in the case of the Pascua Lama project, Barrick Gold, despite what is stated on its website, did not have effective mechanisms in place for complaints in the face of adverse impacts of the company’s investment on human rights, as recommended by the UN Guiding Principles on Business and Human Rights.

All of the above sharply contrasts with the statements made by Barrick Gold in response to the questionnaire that was sent to it pursuant to this HRIA. Barrick Gold’s response was that it respects human rights in every area of its business and adheres to various international commitments and principles protecting human rights. In its responses, Barrick Gold said, among other things, that it makes significant efforts consistent with the highest standards of the industry, including the UN Guiding Principles on Business and Human Rights.380

In the case of the Pascua Lama project, the company’s practices in the stage prior to its approval and during its operation, and subsequent to the cessation of operations after receiving sanctions by the environmental authority, also sharply contrast with the policies and principles defined in its website, where Barrick Gold says the company not only adheres to human rights but also expresses its commitment to the rights of indigenous peoples.381 It should be noted that Barrick Gold is a member company of the International Council on Mining and Metals (ICMM), and therefore is required to uphold the commitment of the ICMM for mining and indigenous peoples, which includes the principle of free, prior, and informed consent by the people directly affected by its operations.382 This commitment would extend to consent for the Pascua Lama project, which the company never obtained from the CADHA, despite the mine’s direct impact on the community.

Goldcorp, owner of the El Morro mining project, which has not entered into operation yet, shows very similar shortcomings to those of Barrick Gold with respect to the human rights of the CADHA and to the lack of due diligence in actions taken to avoid the impact on those rights. In fact, as in the case of the Pascua Lama project, El Morro is located in an area of approximately 2,460 hectares, out of which 1,420 correspond to the territory of the CADHA legally registered in its name. This situation is one that the company is fully aware

380 Response of Barrick Gold to the questionnaire sent in the context of this study.
382 The position of the ICMM in relation to free, prior, and informed consent is to ensure respect for individual and collective rights and interests of indigenous peoples, as well as those of states, to make decisions on the use of resources (accepting that there may be a limited recognition of the rights of indigenous peoples in some countries). These commitments are described in ICMM, Indigenous Peoples and Mining Position Statement (2013), http://www.icmm.com/en-gb/publications/indigenous-peoples-and-mining-position-statement.
of, yet—ignoring the UN Guiding Principles applicable in this case—the company went ahead with its project in that territory.

The lack of due diligence of the company to identify and prevent the negative consequences of the project in this indigenous community is also clearly reflected in the project’s environmental impact study, which did not adequately consider the impacts the project would have on that community. As has been pointed out in this HRIA, this oversight involves a situation that was verified by the courts, which, in 2012, annulled the environmental approval of El Morro for violating constitutional guarantees of the right to equality before the law and the right to communal property of the CADHA. This annulment is in effect until a baseline study that takes into consideration the CADHA and its impacts—especially with regard to the community’s right to communal property and to the impact on members’ way of life and customs—is included in the environmental impact study.

Goldcorp’s lack of due diligence with respect for human rights is also seen in the El Morro project’s community consultation process. As noted, this process was challenged in 2014 by the courts because El Morro did not take the CADHA into consideration in its project. As in the case of Barrick Gold and the Pascua Lama project, Goldcorp did not hold dialogues with the community relating to the study of social impact, to the adoption of compensation measures for damages caused by the El Morro project, or to the profit-sharing method, as proposed by the UN Special Rapporteur in 2010.

It was in this context that Goldcorp also developed strategies aimed at co-opting and undermining the social fabric of the CADHA. Indeed, it paid compensation for environmental and sociocultural impacts of the El Morro project (Nueva Unión) to three livestock breeders (who were CADHA members), whom it recognized as the only ones affected by the project. As a result, Goldcorp created a serious conflict within the CADHA, a conflict that has put at risk even the membership of the community members who agreed to sign these compensation agreements with the company.

These actions, ultimately, have been instrumental in the closure of the project by the courts.

Like Barrick Gold, Goldcorp in Chile has not had effective mechanisms for complaint regarding the adverse impacts of its investment on human rights, as ordered by the UN Guiding Principles on Business and Human Rights.

As noted, in 2015, Goldcorp and Teck Resources, the latter company also based in Canada and owner of the Relincho project located 40 kilometers from El Morro, formalized an
agreement to merge the El Morro and Relincho projects into one, a project initially called Corredor, and presently called Nueva Unión.

Both companies have a formal commitment to human rights. This is expressed on their institutional websites, which state that their commitment extends to the fulfillment of the rights of indigenous peoples by making references to the ILO Convention 169 and, in the case of Teck Resources, to the UN Declaration on the Rights of Indigenous Peoples. Like Barrick Gold, Goldcorp is a member company of the International Council on Mining and Metals (ICMM) and therefore is bound to the same standards related to the rights of indigenous peoples, including respect for the right to free, prior, and informed consent by the people directly affected by its operations.

It should be noted that the commitment to human rights and particularly the rights of indigenous peoples was also expressed in Goldcorp’s response to the questionnaire sent to the company as part of this HRIA. In that response, in which Goldcorp referred almost exclusively to the Corredor project, Goldcorp said that the project would be “committed to an ongoing dialogue with the CADHA and other communities, and to improving past relationships, in order to build, together with communities, a current and future relationship that is participatory, inclusive, transparent, and associative.” Goldcorp adds that “the commitment of the Corredor Project, such as its owners Goldcorp and Teck, is to respect and comply with all human rights as expressed in the Universal Declaration of Human Rights, the UN Guiding Principles, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and Fundamental ILO Conventions.”

These statements contrast with the practices actually carried out to date by Goldcorp in the case of the El Morro project, as have been described in this HRIA. Although the statements made by both companies at the announcement of the merger of the mining projects are clear in their commitment to human rights, the trajectory of Goldcorp in the El Morro project casts doubts on these two companies’ ability to meet these commitments.


384 Goldcorp’s response to the questionnaire sent for this study.
## ANNEXES

### ANNEX 1.
INTERVIEWS WITH CHILEAN STATE SERVICES

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<td>ATTORNEY</td>
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<td>JAIME GARCIA</td>
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<td>ROSA SANCHEZ</td>
<td>CONSULTANT</td>
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<td>HUMAN RIGHTS DIRECTOR</td>
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<td>VERONICA SUBIA</td>
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<td>RODRIGO SAEZ</td>
<td>ENVIRONMENT AND INSPECTION UNIT</td>
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<td>PATRICIO LUENGO</td>
<td>RECORDS AGENT</td>
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<td>6</td>
<td>13/11/15 NATIONAL CORPORATION FOR INDIGENOUS DEVELOPMENT (CONADI), COPIAPO</td>
<td>CLAUDIO ARAYA</td>
<td>DIRECTOR, ATACAMA PROJECTS AND PROGRAMS</td>
</tr>
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<td>7</td>
<td>16/11/15 ENVIRONMENTAL ASSESSMENT SERVICE (SEA)</td>
<td>JUAN MOSCOSO</td>
<td>HEAD, LEGAL DIVISION</td>
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<td>ALVARO DURAN</td>
<td>ATTORNEY, LEGAL DIVISION</td>
</tr>
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<td>8</td>
<td>21/12/15 NATIONAL CORPORATION FOR INDIGENOUS DEVELOPMENT (CONADI), TEMUCO</td>
<td>ALEJANDRO NAVARRETE</td>
<td>DIRECTOR, ILO CONVENTION 169</td>
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<td>CRISTOBAL CARMONA</td>
<td>DIRECTOR, ENVIRONMENTAL UNIT</td>
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### ANNEX 2. INTERVIEWS WITH REPRESENTATIVES OF THE CANADIAN STATE

<table>
<thead>
<tr>
<th>DATE</th>
<th>GRANTED / NOT GRANTED</th>
<th>OFFICER’S NAME</th>
<th>POSITION</th>
<th>INSTITUTION</th>
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<tbody>
<tr>
<td>1</td>
<td>17/09/15</td>
<td>GRANTED</td>
<td>JEFFREY DAVIDSON</td>
<td>GOVERNMENTAL OFFICE OF CORPORATE SOCIAL RESPONSIBILITY FOR THE EXTRACTIVE SECTOR, OTTAWA, CANADA</td>
</tr>
<tr>
<td>2</td>
<td>11/15</td>
<td>NOT GRANTED</td>
<td>MARGOT EDWARDS</td>
<td>EMBASSY OF CANADA IN CHILE, SANTIAGO, CHILE</td>
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### ANNEX 3. INTERVIEWS WITH MINING COMPANY REPRESENTATIVES IN CHILE AND CANADA

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<th>DATE</th>
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<th>COMPANY</th>
<th>OFFICER’S NAME</th>
<th>POSITION</th>
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<tr>
<td>1</td>
<td>051115</td>
<td>GRANTED</td>
<td>GOLDCORP</td>
<td>EXECUTIVE DIRECTOR, FORMER EL MORRO MINING PROJECT, CHILE</td>
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<td>HORACIO BRUNA</td>
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<td></td>
<td>MAURICIO ALVAREZ</td>
<td>CORPORATE ATTORNEY, CHILE</td>
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<tr>
<td>2</td>
<td>NOT GRANTED</td>
<td>BARRICK</td>
<td>RENE MUGA ESCOBAR</td>
<td>EXECUTIVE DIRECTOR, PASCUA LAMA, CHILE</td>
</tr>
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<td>3</td>
<td>NOT GRANTED</td>
<td>TECK RESOURCES</td>
<td>MARCIA SMITH</td>
<td>SENIOR VP, SUSTAINABILITY AND EXTERNAL AFFAIRS, CANADA</td>
</tr>
<tr>
<td>4</td>
<td>NOT GRANTED</td>
<td>GOLDCORP</td>
<td>JERRY DANNI</td>
<td>SENIOR VP, SUSTAINABILITY, CANADA</td>
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<tr>
<td>5</td>
<td>NOT GRANTED</td>
<td>BARRICK GOLD</td>
<td>PETER SINCLAIR</td>
<td>CHIEF SUSTAINABILITY OFFICER, CANADA</td>
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