

COAL AND GOLD, HARD AND COLD:
USING TRADE AGREEMENTS TO RESOLVE HUMAN RIGHTS
VIOLATIONS IN THE CARIBBEAN COLOMBIA MINERAL
EXTRACTION INDUSTRY

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The obvious recipients of the bounty made possible by modern regional trade agreements (RTAs) are the transnational corporations (TNCs) whose markets these agreements expand and whose investments they protect. It is equally clear, however, that TNCs have escaped direct responsibility for compliance with the obligations undertaken in these agreements, leaving the action-forcing commitments to the signatory governments. Such an escape from quasi-signatory status is inconsistent with emerging international law.

In the fields of international criminal and human rights law, it “has long been recognized . . . that international law imposes duties and liabilities upon individuals as well as States.”¹ Moreover, in most RTAs corporations obtain rights particular to them, such as the right to challenge government actions before international arbitration tribunals for substantial interference with their investments, and, in the North American Free Trade Agreement (NAFTA), the right to challenge national signatories before international dispute settlement panels for breach of national dumping and subsidy laws. From such

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¹ Jordan J. Paust, *The Reality of Private Rights, Duties, and Participation in the International Legal Process*, 25 MICH. J. INT’L L. 1229, 1234 (2004).

direct rights may logically follow direct obligations. International scholars adjudge that no rule of international law prevents a treaty's provisions from being applied directly to corporations, without need of implementation by domestic law.²

Despite this longstanding inclusion of TNCs as rights holders in trade treaties, no RTA of which the author is aware holds TNCs liable for violation of the strong human rights protections in modern RTAs for workers, indigenous communities, and the environment. As a result, these central rights fall outside the usual due diligence that a TNC will perform in evaluating the costs and benefits of undertaking a project. Moreover, the proven dispute settlement systems in RTAs cannot be called into action to remediate or punish actions by TNCs that bank the benefits but avoid the costs of these agreements.

The Colombia-United States Trade Promotion Agreement (CTPA or Agreement) is an RTA that boasts such robust human rights protections. In this regard, we applaud the myriad substantial steps that Colombia's new Ministry of Labor has taken to implement its strengthened labor laws and to satisfy the CTPA's high standards for worker rights. New inspectors, investigators, and prosecutors have been hired and trained. Convictions have been obtained against perpetrators of union murders dating back 10 years and backlogs of crimes against unionists have been cleared.³ Colombia's agencies that strive for environmental protection and inclusion of indigenous communities in the economic growth of the country have raced forward with equally forceful actions.

Nonetheless, the enormity of the task and the scarcity of

² MARKOS KARAVIAS, CORPORATE OBLIGATIONS UNDER INTERNATIONAL LAW 2-3 (2013). Karavias believes that such inclusion, by creating a more credible deterrent, would result in greater compliance by TNCs with human rights obligations. *Id.* at 3.

³ OFFICE OF THE U.S. TRADE REPRESENTATIVE, *Recent Labor Rights Advances in Colombia*, (Oct. 2011), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2011/october/recent-labor-rights-advances-colombia>. Jail sentences have been meted out not only for criminal actions against union leaders, but even for a café chain executive who ignored a court order to rehire workers fired for organizing a union. *Id.*

resources practically guarantee that Colombia's efforts to implement the Agreement's protections of worker and indigenous rights and the environment will be insufficiently robust to ensure compliance by TNCs. While the TNCs are bound by the laws of the host government, enforcement of these laws is prohibitively expensive for emerging market governments with limited resources. Colombia has taken substantial action to strengthen its labor and other laws to satisfy the CTPA's high standards for protecting workers, indigenous communities, and the environment. However, we believe that only by creating a system to bind TNCs directly to the RTA's human rights obligations, and using the CTPA's many astute processes to assist in enforcement of this system, will we realize the Agreement's intent to protect trade-related human rights.

We have identified three options to secure this result: amendment of the RTA to make its human rights provisions directly applicable to TNCs; application to TNCs in Colombia's mining industry of the U.N. Guiding Principles for Business and Human Rights;⁴ and Colombia's issuance of a special annex to its mineral extraction licenses. Our analysis indicates that the first option is politically impractical, especially so soon after entry into force of the Agreement, and that the second option relies injudiciously on the TNC's sense of corporate social responsibility.

We conclude that compliance with the CTPA's human rights protections will improve substantially only if the Ministry of Mines requires that licenses for TNC projects in Caribbean Colombia's mineral extraction industry include a Human Rights Annex that brings the TNC directly into preventive and remedial enforcement in a cooperative effort with Colombian authorities. The TNC's contribution would include establishment and funding of non-judicial grievance, mediation, and binding arbitration mechanisms to complement the additional inspectors and the strengthened criminal laws that are key elements of the Colombian government's response to the CTPA's protections.

⁴ U.N. Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/17/31/Add. 3 (Mar. 21, 2011).

I. Colombia's Rich Diversity in People and Natural Resources

Colombia is one of the most ecologically diverse countries in the world. The great variety of minerals renders the country attractive for foreign and local companies seeking to invest. Among these minerals are gold, oil, coal, iron, and nickel. Coal, nickel, and gold are the principal extractive minerals in Caribbean Colombia. The Caribbean region, with its unique cultural and ecological diversity, contributes 15 percent of Colombia's GDP and mining contributes about 14 percent of the region's economic activity.⁵

Mining has rapidly grown in the last 20 years, to the extent that by the year 2010, 40 percent of Colombian territory was covered by more than 20 coal extraction projects.⁶ Colombia is presently the largest coal producer in Latin America and the tenth-largest producer worldwide.⁷ In pursuit of the Government's designation of mineral extraction as a driving force of development, Colombia has signed commercial agreements with several countries and regions, including the United States and the European Union, to encourage international exchange of goods and services. Many countries find in Colombia opportunity to invest, especially in the exploitation of natural resources that cannot easily be found elsewhere.

II. Human Rights Concerns of Workers in the Caribbean Colombia Mineral Extraction Industry

With respect to workers, Colombia faces three major labor rights issues in the mineral extractive sector. First is the substantial violence against trade unionists, including homicides, death threats, arbitrary detentions, and kidnappings. The second is an unenviable record of health and safety problems. Finally, there is a weak system

⁵ TATIANA RODRIGUEZ & DANILO URREA, CENSAT AGUA VIVA-AMIGOS DE LA TIERRA COLOMBIA, AGUA O MINERÍA, UN DEBATE NACIONAL 4 (2011).

⁶ OFFICE OF THE U.S. TRADE REPRESENTATIVE., *supra* note 3, at 15.

⁷ María Teresa Ronderos, *La Fiebre Minera Se Apoderó de Colombia*, SEMANA (Colom.), Sept. 6, 2011.

for enforcing the worker protections that exist.⁸

Colombia once claimed the strongest labor unions in Latin America, a record that was brutally reversed beginning in the late 1980s. At this time Colombia earned the reputation as the most dangerous place on earth for a union organizer, with 4,000 union members killed and tens of thousands injured over the next 20 years. Although union violence has decreased under the last two presidents, there was little surprise when Colombia and the United States signed the CTPA that gaining the approval of the U.S. Congress would require strengthening the labor provisions of the Agreement.⁹

In addition to commitments to adopt laws implementing the International Labor Organization's Declaration on Fundamental Principles and Rights at Work, the two parties signed a Labor Rights Action Plan that included specific steps with tight time deadlines for improving Colombia's record on the treatment of labor leaders.¹⁰ With on-site assistance from the ILO, the new Labor Ministry has overseen tightening of the criminal code to punish labor rights violators, hiring of additional labor inspectors, and public education.

The health and safety of mine workers also are at risk. Coal mining always has been one of the most dangerous industries, even in developed countries, Miners are at risk of serious injury and death from unsafe working conditions or fatal diseases (such as black lung and silicosis); as many as two coal-mining accidents every day.¹¹ In addition to these risks common to miners everywhere, coal miners in Colombia face additional risks, including terrorist attacks and kidnappings from paramilitary forces and guerillas that are the

⁸ M. ANGELES VILLARREAL, CONG. RES. SERV., U.S.-COLOMBIA FREE TRADE AGREEMENT: BACKGROUND AND ISSUES 1, (Feb. 14, 2014), *available at* <http://www.fas.org/sgp/crs/row/RL34470.pdf> (last accessed Aug. 5, 2015).

⁹ *Id.* at 8.

¹⁰ Office of the United States Trade Representative, *Colombian Action Plan Related to Labor Rights*, (Apr. 7, 2011), <https://ustr.gov/sites/default/files/uploads/agreements/morocco/pdfs/Colombian%20Action%20Plan%20Related%20to%20Labor%20Rights.pdf>.

¹¹ Helda Martinez, *Colombia: Coal Mine Accidents Underreported to Protect Livelihoods*, INTER PRESS SERV., Mar. 19, 2007, <http://www.ipsnews.net/2007/03/colombia-coal-mine-accidents-underreported-to-protect-livelihoods/>.

legacy of the FARC rebellion.¹² Unfortunately, Colombia has not signed the International Labor Organization (ILO) treaty most relevant to safety and health in mines.¹³

III. Mining's Intersections with Colombia's Ethnic Cultures

Colombia has more than 80 indigenous communities whose lands and streams not only have traditional and spiritual meaning, but also are essential elements of life. These indispensable aspects of their identity are protected rights under Article 2 of the UN Declaration on the Rights of Indigenous Peoples.¹⁴ However, many of these communities have suffered loss of lands, displacement, labor abuses, and health issues because of the mining industry.

The most promising lands for exploitation usually are within the territory of one or more of these communities. However, the government nonetheless offers these territories to be exploited by the major international mining companies.¹⁵ The indigenous peoples often are forced to abandon their lands. When drilling commences, the mountains are broken up and the minerals are extracted from the surface. After years of exploitation, the mine is abandoned. The area is neither cleaned up nor does it receive treatment to help the surface to recover.¹⁶ As a result of this debacle of a process, the damage to

¹² JAMES BRITAIN, *REVOLUTIONARY SOCIAL CHANGE IN COLOMBIA: THE ORIGIN AND DIRECTION OF THE FARC-EP 95-97* (2010). *See also* OPEN REVOLT!, *The Real FARC-EP: Inside and Out*, Nov. 16, 2011, <http://openrevolt.info/2011/11/16/the-real-farc/>.

¹³ INT'L LAB. ORG., *SAFETY AND HEALTH IN OPENCAST MINES*, 1991, available at http://www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/@safework/documents/normativeinstrument/wcms_107828.pdf

¹⁴ U.N. General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, adopted Oct. 2, 2007, available at <http://www.refworld.org/docid/471355a82.html> (last accessed July 12, 2015).

¹⁵ These actions contradict Articles 63 and 329 of the Colombian Constitution which state that the land of the indigenous population is not subject to prescription or seizure. CONSTITUCIÓN POLÍTICA DE COLOMBIA, arts. 63 & 329.

¹⁶ HUMAN RIGHTS EVERYWHERE, *ANALYSIS OF MINING IN INDIGENOUS TERRITORIES IN COLOMBIA*, 1, 3 (June 2011), http://www.fta-eu-latinamerica.org/wp-content/uploads/2011/08/Analysis-of-mining_TP2-1.pdf.

the land causes issues for decades. Many toxic chemicals will remain for generations.¹⁷ In addition, the infrastructure is not removed and stays on the land, further contaminating the environment.

Despite the promise of Colombian law to consult with indigenous communities and take account of their advice,¹⁸ sacred sites continue to be violated, tribes continue to be displaced, community lands are fragmented with forced re-housing, and the political and cultural structure of indigenous peoples is devastated.

IV. Environmental Impacts of Mineral Extraction

Mining in general, and the opencast—as opposed to underground— mining practiced in Colombia in particular, greatly affect the environment. Soil erosion, noise and water pollution, deforestation, wildlife displacement, diversion and sometimes elimination of rivers, and dust pollution are some of the effects of opencast mining.¹⁹

Pyrite and other sulphurous residues of the process react with air and water to create mercury that pollutes surface and ground waters, in turn distressing wildlife, agriculture, and of course human health.²⁰ The transportation and exportation of coal in open containers creates coal dust that causes air pollution and covers buildings, plants, beaches, and streets in a sticky black film that does not deteriorate.

Actions by the owners of El Cerrejón mine provide an example of a positive social responsibility policy that includes reforestation, investment in sustainable development research, preservation of animal and plant life, water and air preservation, and

¹⁷ *Id.*

¹⁸ CONSTITUCIÓN POLÍTICA DE COLOMBIA, art. 330.

¹⁹ WORLD COAL ASSOCIATION, *Coal Mining and the Environment*, <http://www.worldcoal.org/coal-the-environment/coal-mining-the-environment/> (last accessed May 30, 2015). The exploitation of only three mines (La Guajira, La Loma, and El Descanso, all in the Cesar department) requires the use of more than 120,000 hectares of land.

²⁰ *Id.*

creation of awareness among the affected communities. The company has received national and international awards recognizing its performance implementing environmental policies.²¹ Nevertheless, it has been impossible to mitigate the environmental impact in its totality. Some animals may never be able to relocate, rivers may never recover, gases are still being released to the atmosphere, and the water cycle is still being altered.

V. *Protections of the Colombia-US Trade Promotion Agreement*

The labor chapter of the CTPA requires that each Party “shall not fail to effectively enforce its labor laws . . . through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties.”²² The labor laws subject to this obligation are those directly related to the five worker rights protected by the ILO’s Declaration of Rights and Principles at Work: “freedom of association; effective recognition of the right to collective bargaining; elimination of all forms of compulsory or forced labor; effective abolition of child labor and . . . a prohibition of the worst forms of child labor; and elimination of discrimination in respect of employment and occupation.”²³ The Agreement makes two significant additions to the Work Declaration in its requirement of effective enforcement: “acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health;” and, in addition to the specified child labor prescriptions, “other labor protections for children and minors.”²⁴

The Environment Chapter does not establish specific rules

²¹ EL CERREJÓN, *Nuestra Empresa*, <http://www.cerrejon.com/site/nuestra-empresa.aspx> (last accessed Aug. 2, 2015).

²² Trade Promotion Agreement, U.S.-Col., Sept. 21, 2006, art. 17.3, available at https://ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file993_10146.pdf.

²³ Int’l Labour Organization, *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*, June 18, 1988, available at <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>.

²⁴ Trade Promotion Agreement, *supra* note 22, at arts. 17.2.1, 17.3.1(a) & 17.8.

and regulations determining what environmental standards the Parties must adopt. However, it does compel Parties to have high standards of environmental protection that should not only be maintained but increased over time. Parties have the right to create their own environmental policies according to their priorities, but these policies and priorities must be guided by the sustainable development concept.²⁵

The environment chapter commits the parties to the conservation and sustainable use of biological diversity because of its importance in realizing sustainable development. The section continues with acknowledgement of a critical connection of biological diversity with indigenous communities:

The Parties recognize the importance of respecting and preserving traditional knowledge and practices of indigenous and other communities that contribute to the conservation and sustainable use of biological diversity.²⁶

This provision makes preservation of indigenous cultures a critical aspect of preservation of biological diversity.

VI. Options for Direct Enforcement against TNCs

As noted, amendment of the CTPA so soon after its entry into force is a non-starter. Even NAFTA, which celebrated its 20th anniversary last year and is widely acknowledged to need serious revision to account for today's issues, likely, has its best chance of revitalization in the Trans-Pacific Partnership.²⁷ With its twelve potential Parties, any revision would strike only a glancing blow to NAFTA's shortcomings.

A second option, use of the UN's Guiding Principles on Business and Human Rights anticipates that, under the under the

²⁵ *Id.* at ch. 18.

²⁶ *Id.* at art. 18.11.1-3.

²⁷ Jim Kuhnen, *Obama in Mexico to Meet with N. American Leaders*, WASHINGTON EXAMINER, Feb. 19, 2014, http://www.washingtonexaminer.com/obama-in-mexico-to-meet-with-n.-american-leaders/article/feed/2119358?custom_click=rss.

Protect, Respect, and Remedy framework of the Guiding Principles,²⁸ States will shoulder the legal obligation under human rights treaties to protect their citizens from infringements by businesses, businesses will take on the responsibility to respect human rights by not violating HRs either directly or indirectly through their suppliers, and both states and businesses will contribute to greater access to effective remedies for human rights violations.

The precatory nature of the Guiding Principles makes them inadequate to bring TNCs into a binding relationship with the CTPA's human rights protections, although the third option, below, is entirely consistent with the document's division of responsibilities.

The third approach is to require the TNC wishing to do business in Colombia²⁹ to include the CTPA's human rights protections as conditions to its license to operate the mineral extraction project. Because the CTPA's human rights protections are written for the governments which they bind, a Human Rights Annex to the project license would be appropriate to address worker, indigenous, and environmental protections keyed to a transnational investor in the particular mineral extraction project.

The Human Rights Annex to the project license would address the unique circumstances surrounding, for example, a gold mine in coastal Colombia or a coal mine in the Magdalena River Valley. The Annex must put emphasis on the detailed needs of the vulnerable entities at risk for that project, whether they are a local indigenous community or an especially sensitive environmental need, or both. In any event, the Annex must address the human rights protections for company workers in the exploration, development, and operational phases of the project, including transportation. This approach will be stricter than presently anticipated by Colombian law for environmental licensing, which does not pertain until the

²⁸ U.N. Human Rights Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HR/C/8/5 (Apr. 7, 2008).

²⁹ Because these obligations flow from the CTPA's human rights protections, the Human Rights Annexes addressed here would apply only to foreign direct investors in Colombia, not to businesses wholly-owned by Colombian entities.

exploitation phases begin.³⁰

Although the Human Rights Annex would encompass obligations new to project licenses, enforcement of its provisions would be fully consistent with the obligations undertaken by the Parties in the CTPA. The Annex will apply these obligations directly to the private companies benefiting from the CTPA and will operate independently of the laws and regulations that Colombian government entities have promulgated in pursuit of their obligations under the trade agreement. What may appear to be duplicate enforcement mechanisms will, in fact, be unequivocally complementary and, because the rationale for the Human Rights Annex is to impose obligations on foreign investors generally proportionate to their benefits from the CTPA, funding and partial enforcement by the TNCs of these requirements is justified.

Because the Colombian government's obligations under the CTPA will parallel those of the TNCs under the Human Rights Annex, the 480 new inspectors Colombia will hire under the Labor Action Plan³¹ appropriately may be assigned to ensure compliance with the Annex. The TNC itself will be required by the Annex to employ its own internal inspectors to achieve self-enforcement and to fund additional inspectors by the new Ministry of Labor that prove necessary if the TNC's internal compliance measures are inadequate.

Investigations initiated by the TNC's or the Ministry's inspectors should lead to an increasingly formal series of remedies. As anticipated both by the UN Guiding Principles and the ICMM's Good Practice Guide,³² the first step would be a non-judicial

³⁰ D. 2820, 2010, DIARIO OFICIAL [D.O.] (Colom.). See also Frederick Felder, *Why Colombia's Mining Law Hasn't Lived Up to Its Promise*, MINING MARKETS, Aug. 8, 2006, <http://www.miningmarkets.ca/news/why-colombias-mining-sector-hasnt-lived-up-to-its-promise/1003191917/?&er=NA> (last accessed July 12, 2015).

³¹ Colombian Action Plan Related to Labor Rights 1, Apr. 7, 2011, available at <https://ustr.gov/sites/default/files/uploads/agreements/morocco/pdfs/Colombian%20Action%20Plan%20Related%20to%20Labor%20Rights.pdf> (last accessed July 12, 2015).

³² U.N. Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. HR/PUB/11/04 (2011), available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (last accessed July

grievance mechanism, funded entirely by the TNC. Because most violations will be minor, this stage should resolve most reports of potential violation.

The next level of remedy would be the hiring of a neutral mediator to propose solutions to the company and the grievant. If mediation fails, binding arbitration would be conducted by arbitrators appointed under Colombia's Arbitration Law.³³ The tribunal could award damages and would recommend measures to prevent a recurrence of the violation.

A more extensive parallel to the CTPA would involve use of the dispute settlement provisions of the Agreement itself, although these provisions would be available only if the alleged violation by the TNC implicated a government agent, such as a mining inspector or agency. The Parties should engage their attorneys to interpret the CTPA's provisions and customary international law to support significant use of the powerful dispute settlement mechanisms of the Agreement. This step will measurably increase the effectiveness of the envisioned enforcement system.

Criminal penalties should be available for the most heinous violations of the Agreement's provisions, including abuses resulting in serious injury or death, or a persistent pattern of serious violations by the particular TNC. These penalties would be sought under the existing Colombian penal code or through appropriate amendment of the code by the Colombian Congress.

VII. Final Thoughts

The present system of relying entirely on Colombian law and government enforcement to protect mining workers, affected indigenous communities, and the air, land, and water of Caribbean Colombia from the proven harm from mineral extraction is in my view patently inadequate. Although the Colombian government has

9, 2015); INT'L COUNCIL ON MINING & METALS, GOOD PRACTICE GUIDE: INDIGENOUS PEOPLES AND MINING (2010), available at <https://www.icmm.com/document/1221>(last accessed July 9, 2015).

³³ L. 1563/12, julio 12, 2012, DIARIO OFICIAL [D.O.] (Colom.).

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worked major improvements in enforcement of its human rights commitments made in the CTPA, the distance such enforcement still must travel to reach an acceptable level is substantial, given the terrible situation that existed prior to the Agreement.

Consistent with my experience as part of the U.S. government's trade negotiating machinery for many years, staffing to ensure that the thousands of commitments made in the dozens of previously-concluded trade agreements is woefully inadequate, and the priority for doing so is extremely low. The Office of the U.S. Trade Representative and its colleagues in the federal agencies are trained and motivated primarily in the negotiation of new trade agreements. In recent years, the agencies have established offices dedicated solely to enforcement of past agreements, but the staffing of these offices is as yet inadequate to address any but the highest priority issues.

As to labor rights, the United States has filed only one dispute settlement case,³⁴ even though the human rights of workers has been addressed in U.S. regional trade agreements since NAFTA began in 1994. Against this background, the pro-active approach of charging the TNCs who commit the violations with a direct enforcement role is understandable. Nothing less will even marginally raise the unacceptable level of human rights violations that TNCs continue to commit with near impunity.

³⁴ Office of United States Trade Representative, *CAFTA-DR Dispute Settlement Proceeding Regarding Guatemala's Failure to Effectively Enforce Its Labor Laws*, 80 Fed. Reg. 4027 (Jan. 26, 2015), available at <https://federalregister.gov/a/2015-01329> (last accessed July 12, 2015).