

# NO RECOURSE: TRANSNATIONAL CORPORATIONS AND THE PROTECTION OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN BOLIVIA

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## INTRODUCTION

On October 17, 2003, after a month of protests throughout the country and as many as eighty people killed in confrontations between protestors and the military, Bolivian President Gonzalo Sanchez de Lozada resigned. Although triggered by the approaching consummation of a deal to export gas through Chile, the protests had been building for many months, even years, as Bolivians became increasingly disenchanted with nearly two decades of neoliberal economic policies that appeared to do little to help the country's poor and marginalized majorities. Indeed, starting in the mid-1980s, Bolivia embarked on a process of economic reform that has been described as "the most textbook application of neo-liberalism yet to appear in the Americas."<sup>1</sup> Following the prescriptions of international financial institutions ("IFIs") such as the World Bank and International Monetary Fund, Bolivia opened its markets to foreign products, privatized many State-owned enterprises, and took strong measures to attract foreign investors, among other reforms.<sup>2</sup> Al-

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1. See KEVIN HEALY, LLAMAS, WEAVINGS AND ORGANIC CHOCOLATE: MULTICULTURAL GRASSROOTS DEVELOPMENT IN THE ANDES AND AMAZON OF BOLIVIA 51 (2001).

2. See generally Juan Antonio Morales, *Economic Vulnerability in Bolivia*, in TOWARDS DEMOCRATIC VIABILITY 41, 49-50 (John Crabtree & Laurence Whitehead eds., 2001). As described by Herbert Klein, the initial reasons for Bolivia's adoption of economic liberalism and rejection of the State capitalism that had predominated until the 1980s are twofold:

First was the impact of hyper-inflation for the second time in modern Bolivian history, a crisis that virtually destroyed the functioning of the national economy; and second the total collapse of the expensive State mining system which had been constructed on the basis of a tin industry which was rapidly going out of existence. These two irreducible events . . . meant that a radical solution had to be adopted. With the help of external experts, [President] Paz

though these measures initially stabilized Bolivia's economy and controlled rampant inflation,<sup>3</sup> poverty rates in Bolivia have not decreased since 1997,<sup>4</sup> and many Bolivians complain that foreign investment and free trade have brought more problems than they have solved.<sup>5</sup>

The assumption by transnational corporations ("TNCs") of functions previously performed by the State has been a particularly contentious topic. Over the past decade, TNCs have taken on a much larger and more visible role in the country, conducting oil and gas exploration and distribution, managing public utilities, and employing large numbers of citizens. IFIs and the Bolivian government intended that the entry of TNCs bring much needed capital and expertise to Bolivia, thereby contributing to the country's economic development. TNCs have nevertheless become the focus of much anger and frustration among Bolivians, many of whom assert that these companies are mistreating, stealing from, or taking advantage of them. Indeed, in some cases, Bolivians have accused TNCs of human rights violations. Not surprisingly, therefore, TNCs and government actions supporting them have become the subject of popular protest.

This Report analyzes two cases in which TNC activities have had an impact on Bolivian citizens' enjoyment of economic, social, and cultural rights ("ESC rights"). In so doing, it analyzes not only corporate conduct but also the Bolivian government's role in protecting ESC rights from violation. The cases involve an oil spill by Transredes, a TNC partly owned by Enron and Shell, in Bolivia's Desaguadero River, which affected over one hundred indigenous communities; and the water war that took place in the city of Cochabamba over the privatization of Cocha-

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Estenssoro in a matter of a few months carried out a classical orthodox economic shock the likes of which were a textbook model of conservative economic policy.

HERBERT KLEIN, *BOLIVIA: THE EVOLUTION OF A MULTI-ETHNIC SOCIETY* 275 (2d ed. 1992).

3. See Morales, *supra* note 2, at 49-50.

4. See Economic Commission for Latin America and the Caribbean, *Panorama Social de América Latina 2002-2003*, available at [http://www.eclac.org/publicaciones/DesarrolloSocial/9/LCG2209PE/PSE\\_2003\\_Sintesis.pdf](http://www.eclac.org/publicaciones/DesarrolloSocial/9/LCG2209PE/PSE_2003_Sintesis.pdf) (last visited Feb. 10, 2004).

5. See, e.g., Interview with Father Gregorio Iriarte, in Bolivia (May 21, 2003) (criticizing the Free Trade Area of the Americas, and arguing that economic liberalism has deepened the economic divide between rich and poor in Bolivia and worldwide).

bamba's water system and its operation by the consortium Aguas del Tunari, partly owned by Bechtel.

Although the Report highlights a number of ESC rights violated by the corporate actors or by the State, we argue that the central problem raised by both cases is Bolivia's failure to develop effective procedures to prevent and remedy violations of ESC rights by TNCs. Put differently, the core problem involves Bolivia's failure to guarantee the procedural rights that are necessary for the effective protection of substantive ESC rights. This observation has important implications not only for Bolivia but also for international institutions and monitoring bodies. Although these bodies have paid increasing attention to the issues of ESC rights and TNC responsibility for human rights violations, they have focused relatively little attention on the problem of how States should protect ESC rights from violation by TNCs. On one hand, in the area of TNC responsibility, most recent work has emphasized the development of international rather than domestic norms and enforcement mechanisms. This is true despite the obligation of State parties to protect ESC rights against interference by private parties. On the other hand, although significant progress has occurred in defining and elaborating ESC norms, the role of the State in enforcing these rights against third parties, including TNCs, has too often been ignored. This Report therefore attempts to address a gap in international human rights law by suggesting ways in which international human rights institutions and monitoring bodies can encourage States to develop and improve domestic processes for the protection of ESC rights against TNCs.

We wish to emphasize that this Report does not aim to answer the large questions of economic policy with which Bolivians are currently wrestling. We have not analyzed the potential benefits that foreign direct investment and TNCs can bring to poor countries, and are consequently not in a position to weigh such benefits against the particular costs that are described herein. As a result, this Report should not be used to justify any particular view regarding such investment or Bolivia's economic relationship to the rest of the world. This Report does offer a cautionary tale about the dangers that poorly regulated, unchecked, TNC activity can pose to human rights. Assuming that TNCs continue operating in Bolivia, we hope that the Bolivian govern-

ment will follow our recommendations regarding the development of procedures to protect ESC rights from TNC activity.

This Report represents the culmination of a year-long project undertaken by the Joseph R. Crowley Program in International Human Rights at Fordham Law School. The Fordham delegation was led by Professor Tracy Higgins, co-director of the Crowley Program, and Maria McFarland, the 2002-2003 Crowley Fellow. The delegation included Fordham Law Professor Rachel Vorspan; Marcela Llanque Vargas, Vice-President of the Permanent Assembly of Human Rights of Bolivia's La Paz office; and the seven Fordham Law School students selected as 2002-2003 Crowley Scholars, Leena Khandwala, Margarita Melikjanian, Danitra Oliver, Marny Requa, Seema Saiffee, Nycole Thompson, and Christina Wilson.<sup>6</sup> Following the practice established in previous missions, the Crowley delegation participated in an intense program of study throughout the academic year preceding the mission.<sup>7</sup> This program included a seminar specifically addressing the issues of Bolivian history, law, and society; corporate social responsibility for human rights violations; and international law on economic, social, and cultural rights.

The delegation spent two weeks in Bolivia, from May 18 to May 31, 2003, conducting interviews and collecting documentation in the cities of Cochabamba, Oruro, and La Paz, as well as eleven isolated communities along the Desaguadero River. During this period, the delegation met with a broad range of individuals: Bolivian citizens affected by the water wars and oil spill, political activists, lawyers, academics, representatives of non-governmental organizations ("NGOs"), political analysts, local and national government officials, including legislators and repre-

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6. We were also fortunate to enjoy the company and assistance of two interns: Hannah Grey and Jessica Purcell. The analysis and recommendations contained in this Report are those of the authors and do not necessarily reflect the views of other delegation members, or of the Permanent Assembly of Human Rights of Bolivia.

7. See Crowley Program in Int'l Human Rights & Lawyers Committee for Human Rights, *Justice on Trial: State Security Court, Police Impunity, and the Intimidation of Human Rights Defenders in Turkey*, 22 FORDHAM INT'L L.J. 2129 (1999); Crowley Program in Int'l Human Rights, *One Country, Two Legal Systems*, 23 FORDHAM INT'L L.J. 1 (1999); Crowley Program in Int'l Human Rights & Centro de Derechos Humanos Miguel Agustín Pro Juárez, *Presumed Guilty?: Criminal Justice and Human Rights In Mexico*, 24 FORDHAM INT'L L.J. 801 (2001); Jeanmarie Fenrich & Tracy E. Higgins, *Promise Unfulfilled: Law, Culture and Women's Inheritance Rights in Ghana, Report of the Joseph R. Crowley Program in International Human Rights*, 25 FORDHAM INT'L L.J. 259 (2001); Nicole Fritz & Martin Flaherty, *Unjust Order: Malaysia's Internal Security Act*, 26 FORDHAM INT'L L.J. 1345 (2003).

sentatives of various Ministries and Superintendencies, and corporate officials from both Transredes and Aguas del Tunari.<sup>8</sup> Additional interviews were subsequently conducted in Washington, D.C. in August 2003.

The first section of this Report provides background information on the issue of TNC violations of ESC rights, and describes the international legal framework within which we are working. Sections II and III deal with the oil spill and water war cases respectively. These sections document the salient facts of each case, analyze them under international human rights law, describing both the TNCs' and the Bolivian government's responsibilities for alleged violations, and present recommendations to the Bolivian State and TNCs. In both cases, we find violations of ESC rights, such as the rights to water and health, environmental rights, and indigenous peoples' rights. However, as previously noted, we find that the most significant rights violations were committed by the Bolivian State in its failure to create or implement procedures for the protection and enforcement of substantive ESC rights. Finally, Section IV offers general observations and recommendations to international institutions and monitoring bodies regarding the protection of ESC rights from violation by TNCs.

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8. The Crowley Program wishes to thank everyone who met with our delegation and who gave their time, assistance, and documentation. We are especially indebted to the Permanent Assembly for Human Rights in Bolivia, which assisted and advised us in the scheduling of interviews, and to Marcela Llanque Vargas, who was a full member of our delegation and whose perspective as a Bolivian lawyer and human rights activist greatly enriched our understanding of the country and the cases. We would also like to thank the many local guides and NGO representatives in Oruro who assisted us in reaching the affected communities surrounding the Desaguadero, as well as Lee Cridland and Javier Molina of Voluntarios Bolivia for their logistical assistance, and our excellent translators Angelica Fernandez, Amparo Burgos, Gabriela Yañez, Pedro Rojas, Roman Crespo, and Daniel Qotari.

We are grateful to the many individuals who advised us before the mission, including in particular Professors Cynthia Williams and Chantal Thomas, both of whom were unfortunately unable to join us on the ground, but whose thoughts influenced our planning. Finally, we wish to emphasize our gratitude to the individuals in communities along the Desaguadero River who in many cases went to a great deal of trouble and expense to talk with us and provide us with copies of documentation regarding their situation. The stories and opinions they shared with us were invaluable to our understanding of the oil spill, and essential to this Report.

I. TRANSNATIONAL CORPORATIONS AND ECONOMIC,  
SOCIAL, AND CULTURAL RIGHTS: BACKGROUND  
AND APPLICABLE LAW

This Section first provides a brief description of the impact of TNC activity on economic, social, and cultural rights, explaining the obstacles to effective national protection and enforcement of ESC rights against TNCs. It then offers an overview of international law on economic, social, and cultural rights, and international law governing corporate responsibility with respect to human rights.

A. *The Impact of TNC Activities on ESC Rights*

In recent decades, TNCs have become increasingly important actors in developing countries, expanding their activities throughout the world and, in some cases, assuming functions that had been performed by the public sector. Along with this change in TNCs' functions and profile, TNCs' ability to affect human rights has also increased. To be sure, TNCs' presence may have an overall positive effect on human rights in a given country;<sup>9</sup> however, TNCs are also capable of committing large-scale human rights abuses and supporting governments in the commission of such abuses. And TNCs are now regularly accused of human rights violations, particularly violations of citizens' ESC rights. For example, TNCs engaged in natural resource exploitation are frequently accused of affecting people's enjoyment of a healthy environment or the rights of indigenous peoples,<sup>10</sup> and TNCs who employ local laborers in countries with weak labor protections are often criticized for failing to respect workers' rights.<sup>11</sup> At the same time, governments in developing countries are poorly positioned to prevent or punish human rights violations by TNCs, particularly violations of ESC rights. Indeed, governments are often facilitators or collaborators in the violations. This is true for several reasons. First, the domestic laws, contracts, and rules regulating TNCs are often shaped

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9. Some scholars have argued that overall increased foreign direct investment and transnational corporations ("TNC") activity in any given country has positive effects on human rights. See, e.g., William H. Meyer, *Human Rights and MNCs: Theory Versus Quantitative Analysis*, 18 HUM. RTS. Q. 368 (1996).

10. See, e.g., *Jota v. Texaco*, 157 F.3d 153, 155 (2d Cir. 1998).

11. See generally Clean Clothes Campaign, at <http://www.cleanclothes.org/> (last visited Feb. 11, 2004).

by countries' desire to attract investment, and may reflect pressure from multinational institutions or TNCs themselves.<sup>12</sup> The water war case discussed in this Report presents an example of a contract and law that provided inadequate protections for citizens' water rights because of real or perceived pressures on the government to attract investment. Second, due to their fear of losing foreign investment, governments are often unwilling to enforce fully their laws and regulations against TNCs. Government officials face pressure from both foreign governments and TNCs themselves to treat investors favorably. In the oil spill case, discussed in the next section, the former Vice-Minister for the Environment reported that Transredes repeatedly pressured her through her acquaintances and relatives to treat the company favorably.<sup>13</sup> She and another official told us that visits from representatives from the U.S. Embassy to the Vice-Ministry for Environment added to this pressure.<sup>14</sup>

Third, a power imbalance between TNCs and the ordinary citizens who are affected by TNC activities may prevent adequate

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12. See Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 738-39 (2002).

It is well known that companies in the United States are actively involved in lobbying both Congress and administrative agencies in the United States to protect and advance their regulatory interests . . . . An analogous process occurs internationally as well, with companies negotiating with host countries about taxes, subsidies, rule of law issues, wages, and other parameters prior to investing — including negotiations to forestall enhanced labor protection as a condition of investment. Moreover, some important economic intermediaries such as the World Bank also engage in similar discussions, with a goal of protecting investors from enhanced host-country labor protections as part of a complex of conditions for lending. For their part, countries recognize that they are competing for foreign investment; and this competition can shape and constrain domestic regulation. The major implication of these international discussions for corporate social responsibility issues is that the 'rules of the game' are not always neutral arbiters of the public good, according to which corporate enterprise can confidently act. Rather, in significant instances those rules have been shaped by transnational enterprises' interests or even presumed interests.

*Id.*

13. See Telephone Interview with Neisa Roca, Former Vice-Minister for the Environment, in Bolivia (May 27, 2003) [hereinafter Neisa Roca Telephone Interview].

14. According to Patricia Garcia, representatives from the embassies of the United States and United Kingdom (and possibly the Netherlands) visited the Vice-Ministry after the oil spill to urge the Vice-Ministry to take into account the importance of Transredes's investment in Bolivia in making decisions about the spill. See Interview with Patricia Garcia, Legal Advisor to Ministry of Sustainable Development, in Bolivia (May 28, 2003) [hereinafter Interview with Patricia Garcia].

enforcement of national laws and regulations for protection of ESC rights. Often, the people whose rights are affected by TNC activities belong to vulnerable populations, lacking both knowledge about their rights and the resources to defend them. The relationship between Transredes and the communities along the Desaguadero River who were affected by the oil spill provides a typical example of this power imbalance and its consequences.

Finally, secrecy is often emphasized in dealings between governments and TNCs. In some cases, this is the result of outright corruption, government officials taking bribes from TNCs or otherwise making bad decisions for their personal benefit.<sup>15</sup> In other cases, TNCs themselves demand that negotiations be conducted behind closed doors, as may have occurred in the case of the water wars.<sup>16</sup> In addition, if government officials are sacrificing ESC rights in negotiations with TNCs, or otherwise making trade-offs that are likely to be unpopular, they are likely to hide this decision-making process from the public. In the water war case, several factors appear to have motivated the secrecy of the negotiations, but among them was the fact that the government feared that the public would object to specific provisions of the contract and new law.

Given these obstacles to domestic protection and enforcement of ESC rights against TNCs, one might reasonably ask whether international enforcement of human rights law might be more effective at responding to TNC violations of ESC rights. This Report endeavors to answer this question. By way of background, the next subsections provide an overview of the two main areas of international law relevant to TNC violations of ESC rights.

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15. In commenting on Transparency International's 2002 Bribe Payers' Index, Transparency International Chairman Peter Eigen stated:

The laws are not being properly enforced. Our new survey leaves no doubt that large numbers of multinational corporations from the richest nations are pursuing a criminal course to win contracts in the leading emerging market economies of the world . . . . The governments of the richest nations continue to fail to recognize the rampant undermining of fair global trade by bribe-paying multinational enterprises.

Press Release on the Bribe Payers Index 2002, *available at* [http://www.transparency.org/pressreleases\\_archive/2002/2002.05.14.bpi.en.html](http://www.transparency.org/pressreleases_archive/2002/2002.05.14.bpi.en.html) (last visited Feb. 11, 2004).

16. The concession agreement included a confidentiality clause forbidding government officials from disclosing several details about the negotiations between the government and the company. Details about the clause are discussed in the section on the Water Wars.



B. *Overview: International Law on Economic, Social and Cultural Rights*

All of the rights addressed in this Report fall within the category of economic, social, and cultural rights as opposed to civil and political rights. Although ESC rights are fully a part of international law, and have been established and described in numerous international and regional treaties,<sup>17</sup> in practice they have received far less attention from States, NGOs, and international institutions than have civil and political rights. As noted by the United Nations ("U.N.") Committee on Economic, Social, and Cultural Rights ("ESCR Committee"):

[T]he international community as a whole continue[s] to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social, and cultural rights."<sup>18</sup>

An important reason for the relative neglect of this category of rights is the manner in which the International Covenant on Economic, Social and Cultural Rights describes State obligations regarding ESC rights. Each State is obligated to "take steps. . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."<sup>19</sup> The notion of pro-

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17. See, e.g., International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (1967) [hereinafter ICESCR]; American Convention on Human Rights, July 18, 1978, 1144 U.N.T.S. 123; Organization of American States: Additional Protocol to the American Convention of Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador," Nov. 17, 1988, 28 I.L.M. 156 [hereinafter Protocol of San Salvador]; Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, Supp. No. 21, at 193, U.N. Doc. A/Res/34/180, 19 I.L.M. 33 (1980) [hereinafter CEDAW]; International Labor Organization: Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382 [hereinafter ILO Convention No. 169].

18. United Nations Committee on Economic, Social, and Cultural Rights, Statement to the World Conference, U.N. Doc. E/1993/22/, at 83, 5.

19. ICESCR, *supra* note 17, art. 2(1). In addition, the ICESCR forbids discrimination in the protection of ESC rights on the basis of "race, colour, sex, language, relig-

gressive realization of ESC rights recognizes that financial constraints often prevent States from immediately guaranteeing the full exercise of ESC rights. However, the standard is also imprecise, leaving open to question the types of steps that would contribute to progressive realization, and the timetable within which those steps should be taken.

A second factor, both cause and effect of the neglect of ESC rights, is the lack of enforcement mechanisms for these rights. An important tool in the protection of civil and political rights is the existence of domestic and international legal mechanisms allowing for individual petition and adjudication of claims. Through adjudication, tribunals clarify the meaning of rights in the context of specific cases, and over time, establish authoritative interpretations. In contrast, most countries treat economic and social rights as non-justiciable even where the rights are included in the constitution.<sup>20</sup> Moreover, although some international mechanisms have been created to monitor the implementation of treaties concerning ESC rights,<sup>21</sup> the provision of reme-

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ion, political or other opinion, national or social origin, property, birth, or other status." *Id.* art. 2(2).

20. As noted by Craven:

In the majority of States, economic, social and cultural rights are almost entirely absent from the common discourse on human rights. Even in those States where economic and social rights are constitutionally enacted or where the ICESCR forms part of domestic law, national courts have relied upon the oversimplified characterization of economic and social rights as 'non-justiciable' rights, with the result that they have rarely given them full effect. In turn, the lack of national case law directly related to economic, social, and cultural rights has itself perpetuated the idea that those rights are not capable of judicial enforcement.

MATTHEW C. R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 10 (1995).

21. Such mechanisms include reporting systems under the ICESCR, and under the Protocol of San Salvador. However, at least in the case of Bolivia, these appear to have had only a limited impact. Bolivia has yet to ratify the Protocol of San Salvador, although it has been a signatory to it since 1988. And while it is a party to the ICESCR, it has only submitted one report to the ESCR Committee, and it did so seventeen years late. That report lacked

specific information on the practical application of the legal framework, which is necessary for the Committee's evaluation of the implementation of economic, social and cultural rights in Bolivia [and] many of the questions put by the members of the Committee were left unanswered or were answered by statements of a general nature.

Concluding Observations of the ESCR Committee: Bolivia, E/C.12/1/Add.60 (May 21, 2001).

dies for violations of ESC rights is generally left to State Parties.<sup>22</sup> Thus, whereas in the area of civil and political rights substantial precedent exists from domestic and international bodies regarding the interpretation of those rights in specific cases, no corresponding body of case law exists with respect to ESC rights.

In turn, the generality of the standard of *progressive realization* and the lack of case law regarding ESC rights impede effective monitoring of the rights by NGOs or other international bodies. To be effective, human rights monitoring groups require clear norms that allow for the identification of violations. But for the most part, the substantive content of ESC rights is too vague and broadly defined to lend itself to the identification of violations. Indeed, in both cases discussed in this Report, citizens raised serious and colorable claims that their rights to water, property, health, or as indigenous peoples were violated. But in both cases, the generality of the relevant standards made it very difficult to determine conclusively when or even whether violations occurred.

Despite these difficulties, increased attention from scholars, NGOs, and international bodies has yielded some progress towards elaborating the meaning of ESC rights. Although leading human rights NGOs have tended in the past to focus almost exclusively on violations of civil and political rights,<sup>23</sup> several organizations have started to look more closely at ESC rights issues and invoke the economic, social, and cultural rights ("ESCR") framework in their work.<sup>24</sup> For its part, the U.N. system for

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22. As stated by the ESCR Committee:

[i]n general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. The rule requiring the exhaustion of domestic remedies reinforces the primacy of national remedies in this respect. The existence and further development of international procedures for the pursuit of individual claims is important, but such procedures are ultimately only supplementary to effective national remedies.

ESCR Committee, General Comment 9, The Domestic Application of the Covenant, art. 4, U.N. Doc. E/C.12/1998/24 (1998). The Protocol of San Salvador allows for the use of the individual petitions system in cases of direct violations by States Parties of the right to education and the right to form unions. See Protocol of San Salvador, *supra* note 17 art. 19(6), 28 I.L.M. at 168.

23. See KATERINA TOMASEVSKI, DEVELOPMENT AID AND HUMAN RIGHTS 113-16 (1989).

24. Several advocacy groups have started to look at ESC rights issues, and to use the international norms on ESC rights as a basis on which to criticize governments and

human rights protection has also paid increasing attention to ESC rights in recent years.<sup>25</sup>

Scholars, as well as the ESCR Committee, have begun to elaborate the underlying structure of State obligations with respect to ESC rights. Thus, it is now generally accepted that all human rights impose three types of obligations on a State: the negative obligation to respect the right, i.e., to refrain from actions that would interfere with enjoyment of the right; and the positive obligations to protect and to fulfill the right, i.e., to prevent third parties from infringing on the right, and to take actions to strengthen people's ability to enjoy the right.<sup>26</sup> In addi-

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demand policy changes. Examples include organizations focused specifically on ESC rights, such as the Center for Economic and Social Rights, which looks at a variety of ESC rights issues, general human rights organizations such as Human Rights Watch that are starting to look at ESC rights issues, and issue-specific advocacy groups, such as Earthjustice, which uses ESC rights, among other tools, to address environmental justice questions.

25. Audrey Chapman and Sage Russell note that:

Economic, social, and cultural rights are no longer as neglected as they once were in relation to civil and political rights. Wider agreement on the core elements of these rights, development of international standards, and some guides to monitoring and evaluating them now exist. Since 1999 the [ESCR] Committee has once again begun adopting general comments on the individual rights in the Covenant, including general comments on the rights to food and health and two general comments on education. In her role as U.N. High Commissioner for Human Rights, Mary Robinson has sought to elevate the status of economic and social rights. In recent years the U.N. Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights have appointed Special Rapporteurs to investigate and report on the implementation and violation of some economic and social rights around the world. . . . Although not official United Nations documents, the 1986 Limburg Principles on the Implementation of Economic, Social, and Cultural Rights and the 1997 Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights . . . have achieved wide currency internationally and *de facto* status within the Committee . . . .

Audrey Chapman & Sage Russell, *Introduction*, CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL, AND CULTURAL RIGHTS 3-4 (Audrey Chapman & Sage Russell eds., 2002).

26. As has been recognized by the ESCR Committee in its General Comment on the Right to Adequate Food:

[A]ny . . . human right . . . imposes three types or levels of obligations on States parties: the obligations to *respect*, to *protect* and to *fulfill*. In turn, the obligation to *fulfill* incorporates both an obligation to *facilitate* and an obligation to *provide*. The obligation to *respect* existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to *fulfill* (*facilitate*) means the State must pro-ac-

tion, the ESCR Committee has described three procedural rights that are necessary to make ESC rights meaningful in practice and are therefore implicit in the International Covenant on Economic, Social, and Cultural Rights ("ICESCR") framework. These rights are: the right to information, the right to participation, and the right to effective remedies for violations of ESC rights.

Although the issue of TNC involvement in ESCR violations has not been addressed systematically from the perspective of international law on ESC rights, some of the developments described above are relevant to the issue of TNCs' impact on ESC rights. In particular, States' obligation to protect ESC rights from violations by a third party implies that States have an obligation under international law to protect ESC rights from violations by TNCs.<sup>27</sup> And, as our two cases will illustrate, the procedural rights described above are of tremendous importance in cases involving TNCs. Given the pressures on developing countries to treat TNCs favorably, issues such as transparency in decision-making and the existence of effective remedies against violations by TNCs are critical.

This Report takes the position that Bolivia's obligations with respect to ESC rights include all three levels described above: respect, protect, and fulfill. In addition, the Report analyzes not only the alleged violations of substantive ESC rights, but also violations of corresponding procedural rights. Throughout, we draw upon a variety of instruments dealing with ESC rights that are binding on Bolivia, such as the ICESCR, the American Convention on Human Rights, and the International Labor Organization ("ILO") Convention No. 169 concerning Indigenous and

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tively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfill (provide)* that right directly. This obligation also applies for persons who are victims of natural or other disasters.

ESCR Committee, General Comment No. 12, The Right to Adequate Food, para. 15, U.N. Doc. E/C.12/1999/5 (1999).

27. Cf. Scott Leckie, *Violations of Economic, Social and Cultural Rights*, in THE MAASRICHT GUIDELINES ON VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS, SIM SPECIAL NO. 20, 114 (Theo C. Van Boven et al. eds., Netherlands Institute of Human Rights 1998) ("While it is legally possible to reach TNCs indirectly through a State's obligation to 'protect' human rights, the immense influence that these mammoth entities exert often makes such options futile.").

Tribal Peoples in Independent Countries ("ILO Convention No. 169"). We also rely on General Comments by the ESCR Committee, as guides to the interpretation of the rights contained in the ICESCR.

*C. International Law on Corporate Responsibilities with Respect to Human Rights*

A separate strand of international human rights law has, in recent years, begun to address the scope of corporate responsibility with respect to human rights. Traditionally, human rights law was thought to apply almost exclusively to States, and, in limited cases, to individuals.<sup>28</sup> Yet, in view of the increasing power wielded by TNCs and their capacity to affect the enjoyment of human rights, scholars have argued that corporate actors should be bound (or at least guided) by international human rights norms. Very recently, this scholarly debate coupled with mounting evidence of human rights abuses by TNCs has led to the development of new legal norms. Perhaps most significantly, the U.N. Subcommission for the Protection and Promotion of Human Rights (the "U.N. Subcommission") has approved the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights ("Draft Norms for TNCs").<sup>29</sup> The Draft Norms list a series of obligations that TNCs and other businesses have with regard to human rights, including ESC rights, making clear that human rights obligations bind not only governments and individuals, but corporations as well. Although a formal permanent enforcement mechanism has yet to be created for these norms, the U.N. Subcommission established a temporary mechanism for monitoring violations.<sup>30</sup> The U.N. Subcommission requested the Working Group on the Working Methods and Activities of Transnational Corporations, which drafted the norms, to receive

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28. See Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 443, 466 (2001) ("[T]he unstated understanding during the growth of the human rights movement was that the duties [with respect to human rights] were still those of [S]tates.").

29. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), approved by the U.N. Sub-Commission on the Promotion and Protection of Human Rights, Res. 2003/16, U.N. Doc. E/CN.4/Sub.2/2003/L.11 at 52 (Aug. 13, 2003) [hereinafter Draft Norms for TNCs].

30. See *id.*

submissions from governments, NGOs, and other groups regarding TNC activities that affect human rights; to invite the TNCs involved to comment on the submissions; and to transmit the Working Group's own comments to the TNC.<sup>31</sup> This is a promising development that may lead in the future to more effective monitoring of human rights violations by TNCs.

A second avenue for establishing rules to govern TNC behavior with respect to human rights is the development of voluntary codes and guidelines for conduct. By adopting voluntary codes of corporate conduct, corporations undertake to conduct their operations in accordance with various principles, including human rights standards. A wide variety of such codes has been created, and corporations are increasingly signing on to them.<sup>32</sup> Due to their voluntary character, their effectiveness is somewhat questionable; however, insofar as they establish obligations that corporations have accepted, they can be used as standards against which to measure corporate actions. Intergovernmental organizations, such as the Organization for Economic Cooperation and Development, have also been developing guidelines describing principles that apply to transnational corporations.<sup>33</sup> Although these guidelines are similarly described as voluntary by the authoring organizations, they do provide for limited dispute resolution and complaint procedures.<sup>34</sup>

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31. *See id.*

32. Such codes include the U.N. Global Compact, which lists nine principles to which all businesses can subscribe, as well as industry or issue-specific codes, such as the Fair Labor Association's Workplace Code of Conduct. *See* U.N. Global Compact, *available at* <http://www.unglobalcompact.org> (last visited Feb. 11, 2004); Fair Labor Association Workplace Code of Conduct, *available at* <http://www.fairlabor.org/all/code/index.html> (last visited Feb. 11, 2004).

33. *See, e.g.*, International Labor Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, *available at* <http://www.ilo.org/public/english/standards/norm/sources/mne.htm> (last visited Feb. 11, 2004); Organization for Economic Cooperation and Development, Guidelines for Multinational Enterprises (revised in 2000), *in* The OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic Texts, *available at* <http://www.oecd.org/> (last visited Feb. 13, 2004) [hereinafter OECD Guidelines for Multinational Enterprises].

34. For example, the OECD Guidelines for Multinational Enterprises allow a variety of actors (governments, businesses, employee organizations, NGOs, and the public) to raise complaints about the conduct of companies with respect to the Guidelines. *See* OECD Guidelines for Multinational Enterprises, *supra* note 33, at 25. These complaints are then resolved through consultation, or as a final recourse, through clarifications or recommendations issued by the Committee. *Id.* at 28-29.

Another interesting development is the increase in litigation against TNCs under

## II. THE TRANSREDES OIL SPILL IN THE DESAGUADERO RIVER

The Desaguadero River water system originates in Lake Titicaca, one of the world's highest major lakes,<sup>35</sup> and flows across the arid Bolivian *altiplano* for 400 kilometers,<sup>36</sup> eventually feeding into lakes Uru Uru and Poopo in the center of the *altiplano*.<sup>37</sup> Because the Desaguadero River water system is at such high altitude, the climate is very cold and dry, and few plants grow in the area. Nonetheless, it is home to several species of fish, and Lakes Uru Uru and Poopo are nesting sites for numerous waterfowl species, including Andean flamingos and some endangered species.<sup>38</sup>

Many indigenous communities have lived on the *altiplano* for centuries. The Aymaras and Quechuas in the region have scratched out a living based primarily on ranching — raising camelids like alpacas and vicuñas, and more recently, cattle and sheep.<sup>39</sup> Their animals feed primarily off totora reeds and other native plants around the Desaguadero.<sup>40</sup> Another highly marginalized indigenous group, the Uru Morato people, has lived off the water since before the Spanish conquest of the Americas.<sup>41</sup> Until around 1930, the Uru Moratos lived on Lake

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U.S. law for human rights abuses allegedly committed abroad. See Beth Stephens, *The Amoral Economy of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 87 (2002) (discussing recent litigation against corporations under the Alien Tort Claims Act and Torture Victim Protection Act). However, while lawsuits are potentially a very effective way of holding corporations responsible for abuses, there are numerous obstacles, both procedural and substantive, to successfully pursuing these cases. See Williams, *supra* note 12, at 750-75 (2002).

35. Lake Titicaca is 3820 meters above sea level and has a surface area of over 9000 square kilometers. See DEANNA SWANEY, LONELY PLANET GUIDE TO BOLIVIA 233 (4th ed. 2001).

36. See UNESCO World Water Assessment Program, Lake Titicaca Basin, available at [http://mirror.eschima.bnu.edu.cn/Mirror2/unesco/www.unesco.org/water/wwap/case\\_studies/titicaca\\_lake/](http://mirror.eschima.bnu.edu.cn/Mirror2/unesco/www.unesco.org/water/wwap/case_studies/titicaca_lake/) (last visited Feb. 13, 2004). The *altiplano* is a vast flat area at very high altitude in the Bolivian Andes.

37. See Lago Poopó y Uru-Uru, at <http://www.agualtiplano.net/humedales/humedales/poopo-uru.htm> (last visited Feb. 8, 2004); Cuenca del Poopó, at <http://www.agualtiplano.net/cuencas/poopo.htm> (last visited Feb. 8, 2004). Both lakes are over 3600 meters above sea level. Lake Poopo is very large, with a surface of 1337 square kilometers. *Id.*

38. *Id.*

39. See JUAN CARLOS MONTAÑA ET AL., EFECTOS AMBIENTALES Y SOCIOECONOMICOS POR EL DERRAME DE PETROLEO EN EL RIO DESAGUADERO 99 (2002).

40. See *id.* at 101-03.

41. See RAMIRO MOLINA & ROSSANA BARRAGAN, ETHNICITY AND MARGINALITY: THE



Poopo, inhabiting “huts . . . built on top of the *totorales* (reeds) and islands, and they had little contact with the outside world.”<sup>42</sup> While the Uru Moratos now live on land, they continue to base their survival and economy primarily on fishing on Lake Poopo, hunting waterfowl along the shores of the lake, and in recent years, some agriculture.<sup>43</sup> “Thus Lake Poopo constitutes the main reservoir of their subsistence.”<sup>44</sup> All the indigenous communities in the region depend on the Desaguadero water system for drinking water for themselves and their animals as well as for irrigation. Because some of the communities live several miles away from the river itself, in many cases they have built artisan canals, directing water to their crops or towns.<sup>45</sup> They have also built wells that tap into the Desaguadero’s water underground.<sup>46</sup>

Poverty along the Desaguadero River is widespread and severe. In twenty-eight of thirty-four regions in the department of Oruro, which is traversed by the Desaguadero, at least eighty-five percent of the population lives below the poverty line, defined as U.S. \$35 per month. In ten of these, the percentage of people in poverty is even higher: over 98%.<sup>47</sup> The economic plight of these people is reflected in simple yet compelling demographic statistics: a 1985 study of the Uru Moratos found that almost one out of every four children died before the age of five, and life expectancy was an average of forty-eight years.<sup>48</sup>

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URU MORATOS AND AYMARAS OF LAKE POOPO 15-37 (1985) (this report was prepared for UNICEF) (on file with Crowley Program). The Uru Moratos are a subgroup of the broader Uru population, which includes the Uru Chipayas and the Iru-Itu. *Id.* at 7. In describing this group, Molina and Barragan state:

The outstanding characteristic of this group is that they are doubly margina[lized]. First, in relation[ ] to the other villagers of the region and second in their relationship to the “national” society. This margina[lization] which has profound historical roots, is the basis for their very poor living conditions. It has also resulted in the almost total extin[c]tion of one of the most important groups of the Andean Region.

*Id.* at 66.

42. *Id.* at 67.

43. *See id.* at 73-94.

44. *Id.* at 73.

45. *See* MONTROYA ET AL., *supra* note 39, at 90.

46. *See id.* at 90.

47. *See* UDAPE Mapa de Pobreza, Oruro, 2001, available at <http://www.udape.gov.bo/mapaPobreza2001/id8.htm> (last visited Feb. 8, 2004). For rural areas (which predominate in Oruro), the poverty line is currently defined as a monthly income of 268 bolivianos (approximately U.S. \$35) a month. *See also* UDAPE, Crisis, Crecimiento y Pobreza 1999-2002 (Jan. 2003), available at [www.udape.gov.bo](http://www.udape.gov.bo).

48. *See* MOLINA & BARRAGAN, *supra* note 41, at 72.

For a number of years, the communities dependent on the Desaguadero water system have complained that their ability to survive has been affected by contamination of the river, most likely caused by environmentally irresponsible mining activities. In interviews, they reported that, as early as the 1980s, they noticed a change in the quality of their water, and that it became "salty" or "spicy."<sup>49</sup> Studies by environmental experts associated with NGOs confirm high levels of salinity in the water, which damage the vegetation along the Desaguadero and lakes Uru Uru and Poopo, as well as cyanide contamination and high levels of heavy metals, which render the water inadequate for human consumption.<sup>50</sup> They attribute much of this contamination to companies engaged in gold mining along the river, including the company Inti Raymi whose majority shareholder is Newmont Mining Corporation,<sup>51</sup> a TNC headquartered in Denver, Colorado.<sup>52</sup> The government has recently agreed to conduct an audit of environmental damage that may have been caused by Inti Raymi.<sup>53</sup>

On or before January 31, 2000, a sudden and massive oil spill in the Desaguadero River added to the contamination of the river, creating new difficulties for the communities in the region. The spill originated in the OSSA-2 pipeline owned by Transredes, S.A., a transnational corporation jointly owned by Shell and Enron. It is commonly estimated to have consisted of

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49. Interview with Community of San Pedro de Challacollo, in Bolivia (May 23, 2003) [hereinafter Community of San Pedro de Challacollo Interview].

50. See FELIPE CORONADO ET AL., SANTO TOMAS: EVALUACION AMBIENTAL DE LA COMUNIDAD (LAGO URU URU-ORURO) 20-26, 64-67 (2003); FELIPE CORONADO, SOL, SAL Y OLVIDO: EVALUACION AMBIENTAL DE LA COMUNIDAD DE TOMA TOMA 39-62 (2003).

51. See CORONADO ET AL., *supra* note 50, at 27-37, 63. See also Newmont, The Gold Company: Kori Kollo, Bolivia, *available at* <http://www.newmont.com/en/ourbusiness/operations/sthamera/korikollo/index.asp> (last visited Feb. 8, 2004). Juan Carlos Montoya has pointed out that there are several sources of contamination affecting the Desaguadero water system: naturally present minerals and metals such as arsenic, as well as operating and abandoned mines in the area. See MONTOKA ET AL., *supra* note 39, at 61. Mr. Montoya notes the presence of arsenic, copper, cadmium, zinc, and lead in the Desaguadero system at levels higher than permissible for drinking water; similarly, excessively high concentrations of these metals were found in fish. *Id.* at 62-63. In addition, he notes that the level of salinity in the water is too high for human consumption. *Id.* at 62.

52. See Newmont, The Gold Company: Profile, *available at* <http://www.newmont.com/en/about/profile/index.asp> (last visited Feb. 11, 2004).

53. See Message from Gilberto Pauwels, director of Centro de Ecología y Pueblos Andinos ("CEPA") (Mar. 31, 2004).

29,000 barrels of oil and affected approximately 127 peasant and indigenous communities that depend on the Desaguadero for drinking water for humans and animals, irrigation, and fishing.

In the months and years following the spill, Transredes provided emergency assistance to the communities surrounding the Desaguadero, cleaned up the spill, and compensated affected individuals for their losses. It distributed a total of U.S. \$3.7 million in direct compensation to affected communities; that is approximately U.S. \$800 per family<sup>54</sup> or U.S. \$200 - U.S. \$300 per individual.<sup>55</sup>

Bolivia's Constitution recognizes the rights to "life, health, and security,"<sup>56</sup> as well as the "social, economic and cultural rights of the indigenous peoples that inhabit the national territory, especially those related to their original community lands, guaranteeing the use and sustainable utilization of the natural resources . . . ."<sup>57</sup> Since 1992, Bolivia has had a Law of the Environment ("Ley del Medio Ambiente"),<sup>58</sup> which specifically recognizes the human right to a healthy environment, establishing that it "is the duty of the State and of society to guarantee the right that every person and living being has to enjoy a healthy and pleasant environment in the development and exercise of their activities."<sup>59</sup> The Law establishes a number of principles and an institutional framework for protection of the environment in a manner consistent with sustainable development.<sup>60</sup>

Despite these legal guarantees, the Bolivian government did virtually nothing in the immediate post-spill period either to

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54. According to the government-ordered Environmental Audit of the Oil Spill, the total number of families affected by the spill was 4,608. *See* Environmental and Energy Development Solutions (ENSR) International, 4 Auditoria Ambiental del Derrame de Hidrocarburos en el Rio Desaguadero, 17 (Apr. 2001) [hereinafter Environmental Audit].

55. According to data used in the Environmental Audit, the average number of individuals in a household is three to four. *Id.* at 15, Table IV.2.1.2.1.

56. CONSTITUCIÓN POLÍTICA DE BOLIVIA DE 1967 art. 7(1) (amended 1994) [hereinafter BOL. CONST.].

57. BOL. CONST. art 171(I).

58. Ley del Medio Ambiente, Ley No. 1333, Apr. 27, 1992 [hereinafter Law of the Environment].

59. *Id.* art. 17.

60. The Law describes its own objective as "the protection and conservation of the environment and natural resources, regulating the actions of man in relation to nature, and promoting sustainable development with the end of improving the quality of life of the population." *Id.* art. 1.

minimize damage or to protect the interests of the affected communities. Without a governmental presence to defend the interests of affected communities and the Bolivian State, or to mediate between those interests and the interests of Transredes, the response to the spill reflects the imbalance between the affected communities and the company. Whereas the company had substantial resources and know-how regarding legal, financial, and technical issues, community members tended to be very poorly educated and inexperienced with the outside world. Most were confused both as to the long-term impact of the spill and their legal rights. As a result, the communities, for the most part, went along with what Transredes told them to do and waited for the company to deliver on its promises of compensation, clean-up, and emergency assistance. When these promises were not fully kept, the communities were left unhappy, but with little recourse.

The following sections provide an account of the circumstances surrounding the spill. We begin with a brief description of Transredes itself, then proceed to explain the causes of the spill. Next, the Report discusses both Transredes' and the Bolivian government's actions in response to the spill, particularly with respect to the clean-up process, emergency assistance, the compensation process, the Environmental Audit of the spill, and the sanctions imposed on Transredes by the Bolivian government. Finally, we analyze the spill from the perspective of international human rights law.

### *A. Facts*

#### 1. Transredes' Composition

Transredes S.A. is a multinational company formed in 1997 to take over Bolivia's then- publicly owned oil and gas transportation system through Bolivia's process of "capitalization".<sup>61</sup> Fifty

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61. See Testimonio de Protocolizacion de Documento Relativo a: Contrato de Suscripcion de Acciones otorgado por el Ministerio Sin Cartera Responsable de la Capitalizacion y Transredes — Transporte de Hidrocarburos Sociedad de Economia Mixta (Transredes S.A.M.) en Favor de: TR Holdings Ltda. (May 16, 1997); Escritura sobre conversion de una Sociedad de Economia Mixta a una Sociedad Anomina Que Hace Transredes — Transporte de Hidrocarburos Sociedad de Economia Mixta (Transredes S.A.M.) (May 27, 1997).

The basic idea of capitalization was to convert [former State-owned] companies into joint stock companies and to increase their capital by selling new

per cent of the company is owned by TR Holdings, which in turn is owned entirely and in equal parts by Enron and Shell.<sup>62</sup> Another 34% is owned by Bolivian pension funds, in accordance with the capitalization process, and 16% is owned by other shareholders.<sup>63</sup> As of May 2003, the board of directors was composed of seven directors: four named by TR Holdings, and three named by the Bolivian pension funds.<sup>64</sup>

## 2. Causes of the Spill

### a. The Condition of the Pipeline

In August of 1999, according to Transredes officials, a Transredes employee reported that the section of the pipeline that extended over the Desaguadero River had fallen off its supports and was under water.<sup>65</sup> Transredes officials concede that no one was sent to check on the condition of the pipe.<sup>66</sup> Nevertheless, they claim that the company had been planning for several months to replace the pipes in that section of the pipeline because of their poor condition; by September of 1999 they already had the new pipes awaiting installation.<sup>67</sup>

That same year, the Superintendency of Hydrocarbons of Bolivia contracted with the company COINGAS to conduct a routine inspection of the Transredes oil pipeline to determine whether any repairs were needed. In its report to the Superintendency, COINGAS informed the Superintendency that a thirty-meter long portion of the Transredes pipeline that went over the Desaguadero was off its supports and under water, and asserted that they had found corrosion and pitting in that por-

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shares (equivalent to the existing share capital) to private investors or 'strategic partners.' The new investors automatically would assume management functions. Once capitalized, the original share capital would be distributed amongst all adult Bolivians. This capital was to be administrated by pension funds, with the benefits accruing in annuities to the elderly in the form of annual pension payments . . . .

Juan Antonio Morales, *supra* note 2, at 53-54.

62. See Transredes S.A. Memoria Annual 2001 (Annual Report 2001), at 10.

63. See *id.*

64. See Statement by Fernando Gonzalez, Interview with Transredes Legal Team, in Bolivia (May 29, 2003) (on file with author) [hereinafter Fernando Gonzalez Statement].

65. See *id.*

66. See *id.*

67. See *id.*

tion of the pipeline.<sup>68</sup> COINGAS qualified the problem as one of "first priority" and recommended maintenance or, if necessary, changing the pipeline, and placing it back on its supports.<sup>69</sup> The Superintendency of Hydrocarbons presented this report to Transredes on December 1, 1999.<sup>70</sup>

According to Transredes officials, once the company received the COINGAS report, it confirmed the condition of the pipeline; however, because of the holidays, the company postponed any repairs.<sup>71</sup> Transredes did not repair the pipeline in January either. Company officials now say that they feared that it would be dangerous to repair the pipeline due to the rainy season.<sup>72</sup> Nonetheless, despite the condition of the pipeline, the company continued to pump oil through it. When asked why they did not stop pumping, Transredes' representatives told us that "that was considered . . . but [the company] didn't realize that the pipeline was in imminent danger . . . It takes . . . time to replace pipes."<sup>73</sup>

### b. Proximate Cause

According to Transredes representatives, during the days prior to the spill, unusually heavy rainfall caused the submerged portion of the pipeline to rub against the supports off of which it had fallen.<sup>74</sup> The constant rubbing resulted in a perforation of

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68. See Construcción & Instalación de Gas Consultoría y Servicios Petroleros ("COINGAS"), Inspección Técnico Operativa de Oleoductos en Operación: Resumen Ejecutivo 1544-45 (Oct. 1999) (on file with author).

69. *Id.* The report states that "first priority" problems must be corrected "as soon as possible." *Id.*

70. See Letter from Ing. Guillermo Torres, Superintendent of Hydrocarbons, to the Crowley Program (Sept. 26, 2003) (on file with author) [hereinafter Guillermo Torres Letter].

71. See Fernando Gonzalez Statement, *supra* note 64.

72. See *id.*

73. *Id.* Jorge Reynolds, an attorney with the Superintendency of Hydrocarbons, explained that, because oil transportation is a public service, Transredes is generally expected to provide continuous oil transportation services; however, in situations where such operations could be dangerous (i.e., where there is "operative danger"), the company can ask the Superintendency of Hydrocarbons for authorization to suspend operations. See Interview with Jorge Reynolds, Attorney, Superintendency of Hydrocarbons, in New York, N.Y. (Sept. 30, 2003) (on file with author).

74. See Statement by Brigitte Herrera, Interview with Transredes Legal Team, in Bolivia (May 29, 2003) (on file with author) [hereinafter Brigitte Herrera Statement]. However, other studies indicate that the increase in water in the river was moderate and normal for that time of year. See also RENE GOMEZ-GARCIA, INFORME PRELIMINAR: DESASTRE DEL DERRAME DE PETROLEO OSSA 2 OPERADO POR TRANSREDES S.A. 2 (2000).

the pipeline, which “gradually grew to the size of a boliviano, and that’s where the oil came out of.”<sup>75</sup>

Transredes has asserted that approximately 29,000 barrels of oil spilled. The company based this calculation on the report that the refinery in Arica had lost 29,780 barrels of oil.<sup>76</sup> TR explained that such a large amount of oil could spill through the small perforation because of the high pressure at which the oil was traveling.<sup>77</sup> The company could not estimate for how long the oil had been spilling before the problem was discovered.<sup>78</sup>

### c. Delay in Detecting the Spill

The oil spill was discovered by a hydrobiologist, Jean Gabriel Wasson, who was conducting studies in the Desaguadero at the time. He informed police of the fact that there was oil in the river on Sunday, January 30, 2000, but the police failed to transmit this information to anyone else.<sup>79</sup> According to Transredes representatives, that Sunday they noticed a drop in pressure in the pipeline.<sup>80</sup> In order to respond, however, they had to locate the source of the drop in pressure over 500 km of pipeline; they claim that on Monday morning they sent out “patrols” to do this.<sup>81</sup> Transredes closed the valves around the origin of the spill, thereby stopping the flow of oil to the river, on Monday January 31, 2000 at 6:00 p.m.<sup>82</sup>

The government has criticized this slow response. According to the Environmental Audit, “the control instruments existing in the pumping stations for OSSA II at the time of the spill were old, of poor resolution, and were working partially. Because of this, it was impossible to detect and respond to the con-

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75. Brigitte Herrera Statement, *supra* note 74.

76. See Fernando Gonzalez Statement, *supra* note 64; MONTAYA ET AL., *supra* note 39, at 154-55; E.H. OWENS, DERRAME DE PETROLEO EN EL RIO DESAGUADERO: DESTINO Y PERSISTENCIA DEL PETROLEO DERRAMADO 11 (June 8, 2000) (Report prepared for Transredes by Polaris Applied Sciences) [hereinafter Polaris Report]. However, according to Rene Gomez-Garcia Palau, who has conducted an independent study of the oil spill, the volume of oil spilled is actually between 43,000 and 61,000 barrels, depending on the amount of time it was spilling (two or three days). See GOMEZ-GARCIA, *supra* note 74, at 2.

77. *See id.*

78. *See id.*

79. *See id.*

80. *Id.*

81. *Id.*

82. See 2 Environmental Audit, *supra* note 54, at 75.

tingency of the spill in an opportune manner on the basis of the data available in the stations. The instrumentation that Transredes relied upon did not fit within the framework of best international practices[.]”<sup>83</sup>

### 3. Responses to the Oil Spill

In view of the vulnerability of the pipeline and the environmental and cultural sensitivity of the Desaguadero region, Transredes was remarkably poorly prepared for the possibility of a spill. Indeed, Transredes’s immediate response to the crisis did not follow any preset plan. Although required by environmental law, the contingency plan included in the company’s environmental manifest filed with the Bolivian government did not even contemplate the possibility of a spill in the Desaguadero.<sup>84</sup> As a result, the initial actions taken by the company were ad hoc and somewhat ineffective.

The bulk of this section analyzes in greater detail the company’s response and the problems associated with it. Yet it should be noted at the outset that the problems created by Transredes’ inadequate preparation were exacerbated by the government’s lack of oversight. The main governmental entity

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83. *Id.* at 6.

84. The Environmental Audit notes that:

The contingency plan describes the strategies in case of hydrocarbons spills in waterways. . . . However, the measures and strategies . . . are of a general character and do not indicate specific emergency procedures in cases of spills of large volume (like that which occurred in the Desaguadero), in which the containment techniques mentioned in the plan would not be sufficient and/or applicable.

*Id.* at 56. Worse yet, the Audit notes:

the most relevant deficiency . . . in the Contingency Plan is the incorrect identification of priority vulnerable areas. The identified areas are . . . [ten rivers], which correspond to the OSSA-I, not the OSSA-II [pipeline]. Having failed to consider any river in the area of the Altiplano or the Occidental Cordillera, the [Contingency Plan omits] the Desaguadero River, which is the principal waterway of the Altiplano, and on which the hydrocarbons spill of the OSSA-II occurred . . . .

*Id.* at 56. It is not clear why the Vice-Ministry of Environment approved the Environmental Manifest despite these deficiencies. One official of the Vice-Ministry, currently in charge of issues related to the oil spill, told us that the Vice-Ministry had to assume the truth of the facts included in the environmental manifest, given that it was a sworn statement. See Interview with Maria Cristina Arellano, Head of the General Management of Impact, Quality and Environmental Services in the Vice-Ministry for the Environment (May 28, 2003). Another told us that the problem was lack of expertise within the Vice-Ministry. See Interview with Patricia Garcia, *supra* note 14.



that should have directed the response to the crisis was the Ministry of Sustainable Development, through the Vice-Ministry of Environment.<sup>85</sup> But for the most part, the Vice-Ministry's actions consisted of demanding that Transredes submit reports regarding its plans to respond to the spill. In fact, the Vice-Ministry's first action was to demand that Transredes submit an Action Plan for approval.<sup>86</sup> Subsequently, through a number of "notes" from late February to early April, the Vice-Ministry of Environment and Natural Resources instructed that Transredes take the following actions: present an Integral Plan for the processing of contaminated material collected from the river; carry out clean-up actions in certain zones affected by the spill; provide water to the affected communities; speed up the clean-up and mitigation actions; provide permanent health and veterinary attention in the areas affected by the spill and carry out autopsies and lab analyses; and collaborate with peasant communities to avoid a drop in the prices of meat.<sup>87</sup> Notwithstanding these directives, the Vice-Ministry apparently did nothing to ensure that Transredes complied. Moreover, the Vice-Ministry failed to provide any more detailed instructions to the company regarding the actions it should take. Finally, the Vice-Ministry failed to undertake any thorough, independent analysis of the extent of the damage caused by the spill, depending primarily on the reports of the local government and Transredes' experts. According to a lawyer for the Vice-Ministry of Environment and Natural Resources, the Vice-Ministry's failure to take more concrete actions immediately after the spill was the result of lack of experience: "The environment is a new [issue to us] and we don't have much experience [with it]. There was a group of technicians and a lawyer who did not know how to apply laws. They started issuing technical instructions for the company to fulfill, but without an environmental focus. It looked as though they were working for the company."<sup>88</sup>

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85. MONTROYA ET AL. *supra* note 39, at 150.

86. The plan was required to specify, among other points, the company's plans for containment, recovery, and cleanup, as well as a program for remediation and restoration, a program for compensation and community relations, and a monitoring plan. See 2 Environmental Audit, *supra* note 54, at 74.

87. See Ministerio de Desarrollo Sostenible y Planificación, Resumen Cronológico: Derrame de Petróleo en el Río Desaguadero, para. 2.3 [hereinafter Resumen Cronológico].

88. See Interview with Patricia Garcia, *supra* note 14.

During the first few months after the spill, the Prefecture of Oruro monitored the spill's impact and the company's response, but its power was limited.<sup>89</sup> As an initial matter, on February 3, 2000, the Prefecture submitted a report to the Vice-Ministry of the Environment, noting the contamination of the river, the urgent need for cleanup, and Transredes' lack of a contingency plan, and requesting that the Vice-Ministry order Transredes to respond more efficiently.<sup>90</sup> On February 10, 2000, the Ministry of Sustainable Development issued a resolution stating that, because the regional governments are charged with coordinating actions to prevent contamination of affected areas,<sup>91</sup> the Oruro Prefecture was authorized to monitor the oil spill.<sup>92</sup> The Prefect would be required to submit reports regarding its actions to the competent environmental authority at the national level, presumably the Vice-Ministry of Environment.<sup>93</sup> The Prefecture conducted some monitoring of the environmental impact of the spill, including tests of the contamination of water and soil during and after cleanup operations.<sup>94</sup> Also, the Prefecture monitored and reported on Transredes's fulfillment of obligations it undertook in framework agreements with affected communities.<sup>95</sup> Nevertheless, although the Prefecture's reports described and critiqued the company's response, and recommended actions that the Vice-Ministry should demand of Transredes, the Prefecture did not have the authority to direct the response to the spill.

The Bolivian government also failed to act to protect the interests of the communities living along the Desaguadero. Whether at the local or national level, government officials neither advised communities of their rights nor intervened to mediate between the company and the communities. The Minis-

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89. Bolivia is geographically and politically divided into departments, governed by Prefects, who are appointed by the national Executive. *See* BOL. CONST. arts. 108-09.

90. *See* Letter from Carlos Bohrt, Prefect of Oruro, to Neisa Roca, Vice-Minister of Environment (Feb. 3, 2000) (on file with author).

91. *See* Reglamento para la Prevención y Control Ambiental, arts. 4-5.

92. *See* Ministerio de Desarrollo Sostenible y Planificación, Resolución Ministerial No. 018/2000 (Feb. 10, 2000).

93. *See id.*

94. *See, e.g.*, Prefectura del Departamento de Oruro, Dirección de Recursos Naturales y Medio Ambiente, Unidad de Medio Ambiente, Informe de Análisis de Agua, Sedimento y Suelo (June 15, 2000).

95. *See* Prefectura del Departamento de Oruro, Informe: Viaje de Inspección, Dirección Departamental de Recursos Naturales y Medio Ambiente (Apr. 27, 2000).

try of Sustainable Development and the Vice-Ministry of the Environment made no effort to provide direct assistance to the communities even while they criticized Transredes. For its part, the Prefecture appears to have taken little action to advise affected communities of their rights or mediate between the company and community members. Other government officials who arguably had jurisdiction to act to protect the rights of the community members similarly failed to do so. For example, in interviews, officials from the Vice-Ministry of Indigenous Affairs explained that the Aymara and Quechua people around the Desaguadero organize land ownership based on families, rather than on the traditional “ayllu” scheme; as a result, they are designated as peasants by the Vice-Ministry, and their issues fall within the jurisdiction of the Ministry of Peasant Affairs. As for the Uru Moratos, the Vice-Ministry of Indigenous Affairs did not get involved in advising them because:

They haven't been directly impacted, but indirectly as the flow to Poopo lake, their habitat, [was] contaminated . . . . [Moreover, t]he organization system of the Uru has always made their relating to the States very difficult. They don't find members of the state with whom they can work well . . . . They should be organized through their own structure. They are few and wield very little political pressure. They have no land ownership, conflicted relations with their neighbors. Their work is fishing, commercial trading, laboring in the city, migrant work. This makes it difficult to make specific strategies, to have lines of action.<sup>96</sup>

Ultimately, no government authority took responsibility for securing the interests of the people, and they were left to deal with Transredes largely on their own. In the absence of Bolivian law specifically directing the company's response to the spill, in the absence of a preset contingency plan, and with limited guidance from the government, Transredes alone determined the nature and scope of its response.

#### a. Transredes' Actions in Response to the Spill

Once the spill was detected and the flow of oil stopped, the company's first actions were to hire the American companies

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96. Interview with Felipe Caballero and Jose Ramirez, Officials from the Vice-Ministry of Indigenous Affairs, in Bolivia (May 28, 2003).

PCA and Garner to evaluate the impact of the spill, put in place barriers to contain the spread of the oil, and set up a supply system to transport equipment to the site of the spill.<sup>97</sup> After the immediate crisis period had passed, the company focused on three areas of activity: cleanup operations, emergency relief, and compensation. Again, there was no law specifically dictating how Transredes should conduct these operations and little intervention by the government. To the extent that the government did attempt to oversee the cleanup, various government officials reported that the company resisted any interference with its plans.<sup>98</sup> An attorney for the Ministry of Sustainable Development told us:

The company made the mistake of believing that if they worked with the companies from America and did everything these companies told them, they were doing everything and that was it. They believed they did not have to obey any Bolivian law. In the beginning they were very arrogant . . . when I first came to work here, once the Transredes attorney came and all attorneys from Ministry were practically hiding under their desks . . . . The same thing happened with technicians. In our papers we [congratulate] Transredes [for] doing a great job. Transredes took advantage of their economic power and relations they had with external companies."<sup>99</sup>

The following subsections explore in greater detail Transredes' actions with regard to clean-up, emergency assistance, and compensation.

### (1) The Cleanup

Transredes conducted the cleanup operation by hiring community members to clean the water and soil manually, most of the time wearing protective gear provided by the company.<sup>100</sup> Community members state that they were paid approximately 40 bolivianos, about U.S. \$5 per day.<sup>101</sup> The oil removed from the river was deposited in plastic bags, and then transported to the

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97. See 2 Environmental Audit, *supra* note 54, at 76-77.

98. See Telephone Interview with Neisa Roca, *supra* note 13.

99. Interview with Patricia Garcia, *supra* note 14.

100. See Fernando Gonzalez Statement, *supra* note 64. According to Mr. Gonzalez, they hired Garner, a U.S. company, to oversee cleanup operations. See *id.*

101. See Interview with Community of Santo Tomas, in Bolivia (May 23, 2003) [hereinafter Community of Santo Tomas Interview]. The Environmental Audit notes that daily wages ranged between 35 and 40 bolivianos, which was high in relation to the

Sica-Sica pumping station several miles away.<sup>102</sup> Although according to the Environmental Audit this process was consistent with internationally accepted standards, it remains controversial.<sup>103</sup>

First, some have criticized the decision to hire local people to conduct the cleanup, given their lack of expertise in this work.<sup>104</sup> In addition, although community members who participated in the cleanup were paid more than the average daily wage in the region, several sources stated that the hiring of community members was very divisive, and perhaps deliberately so.<sup>105</sup> Specifically, they insist that Transredes created controversy by paying people different amounts for the same work.<sup>106</sup> They also noted that hiring local people as supervisors created a conflict of interest.<sup>107</sup> Thus, the Environmental Audit found that, because community leaders were designated as foremen in the cleanup, they were "in many cases, strongly questioned by their bases ' . . . for not having demanded that Transredes clean up everything.' "<sup>108</sup>

Second, serious questions remain as to the thoroughness of the cleanup effort. Many community members assert that oil remains in the soil near the river. For example, Saul Apaza, a leader from the community of Japo, stated in an interview that "Santo Tomas is in the mouth of the left branch of the Desaguadero River. When the oil entered, it covered everything. But

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average income of 25 to 30 bolivianos in the region. See 2 Environmental Audit, *supra* note 54, at 89.

102. See Interview with Fidel Castro Ponce, Sica-Sica Pumping Station Supervisor, in Bolivia (May 24, 2003).

103. See 7 Environmental Audit, *supra* note 54, at 8

104. See MONTAYA ET AL., *supra* note 39, at 165-66.

105. See *id.* at 166. The Environmental Audit notes that the population complained about internal conflicts over access to clean-up jobs, as well as lack of training. See 1 Environmental Audit, *supra* note 54, at 6.

106. See MONTAYA ET AL., *supra* note 39, at 166. According to Montoya, differences in payment to community members "not only caused internal division in the communities, but also neutralized the attitude of community members in the face of the conflict, as the economic retribution for their services was a 'positive' facet of the spill that benefited them." *Id.* at 166.

107. See *id.* at 166-67.

108. 7 Environmental Audit, *supra* note 54, at 8. Another allegation by one commentator is that in many cases, Transredes required that people who were hired for cleanup sign compensation agreements; the wages paid to those engaged in cleanup were later considered by the company to be part of their "compensation." MONTAYA ET AL., *supra* note 39, at 164-67.

after a week, another wave of water came, which covered all the oil with sediment. It has been verified that under the earth there is oil, which remained and which has not been cleaned. What has been cleaned is on top — the superficial part.”<sup>109</sup>

Community members living on the shores of Lake Poopo also dispute Transredes’ claim that the oil never reached the lake. For example, members of an Uru Morato community located at the southernmost end of Lake Poopo, furthest from the point at which the Desaguadero enters the lake, insisted to our delegation that oil was still present under a layer of sediment near the lake. Indeed, community members led the delegation to a location near the lake and removed a thin layer of sediment to reveal a substance they claimed was oil. This substance could be found under the soil’s surface throughout the area, 100 meters in each direction from the starting point.<sup>110</sup> When confronted with the community’s claims, Transredes representative Tony Henshaw reiterated the company’s position that oil had never reached the lake.<sup>111</sup> In support of his position, he pointed to a report by Polaris Applied Sciences, which states that “hydrocarbons were not found in the samples of water and sediment collected from the areas of lakes Uru Uru and Poopo, so the oil did not abandon the Desaguadero system.”<sup>112</sup> At the same time, Henshaw conceded that the conclusion was based on only a small number of samples taken from a lake spanning over 1000 square kilometers.<sup>113</sup> Moreover, Henshaw was unable to explain why the community members had been included in the compensation process if no oil had reached the lake.<sup>114</sup>

Third, several people within the affected communities alleged that the company misled them about the nature of the contamination. For example, one woman in San Pedro de Chal-

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109. Statement by Saul Apaza, Interview with Santo Tomas Community, in Bolivia (May 23, 2003).

110. Professor Tracy Higgins, to verify the presence of the substance throughout the area, walked approximately 100 meters in four different directions from the initial spot, and found the same substance under the surface.

111. See Interview with Anthony Henshaw, in Bolivia (May 28, 2003); Fernando Gonzalez Statement, *supra* note 64.

112. See Respuesta a preguntas formuladas por la Universidad de Fordham, en la reunion sostenida con Transredes el 29 de mayo de 2003 (answers to questions provided by Transredes), question 3 [hereinafter Transredes Respuesta]. See Polaris Report, *supra* note 76, at 20.

113. See Interview with Anthony Henshaw, *supra* note 111.

114. See *id.*

Iacollo stated that “at the time of cleaning they said it wasn’t contamination; it was only crude oil.”<sup>115</sup> Another man in El Choro said that “[a]t first the company minimized the damages. Later, through all means it tried to divide the communities. It even told us that the crude oil was a fertilizer. There was desperation.”<sup>116</sup>

## (2) Emergency Supplies and Medical/Veterinary Care

In the aftermath of the spill, the communities were faced with serious contamination of their water supply and the food and water supplies for their livestock. Transredes took a number of actions to mitigate the spill’s impact on the affected communities on its own, with limited governmental instructions and no guidance from Bolivian law. Transredes promised to provide water for to the affected communities, medical and veterinary care, and in some cases, food for animals.<sup>117</sup>

In interviews with the Crowley delegation, community members complained that Transredes did not provide adequate water,<sup>118</sup> food, or veterinary care.<sup>119</sup> A representative statement was made by the Vice-President of the Municipal Council of El Choro:

This sector of the municipality only has ranching activity: sheep and cattle. We provide meat, cheese, and milk to the markets of Oruro, Cochabamba, and La Paz. After the oil spill, the price of products dropped considerably. At the time, there was a drop in the production of forage because we

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115. Interview with President of the Association of Women of Sora Chico, San Pedro de Challacollo, in Bolivia (May 23, 2003).

116. Interview with Representative from Primo Chambi, El Choro, in Bolivia (May 23, 2003) [hereinafter Representative from Primo Chambi Interview].

117. See Press Release, Transredes S.A., *Queda Mucho por Hacer . . . Pero Estamos Trabajando Fuerte* (Feb. 11, 2000).

118. With regard to water distribution, the Environmental Audit points out that a large amount of water was distributed. See 7 Environmental Audit, *supra* note 54, at 10. However, the company’s distribution method (responding to demand) resulted in some communities receiving more water than they needed, while others received insufficient water, and a high percentage of communities (48%) did not receive water at all. See *id.* at 10.

119. See, e.g., Interview with Community of Pata Pata, in Bolivia (May 23, 2003) [hereinafter Community of Pata Pata Interview] (“Forage was not brought; water was not brought. Other communities got water but this one did not.”); Interview with Max Calisaya Apaza, Community of Puñaca (May 23, 2003) [hereinafter Community of Puñaca Interview] (“The company came; they were promising to give the cattle food. They didn’t bring feed for the cattle or drinking water.”).

closed the irrigation channels. We lacked water for our animals and ourselves. Transredes gave us a little water but not enough. Due to this and the contamination there were animal deaths . . . . From the time of the spill until this date we have great losses . . . . Since then, animals are born with malformations. Forage is very low; this is a consequence until this date . . . . We don't have drinking water; we keep drinking the channel's water. Many people are migrating to other places.<sup>120</sup>

This sentiment was shared by community members throughout the region. Moreover, the Environmental Audit concluded that both the medical and veterinary care provided by Transredes were deficient, as the care had a general focus, and did not address specific health problems that might have resulted from the oil spill.<sup>121</sup>

### (3) The Compensation Process

Bolivian law establishes that companies engaged in dangerous activities or in hydrocarbons activity are obligated to compensate individuals for harms resulting from such activities.<sup>122</sup> Thus, insofar as transporting oil is both a dangerous activity and a hydrocarbons activity, Bolivian law establishes an obligation for Transredes to compensate individuals for the harms caused by the oil spill. In interviews, the head of Transredes' Legal Department recognized that the company was subject to strict liability for the spill.<sup>123</sup>

Describing the effects of the spill with precision is difficult, given that studies of the spill's impact have reached differing conclusions. Transredes, through contracted experts, produced some initial studies of the spill's impact which, unsurprisingly, yielded comparatively low estimates of the damage.<sup>124</sup> For its part, the government did not conduct broad studies of the spill's impact until many months later, through the Environmental Audit. Because of the passage of time and resulting loss of evidence, the auditors had to rely on Transredes' studies of the im-

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120. Interview with Community of El Choro, in Bolivia (May 23, 2003) [hereinafter Community of El Choro Interview].

121. See 7 Environmental Audit at 11-14.

122. See *CÓDIGO CIVIL* (CÓD. CIV.) (Bol.), art. 998.

123. See Fernando Gonzalez Statement, *supra* note 64.

124. See, e.g., Polaris Report, *supra* note 76.



mediate impact of the spill. As a result, even the governmental audit cannot be regarded as fully independent. A few independent groups have also conducted studies of the effects of the spill, again reaching varying conclusions.<sup>125</sup>

According to Transredes representatives, their medical team saw 13,000 human patients and found that none of them had any health problems related to the oil spill.<sup>126</sup> Similarly, with respect to animals, Transredes official Tony Henshaw claimed that the company had approximately 200 autopsies performed on animals and found no hydrocarbons in any of them.<sup>127</sup> Another Transredes representative stated that “the only animal that died was a cow that ate a plastic bag that was going to be used for cleanup.”<sup>128</sup> Transredes and others have argued that, for the most part, the health problems experienced by humans and animals are unrelated to the oil spill and may result from other contamination already in the Desaguadero River or, in the case of animal diseases and deaths, from inbreeding.<sup>129</sup> Indeed, questions about the health of the animals prompted Henshaw to remark simply: “Life is hard in the alti-plano.”<sup>130</sup> However, community members generally assert that the health problems they noticed in animals and humans only started or increased after the oil spill.<sup>131</sup> They also complained that Transredes was deceptive. For example, a community member from El Choro stated that “the technicians were irresponsi-

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125. Of note, the study *Efectos Ambientales y Socioeconomicos por el Derrame de Petroleo en el Rio Desaguadero* jointly published by the Technical University of Oruro, the Center for Ecology and Andean Peoples, and the Program of Strategic Investigation of Bolivia, is the most comprehensive independent study of the spill's impacts.

126. See Fernando Gonzalez Statement, *supra* note 64.

127. See Interview with Anthony Henshaw, *supra* note 111.

128. Brigitte Herrera Statement, *supra* note 74.

129. See Interview with Pietro Fiorilo, CARE, in Bolivia (May 22, 2003) [hereinafter Pietro Fiorilo Interview]; Fernando Gonzalez Statement, *supra* note 65; Brigitte Herrera Statement, *supra* note 74.

130. See Interview with Anthony Henshaw, *supra* note 111.

131. See Interview with Community of Pata Pata, *supra* note 119 (“Fifty percent of animal deaths [were] caused by mining contamination. After the oil spill, the rest of the animals died.”); Interview with Community of Toma Toma, in Bolivia (May 23, 2003) (“Sheep died eating the oil . . . . It killed a sheep, and causes lambs with deformities — like the one with 8 legs. People have problems with vision.”); Community of Ulloma Interview, in Bolivia (May 20, 2003) (“In January 30, 2000, the oil spill happened which caused lots of problems and took us to poverty. Animals drank water from the river, and grazed around the river or the islands in the river. They ate the grass, got diarrhea and died. For example, a person who had 200 sheep or over, lost about 40.”).

ble, manifesting that the infections in our sheep were caused by a mosquito.”<sup>132</sup>

At this stage, determining the accuracy of veterinary diagnoses is impossible. Moreover, because baseline statistics regarding mortality and health do not exist for livestock in the region, a controlled comparison cannot be made. Nonetheless, the Environmental Auditors found evidence that “exposure to contamination has generated health problems in the population in the region during the period analyzed”<sup>133</sup> and found that out of ninety-nine cases of dead animals analyzed by Transredes’s own vets, “approximately 40%” presented a “diagnosis related to intoxication.”<sup>134</sup>

This project does not undertake a substantive evaluation of these studies. Rather, the delegation focused on documenting the perceptions of the community members regarding the harm they suffered and, more importantly, their experiences dealing with Transredes in the compensation process. With this focus, the Crowley delegation found that communities believed the effects of the spill were extremely severe and that many of these effects persist due to improper cleanup or inadequate compensation and remedial measures. Community members maintain that consumption of contaminated water and forage resulted in health problems in animals and humans, and in a drop in the market prices of their products.<sup>135</sup> A statement by a Rancho Chuquiña community member is illustrative:

Transredes told us not to give forage to animals, but there was nothing else, so the animals ate and some are blind, some have coughs, some birth defects. They are still sick . . . . One person had 2000 sheep, but now has 200. They still forage from here, but are very skinny, and we can’t sell the sheep now. Now we have to go to Oruro to earn money . . . . Now there isn’t life here in the country, Señorita.<sup>136</sup>

Residents of Chuquiña led the Crowley delegation to a sheep pen, and pointed out a number of deformities or health

132. Representative from Primo Chambi Interview, *supra* note 116.

133. 7 Environmental Audit, *supra* note 54, at 11.

134. *Id.* at 13.

135. *See id.* at 11-13, 36 (“The oil spill has generated a temporary and generalized drop in the prices of products from the affected areas . . . . This drop in prices affected principally the sale of meat and cheese . . . .”).

136. Interview with Community of Rancho Chuquiña, in Bolivia (May 23, 2003).

problems in the animals.<sup>137</sup> The family claimed that all or most of the problems were caused by the contamination resulting from the spill.<sup>138</sup>

Whatever the merits of these particular claims, even Transredes concedes that the spill prevented communities from safely using the Desaguadero's water for months,<sup>139</sup> and destroyed forage for their animals.<sup>140</sup> Such widespread and serious damage resulting from the spill necessitated an elaborate scheme to evaluate and quantify claims brought by individuals and communities against the company. Despite the importance of an independent and objective mechanism to adjudicate the claims, here again the government failed to act to oversee the process or to protect the interests of those harmed. Transredes was again left to deal with the communities on its own.

Under the direction of the company, the compensation process took place in two phases. In the first phase, the company paid community members who had signed compensation agreements an amount determined by evaluators hired by Transredes. The company paid the compensation in kind or through community or group development projects rather than cash. The company contracted with Cooperative for Assistance and Relief Everywhere-Bolivia ("CARE-Bolivia"), an international humanitarian NGO for the purpose of distributing the compensation. The second phase of compensation took place over a year after the spill, in accordance with the findings of an audit ordered by the Ministry of Sustainable Development. Transredes distributed this remaining compensation in cash.

Transredes considers the compensation process, particularly the first phase, to have been a great success.<sup>141</sup> Both Transredes and CARE have touted their affiliation (the "Desaguadero Program") as a novel and highly positive form of NGO-corporate

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137. Among the health problems the group documented there were blindness, loss of wool, a protruding uterus, a deformed head, eye problems (such as tumors), and tumors on the face. See Interview with Family on the Outskirts of Chuquiña, in Bolivia (May 23, 2003).

138. See *id.*

139. Transredes announced that the river water could be used normally on May 23, 2000. See Environmental Audit, *supra* note 54, at 24.

140. See *id.* at 32.

141. The company has challenged some of the audit's findings that supported the second phase of compensation. See Fernando Gonzalez Statement, *supra* note 64.

cooperation. Indeed, in its final report on the Desaguadero Program, CARE states that:

The allies Transredes and CARE Bolivia finished the process satisfied at having been able to fulfill their commitments to the affected communities, and generate learned lessons that are not only useful to us, but also to the communities where we work, the organizations with which we associate, other enterprises in the sector, national and international NGOs, and also the Bolivian State, all of whom could find in [the Desaguadero] Program a model of work between communities, private enterprise, and organizations of civil society.<sup>142</sup>

Despite the rosy picture painted by the partners in the Desaguadero Program, certain aspects of the compensation process raise serious concerns. The balance of this section describes the process in greater detail and explains these concerns.

(a) First phase: Transredes' compensation process

Shortly after the spill occurred, Transredes initiated a compensation process whereby communities and the company would sign a series of agreements establishing the method for evaluating damages and the amount of compensation due. This amount would later be distributed by CARE-Bolivia.<sup>143</sup>

First, Transredes and affected communities signed standard framework agreements ("convenios marco"), which established the process by which individuals' damages would be evaluated.<sup>144</sup> According to these agreements, Transredes would compensate communities for direct losses caused by the spill.<sup>145</sup> To do this, Transredes would distribute claim forms on which families would specify any concrete losses for which they could produce some kind of proof.<sup>146</sup> These claim forms would then serve

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142. CARE — TRANSREDES, *BALANCE DEL PROGRAMA DESAGUADERO: 2 AÑOS DE COMPENSACIÓN PARA EL DESARROLLO 2000-2002*, at 4 (Brigitte Herrera ed., 2003) [hereinafter *BALANCE DEL PROGRAMA DESAGUADERO*].

143. *See id.* at 7.

144. *See* form Convenio Marco [hereinafter *Convenio Marco*], in TRANSREDES S.A., *DERRAME OSSA-2 AL RIO DESAGUADERO: TERCER INFORME INTERMEDIO: CONCLUSIÓN DE LAS OPERACIONES DE LIMPIEZA Y ACTUALIZACIÓN DEL PROGRAMA DE COMPENSACIÓN* ANN. G (2001) [hereinafter *TERCER INFORME INTERMEDIO*].

145. *Id.* at cl. 3.1(b).

146. *See* 2 Environmental Audit, *supra* note 54, at 148. The Audit points out that in communiqués from Transredes to the communities, the company established that:

The only instrument that is accepted by the laws to support a just claim, is a

as the basis for teams of evaluators to calculate each family's losses.<sup>147</sup> Transredes would pay for several evaluators, one selected by Transredes, and one selected by each community.<sup>148</sup> An agreement between Transredes' and each community's evaluators would determine the final amount of compensation, and the parties agreed to "recognize and accept without any discussion the agreed decision at which the independent evaluators arrive."<sup>149</sup> Also in the framework agreements, Transredes committed itself to carrying out an emergency plan to protect and preserve the health of the community, its animals, and natural resources from harms caused by the spill.<sup>150</sup> The agreement provided that disputes between the parties would be resolved through mediation or arbitration.<sup>151</sup>

To receive the agreed upon compensation, each community had to sign a Contrato Transaccional [transactional agreement] with Transredes, declaring that the compensation amount included "all damages direct or indirect, present and future, caused by the spill . . . ."<sup>152</sup> The transactional agreements contained language waiving any legal action against Transredes or its agents, through "arbitral, civil, criminal, or administrative channels."<sup>153</sup> The communities also agreed to distribution of the compensation by CARE, in kind or through community development projects, rather than in cash.<sup>154</sup> Finally, the communities that signed the transactional agreements would sign agreements with CARE for the execution of projects or compensation

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declaration of the goods, properties and capacities prejudiced by an incident. This document is the Claim form that is distributed to all heads of families of the communities that think they are affected by the spill. . . . Each claim must have a backing or proof because it is not possible to calculate on the basis of desires or aspirations of being compensated, but rather on the basis of evidence of a concrete and direct harm that can be measured and that can be assigned a value in money.

*Id.* at 148.

147. See Convenio Marco, *supra* note 144; Acta, in TERCER INFORME INTERMEDIO, *supra* note 144, ann. G [hereinafter Acta].

148. See *id.* at cl. 2.

149. *Id.* at cl. 3.

150. See Convenio Marco *supra* note 144, at cl. 3.1(a).

151. See *id.* at cl. 4.

152. See form Contrato Transaccional [hereinafter Contrato Transaccional], in TERCER INFORME INTERMEDIO, *supra* note 144, ann. G, cl. 4.

153. *Id.*

154. *Id.* at cl. 3.

in kind.<sup>155</sup>

From the outset, the compensation process was heavily weighted in favor of the company. First, because of their lack of experience in negotiation and lack of outside legal advice, the communities had only a limited understanding of their legal rights and options. Transredes approached the communities through Community Liaison Officers ("CLOs"), hired by the company to explain, among other things, the compensation agreements.<sup>156</sup> No lawyers or other advisors were provided to the communities by the company or by the government; and most communities could not afford to hire lawyers to advise them. One person from an Uru Morato community stated that Transredes and CARE asked them to find a lawyer, but they never considered consulting one because they do not trust strangers.<sup>157</sup> When asked whether Transredes took any action to ensure that the communities had independent legal advice, the head of Transredes' legal department, Fernando Gonzalez, stated that "we trusted very much in the balance of the agreement itself, because it is very balanced . . . We are accepting our obligations: that's the most important thing."<sup>158</sup>

For its part, the government did nothing to obtain legal counsel for communities; worse yet, it appears that some governmental authorities may have pressured communities to sign compensation agreements. Juan Carlos Montoya, who at the time of the Mission was in charge of the Prefecture's Environmental Unit ("Unidad de Medio Ambiente"), notes:

In reality, the only thing the Prefecture was able to do was to facilitate the meetings between the communities and the company. It was not able to analyze the agreement proposed by Transredes to the communities; rather, it accelerated and applied pressure for the communities to sign and rapidly resolve the conflict, forbidding any judicial action against Transredes: "The Prefect himself threatened the environmental organizations that he was not going to allow lawsuits against the company Transredes, because those lawsuits made investments escape."<sup>159</sup>

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155. See *BALANCE DEL PROGRAMA DESAGUADERO*, *supra* note 142, at 7.

156. See 2 *Environmental Audit*, *supra* note 54, at 140-41.

157. See *Community of Puñaca Interview*, *supra* note 119.

158. Fernando Gonzalez Statement, *supra* note 64.

159. *MONTOKA ET AL.*, *supra* note 39, at 164.

Local NGOs were similarly unhelpful in providing legal advice to the affected communities.<sup>160</sup> NGO effectiveness was undermined by several factors, including a lack of organization and internal divisions.<sup>161</sup> For the purposes of this Report, however, the most troubling issue is the allegation that Transredes may have attempted deliberately to undermine the effectiveness of the NGO response. According to Arturo Alessandri, head of the Oruro departmental office of the Permanent Assembly of Human Rights, the problem was even more serious: in his view Transredes's greatest success consisted of "disorganizing" NGOs and "frustrating [their] capacity to respond as organizations of civil society" by hiring "civic leaders or from labor or environmental organizations."<sup>162</sup> If true, these allegations suggest that Transredes not only failed to provide independent counsel to the communities but also deprived them of their best opportunity for assistance.

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160. Oruro, the largest city in the region affected by the oil spill, has numerous small NGOs or branches of NGOs that got involved in the events surrounding the oil spill in one way or another. However, their effectiveness as defenders of citizens' interests or as protectors of the environment was ultimately limited. For the most part, the NGOs' role consisted of drawing public attention to the plight of affected communities through the media and by conducting studies of the impact of the spill. Insofar as they were able to channel some of the communities' demands, they may have assisted the communities in pressuring the company to respond to their complaints.

161. NGOs appear to have been initially stunned, and slow to respond to the crisis. Thus, for example, they did not provide timely advice to affected communities regarding their rights. NGOs also appear to have been confused about how to approach Transredes; in some cases, NGOs chose to collaborate with the company, or to advise communities to go along with Transredes' compensation process, while other NGOs were consistently hostile to the company. *See* Interview with Arturo Alessandri, Asamblea Permanente de Derechos Humanos — Oruro (May 22, 2003). For example, the environmental organization LIDEMA ("Liga de Defensa del Medio Ambiente") signed an agreement with Transredes, whereby LIDEMA would administer funds that Transredes was giving to the Prefecture of Oruro to finance the Prefecture's monitoring of Transredes' actions to mitigate the spill's damage. *See* Transredes Respuesta, *supra* note 112, at question 2. According to the company, it gave U.S. \$60,310 to LIDEMA, of which the Prefecture took U.S. \$11,793.74 and LIDEMA charged U.S. \$9,046.50. *Id.* However, eventually the directorate of LIDEMA decided to return the remaining U.S. \$39,460.76 to Transredes, because the Prefecture and the Vice-Ministry of the Environment were unable to reach an agreement regarding how the money should be spent. *Id.* Other NGOs thought LIDEMA should not have agreed to administer the funds, because Transredes was using the organization to clean up its image. *See* Interview with Patricia Molina, FOBOMADE (May 27, 2003). Such differences between groups resulted in infighting within the NGO community, and an inability to present a solid front to the company, government, and affected communities.

162. Interview with Arturo Alessandri, Asamblea Permanente de Derechos Humanos-Oruro, in Bolivia (May 22, 2003).

The lack of legal advice undermined communities' ability to protect their interests in the negotiation process. As the Environmental Audit noted:

[The process] in reality is determined in all its central elements by Transredes. All the documents with legal value that mark the milestones in the process: Framework Agreement, Claim Forms, Evaluation of Damages, Transactional Agreements, and Agreements for Execution of Projects or Payment in Kind, are defined unilaterally by Transredes. The communities, in contrast, have not had legal advice that would have allowed them to give these documents a different reading. Only in situations of extreme rejection of the process in some communities, these have resorted to legal support. The analysis of these documents shows that they did not favor the communities and that even in some cases legal norms have been transgressed.<sup>163</sup>

Indeed, some communities seemed not to understand that they had an alternative to signing the agreements. The comment of a member of the San Pedro de Challacollo community was typical: "people from the El Choro municipality said that we had to sign the compensation agreements because otherwise we would lose compensation."<sup>164</sup> In the end, virtually all the communities signed framework and compensation agreements without amendment.

Beyond the decision to sign the agreements, timely and independent legal advice might also have reduced confusion within communities over key issues such as what they should declare as a loss. For example, an interviewee in San Pedro de Challacollo stated that "[w]e were not well informed because we thought that we would have to pay taxes on each animal we had, so we did not have them taken into account in their totality."<sup>165</sup> Another interviewee in El Choro said that "[t]here are many people who were left without compensation, humble people who could not express themselves."<sup>166</sup>

Even those community members who understood that legal alternatives existed declined, for the most part, to pursue them because they believed it would not be effective and would take

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163. 2 Environmental Audit, *supra* note 54, at 182.

164. Community of San Pedro de Challacollo Interview, *supra* note 49.

165. *Id.*

166. Community of El Choro Interview, *supra* note 120.



too long. In an interview in the community of Santo Tomas, an individual told us: "We wanted to start a suit, but we have seen that a suit is not going to be resolved in a month or a year, so we wanted to resolve it directly between the company and the community."<sup>167</sup> Another person added that "[o]ur justice delays a lot, up to ten years, and the proof of the crime disappears."<sup>168</sup>

The pressure to sign compensation agreements was exacerbated by the communities' extreme poverty and need of emergency assistance. Residents felt that they simply could not afford delays in receiving compensation, even if by going through a longer process, such as a lawsuit, they might receive more. Teofilo Quispe, from Puñaca, told us that members of his community knew that they could sue Transredes instead of signing but decided to sign anyway because they needed the money: ninety percent of the community was in favor of signing the compensation agreements, even though they were not happy with the settlement amount.<sup>169</sup> Moreover, some of the company's representatives may have misled individuals regarding the economic advantages of signing compensation agreements: one individual we interviewed alleged that the company told his community that the first to sign would be the best compensated.<sup>170</sup>

Another factor that undermined the bargaining position of the communities was the emergence of division within and among the various groups. In interviews with communities, we heard repeated complaints about unequal distribution of compensation, favoring certain communities or municipal leaders and not others. Some alleged that this pattern of distribution was part of a deliberate strategy by the company to divide the communities and turn them against each other. For example, one community leader in San Pedro de Challacollo told us that:

Transredes has made us fight among families, among communities, and among peoples. At first, we worked with El Choro. Unfortunately, our municipal authorities have leaned in favor of El Choro. Over time, we have been totally abandoned by authorities of the municipality . . . . We have been compensated . . . with thirty-two tractors, but Challacollo only

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167. Community of Santo Tomas Interview, *supra* note 101.

168. *Id.*

169. See Statements by Teofilo Quispe, Community of Puñaca Interview, *supra* note 119.

170. See Community of El Choro Interview, *supra* note 120.

received five tractors, and the rest benefited our brothers from El Choro.<sup>171</sup>

Determining whether Transredes deliberately treated the communities differently or the division was a predictable by-product of a poorly understood distribution scheme is difficult. The company apparently resisted the urging of NGOs to meet with all of the community leaders as a group and instead opted to deal with the communities individually.<sup>172</sup> Moreover, Transredes did little or nothing to dispel the perception of unequal treatment. Whatever the source of the divisions, the lack of unity among the communities reduced their strength in negotiating with the company and made it more difficult for them to secure an effective governmental response.

Several provisions of the compensation agreements themselves further exacerbated the power imbalance between the company and the communities. First, the Framework Agreements established that Transredes would provide emergency assistance to the communities that signed.<sup>173</sup> Given the communities' urgent needs for water and medical and veterinary assistance after the spill, this provision was a powerful incentive for communities to sign the Framework Agreements. Thus, even if they had doubts about the compensation process proposed by Transredes, the provision regarding emergency assistance practi-

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171. Statements by Javier Carasila Yugar, President of the Territorial Base Organization of Rancho Carasila, Community of San Pedro de Challacollo Interview, *supra* note 49. While this statement is representative of what many people told us about the effect the compensation process had on internal community relations, it does not necessarily mean that Rancho Carasila was treated differently from El Choro communities in the compensation process. The compensation chart provided to us by CARE and Transredes states that twenty-six families in Rancho Carasila received a total of U.S. \$6,371.92 in kind, primarily in the form of cattle. See BALANCE DEL PROGRAMA DESAGUADERO, *supra* note 142, at 21. The average community of approximately thirty-eight families in El Choro received U.S. \$21,000-U.S. \$22,000 in the form of tractors and the planting of forage. These numbers indicate that the average family in El Choro received more compensation than the average family in Rancho Carasila; however, this difference may simply reflect differential losses resulting from the spill.

172. For example, the Bishop of Oruro, Monseñor Braulio Saez, stated in an interview:

I think that Transredes was concerned about their reputation and the money that they would have to pay because they started having separate meetings with the communities rather than a total meeting with the communities as the institutions wanted.

Interview with Monsenor Braulio Saez, Bishop of Oruro, In Bolivia (May 22, 2003).

173. See Convenio Marco, *supra* note 144, at cl. 3.1(a).

cally ensured that communities would sign Framework Agreements.

Second, the Framework Agreements called for Transredes to hire two sets of evaluators, one selected by the company and one by each community.<sup>174</sup> As a practical matter, the communities could not afford to pay for evaluators and therefore had to rely on Transredes. Yet because Transredes employed them, the evaluators faced an immediate conflict of interest. Worse yet, this situation created a tool for Transredes to manipulate evaluators' findings: Some observers have alleged that when the time came for the two teams to compare their results, "the independent evaluators did not defend the results of their work because they were pressured with the threat that their wages would be withheld if they did not accept the amount proposed by Transredes."<sup>175</sup> These allegations offer one possible explanation of the Environmental Audit's finding that "the payments that Transredes made to evaluators bear no relation to the number of claim forms to be evaluated, and it is not clear what criterion was applied for this."<sup>176</sup>

Not only did the communities lack the resources to hire their own evaluators, they lacked the necessary expertise to select qualified individuals. As the Environmental Audit noted: "The identification of these professionals signifies a problem for a population that does not have a fluid contact with professionals with these characteristics . . . ."<sup>177</sup> In the absence of community expertise, Transredes stepped in to fill the gap. Out of twenty-eight authorities interviewed by the auditors regarding this issue, five stated that Transredes imposed or actively participated in the selection of the community evaluator.<sup>178</sup> It is difficult to see how these individuals, selected and paid by Transredes, were in any sense independent.

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174. *See id.*; Acta, *supra* note 147, at ¶ 2.

175. MONTROYA ET AL., *supra* note 39, at 170.

176. 2 Environmental Audit, *supra* note 54, at 157. Indeed, the audit includes a chart listing the fees paid to each independent evaluator, and the number of claim forms evaluated. *Id.* at table II.3.4.5-1. An example of the fee variations referenced in the audit is that for the Rivera Agreement, the independent evaluator was paid U.S. \$50,800 to conduct an evaluation of 133 claim forms. In contrast, the independent evaluator for the Llocohuta agreement was paid U.S. \$5,453 to evaluate 147 claim forms. *Id.*

177. *Id.* at 155.

178. *See id.* at 157.

Finally, although the agreements that the communities signed with Transredes and CARE established a set of deadlines for the completion of each step in the compensation process,<sup>179</sup> these deadlines were not met.<sup>180</sup> Thus, according to the Environmental Audit, "the agreements that Transredes signed with the affected communities suggest to them a space of time for receipt of compensation that was not realistic, but that could have motivated them to sign the Framework Agreement to rapidly receive the compensation and dispose of it to cover the harms they had suffered due to the spill."<sup>181</sup> In other words, if the communities settled for less money in order to receive desperately needed compensation more quickly, they lost some of the benefit of their bargain when the payments were delayed.

#### (b) The CARE Distribution

On June 20, 2000, CARE-Bolivia and Transredes signed an agreement to establish a "strategic alliance, making possible the execution of projects of community development in the areas where Transredes operates."<sup>182</sup> A separate agreement, signed by CARE-Bolivia and Transredes on August 3, 2000, established that CARE would carry out the compensation of families affected by the oil spill, "and would turn a simple process of compensation into a contribution to the sustainable development of a very poor region."<sup>183</sup> In an interview, Jan Schollaert, the Director of CARE-Bolivia, stated that there was a lot of opposition both within CARE and in the broader NGO community to this cooperation; however, Schollaert said that CARE "did it for strategic reasons because [the] private sector is huge in Latin American and if you want to be involved you have to work with them as well."<sup>184</sup>

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179. *See id.* at 139.

180. *See id.* at 139. The Audit explains that there were delays in the hiring of independent evaluators for the communities (two to three months on average), so the evaluations were only completed three to four and a half months after the signing of the Framework Agreement. After that, it often took weeks or months before the two sets of evaluators agreed upon the final amount of compensation. *Id.* at 148.

181. *Id.* at 139-40.

182. CARE & TRANSREDES, PROGRAMA DESAGUADERO . . . DE CONFLICTOS Y COMPENSACIÓN A CONSENSO Y DESARROLLO: REPORTE DEL PRIMER AÑO 6 (Sept. 2001) [hereinafter *FIRST REPORT*].

183. *Id.* at 6.

184. Interview with Jan Schollaert, Country Director of CARE Bolivia, in Bolivia (May 27, 2003).

CARE set up a temporary office in Oruro, from which to conduct distribution operations, and hired new personnel for this purpose: at its peak, there were as many as twenty-eight people working for CARE in the Desaguadero Program.<sup>185</sup> In our interviews with CARE employees, we were told that the organization was not involved in the process of determining the amount of compensation owed, or in the process of negotiation over the compensation agreements.<sup>186</sup> Rather, the organization came in only after a compensation agreement had been signed, to assist the communities in designing a community development project, or to distribute compensation in kind.<sup>187</sup>

CARE-Bolivia claims that the process by which the compensation was distributed was highly participatory.<sup>188</sup> To assist communities in reaching a decision about the form of compensation, CARE met with communities and determined what their demands and primary needs were.<sup>189</sup> On that basis, CARE developed a project with the participation of the community.<sup>190</sup> Each community selected two individuals to participate, along with CARE representatives, in a committee to administer the compensation funds for that community ("Administrative Committee"). These committees were directly responsible for the management of compensation funds.<sup>191</sup> In some cases, CARE supplemented the agreed amount of compensation with additional funding from other sources for the development projects.<sup>192</sup>

Compensation was not provided in cash, but rather in the form of community or group development projects, or in kind (in the form of animals or seeds).<sup>193</sup> According to CARE, most of the compensation, approximately seventy-five percent, took the form of projects that benefited groups of families within a

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185. See Pietro Fiorilo Interview, *supra* note 129.

186. See Interview with Jan Schollaert, *supra* note 184.

187. See *id.*

188. See CARE-Bolivia & Transredes, BALANCE DEL PROGRAMA DESAGUADERO, *supra* note 142, at 8.

189. See *id.*

190. See *id.* The Environmental Audit notes that a comparison between the project profiles elaborated with the communities and the actual compensation projects that were carried out shows that the project profiles were not taken into account by CARE in the definition of the final project. See 2 Environmental Audit, *supra* note 54, at 143.

191. See *id.* at 143. See also FIRST REPORT, *supra* note 182, at 19.

192. See *id.* BALANCE DEL PROGRAMA DESAGUADERO, *supra* note 142, at 9.

193. See Interview with Jorge Campero, CARE-Oruro, in Bolivia (May 22, 2003) [hereinafter Jorge Campero Interview].

community, such as the purchase of cattle and machinery.<sup>194</sup> Another seventeen per cent took the form of community projects that would benefit the majority of the members of a community, not just affected families.<sup>195</sup> Most often, these projects consisted of the sowing of forage but also include the development of systems of potable water, construction of housing and productive infrastructure, and the purchase of land.<sup>196</sup> Seven per cent of the compensation was used for the purchase of food and tools.<sup>197</sup> CARE and Transredes note that as of the first year of the compensation process, everyone who received compensation, and particularly those persons who received compensation in the form of community or group projects, received training to ensure the sustainability of the projects.<sup>198</sup> For example, CARE representatives are very proud of the fact that, where tractors were purchased for communities, CARE taught community members not only how to operate the tractors, but also how to maintain them. This training would not have been ensured had the communities been compensated in cash and left to purchase their own tractors.

Transredes decided not to distribute cash because of the risk that community members would not spend the cash in a productive manner.<sup>199</sup> CARE representatives stated that paying the compensation in cash would have been unwise because the affected individuals might have spent it all without repairing the harm caused by the spill.<sup>200</sup>

According to CARE and Transredes, through this process, they distributed U.S. \$1,190,746.96 in compensation to 3,938 families in 131 communities or an average of U.S. \$302 per family.<sup>201</sup> CARE-Bolivia received U.S. \$817,541 from Transredes for implementing the Program.<sup>202</sup> Put differently, CARE earned

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194. See BALANCE DEL PROGRAMA DESAGUADERO, *supra* note 142, at 11.

195. See *id.* at 9.

196. See *id.*

197. See *id.* at 12.

198. See *id.* at 20.

199. See Fernando Gonzalez Statement, *supra* note 64.

200. See Jorge Campero Interview, *supra* note 193.

201. See BALANCE DEL PROGRAMA DESAGUADERO, *supra* note 142, at 21-23. In addition, they distributed U.S. \$13,329 in interest earned in the communities' bank accounts, as well as U.S. \$330,654 leveraged from other sources. See *id.* at 9.

202. See *id.*

sixty-eight cents for every dollar it distributed to the communities.

Overall, the job that CARE did in distributing the compensation appears to have been reasonably good. Although some community members with whom we spoke stated that they would have preferred compensation in cash, we did not hear significant complaints about CARE's performance. Indeed, some aspects of the partnership are valuable and worth emulating. In particular, the provision of experts who can advise and assist communities in the investment of funds appears to be a positive, if expensive, development. Nevertheless some problems must be noted. First, the communities could have been given greater control over the form of compensation. Although some groups might have lacked the organization and expertise to manage and invest cash awards, this was likely not the case for all. Moreover, even those least prepared to handle direct cash payments might have been counseled and assisted in doing so. Second, by participating in the compensation process established by Transredes, with all its flaws and imbalances, CARE contributed to the legitimization of that process. Although CARE asserts that it played no part in enlisting the communities to settle with Transredes, by overseeing the distribution scheme it put a humanitarian face on that process. In fact, this may be precisely the purpose for which Transredes contracted with CARE. As stated by one CARE employee, "CARE has had to wash the face of Transredes, and perhaps that was the objective behind everything. CARE has been burned in some cases."<sup>203</sup>

### (c) The Second Disbursement

In April of 2001, over a year after the oil spill happened, the government-ordered audit of the spill was completed and released.

In addition to procedural irregularities,<sup>204</sup> the audit highlighted the following substantive problems in the compensation scheme: First, "not all affected individuals have been recognized as such in the process of compensation, such that discontent has

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203. Interview with Pietro Fiorilo, *supra* note 129.

204. See 2 Environmental Audit, *supra* note 54, 182 (noting communities' lack of legal advice, and fact that "all the documents with legal value that mark the milestones in the process . . . are defined unilaterally by Transredes . . . these documents . . . did not favor the communities . . .").

been created in the communities due to this fact.”<sup>205</sup> Second, “the amounts of compensation established do not always adequately express the true magnitude of the damages caused by the spill to the population.”<sup>206</sup> Third, “the environmental impacts are not considered in the evaluations of the impacts and amounts set for compensation.”<sup>207</sup> The auditors were particularly concerned about the fact that no compensation had been paid for the impact of the spill on the population’s pastures, which they described as “the greatest harm” caused by the spill.<sup>208</sup> Affected community members apparently failed to include harm to pastures in their claim forms, not realizing that the loss could be compensated.<sup>209</sup> Finally, “the process has turned out to be very slow, there being an important percentage of communities that has not succeeded in receiving compensation.”<sup>210</sup>

On the basis of this analysis, the Audit recommended that Transredes compensate those newly-identified individuals and complete payment to those for whom compensation was incomplete or insufficient.<sup>211</sup> It also recommended that Transredes implement “a program to support the recovery of soils and pastures, given that the compensation to communities does not represent compensation to the Bolivian State for the impacts caused in the areas affected by exposure to the spill, the cleanup, and pasturing. This program must cover the area exposed to the spill and cleaned, and the area of native pastures that were overused [as a result of the spill.]”<sup>212</sup> Finally, the audit stated that, because of the impact of the spill on local organizations, Transredes should establish a program, implemented through a specialized institution selected by those affected, to strengthen such organizations and assist them in the consolidation of basic citizen rights, land titling, and other social needs.<sup>213</sup>

Ultimately, the auditors recommended that, in addition to the U.S. \$1.2 million that the company had already distributed

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205. *Id.* at VII-15.

206. *Id.*

207. *Id.*

208. *Id.* at II-182.

209. *See id.*

210. *Id.* at VII-15.

211. *See id.*

212. *Id.*

213. *See id.* at VII-16.



through CARE, the company pay a total of U.S. \$2.5 million more in direct compensation to affected communities in a second phase of the compensation process.<sup>214</sup> Transredes distributed this additional compensation directly, without CARE's assistance. In general, this second round of compensation did not satisfy communities who felt that it was still insufficient to cover their losses. Curiously, notwithstanding its insistence that the first distribution be made in kind or through development projects, Transredes made the second distribution in cash. The company evidently disregarded its earlier concerns regarding mishandling of the funds and made the distribution without putting into place procedures to ensure a fair distribution within communities. As a result, in some cases, communities complained that their leaders who received the cash disappeared with it and were not seen again by the communities.<sup>215</sup>

#### (d) Exceptional Cases

In only two instances, communities or individuals rejected the compensation process described above and filed lawsuits against Transredes for compensation. However, after numerous delays and obstacles in the Bolivian courts, both of these cases ended in settlements for the amount of compensation cited in the Environmental Audit.

The first case was a criminal complaint filed by Ms. Dionicia Vasquez, with the assistance of the NGO Pastoral Social, against Transredes for the crime of "contaminating waters destined for public consumption, industrial, agricultural, and fishing uses,"<sup>216</sup> which resulted in damage to her quinoa crops.<sup>217</sup> Transredes presented a series of jurisdictional and procedural arguments for the dismissal of the case, most of which were rejected by the courts.<sup>218</sup> However, Ms. Vasquez ultimately "got tired"<sup>219</sup> and

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214. See Interview with Transredes Legal Team, in Bolivia (May 29, 2003). In addition, the Audit recommended that Transredes pay U.S. \$2.2 million in indirect compensation for the recovery of grasslands, to be administered by the government. *Id.*

215. See Community of Puñaca Interview, *supra* note 119.

216. See Código Penal, arts. 216(2), 358(5).

217. See Complaint by Dionicia Vásquez de Riglos against Transredes, S.A. (Mar. 24, 2000).

218. See Resumen del Juicio Penal iniciado por Dionicia Vásquez de Riglos (summary of case provided by Transredes, S.A.).

219. See Arturo Alessandri Interview, *supra* note 162.

settled with the company for U.S. \$58,000.<sup>220</sup>

The second case involved two communities, Japo and Chuquiña, which refused to sign even the Framework Agreements, and instead, started documenting the effects of the oil spill, conducting protests, and demanding that independent commissions be formed to conduct studies of the specific problems.<sup>221</sup> According to most observers, Japo and Chuquiña were able to challenge Transredes' compensation process thanks to Chuquiña's past experience and savvy leadership. Chuquiña had substantial experience negotiating with the mining company Inti Raymi over compensation to the community for Inti Raymi's use of adjacent land to conduct mining operations.<sup>222</sup> Chuquiña's leader, Raul Rocha, is also a regional politician who travels frequently between Oruro and La Paz, and he may possess a better understanding of the legal system than the other community leaders. Japo does not share Chuquiña's experience, and its behavior is consequently more surprising, but it seems to have simply followed Chuquiña's lead on the issue.

In their lawsuit, filed in July 2001 in a La Paz civil court, Chuquiña and Japo sought over U.S. \$14 million in compensation for damages caused by the spill.<sup>223</sup> The plaintiffs alleged that the oil spill contaminated their water and destroyed the pastures on which their animals fed, leading to illnesses and death

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220. See *Convenio Transaccional Definitivo*, Transredes — Dionicia Vásquez de Riglos (July 20, 2002).

221. Transredes and these communities agreed to establish a Water Commission and a Forage Commission. The Water Commission evaluated and made recommendations with regard to these communities' needs for drinking water, the need to dig wells to provide water to the communities, and the condition of animals' drinking places. See COMISIÓN DE AGUA, *INFORME DE LA COMISION DE AGUA AL MINISTERIO DE AGRICULTURA, GANADERIA Y DESARROLLO RURAL* (June 5, 2000). The Forage Commission issued a Report evaluating the sufficiency of forage for animals in Chuquiña and Japo, and determining the extent of need for forage to be provided. See COMISIÓN DE FORRAJE, *INFORME DE LA COMISIÓN DE FORRAJE AL MINISTERIO DE AGRICULTURA, GANADERIA Y DESARROLLO RURAL* (June 8, 2000).

222. This point has been made by several commentators. See, e.g., MONTROYA ET AL., *supra* note 39, at 182. See also LEANNE FARRELL, ¿PETRÓLEO EN EL ALTIPLANO? DIEZ MESES DESPUÉS . . . UN ANÁLISIS DE LA COMPENSACIÓN PARA EL DERRAME DESAGUADERO 20 (Dec. 8, 2000).

223. See Complaint by Raul Rocha Ayala, Gregorio Quispaya Lucana, and Eugenio Huaygua Pita, against Transredes (La Paz Civil Court, July 21, 2001) [hereinafter Rocha Complaint]. This complaint was later amended to include the Ministry of Sustainable Development as a defendant, for failing to properly apply the law in the oil spill case. See Motion to Join Ministry of Sustainable Development as a Defendant (La Paz Civil Court, May 10, 2002).

in the animals.<sup>224</sup> They also alleged that although Transredes had promised to cover the cost of provision of emergency forage for the animals, Transredes refused to do so in an attempt to force them to sign a compensation agreement.<sup>225</sup> The complaint stated that Transredes threatened the members of the Forage Commission with non-payment so that they would minimize the need for forage and would sign on to the report proposed by the company's technicians.<sup>226</sup> According to the plaintiffs, when the members of the Forage Commission reported these facts to the government, "the authorities did not take any action, evidencing a great institutional weakness, as well as negligence that could be considered criminal."<sup>227</sup> The plaintiffs alleged that the cleanup process was superficial and did not remedy the damage done to the soil; that they suffered economic losses because their animals lost market value due to the perception that they were contaminated; that they were forced to leave their land for a period of time; and that the spill broke the natural harmony of their lives and was a major economic catastrophe.<sup>228</sup>

The case never reached the merits; like Ms. Vasquez's suit, it was bogged down in jurisdictional issues for nearly two years, until it was settled.<sup>229</sup>

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224. See Rocha Complaint.

225. See *id.*

226. See *id.*

227. *Id.*

228. See *id.* The complaint stated that these facts established violations of the plaintiffs' rights to life, health, security, work, their right not to be displaced, right to conservation of the environment and natural resources, and the right to respect for indigenous cultural practices, among others. In addition, according to the complaint, Transredes was liable pursuant to a provision in the Civil Code that states that "[w]hoever through a faulty fact causes to another an unjust injury, is obligated to compensate." See Cód. Civ., art. 984; Rocha Complaint, *supra* note 223. The plaintiffs relied on the Administrative Resolution by the Superintendency of Hydrocarbons fining Transredes for the spill to prove the company's fault. *Id.* They also relied on the provision of the Civil Code that states that: "Whoever in the performance of a dangerous activity causes injury to another is obligated to indemnify if he or she does not prove the fault of the victim." Cód. Civ., art. 998; Rocha Complaint, *supra* note 223.

229. About a month after the original complaint was filed, the trial judge dismissed the case for lack of jurisdiction. See Juez 10mo de Partido en lo Civil, Resolución No. 481/2000 (Aug. 16, 2001). He was reversed on appeal on January 30, 2002. On October 30, 2002, the trial judge ruled in favor of a motion by Transredes, finding improper service of process because Transredes was served in its La Paz offices, rather than its main office in Santa Cruz. On January 28, 2003, the judge once again dismissed the case for lack of jurisdiction. The plaintiffs appealed this decision. However, the

## b. The Bolivian Government's Administrative Response

As this Report has already noted, the government's response to the spill during its immediate aftermath was quite limited. For the most part, the government's actions were administrative: issuing various resolutions and sanctions and most significantly, ordering the Environmental Audit. Issued over a year after the spill occurred, the audit report comprised eight volumes and numerous appendices, thousands of pages in all. Yet because it was not even begun until nearly six months after the spill, the auditing process was limited in important ways and the report of the audit is therefore not as thorough as it might have been. The administrative resolutions provided for only minimal sanctions, and, at the time this Report went to press, were still being contested by the company. Although citizens have demanded that the government initiate criminal proceedings against Transredes it has so far failed to do so.

This section begins by setting out the legal and political framework applicable to the Bolivian government's administrative actions after the spill, describing Bolivia's administrative structure and the procedures that apply to the oil spill case. It then examines these actions, focusing particularly on the audit, its limitations, and the resulting sanctions issued against Transredes.

### (1) Administrative Framework

#### (a) Agency Structure

Under Bolivia's environmental regulations, the Vice-Ministry of Environment and Natural Resources, (part of the Ministry of Sustainable Development,) was the "Competent Environmental Authority" at the national level, who should have overseen and responded to the spill.<sup>230</sup> The Vice-Ministry of Energy and

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parties reached a settlement on May 21, 2003 (during the Crowley Program's mission) when the plaintiffs and Transredes signed a compensation agreement for the amount of U.S. \$397,118.85 (the amount of compensation that was appropriate according to the Environmental Audit). See *Convenio Transaccional Definitivo*, Transredes — Chuquiña (May 21, 2003) [hereinafter *Transredes — Chuquiña Convenio Transaccional Definitivo*].

230. The Vice-Ministry's functions in this context include that of proposing programs of prevention and control of contamination of waters and the atmosphere. See *Reglamento de Ley de Organizacion del Poder Ejecutivo*, Decreto Supremo 25055, art.

Hydrocarbons, (part of the Ministry of Economic Development,) was the “competent sector organism,”<sup>231</sup> and as such was responsible for participating “in processes of environmental monitoring and control, and for promoting and incentivizing the application of measures for environmental improvement and conservation.”<sup>232</sup> In addition, the Vice-Ministry for Indigenous Affairs is required to monitor the “fulfillment and application of the laws and international agreements that establish rights and promote the development of indigenous and original peoples.”<sup>233</sup>

Bolivia has a separate system, known as SIRESE (“Sistema de Regulacion Sectorial” or “System of Sector Regulation”), at the national level to regulate particular sectors of economic activity. Within SIRESE, there is a Superintendency of Hydrocarbons, which is responsible for granting, modifying and revoking concessions and licenses for hydrocarbons activity; applying sanctions in accordance with sector norms, contracts, and licenses; monitoring the fulfillment of the obligations and rights of concessionaires; and applying penalties established within its regulations.<sup>234</sup>

#### (b) Procedures for Violations of the Law of the Environment

Bolivia’s Law of the Environment establishes a procedure that must be followed when someone reports a violation of its norms protecting the environment: “All persons and public officials have the obligation of reporting to the competent authority the infraction of norms that protect the environment.”<sup>235</sup> Once a written report has been presented, the authority receiving the report must, within twenty-four hours, indicate the date and time for an inspection to be carried out within the following seventy-two hours.<sup>236</sup> A testing period lasting six days begins imme-

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16 (May 23, 1998) [hereinafter Supreme Decree 25055]. See also 2 Environmental Audit, *supra* note 54, at 45.

231. Ley de Organizacion del Poder Ejecutivo No. 1788, art. 11 (Sept. 16, 1997) (Bol.); Supreme Decree 25055, *supra* note 230, art. 11.

232. See 2 Environmental Audit, *supra* note 54, at 46.

233. Supreme Decree 25055, *supra* note 230.

234. See Ley SIRESE No. 1600, art. 10 (Oct. 28, 1994) (Bol.); Ley de Hidrocarburos, No. 1689, art. 66 (1996) (Bol.); Reglamento de Transporte de Hidrocarburos por Ductos, art. 7 (1996) (Bol.).

235. Law of the Environment, *supra* note 58, art. 100.

236. *Id.* art. 101(a).

diately after the inspection.<sup>237</sup> Once the six days have passed, the Authority must dictate a resolution within 48 hours.<sup>238</sup> The Resolution must determine the corresponding sanction, and the compensation for the damages caused.<sup>239</sup> Violations of the Law of the Environment are generally considered administrative infractions.<sup>240</sup> However, if the environmental authority determines that a given violation constitutes an environmental crime, the authority must submit all its information to the Public Ministry for processing within the criminal justice system.<sup>241</sup>

## (2) The Environmental Audit and Resulting Sanctions

The most significant governmental response to the oil spill was the ordering of the Environmental Audit. Despite the im-

237. *Id.*

238. *Id.* art. 40.

239. *Id.* art. 101(b).

240. *Id.* arts. 99, 101. Such sanctions are to:

be imposed by the competent environmental authority, and consist of: first, written admonishments for first occurrences of the infraction, allowing the admonished party a period of time to correct the infraction; second, if the infraction persists, imposition of a fine — an appropriate sanction and restitution for the damage caused, measured as three per thousand over the total declared patrimony or assets of the company, project, or work; and third, in cases of recurrence of the infraction, license revocation.

*Id.*

241. *Id.* at art. 101(c). The Law defines several environmental crimes relevant to the oil spill, including contaminating water destined for human consumption, and interrupting the provision of water for human consumption or irrigation:

Article 105(a): One commits a crime against the environment if . . . a person: Poisons, contaminates, or adulterates waters destined to human consumption, to industrial use, to agricultural, ranching, or fishing, or industrial use, over the permissible limits to be established in the respective regulations.

Article 107: Whoever pours in or throws untreated residual waters, chemical or biochemical liquids, objects or waste of any nature, in the channels of waters, on the shores, aquifers, riverbeds, rivers, lakes, lagoons, reservoirs of waters, capable of contaminating or degrading the waters that exceed the limits to be established in regulations, will be sanctioned with the penalty of deprivation of liberty from one to four years, and with a fine of one hundred per cent of the damage caused.

Article 108: Whoever illegally or arbitrarily interrupts or suspends the service of provision of water for the consumption of populations, or destined to irrigation, will be sanctioned with deprivation of liberty of up to two years, plus thirty days of fine equivalent to the basic daily salary.

Article 112: Whoever . . . does not fulfill sanitary and environmental protection norms, will suffer the penalty of deprivation of liberty of up to two years.

*Id.* at art. 112.

*Id.* arts. 105(a), 107, 108, 112.

portance of documenting the causes of the spill and the damage that resulted, the Audit did not officially begin until July 13, 2000.<sup>242</sup> According to Patricia Garcia, legal advisor to the Ministry of Sustainable Development, the Vice-Ministry had twice ordered that the auditing process begin, but because of Transredes' preference for the use of outside consultants to respond to the spill, it "did not obey, saying that the audit was not necessary."<sup>243</sup> Another reason for the delay in starting the Audit, according to the same official, was that Transredes and the Vice-Ministry were engaged in negotiations over the process of selection of the auditors, who would pay for the audit, and how much the audit should cost, given that the law at the time did not include specific provisions regarding these issues.<sup>244</sup> Ultimately, the government and Transredes agreed that the company would pay for the costs of the Audit, and that it would also hire a consulting firm to select the auditing firm.<sup>245</sup> The Vice-Ministry set the terms of reference for the Audit, (which determine the Audit's scope and subject).<sup>246</sup>

The consulting firm ENSR International Bolivia conducted the Environmental Audit.<sup>247</sup> Because ENSR lacked expertise on social and economic issues, ENSR subcontracted with the organization Instituto Socio Ambiental ("ISA") to work on the social and economic aspects of the Audit.<sup>248</sup>

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242. See *Resumen Cronologico*, *supra* note 87, at ¶ 3.21.

243. Interview with Patricia Garcia, *supra* note 14.

244. *Id.* According to Ms. Garcia, the company wanted to set a cap on how much it would spend on the audit, but the Vice-Ministry did not agree to this. She also stated that the gaps in the law regarding the auditing process have been corrected through a decree: now the government chooses the auditor but the company pays for it. *Id.*

245. *Id.*

246. *Id.*

247. The selection of ENSR was not uncontroversial. At least one NGO representative, Patricia Molina of FOBOMADE, has questioned the firm's independence, noting ENSR's close connections with oil companies. See Interview with Patricia Molina, in Bolivia (Feb. 7, 2003) [hereinafter Interview with Patricia Molina, February].

248. Officials from ENSR refused to speak with the Crowley delegation, on the grounds that a confidentiality clause in their contract with Transredes prevents them from discussing the contents of the Audit. However, pursuant to a written authorization from Transredes, Luz Maria Calvo, head of the social unit of the auditing team, was able to provide written answers to a questionnaire from the Crowley delegation.

Some have alleged that the sections of the Audit written by ISA are good, but suggest that the analysis of the environmental damage caused by the spill, done by ENSR, is overly favorable to Transredes. See Interview with Patricia Molina, February, *supra* note 247.

The auditors faced a number of obstacles in data-gathering that ultimately undermined the independence of their conclusions. First, because Transredes' consultants had conducted most of the studies in the period immediately after the spill, the auditors lacked independent technical information regarding the short term effects of the spill and the measures that Transredes took to respond to it.<sup>249</sup> Second, changes in environmental conditions between the time of the spill and the start of the audit nearly six months later prevented the auditors from conducting effective studies of the environmental impact of the spill.<sup>250</sup> Also, the lack of baseline information regarding the environment and population of the affected area prevented the auditors from reaching definitive conclusions about the effects of

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249. In response to the questions of (1) whether studies of the impact of the oil spill were conducted immediately after the oil spill, and (2) if so, who conducted the studies, Ms. Calvo responded as follows: "The studies . . . were carried out by several national and foreign companies *hired by Transredes* . . ." See Luz Maria Calvo, Responses to Crowley Questionnaire, answer 8 (emphasis added) [hereinafter Calvo Responses].

250. Interview with Patricia Garcia, *supra* note 14. See also, Calvo Responses, *supra* note 249, at answer 6. Ms. Calvo emphasized, among other problems faced by the auditing team, the following:

- (1) The audit started when the cleanup process had practically ended. Consequently, evidence of the crude oil was then minimal.
- (2) Because of the delay, the team was unable to verify the impact of the spill on the health of livestock. Although the auditing team reviewed numerous declarations of impacts on the health of livestock, especially abortions and deaths of animals, they were unable to formally verify them because of the loss of evidence in the period of time before the audit began.
- (3) Because of the delay, and the resulting loss of evidence, the team was also unable to verify the immediate impact of the spill on human health. Thus, such impact could not be used as a basis for calculating compensation.
- (4) Because the spill affected the normal calendar for taking livestock to pasture, and the livestock was kept in the dry pastures that were not reached by the spill, these dry pastures were overused by the time the audit started. Thus, the team was unable to evaluate these pastures.

*Id.*

"More broadly," Ms. Calvo notes:

the separation [of time] between the audit and the moment of the spill forced the socio-economic team of the audit to double its technical efforts . . . to reconstruct the event and its impact via alternative methodologies . . . . In short, it was necessary to develop an enormous reconstruction job of what happened based on the comparison of various sources: affected individuals, documentation of the company, bibliography, interviews with authorities, etc.

*Id.* Nonetheless, Ms. Calvo also points out that "the delay in the start of the audit allowed us to see impacts that at the time of the spill could not be seen, such as: the duration of the drop in prices, or the duration of the impact on the calendar for pasturing livestock." *Id.*



the spill.<sup>251</sup> For example, because general information on the health of the affected livestock populations did not exist, the auditors had difficulty attributing animal deaths and health problems to the oil spill.<sup>252</sup>

The auditors' Final Report was due on December 21, 2000; however, at the request of the auditors, the Vice-Ministry extended the deadline for the Report on two occasions.<sup>253</sup> On both occasions, the main reason cited for the delay was Transredes's failure to provide requested information to the auditors in a timely manner.<sup>254</sup> According to the company, its files were in disarray, so it had trouble putting the requested documentation together.<sup>255</sup> The Report was finally delivered on April 2, 2001, fourteen months after the spill occurred.<sup>256</sup>

Despite these obstacles, the auditors identified deficiencies in Transredes' environmental manifest, its maintenance of the oil pipeline, and the measures it took to respond to the disaster.<sup>257</sup> Among its most important recommendations were: that Transredes provide additional compensation to the affected communities;<sup>258</sup> that it conduct, through independent consultants, continuing monitoring operations, including annual sampling of soil, water, and biological organisms in various areas

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251. Interview with Patricia Garcia, *supra* note 14. Ms. Calvo also notes this problem, pointing out that:

Baseline information was one of the big obstacles that had to be confronted to determine the socioeconomic impact of the spill. In the case of the health of the population, baseline information in the country is better than in other respects, thanks to the existence of the National System of Information on Health ("Sistema Nacional de Informacion en Salud"). But with respect to [demographic] and economic data, livestock-raising, pastures, etc., the baseline information was very weak and it was necessary to reconstruct it.

Calvo Responses, at answer 11.

252. Interview with Patricia Garcia, *supra* note 14.

253. See Resumen Cronologico, *supra* note 87, at ¶¶ 3.2-3.4.

254. See *id.* at ¶¶ 3.3-3.4.

255. See Fernando Gonzalez Statement, *supra* note 64. Ms. Calvo stated that one of the problems the auditing team faced was the timely delivery of information regarding the compensation process. See Calvo Response, *supra* note 249, at answer 12. She explains that "according to the company, this was delayed because the agreements with the communities had not been finalized." *Id.* at answer 14.

256. Resumen Cronologico, *supra* note 87, at ¶¶ 3.3, 3.4.

257. See generally Dictamen, 7 Environmental Audit, *supra* note 54. Transredes officials have expressed their disagreement with several of these conclusions, and have stated that they considered suing some of the auditors, but are unlikely to do so. See Interview with Anthony Henshaw, *supra* note 111.

258. See 7 Environmental Audit, *supra* note 54, at 15.

around the Desaguadero;<sup>259</sup> that it establish a program to monitor continuing health effects on the human and animal population;<sup>260</sup> and that it establish an integral recovery program for the fields that were directly affected or overused as a result of the spill.<sup>261</sup>

The audit also formed the basis for an administrative resolution by the Vice-Ministry of Environment admonishing Transredes for three infractions related to the spill.<sup>262</sup> The Vice-Ministry imposed a fine of a little over twelve million bolivianos (approximately U.S. \$1.8 million)<sup>263</sup> for a fourth infraction, the failure to present an Action Plan, for which the company had been previously admonished.<sup>264</sup> Transredes appealed the resolution on July 31, 2001.<sup>265</sup> According to the company, as of Au-

259. *See id.* at 19.

260. *See id.* at 34, 40.

261. *See id.* at 30-31.

262. Ministerio de Desarrollo Sostenible y Planificación, Resolución Administrativa VMARNDF No. 011/01 (July 18, 2001) [hereinafter Administrative Resolution 011/01]. Admonishments issue for first time violations of the environmental law, in cases where the violations do not constitute environmental crimes. *See* Reglamento General de Gestión Ambiental, No. 24176, art. 97(a). The Vice-Ministry of the Environment also initiated two administrative proceedings against Transredes that were unrelated to the results of the audit: one dealt with Transredes' commitment to provide forage to the communities of Japo and Chuquiña, and the other sanctioned Transredes for depositing oil in Sica Sica without a license. The first of these was closed due to the signing of compensation agreements between Transredes and the communities of Japo and Chuquiña. *See* Convenio Transaccional Definitivo, Japo and Transredes (Feb. 15, 2002); Convenio Transaccional por Impactos del Derrame a Mediano Plazo, Japo and Transredes (July 12, 2002); Transredes — Chuquiña Convenio Transaccional Definitivo, *supra* note 229. The second resulted in a fine of U.S. \$107,233.70 on Transredes. *See* Ministerio de Desarrollo Sostenible y Planificación, Resolución Administrativa No. 003/01 (Jan. 31, 2001) [hereinafter Administrative Resolution 003/01]. On appeal to the Bolivian Supreme Court, the Court upheld the resolution in part, and reversed solely with regard to the calculation of the amount of the fine. *See* Sala Plena de la Corte Suprema de Justicia de Bolivia, Sentencia 90/2002 (Dec. 5, 2002).

263. The company stated in its appeal of this decision that, in dollars, the fine was U.S. \$1,839,277. *See* Transredes, Apela de la Resolución Administrativa VMARNDF No. 011/01 del 18 de julio del 2001, ¶ 9.6 (July 31, 2001) (on file with authors) [hereinafter Transredes Appeal].

264. Fines issue for violations that persist after an admonishment; these fines are calculated as three per thousand of the total declared patrimony or assets of the company, project, or work at issue. *See* Reglamento General de Gestión Ambiental, art. 97(b).

265. *See* Transredes Appeal, *supra* note 263. The grounds for appeal include violations of the company's "right to a defense" with regard to the final report of the audit, violations of the principle of *non bis in idem* (similar to double jeopardy), the Vice Ministry's lack of jurisdiction, incorrect application of the law to the facts, and violations of

gust 2003 a decision by the Ministry of Sustainable Development was pending.<sup>266</sup>

The first infraction addressed by this resolution was Transredes' presentation of incomplete and altered information under oath in the Environmental Manifest required by the Vice-Ministry as a prerequisite to conducting its operations.<sup>267</sup> According to the resolution and Transredes' own submission to the Vice-Ministry, Transredes failed to include the Desaguadero River in the Contingency Plan for spills in major watercourses in its Environmental Manifest.<sup>268</sup> As a result of this omission by Transredes, the Vice-Ministry approved the Environmental Manifest without giving special consideration to an area of high ecological fragility.<sup>269</sup>

Moreover, Transredes' Environmental Manifest notes that the OSSA II pipeline system had exceeded its projected useful life by twelve or thirteen years at the time of the Environmental

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the principle of non-retroactivity of the law. *Id.* Because the details of these arguments are of limited relevance to this Report, we do not discuss them at length here.

266. See Resumen del Proceso Administrativo Ambiental: "Infracciones administrativas a los Reglamentos de la Ley del Medio Ambiente sobre la base del análisis del Informe de Auditoría Ambiental", at ¶ 3 (on file with authors).

267. See Administrative Resolution 011/01, *supra* note 262, at 21. Under the Regulations for Environmental Prevention and Control ("REPC"), the legal representatives of projects, works, or activities in process of implementation or operation at the time the REPC went into effect were required to submit an Environmental Manifest ("Manifiesto Ambiental" or "MA") to the competent environmental authority. In the MA, the legal representatives of the project are required to explain "the environmental state in which the project is, and propose a plan of environmental adaptation, if appropriate. The environmental manifest has the status of a sworn declaration, and can be approved or rejected by the competent environmental authority . . . ." See Reglamento de Prevención y Control Ambiental, arts. 7, 100. Bolivia's environmental regulations forbid the presentation of an environmental manifest with altered information. See Reglamento General de Gestión Ambiental, art. 96(b); Reglamento de Prevención y Control Ambiental, art. 169(b). The provision does not refer to incomplete information, but only to altered information. Thus, Transredes is arguing on appeal that this provision simply does not apply to the facts, given that the company did not actively alter any information in the Environmental Manifest. See Transredes Appeal, *supra* note 263, at ¶ 6 et seq.

268. See Administrative Resolution 011/01, *supra* note 262, at 16. See also Transredes Memorial de Defensa a la Citación VMARNDF Nro. 001/2001 del 19 de junio del 2001, ¶ 5 (July 4, 2001) (on file with authors) [hereinafter Transredes Response].

269. The Competent Environmental Authority approves the Environmental Manifest through a Declaration of Environmental Adaptation ("Declaratoria de Adecuación Ambiental" or "DAA"). See Reglamento General de Gestión Ambiental, *supra* note 262, art. 57. The DAA has the character of an *environmental license*, and establishes the environmental conditions that must be satisfied in accordance with the Environmental Manifest. *Id.*

Manifest's approval, but according to the Ministry it did not identify "specific environmental deficiencies for the OSSA II."<sup>270</sup> As a result, the Environmental Manifest did not identify corresponding mitigation or corrective measures, including the maintenance of the ducts in areas where they crossed bodies of water.<sup>271</sup> In short, Transredes failed to provide complete and useful information in its Environmental Manifest, which in turn undermined a monitoring system premised on self-reporting.

The second infraction resulted from Transredes' failure to implement mitigation measures in advance of the spill.<sup>272</sup> According to the Vice-Ministry, Transredes failed to respond to the spill in an "efficient and immediate manner" as required in the Environmental Manifest because, as recognized by Transredes itself, its system to monitor oil flow was out of service from January to February 15, 2000.<sup>273</sup> As a result, the oil spill went undetected for eighteen to thirty-two hours.<sup>274</sup> The Vice-Ministry also noted that Transredes had failed to train its personnel for emergencies.<sup>275</sup>

The third infraction was based on Transredes' contamination of soil and water as a result of the oil spill.<sup>276</sup>

The fourth infraction listed by the Vice-Ministry was based on Transredes' failure to present an Action Plan describing the

270. See Administrative Resolution 011/01, *supra* note 262, at 17.

271. See *id.*

272. See Administrative Resolution 011/01, *supra* note 262, at 21. Failure to implement mitigation measures in the Plan for Application and Environmental Monitoring is a contravention of Bolivia's Environmental Law. See Reglamento General de Gestión Ambiental, art. 96(h); Reglamento de Prevención y Control Ambiental, art. 169(i).

273. See Administrative Resolution 011/01, *supra* note 262, at 13. Transredes admitted to the fact that its oil flow monitoring system was out of service in a submission to the Ministry of Sustainable Development. See also Transredes Response, *supra* note 268, at ¶ 5(3),(1) (on file with authors).

274. See Administrative Resolution 011/01, *supra* note 262, at 13.

275. *Id.* at 14. The Vice-Ministry noted that such training was required under the environmental regulations for the Hydrocarbons Sector. *Id.* at 14. See also Reglamento Ambiental para el Sector Hidrocarburos, Decreto Supremo No. 24335, art. 121 (Jul. 19, 1996).

276. See Administrative Resolution 011/01, *supra* note 262, at 22 (July 18, 2001). Bolivian environmental regulations provide that "contamination of bodies of water by an oil spill" is an administrative infraction. See Reglamento en Materia de Contaminación Hidrica, art. 71(j). Also, Bolivia's Environmental Law provides that a contravention or fault is committed by anyone who takes actions that injure, lesion, deteriorate, damage, or destroy the environment. See Law of the Environment, *supra* note 58, art. 103. In turn, actions that degrade the environment include actions that "contaminate the air, the waters in all their States, the soil, and sub-soil." *Id.* art. 20(a).

mitigation and corrective measures to be taken.<sup>277</sup> According to the resolution, Transredes' failure to satisfy the Vice-Ministry's request for the plan prevented the Vice-Ministry from evaluating and verifying the fulfillment of the Environmental Law and its regulations following the spill.<sup>278</sup> Because the behavior persisted despite a previous admonishment,<sup>279</sup> the new resolution carried a fine.<sup>280</sup> According to the Vice-Ministry, Transredes' failure to present an Action Plan constituted a "failure to carry out the application of the corrective or mitigation measures" in a timely way following a determination by the government that such measures are necessary.<sup>281</sup>

Interestingly, the government did not dictate the specific corrective or mitigation measures that were to be taken by the company. Rather, the Vice-Ministry simply required the company to list in an Action Plan the measures it intended to take. In its administrative resolution fining the company, the Vice-Ministry notes that, according to Bolivia's environmental regulations, "those responsible for economic activities that cause environmental damages are responsible for the reparation and compensation of the same."<sup>282</sup> Yet, the fact that the company was legally responsible for repairing and compensating the damage does not explain why the government asked the company to develop an Action Plan, rather than itself dictating the measures that the company should take. On the contrary, given that the company would be required to fund the cleanup and compensation programs, it had every incentive to limit their scope. Moreover, given that Transredes had already been admonished for its failure to present the requested Action Plan, leaving to Trans-

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277. See Administrative Resolution 011/01, *supra* note 262, at 22. The resolution notes that the Action Plan should have also included details about the resources that were required and available for the actions of containment, recovery and cleanup, program of remediation and restoration, which were to be approved and controlled by the Viceministry; because of the failure to present an Action Plan, the Viceministry was never able to corroborate the expenses that the company incurred. *Id.* at 3.

278. *Id.* at 22.

279. Administrative Resolution 003/01, *supra* note 262.

280. Administrative Resolution 011/01, *supra* note 262, at 22.

281. *Id.* See also Reglamento General de Gestión Ambiental, *supra* note 262, art. 96(g). See also Law of the Environment, *supra* note 58, art. 97 (providing that the government will dictate necessary measures to correct irregularities that are found through inspections, will notify the interested party, and grant an adequate term to correct the irregularities).

282. Administrative Resolution 011/01, *supra* note 262, at 22.

redes the development of a response to the spill seems problematic. Finally, even this limited and indirect enforcement effort was made well after it had any chance to be effective. Indeed, the Vice-Ministry first admonished Transredes for a failure to present an Action Plan only after an entire year had passed since it had demanded the Plan and after most of the cleanup and compensation processes had been completed.

For its part, Transredes claims that it did present an Action Plan, in the form of the "Intermediate Report of the Contingency Plan of the Cleanup and Monitoring Work – Oil Spill in the Desaguadero River Contingency" or "Informe Intermedio del Plan de Contingencia de los Trabajos de Limpieza y Monitoreo – Contingencia Derrame en el Rio Desaguadero" (the "Intermediate Report").<sup>283</sup> According to the company, this Intermediate Report, while not specifically named "Action Plan," fully satisfied the government's demand. Indeed, every page of the Intermediate Report bears the footnoted title "Oil Spill in the Desaguadero River: Action Plan."<sup>284</sup> Nonetheless, the report is only twenty pages long, (not including annexes consisting primarily of results of various studies,) and is of a very general nature; thus, it is questionable whether this report satisfied the relevant legal requirements.<sup>285</sup>

### (3) The Superintendency of Hydrocarbons' Fine

On August 3, 2000, the Superintendency of Hydrocarbons issued an administrative resolution fining Transredes 710,000 bolivianos, (approximately U.S. \$100,000), the maximum sum allowable by law, for failing to maintain the pipeline over the Desaguadero and thereby causing the oil spill.<sup>286</sup> Although the amount of the fine was small, Transredes has appealed the resolution to the Bolivian Supreme Court after exhausting all administrative appeals.<sup>287</sup>

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283. See Transredes Appeal, *supra* note 262, at ¶ 9 et seq.

284. See generally Transredes, Contingencia Derrame en la Cuenca del Desaguadero: Informe Intermedio del Plan de Contingencia de los Trabajos de Limpieza y Monitoreo (Feb. 2000).

285. See *id.*

286. See Superintendencia de Hidrocarburos, Resolucion Administrativa No. 257/2000, at 36 (Aug. 3, 2000).

287. Transredes first appealed within the Superintendency of Hydrocarbons, and then to the General Superintendent overseeing all Superintendencies. Transredes lost the first appeal. See Superintendencia de Hidrocarburos, Resolucion Administrativa

#### (4) The Failure to Initiate Criminal Proceedings

As previously noted, Bolivian law requires that, once a violation of the Law of the Environment is reported, the Vice-Ministry of the Environment conduct an inspection of the site of the violation, and shortly thereafter make a determination of whether the violation constitutes an environmental crime or merely an administrative infraction. If the violation constitutes an environmental crime, the Vice-Ministry is required to submit its information to the Public Ministry for the initiation of a criminal proceeding.

Although the oil spill seems to fit within the language of several environmental crimes specified in the Law of the Environment,<sup>288</sup> the Vice-Ministry never submitted its information to the Public Ministry, and no criminal proceeding was ever initiated. Patricia Garcia, a legal advisor to the Ministry of Sustainable Development, explained that the Vice-Ministry faced two obstacles to starting a criminal proceeding: first, the lack of sufficient information about the spill's impact, and second, the lack of clearly established levels of permissible contamination in the applicable regulations.<sup>289</sup> Even after the conclusion of the audit, the Vice-Ministry felt that it did not have enough evidence of contamination of waters to proceed with a criminal case.<sup>290</sup>

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No. 014/2001 (Jan. 15, 2001). The General Superintendency confirmed most of the findings of the Superintendency of Hydrocarbons, and only overturned the fine, with instructions that the Superintendency of Hydrocarbons justify the imposition of the maximum fine; subsequently, the Superintendency of Hydrocarbons issued another resolution in which it imposed the fine once again and provided a detailed justification for it. See Superintendencia de Hidrocarburos, Resolucion Administrativa No. 0061/2002 (Feb. 6, 2002). See also Letter from Guillermo Torres to the Crowley Program, *supra* note 70 (Sept. 26, 2003). According to former Superintendent of Hydrocarbons Carlos Miranda, the company challenged the fine because it has recovered money from its insurance company for the expenses related to the spill on the grounds that the spill was an accident, caused by *force majeure*; given that the fine implies that the company was at fault, this may mean that the company will have to return some of its insurance money. See Interview with Carlos Miranda, Ex-Superintendent, Hidrocarburos, in Bolivia (Feb. 2003).

288. See discussion *supra* note 241.

289. See Interview with Patricia Garcia, *supra* note 14. The limits to Articles 105 and 107 of the Law of the Environment were established one year later, through an amendment to the Environmental Regulations for the Hydrocarbons Sector, in Supreme Decree No. 26171 (May 4, 2001).

290. See Interview with Patricia Garcia, *supra* note 14.

### B. *Human Rights Issues*

The oil spill in the Desaguadero presents several potential human rights violations by the Bolivian government, including violations of the right to water, the right to health, and several rights pertaining to indigenous peoples. With regard to each of these possible violations, this section analyzes the responsibility of both the State and the company under international human rights standards. Although the section discusses the rights separately, a general point should be noted at the outset: determining whether ESC rights have been violated and by whom is problematic in that international law defines the rights very broadly and without specifying clear standards of care. Ultimately, we conclude that the government bears responsibility for compromising the enjoyment of these rights; however, the analysis emphasizes the ambiguity of the duties of the parties under international human rights law.

Notwithstanding the vagueness of the substantive standards, international human rights law does provide a procedural standard that is quite useful in this case: international law requires States to establish effective remedies for human rights violations, including violations of economic, social and cultural rights. This case is an excellent example of a State failure to provide effective remedies for violations (or, in any case, arguable violations) of ESC rights.

#### 1. Substantive Rights

##### a. The Right to Water

The obligations of the Bolivian State with regard to the right to water can be inferred from its ratification of human rights treaties, such as the ICESCR, that guarantee rights the fulfillment of which is impossible without water. Thus, a right to water is implicit in several recognized human rights, including, among others, the right to life,<sup>291</sup> the right to health,<sup>292</sup> the right

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291. Article 6 of the International Covenant on Civil and Political Rights (hereinafter "ICCPR"), to which Bolivia has acceded, provides: "Every human being has the inherent right to life." International Covenant on Civil and Political Rights, art. 6, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 361 [hereinafter ICCPR]. While this Article has generally been interpreted as prohibiting States from arbitrarily depriving anyone of life, recent trends have shifted towards requiring States to take positive measures to ensure the right to life. See Stephen McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 GEO. INT'L ENVTL. L. REV. 1, 10 (1992) (quoting Human



to an adequate standard of living,<sup>293</sup> and the right to adequate food.<sup>294</sup> There is also an argument that the right to water exists

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Rights Committee member Rosalyn Higgins, as stating that “under the right to life . . . States are under the duty ‘to pursue policies which are designed to ensure access to the means of survival’ for all individuals and all peoples.”). The Human Rights Committee, established by the ICCPR, has recommended that under Article 6, States should take measures to promote human security by reducing infant mortality and increasing life expectancy, particularly by eradicating malnutrition and epidemics. *Id.* The right to drinking water has been recognized as “an essential component of the right to life.” See Preliminary Report on the Relationship between the enjoyment of economic, social, and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation, 54th Sess., Agenda Item 4, art. 42, U.N. Doc. E/CN.4Sub.2/2002/10 (2002) [hereinafter Guisse Report].

292. Article 12 of the International Covenant of Economic, Social and Cultural Rights (“ICESCR”), to which Bolivia has acceded, provides that States Parties “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” See ICESCR, *supra* note 17, art. 12(1), 6 I.L.M. at 363. In its General Comment on the right to health, the United Nations Committee on Economic, Social and Cultural Rights, interpreted that right as including not only timely and appropriate health care, but also factors that are necessary for good health, including access to safe drinking water and adequate sanitation. See ESCR Committee, General Comment No. 14, The Right to the Highest Attainable Standard of Health, art. 4, U.N. Doc. E/C.12/2000/4 (2000) [hereinafter General Comment No. 14]. In addition, the Protocol of San Salvador, which Bolivia has signed though not yet ratified, contains a right to health, understood to mean “the enjoyment of the highest level of physical, mental and social well-being.” Protocol of San Salvador, *supra* note 17, art. 10(1), 28 I.L.M. at 164. Furthermore, Article 24 of the Convention on the Rights of the Child (1989), to which Bolivia is a party, states that children are entitled to achieve the highest attainable standard of health, which requires States to take appropriate measures to eliminate disease and malnutrition, and to provide adequate nutritious foods and clean drinking water. Convention on the Rights of the Child, art. 24(1), 24(2)(c), G.A. Res. 44/25, ann., 44 U.N. GAOR Supp. No. 45, at 167 (1989) (entered into force Sept. 2, 1990).

293. Article 11 of the ICESCR requires States to “recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.” ICESCR, *supra* note 17, art. 11, 6 I.L.M. at 363. While there is no specific mention of water, it can be inferred that an adequate standard of living can not be achieved without a sufficient water supply. See, e.g., Guisse Report, *supra* note 291 (“Water is essential to life.”) Furthermore, the Convention on the Elimination of all Forms of Discrimination Against Women [hereinafter CEDAW], to which Bolivia is a party, requires States to ensure that women enjoy the right to adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply. CEDAW, *supra* note 17, art. 14, 19 I.L.M. at 40-41.

294. The right to adequate food is recognized indirectly in the right to an adequate standard of living and also independently in the Protocol of San Salvador, which states that everyone has the right to “adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development.” Protocol of San Salvador, *supra* note 17, art. 12, 28 I.L.M. at 165. A report submitted to the Commission on Human Rights by Special Rapporteur Jean Ziegler on the right to food provides that “the key element of water must also be a fundamental element of the

as a matter of customary international law.<sup>295</sup>

Very recently, the ESCR Committee issued a General Comment on the Right to Water<sup>296</sup> ("General Comment 15") that recognizes water as an independent right under Articles 11 and 12 of the ICESCR and provides substantial guidance on what the right to water entails.<sup>297</sup> General Comment 15 defines the right to water broadly, requiring it to be accessible, affordable, safe, adequate for a life of dignity, and provided without discrimination.<sup>298</sup> As an immediate measure, General Comment 15 requires States to ensure that people have access to the minimum

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right to food." Report by the Special Rapporteur Jean Ziegler on the right to food, Commission on Human Rights, 59th Sess., Agenda Item 10, at 12, U.N. Doc. E/CN.4/2003/54 (2003).

295. A variety of sources indicate that a right to water is universally recognized. These include international human rights law documents that expressly or implicitly recognize the right, the recognition of the right to water in numerous international fora and agreements, and the opinion of experts, including the U.N. Special Rapporteur on water rights for the U.N. Subcommission on the Protection and Promotion of Human Rights. See Guisse Report, *supra* note 291. See also World Health Organization, *The Right to Water*, ch. 1, available at [http://www.who.int/water\\_sanitation\\_health/righttowater/en/](http://www.who.int/water_sanitation_health/righttowater/en/) (last visited Feb. 13, 2004). Furthermore, most States have engaged in a consistent practice of taking measures to ensure water provision for their citizens, thereby satisfying the requirement that a customary law be evidenced by the general practice of States. Finally, it could be argued that States are motivated by the belief that States have a legal obligation to ensure access to clean and affordable water for its inhabitants, as suggested by the fact that numerous world conferences and summits have recognized water as a human right, not merely a need. See, e.g., Mar del Plata Action Plan, adopted in 1977 during a UN Conference on Water; Agenda 21, adopted in the UN Conference on Environment and Development (1991), which provides that "all peoples . . . have the right to have access to drinking water in quantities and of a quality equal to their basic needs"; and the Global Water Contract in 1998, which stressed the individual right to water and the participation by citizens in achieving this right. Nonetheless, the argument loses some of its force in the face of contrary statements emerging from other international conferences and meetings. See, e.g., The Dublin Statement on Water and Sustainable Development, Principle No. 4 (providing that "[w]ater has an economic value in all its competing uses and should be recognized as an economic good").

296. ESCR Committee, General Comment No. 15, The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social, and Cultural Rights), U.N. Doc. E/C.12/2002/11 (29th Sess. 2002) [hereinafter General Comment 15].

297. As previously noted, general comments by the ESCR Committee are non-binding documents. However, they are used by the Committee to flesh out the normative content of the ICESCR rights, set benchmarks, devise accountability mechanisms, provide means for vindication to aggrieved people, and hold States accountable internationally through the examination of reports. HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS: TEXT AND MATERIALS* 305-06 (2d ed. 2000).

298. General Comment 15, *supra* note 296.

level of water required for personal and domestic uses, including drinking, sanitation, washing clothes, cooking and personal and household hygiene.<sup>299</sup> States must ensure that water is provided in a non-discriminatory manner, and pay special attention to the needs of poor and vulnerable groups, such as children, women and indigenous peoples.<sup>300</sup> Other obligations can be progressively realized based on the State's resources. The goal is for the State to move quickly and effectively towards a full realization of the right to water.<sup>301</sup> States must also ensure that the manner of the realization to the right to water is sustainable, in order to preserve the right for present and future generations.<sup>302</sup>

State obligations regarding the right to water fall into three categories: to respect, protect and fulfill.<sup>303</sup> The duty to respect requires a State to ensure that the activities of its institutions, agencies and representatives do not interfere with people's access to water, including their customary and traditional arrangements for water allocation.<sup>304</sup> The duty to protect requires States to take measures to ensure that the right to water is not interfered with by a third party, including legislative measures and the establishment of regulatory systems.<sup>305</sup> The duty to fulfill requires States to facilitate people's enjoyment of the right to water, promote the right through education on water issues, and provide the right to people who are otherwise unable to realize it themselves.<sup>306</sup> The General Comment also emphasizes the principal of non-retrogression, whereby governments are prohibited from going back on any measures they have already taken to provide water.<sup>307</sup>

The communities in the vicinity of the Desaguadero River have long suffered neglect in the provision of water services. For the most part, they have no connections to water services and cannot afford to purchase water from other sources, so they depend on the Desaguadero for all of their water. The water in the Desaguadero is of questionable quality, probably unsafe to drink

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299. *See id.* arts. 12-13.

300. *See id.* arts. 6-7.

301. *See id.* art. 18.

302. *See id.* art. 75.

303. *See id.* art. 209.

304. *See id.* art. 21.

305. *See id.* art. 23.

306. *See id.* art. 2510.

307. *See id.* arts. 19, 428.

due to contamination. Thus, there is an ongoing failure of the government to make any effort to fulfill the right to water of the people in these communities. That said, the oil spill in the Desaguadero made it impossible for the people who depend on the Desaguadero's water to use it for any purpose.

The critical question is whether and at what point the government violated the communities' right to water. Although it is clear that the government had an obligation to protect the communities' right to water, the difficulty arises because international human rights law does not specify a standard of care with respect to the right. At one extreme, one could argue that any act or omission that results in an interference with someone's enjoyment of the right to water is a violation of the right. Under this standard, the fact of the spill alone would establish that the government (through a failure to protect the right) is responsible for violating the right to water. Yet, imposing a strict liability standard for the violation of the right to water would have the paradoxical and, in our view, undesirable effect of treating as violations of international human rights some acts or omissions that might not give rise to liability under ordinary tort standards.

Applying the higher standard of negligence, the Bolivian government is nevertheless responsible for violating the right to water in this case. Although the State made some effort to enforce legislation forbidding pollution of water resources, its enforcement effort and the legislation itself were so inadequate as to constitute a breach of the State's duty to protect the right to water. For example, according to the Vice-Ministry of Environment, although the pipeline was over a decade past its useful life, the government failed to order the company to take special measures to replace the pipeline or continuously maintain it pending its replacement. Moreover, the Vice-Ministry of Environment should have noted and corrected the absence in Transredes' environmental manifest of any reference to the fact that its pipeline went over the Desaguadero, or to measures that could prevent or mitigate a spill in the Desaguadero. The system of bureaucratic oversight established by Bolivian law relied entirely on the self-reporting of corporations. Whether such a system could ideally function effectively enough to protect the rights at stake is questionable. The Bolivian government's failure to enforce even this weak scheme rendered it entirely ineffective.

### b. The Right to Health

A number of international treaties to which Bolivia is a party<sup>308</sup> recognize the right to health. The International Covenant on Economic, Social and Cultural Rights recognizes “the right of everyone “to the enjoyment of the highest attainable standard of physical and mental health.”<sup>309</sup> Additionally, the right to health is recognized, *inter alia*, in the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>310</sup> the Convention on the Elimination of All Forms of Discrimination against Women,<sup>311</sup> the Convention on the Rights of the Child,<sup>312</sup> and in several regional human rights treaties, including the Protocol of San Salvador.<sup>313</sup>

As described by the ESCR Committee, the right to health encompasses more than access to health care; rather, “article 12.2 acknowledge[s] that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.”<sup>314</sup> Of relevance to the oil spill case, the Committee has noted that:

Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This category includes such omissions as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right

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308. Bolivia is a party to, among other treaties, the ICESCR (ratified Nov. 1982), the Convention on the Elimination of All Forms of Racial Discrimination (ratified Oct. 1970), CEDAW (ratified July 1990), and the Convention on the Rights of the Child (ratified July 1990). As previously noted, it has signed but not yet ratified the Protocol of San Salvador.

309. ICESCR, *supra* note 17, art. 12, 6 I.L.M. at 363.

310. International Convention on the Elimination of All Forms of Racial Discrimination, article 5 (e) (iv), Jan. 4, 1969, 660 U.N.T.S. 195.

311. CEDAW, *supra* note 17, arts. 11.1 (f), and 12, 19 I.L.M. at 39-40.

312. Convention on the Rights of the Child, *supra* note 292, art. 24.

313. Protocol of San Salvador, *supra* note 17, art. 10, 28 I.L.M. 164. *See also* European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89 (entered into force Feb. 26, 1965) of 1961 as revised, (art. 11); the African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986) art. 16.

314. General Comment No. 14, *supra* note 292, para. 4.

to health of others . . . and the failure to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries.<sup>315</sup>

Thus, the Committee draws a clear connection between State responsibility and the actions of third parties such as corporations.

As with the right to water, the spill affected the community members' enjoyment of the right to health. First, the Environmental Audit notes some evidence of direct effects on the community members' health. Second, the spill deprived the community members of the conditions for leading a healthy life, including access to safe and potable water and a healthy environment.

Assuming that the link between the spill and negative effects on health can be established, the failure to effectively monitor Transredes' activities constitutes a failure to protect the right to health. And the government's failure to intervene following the spill to minimize the negative consequences to health also violated the right.

### c. The Rights of Indigenous Peoples

The rights of indigenous peoples are explicitly protected through several international treaties, the most comprehensive of which is International Labor Organization Convention No. 169 Concerning Indigenous and Tribal Peoples, which has been incorporated into Bolivian Law.<sup>316</sup> Additional important documents are the United Nations' Draft Declaration on the Rights of Indigenous Peoples (the "Draft Declaration"),<sup>317</sup> and the Proposed American Declaration on the Rights of Indigenous Peoples.<sup>318</sup> Neither is binding, but both are useful guides to the interpretation of indigenous peoples' rights.<sup>319</sup>

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315. *Id.* at para. 51.

316. *See* Law 1257 (July 11, 1991).

317. Draft Declaration on the Rights of Indigenous Peoples, E/CN.4/Sub.2/1994/2/Add.1 (1994) [hereinafter Draft Declaration].

318. Proposed American Declaration on the Rights of Indigenous Peoples (Approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333rd session, 95th Regular Session), OEA/Ser/L/V/II.95 Doc.6 (1997).

319. Awaiting adoption by the United Nations, the provisions of the Draft Declaration are not yet binding on the States. Nevertheless, the Draft offers persuasive force and signals the current trend towards international protection of indigenous peoples' rights. Although the Draft Declaration has yet to be adopted by the Organization of American States ("OAS"), the Inter-American Commission on Human Rights previously

ILO No. 169 applies to:

[T]ribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

[P]eoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.<sup>320</sup>

A fundamental criterion for determining the groups to which ILO No. 169 applies is the self-identification of the groups as indigenous or tribal.<sup>321</sup> As previously noted, according to officials at Bolivia's Vice-Ministry for Indigenous Affairs, the Aymara and Quechua-speaking communities near the Desaguadero do not qualify as indigenous groups because they identify as peasants, rather than as indigenous peoples. However, the Uru Moratos, at least, do self-identify as indigenous groups and are considered to be such by the Bolivian government. Therefore, without prejudice to the question of whether the Aymaras and

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rejected the argument for barring interpretation of the American Declaration in light of the Draft Declaration. Regarding the Draft Declaration in particular, the Commission noted that:

[w]hile [Article XVIII], like the remainder of the Draft Declaration, has not yet been approved by the OAS General Assembly and therefore does not in itself have the effect of a final Declaration, the Commission considers that the basic principles reflected in many of the provisions of the Declaration, including aspects of Article XVIII, reflect general international legal principles developing out of and applicable inside and outside of the inter-American system and to this extent are properly considered in interpreting and applying the provisions of the American Declaration in the context of indigenous peoples.

Draft Declaration, *supra* note 317.

Although the Commission confined its application of the Draft Declaration to the interpretation of the American Declaration, the argument for interpreting Petitioners' complaints in light of ongoing developments in international human rights law finds force with respect to other international instruments as well. In addition, several other treaties not specific to indigenous peoples contain provisions implicating the rights of indigenous peoples.

320. Draft Declaration, *supra* note 317.

321. ILO Convention No. 169, *supra* note 17, art. 1, 28 I.L.M. at 1384-85.

Quechuas do or do not qualify as indigenous, the following analysis will focus on the Uru Moratos' rights as indigenous peoples.

In addition to all the human rights previously discussed in this section, international law provides for various rights that specifically pertain to indigenous peoples. Of these rights, the most relevant to this case are the right to property, the right to cultural integrity, and the right to environmental protection. Transnational instruments generously protect the rights of indigenous groups to property, including the right to develop, use and enjoy their lands.<sup>322</sup> ILO No. 169 requires both recognition and affirmative enforcement of property rights: Article 14(1) states that "[t]he rights of . . . [indigenous] peoples . . . over the lands which they traditionally occupy shall be recognized;"<sup>323</sup> and Article 14(2) states that "[g]overnments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy and to guarantee effective protection of their rights of ownership and possession."<sup>324</sup> In addition, Article 18 of ILO No. 169 states that "[a]dequate penalties shall be established by law for unauthorized intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences."<sup>325</sup>

ILO No. 169 establishes that governments are responsible for "promoting the full realization of the social, economic and

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322. Draft Declaration, *supra* note 317, arts. 10, 26, 27, 28, 30; ILO Convention No. 169, *supra* note 17, arts. 13-19, 28 I.L.M. at 1387-88; American Convention on Human Rights *supra* note 17, ratified June 20, 1979, art. 21, 1144 U.N.T.S. 123, O.A.S. Treaty Series No. 36; American Declaration on the Rights and Duties of Man, art. 13, O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OEA/Ser. L/V/I.4 Rev. (1965) [hereinafter American Declaration]; Universal Declaration of Human Rights, art. 17, G.A. Res. 217 A (III), U.N. Doc. A/810 (1948) [hereinafter UDHR]; International Convention on the Elimination of all Forms of Racial Discrimination, art. 5(a)(v), June 7, 1966, Sept. 22, 1970, art. 5(a)(v), 660 U.N.T.S. 195. [hereinafter ICERD]; Committee on the Elimination of Racial Discrimination, General Recommendation XXIII (51) Concerning Indigenous Peoples, para. 5, CERD/C/51/Misc.13/Rev.4 (1997); Copenhagen Declaration on Social Development and Programme of Action of the World Summit for Social Development, Annex II: Programme of Action of the World Summit for Social Development Content, Chapter II: Eradication of Poverty, para. B(32), U.N. Doc. A/CONF.166/9/Annex II (1995), available at [gopher://gopher.undp.org:70/00/unconfs/wssd/summit/off/a-9.en](http://gopher://gopher.undp.org:70/00/unconfs/wssd/summit/off/a-9.en); Agenda 21: Programme of Action for Sustainable Development, Rio Declaration on Environment and Development Statement of Principles, Principle 26.4(b), U.N. GAOR, 46th Sess., Agenda Item 21, U.N. Doc. A/CONF.151/26 (1992) [hereinafter Agenda 21].

323. ILO Convention No. 169, *supra* note 17, art. 14(1).

324. *Id.* art. 14(2).

325. *Id.* art. 18.



cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions.”<sup>326</sup> In applying the provisions of the Convention, “the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected.”<sup>327</sup> In addition, the Inter-American Commission on Human Rights has found that States have an obligation under the American Declaration of the Rights and Duties of Man to protect indigenous peoples’ cultural integrity.<sup>328</sup> The United Nations Human Rights Committee has stated that “culture manifests itself in many forms, including a particular way of life associated with the use of land and resources, specially in the case of indigenous peoples.”<sup>329</sup>

Finally, article 7(4) of ILO No. 169 instructs States to “take measures, in cooperation with the peoples concerned, to protect and preserve the environment of the territories [indigenous peoples] inhabit.” The Inter-American Commission on Human Rights has stated that “the protection of the rights of indigenous individuals and communities affected by oil and other development activities requires that adequate protective measures be put in place before damage has been suffered.”<sup>330</sup>

According to the community members we interviewed, the oil spilled by Transredes reached portions of territory traditionally inhabited by the Uru Moratos. If so, the oil spill was an “unauthorized intrusion upon . . . the lands of [indigenous] peoples” which the government was required to take measures to prevent. Insofar as the Uru Moratos’ cultural practices are intimately associated with the water and plant and animal life in the Desaguadero River system, the oil spill directly threatened their distinct culture. In the end, the government’s near complete

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326. *Id.* art. 2(b).

327. *Id.* art. 5(a).

328. Danns’ case, Report No. 75/02, Case No. 11.140 Mary and Carrie Dann, para. 131, Inter-Am. C.H.R. (2002)

329. Human Rights Committee, General Comment No. 23(50), para. 7.

330. Inter-Am. C.H.R., Report on the Human Rights Situation in Ecuador, OEA/Ser.L/V/II.96 (1997). *See also* Report on Human Rights of Indigenous Peoples: Indigenous People and their relationship to land (1999), the Sub-Commission on Prevention of Discrimination and Protection of Minorities; The Yanomami Case, Case 7615 (Brazil), Inter-Am. C.H.R., OEA/Ser.L/V/II.66, doc. 10 rev. 1, at 24, 31 (1985); The Miskito Case, Case 7964 (Nicaragua), Inter-Am. C.H.R., OEA/Ser.L/VII.62, doc. 10 rev. 3 (1983) (discussing just compensation for destroying indigenous property); *Study on Indigenous Land Rights*, UN Subcommission on Prevention of Discrimination and Protection of Minorities, Resolution 1997/10.

failure to intervene to protect the interests of the highly vulnerable population of Uru Moratos from the direct impact of the spill and, more importantly, in the negotiation process with Transredes, constitutes a breach of its obligations to indigenous populations under ILO No. 169.

## 2. Transredes' Obligations as a Private Actor

For the most part, human rights law addresses the activity of private actors only indirectly by imposing obligations on States to regulate their conduct. Thus, the actions of Transredes raise human rights concerns in that they triggered obligations on the part of Bolivia to prevent or respond to the crisis. The recent approval of the Draft Norms for TNCs, however, raises the possibility of holding TNCs directly responsible for violations of human rights. Although these Norms were not binding on Transredes at the time, we consider in this subsection how the Draft Norms would apply to the facts in this case in order to illustrate the importance of the Norms in addressing TNC conduct.

The Draft Norms for TNCs provide that "within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of, and protect human rights recognized in international as well as national law."<sup>331</sup> Among other obligations, the Draft Norms for TNCs provide that "[t]ransnational corporations and other business enterprises shall respect civil, cultural, economic, political, and social rights, and contribute to their realization, in particular the rights to. . . adequate food and drinking water; and refrain from actions which obstruct or impede the realization of those rights."<sup>332</sup>

Under this standard, Transredes' act of knowingly pumping oil through a pipeline that was off its supports, despite the danger of a spill, could be considered negligent or even reckless with respect to the right to water. Even if the initial spilling of oil was not negligent, Transredes' failure to detect and contain the spill in a timely way and to act quickly and effectively to minimize its impact would seem to satisfy a negligence standard of

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331. Draft Norms for TNCs, *supra* note 29, art. 1.

332. *Id.* art. 12.

liability. Moreover, to the extent that Transredes' failure to include a plan for the region in its Environmental Manifest as required by Bolivian law contributed to its ineffective response, it might be responsible under a negligence per se standard.

With respect to the right to health, the Draft Norms for TNCs state that "[t]ransnational corporations and other business enterprises shall respect civil, cultural, economic, political, and social rights, and contribute to their realization, in particular the rights to . . . the highest attainable standard of physical and mental health; and refrain from actions which obstruct or impede the realization of those rights."<sup>333</sup> As previously noted, assuming a standard of ordinary negligence, Transredes' failure either to repair the pipeline or discontinue the pumping of oil could warrant a finding of negligence with respect to the spill. In addition, to the extent that Transredes' cleanup efforts were inadequate, the company failed to minimize the health consequences to the population. Even more troubling are reports that Transredes actively misled the affected communities as to the risks to health presented by the spill. If true, these reports suggest an intentional tort rather than negligence.

Yet, establishing a violation of the right to health in this case presents an evidentiary obstacle: because of the lack of specific demographic information regarding the baseline health of the affected communities, the actual impact of the spill is difficult to measure. This is especially true as to long term health consequences of the contamination. The widespread contamination of the river by mining in the region further complicates the issue of causation. In view of these problems, *and despite the fact that Transredes' negligence put at risk the health of the members of the community*, we cannot state conclusively that Transredes would be in violation of its obligations under the Draft Norms to protect the right to health.

Although the Draft Norms for TNCs do not specifically address TNCs' obligations with regard to indigenous peoples, they do provide that TNCs are generally obligated to respect economic, social, and cultural rights.<sup>334</sup> Thus, TNCs are obliged to respect indigenous peoples' rights as elaborated in ILO No. 169, as part of this general obligation. Assuming that the relevant

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333. *Id.*

334. *Id.*

standard with respect to the rights of indigenous peoples is negligence under the Draft Norms and ILO No. 169, Transredes would be in violation of the Uru Moratos' rights to property, to a healthy environment, and to cultural integrity, according to the same argument elaborated above regarding State responsibility.

### 3. Procedural Rights: The Right to Effective Remedies

As noted in the last subsection, the facts surrounding the oil spill present several potential violations of substantive human rights. However, primarily as a result of the incomplete elaboration of the relevant human rights standards, establishing the existence of a violation is difficult.

Nonetheless, one fact that does stand out about the oil spill is the government's near-complete failure to intervene in the response to the crisis, essentially allowing Transredes to make all the key decisions about clean-up, emergency relief, and compensation proceedings. The government's abandonment of the affected communities is itself a human rights violation: the failure to provide effective remedies as required by international law.

An essential obligation of States with regard to the protection of human rights is that of creating effective remedies for violations of those rights.<sup>335</sup> As an initial matter, the Universal Declaration of Human Rights provides that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."<sup>336</sup> The International Covenant on Civil and Political Rights ("ICCPR") specifically states that governments are required to provide effective remedies for violations of the rights contained therein: States Parties undertake "[t]o ensure that any person whose rights or freedoms . . . are violated shall have an effective remedy . . . ; [t]o ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; [and t]o ensure that the competent authorities shall enforce

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335. *Id.*

336. Universal Declaration of Human Rights, art. 8, Dec. 10, 1948, UDHR, art. 8, G.A. Res. 217A, U.N. GAOR, 3d Sess., Pt. 1, Resolutions, at 71, U.N. Doc. A/810 (1948) [hereinafter UDHR].

such remedies when granted.”<sup>337</sup>

The American Convention on Human Rights also provides specifically for a right to judicial protection, which requires States Parties to create courts or tribunals to which individuals can have recourse for protection of the rights, including ESC rights, contained within the Convention.<sup>338</sup> In addition, the American Convention requires States to provide a fair hearing, not only in criminal proceedings, but also “for the determination of . . . rights and obligations of a civil, labor, fiscal, or any other nature.”<sup>339</sup> Of significance to this case, the Inter-American Court has also found that Article 1, which requires States to guarantee the full and free exercise of rights, entails obligations of due diligence with respect to violations of Convention rights:

The second obligation of the States Parties is to “ensure” the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must *prevent, investigate and punish any violation of the rights recognized by the Convention* and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for

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337. ICCPR, *supra* note 17, art. 2(3).

338. American Convention on Human Rights, *supra* note 17, art. 25(1) and (2). The Convention provides:

(1) Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties, to develop the possibilities of judicial remedy; and to ensure that the competent authorities shall enforce such remedies when granted.

*Id.*

339. See American Convention on Human Rights, *supra* note 17, art. 8(1). The Inter-American Court has commented that:

Under the Convention, States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8(1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1).

See *Velasquez Rodriguez Case* (Preliminary Exceptions), (1987) 1 Inter-Am. Ct. H.R. (ser. C) para. 91.

damages resulting from the violation.<sup>340</sup>

Although the ICESCR does not specifically list a right to effective remedies for violations of ESC rights, there are strong arguments supporting the view that this right is implied, at least where the rights at issue are justiciable. Under the ICESCR, each State Party undertakes "to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."<sup>341</sup> As noted by the ESCR Committee, the phrase "all appropriate means" in this article of the ICESCR implies that States parties must not only legislate, but also implement other measures to protect ESC rights. Thus, "among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable"<sup>342</sup> and "[o]ther measures which may also be considered 'appropriate' . . . include, but are not limited to, administrative, financial, educational and social measures."<sup>343</sup>

In addition, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights ("Maastricht Guidelines") explain that "[v]iolations of economic, social and cultural rights can occur through the direct action of States or other entities

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340. See *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988).

341. ICESCR, *supra* note 17, art. 2, 6 I.L.M. at 361.

342. *Id.* art. 5. On the question of justiciability of ESC rights, the Committee has stated:

It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.

*Id.*

Committee on Economic, Social and Cultural Rights, General Comment 9: The Domestic Application of the Covenant, U.N. Doc. E/C.12/1998/24 (1998), art. 10.

343. *Id.* art. 7.

insufficiently regulated by States.”<sup>344</sup> Thus, States have a responsibility, pursuant to their obligation to protect ESC rights, “to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights.”<sup>345</sup> Such deprivations “are in principle imputable to the State within whose jurisdiction they occur. As a consequence, the State responsible must establish *mechanisms to correct such violations, including monitoring, investigation, prosecution, and remedies for victims.*”<sup>346</sup> The Maastricht Guidelines specifically state that “[a]ny person or group who is a victim of a violation of an economic, social or cultural right should have access to effective judicial or other appropriate remedies at both national and international levels.”<sup>347</sup> And “[a]ll victims of violations of economic, social and cultural rights are entitled to adequate reparation, which may take the form of restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition.”<sup>348</sup>

Various international declarations and instruments also establish that particular ESC rights potentially violated in the oil spill entail a right to effective remedies. For example, the Draft Declaration on the Rights of Indigenous Peoples provides that “[i]ndigenous peoples have the right to . . . effective remedies for all infringements of their individual and collective rights”<sup>349</sup> Similarly, the Committee on ESCR has stated that “[a]ny persons or groups who have been denied their right to water should have access to effective judicial or other appropriate remedies at both national and international levels. . . All victims of violations of the right to water should be entitled to adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition.”<sup>350</sup> In addition, the Committee has taken the view that “[a]ny person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels.”<sup>351</sup>

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344. Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights, para. 14, Maastricht, The Netherlands, Jan. 22-26, 1997.

345. *Id.* at para. 18.

346. *Id.* at para. 16 (emphasis added).

347. *Id.* at para. 22.

348. *Id.* at para. 23.

349. Draft Declaration, *supra* note 317, at para. 30.

350. General Comment 15, *supra* note 296, art. 55.

351. General Comment 14, *supra* note 292, at para. 59.

In the case of the Transredes oil spill, there is a strong argument that the Bolivian government failed to provide effective remedies for Transredes' violations of the community members' rights to water and health, as well as the rights of indigenous peoples. Although determining conclusively whether there was a violation of these substantive rights is difficult, the right to effective remedies should apply whenever there is a colorable claim of a human rights violation; indeed, the point of providing mechanisms for investigation, adjudication, and reparation is to determine whether violations have occurred. This case raised serious human rights concerns that merited a government response; thus, the right to effective remedies was triggered.

The right to effective remedies requires, among other things, that the government provide effective judicial remedies for violations of justiciable rights. In this case, several of the rights were justiciable – indeed, Bolivian law allows for civil suits for damages resulting from contamination of water sources. However, although it was theoretically possible for affected individuals to sue Transredes or the government for a remedy, in fact there were significant barriers to successful pursuit of a civil suit, including the high costs of a lawsuit, difficulties in obtaining counsel, and perceived lack of impartiality of the judiciary. Thus, there are institutional problems in Bolivia's judicial system that limit all Bolivians' access to effective judicial remedies for human rights violations. These institutional problems have a particularly negative impact on poor people's ability to access justice because they cannot afford the costs of legal action. Indeed, several of the community members we interviewed suggested that the costs of suing and their perception that the judicial system would favor the company were significant deterrents to suit. Moreover, delays in legal proceedings are a further obstacle to poor people's accessing the judicial system. For example, the civil lawsuit filed by the Chuquiña community against Transredes was still in a jurisdictional phase nearly two years after its filing. Given the economic need of the community, the slowness of the process provided a strong incentive to settle.

The right to effective remedies encompasses more than judicial remedies. As noted in the Maastricht Guidelines, States are required to "establish mechanisms to correct such violations, including monitoring, investigation, prosecution, and remedies



for victims.”<sup>352</sup> In the oil spill case, the Bolivian government did very little to correct the violations; in fact, it appeared to have few if any mechanisms in place to deal with the spill and its consequences. To begin with, given the vulnerability of the victims, it would have been appropriate for the government to advise the victims of their rights and legal options; it would also have been appropriate to have governmental legal experts (for example, representatives from the ombudsman’s office) supervise the process by which Transredes and the communities reached settlements. Similarly, the government should have taken a more active role in ensuring that emergency assistance, including veterinary and medical assistance, was provided in a prompt and effective manner. Given that Transredes’ medical and veterinary experts had an incentive to minimize the health impacts of the spill, the government should have sent its own doctors and veterinarians to treat the affected communities and their animals. Finally, given that the victims were not in a position to collect information about the spill’s impact, and that the company could not be impartial in its studies of the impact, the government should have begun conducting studies of the spill’s impact immediately.

In fact, the government did none of these things. Aside from making occasional demands that the company take certain actions with regard to cleanup and emergency assistance, for many months after the spill took place the government essentially abdicated its responsibility to provide any remedy for the harms caused by the spill. The government failed to provide legal advice to the affected communities, thereby allowing Transredes to take advantage of the community members’ need and ignorance by having them sign settlement agreements of questionable fairness. And the government took no major actions to remedy the harms caused by the spill or to monitor the company’s actions with respect to the spill. The government did not even collect information about the spill’s impact until many months later. The Environmental Audit was the sole means by which harms and appropriate remedies were determined, and its effectiveness was curtailed due to the long delay in starting the audit and the resulting lack of independent information about the spill’s impact.

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352. Maastricht Guidelines, *supra* note 344, at para. 16.

Because of all these failures, determining the true extent of the damage that was caused by the oil spill and thus the adequacy of the compensation is impossible. In short, the government's inaction in this case constitutes a clear violation of the affected community members' right to effective remedies for violations of their human rights.

### *C. Recommendations*

To the Bolivian State:

1. Engage in continued monitoring of the environmental effects of the spill, through the Vice-Ministry of Sustainable Development, Ministry of Health, and Prefecture of Oruro. Specifically, monitoring should include:
  - Thorough and regular tests of soil, water, and plants, in areas where citizens have alleged that oil is still present. In particular, we recommend testing of the soil on the shores of Lake Poopo, to determine the nature of the oil-like substance there.
  - Autopsies and veterinary studies of the animals that the affected communities claim are still dying or experiencing health problems as a result of the spill.
  - Medical studies of the continuing effect of the spill on community members along the Desaguadero.

This monitoring should be conducted independently of Transredes, to ensure transparency and impartiality. The monitoring process should be conducted in a public manner, open to input from the local population, and responsive to their concerns.
2. Provide health care and veterinary care to persons and animals whose health may have been affected by the spill.
3. Conduct studies of the quality of water in the Desaguadero River to determine its suitability for human consumption in accordance with international health standards. Should the water be found unsuitable for human consumption, take immediate measures for the continued provision of sufficient water of an adequate quality to the communities along the Desaguadero.
4. The Vice-Ministry of Environment should conduct an

internal review of its actions, both with respect to prevention of the oil spill and the response to the spill. The Vice-Ministry's failure to conduct an immediate investigation of the impact of the spill should be a particular focus of the review. Following the review, the Vice-Ministry or other appropriate agency should establish procedures and mechanisms that will correct the underlying problems. The Bolivian State should ensure that such procedures and mechanisms are properly funded, and that the persons charged with implementing them receive proper training.

5. The Vice-Ministry for Indigenous Affairs should conduct a study of the impact of the oil spill on the way of life of the Uru Moratos, and determine whether additional remedial measures should be taken to restore the Uru Moratos' cultural integrity.
6. The Vice-Ministry for Indigenous Affairs should conduct an internal review of its procedures, to evaluate its failure to intervene in this case, and correct underlying problems.
7. The Bolivian legislature, the Superintendency of Hydrocarbons, and the Vice-Ministry for the Environment should conduct a review of administrative fines for environmental disasters, to determine their value as deterrents.
8. The administrative fines available to the Superintendency of Hydrocarbons should be increased.
9. The national office of the Defensoria del Pueblo (Ombudsman's office) should conduct a review of the compensation agreements signed by the affected communities, to determine their legality under Bolivian law. It should also review the compensation process as a whole, to:
  - Determine why the affected communities received little or no independent legal advice.
  - Analyze economic and other impediments to the affected communities' access to the judicial system.
  - Evaluate and propose measures that can be taken to provide legal advice to people in similar situations, and

to eliminate economic barriers to vulnerable populations' access to the judicial system.

10. Study the judicial system's functioning in civil cases, and take measures to identify and to correct problems. In particular, the following issues require examination:
  - Unwarranted delays.
  - Bias and potential corruption in the judiciary.
  - The lack of expertise of judges with respect to environmental cases, and cases raising issues of economic, social, and cultural rights.
11. Ratify the Protocol of San Salvador and incorporate it into domestic law.

To Transredes:

1. Provide funding for the State's continued monitoring of the spill's impact, and for any remedial actions that may be required.
2. Review internal procedures for response to environmental crises in light of the events of this case.
3. Conduct an internal review to determine what actions the company could have taken to prevent the spill. In particular, the decision to continue pumping oil through the pipeline, despite the danger of a spill, requires close scrutiny. Reform internal procedures and policies on the basis of this assessment.
4. Replace portions of its pipelines that are past their useful life.
5. Stop any efforts currently underway to sue the Environmental Auditors.
6. Make a commitment voluntarily to abide by the Draft Norms for TNCs.

### III. *THE "WATER WAR"*

The "water war" took place in the early months of 2000, following the privatization of the water system in Cochabamba, Bolivia, and the passage of a new water law. The privatization and new water law resulted in large increases in rates for water services and raised concerns among farmers and owners of private wells, who had never before paid for the use of natural water sources, that they would now be charged for water. For several months protestors took to the streets, demanding that rate increases be rolled back, that the new water law be repealed, and that Aguas del Tunari, the company that took over the city's water system, leave the country. Social unrest became so widespread that the government declared a national state of emergency, finally repealing the water law and telling Aguas del Tunari that the government could no longer protect it.

Although various advocates have described the events leading to the Cochabamba water war as a deprivation of Cochabamba's citizens' right to water, because of the lack of specificity in the legal definition of the right, determining whether and when the right was violated is difficult. Nevertheless, there is no doubt that the processes by which Cochabamba's water system was privatized and the new water law passed lacked transparency and public participation. With regard to the privatization negotiation, few opportunities for public input were available and the government made no effort to communicate to the public the nature of the deal with AdT. Finally, in order to ratify its deal with AdT, the government succeeded in passing a new water law in a hurried and deceptive manner, again undermining public participation.

Although this Part addresses the violation of substantive ESC rights, we approach the water war primarily as an illustration of how a State's failure to respect rights of public participation may contribute to the violation of substantive rights, particularly social, economic, and cultural rights. This Part begins with an overview of the water war and the events that preceded it. The next section explores possible violations of substantive rights, primarily focusing on the right to water. The third section analyzes possible violations of procedural rights, specifically rights to transparent and participatory processes. The final sec-

tion offers recommendations for addressing the violations discussed.

### A. *Facts*

#### 1. Background: Provision of Water in Cochabamba

The water system in Cochabamba, a city with a population of 600,000, has been in need of improvement and expansion for many years. Aquifers in the city and the surrounding areas are overtaxed, residential access to water is incomplete, and an inequality of access to water exists based on wealth. As a result, water has become a contentious political issue. From 1967 to 1999, the water system in Cochabamba was run by a municipal company, SEMAPA. As of 1997, SEMAPA served only 57% of Cochabamba's population.<sup>353</sup> The remaining population obtained water from wells or private vendors, and as a result, paid more for its water.<sup>354</sup> The SEMAPA network was also highly inefficient, experiencing losses of 50% of the water transported.<sup>355</sup> Because of the limited availability of water in Cochabamba, water was rationed, and in many parts of the city water was available only once or twice a week.<sup>356</sup> Not surprisingly, "[a] solution to the serious water problems facing Cochabamba had been a vociferous demand of its citizens for many years."<sup>357</sup>

#### 2. Initial Privatization Attempt

In the late 1990s, the World Bank approved a sector loan to Bolivia to support improvements in the water systems of La Paz, Santa Cruz, and Cochabamba.<sup>358</sup> According to the World Bank's Senior Water Advisor, John Briscoe, the water system in Santa Cruz was run through a cooperative system and functioned well.<sup>359</sup> In contrast, the water systems in La Paz and Cochabamba, which were run as public utilities, had been functioning

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353. See Claudia Vargas & Andrew Nickson, *The Limitations of Water Regulation: The Failure of the Cochabamba Concession in Bolivia*, 21 BULL. OF LATIN AM. RES. 99, 104-07 (2002).

354. *Id.* at 105.

355. See *id.* at 104-05.

356. *Id.* at 105.

357. *Id.*

358. See Interview with John Briscoe, Senior Water Advisor, at the World Bank, in Washington D.C. (Aug. 21, 2003).

359. *Id.*

poorly for decades. The Bank therefore withheld approval of the loans to those cities, subject to a reform in these water systems that would allow for improvements.<sup>360</sup> In the view of the World Bank, when no “credible provider” of water services exists, as was the case in Cochabamba, privatization must be considered.<sup>361</sup> Subsequently, the government began to explore privatization options for Cochabamba’s water system.

In 1997, the government initiated a tender process for a concession for water services in Cochabamba.<sup>362</sup> At the time, government officials were considering two options for increasing the supply of water to the city: the Misicuni Multipurpose Project (“MMP”), which “involved building a 120m dam, a reservoir to regulate the 6.6 cu.m/sec. flow of raw water, a 19.4 km tunnel and a hydroelectric power plant” at a cost of U.S. \$300 million,<sup>363</sup> and the Corani Project, which involved the construction of an 11 km tunnel to transport water to the city at a cost of U.S. \$90 million.<sup>364</sup> The World Bank concluded that the MMP was not feasible due to its high cost and advised Bolivia not to pursue the project.<sup>365</sup> The government therefore decided to link the concession process with the Corani project.<sup>366</sup> This call for tender was cancelled, however, after a successful legal challenge by the Municipality of Cochabamba on the ground of non-compliance with the procurement law.<sup>367</sup>

According to some interviewees, Bolivia’s President at the

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360. *Id.*

361. *Id.*

362. *See* Vargas & Nickson, *supra* note 353, at 105-06.

363. *Id.* at 105-06.

364. *Id.* at 106 n.9.

365. *Id.* at 106. According to John Briscoe, the initial MMP presented to the World Bank required the construction of a dam that would produce ten times more water than the city needed, and would be very expensive; because there was a smaller dam project that was cheaper, the Bank told the government of Bolivia that the MMP made no sense. *See* Interview with John Briscoe, *supra* note 358; Armando de la Parra, a former Congressman from Cochabamba, told us that he believed that the World Bank opposed the MMP because it would require public investment and in the Bank’s view these sorts of projects should be funded through private investment. *See* Telephone Interview with Armando de la Parra, former Congressman representing Cochabamba (Sept. 23, 2003).

366. The tender documents provided that the concessionaire would have to sign a “take or pay” contract with Corani S.A., i.e., the concessionaire would agree to purchase a fixed amount of water from Corani S.A. at a fixed price, regardless of the concessionaire’s capacity to receive the water. *See* Vargas & Nickson, *supra* note 353, at 106.

367. *See id.*

time, Gonzalo Sanchez de Lozada, favored the Corani Project, whereas Cochabamba's mayor, Manfred Reyes Villa, who belonged to the rival NFR party, favored the Misicuni Project.<sup>368</sup> "[I]t was widely believed that the reason for the appeal was because the mayor supported the [Misicuni Project] and wanted to exclude consideration of the Corani alternative."<sup>369</sup> Some believe that Reyes Villa's support "reflected pressure from politically influential Bolivian engineering and construction companies, who expected lucrative contracts from the [Misicuni Project]."<sup>370</sup> However, much of the public also supported the MMP: Former Cochabamba Congressman Armando de la Parra stated that Cochabamba "as a whole decided to go with Misicuni. Before the elections of 1997 there was a movement saying that it had to be Misicuni."<sup>371</sup> Bolivian journalist Luis Bredow observed that "the Misicuni project has been on Cochabambinos' minds for fifteen to twenty years; as a politician in Cochabamba you have to say you will build Misicuni."<sup>372</sup>

### 3. The Second Call for Tender

In 1997, Hugo Banzer, known for his violent dictatorship of Bolivia in the 1970s, was elected President. Banzer's governing coalition included the party of Cochabamba's mayor, Manfred Reyes Villa, and Banzer himself had campaigned on the promise of building the MMP. Thus, despite the high cost, in 1999, the Bolivian government issued a second call for tender for a

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368. See Interview with William Scarborough, U.S. Consul, in Cochabamba, Bolivia (May 10, 2003). According to Mr. Scarborough, "Mayor Reyes Villa turned Misicuni . . . into a political issue. Corani was Sanchez's project . . . . The two of them went on a collision course and Manfred won." *Id.*

369. Vargas & Nickson, *supra* note 353, at 106 n.9.

370. *Id.* See also William Finnegan, *Leasing the Rain*, *NEW YORKER*, Apr. 8, 2002, at 43. Finnegan notes that:

some of [Reyes Villa's] main financial backers stood to profit fabulously from the Misicuni Dam's construction. When the central government first tried to lease Cochabamba's water system to foreign bidders, in 1997, and did not include Misicuni in the tender, Bombón [(Reyes Villa)] stopped it cold. It was only the inclusion of the project in the Aguas del Tunari contract that got the Mayor on board.

*Id.*

371. See Interview with Armando de la Parra, *supra* note 365. Mr. De la Parra also notes that the Corani project was unattractive compared to Misicuni because Cochabamba would be obligated to purchase water from Corani S.A. for twenty years, and the price of water was too high. *Id.*

372. See Interview with Luis Bredow, La Paz, Bolivia (May 26, 2003).



scheme that this time included the MMP instead of Corani.<sup>373</sup> This call for tender failed in April 1999, attracting only one bid and none that satisfied all the conditions of the call for tender.<sup>374</sup> The sole bidder was Aguas del Tunari (AdT), a transnational corporation whose majority shareholder was International Water Limited, a wholly-owned subsidiary of the American corporation Bechtel Enterprises.<sup>375</sup>

Given the lack of other bidders, President Banzer authorized, via a Supreme Decree, the initiation of direct negotiations with AdT.<sup>376</sup> The Decree created a Negotiation Commission, made up of the Vice-Minister of Investment and Privatization, the Prefect of Cochabamba, the Mayor of Cochabamba, the Superintendent of Water, the Superintendent of Electricity, the Executive President of Misicuni Enterprises, and the General Manager of SEMAPA.<sup>377</sup> Significantly, it included no community leaders or representatives from stakeholder groups such as the irrigators.

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373. See Interview with Michael E. Curtin, Executive Consultant to International Water Limited and former President of Aguas del Tunari ("AdT"), in Washington, D.C. (Aug. 21, 2003) [hereinafter Interview with Michael Curtin].

374. See Decreto Supremo 25351 (Apr. 19, 1999). AdT officials have speculated that the high costs of the MMP, combined with other costs in the terms of reference for the bid, were unattractive to most potential bidders. See Interview with Michael E. Curtin, *supra* note 373 (speculating that other companies probably did not place a bid, and AdT submitted a non-compliant bid, because the government's terms of reference were not attractive).

375. The majority of AdT — 55% — was owned by International Water Ltd. (AIWL) and the remainder by the Spanish company Abengoa Servicios Urbanos (25%) and four Bolivian companies (5% each). See Vargas & Nickson, *supra* note 353, at 106 n. 10. At the time the Contract was signed, AdT was registered in the Cayman Islands, and IWL was a U.K.-based company wholly owned by Bechtel Enterprises ("Bechtel"), a privately held firm in San Francisco, California. See *id.* In November 1999, Bechtel sold 50% of its interest in IWL to Edison S.p.A. ("Edison"), an Italian company. See *id.* On December 8, 1999, International Water Holdings B.V. was established in the Netherlands, with Edison and Bechtel having 50-50 shares in it, and IWL being a 100% subsidiary of it. See *id.* The holding company had a post office box but no office in the Netherlands. This change to IWL's status was approved by Luis Uzin, Bolivia's Superintendent of Waters, on behalf of the Bolivian government. See *id.* See also Interview with Michael Curtin, *supra* note 373. On this basis, AdT has subsequently asserted that a bilateral investment treaty between Bolivia and the Netherlands applies to its investment in Bolivia. See *id.*

376. *Id.*

377. See *id.* Vargas & Nickson, *supra* note 353, at 107 n.11.

## 4. Negotiations with AdT

The details of the government's negotiations with AdT are not publicly known, and consequently are difficult to describe with precision. Although AdT's President claims that the negotiations were not particularly secretive,<sup>378</sup> one of the lawyers who advised AdT told us that: "[n]egotiations were behind closed doors. Even . . . [the] Bolivian lawyers had a small role. The real negotiation was by [Geoffrey] Thorpe and the government's technical team. It was done in a huge hurry, very hasty. Usually we have three to four months for due diligence — they gave us six weeks."<sup>379</sup> Moreover, the concession agreement reached between the Negotiation Commission and Aguas del Tunari specifically required confidentiality regarding all information that the parties might "find out about, or have direct knowledge of in virtue of their participation in [the] Contract and in the negotiations."<sup>380</sup> This obligation extended to all personnel working for

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378. See Interview with Michael Curtin, *supra* note 373.

379. Interview with William Scarborough, *supra* note 368. At the time of the negotiations over the water concession, and throughout the water war, Geoffrey Thorpe was the President of AdT. See Interview with Michael Curtin, *supra* note 373.

380. See Contrato de Concesion de Aprovechamiento de Aguas y de Servicio Publico de Agua Potable y Alcantarillado en la Ciudad de Cochabamba, art. 24.3 (Sept. 3, 1999) [hereinafter *Contrato de Concesion*]. The confidentiality provision states in full:

24.3 Confidentiality

- 24.3.1. None of the Parties shall divulge to third parties any information regarding which confidential character has been specified by the other party or about which they know, find out about, or have direct knowledge of in virtue of their participation in this Contract and in the negotiations that led to its celebration. Said obligation to maintain confidentiality extends to all the personnel in the service of the Parties, so the latter must adopt the necessary measures so that said personnel satisfies the confidentiality norms herein established. Both Parties must satisfy this clause unless they have the authorization of the other party, a judicial order, or a requirement from competent national or municipal authorities. For the effects of this clause, the shareholders and final shareholders of the concessionaire, as well as the water operator will not be considered third parties.
- 24.3.2 For purposes of the last paragraph, the following information is considered confidential: all information obtained in the data room as part of the bidding and negotiating process, including interviews with authorized personnel and inspection visits to SEMAPA's installations. Similarly, all information presented by the Concessionaire in relation to the process of bidding and negotiation or by the Shareholders in connection with their offer to sign the present Contract will be considered confidential.
- 24.3.3 The obligation to maintain confidentiality that each party assumes according to Clause 24.3.1 will subsist for a period of five years after the termination of the present Contract for any reason.

either party, and would continue for five years after the termination of the contract, regardless of the reason.<sup>381</sup>

Nonetheless, after the water war, some information about the content of negotiations has been released by Aguas del Tunari, as well as by government officials. According to Bechtel's Fact Sheet on the Water War:

Over the course of negotiations, the Negotiating Committee insisted on a number of elements that could only be addressed by raising tariffs:

- The municipality in particular insisted the Misicuni dam be built during the first two years of Aguas del Tunari's contract.
- The municipality wanted the consortium to repay SEMAPA's previously accumulated debt and roll that cost into the rate structure.
- The municipality also insisted that Aguas del Tunari sign and execute a contract for construction of a treatment plant that the consortium thought excessively expensive and unnecessary.
- In addition, the State decided that Aguas del Tunari must pay for using the tunnel under construction, and the municipality decided to charge the consortium for the existing SEMAPA assets.<sup>382</sup>

Bechtel's claim that the government pressed for completion of the MMP in the first two years of AdT's contract has been echoed by other sources. According to one source, the Banzer government "wanted to finish Misicuni by 2002 when new elections would take place."<sup>383</sup> According to IWL's Bolivian counsel, AdT proposed building Misicuni in eight years, rather than two, but the "President said 'no, I promised this project would be built within my administration'. . . so the 8 year project would have to be compressed to 18-22 months."<sup>384</sup> Ultimately, however, the government agreed to leave AdT's obligation to com-

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*Id.*

381. *Id.*

382. See Bechtel Fact Sheet, Cochabamba and the Aguas del Tunari Consortium, available at <http://www.bechtel.com/pdf/cochabambafacts.pdf> (last visited Mar. 6, 2004) [hereinafter Bechtel Fact Sheet].

383. Interview with William Scarborough, *supra* note 368.

384. Interview with Ramiro Guevara, Partner, Valdés, Rodriguez, Miranda, Gutierrez & Guevara, in Bolivia (May 29, 2003).

plete the MMP open, subject to AdT's ability to obtain "unconditional promises of financing, or financing not guaranteed by the shareholders' assets, under conditions that are acceptable to the concessionaire."<sup>385</sup> Moreover, the size of the dam that the company was required to build as part of the MMP was reduced from 120m to 95m, and the electricity the MMP was supposed to generate was reduced by two-thirds (from 120 Mw to 40 Mw).<sup>386</sup> The final contract stated that the "final dimensions, specifications, and costs of said works will be determined by field investigations, viability studies, and detailed design."<sup>387</sup>

According to AdT's President, Michael Curtin, the initial terms of reference for the bid provided for two 20% increases in the water tariffs in Cochabamba, one prior to the awarding of the concession and the other in 2002.<sup>388</sup> IWL's lawyer reported that the company told the government that obtaining loans to finance Misicuni without a substantial tariff increase would be difficult,<sup>389</sup> and that if the government insisted that AdT assume SEMAPA's preexisting loans, tariffs would have to be increased even more.<sup>390</sup> Michael Curtin said that he believed the cost of building Misicuni and repaying the debt accounted for well over 70% of the tariff increases.<sup>391</sup> Bechtel's Fact Sheet states that "[h]alf the rate increase was necessitated by such government requirements as paying down more than U.S. \$30 million in debt accumulated by the public utility that had previously operated the system. Rate increases were also needed to finance proper maintenance and expansion of the water system."<sup>392</sup> According to Mr. Curtin, the government could have reduced the size of the rate increases by taking over the debt of SEMAPA, but it re-

385. See *Contrato de Concesion*, art. 12.2.

386. See TOM KRUSE, *LAS VICTORIAS DE ABRIL: UNA HISTORIA BREVE Y BALANCE DE LA "GUERRA DEL AGUA"* (manuscript on file with authors). See also Interview with Michael Curtin, *supra* note 373 (Aug. 21, 2003) ("during the negotiations, there were various things that were changed: number one, the size of the dam, number two the amount of electricity. They hadn't finished the tunnel . . . We were asked to . . . take responsibility for the tunnel, and we said no").

387. See *Contrato de Concesion*, art. 12.1.12.

388. See Interview with Michael Curtin, *supra* note 373.

389. Interview with Ramiro Guevara, *supra* note 384.

390. *Id.*

391. Interview with Michael Curtin, *supra* note 373 (Aug. 21, 2003).

392. Bechtel Perspective on the Aguas del Tunari water concession in Cochabamba, Bolivia, available at <http://www.bechtel.com/cochabambaresponse.html> (last visited Mar. 6, 2004).

fused to do so on the grounds that if it assumed SEMAPA's debt, it would have to do the same elsewhere.<sup>393</sup> Moreover, according to Mr. Curtin, the government did not offer to subsidize the tariff increases.<sup>394</sup>

Both the company and the government foresaw that rate increases would be unpopular, and that they might generate public protest. IWL's lawyer claims that the company warned the government about the likelihood of social unrest due to tariff increases, but "the government told the company very clearly, from the outset, that's not your problem. Political problems should be dealt with by the government not the company . . . . The government accepted the political problems that would arrive as a result of the contract."<sup>395</sup> According to AdT's president, the government said: "Don't worry about it. We'll take care of it."<sup>396</sup> AdT's President claims that, although in hindsight one might view these assurances with skepticism, "in 1999, the track record of privatizations and concessions in Bolivia was as good as it's ever going to be in Latin America . . . so when the government said 'don't worry, we'll take care of that, including a publicity campaign before we took over the concession,' we tended to believe them."<sup>397</sup>

## 5. The Concession Agreement

The concession agreement was completed on September 3, 1999, and signed by Luis Uzin, the Superintendent of Waters, and Aguas del Tunari's Chief Executive, Geoffrey Thorpe.<sup>398</sup> The agreement granted AdT a concession to operate the Cochabamba water system for forty years. The area covered by the concession encompassed the Municipality of Cochabamba, excluding areas above 2750 meters above sea level.<sup>399</sup> The contract gave AdT the exclusive right to implement the Misicuni Pro-

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393. Interview with Michael Curtin, *supra* note 373.

394. *Id.*

395. Interview with Ramiro Guevara, *supra* note 384.

396. Interview with Michael Curtin, *supra* note 373.

397. *Id.*

398. See Contrato de Concesion; Contrato de Aprovechamiento de Aguas y de Servicio Publico de Agua Potable y Alcantarillado en la Ciudad de Cochabamba (Sept. 3, 1999). The agreement was also approved by the President through a Supreme Decree on September 2nd. See Decreto Supremo 25501 (Sept. 2, 1999).

399. See Contrato de Concesion, ann. 4, art. 15.

ject<sup>400</sup> and obligated AdT to complete the Misicuni Project, subject to the company obtaining financing.<sup>401</sup> The contract also gave AdT the exclusive right to provide water services in Cochabamba and to require potential users to connect themselves to AdT's water and sewage systems under applicable law.<sup>402</sup> The agreement required AdT to provide service to existing users and to expand the water system as directed by the Superintendent of Basic Sanitation.<sup>403</sup> Under the contract, AdT had the right to install meters to monitor the water consumption both of users connected to the system and owners of private wells, and to charge for that installation.<sup>404</sup> The agreement obligated AdT to be accessible, efficient, and fair when dealing with users and maintain information services for users,<sup>405</sup> and warned that AdT should not abuse its dominant position in providing water.<sup>406</sup>

The Superintendency of Basic Sanitation maintained its role as supervisor of the water system and the Misicuni Project and, in that role, had the authority to approve tariffs for water service delivery.<sup>407</sup> The tariff structure established in the contract followed the principle of full cost recovery. In other words, all of the services and projects (including the Misicuni Project) were eventually to be funded out of the tariffs, without subsidies.<sup>408</sup> Under the contract, AdT had the right to a rate of return on investment of between 15% and 17%.<sup>409</sup>

The contract established the conditions for its own termination.<sup>410</sup> It could be terminated by mutual agreement of the par-

400. *See id.* art. 5(ii).

401. *See id.* art. 12.2.

402. *See id.* arts. 14, 14.5.

403. *See id.* art. 18.3. AdT was required to provide service for all users within the area of concession who received water service at the time the Contract was initiated. *See id.* art. 18.3.1. It was also obligated to fulfill goals of expansion set by the Superintendent every five years. *See id.* ann. 6, art. 18.3.2: Goals of Expansion. Despite this requirement, the goals — financed by tariffs — could be rejected by AdT if they resulted in tariff increases of more than 25%, in which case the Superintendent would have to revise the expansion goals. *See id.* art. 18.3.2.

404. *Id.* ann. 5, art. 1.13.

405. *Id.* art. 18.5.

406. *Id.* art. 38.1.

407. *Id.* art. 17.1.

408. *See* KRUSE, *supra* note 386. *See also* Interview with Michael Curtin, *supra* note 373.

409. Contrato de Concesion, ann. 5, art. 4.2.

410. *Id.* art. 27.

ties;<sup>411</sup> at the request of AdT under specified circumstances;<sup>412</sup> by expiration of the term of the concession;<sup>413</sup> by a declaration of caducity of the contract by the Superintendency of Waters in certain specified circumstances;<sup>414</sup> and by impossibility.<sup>415</sup> Impossibility was defined as “a fortuitous event or one of force majeure, an action of the forces of nature . . . or any other event, action or omission of a third party, including public protests for environmental, social, or political reasons . . . that are not caused directly or indirectly by an action or omission of an Entity of the Government.”<sup>416</sup> Impossibility could also be generated by “civil commotion, acts of war . . . or other failures of public security” when this was “caused directly or indirectly by an action or omission of a Government Entity.”<sup>417</sup> In the event of impossibility, certain rights and obligations affected by the concession agreement could be suspended;<sup>418</sup> however, the concession agreement would remain in effect for six months.<sup>419</sup> After six months, if the circumstances had not been overcome, “either party [could] declare the termination of the Contract through written notice to the other party.”<sup>420</sup>

## 6. Water Law 2029

At the time the concession agreement between AdT and Bolivia was signed, the management of water resources in Bolivia was governed by a law from 1906.<sup>421</sup> This law gave private parties property interests in the water that crossed their lands,<sup>422</sup> granted them the right to dig wells to use underground water,<sup>423</sup> and provided for a system of concessions in perpetuity to individuals or groups to use public waters for irrigation.<sup>424</sup>

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411. *Id.* art. 27.1.

412. *See id.* art. 27.3.

413. *Id.* art. 27.1.

414. *Id.* art. 27.2.

415. *Id.* art. 42.

416. *Id.* art. 42.3.

417. *Id.* art. 42.4.

418. *Id.* art. 42.1.

419. *Id.* art. 42.10.

420. *Id.*

421. *See* Ley de Dominio y Aprovechamiento de Aguas de 1906 [hereinafter Law of Control and Utilization of Waters of 1906 or “1906 Law”].

422. *Id.* arts. 1, 5.

423. *Id.* arts. 20-21.

424. *Id.* arts. 231, 233.

Towards the end of the 1990s, a consensus emerged among the government and groups studying water issues in Bolivia that the 1906 water law was outdated and that a new law needed to be passed.<sup>425</sup> Despite this general consensus, the content of the new law was controversial: “over the last decades there have been over twenty versions of projects of a new law of waters.”<sup>426</sup> Various groups from civil society, including indigenous and peasant groups, became involved in negotiations over the new law of waters, and even presented their own proposals.<sup>427</sup> In particular, these groups were concerned about the prospect of privatization of water, continued recognition of indigenous uses and customs regarding water management, and the role of the Superintendency of Waters in regulation.<sup>428</sup>

Notwithstanding this broad public interest in water reform, shortly after the signing of the concession agreement between Bolivia and AdT, in October 1999, the Bolivian Congress suddenly passed Law 2029 on Potable Water Services and Sanitary Sewage (“Ley de Servicios de Agua Potable y Alcantarillado Sanitario”)<sup>429</sup> “without consulting civil society.”<sup>430</sup> This law was not the general law of waters that had been the subject of negotiations with stakeholders, but ostensibly a law dealing only with drinking water and sewage services. In fact, the law contained several provisions regarding water management generally, including controversial provisions allowing for privatization of water sources. Indeed, some have charged that the government

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425. See, e.g., Margarita Florez & Pablo Solon, *The Water War: Hydraulic Resources Strategy and Citizen Participation at the IDB in the Case of Bolivia* (Mar. 2001), available at <http://bicusa.org/mdbs/idb/WaterWar.htm> (last visited Feb. 27, 2004); <http://www.funsolon.org/COMUNIDAD/AGUA/Inglaguabid.htm> (last viewed Sept. 1, 2003). (“All the sectors of the State and civil society agree in that this law does not fit within current legislation and reality.”).

426. *Id.*

427. *Id.* (“The indigenous and peasant movements, and other sectors of civil society, submitted fairly developed counterproposals, as is the case of the proposal of the CSUTCB, the CSCB and the CIDOB from May of 1999.”). See also Confederacion de Pueblos Indigenas de Bolivia (CIDOB) et al, *Declaracion Conjunta sobre el Anteproyecto de Ley del Recurso Agua*, available at <http://www.aguabolivia.org> (last visited Feb. 27, 2004); Rene Orellana & Pablo Solon, *La Polemica Del Agua, Primera Parte: Derechos de Uso y Aprovechamiento*, also available at <http://www.aguabolivia.org> (last visited Feb. 27, 2004).

428. *Id.*

429. Ley No. 2029, *Ley de Servicios de Agua Potable y Alcantarillado Sanitario* (Oct. 29, 1999).

430. See Florez & Solon, *supra* note 425.



attempted to forestall public protest against the general law of waters by incorporating the main provisions of that law into Law 2029.<sup>431</sup> The head of the Cochabamba Irrigators' Federation, Omar Fernandez, told the delegation that the irrigators did not realize that Law 2029 would affect them because it was supposed to be a law about urban water services:

In 1999 we got to know the government was to approve the water supply law. We didn't assign too much importance to that. The project discusse[d] and affect[ed] the water supply and we are irrigators . . . [However, the] water supply law not only treated topics of water supply but it was a general water law in fact.<sup>432</sup>

According to Professor Carlos Crespo, of the Centro de Estudios Superiores Universitarios at the Universidad Mayor de San Simon in Cochabamba, Law 2029 was passed as a result of an agreement between the pro-government political parties and the main opposition party, the Revolutionary Nationalist Movement (MNR) and as part of a large package of laws, including the Law of Municipalities and others.<sup>433</sup> Armando de la Parra, who at the time of the water war was a congressman for Cochabamba, explained that Law 2029 was passed because President Banzer wanted to support the AdT concession agreement and respond to pressure from the international financial institutions such as the Inter-American Development Bank.<sup>434</sup> Crespo and others have argued that Law 2029 was passed for two reasons: first, to provide a legal framework for the Aguas del Tunari concession;

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431. See Interview with René Orellana, Sociologist, Center of Development and Communication of Andean People, in Bolivia (May 19, 2003) ("Peasant organizations and business organizations felt that a proposal by government to privatize, to make a market for water and concession rights [was not good] . . . . There were . . . first protests against this law. So [the] government put these laws into the water supply law. It was put in two or three articles and was not distinguishable from the rest.").

432. Interview with Omar Fernandez, Head of Cochabamba Irrigators' Federation, in Bolivia (May 20, 2003).

433. See Carlos Crespo, *Equity, Democracy and Accountability in Bolivian Water Reforms* 179 (unpublished manuscript on file with Crowley Program). The other laws were: The Children and Adolescents Law (No. 2026); Civil Servant Statute Law (No. 2027), and Municipalities Law (No. 2028). *Id.* at 179 n.30.

434. Interview with Armando de la Parra, *supra* note 365. Professor Carlos Crespo also notes that the government claimed that Law 2029 was passed quickly in response to "pressure from international co-operation agencies to have a legal framework that would enable the disbursement of funds for water supply projects." See Crespo, *supra* note 433, at 178-79.

and second, to establish the regulatory authority of the Superintendency of Basic Sanitation.<sup>435</sup>

Whatever the precise motivation, Law 2029 was approved in a forty-eight hour session of Congress, leaving groups from civil society who opposed the law without time to react.<sup>436</sup> No effort was made to consult stakeholder groups at the time.<sup>437</sup> One source told us, legislators who “were negotiating did not know the law even though they opposed it.”<sup>438</sup> Yet another person echoed this remark: “many congress people did not even know that the [law had been drafted] . . . .”<sup>439</sup>

Law 2029 created the Superintendency of Basic Sanitation,<sup>440</sup> and authorized it to regulate potable water and sewage services, grant and revoke concessions and servitudes relating to potable water and sewage, and monitor and publicize rates for water services.<sup>441</sup> The law allowed for private parties to participate in the provision of water and sewage services via concessions.<sup>442</sup> Moreover, the State would “foster the participation of the private sector in the provision of Potable Water and Sanitary Sewage Services.”<sup>443</sup> The Law prioritized principles of “economic efficiency” and “financial sufficiency” over others, such as affordability and universal access, thereby requiring that tariffs for water services be high enough to cover costs of operation and expansion, and to create incentives for efficient use.<sup>444</sup>

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435. See Florez & Solon, *supra* note 425. See also Crespo, *supra* note 433, at 179. Professor Crespo argues that “because no agreement had been reached with social organizations in the debate on the Water Resources Law, the government saw its chance of getting what it wanted through Law 2029.” *Id.*

436. See *id.* See also Florez & Solon, *supra* note 425.

437. See Crespo, *supra* note 433, at 179.

438. Interview with René Orellana, *supra* note 431.

439. Interview with Humberto Vargas Rivas, Centro de Estudio de la Realidad Economica y Social, in Bolivia (May 19, 2003).

440. See Law 2029, art. 14.

441. See *id.* arts. 9, 15.

442. *Id.* art. 19.

443. *Id.*

444. According to Law 2029, several principles would govern the rate structure for water and sewage services: economic efficiency, neutrality, solidarity, redistribution, financial sufficiency, simplicity, and transparency. See *id.* art. 49. Of these, economic efficiency and financial sufficiency took priority over the rest in cases where the principles conflicted. See *id.* art. 49(g). Economic efficiency meant that rates would “approximate the prices corresponding to a competitive market . . . and the rate structure would communicate to Users the scarcity of potable water resources, thereby creating incentives for its efficient use.” *Id.* art. 49(a). Financial sufficiency meant that the formulas for establishing rates would “guarantee the recovery of the costs and expenses of opera-

Law 2029 deemed all waters in the country the original property of the State.<sup>445</sup> Parties who wished to provide water or sewage services could request a concession, which would grant “exclusive use” of water sources to the concessionaire and could have a duration of up to forty years.<sup>446</sup> In areas covered by concession agreements, Law 2029 further required occupants or owners of buildings with the “corresponding infrastructure” to “contract and connect with the Potable Water and Sanitary Sewage Services [and] pay current rates for the Potable Water and Sanitary Sewage Services.”<sup>447</sup> However, “in exceptional cases . . . when there is availability of water . . . special treatment will be allowed for industrial, mining or agricultural users to self-supply for productive ends . . . .”<sup>448</sup> After the passage of the law, such users would have a limited time in which to regularize their situation.<sup>449</sup>

For areas with small or dispersed populations, concessions could not be offered; rather, parties who wished to provide water or sewage services had to request licenses, which would have a duration of up to five years and would not grant exclusive use of water sources.<sup>450</sup> In these areas, communities would be allowed to associate to participate in the arrangements for water services.<sup>451</sup>

### 7. Aguas del Tunari’s Operation of the Cochabamba Water System

AdT began its operation of the Cochabamba water system on November 1, 1999. According to Bechtel, in the first two months of the concession contract: Aguas del Tunari increased supply by 30% through repairs and technical enhancements; the consortium engaged the community in a water conservation and

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tion, including expansion, replacement, and maintenance, would allow remuneration of the capital of shareholders in the same way in which an efficient enterprise in a sector of comparable risk would have done, and would permit the use of technologies and administrative systems that would guarantee the better quality, continuity, and security to Users.” *Id.* art. 49(d).

445. *See id.* art. 28.

446. *Id.* arts. 29, 34.

447. *Id.* art. 72.

448. *Id.*

449. *Id.* art. 74.

450. *Id.* arts. 44-45.

451. *Id.* art. 73(a)(c).

education program, and instituted internationally accepted best practices in managing the system; many consumers expressed their satisfaction, and Aguas del Tunari employees were developing a new mode of operation and pride in their work.<sup>452</sup> In contrast, others claim that Aguas del Tunari did not make any investments in Cochabamba's water system, or in any case, that such investments were not visible to Cochabamba's residents.<sup>453</sup> These claims are supported by the statements of AdT's president, Michael Curtin, who conceded that the company did not have the time to make any investments because the water war started shortly after AdT took over the concession.<sup>454</sup>

Neither the government nor AdT made much effort to inform the public about the changes that were to be implemented in the Cochabamba water system, either with respect to rates or improvements. According to Bechtel's "fact sheet" on the Cochabamba water war, in the negotiations "Aguas del Tunari strongly recommended to the municipality that it launch an information campaign to inform the population of the changes that were to be implemented. The municipality was to carry out this action but never did."<sup>455</sup> The company itself did not conduct an information campaign either; IWL's lawyer in Bolivia told us that the company simply did not have enough time to start an information campaign before the social unrest began.<sup>456</sup> Michael Curtin told us that he viewed the company's failure to conduct such a campaign as one of its biggest mistakes but noted that the company had relied on the government to do so, due to its excellent track record with regard to privatizations.<sup>457</sup>

## 8. Complaints about the Concession and Water Law

In the first months of AdT's operation of the Cochabamba water system, residents of Cochabamba and surrounding areas

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452. See Bechtel Perspective on the Aguas del Tunari Water Concession in Cochabamba, Bolivia (Aug. 1, 2002), *available at* <http://www.bechtel.com/newsarticles/65.asp> (last viewed Oct. 7, 2003); Cochabamba and the Aguas del Tunari Consortium 4, *available at* <http://www.bechtel.com/newsarticles/65.asp> (last viewed Oct. 7, 2003) [hereinafter *Aguas del Tunari Consortium 4*].

453. See, e.g., Interview with Hugo Galindo, former Prefect of Cochabamba, in Bolivia (May 20, 2003).

454. See Interview with Michael Curtin, *supra* note 373.

455. Bechtel Fact Sheet, *supra* note 382, at 3.

456. Interview with Ramiro Guevara, *supra* note 384.

457. Interview with Michael Curtin, *supra* note 373.

began to express concerns about the concession agreement and Law 2029. As described by Oscar Olivera, leader of the Coordinadora Para La Defensa del Agua y de la Vida (the “Coordinator for Defense of Water and Life” or “Coordinadora”), these concerns revolved, for the most part, around three issues. First, in the city, the people connected to the central water network were affected by excessive rate increases.<sup>458</sup> Second, people who used water from private or cooperative wells feared that they would lose their property under the new water law.<sup>459</sup> And third, peasants were concerned that under Law 2029 water would become a commodity, and they would no longer be able to use natural water sources according to their traditional uses and customs.<sup>460</sup> The following subsections discuss each of these sets of concerns at greater length.

#### a. Tariff Increases

Although the Superintendency of Basic Sanitation had agreed to an initial tariff increase of 35% on average for water services,<sup>461</sup> many people in Cochabamba insist that, in fact, rates went up much more than that. One source states that, holding consumption levels constant, charges in water bills went up by 43% for the poorest families, 40% for poor families, and over 200% for some customers.<sup>462</sup> Moreover, copies of bills that the Coordinadora and others possess indicate rate increases higher than 35%, even for the poorest consumers.<sup>463</sup>

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458. See Interview with Oscar Olivera, Leader of Coordinadora, in Bolivia (May 19, 2003).

459. *Id.*

460. *Id.*

461. See Vargas & Nickson, *supra* note 353, at 112.

462. These numbers come from a computer analysis of water rates run by SEMAPA, see *Bechtel vs. Bolivia: The Water Rate Hikes By Bechtel's Bolivian Company (Aguas del Tunari)*, *The Real Numbers*, (The Democracy Center), available at the Democracy Center's website: <http://www.democracycctr.org/bechtel/waterbills/waterbills-global.htm> (last visited Feb. 23, 2004).

463. See *Bechtel vs. Bolivia: Cochabamba's Water Bills from Bechtel*, (The Democracy Center), available at <http://www.democracycctr.org/bechtel/waterbills> (last visited Oct. 7, 2003). The Crowley Program also reviewed some water bills that the Coordinadora's leaders kept, which appear to indicate a lack of consistency in rate increases. A few of the water bills showed extreme rate increases for people in the R2 category — that of the poorest users. For example, we reviewed the water bills for Mr. Cecilio Orellana for September 1999 and for January 2000. Mr. Orellana appears to have been charged 68.50 bolivianos for his consumption of eighty-three cubic meters of water in September. Four months later, Aguas del Tunari appears to have charged him nearly three

Bechtel has disputed this claim, arguing that the rates did not increase that much, but that water bills increased because expanded service resulted in greater consumption of water.<sup>464</sup> Michael Curtin, President of AdT, also suggested that the hundreds of copies of bills that the Coordinadora has in its offices, indicating very sharp rate increases, may be “manufactured.”<sup>465</sup> In its Fact Sheet on the Water Wars, Bechtel includes a chart that shows that, keeping consumption levels constant, rate increases for water were very small for the poorest people: for consumers in the R-2 Category (poor housing), who used between 1 and 12 cubic meters of water a month, the rates actually dropped by 1.6%.<sup>466</sup>

But Bechtel’s chart on water consumption is misleading: it addresses only the rate increases for water services, failing to mention that the company also increased rates for sewage services and bundled together those charges in consumers’ bills. Charts that Aguas del Tunari distributed in Cochabamba at the time of the rate increases correspond to Bechtel’s numbers with respect to rate increases for water, but show much higher rate increases for sewage services, even for Bolivia’s poorest.<sup>467</sup> Thus, for the R-2 Category of consumer, the rates for sewage services went up by 42.2%.<sup>468</sup> Charts that combine the rate increases for water and sewage show that people in the R-2 category who consumed up to 12 cubic meters of water a month would have seen an overall rate *increase* of 21.6%.<sup>469</sup> In fact, people in the R-2 category consumed on average sixteen cubic meters of water per month.<sup>470</sup> At that level, they would have seen an overall rate increase of 42.3%.<sup>471</sup>

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times that amount, 240.60 bolivianos, for consumption of only forty-three cubic meters. See Water Bills for Mr. Cecilio Orellana (on file with the Crowley Program).

464. See Bechtel Fact Sheet, *supra* note 382, at 4; Aguas del Tunari Consortium 4, *supra* note 452.

465. Interview with Michael Curtin, *supra* note 373.

466. See Bechtel Fact Sheet, *supra* note 382, at 4; Aguas del Tunari Consortium 4, *supra* note 452.

467. See Aguas del Tunari, Tarifas de los Servicios de Agua y Alcantarillado que corresponden al 81.2% de nuestros clientes: Conozca su Factura (Cochabamba, Jan. 23, 2000). The Crowley Program obtained copies of these charts from the current head of SEMAPA, Gonzalo Ugalde Canedo [hereinafter “SEMAPA Charts”].

468. *Id.*

469. *Id.*

470. See Crespo, *supra* note 433, at 175, table 18.

471. *Id.* See also SEMAPA Charts.

Bechtel's Fact Sheet states that in negotiations over the concession agreement, "[t]he Negotiating Committee did eventually accept one important Aguas del Tunari proposal: that the municipality implement a tariff structure opposite that of SEMAPA — one that would put no or smaller increases on the poorest citizens and increase substantially the bill for larger users."<sup>472</sup> But the tariff structure that Aguas del Tunari ultimately applied in Cochabamba indicates the opposite: keeping consumption levels constant, the overall rate increases for the poorest consumers are in many cases larger than they are for the higher-income consumers.<sup>473</sup> For example, for people consuming up to twelve cubic meters of water a month, the overall rate increases in the R-2 category are 21.6%; in the R-3 category (economy residential), the increases are only 10%, and in the R-4 category (luxury residential), they are 21%.<sup>474</sup> For people consuming 16 cubic meters of water a month, people in the R-2 category saw an overall rate increase of 42.3%, whereas people in the R-3 category only saw an overall rate increase of 28.8% and people in the R-4 category saw a rate increase of 36.6%.<sup>475</sup> Although at higher levels of consumption this trend is reversed (rate increases were larger for the R-4 and R-3 categories than they were for the R-2 category), at lower levels of consumption the rate increases are in fact regressive.<sup>476</sup>

An additional charge made by some Cochabamba residents is that Aguas del Tunari not only increased rates excessively but recategorized residents arbitrarily, placing them in a higher residential category for purposes of billing.<sup>477</sup> People who were recategorized would have paid much higher rates than they had in the past.

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472. See Bechtel Fact Sheet, *supra* note 382, at 4; Aguas del Tunari Consortium 4, *supra* note 452.

473. See SEMAPA Charts, *supra* note 467.

474. *Id.*

475. *Id.*

476. Note that this does not mean that the poorer categories of users paid more per cubic meter of water than the wealthier categories. To the contrary, R-2 category users already paid significantly less per cubic meter than R-3 or R-4 category users. The point is that the increases in rates were higher for the poorer categories of users than they were for the wealthier categories; in other words, poor people were paying proportionately more, in comparison to what they paid in the past, than wealthy people were.

477. See Telephone Interview with Jim Shultz, Executive Director, The Democracy Center, Cochabamba, Bolivia (Oct. 7, 2003). See also Crespo, *supra* note 433, at 174-75.

## b. Metering of Private and Cooperative Wells

Many people in Cochabamba obtain water through alternative water supply systems, some of which draw water through private or cooperative wells. These people feared that Aguas del Tunari would charge them for the water they drew from their wells or require them to obtain their water exclusively from AdT's network. Although none of the residents we interviewed had had meters installed on their wells, some believed that AdT planned to place meters on wells and simply had not yet done so by the time the water war started.<sup>478</sup>

Bechtel has asserted that in the few months that it operated the water system in Cochabamba, "Aguas del Tunari only charged for water provided through the network it operated. It did not charge for water from private or cooperative wells."<sup>479</sup> According to Michael Curtin, meters were to be installed only to measure water usage, so that the company could then charge people for use of sewage services.<sup>480</sup> These statements are supported by the assertions of at least one former government official, who told us that AdT never tried to put meters on private wells, and that people were just afraid that this was going to happen.<sup>481</sup>

Nevertheless, Law 2029 and the concession agreement contained provisions that suggest that AdT could charge for water drawn from private wells, or in any case, could force people in the concession area to stop using water from wells and instead

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478. Franz Taquichiri, the leader of a *junta vecinal* [neighborhood board], told the Crowley delegation that AdT representatives came to his neighborhood, "La Vertiente," towards the end of 1999, to count how many private wells there were so that the company could install meters. See Interview with Franz Taquichiri in Bolivia (May 19, 2003). The neighborhood's residents did not let the AdT representatives come in, and the women in the neighborhood ran them out with brooms. See *id.* According to Mr. Taquichiri, the AdT representatives returned a week later with Jose Orellana, the President of the Federation of Neighborhood Boards of Cochabamba. See *id.* Mr. Orellana tried to convince the people in this neighborhood that they should allow the AdT representatives to come in, but the residents continued to resist because they did not understand how water could be turned into a commodity. See *id.* Mr. Taquichiri explained that in this manner, several neighborhoods started to organize "to defend water in Cochabamba." See *id.*

479. Bechtel Fact Sheet, *supra* note 382; see also News Release, Bechtel Perspective on the Aguas del Tunari Water Concession in Cochabamba, Bolivia, available at <http://www.bechtel.com/cochabambaresponse.htm> (last visited Mar. 1, 2004).

480. Interview with Michael Curtin, *supra* note 373.

481. Interview with Hugo Galindo, *supra* note 453.



connect to the AdT network. Both Law 2029 and the concession agreement granted AdT “exclusive use” of water sources in the area covered by the concession. The concession agreement stated that AdT has the “right to obligate potential users to connect themselves to the systems of potable water and sewage of the concessionaire.”<sup>482</sup> Similarly, Law 2029 stated that persons who own or occupy buildings in a concession area *must* contract with and connect to water services provided by the concessionaire.<sup>483</sup> The concession agreement also provided that six months after the start of the concession, the use of alternative sources of water in the concession area would be forbidden without the approval of the company.<sup>484</sup> Finally, the concession agreement provided that AdT has the right to “install meters for any user at any time, and to demand payment for the installation.”<sup>485</sup>

In light of these provisions, at the very least, users of water obtained from alternative water supply systems such as wells would have been operating illegally. As stated by the analyst Carlos Crespo:

The government . . . applied the “natural monopoly” principle, seeing the co-existence of two water networks in the same city to be undesirable. But [this] ignored the fact that there are many social and private alternative systems of water supply in Bolivia, in concession zones, and in Cochabamba these are the most important. Under this rule, water co-operatives, committees and associations, could be penalised, and, in some cases, were at risk of being considered illegal.<sup>486</sup>

Without knowing AdT’s intentions regarding the enforcement of its rights as concessionaire, users of alternative water sources had legitimate reasons to be concerned.

### c. The Concerns of the Irrigators

Several peasant groups in the vicinity of Cochabamba were strongly opposed to Law 2029 because they felt that it did not adequately protect their uses and customs. They feared that under Law 2029 water would become a commodity, that they

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482. Contrato de Concesion, art. 14.5.

483. See Law 2029, art. 72.

484. See Contrato de Concesion, at ann. 5, art. 1.3.

485. See Contrato de Concesion, at ann. 5, art. 1.1.

486. See Carlos Crespo, *supra* note 433, at 163-64.

might have to pay for its use, or that they would simply lose the ability to access water sources in accordance with their traditions.

Michael Curtin told us that AdT was not planning to provide water to peasants for irrigation, or to charge them for water, claiming that the company knew not to “mess with farmers.”<sup>487</sup> However, Law 2029 seemed to permit the concessionaire to charge peasants who drew water in the area covered by the concession. Indeed, the new law seemed to require that peasants who used water for agriculture in areas covered by concession agreements obtain their water through the concessionaire, except in special circumstances to be determined by the government.<sup>488</sup> Moreover, if they did obtain their water through the concessionaire, they would have to pay for the water.<sup>489</sup> In areas that were not covered by a concession agreement because populations were too small or dispersed (as is the case with many areas in which peasants live), groups of citizens or governmental entities would have to obtain five-year, non-exclusive licenses for water provision.<sup>490</sup> As Professor Crespo notes, the process of having to obtain licenses was itself a large burden to impose on poor peasants living in rural areas.<sup>491</sup> And the short length of the licenses, in conjunction with their non-exclusivity, created a sense of insecurity among peasants who felt that, in accordance with their traditions, they had a property interest in the water sources. Omar Fernandez explained the irrigators’ feeling on this issue: “[r]egarding water rights, the multinationals had a 40-year concession and we irrigators who have lived always along with water and the water is ours, the law only gave us a right to

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487. Interview with Michael Curtin, *supra* note 373.

488. *See* Law 2029, art. 72.

489. *Id.* art. 72.

490. *Id.* arts. 44-45.

491. Professor Crespo points out that the licensing requirements presented two problems:

Firstly, government bureaucracy would be hard pushed to meet the paperwork demands involved in issuing such a large number of licenses every five years. And secondly, although the license itself was to be free of charge, any additional costs were to be covered by peasants and indigenous organisations (transport, lodging and lawyer’s fees, for example) . . . . Bolivian history is full of examples of how the State has excluded these sectors, not only by physical violence, and cultural subjugation, but also by implementing institutional measures and a culture of “procedures,” that include bribery (“coimas”), clientelism and corruption, resulting in loss of access to resources.

Crespo, *supra* note 433, at 168.

use water for 5 years.”<sup>492</sup>

### 9. The Conflict

The irrigators were the first to start organizing against the concession and new water law, but eventually a coalition between the peasants and city residents emerged to protest the concession and Law 2029. This organization was known as the “Coordinator for Defense of Water and Life” (“Coordinadora Para la Defensa del Agua y la Vida” or “Coordinadora”).<sup>493</sup>

The Coordinadora started organizing strikes in January 2000 to protest the rate increases.<sup>494</sup> On January 13th, the regional government or Prefecture, reached an agreement with the Coordinadora, according to which the government would review the concession agreement and water law.<sup>495</sup> Cochabamba’s Prefect Hugo Galindo, appointed by President Banzer, told us that he explained to Banzer that the citizens were upset at the rate increases because they did not perceive any positive gains from the privatization.<sup>496</sup> Galindo proposed that rates be rolled back until the company had made some visible improvements to the water system; however, the President refused because “the rate increases were going to finance the building of the Misicuni project and he wanted the project completed during his term.”<sup>497</sup> After that, Galindo reports that he was excluded from the President’s inner circle.<sup>498</sup>

When changes failed to materialize, the Coordinadora called another protest for February 4th. The central government sent in 1,000 armed soldiers and police, and two days of

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492. Interview with Omar Fernandez, *supra* note 432.

493. See Interview with Oscar Olivera, *supra* note 458.

494. ASAMBLEA PERMANENTE DE DERECHOS HUMANOS DE COCHABAMBA, POR EL DERECHO AL AGUA Y A LA VIDA: VIOLACIONES A LOS DERECHOS HUMANOS DURANTE LAS MOVILIZACIONES DEL 4 Y 5 DE FEBRERO 2000, 2-3 (2000) [hereinafter POR EL DERECHO AL AGUA Y A LA VIDA]. In addition to peasants and other people who were affected by the new water law and the concession agreement, participants appear to have included other people who were upset at the Bolivian government for other reasons, and viewed the water protests as a way to channel their dissatisfaction. See Interview with Luis Bredow, *supra* note 372.

495. See *Acuerdo Regional por la Dotación de Agua, Defensa de la Economía Popular, La Convivencia Pacífica, y el Respeto de los Derechos Humanos*, in POR EL DERECHO AL AGUA Y A LA VIDA, *supra* note 494, at ann. 1.

496. See Interview with Hugo Galindo, *supra* note 453.

497. See *id.*

498. See *id.*

conflict ensued. Approximately 178 people were wounded as a result of the government's extensive use of tear gas, beatings, and lead bullets.<sup>499</sup> The protests ended with another agreement among the national government, Cochabamba's Parliamentary Brigade, and the Coordinadora to review Law 2029 and the concession agreement.<sup>500</sup> According to Bechtel, after this protest, "[t]he higher rates didn't last long. Responding to public criticism, the government rolled back rates in February. Customers who had paid the higher rates were refunded the difference."<sup>501</sup> This rollback was only temporary, however, with the higher rates to be reinstated in six months, and thus failed to end the protests.<sup>502</sup>

In a large poll conducted by the Coordinadora in March, Cochabamba residents overwhelmingly opposed the tariff increases and Law 2029 and supported cancellation of the contract with AdT.<sup>503</sup> An indefinite general strike was called for April to demand the cancellation of the contract and the repeal of Water Law 2029.<sup>504</sup> The strike began on April 4th; on April 6th, the regional and city governments began to negotiate with the Coordinadora, until police interrupted the negotiations and arrested the community leaders, alleging incitement to violence and subversion.<sup>505</sup> On April 8th, the President declared a national state of emergency.<sup>506</sup> During the conflict that day, a seventeen-year-old student, Victor Hugo Daza, was shot and killed by a sniper who later turned out to be an army officer in plainclothes.<sup>507</sup> More than a hundred people were injured in confrontations between protestors and government forces.<sup>508</sup>

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499. See generally *POR EL DERECHO AL AGUA Y A LA VIDA*, *supra* note 494, at 10.

500. See *Convenio Por Cochabamba*, in *POR EL DERECHO AL AGUA Y A LA VIDA*, *supra* note 494, at ann. 2.

501. See Bechtel Perspective on the Aguas del Tunari Water Concession in Cochabamba, Bolivia, at <http://www.bechtel.com/cochabambaresponse.htm> (last visited Mar. 1, 2004); Bechtel Fact Sheet, *supra* note 382.

502. See Jim Shultz, *Bolivia's War over Water*, The Democracy Center, available at <http://www.democracyctr.org/bechtel/index.htm> (last visited Mar. 1, 2004).

503. See Interview with Father Luis Sanchez in Bolivia (May 19, 2003). According to the Coordinadora, over 50,000 people were polled. *Id.* Father Sanchez is a member of the Board of Directors of SEMAPA, elected as a representative from his neighborhood.

504. See *id.*

505. See *id.* They were released within a few hours. *Id.*

506. See Shultz, *supra* note 502.

507. See *id.* See also Finnegan, *supra* note 370.

508. See *id.*

Throughout the unrest, the national government made little effort to reach an agreement with protesters, choosing instead to use force to quell the protests. According to Galindo, “this was a stubborn government who wanted to take the project forward — enforce this contract and take it forward.”<sup>509</sup> Humberto Vargas, a political analyst in Cochabamba who supported the Coordinadora, echoed this view, telling us that “the national government was very uncooperative and wanted to keep Aguas del Tunari in the country. Even when I was trying to present my solution to the government, the police came in and took me and others prisoner. Since we were never given the opportunity to have a dialogue with the government, it was impossible to arrive at any solution other than a cancellation of the contract.”<sup>510</sup> Similarly, AdT officials did not attempt to meet with the protestors. The company claims that such a meeting would have been pointless: Michael Curtin told us that the company did not pursue discussions with the Coordinadora because it was evident that Olivera did not want to reach an agreement.<sup>511</sup> Others insist, however, that the company made no effort to respond to the legitimate complaints of protestors. For example, Hugo Galindo claims that he explained to Geoffrey Thorpe, then President of AdT, that all the company had to do was “marketing — small projects people can see and appreciate, but [Thorpe] said no because ‘there is a contract and it will be satisfied.’”<sup>512</sup>

On April 10th, the government announced that AdT officials had left the country and the contract was cancelled, and released Coordinadora leaders. The municipal water company, SEMAPA, resumed control of the water system. The next day, Law 2029 was repealed; it was replaced by Law No. 2066, which responded to several of the protestors’ demands.

## 10. The Aftermath

### a. Proceedings at ICSID

AdT applied for arbitration at the International Center for the Settlement of Investment Disputes (“ICSID”) in November

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509. Interview with Hugo Galindo, *supra* note 453.

510. Interview with Humberto Vargas Rivas, *supra* note 439.

511. See Interview with Michael Curtin, *supra* note 373.

512. Interview with Hugo Galindo, *supra* note 453.

2001, seeking U.S. \$25 million from the Bolivian State for the recovery of its investments.<sup>513</sup> AdT argues that ICSID has jurisdiction over the dispute because of the Bolivia/Netherlands bilateral investment treaty ("BIT"). The parties' filings in the arbitration are not public; however, according to Michael Curtin, AdT is arguing that Bolivia did not fulfill its obligations to AdT under the Bolivia-Netherlands BIT.<sup>514</sup> Julio Garrett, the General Director of Industry in Bolivia's Ministry of Economic Development, told us that Bolivia is challenging the jurisdiction of ICSID, and he expects the challenge to be successful.<sup>515</sup> He also said that in his view, the social conflict of the water war amounted to a reason of *force majeure* that triggered the impossibility provision for terminating the contract.<sup>516</sup> Garrett acknowledged that Bolivia's government had not fully complied with the termination clause in that it wrote a letter to AdT terminating the agreement before six months had elapsed since the occurrence of the impossibility.<sup>517</sup> Nevertheless, he insists that "writing the letter was a requirement for the end of the war. If they had not sent the letter, revolution would have continued."<sup>518</sup>

A group of Cochabamba residents and organizations, including the Coordinadora and the Irrigators' Federation, filed a petition to intervene in the ICSID proceeding in August 2002.<sup>519</sup> They argued that any award by ICSID in favor of AdT would directly affect them because such an award would be paid by SEMAPA, thereby reducing SEMAPA's resources and undermining efforts to protect water rights.<sup>520</sup> Moreover, the award would undermine all Bolivians' interests "in ensuring that the Govern-

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513. Bechtel Fact Sheet, *supra* note 382, at Statement of Facts. Michael Curtin, President of AdT, stated that the investment costs include: the costs of investigating the Cochabamba water system to determine its viability as an investment, the cost of bidding and negotiating the concession, and U.S. \$10 million that AdT was required to have in its account in order to take over the Cochabamba water system (although not all of that money was spent). See Interview with Michael Curtin, *supra* note 373.

514. Interview with Michael Curtin, *supra* note 373.

515. Interview with Julio Garrett, General Director of Industry, Bolivia Ministry of Economic Development, in Bolivia (May 27, 2003).

516. See Interview with Julio Garrett, *supra* note 515.

517. As noted previously, the concession agreement provides for the termination of a contract due to impossibility, after six months have passed since the occurrence of the impossibility. See *Contrato de Concesion*, art. 42.10.

518. Interview with Julio Garrett, *supra* note 515.

519. Petition of La Coordinadora Para la Defensa del Agua y Vida, et al., to the Arbitral Tribunal, Case No. ARB/02/03 (filed Aug. 29, 2002).

520. *Id.* at para. 18-20.

ment of Bolivia can implement legitimate measures to maintain public order and guarantee access to services and resources essential to the lives of all Bolivians without fear of major financial penalties for doing so.”<sup>521</sup> On these grounds, they requested standing to participate as parties in the proceedings before the arbitral tribunal, or in the alternative, to participate as *amici curiae*, with access to all submissions made to the Tribunal, and with permission to attend all hearings of the Tribunal and make submissions to the Tribunal.<sup>522</sup> They also requested public disclosure of all submissions to the Tribunal, transcripts of hearings, and other documents related to the case; that the Tribunal open all hearings in the case to the public; that the Tribunal conduct public hearings in Cochabamba, Bolivia, regarding the facts underlying the claims; and that the Tribunal permit the Petitioners to respond to arguments by any party to the case.<sup>523</sup>

The Tribunal denied this petition in January 2003, on the grounds that “it is manifestly clear to the Tribunal that it does not, absent the agreement of the Parties, have the power to join a non-party to the proceedings; to provide access to hearings to non-parties and, *a fortiori*, to the public generally; or to make the documents of the proceedings public. Second, the consent required of the Parties to grant the requests is not present . . . . Third, the Tribunal is of the view that there is not at present a need to call witnesses or seek supplementary non-party submissions at the jurisdictional phase of its work.”<sup>524</sup>

According to Julio Garrett, the government did not oppose the citizens’ intervention: “Bolivia has no problem about being transparent about this. It’s Aguas del Tunari that’s taking advantage of the situation.”<sup>525</sup> Ramiro Guevara, IWL’s counsel in Bolivia, told us that the company opposed the citizens’ petition because it is “not a problem of citizens.”<sup>526</sup> Michael Curtin stated that the company opposed the petition because of the additional

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521. *Id.* at para. 21.

522. *Id.* at para. 3(i)-(ii).

523. *Id.* at para. 3(iii)-(vi).

524. Letter to J. Martin Wagner from David D. Caron, President of the Tribunal, *in re Aguas del Tunari vs. The Republic of Bolivia*, Jan. 29, 2003.

525. Interview with Julio Garrett, *supra* note 515. Nonetheless, the current head of SEMAPA makes the point that “the government and the Superintendent have isolated us from the ICSID arbitration.” Interview with Gonzalo Ugalde Canedo, General Manager of SEMAPA, in Bolivia (May 20, 2003).

526. Interview with Ramiro Guevara, *supra* note 384.

costs that intervention would create for the company.<sup>527</sup> He also asserted that he suspected the petition was not filed in good faith, as the demands in the petition were so great that it was certain to be denied.<sup>528</sup>

The case was still pending before ICSID at the time of publication of this Report.

#### b. Water in Cochabamba Today

In the wake of the water war, the adequate supply of water remains a serious problem in Cochabamba. SEMAPA has resumed control of the water system since the end of the conflict. According to Oscar Olivera, the Coordinadora wants a water company based on four principles: transparency in management, efficiency, social participation, and social justice.<sup>529</sup> In his view, SEMAPA should be neither a private nor a public institution, but rather should be an entity subject to social control. Thus, SEMAPA is currently run by a combination of officials from the municipality and representatives from civil society.<sup>530</sup> Regulations accompanying the new water law may also include measures to increase social control of water systems.<sup>531</sup> However, SEMAPA continues to suffer from serious problems, most notably the lack of sufficient water to satisfy the population and expand the service network.<sup>532</sup>

### B. *Human Rights Issues*

The discourse of human rights is often used with respect to the water wars; however, the specific arguments for finding human rights violations in this case are rarely spelled out in any detail. This section will discuss the economic, social, and cultural rights at issue in the water war case, focusing on substantive and procedural rights separately. Violations of civil and political rights that occurred during the water wars are not discussed. Although citizen' substantive rights to water and to property may have been violated in this case, we conclude that the most serious ESC rights violations have to do with procedural rights; spe-

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527. Interview with Michael Curtin, *supra* note 373.

528. *Id.*

529. See Interview with Oscar Olivera, *supra* note 458.

530. See Interview with Father Luis Sanchez, *supra* note 503.

531. *Id.*

532. *Id.*



cifically, the failure of the Bolivian State to implement procedures to inform the public and ensure effective public participation in decision-making about water.

### 1. Substantive Rights

The two substantive rights that are most directly at issue in this case are the right to water and the right to property. The following subsections discuss each in turn.

#### a. The Right to Water

As noted in the discussion of the Transredes oil spill, the right to water can be inferred from the existence of other rights in binding instruments to which Bolivia is a party; it may also be a principle of customary international law. The ESCR Committee's recent General Comment No. 15 on the right to water provides a great deal of guidance with regard to the content of the right to water. Nonetheless, the content of the right to water remains in many respects unclear. The following subsections present the various arguments for finding a violation of the right to water in this case.

##### (1) Privatization as a violation of the Right to Water

In his reports on the water war, New Yorker journalist William Finnegan noted that peasants in Cochabamba charged AdT with trying to "lease the rain," something inconceivable to the farmers who were accustomed to free use of natural water sources for irrigation.<sup>533</sup> Under this view, one might regard privatization itself as a per se violation of the right to water. We do not take this position. Water is a scarce resource, and how best to distribute water is controversial. Even the Coordinadora leadership, although "vow[ing] to treat water as a 'human right'" concedes that "it cannot be provided [for] free."<sup>534</sup>

Opponents of privatization point out that global water corporations are motivated by profit and cannot be trusted to fulfill socially responsible objectives such as universal access to water and sanitation.<sup>535</sup> Proponents of privatization point to the failure of the public sector in many developing countries to provide

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533. See Finnegan, *supra* note 370, at 43.

534. See *id.*

535. See Public Citizen, *The Myth of Private Sector Financing: Global Water Corporations*

adequate access to water, and argue that the private sector is stepping in to fill a critical need.<sup>536</sup> Although the ESCR Committee has stated that “[w]ater should be treated as a social and cultural good, and not primarily as an economic good,”<sup>537</sup> it has, at the same time, left open the possibility of private sector involvement in the provision of water services.<sup>538</sup>

In our view, privatization should not be dismissed as a means of progressively realizing the right to water, although its value depends on the manner in which the privatization is carried out. Thus, we conclude that the fact of privatization of Cochabamba’s water system, standing alone, does not suffice to establish a violation of the right to water. Moreover, in the case of Cochabamba, even before the AdT concession, Bolivia had failed to meet its obligations with respect to water provision for Cochabamba’s citizens. At the time, nearly half the city’s residents lacked access to safe and sufficient water, a situation that had persisted for decades. In theory, the privatization of Cochabamba’s water supply might have expanded the availability of water through increased production and greater efficiency while maintaining a rate structure that protected the poorest consumers.

Nonetheless, the circumstances surrounding this case of privatization do raise concerns regarding the right to water of Cochabamba’s citizens. Three main problems relate to the affordability of water, interference with customary or traditional arrangements for water allocation, and the lack of public participation in decision-making processes regarding the right to water.

## (2) Affordability of Water

According to the ESCR Committee, governments are required to ensure that water is affordable.<sup>539</sup> To this end, “States

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*Seek New Public Handouts*, at 1, available at <http://www.citizen.org/documents/mythof-privatefinancing.pdf> (last visited May 9, 2003).

536. See PETER H. GLEICK ET AL., *THE NEW ECONOMY OF WATER: THE RISKS AND BENEFITS OF GLOBALIZATION AND PRIVATIZATION OF FRESH WATER* 21 (2002); see also Interview with John Briscoe, *supra* note 358.

537. General Comment No. 15, *supra* note 296, para. 11.

538. There are several instances in which the ESCR Committee’s General Comment makes reference to the role of the private sector in water services. See, e.g., *id.* paras. 27, 49.

539. See *id.* at para. 2.

parties must adopt the necessary measures that may include, *inter alia*: (a) use of a range of appropriate low-cost techniques and technologies; (b) appropriate pricing policies such as free or low-cost water; and (c) income supplements. Any payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.”<sup>540</sup>

The ESCR Committee’s statement contains two distinct but related principles. First, there is the principle of equity: a comparative standard that holds that poor households should not bear a disproportionate burden of water expenses as compared to rich households. And second, there is the principle of affordability, which suggests the right to water sets an upper limit on the cost of water in relation to people’s ability to pay for it. We apply each of these principles in turn.

In the case of the AdT concession, Bolivia’s government and AdT did not design the rate increases with the principle of equity in mind. Neither party proposed subsidies to mitigate the impact of rate increases on the poor. Moreover, the rate increases for the poorest people in Cochabamba were, at some levels of consumption, proportionately higher than they were for wealthier residents.<sup>541</sup> Thus, although the overall tariff structure remained progressive, AdT’s tariff structure was less equitable than the previous one. Measured against the principle of equity, therefore, the privatization of Cochabamba’s water supply undermined the progressive realization of the right to water by the poorest consumers.

With respect to the concept of affordability, the ESCR Committee offers the following definition: “[t]he direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the realization of other Covenant rights.” Thus, for water to be regarded as affordable, individuals must be able to secure an adequate supply without compromising other basic needs.<sup>542</sup>

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540. *Id.* at para. 27.

541. See discussion, *supra* Part III.A.8.a.

542. Similarly, with respect to the right to housing, the ESCR Committee has

The concession with AdT guaranteed a 16% rate of return to Aguas del Tunari, included the expensive Misicuni project, required AdT to assume SEMAPA's large debt, and incorporated a policy of full cost recovery, even though the signatories knew that this agreement would necessarily lead to substantial increases in rates. Although the rate increases for water and sewage services varied in accordance with income level, the State did not take any measures to mitigate the impact of the increases, even for the most vulnerable citizens. As a result, the increases put a tremendous strain on the budgets of Cochabamba's poor and, at least in some cases, threatened the satisfaction of basic needs or the fulfillment of other ESC rights. For example, Jim Shultz relates the case of "Tanya Paredes, a mother of four who supports her family knitting baby clothes, [who] saw her water bill increased from U.S. \$5 per month to nearly U.S. \$20, a rise equal to what it costs her to feed her family for a week and a half. 'What we pay for water comes out of what we have to pay for food, clothes and the other things we need to buy for our children,' she says."<sup>543</sup> In that case, the rate increase threatened Ms. Paredes' satisfaction of her family's basic needs, such as food and possibly housing and health care.

To the extent that Cochabamba's poorest residents face increases in tariffs sufficient to undermine their ability to meet other basic needs, Bolivia violated their right to water.

### (3) Interference with traditional arrangements for water allocation

According to the ESCR Committee, "[t]he obligation to *respect* [the right to water] requires that State parties refrain from interfering directly or indirectly with the enjoyment of the right to water. The obligation includes, *inter alia* . . . arbitrarily interfering with customary or traditional arrangements for water allocation . . . ."<sup>544</sup>

Although AdT claims that it did not plan to sell water to

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stated that the cost of housing "should be at such a level that the attainment and satisfaction of other *basic needs* are not threatened or compromised." *The right to adequate housing* (Art. 11(1) of the Covenant), ESCR Committee, 6th Sess., General Comment No. 4, at para. 8(c), U.N. Doc. E/1992/23 (1991) (emphasis added) [hereinafter General Comment No. 4].

543. See Shultz, *supra* note 502.

544. General Comment No. 15, *supra* note 296, at para. 21.

peasants for irrigation, Law 2029 allowed the possibility of charging peasants who drew water in the area covered by the concession. Moreover, Law 2029 required that peasants obtain their water through the concessionaire, except in special circumstances to be determined by the government.<sup>545</sup> In areas that could not be covered by a concession, groups of citizens or governmental entities would have to obtain five-year, non-exclusive licenses for water provision.<sup>546</sup> All of these requirements, in the view of the peasants living around Cochabamba, affected their traditional uses and customs with regard to water allocation.<sup>547</sup> In particular, they feared that they might lose the ability to draw water for irrigation without paying for it.

Assuming that these provisions did interfere to some extent with customary arrangements for water allocation, such interference constitutes a violation of the right to water only if it is arbitrary. As noted by Hugo Galindo, former Prefect of Cochabamba, “not all uses and customs are good. Technology [has] changed over time and if you can have a better life by changing your uses and customs why not? In fact, that’s why a big migration of peasants to the city has occurred—because uses and customs aren’t working.”<sup>548</sup> For example, if requiring peasants to obtain their water through the concessionaire would mean improved access to water for them, then the interference with customary arrangements would not have been arbitrary. Similarly, if the belief that scarce water resources would be better managed through a concessionaire motivated the decision, it might not have been arbitrary.

Notwithstanding these qualifications, Law 2029 was passed with little debate and was apparently intended simply to provide a legal framework for the AdT concession and the operation of the Superintendency of Basic Sanitation. To the extent that the interference with “uses and customs” was merely a byproduct of the deal structured to serve other purposes, the interference may be deemed arbitrary and in violation of the right to water.

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545. Law 2029, art. 72.

546. *Id.* arts. 44-45.

547. These uses and customs involved drawing water directly from natural water sources, in accordance with a complex set of rules regarding who could draw water when, so as to ensure equitable sharing of water, and so as to avoid overdrawing water. See Interview with Omar Fernandez, *supra* note 432.

548. See Interview with Hugo Galindo, *supra* note 453.

## b. The Right to Property

Some residents of Cochabamba complained that the contract allowed AdT to install meters on private and community-owned wells and that, under Law 2029 and the concession agreement, the company could require people to connect to the AdT water service network.<sup>549</sup> People who obtained water through wells they had built themselves feared that AdT would begin to charge them for the water drawn from these wells, violating their property rights.

Although the provisions in Law 2029 and the concession agreement do seem to allow AdT to charge people for water from wells they had built, that such charges would constitute a violation of the right to property is less clear. The right to property, though not explicitly recognized in the ICESCR or ICCPR, is recognized in the American Convention on Human Rights,<sup>550</sup> which is binding on Bolivia, and in the Universal Declaration of Human Rights.<sup>551</sup> The Universal Declaration provides that all people have the right to own property, privately or in association with others, and prohibits arbitrary deprivations of property.<sup>552</sup> The American Convention on Human Rights provides more detail and includes a right to compensation:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

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.<sup>553</sup>

The new water law and contract gave AdT control over all water sources in the area during the period of the concession, allowing the company to charge well owners for water. Nevertheless, given that the Bolivian Constitution provides that all waters in Bolivia belong to the State, AdT's charging for water cannot properly be regarded as a deprivation of property in the water itself. Alternatively, well owners might argue that insofar

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549. See *Contrato de Concesion*, ann. 5, art. 1.1; Law 2029, art. 72.

550. American Convention on Human Rights, *supra* note 17, art. 21.

551. Universal Declaration of Human Rights, *supra* note 336, art. 17.

552. See *id.*

553. American Convention on Human Rights, *supra* note 17, art. 21(1)-(2).

as the imposition of tariffs would deprive the wells of their value, the granting to AdT of the concession and rights of water drawn from the wells amounted to a deprivation of the owners' property in the wells themselves. Yet this argument too depends on an assumption that the well owners reasonably relied on the continued access to free water, an assumption undermined by the State's ownership of all water resources.

## 2. Procedural Rights

### a. The Rights to Participation and Information

The central problem in the process of privatization of Cochabamba's water system and a major cause of the water war was the lack of transparency and public participation in the decision-making process. Meaningful consultation with stakeholders during the negotiation process might have led to substantive changes in the contract. Indeed, many of the citizens' complaints about the law and contract concerned provisions that were relatively unimportant to the parties. For example, given that AdT claims it did not intend to charge for water drawn from private wells or used in irrigation, the contract could have simply prohibited such charges, eliminating a major source of discontent among the water warriors. Even without substantive changes to the contract, consultation and a better campaign to inform citizens of the terms contained in the new contract and law might have generated wider public support and avoided the conflict.

Although the ICESCR does not explicitly provide for a right to participate in decision-making related to ESC rights or a right to information, the ESCR Committee has recognized the existence of these rights and their importance to the protection and fulfillment of various substantive ESC rights.<sup>554</sup> In particular, with regard to the right to water, the ESCR Committee has noted that one of the State's core obligations is "[t]o adopt and implement a national water strategy and plan of action addressing the

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554. For example, in its General Comment on the Right to Housing, the ESCR Committee stated that "the full enjoyment of other rights — such as . . . the right to participate in public decision-making — is indispensable if the right to adequate housing is to be realized and maintained by all groups in society." General Comment No. 4, *supra* note 542, at ¶ 9. In addition, the Committee emphasized that national housing strategies "should reflect extensive consultation with, and participation by, all of those affected[.]" *Id.* at ¶ 12.

whole population; the strategy and plan of action should be devised, and periodically reviewed, on the basis of a *participatory and transparent process*.<sup>555</sup> In a later paragraph, the General Comment reiterates the importance of public participation in decision-making about water, and public access to information concerning water:

The formulation and implementation of national water strategies and plans of action should respect, *inter alia*, the principles of non-discrimination and people's participation. The right of individuals and groups to participate in decision-making processes, that may affect their exercise of the right to water, must be an integral part of any policy, programme or strategy concerning water. Individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties.<sup>556</sup>

The participation of local and national representatives, although perhaps sufficient to satisfy the ICCPR requirement that citizens be permitted to participate in the conduct of public affairs,<sup>557</sup> falls short of the standard established in the ESCR's General Comment. The General Comment speaks of "the right of individuals and groups to participate," suggesting that realization of the right requires a more direct opportunity for participation in decisions affecting water than is afforded by ordinary

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555. General Comment No. 15, *supra* note 296, at ¶ 37(f) (emphasis added).

556. *Id.* at ¶ 48.

557. "The conduct of public affairs . . . is a broad concept which relates to the exercise of political power . . . . The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs . . . should be established by the constitution and other laws. . . ." See ICCPR General Comment 25, *The Right to Participate in Public Affairs, Voting Rights, and the Right of Equal Access to Public Service*, A/51/40, vol. I, ann. V, at 98-103, ¶ 5 (1996) [hereinafter ICCPR General Comment 25]. Under the ICCPR, citizens can participate directly in the conduct of public affairs "when they exercise power as members of legislative bodies or by holding executive office, [or] when they choose or change their constitution or decide public issues through referendum or other electoral process." *Id.* at ¶ 6. But citizens also participate in the conduct of public affairs indirectly "through freely chosen representatives" or "by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association." *Id.* at ¶¶ 7-8. There is no indication that the right to participation under the ICCPR requires that citizens be given opportunities for heightened participation in the context of certain types of decisions.



democratic processes.<sup>558</sup> Finally, the Comment also refers to the obligation of public authorities or third parties (such as AdT) to provide information to individuals and groups, suggesting that the representative role of public authorities is not sufficient to satisfy the right to participate in decisions concerning water.<sup>559</sup>

International human rights law does not specify the precise

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558. Rights to participation are also found in international law regarding indigenous peoples. In particular, indigenous peoples have the right to participate in decision-making that affects their cultural existence. The Draft Declaration on the Rights of Indigenous Peoples affords indigenous peoples "the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies . . . ." Draft Declaration, art. 19. A similar provision is found in ILO Convention 169. See ILO Convention No. 169, *supra* note 17 art. 7(1). Moreover, the Inter-American Commission on Human Rights has instructed States to "take the measures necessary to ensure the meaningful and effective participation of indigenous representatives in the decision-making processes about development and other issues which affect them and their cultural survival." See Inter-Am. C.H.R., *Report on the Situation of Human Rights Situation in Ecuador*, ch. IX, OEA/Ser/L/V/II/96 (1997); see also *Resolution on Permanent Sovereignty Over Natural Resources*, G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, U.N. Doc.A/RES/1803 (1962); *Report of the UN Special Rapporteur on Indigenous Populations* (1983) (noting that in the absence of a negotiated agreement with the indigenous groups who will be affected by mining, such activity is prohibited on indigenous lands); *Länsman et al. v. Finland*, ¶ 9.6, Communication No. 511/1992, U.N. Hum. Rts. Comm., 52d Sess., U.N. Doc. CCPR/C/52/D/511/1992 (Committee of Human Rights) (concluding that quarrying did not deprive indigenous peoples of the right to enjoy their culture because, in particular, the groups affected were consulted during the process).

559. Similar requirements of a heightened degree of participation and provision of information can be found in other international instruments dealing with particular areas of law, such as the U.N. Economic Commission for Europe's Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. See *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (Aarhus 1998), June, 25, 1998, available at <http://www.unece.org/env/pp/treatytext.htm> (last visited Apr. 2, 2004). The Convention explicitly recognizes that, in the area of environment, "improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns." *Id.* Moreover, as stated by U.N. Secretary General Kofi Annan,

[a]lthough regional in scope, the significance of the Aarhus Convention is global. It is by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizen's participation in environmental issues and for access to information on the environment held by public authorities. As such it is the most ambitious venture in the area of 'environmental democracy' so far undertaken under the auspices of the United Nations.

See Statement by Kofi Annan, available at <http://www.unece.org/env/pp> (last visited Apr. 9, 2004).

form for heightened participation in matters concerning water and other central ESC rights. Indeed, the appropriate form may vary from State to State. Thus, our conclusion that the privatization process failed to ensure adequate public participation does not imply that the process itself had to take any particular form. Rather, we conclude that, viewed as a whole, it failed to meet the standard of a “participatory and transparent process” or even the less burdensome standard of giving groups “full and equal access to information” concerning access to water.

Part of the problem is structural: Bolivia lacks a legal mechanism through which stakeholders may participate in policy decisions regarding ESC rights or even obtain information regarding such decisions. Bolivia regulates the activities of corporations in various sectors at the national level through Superintendencies. In turn, the overall legal framework for this regulatory structure is the Law for the System of Sectorial Regulation (“SIRESE Law”).<sup>560</sup> This Law requires Superintendencies to hear and process complaints presented by users, as well as by the regulated companies and the government.<sup>561</sup> Users may also challenge administrative resolutions through a “revocation appeal” if they can show that “they have been prejudiced in their legitimate interests or rights.”<sup>562</sup> Bolivia also has a “Law of Popular Participation”<sup>563</sup> that is designed to integrate indigenous, peasant and urban local communities into the legal and political life of the country.<sup>564</sup> It does so primarily by decentralizing administrative authority, granting greater powers to municipal governments and allowing for the creation of community groups (“base territorial organizations”) that through a “vigilance committee” have an oversight role with respect to municipalities, particularly with respect to budgeting issues.<sup>565</sup>

Neither of these alternatives offered an avenue for popular participation in the privatization process in Cochabamba. Although the SIRESE law provides a means of challenging deci-

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560. Ley SIRESE, Ley No. 1600 (Oct. 28, 1994).

561. *Id.* art. 10(h).

562. *Id.* art. 22.

563. See Ley de Participacion Popular, Ley No. 1551 (Apr. 20, 1993).

564. *Id.* art. 1.

565. See *id.* arts. 7-10. See also Steven E. Hendrix, *Advancing Toward Privatization, Education Reform, Popular Participation and Decentralization: Bolivia's Innovation in Legal and Economic Reform*, 14 ARIZ. J. OF INT'L & COMP. L. 679, 698-709 (1997).

sions after the fact, it does nothing to ensure timely participation in decision-making at the Superintendency level. The Law of Popular Participation applies only at the municipal level, so it would not have facilitated public access to information about negotiations over the concession agreement or Law 2029, which were conducted by the national government. In short, as one commentator noted, Bolivia has “no effective mechanism through which the population can be consulted before decisions are made by the Regulatory authority, on such vital issues as tariffs, concessions, regulation taxes or charges. . . .”<sup>566</sup>

These structural problems were exacerbated in this case as the contract negotiations were not open to the public, and many details, such as the provision allowing AdT to install meters on private wells, were not publicized at all. The confidentiality clause in the concession agreement limited the public’s access to information even after the negotiations were completed. Moreover, no government or corporate official appears to have expressed any interest in making the process more open, in integrating members of civil society in the negotiations, or in informing the public of the content of negotiations.<sup>567</sup> To the contrary, parties may have wanted secrecy precisely because they knew that the public would oppose the agreement. The passage of Law 2029 raises similar concerns. Although various interest groups, including indigenous and irrigators’ groups, had participated actively in negotiations over the proposed general law of waters over a long period of time, Law 2029 was passed very quickly, without any input from these groups. The fact that Law 2029 — ostensibly meant to address urban water services — also dealt with issues that had been the subject of dispute in negotiations over the general law of waters suggests that the passage of Law 2029 may have been done in such a way as to avoid or minimize public deliberation over its terms.

Our position is that this failure to provide a participatory and transparent process is itself a violation of the procedural rights of Cochabamba residents. At the same time, a better process, both in connection with privatization and the passage of Law 2029, might have reduced or eliminated threats to substantive rights. For example, public participation might have re-

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566. Crespo, *supra* note 433, at 185.

567. See discussion, *supra* Part III.A.4.

sulted in changes to the agreement that in turn lessened the impact on the city's poor. Yet, even if such changes had not resulted, greater transparency and participation might have legitimated the actual outcome of negotiations and the legislation in the eyes of the population, thereby preventing the water wars.

In short, we conclude that Bolivia's failure to conduct its negotiations and decision-making regarding water in a transparent and participatory manner was one of the central causes of the water wars and may have contributed to the substantive violations of human rights discussed in the last section.

### 3. Aguas del Tunari's Responsibility

The Draft Norms for TNCs provide that "[w]ithin their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups."<sup>568</sup> Among other obligations, the Draft Norms provide that "[t]ransnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realization, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health . . . and shall refrain from actions which obstruct or impede the realization of those rights."<sup>569</sup>

In the present case, Aguas del Tunari operated in concert with the Bolivian government in imposing a concession agreement that included several provisions and a tariff structure that arguably violated the right to water of Cochabamba's residents. The company designed the rate structure, and consequently was fully aware of the severity of rate increases for poor residents of Cochabamba. Insofar as those rate increases can be considered violative of the rights of at least some Cochabamba residents, Aguas del Tunari could be deemed responsible under the Draft Norms for a failure to respect the right to "adequate drinking water." Moreover, Aguas del Tunari engaged in negotiations

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568. Draft Norms for TNCs, *supra* note 29, art. 1.

569. *Id.* art. 12.

with the Bolivian government and conducted its operation in a highly secretive manner, which included no participation from members of civil society. The company did not make any significant effort to open up the process of negotiations to consultation, or even to provide information to the public about its plans. To the contrary, it included a confidentiality clause in the contract, and refused to speak with Coordinadora representatives during the water war. The fact that the company admits that it was concerned about public opposition to the contract, and that it trusted the government to “take care of it” evidences a willingness on the part of the company to participate in the imposition of a contract that was likely to be rejected by large segments of the population. Although these actions may not have violated national laws regarding transparency and accountability, AdT’s failure to ensure that international law regarding transparency and public participation was respected would constitute a violation of the procedural guarantees of the Draft Norms.

### *C. Recommendations*

To the Bolivian State:

1. Establish formal procedures for stakeholder participation in decision-making related to ESC rights. These procedures should include adequate notification of stakeholders of the decision-making process, full provision of information regarding the process, and opportunities for stakeholder input.
2. Establish procedures for the review of individual complaints regarding violations of ESC rights, including violations resulting from the absence of adequate information about or public participation in decision-making regarding ESC rights.
3. Require that, in all decisions that might affect ESC rights, the impact on vulnerable populations be considered and mitigated.
4. Improve and expand Cochabamba’s water system, paying particular attention to the situation of persons who are not currently connected to the network.

To Aguas del Tunari and its parent companies:

1. Agree to release to the public all documentation filed in the ICSID proceeding.
2. Require stakeholder participation in negotiations with national governments over deals that might impact on ESC rights.
3. Commit to abiding by the Draft Norms for TNCs.

#### IV. *FINAL OBSERVATIONS AND RECOMMENDATIONS REGARDING ESC RIGHTS IN A GLOBALIZED WORLD*

The two cases discussed in this Report illustrate our initial observation that the growth of TNC activities in developing countries has increasingly affected the enjoyment of ESC rights by people in those countries. The core problem presented by these cases is not the absence of substantive norms but rather the lack of enforcement. International law establishes a variety of applicable principles with respect to the protection of the economic, social, and cultural rights implicated in the cases, and, more recently, to the responsibilities of TNCs regarding ESC rights. Yet, norms were simply not enforced. At a domestic level, this lack of enforcement resulted from governmental incompetence and insufficient resources, as well as pressure from TNCs. At an international level, few mechanisms exist to enforce ESC rights against governments, much less against TNCs, and those few mechanisms are weak and inaccessible to people who are most likely to need them.<sup>570</sup>

The lack of international enforcement mechanisms for ESC rights against TNCs is particularly striking given the rapid development of international legal mechanisms for the enforcement of rights under private investment agreements. As illustrated by Aguas del Tunari's invocation of the jurisdiction of ICSID based on the BIT between Bolivia and the Netherlands, TNCs now have at their disposal not only rules designed to guarantee investment security, but also tribunals empowered to enforce those rules.<sup>571</sup> In contrast, for the violations of ESC rights described in this Report, options for enforcement were extremely limited:

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570. As stated by Beth Stephens in writing about corporate responsibility for human rights violations, "[e]nforcement . . . remains 'the Achilles' heel' of the system." Stephens, *supra* note 34, at 48.

571. Rulings by ICSID cannot be easily ignored by the countries involved. As John Briscoe noted with respect to the water wars case, although the International Development Association of the World Bank and ICSID operate independently, if ICSID ruled

the strongest course of action for individuals in either case would have been to file a petition against Bolivia with the Inter-American Commission of Human Rights for the violations of rights contained in the American Convention.<sup>572</sup> Yet, the claimants would have been able to do little with respect to the alleged violations by the TNCs,<sup>573</sup> or about violations of rights not contained within the American Convention.<sup>574</sup>

In short, although private international law has experienced remarkable development in recent years, international human rights law, particularly with respect to ESC rights, has failed to keep pace with globalization. In our view, this situation argues strongly in favor of two things: first, the development of new international enforcement mechanisms to address ESC rights, including TNC responsibility for violations of such rights (or the expansion of existing international enforcement mechanisms so as to address these issues); and second, increased attention to the design and effectiveness of domestic processes for the enforcement of ESC rights, particularly against TNCs. The former is already the subject of much debate and scholarly attention and is consequently only briefly addressed in the following paragraphs. The latter, however, requires further elaboration and is the focus of the remainder of this Report.

#### A. *International Enforcement Mechanisms*

The effort to develop better enforcement mechanisms at the international level must take place along two fronts: the enforcement of human rights norms against TNCs, and improvement of international enforcement of ESC rights generally. On the first front, we consider the approval by the U.N. Subcommission on the Promotion and Protection of Human Rights' of the

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that the Bolivian government's actions towards AdT constituted an expropriation "that won't help in requests for loans." Interview with John Briscoe, *supra* note 358.

572. These include potentially the right to property and the right to effective judicial remedies. See American Convention on Human Rights, *supra* note 17, arts. 21, 25 (providing for the right to property and the right to judicial protection respectively).

573. The Inter-American Commission reviews only petitions regarding violations committed by Member States of the OAS.

574. These would include, for example, the right to health, and the right to a healthy environment. Cf. Protocol of San Salvador, *supra* note 17, arts. 10-12 (rights to health, and a healthy environment). As previously noted, Bolivia has not yet ratified the Protocol of San Salvador, which addresses economic, social, and cultural rights. We strongly recommend that Bolivia ratify this instrument.

Draft Norms for TNCs, along with its request that the Working Group on the Working Methods and Activities of TNCs temporarily monitor the implementation of the Draft Norms, to be a highly positive development. We recommend that the U.N. Human Rights Commission approve the Draft Norms, and establish a permanent monitoring mechanism that can receive complaints regarding TNC violations of human rights, including ESC rights. In addition, although voluntary codes of corporate conduct and the guidelines or principles for multinational enterprises developed by the OECD and ILO are welcome developments, associated reporting and monitoring mechanisms should be strengthened.

Assessments of the impact of TNC activity on human rights should also be incorporated into the work of existing human rights monitoring bodies and tribunals. For example, the ESCR Committee should address more systematically TNC violations of ESC rights in its review of country reports. Similarly, regional human rights systems should explore the possibility of addressing TNC responsibility for human rights violations. For example, the Inter-American system might begin this process through the development of specialized studies on TNC responsibility for human rights violations in the region,<sup>575</sup> and eventually develop a regional legal framework applicable to TNCs.

On the second front, the establishment of an individual petition system in connection with the ICESCR<sup>576</sup> would assist in the definition of violations by generating more detailed and specific interpretations of the content of ESC rights.<sup>577</sup> Although

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575. These might be similar to its recent reports on indigenous people's rights or women's rights. *See* Inter-American Commission on Human Rights, Report on the Status of Women in the Americas, OEA/Ser.L/V/II.100, Doc. 17 (Oct. 13, 1998); Inter-American Commission on Human Rights, The Human Rights Situation of Indigenous People in the Americas, OEA/Ser.L/V/II.108, Doc. 62 (Oct. 20, 2000).

576. The Protocol of San Salvador allows for individual petitions in limited cases. *See* Protocol of San Salvador, art. 19(6). This system could be extended to violations of other ESC rights as well.

577. Since 1990, the ESCR Committee has been contemplating the adoption of a draft optional protocol to the ICESCR, which would grant the right of individuals or groups to submit communications (complaints) to the ESCR Committee regarding State failures to comply with the ICESCR. *See* KITTY ARAMBULO, STRENGTHENING THE SUPERVISION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 173-346 (1999). At least one scholar has proposed a review process focused on violations of the ICESCR, rather than on the "progressive realization" of ESC rights: "The Committee does not and cannot assess progressive realization; if effective and



the ESCR Committee has helped to clarify the content of various rights through its General Comments, few examples exist of the application of the rights to specific cases, and so in many respects, the standards remain abstract. As a result, violations of these rights can be difficult to identify with any degree of confidence.<sup>578</sup> We encountered this difficulty in both cases described here. Through consideration of individual petitions, the ESCR Committee could, for example, clarify the standard of care that applies to violations of the right to water or health. Equally importantly, a system for considering individual petitions would create an avenue of recourse for individuals who have suffered violations of ESC rights, and who have not been able to obtain effective remedies from their own States.

### B. *Strengthening Procedural ESC Rights*

Although effective international mechanisms for enforcement of ESC rights and for the enforcement of human rights norms against TNCs are important, the development of domestic enforcement mechanisms will likely be more significant from the standpoint of most victims. Domestic laws and institutions are the primary mechanisms for realizing ESC rights and for regulating the conduct of TNCs. Indeed, although ESCR standards have in recent years been receiving more detailed elaboration from the ESCR Committee, to some extent their meaning must be left broadly defined so that their specific meaning can be determined by each state in context.<sup>579</sup> Thus, with regard to many

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systematic monitoring of economic, social, and cultural rights is to take place, then nongovernmental organizations, governments, and human rights-monitoring bodies need to reorient their work to identifying and rectifying violations.” Audrey R. Chapman, A “*Violations Approach*” for Monitoring the International Covenant on Economic, Social and Cultural Rights, 18 HUM. RTS. Q. 23, 36 (1996).

578. This difficulty has contributed to NGOs’ reluctance to report on violations of ESC rights. For example, Human Rights Watch’s policy on Economic, Social, and Cultural Rights states that:

Human Rights Watch considers that economic, social, and cultural rights are an integral part of the body of international human rights law, with the same character and standing as civil and political rights. We conduct research and advocacy on economic, social, and cultural rights using the same methodology that we use with respect to civil and political rights and *subject to the same criteria, namely, the ability to identify a rights violation, a violator, and a remedy to address the violation.*

HRW Policy on Economic, Social, and Cultural Rights, available at <http://www.hrw.org/esc/> (last visited Apr. 9, 2004) (emphasis added).

579. “The question for the Committee is how to go about identifying the core

rights in the Covenant, the ESCR Committee has opted for demanding that States parties establish benchmarks or indicators to evaluate the enjoyment and progression of ESC rights in each State, rather than setting out international ones that are applicable across the board.<sup>580</sup> And the ICESCR (as well as other international agreements regarding ESC rights) leaves open the means that are to be used to realize the rights, stating only that these must be "appropriate" and include "the adoption of legislative measures."<sup>581</sup> Thus, although the text of the ICESCR and the interpretations of the ESCR Committee impose some outside constraints on what States can do (e.g., States must pay particular attention to the situation of the most disadvantaged

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entitlement flowing from each right recognized in the Covenant. In the first instance, of course, the responsibility rests with the [S]tates parties themselves . . . . In this regard the role of the Committee will be to encourage governments to undertake such efforts as an integral part of the obligations they have undertaken." See Philip Alston, *Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social, and Cultural Rights*, 9 HUM. RTS. Q. 333, 353 (1987).

580. Nonetheless, the ESCR Committee does not rely exclusively on national indicators. As noted by Craven:

The necessity of utilizing national indicators, as opposed to international ones, is justified primarily by the variety of social and economic contexts in which the rights operate. However, although it may be appropriate for States to be given a margin of discretion in determining the level at which a national benchmark should be set, it may be questioned whether national standards should be the sole criterion for assessment. To allow the indicators for assessment to vary from country to country may undermine the universal nature of the rights and may ultimately give States parties the power to decide the extent of their own obligations.

With this in mind, the Committee explicitly stipulated that it 'cannot accept their (States') national indicators as a general criterion for international assessment.' In practice, it has questioned national qualitative and quantitative data on the basis of that received from international and non-governmental sources . . . . The success of this strategy, however, is crucially dependent upon access to reliable alternative sources of information against which the State reports may be balanced. In the absence of such information, the State benchmarks may provide the only basis on which assessment may be made.

See CRAVEN, *supra* note 20, at 118-19 (1995).

581. ICESCR art. 2(1). In addition, the ICESCR does not dictate any particular form of political or economic organization. As stated by the ESCR Committee, "the undertaking 'to take steps. . . by all appropriate means including particularly the adoption of legislative measures' neither requires nor precludes any particular form of government or economic system being used as a vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. . . . The rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems." ESCR Committee, General Comment No. 3: The Nature of States Parties' Obligations (1990).

members of society), for the most part, the method by which the rights are realized is left up to each State.

But to the extent that international law leaves the content and form of implementation of ESC rights open to different States' interpretations and applications, the process whereby States define, prioritize, and implement these rights gains central importance. If water, health care, and housing are to be treated as rights, then procedural safeguards must exist to ensure that States are taking into account the views of major stakeholders in their decision-making, that States do not implement policies in a discriminatory manner or in a manner that unduly burdens vulnerable populations, and that citizens have recourse for complaints about violations of these rights. In effect, such procedural safeguards help to ensure the integrity of the State's progressive realization of ESC rights. Insofar as those rights are defined flexibly to allow States to establish priorities for the use of scarce resources, procedural rights guarantee that the bearers of those rights have a say in the establishment of those priorities.

In view of these considerations, we suggest that efforts to improve the enforcement of ESC rights against both States and TNCs should concentrate on the improvement of domestic processes for enforcement. Along with developing substantive standards, international institutions should emphasize States' compliance with their obligations to provide effective remedies for violations of ESC rights, and to develop transparent and participatory decision-making processes with respect to ESC rights.<sup>582</sup> International law and institutions should stress the centrality of these obligations, put pressure on States to comply with them, and, perhaps most importantly, provide guidance to States regarding measures they can or should take to come into compliance.

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582. States' duty to protect ESC rights from third parties arguably entail additional procedural obligations, such as effective regulation of TNCs to prevent violations from occurring. This obligation is encompassed, along with the obligation to provide effective remedies, by the "due diligence test," which "says that a [S]tate must have taken reasonable or serious steps to prevent or respond to an abuse by a private actor, including investigating and providing a remedy such as compensation. It gauges the efforts and willingness of a [S]tate to act." International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* 52 (2002), available at <http://www.ichrp.org> (last viewed May 19, 2004). The due diligence test was first articulated in the Velasquez Rodriguez case, *supra* note 340.

The need for greater emphasis on domestic process is borne out by our two cases. In both, the most troubling and obvious problems concerned the government's failure to satisfy its obligations with respect to procedural rights — the rights to effective remedies, and to transparent and participatory decision-making with respect to ESC rights. The water wars illustrate the importance of mechanisms that ensure transparent and participatory decision-making concerning basic ESC rights. Had those mechanisms existed, the alleged violations of substantive rights might have been avoided. And both cases illustrate the importance of effective national remedies for violations of ESC rights. In the water wars, given the clear danger that water would become unaffordable for vulnerable individuals, the State should have established a complaint procedure and monitoring system. In the oil spill, the State's failure to intervene to ensure that the damages were properly documented and remedied is the single most important problem presented by the case. Indeed, the State's abandonment of vulnerable populations may well have converted the spill from an environmental incident into a disaster with long-term human rights implications.

A separate point in favor of increasing attention to procedural rights is that such rights lend themselves to monitoring, both at the level of progressive realization, and of identification of violations. Given that States' decision-making and enforcement procedures are usually preset through legislation or rules, it is possible, in advance, to criticize those procedures on their face or to point to alternative procedures that are required to progressively realize ESC rights. Similarly, general problems in the functioning of State institutions that might affect procedural rights, such as lack of efficiency in the judicial system, are often easy to identify even outside of the context of specific cases. For example, in Bolivia, training of the judiciary in the area of environmental protection is one of many measures that would contribute to the progressive realization of ESC rights.

In turn, violations of procedural rights are often easy to identify, at least in the grossest of cases. When States make important decisions regarding ESC rights in complete secrecy, or refuse to enforce their own laws against third parties in cases involving ESC rights, violations of procedural rights are evident. Even in more complicated cases, such as those discussed in this Report, it is often easy to sketch out the actions that the govern-

ment reasonably should (or should not) have taken to satisfy its obligations with respect to procedural rights. In contrast, as our cases illustrate, establishing with certainty and precision a violation of the right to water or health can be quite difficult.

The need for international attention to procedural guarantees of ESC rights is particularly strong in view of the increased presence of TNCs in developing countries. As a result of the internal and external pressures that States are under to attract the foreign direct investment provided by TNCs, States may be more likely to enter contracts or pass laws that provide inadequate protections for ESC rights or enforce laws unequally in cases involving TNCs. They may also tend towards secrecy in decision-making processes involving TNCs, as illustrated by the water wars case.

## 2. Ways of Promoting Procedural Rights

There are several ways in which international institutions can promote procedural rights associated with ESC rights.

First, international and regional human rights bodies should further elaborate and formalize procedural rights. Although the ESCR Committee has noted that States must provide “effective remedies” and “transparent and participatory decision-making processes,” the Committee should provide additional guidance regarding the implications of these rights.<sup>583</sup> Indeed,

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583. Thus, for example, “effective remedies” should be understood to include, as described by the Maastricht Guidelines, “mechanisms to correct such violations, including monitoring, investigation, prosecution, and remedies for victims.” “Effective remedies” should also be understood to require that barriers to access to these mechanisms be eliminated. For example, in cases involving disadvantaged populations, free legal advice should be provided by the State to the alleged victims. As suggested by the oil spill case, the cost of lawsuits and the alleged victims’ need for immediate economic assistance to remedy the harm caused by a violation can become barriers to accessing judicial remedies. States should find ways to avoid these types of problems — perhaps by covering the costs of lawsuits, finding ways to mitigate the economic need of affected individuals, or developing more efficient mechanisms for adjudication. Moreover, it should be recognized that “effective remedies” could also be provided through non-judicial mechanisms, and that several institutions outside the judiciary can contribute to the provision of “effective remedies.” See Scott Leckie, *Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 81, 120 (1998).

While judicial procedures geared towards the vindication of these rights are critical, nonjudicial mechanisms of enforcement are seen as increasingly fundamental to ensuring respect for economic, social and cultural rights and preventing their violation. Ombudsman institutions, national human rights

procedural aspects of ESC rights might be usefully addressed in a separate international instrument. The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters is a useful model in this respect.<sup>584</sup>

Second, international institutions concerned with ESC rights and development should provide technical assistance to countries regarding the design and implementation of participation and enforcement procedures. Fully guaranteeing procedural rights may require broad institutional reforms, for example to combat corruption and increase access to the judicial system. Given the magnitude of such an endeavor, States will require assistance from a variety of international institutions other than the ESCR Committee, which has limited resources and influence.<sup>585</sup> In particular, regional human rights systems, such as the Inter-American system for the protection of Human Rights, should expand their scope to monitor and advise states on the implementation of procedural ESC rights.<sup>586</sup>

It is worth noting that a significant overlap exists between

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commissions, and truth commissions can play very crucial roles in drawing the attention of public authorities to breaches of socioeconomic rights obligations.

*Id.*

In turn, "participation" and "information" rights sound very diffuse, and can raise complicated questions: How much participation is enough? How should different participants' views be taken into account and weighed? One would not want international law answering all these questions in detail, because different answers may be right depending on the domestic context. However, at a minimum, it could be said that in important government decisions that directly affect ESC rights, a heightened form of public participation and provision of information is required, such that all major stakeholders are informed of the issues being discussed, and are given opportunities to directly voice their concerns. This standard would still be fairly malleable (although the types of decisions to which the requirement applies, and the meaning of "stakeholders," bear further elaboration) and leaves States a margin of discretion to shape the processes in a manner that makes sense in their context.

584. See UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, *supra* note 559.

585. However, this should not be a reason for the ESCR Committee to shy away from addressing these issues; after all, addressing procedural rights does not appear to be significantly more difficult than analyzing complex data from States to determine whether they are progressively realizing substantive ESC rights.

586. This could be done on the basis of the Protocol of San Salvador, which deals with ESC rights. In addition, given that the American Convention on Human Rights itself recognizes the right to effective judicial remedies for all violations of human rights in that instrument (not merely ESC rights), the Convention itself provides an initial basis for the Inter-American system to examine the quality of judicial remedies.

the process concerns involved in ESCR protections, and the process concerns associated with the protection of human rights generally,<sup>587</sup> and with the promotion of other goals such as development and the elimination of poverty. Thus, all human rights treaty monitoring bodies within the U.N. should reevaluate their practices in terms of their effectiveness at encouraging and aiding the development of good processes regarding ESC rights.<sup>588</sup> Moreover, although the World Bank has resisted recognizing human rights promotion as within its mandate,<sup>589</sup> it has already taken a strong interest in judicial reform and anti-corruption measures, and has started to promote stakeholder participation in its projects.<sup>590</sup> Insofar as the protection of ESC rights is intertwined with the issue of development, the World Bank and other IFIs could refine their approach to institutional reform so as to enhance ESC rights.

Third, international monitoring bodies and NGOs should

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587. See Anne Gallagher, *Making Human Rights Treaty Obligations a Reality: Working with New Actors and Partners*, in THE FUTURE OF U.N. HUMAN RIGHTS TREATY MONITORING 201, 201-02 (Philip Alston & James Crawford eds., 2000).

Human rights are best protected in societies governed by the rule of law and by a representative, accountable government. The protection of human rights also presupposes an adequate standard of living for all persons; an impartial, accessible and independent judiciary; efficient, professional and disciplined law enforcement; a free and responsible press and a vigorous civil society.

*Id.*

588. As described by Anne Gallagher, there are a number of improvements that can be made in this respect, such as improving the quality and specificity of their recommendations. *Id.* at 222. In addition,

while the treaty bodies are not in a position to fulfill all needs, they could with some effort take the lead in ensuring that the required assistance is of sufficient quality and is channeled in the right direction. The first target of the treaty bodies' attention should be their institutional counterpart, the Technical Cooperation Programme run by the Office of the High Commissioner for Human Rights and which provides technical human rights-related advice and assistance to governments which request it.

*Id.* at 223.

589. See Daniel D. Bradlow, *The World Bank, the IMF, and Human Rights*, 6 TRANS-NAT'L L. & CONTEMP. PROBS. 47, 79 (1996)

590. See The World Bank Participation Sourcebook, available at <http://www.worldbank.org/wbi/sourcebook/sb0002.htm> (last visited Apr. 9, 2004). The World Bank has also issued guidelines for consultation with NGOs and civil society. See, e.g., THE WORLD BANK, CONSULTATIONS WITH CIVIL SOCIETY ORGANIZATIONS: GENERAL GUIDELINES FOR WORLD BANK STAFF (2000). Similarly, the Inter-American Development Bank has also started to incorporate the goal of citizen participation into its operations. See also INTER-AMERICAN DEVELOPMENT BANK, STRATEGY FOR PROMOTING CITIZEN PARTICIPATION IN BANK ACTIVITIES (2002).

begin investigating potential violations of procedural rights. We have made the case that the identification of violations of procedural aspects of ESC rights is not necessarily difficult. Moreover, such a focus on procedure may provide an important avenue for greater NGO participation in monitoring ESC rights because the procedural aspects of those rights are more analogous to the highly procedural domain of civil and political rights, which has long been the subject of NGO scrutiny.

Finally, procedural rights should be incorporated into instruments and mechanisms that address the issue of TNC responsibilities with respect to human rights. For example, voluntary codes of corporate conduct and the Draft Norms on TNCs should require that major stakeholders be given information and the opportunity to participate in the decision-making process.

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The growth of TNC activity presents both opportunities and challenges to the developing world. To a large extent, the citizens of each State must measure the costs and benefits of such activity according to their particular needs and priorities, a process that, as recent events in Bolivia demonstrate, can be difficult and divisive. At the same time, increased attention by international bodies, NGOs and TNCs to the procedural aspects of ESC rights can help to ensure both that the individuals most directly affected by TNC activity will have the opportunity to take part in that deliberation and that the most vulnerable citizens will not bear a disproportionate share of the costs.



*ANNEX I: Crowley Mission Itinerary*

**Monday, May 19, 2003: Cochabamba**

TIME	INTERVIEW
9 a.m.	<i>Oscar Olivera, Jose Gutierrez, and Gabriel Herbas, Coordinadora para la Defensa del Agua y de la Vida</i>
11 a.m.	<i>Rene Orellana, Centro de Comunicación y Desarrollo Andino</i>
 <i>GROUP A:</i>	
2:30 p.m.	<i>William Scarborough, U.S. Consul in Cochabamba</i>
3:00 p.m.	<i>Humberto Vargas, Centro de Estudios de Realidad Económica y Social</i>
 <i>GROUP B:</i>	
2:30 p.m.	<i>Franz Taquichiri, Las Vertientes Neighborhood Association</i>
5:00 p.m.	<i>Father Luis Sánchez, SEMAPA board of directors</i> <i>Raul Salvatierra, alternate member, SEMAPA board of directors</i>

**Tuesday, May 20, 2003: Cochabamba**

<i>GROUP A:</i>	
9:00 a.m.	Meeting at SEMAPA offices: <i>Rene Cardona, Oscar Flores, and Ebeth Claros, SEMAPA workers</i> <i>Gonzalo Ugalde, General Manager of SEMAPA</i>
12:00 p.m.	<i>Marcelo Rojas, a.k.a. "Banderas", SEMAPA worker</i>
2:30 p.m.	<i>Federico Diez de Medina</i>
 <i>GROUP B:</i>	
9:00 a.m.	<i>Omar Fernandez, President of the Federation of Irrigators of Cochabamba</i>
2:30 p.m.	<i>Hugo Galindo, Prefect of Cochabamba 1999-2000</i>
 <i>GROUP C:</i>	
9:00 a.m.	Interviews in Neighborhood of Valle Hermoso <i>Father Luis Sanchez, SEMAPA board of directors</i> <i>Raul Salvatierra, SEMAPA board of directors</i> <i>Gladys Romero Gonzalez, auditor</i> <i>Sonya Cosillo, auditor</i> <i>Salvador Agustin Aricoma, President of Neighborhood Water Committee</i> <i>Gilberto Tomez Benai, Vice-President of Neighborhood Water Committee Community members</i>
4:00	<i>Jim Shultz, The Democracy Center</i>
 <i>ALL GROUPS:</i>	
Evening:	Reception with members of Cochabamba Bar Association, offices of Voluntarios Bolivia

**Wednesday, May 21, 2003: Cochabamba and Oruro**

7:30 a.m.	<i>Father Gregorio Iriarte</i>
9:00 a.m.	Travel to Oruro
4:00 p.m.	Meeting with Oruro NGO and community representatives in the offices of Centro de Ecologia y Pueblos Andinos ("CEPA"): <i>Gilberto Pauwels</i> , CEPA <i>Victor Alanes</i> , CEPA <i>Norma Mollo</i> , CEPA <i>Felipe Coronado</i> , former President, FOBOMADE — Oruro <i>Arturo Alessandri</i> , Asamblea Permanente de Derechos Humanos — Oruro <i>Clemente Paco</i> , Pastoral Social <i>Carol Rocha</i> , Pastoral Social <i>Catalina Ventura</i> , Pastoral Social <i>Hans Moeller</i> , Centro de Organizacion y Servicio Social CISEP <i>Teodoro Blanco</i> , Forestry Engineer and Environmental Investigator <i>Ricardo Valente</i> , Chuquiña community representative <i>Mercedes Luzco</i> , Pata Pata community representative

**Thursday, May 22, 2003: Oruro**

<i>GROUP A:</i>	Travel north of Oruro: Ulloma community Transredes pumping station in Sica-Sica
<i>GROUP B:</i>	
9:00 a.m.	Hans Moeller, CISEP
10:30 a.m.	Daniel Solis, Oruro Prosecutor's Office
2:30 p.m.	Felipe Coronado
<i>GROUP C:</i>	
10:00 a.m.	CARE - Oruro Offices: <i>Jorge Campero</i> , Regional Administrator, CARE - Oruro <i>Pietro Fiorilo</i> , Project "Peace And Development" CARE - Oruro
2:30 p.m.	<i>Arturo Alessandri</i> , Asamblea Permanente de DDHH <i>Clemente Paco</i> , Pastoral Social
<i>GROUP D:</i>	
10:00 a.m.	<i>Juan Carlos Montoya</i> , Departmental Director of Natural Resources and the Environment, Oruro Prefecture
3:00 p.m.	<i>Monseñor Braulio Saez</i> , Bishop of Oruro
<i>GROUPS B, C, and D:</i>	
4:00 p.m.	Meeting with representatives from communities of Toma-Toma, Choro-Choro, Chuquiña, El Choro

**Friday, May 23, 2003: Oruro and surrounding communities**

6:00 a.m. Radio Interview in Quechua, Radio Bolivia

**Community visits:****South Group:**

Puñaca Tinta Maria  
Llapallapani  
Lake Poopo

**Center Group:**

Santo Tomas  
San Pedro de Chalacollo  
El Choro

**North Group**

Pata-Pata  
Eucaliptus  
Chuquiña  
Toma-Toma

**Monday, May 26, 2003: La Paz****GROUP A:**

10:00 a.m. *Rogelio Mayta*, attorney in Chuquiña lawsuit against Transredes

11:30 a.m. *Claude Bessett*, Superintendente General

3:30 p.m. *Carlos Villegas*, CIDES-UMSA

5:30 p.m. *Rene Gomez-Garcia Palau*, Engineer

**GROUP B:**

11:30 a.m. *Carlos Toranzo*, ILDIS Foundation

2:30 p.m. *Ramiro Guevara*, attorney for International Water, Ltd.

5:30 p.m. *Carlos Miranda*, former Superintendent of Hydrocarbons

**GROUP C:**

4:00 *Luis Bredow*, journalist

**ALL GROUPS:**

Evening Reception in offices of Poder Ciudadano

**Tuesday, May 27, 2003: La Paz****GROUP A:**

9:00 a.m. *Patricia Molina*, Foro Boliviano de Medio Ambiente y Desarrollo

11:00 a.m. *Farit Rojas*, Law School at Universidad Catolica

2:30 p.m. *Andres Zaratti*, Anti-Corruption Secretariat of Bolivia

**GROUP B:**

10:30 a.m. Universidad Católica meeting:

*Gonzalo Chavez*, Professor

*Gover Barja*, Professor

12:30 p.m. *Jan Schollaert*, Director of CARE-Bolivia

3:30 p.m. *Julio Garrett*, General Director of Industry in Bolivia's Ministry of Economic Development

*GROUP C:*

10:30 a.m. *Enrique Mariaca*, former Head of Yacimientos  
Petrolieros Fiscales Bolivianos  
12:30 p.m. *Marianella Hidalgo*, Attorney, Member of Auditing  
Team

**Wednesday, May 28, 2003: La Paz**

*GROUP A:*

9:00 a.m. Tony Henshaw, Transredes  
3:00 p.m. *Ramiro Molina*, Coordinator of Area in Indigenous  
Peoples' Rights, Universidad de la Cordillera  
4:30 p.m. Meeting with Representatives of the Ministry of  
Indigenous Affairs:  
*Felipe Caballero*  
*Jose Ramirez*

*GROUP B:*

9:00 a.m. *Maria Cristina Arellano*, Vice-Ministry of  
Environment and Natural Resources  
11:00 a.m. *Patricia Garcia*, legal advisor, Ministry of Sustainable  
Development  
5:00 p.m. *Freddy Heinrich*, President, Liga de Defensa del  
Medio Ambiente (LIDEMA)

*GROUP C:*

9:00 a.m. *Dennis Grabel*, Inter-American Development Bank  
3:00 p.m. Superintendency of Basic Sanitation:  
*Johnny Cuellar*, Superintendent of Basic Sanitation  
*Michael Roca*, economic analyst

**Thursday, May 29, 2003: La Paz**

*GROUP A:*

9:00 a.m.-5:00 p.m. Meeting with Representatives from Transredes  
Legal Department:  
*Fernando Gonzalez*, Head of Transredes Legal  
Department  
*Marita Landivar*, Attorney  
*Jose*, Attorney  
*Brigitte Herrera*, Transredes employee, formerly from  
CARE.

*GROUP B:*

11:30 a.m. *Ramiro Caverro*, former Minister of Sustainable  
Development  
5:00 p.m. *Jaime Rios Chacon*, Human Rights Commission of  
Bolivian Congress

**Friday, May 30, 2003: La Paz**

8:00 a.m. Television Interview, Channel 4

*GROUP A:*

9:00 a.m. *Claudia Vargas*

*GROUP B:*

9:00 a.m. Visit to Unidad de Analisis de Politicas Sociales y Economicas

*GROUP C:*

9:00 a.m. *Tom Kruse*, Centro de Estudios para el Desarrollo Laboral y Agrario

4:00 p.m. *Waldo Albarracin*, President, Asamblea Permanente de Derechos Humanos

9:00 p.m. *Saul Apaza*, representative from Japo community

*Annex 2: ADDITIONAL INTERVIEWS*

**Maria McFarland Preliminary Trip to Bolivia, February 2003**

**Monday, February 3: Cochabamba**

9:00 a.m. *William Scarborough*, U.S. Consul in Cochabamba  
 11:00 a.m. *Richard Pol*, Cochabamba Ombudsman  
 1:00 p.m. *Tom Kruse*, CEDLA  
 2:30 p.m. *Rosario Leon*, director, CERES  
 4:00 p.m. *Dr. Eddy Fernandez*, President Cochabamba Bar Association

**Tuesday, February 4: Cochabamba**

9:00 a.m. *Oscar Olivera* and *Jose Gutierrez*, Coordinadora para la Defensa del Agua y de la Vida  
 11:00 a.m. *Gabriel Herbas*, Foro Boliviano del Medio Ambiente (Cochabamba).  
 4:00 p.m. *Jim Shultz*, the Democracy Center

**Wednesday, February 5: La Paz**

9:30 a.m. *Rogelio Mayta*, *Milena Reque* and *Liliana Warmi*, attorneys for Chuquiña community  
 11:30 a.m. *Peter Harding*, *David Wolfe* and *Ted Craig*, U.S. Embassy in Bolivia  
 3:00 p.m. *George Gray Molina*, director, Unidad de Analisis de Politicas Sociales y Economicas, Bolivia  
 5:30 p.m. *Waldo Albarracin* and *Monica Calasich*, Asamblea Permanente de Derechos Humanos

**Thursday, February 6: LA PAZ**

9:00 a.m. Meeting in Chuquiña lawyers' offices:  
*Rogelio Mayta*  
*Liliana Warmi*  
*Raul Rocha*, Chuquiña leader  
*Luis Gomes*, journalist  
*Rene Gomez Garcia*, engineer  
 12:00 *Martha Cecilia Villada*, Poder Ciudadano  
 3:00 p.m. *Carlos Miranda*, former Superintendent of Hydrocarbons  
 4:00 p.m. *Horst Grebe Lopez*, Instituto Prisma  
 5:00 p.m. United Nations Development Program in Bolivia:  
*Jairo Escobar*  
*Jose Carlo Burga*  
*Santiago Daroca Oller*  
*Jesus Ortego Osa*

**Friday, February 7: La Paz**

9:00 a.m. *Fernando Rodriguez*, Capitulo Boliviano, Plataforma Interamericana de Derechos Humanos  
 10:30 a.m. *Patricia Molina*, Foro Boliviano de Medio Ambiente y Desarrollo  
 2:00 p.m. *Elizabeth Peredo*, Fundacion Solon  
 3:30 p.m. Judge, 10mo Juzgado en lo Civil.

**Maria McFarland Trip to Washington, D.C., August 21, 2003**

11:00 a.m.

*John Briscoe*, Senior Water Advisor, World Bank

1:00 p.m.

*Michael E. Curtin*, President, Aguas del Tunari**Additional Interviews****May 27, 2003:***Neisa Roca*, former Vice-Minister of Environment and Development (phone interview)**September 23, 2003:***Armando de la Parra*, former Congressman representing Cochabamba (phone interview)**September 31, 2003:***Jorge Reynolds*, legal advisor, Superintendency of Hydrocarbons (Crowley Program offices)**October 7, 2003:***Carlos Crespo*, Professor, Universidad Mayor de San Simon (phone interview)