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HUMAN RIGHTS IMPACT ASSESSMENTS OF LARGE-SCALE FOREIGN INVESTMENTS: A Collaborative Reflection

Roundtable Outcome Document

**Columbia Center on Sustainable Investment,
Sciences Po Law School Clinic, and
the Columbia Law School Human Rights Institute**

December 1, 2014



Columbia Center on Sustainable Investment (CCSI)

The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute at Columbia University, is a leading research center and forum dedicated exclusively to the study, practice and discussion of sustainable international investment worldwide. Through research, advisory projects, multi-stakeholder dialogue, and educational programs, CCSI constructs and implements an investment framework that promotes sustainable development, builds trusting relationships for long-term investments and is easily adopted by governments, companies and civil society.



Sciences Po Law School Clinic

The Sciences Po Law School Clinic is an experiential learning program, set within the Sciences Po Law School and articulated around local, national and global public interest projects and objectives. Masters-level students, academics and practitioners work together on a wide range of advocacy projects within the clinic's three programs, and develop integrated research based on systematic documentation and theoretical analysis of the clinical projects. The clinic's Human rights, Economic Development and Globalization (HEDG) program focuses on the promotion, protection and fulfilment of human rights, the accountability of public and private actors in economic globalization, and on equitable and sustainable development.



HUMAN RIGHTS INSTITUTE

Columbia Law School Human Rights Institute

The Human Rights Institute sits at the heart of human rights teaching, practice, and scholarship at Columbia Law School. Founded in 1998 by the late Professor Louis Henkin, the Institute draws on the Law School's deep human rights tradition to support and influence human rights practice in the United States and throughout the world. The activities of the Human Rights Clinic are included in the Institute's work, enabling us to multiply our impact on the field and engage students more fully in our efforts. The Institute currently focuses its work in several substantive areas, including Human Rights in the Global Economy. We have developed distinct approaches to work in each area, building bridges between scholarship and activism, developing capacity within the legal community, engaging governments, and modeling new strategies for progress.

ACKNOWLEDGMENTS

This document was written by Tehtena Mebratu-Tsegaye, Kaitlin Cordes, Manon Aubry, Noémie Lisbonis-Boyer, and Pierre Farcot. The authors are grateful to Jeremy Perelman, Risa Kaufman, and Sophie Thomashausen for their review. An earlier version of the document benefitted from input from Maria Elena Vignoli and Douglas Cantwell.

This is an outcome document of a roundtable hosted at Columbia Law School in April 2014. The roundtable was a joint initiative of the Columbia Center on Sustainable Investment (f.k.a. the Vale Columbia Center on Sustainable International Investment), the Columbia Law School Human Rights Institute, the Columbia Law School Human Rights Clinic, and the Sciences Po Law School Clinic. In addition to the contributions of the four organizing partners, the roundtable received partial support from the Alliance Program: <http://alliance.columbia.edu/>.

The four organizing partners spent the 2013-2014 academic year supporting community-led human rights impact assessments (HRIAs) in the Democratic Republic of the Congo. The idea for the roundtable arose out of a conversation with a lawyer working in private practice who assists businesses in conducting HRIAs and other assessments of actual or potential operations in foreign jurisdictions.

HUMAN RIGHTS IMPACT ASSESSMENTS OF LARGE-SCALE FOREIGN INVESTMENTS: A Collaborative Reflection

On April 16, 2014, Columbia Law School and the Institut d'études politiques de Paris (Sciences Po)¹ hosted a one-day roundtable at Columbia University focused on the opportunities and challenges presented by human rights impact assessments (HRIAs) of large-scale foreign investments.

HRIAs are most commonly used by companies and civil society organizations to systematically investigate and measure the potential or actual impacts of a project on the human rights of people affected, or potentially affected, by a company's operations.² The development of HRIAs has not been linear. A rapid proliferation in their usage has resulted in a range of understandings regarding their purpose, as well as a variety of methodologies to carry them out. In addition to companies and civil society organizations, other stakeholders may also have an interest in undertaking HRIAs, including international financial institutions or host governments of a foreign investment project.³ In this context, the roundtable provided an opportunity for collaborative reflection on the development of HRIAs, as well as on ways to enhance HRIAs as a framework and tool for both human rights advocacy and human rights risk management in respect of foreign investments.

The roundtable brought together 27 experts, practitioners, academics, and law students, representing diverse perspectives and experiences. The participants included experts in conducting HRIAs for both communities and the private sector; a representative from an international financial institution and one from a private financial institution; academics working in the field of business and human rights, particularly on projects related to extractives industries investment; and law clinic students who have examined or supported HRIAs of large foreign investment projects. The participants' experiences had wide geographical reach, with on-the-ground involvement in HRIAs of large-scale investment projects spanning from Canada to the Democratic Republic of the Congo.

By sharing the outcomes of the roundtable, this document aims to support HRIA practitioners, company officials, civil society representatives, and other stakeholders focused on human rights and foreign investment in further reflection on the objectives and methods of HRIAs. The roundtable examined the various practices comprising HRIAs, and the discussion underscored that many of the challenges associated with carrying out an HRIA are common to multiple stakeholders, albeit borne out in different ways. This outcome document first describes some of the primary ways in which HRIAs are undertaken; it then outlines the salient issues and key

¹ The roundtable was a joint initiative of the Columbia Center on Sustainable Investment (f.k.a. the Vale Columbia Center on Sustainable International Investment), the Columbia Law School Human Rights Institute, the Columbia Law School Human Rights Clinic, and the Sciences Po Law School Clinic.

² Saskia Bakker, Marieke Van Den Berg, Deniz Duzenli, and Marike Radstaaake "Human Rights Impact Assessment in Practice: The Case of the Health Rights of Women Assessment Instrument," *Journal of Human Rights Practice*, 1:3 (2009), 436-458.

³ Government use of HRIAs may be desirable, but the roundtable discussion did not focus on governmental involvement in the HRIA process, presumably in part due to the participants' backgrounds. Government responsibility and involvement in the HRIA process may be an interesting point for further discussion.

challenges that practitioners have identified. Examples taken from both public materials and the roundtable discussion illustrate the challenges discussed.

1. TAKING STOCK OF CURRENT HRIA PRACTICES

a. HRIAs: An emerging field with blurred boundaries

Human rights impact assessments of investment projects arose from efforts to understand the potential or actual impacts of business operations on universal human rights. HRIAs are increasingly recognized by both civil society and the private sector as a useful tool to assess the human rights impacts of large-scale projects.

HRIA methodologies and tools have been developed by a number of different stakeholders, including companies and civil society organizations (CSOs), to assess how operations affect human rights, as opposed to the issues typically covered by environmental and social impact assessments (ESIAs). One of the most prominent examples is the tool developed by Rights & Democracy, which provides step-by-step guidance for communities and CSOs on conducting assessments.⁴ HRIAs have further evolved in response to the UN Guiding Principles on Business and Human Rights, which enumerate specific business responsibilities regarding human rights and thus facilitate more concrete measurements of a business's impacts on local communities' fundamental rights. Although the Guiding Principles do not explicitly require HRIAs, they assert that businesses should carry out human rights due diligence.⁵ Since the endorsement of the Guiding Principles by the U.N. Human Rights Council, companies have demonstrated an increasing interest in HRIAs, and tools have been developed to assist them in conducting such assessments.⁶

HRIAs are commonly used as a preventative tool or as an advocacy/redress tool. An HRIA that serves as a preventative tool helps assess the potential impacts of a business's operations before a project deal is concluded or implemented. This type of *ex ante* ("before the event") HRIA can function as a human rights due diligence or risk management tool for companies. While an *ex ante* HRIA can also be used by communities to understand and, if necessary, prevent negative impacts from arising, undertaking an *ex ante* HRIA is frequently difficult for communities, given asymmetries in information and leverage, as discussed below.

An HRIA used as an advocacy tool often takes the form of a community-led HRIA that may be supported by international or local CSOs. In this situation, community members or civil society representatives gather evidence of the actual impacts of an existing project through an *ex post* ("after the fact") HRIA, which in turn informs advocacy efforts and human rights campaigning. As noted by one roundtable participant, evidence from rigorous community-led *ex post* HRIAs can be used to address the power imbalance between the stakeholders, enabling communities to demand concrete remedies for harms caused. In addition, the same participant noted that evidence gathered through HRIAs sometimes feeds into litigation efforts. However, in the view of another participant, HRIAs carried out for litigation purposes should be resisted, because they risk entrenching conflict between stakeholders and stunting the potential for future successful

⁴ Rights & Democracy, "Getting it Right: Human Rights Impact Assessment Guide," available at <http://hria.equalit.ie/en/index.html>.

⁵ Guiding Principles on Business and Human Rights, Principles 17-21, available at http://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_en.pdf.

⁶ See, for instance, this guide developed by BSR: Business Social Responsibility, "Conducting an Effective Human Rights Impact Assessment: Guidelines, Steps, and Examples" (March 2013), available at http://www.bsr.org/reports/BSR_Human_Rights_Impact_Assessments.pdf.

HRIAs. Aside from the use of *ex post* HRIAs as an advocacy tool, they also can support proper redress of harms, particularly when undertaken by companies to assess the actual or ongoing impact of their operations. In this way, an *ex post* HRIA initiated by a community or a company could lead to a similar result – a change in business operations to address any negative impacts discovered by the assessment.

Participants stated that HRIAs undertaken by communities or by companies can support negotiations between companies and communities, either by supporting more fact-based negotiations that help communities engage in discussions with companies on a more equal footing, or by opening up space for more informed negotiations once risks have been identified. Yet in the face of this progress, an existential question persisted throughout the discussion: what should be the goal of an HRIA? For example, when undertaken by civil society, HRIAs often fall under the umbrella of an advocacy tool, and can be likened to a report designed to name and shame. In pursuing this advocacy goal, the distinction between an HRIA and other advocacy tools is blurred, which may reduce their practical efficacy. In contrast, when undertaken by a company, HRIAs may be perceived as simply one more tool to mitigate reputational risk, thus blurring the lines between this and other due diligence processes.

Such distinct objectives raise the question of whether HRIAs can effectively serve different goals, or whether they need to share certain common objectives. In the view of one participant, the goal of an HRIA should be to open channels of communication between stakeholders. This includes considering the resources and processes in place to ensure the relationship between the company and community remain collaborative rather than adversarial. Seeking to build communication between companies and communities could conceivably be an underlying goal of both company- and community-led HRIAs. Because HRIAs have evolved to serve many purposes in different forms, the roundtable discussion provided an opportunity for participants to distill the successful aspects of HRIAs and acknowledge their limitations, including in the context of which stakeholders have initiated the assessment.

To date, the actors who have most actively engaged with HRIAs are the companies whose potential or actual foreign investment projects are being assessed, as well as civil society representatives working in conjunction with members of affected communities. Each actor's objective in carrying out an HRIA differs according to its interests and audiences; this may produce correlative biases in the methodology adopted and the parameters drawn to limit the assessment. Various opportunities and challenges are thus associated with HRIAs conducted or commissioned by companies, civil society, governments, or international financial institutions.

b. Company-led HRIAs: A business case to assess risks

A company may carry out an HRIA to assess the potential or actual impact of its planned or ongoing operations. There may be a good business case for such an assessment. An *ex ante* HRIA can help assess potential risks before an investment is made, and the process of conducting one may help incorporate local communities' concerns into project planning, or even encourage buy-in of the local population for the particular project. This can help ensure a secure and well-functioning project, while guarding against reputational risks. An *ex post* HRIA enables a company to better understand its actual impacts, respond to specific allegations of rights violations, or identify changes that should be implemented to mitigate or redress harms. Corporate-led HRIAs can also be valuable more generally, by stressing the central role of the company in assessing human rights risks and the importance of corporate efforts to promote socially responsible practices that incorporate human rights standards.

Companies interested in HRIAs may lead such an assessment internally, or may seek external support in undertaking the process. For example, a company may decide to partner with another organization that brings additional expertise in conducting HRIAs. One participant from a human rights organization explained its partnership with a large company to assess the impacts that some of its global operations have on the human rights of workers or local communities. The methodology was developed by the human rights organization, which then worked with the company to identify which country operations might be the most high-risk. After collaborative assessments in multiple countries, led by the rights organization in partnership with an internal human rights specialist from the company, the company published aggregated findings from the HRIAs and the steps it had taken to address them.

Apart from partnering with another organization to undertake collaborative or joint HRIAs, some companies may simply seek outside experts who can lead an HRIA to provide human rights due diligence before or after an investment is made. Certain organizations or consulting firms specialize in helping companies interested in HRIAs or in advancing a sustainability or rights agenda more broadly. This may include working directly with companies to conduct HRIAs. One participant explained the process undertaken by the participant's organization, which starts with a corporate-wide mapping to investigate how a company affects human rights. The results can then be used to help a company focus on the most salient issues by understanding where its operations may have the most negative or positive impacts.

c. Civil society- and community-led HRIAs: Putting rights-holders at the center of business projects

Civil society actors have also undertaken an increasing number of HRIAs. A civil society organization (CSO) may carry out an HRIA with the goals of identifying the rights that have been or might be positively or negatively affected by a company's operations. *Ex ante* CSO-led HRIAs offer more opportunities to prevent abuses before they occur, yet CSOs often conduct assessments after an investment project has begun, at which stage information may be more accessible and problems more apparent.

CSOs undertaking HRIAs may be international or local organizations. Although in theory they do not have to involve community members any more than HRIAs initiated by companies, typically a CSO's objective is to directly involve communities in the assessment process, frequently by using the community-led HRIA methodology developed by Rights & Democracy.⁷ This means that civil society work on HRIAs often takes the form of supporting community-led HRIAs. This external capacity-building support can help ensure that the HRIA tool is sustainable, that operations can be monitored periodically throughout a project's life cycle, and that communities can take ownership of HRIA processes.

The support that international CSOs offer to local CSOs or community members to conduct HRIAs can take a variety of forms. For example, an international CSO might support a local CSO by providing training, supplying technical assistance in analyzing the human rights framework, or acting as facilitator to draw on networks and set up meetings with strategic partners. Other capacity-building support could include guidance on engaging with the company being assessed or on developing a working relationship with the company, as this relationship can be crucial to ensuring that advocacy efforts following the release of the HRIA findings are fruitful.

⁷ Rights & Democracy, op. cit., available at: <http://hria.equalit.ie/en/index.html>.

One participant from an international CSO described sustained capacity-building efforts to support local CSOs and community members in undertaking HRIAs in the Democratic Republic of the Congo. The CSO provides support to community organizations and leaders in designing and carrying out HRIAs of mining and infrastructure projects. This capacity-building program focuses on the provision of training, on-site assistance, and technical support. Yet another roundtable participant involved in these efforts noted that, despite intensive and lengthy capacity-building efforts, challenges remain. For example, the management capacities of local partners have sometimes affected execution of the HRIA process, leading to delays or miscommunications. In addition, some local community members have been reluctant to engage in the HRIA process based on fears of repercussions that would exacerbate the negative impacts of the operations. Moreover, some sites have proved too remote or expensive to access, thus influencing the choice of project to assess.

As noted by one participant, the technical support referenced above is one mechanism to build the capacity of local CSOs that sometimes can be provided remotely. For example, supporting local CSOs in researching and assessing legal frameworks can help ground the HRIA in relevant international human rights norms and domestic law. This approach highlights the government's legally binding obligations, as well as the relevant responsibilities of private actors. The same participant explained that this type of technical assistance is one way that non-local law school clinics have provided support to communities and local CSOs conducting HRIAs.

To the extent that community-based CSOs lead the assessment with the support of other stakeholders, the HRIA process can also provide useful capacity-building support by assisting community members in mobilizing and demanding respect for their rights. The assessment process may also offer new opportunities for different stakeholders to engage in dialogue to seek immediate solutions. In addition, organizations may use an HRIA to advocate for longer-term objectives, such as establishing the implementation of a monitoring mechanism to guard against potential future abuses. These outcomes can facilitate community efforts to participate more effectively in the decision-making processes that may affect them.

Community capacity-building begins with educating communities about their rights and translating the language of human rights into the language of needs. One participant shared an anecdote relating to an HRIA conducted on a mining project in the Philippines, where a communication gap arose in a "know your rights" training session. The session was held with elders in the community; problems with communication emerged because the trainer was talking in the language of rights, whereas the elders wanted to know how their needs could be taken care of. The communication difficulties were solved when a local civil society partner, who had been working in the community for years, stepped in. The local partner translated the legal concepts into tangible benefits for the community so that the community members could appreciate what the rights entitlement meant in relatable terms.

Dynamic uses of media tailored to the specific community can sometimes serve as an effective capacity-building method. An example given by one participant involved the use of a radio show in order to educate a local community on the rights of mining workers. The presentations were followed by a call-in session, which allowed the community to voice their concerns and ask questions. The value of the program included its role in community capacity-building as well as information gathering. This dual approach brought to light the day-to-day concerns of affected people, and the HRIA process helped translate those concerns into the correlative responsibilities of relevant stakeholders.

Not only is direct community capacity-building regarding HRIAs crucial, but building the general capacity of local CSOs may also be critical to the success of any HRIA led by local CSOs. A participant identified the need to assess the organizational and technical capacity of local partners in order to safeguard against any consequential impacts on the quality of the HRIA. In the experience of another participant, the capacity-building element of local CSO-led HRIAs can highlight tensions between the need for flexibility in the HRIA process and the need for methodological rigor. Because community empowerment is a key aim of community-led HRIAs, HRIA methodology needs to be flexible enough to meet the needs of the particular community and particular project. This can conflict with the need for methodological rigor, as a lack of standardized methodology can increase the scope for low-quality HRIAs.

d. Sector-wide impact assessments: A new approach

In addition to assessing individual projects or an individual company's operations, HRIAs are also carried out across industry sectors in specific countries. Sector-wide impact assessments (SWIAs) can be particularly useful for engaging a wide range of stakeholders, including government and civil society. In the experience of one participant, a successful sector-wide HRIA of the oil and gas sector has been undertaken in Myanmar, with the final report offering recommendations to both civil society and the government; a similar SWIA is being conducted of the tourism industry in Myanmar. Sector-wide HRIAs based on consultations throughout a country can help governments and companies understand the relevant human rights standards and risks, potentially increasing the likelihood that rights-respecting standards will be built into a company's operations. As another participant noted, company-initiated HRIAs may combine aspects of sector-wide assessments and project-level or product-level assessments, thus allowing companies to understand country-level risks and sectoral-risks, as well as those specific to the company in question.

e. Human rights due diligence by financial institutions

Financial institutions have a particular role to play in safeguarding the human rights of those affected by the projects that they fund. As the funder of a project, a bank has some level of influence over whether a project goes ahead, the way in which it is conducted, and the information disclosed. A number of participants asserted that the financial industry has responsibilities to ensure funds are not used to perpetuate human rights abuses. Guidance applicable to financial institutions includes the "Equator Principles,"⁸ which, in the view of one participant, do not go far enough in ensuring robust and independent HRIAs or in preventing human rights abuses by the underlying project. The participant provided the example of an Australian bank that, despite being a member of the Equator Principles, did a "tick box" HRIA of a sugar project in Cambodia that caused massive displacement of local communities. The participant argued that the methodologically weak HRIA illustrated how institutions can pervert the purpose of the Equator Principles by carrying out deficient HRIAs.

A participant from a financial institution acknowledged that the foundation of a project has to be transparency. There is a tension, however, with increasing disclosure requirements and increasing competition from national financial institutions that are lending to projects but not guided by the Equator Principles. This may reduce the incentives for financial institutions to

⁸ The Equator Principles, which has been officially adopted by 80 institutions in 34 countries, is a risk management framework "for determining, assessing and managing environmental and social risk in projects and is primarily intended to provide a minimum standard for due diligence to support responsible risk decision-making." More information available at: <http://www.equator-principles.com/>.

increase the disclosure requirements of borrowers. Another participant, representing an independent mechanism affiliated with an international financial institution, agreed that national financial institutions without robust standards can push down the overall standards used by financial institutions, and asserted the importance of pushing those standards back up and leveling the playing field for financial institutions. The participant also explained that human rights due diligence by financial institutions is most effective during the project design phase, so that the assessment of potential harm can influence the project design.

2. SALIENT ISSUES AND KEY CHALLENGES OF HRIAS

Despite the growing use of human rights impact assessments by a range of stakeholders and the increasing sophistication of some stakeholders' methodologies, a number of challenges and questions remain. These challenges are often relevant regardless of which stakeholder initiated the assessment, though the parameters of the challenge may change accordingly. Moreover, although stakeholders may agree on best practices in theory, complications on the ground mean that imperfect solutions may be used in practice. Roundtable participants identified multiple pressing questions and challenges, including the timing of the HRIA, complications with community engagement, independence and credibility, and factors that shape whether HRIAs are ultimately effective.

a. Is there an optimal moment to carry out HRIAs?

i. The benefits of *ex-ante* HRIAs

A substantial part of the roundtable discussion centered on the reasons for and the consequences of the timing of an HRIA in a project's life cycle, including the effect the timing has on the acceptance and impact of the HRIA recommendations. Roundtable participants agreed that, in theory, it is always better to have an *ex ante* HRIA. This is because *ex ante* assessments can facilitate efforts to prevent potential abuses before they arise, which is always preferable to redressing rights abuses after they have occurred.

An *ex post* HRIA may also be less effective to the extent that its recommendations relate to operational aspects of the project that should have been incorporated at the design phase. Moreover, participants concurred that *ex post* HRIAs often involve the most contentious issues, as the HRIA is more likely to be carried out in the context of past and ongoing abuses. During *ex post* HRIAs, the relationships between stakeholders are likely to have come under strain, which can result in a fraught HRIA process and a breakdown in communication between various stakeholders.

One of the participants offered an example of an HRIA that demonstrates the potential benefits of an *ex ante* assessment. A mining project in northern Canada was assessed for its potential to negatively affect the rights of the indigenous Inuit community. Because a regulatory process existed that required *ex ante* environmental and social impact assessments (ESIA), the community's HRIA was able to work in tandem with the ESIA to assess the potential impacts of the project prior to its commencement. As a result of the collaborative ESIA/HRIA process, the community was given a seat at the decision-making table before the final mining license was signed. Accordingly, there was an appropriate channel through which recommendations from the HRIA could be communicated before operations began. This example highlights how instrumental an *ex ante* assessment can be in achieving the goals of an HRIA to prevent abuses. And although an HRIA per se was not required as part of the licensing process for this particular project, the case shows the potential for communities to use existing regulatory

processes to incorporate assessments of human rights, as well as the potential for HRIAs to be built explicitly into the regulatory approval process.

One participant who advises companies noted that an *ex ante* HRIA can enable companies and other stakeholders to more fully understand the attendant risks of a proposed project, and to negotiate accordingly before a project begins. In extreme cases, a company might even decide that the human rights risks, and the corresponding reputational risks for the company, are too high to proceed as planned; this is more likely when there is an alternative investment option that is also attractive to the company.

In the view of another participant who has experience advising private actors, companies are much more receptive to *ex ante* HRIAs if they have had trouble with previous projects because of their human rights record. Targeting such companies to harness their increased propensity to perform *ex ante* HRIAs may be useful in order to cultivate sector-wide champions of *ex ante* HRIAs. This, however, may only be useful if companies are willing to stop or modify a project on the basis of their findings, and may also be in tension with the desire to empower communities to take ownership of the HRIA process. A strategy that encourages more company-led HRIAs may also fail to take into account the frequent criticisms leveled against companies regarding their independence and credibility. These issues are discussed further below.

ii. Corresponding challenges: *ex ante* HRIAs and information asymmetry

A key challenge to *ex ante* HRIAs, however, is that they are almost impossible for communities to conduct without the cooperation of companies and governments. Two participants that work with communities concurred on this point, noting that greenfield projects are hard to identify from publicly available information. As a result, by the time the community and civil society learn of a project, contracts may already have been signed and the operational processes begun, rendering it too late to use an HRIA to influence the course and operations of a project. Additionally, even when communities are aware of a planned investment project, companies rarely disclose their business plans, which may be necessary to assess the project. In practice, companies are the main drivers of *ex ante* assessments, as they hold the relevant project information needed to thoroughly assess potential impacts.

This lack of information, regarding either the existence of a project or its key details, effectively precludes community-led *ex ante* HRIAs. One participant referenced an attempted *ex ante* HRIA by a community in Ecuador to assess the potential impacts of a mine that had not yet begun operations. The HRIA was ultimately unsuccessful, because details of the project were sparse and communities were unable to predict the potential impacts of the project. Another participant experienced a similar challenge in the context of a large HRIA of sugar plantations in multiple villages in Cambodia. Because some villages had already been affected, while others had not, community members in villages that were not yet affected could only estimate the potential impacts of the impending project based on rumors and the experiences of nearby villages. Without greater disclosure by the company or the government, the communities were unable to provide relevant evaluations grounded in facts.

The obstacles communities confront in undertaking *ex ante* HRIAs are complex, and might not be fully resolved by simply ensuring greater or more systematic information sharing by companies. During the *ex ante* stage, there may still be many unknowns, even to the company. For example, the specific site for a mine might still be undetermined. In addition, as one participant pointed out, communities may struggle to raise funding for a community-led HRIA before a project starts, because of the current absence of harm and the speculative nature of

the project. Another participant suggested that governments are better positioned than communities to conduct *ex ante* assessments, as they often have more access to information regarding a planned project.

b. The challenge of community engagement

Participants asserted that, regardless of the actor undertaking the assessment, some form of community engagement is necessary to understand the potential or actual impacts of a project on a community. Yet determining the most effective means of engaging communities can be difficult. Engagement strategies may depend in part on which actor has initiated the HRIA. For example, community-led HRIAs can facilitate both the substance and the process of community engagement. They can focus on reflecting community concerns, provide an opportunity for more in-depth community engagement, and equip local community members to address potentially long-term business operations in their communities.

Indeed, CSO-led HRIAs may attract greater community support and engagement than those led by companies, which often find community engagement the most difficult stage in the process.⁹ In addition, HRIAs conducted by community-based CSOs provide the opportunity for at least some community members to participate directly in assessing the potential or actual human rights impacts. Roundtable participants representing civil society identified community engagement as central to an HRIA. Participants noted that this engagement should start with the decision of whether an HRIA is needed, and extend throughout the HRIA process.

As identified by one participant, community engagement in both company-led and community-led HRIAs often depends on available resources and requires the prioritization of vulnerable groups. The participant noted that there should be multiple opportunities to follow up with affected people in order to hear their stories more than once. Doing so allows the assessor to develop a more accurate picture of the potential or actual harm caused by a project, and provides more opportunities for community members to feed into a process.

Yet participants acknowledged a number of recurring challenges in respect of community engagement in HRIAs, including in those led by CSOs. Participants concurred that it is often difficult to identify and properly demarcate a cohesive “community.” An example was given of a participant’s experience in assessing the human rights impacts of tobacco farming on undocumented migrant farmworkers in the United States. Identifying who belonged to this community was challenging, due to the transient nature of the community. To mitigate this challenge, the participant forged a relationship with a farmworkers union, which assisted in identifying the affected “community.”

Related to identification of a community is the issue of community cohesiveness. Power centers exist within communities, creating challenges in identifying who has the authority to represent a community. Assessors must be mindful of potential community divisions and conflicts of interest. One participant noted that there is almost never “one community.” Another participant queried whether accountability mechanisms could be built into the political organization of the community to ensure that those acting as a conduit for the community’s experiences are indeed acting in the interests of the community.

Another recurring challenge is determining what constitutes a sufficient level of community engagement and what participation in the engagement process really means. A participant

⁹ Business Social Responsibility, op. cit., Guideline 6, p. 13.

posited the idea that the number of people engaged may not be determinative of a quality HRIA; rather, ensuring that a varied group is consulted and empowered to set the priorities of the HRIA constitutes a successful engagement process. The same participant considered the channeling of community views into the ultimate decision-making process of the relevant company another indicator that the goals of engagement have succeeded. Another participant asserted that community engagement requires explaining every step of the process to communities, and providing them with the opportunity to determine their priorities and which of their rights should be examined in an HRIA. It was the view of a further participant that, in the context of international CSO-led HRIAs, community consultations may not suffice and must be expanded to encourage ownership of the HRIA. The participant explained that a community must be vested in the process in order to sustain the effects of an HRIA long after the funds allocated to the HRIA by an international CSO have been exhausted.

Participants also cautioned that some risks attached to community engagement in HRIAs. For example, participants noted that, in some contexts, an HRIA could create or exacerbate existing tensions within a community. In addition, participants agreed that expectation management was a key responsibility owed to the community assessed. In the experience of participants, there were often expectations of tangible aid, which assessors were not able to give or to compel any stakeholder to give. One participant queried what these risks meant in terms of the professional responsibility of HRIA practitioners, and how practitioners could themselves engage responsibly with a community.

c. Independence and credibility

Another challenge that arises with HRIAs – whether they are corporate-led, CSO-led, or community-led – relates to perceptions of independence and credibility. For example, company-led or company-initiated HRIAs are sometimes viewed with suspicion; in some contexts, they may be criticized as whitewashing. This may occur even when the company worked in partnership with civil society or a human rights organization. For example, one participant that has partnered with companies noted the importance of safeguards to ensure independence, such as developing the HRIA methodology independently, allowing the company to have input but keeping the final say, and not allowing the company to “vet” the final outcome or to eliminate anything from the HRIA. Despite these procedures, though, the corporate-initiated assessment still may be criticized as biased.

Such a perception of company-initiated HRIAs, including those that are undertaken in partnership with civil society, represents a key challenge faced by companies. It was the shared experience of a number of roundtable participants, however, that even with safeguards in place to ensure rigor and independence, legitimacy remains a prominent issue caused primarily by an absence of trust between stakeholders. One participant who has worked on HRIAs for both companies and communities noted that even when the same methodology was used in both community-led HRIAs and company-led HRIAs, the non-commissioning side frequently treated the results with suspicion.

As with corporate-led HRIAs, assessments conducted by civil society organizations are also subject to potential criticism. The CSO’s image, as well as its prior involvement with the issue, may affect the credibility of the assessment from the perspective of the company, the government, or other relevant actors. For example, if an organization has a track record of vigorous advocacy against the activities of foreign investors, or has a reputation of supporting

those affected by private investment activities,¹⁰ its history may prejudice its relationship with the company being assessed or its legitimacy with other stakeholders. In addition, regardless of the organization's reputation, a company may be suspicious of an HRIA if the mandate came from a CSO, as one participant noted.

The perception of independence or lack thereof affects how credible an HRIA is deemed. Yet other issues of credibility unrelated to independence also arise, given that the quality and depth of HRIAs can vary significantly. As one participant pointed out, there are a lot of "Mickey Mouse" HRIAs that fail to provide rigorous assessments. As there is no formal code of conduct governing HRIA processes, participants discussed whether an independent accreditation body could help in ensuring quality and rigor in the HRIA process.

d. Impacts and effectiveness

i. Dissemination and implementation of HRIA findings

To date, transparency and disclosure of HRIA findings differ widely. In theory, the accessibility of findings could affect whether the HRIA helps to shape outcomes. A transparent *ex ante* HRIA process can help investors or governments incorporate community perspectives into investment decisions, while a transparent *ex post* process can facilitate the provision of robust remedies by providing stakeholders with relevant information to advocate for appropriate redress. Transparent HRIAs might also help encourage longer-term measures to prevent human rights abuses, though directly linking specific measures to HRIA outcomes is difficult.

The question of who should have access to an assessment's findings once the initial stage of the HRIA is complete was discussed during the roundtable. This decision may depend in part on the intended objectives, who conducted the HRIA, and whether it was undertaken before an investment is made or after project operations have begun. For example, a company concerned with its reputation may be unwilling to open itself up to public scrutiny by widely disseminating an assessment that has uncovered human rights abuses. However, while reputation management will always remain a business consideration, a first step to repairing the relationship with the affected community in such a situation could be for the company to disclose its findings and acknowledge its responsibilities. In addition, some companies may simply believe that any findings need to remain confidential for business or other purposes. Creative ways around the "false dilemma" of confidentiality were suggested. For example, one participant noted that an HRIA's findings could be provided solely to the affected community, without disseminating it more broadly or including it on the company's website. The same participant called for transparency of the mandates provided to the assessors in addition to transparency of the HRIA findings. Another participant underscored the need for all HRIA reports, including those conducted by companies and those led by civil society, to be translated into the relevant language(s) and circulated to affected communities.

Although transparency can sometimes help facilitate the implementation of HRIA findings, whether the findings influence a company's relevant decisions depends on many more factors. In terms of CSO-led HRIAs, a company's willingness to consider the HRIA findings or to implement its recommendations may hinge on whether the recommendations align with the company's own interests, or the strength of the CSO's advocacy campaign. With respect to a company-led HRIA, the findings may influence the company's decision on whether or how to

¹⁰ Oxfam America and Rights & Democracy, "Community-based human rights impact assessments: Practical lessons" (2010), p. 7.

invest (if an *ex ante* assessment) or the development of adequate remedies to address the HRIA findings (if an *ex post* assessment) in certain situations.

For example, in the experience of one participant, the findings of HRIAs can sometimes guide investor decisions if undertaken in the planning stage of a project, as noted above. In the participant's view, the extent to which an HRIA dissuaded investors from investing in a particular country depended on whether there was an alternative investment opportunity that could be pursued. Accordingly, extractives companies whose investments are, by their nature, location-specific are less likely to be dissuaded from investing in a specific location because an HRIA uncovers a high risk of human rights abuses. Investors seeking supply chain sourcing, however, often have multiple alternative countries to invest in and are more likely to be influenced by the negative findings of an HRIA.

Moreover, in the view of another participant, the successful implementation of HRIA findings can depend on the level at which changes need to be made. Companies often find issues that can be solved at the company corporate level (for example, working hours) the easiest to resolve. In contrast, issues arising at the country level can be more difficult for companies to remedy, because of the outside actors involved who may contribute to the problem and over whom they have limited or no control, for example, the host government, contractors, or suppliers.

ii. Monitoring and sustainability

Although HRIAs generally assess the potential or actual impacts of a project or investment at a given time, participants noted that it is necessary to monitor human rights impacts throughout the project, as each HRIA only provides a "snap shot" of the current situation. Indeed, in the case of *ex post* HRIAs, the quality and sustainability of remedies related to the assessment may depend on monitoring mechanisms, which can help ensure that harmful practices do not resurface. One example drawn from environmental and social impact assessments is the Participatory Environmental and Social Monitoring Program (PESMP), a community-based monitoring mechanism that was implemented in Peru to help ensure respect for the human rights of the indigenous population affected by Hunt Oil's exploration activities.¹¹ Although this mechanism relates to ESIA's, the model highlights how community members can be trained to carry out human rights monitoring of large-scale investment projects, either designed as HRIAs or as follow-up monitoring related to concluded HRIAs. In addition, joint problem solving and cultural exchange¹² could enhance the sustainability of measures taken.

Monitoring mechanisms can be built into the methodology used for an HRIA. One participant gave the example of an HRIA of a company's supply chain in a specific country for which a monitoring action plan was developed with a human rights specialist and the company's country operations team, with follow up every few months according to a set timeline. A second HRIA was subsequently planned. In the view of a number of roundtable participants, there should be multiple HRIAs for a single project, carried out over a period of time to assess progress. Depending on the sector, such timelines can be designed to take into account the life of a project. For example, mining projects tend to have long timelines and may therefore require extended follow up. Another participant who works with an international CSO noted that communities can be involved in follow-up monitoring, and that it would be useful to provide a matrix that would assist them in continuing to monitor the impacts of a project.

¹¹ IPIECA, "Participatory environmental and social monitoring in rural Andean communities," available for download at: <http://www.ipieca.org/topic/social-responsibility/indigenous-peoples>.

¹² Oxfam America and Rights & Democracy, *op. cit.*, p. 7.

In addition to frequent monitoring, roundtable participants identified the need for effective grievance mechanisms to ensure complaints are heard and addressed on an ongoing basis and between assessments. To date, it appears that relatively few HRIAs have resulted in the creation of adequate grievance mechanisms that allow the voices of affected communities to be heard. As one participant noted, assessing how to link HRIAs with grievance processes would be useful.

Funding is also a long-term challenge to the sustainability of specific HRIAs and their outcomes, particularly because resources are needed for any subsequent monitoring or additional HRIA processes. Civil society participants identified the common problem of receiving funding for a pre-determined period of time, which usually spans one to two years. After this period, there are often no resources to fund continuing monitoring processes. Without monitoring of the ongoing impacts, the HRIA loses efficacy. This is particularly important because, as one participant pointed out, an HRIA cannot solve anything on its own; rather, an HRIA must feed into a plan to ensure that its recommendations are followed and appropriate action taken. Limited resources make this a challenge.

iii. Relationship building

HRIAs can offer opportunities to build relationships between a company and a community. One participant described learning in the course of an HRIA that community members had no way to communicate their grievances to the company or government. The participant believed that the HRIA could help connect the different stakeholders and facilitate their communication. Yet as another participant pointed out, the quality of the relationship between the community, civil society organizations, and the company can depend on multiple factors, including the project stage, the severity of any human rights abuses, the relevant history of the area or project, and the objectives of the organization undertaking the assessment.

The impact of HRIAs on stakeholder relationships can also be complex. In the experience of some participants, when a CSO-led or community-led HRIA begins, relationships between stakeholders may be relatively congenial. As the process continues, however, relationships may sour. For example, one participant pointed to an HRIA in the Philippines that weakened stakeholder relationships as the assessment progressed, due in part to the community's perception of limited access to information and project sites. Relationships may fracture even further where there are different perspectives within the community on whether a project is beneficial for the community. Yet experience of an HRIA undertaken in Peru illustrates that good stakeholder relationships are possible to maintain throughout the process, and that strong relationships with government policymakers or other decision makers can assist with the implementation of HRIA recommendations.

One obstacle to building relationships between communities and companies through HRIAs relates to how to address past grievances. In the experience of one participant, the proposed expansion of a gold mine in Ecuador caused an explosive reaction from the community because previous grievances had gone unanswered. Because community members felt they had been deceived in the past, they were unwilling to provide a social license to operate, even with reassurances from the company that the relevant concerns would be addressed.

iv. Moving forward

The persistent challenges that companies, civil society representatives, and communities confront in undertaking robust HRIAs that strengthen relationships and result in positive change led some participants to ponder what strategies could be used to improve HRIAs. As noted above, one participant asserted that an accreditation body should be established to ensure the credentials of human rights impact assessors, thereby addressing concerns of independence and credibility. The ideal vision of another participant would be the creation of an independent central HRIA body, funded by governments, companies, and donors in order to carry out HRIAs. The participant argued that this would help address concerns about the sustainability of the HRIA framework. As identified by another participant, however, the biggest obstacle to such a body might be the sovereignty of governments and their reluctance to invite outside agencies onto their territory to carry out human rights due diligence. Indeed, even HRIAs in their current form attract controversial reactions from governments. As one participant noted, governments sometimes believe that their actions are being assessed, rather than those of the companies, which may make government officials reticent to assist in places where their direct or tacit approval may be useful.

Another suggestion that was raised several times during the roundtable was the idea of a multi-stakeholder effort in conducting HRIAs. A collaborative approach that involved all relevant actors throughout the process, from the conception of an HRIA to the implementation of its findings, could conceivably address some of the challenges identified and enhance stakeholders' ability to ensure a more continuous monitoring of potential or actual human rights impacts. The success of such an effort might depend on the stage of an investment project and the timing of the HRIA. As one participant noted, *ex ante* HRIAs provide the most potential for successful collaborative partnerships. In order for an HRIA to be collaborative, the mandate should not come solely from a company or the community; rather, both could work together at the start of the process to determine the mandate. Such a collaborative effort could help avoid the potential for "competing HRIAs" that can create or exacerbate adversarial relationships.

CONCLUSION

Human rights impact assessments of large-scale foreign investments are increasingly used by companies, communities, and civil society, as both a preventative tool to assess risks and an advocacy tool to seek the redress of harms. The increased prominence of HRIAs has led to more refined methodologies by some practitioners, but limited oversight of the field has also expanded the number of weak assessments.

Certain issues in respect of HRIAs are easy to identify but harder to address. For example, while *ex ante* assessments that occur before a project is implemented are frequently optimal for both companies and communities, the limited information that exists at that time can render such an assessment impossible for some stakeholders to undertake. Similarly, while community engagement may be critical for the success of an HRIA, determining the proper process of engagement, as well as who comprises the "community," can be difficult for both companies and civil society to get right in practice.

Indeed, all stakeholders undertaking HRIAs confront challenges, many of which are pertinent irrespective of which actor initiated the assessment. Critics may question the independence or credibility of an assessment led by a company or by a CSO, and the levels of trust between companies and communities may mean that neither side is willing to accept an assessment conducted by the other. In addition, companies and CSOs may grapple with which information

to disclose and how to ensure its accessibility, as well as how to ensure the sustainability of an HRIA and the requisite monitoring that it would require. Moreover, companies, civil society representatives, and community members must think carefully about whether an HRIA will hurt or harm relationships between different stakeholders or within communities, and consider how they can use HRIAs to build or strengthen relationships rather than weaken them.

The challenges that exist are daunting, but not insurmountable. Roundtable participants flagged the distinct ways that HRIAs can be used and identified accompanying best practices. Participants further posited ideas for addressing the remaining obstacles, ranging from smaller steps that companies or CSOs can incorporate in their own processes, to larger ideas that could potentially shift the way that HRIAs are undertaken in the future. The roundtable provided an opportunity to reflect, to share experiences, and to brainstorm ways of moving forward. It is hoped that this outcome document can support a continuing discussion of these issues.