

The Proyecto de Derechos Económicos, Sociales y Culturales, A.C. (ProDESC) is an NGO that was founded in 2005 with the goal of providing integral defence through legal, advocacy, organizational and research support, to communities and workers suffering from increasing levels of poverty and declining economic, social and cultural rights (ECSRs) throughout Mexico.

Since 2005, ProDESC has built successful campaigns that have promoted and defended communities' and workers' rights vis-à-vis transnational companies, written wide-ranging reports exposing human rights violations in several industries throughout Mexico, and fostered transnational collaboration to ensure protection for migrant workers in a global economy.

For more information, please see our website: <http://www.prodesc.org.mx/>

1. Have you identified any violations of the rights to water and/or sanitation? If yes, please explain.

In the course of ProDESC's work, we have witnessed violations of the rights to water and sanitation being caused as a result of mining activity all over the country. Large mining companies, the States where these companies have their headquarters and the Mexican State are responsible for these human rights violations.

Mining projects in Mexico directly affect the right to water in two ways: (1) Large volumes of water are used for the exploitation of natural resources, often in areas where water is extremely scarce, thus significantly reducing the amount of water available to local populations for personal consumption and for sanitation and agricultural purposes; and (2) The large volumes of water used in the mining process are often rendered unfit for domestic or agricultural use due to contamination.

These violations of the right to water and sanitation lead to a host of subsequent human rights violations. Mining projects in Mexico are often located in extremely marginalised areas, populated by small, agricultural, often indigenous, communities. The failure of mining companies to treat waste water before dumping it on the land surrounding the mine site over a sustained period of time can cause irrevocable damage to the land. The damage caused to the land is exacerbated by the depletion of the already scarce supply of water as a result of the copious amounts being used by mining companies.

This damage directly impacts upon communities' agricultural activities upon which they rely for their subsistence. This in turn threatens the rights to life and physical integrity,¹ health,² development,³ a

¹ Article 6 (1) of the International Covenant on Civil and Political Rights, ratified by Mexico in 1981, declares, "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Article 5(1) of the American Convention on Human Rights, ratified by Mexico in 1981, states, "Every person has the right to have his physical, mental, and moral integrity respected."

² Per Article 12(1) of the International Covenant on Economic, Social and Political Rights, ratified by Mexico in 1981, "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

³ See UN Declaration on the Right to Development, adopted 4 December 1986, A/RES/41/128.

healthy environment,⁴ and in the case of indigenous communities, their rights connected with the free administration of their land and resources⁵ and their cultural integrity.⁶

As you are aware, in its General Comment No. 15, the Committee on Economic, Social and Cultural Rights includes the following as part of States' obligations in relation to the right to water: "Environmental hygiene, as an aspect of the right to health under article 12, paragraph 2 (b), of the Covenant, encompasses taking steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water conditions. For example, States parties should ensure that natural water resources are protected from contamination by harmful substances and pathogenic microbes."⁷ In addition, the UN Guiding Principles on Business and Human Rights clearly set out the obligations of business enterprises to respect human rights.⁸

In spite of these obligations, the Mexican State regularly fails to oblige mining companies to comply with their obligations by treating wastewater, and this contaminated water is often used for agricultural purposes, thereby causing irrevocable damage to the land. For example, ProDESC commissioned an independent study of the wastewater being used for agricultural purposes in Durango which flows in large quantities from Excellon Resources Inc.'s La Platosa mine. The study found that the water had five times more arsenic than it should for human consumption and was unsuitable for agricultural use. The water also had high levels of salt. Water with this level of salinity can permanently damage the soil rendering it unusable for agriculture.⁹

This situation persists in spite of the fact that Excellon committed to building a water treatment plant in the land rental contract they signed with the local communal landowners, as required by law. The unsuitability of the water for agricultural use and the company's failure to build a water treatment plant is causing both environmental damage and conflict within in the locality. Because Excellon must constantly pump water out of the mine to continue operations, it has disposed of water on communal land, private property, and even onto areas surrounding the federal highway that borders ejido property. Farmers not from the Ejido planting crops on Excellon's private property are using the company's untreated water for agricultural purposes.

⁴ Per Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", ratified by Mexico in 1996, "Everyone shall have the right to live in a healthy environment and to have access to basic public services."

⁵ These rights are grounded in Convention no. 169 of the International Labour Organisation, ratified by Mexico in 1990, in particular Articles 13-20, as well as the UN Declaration on the Rights of Indigenous Peoples, adopted 13 December 2007, A/61/L.67, Articles 12, 13, 20, 25-28, 30-32 and 36.

⁶ The right to cultural integrity incorporates a number of different rights, such as the protection of their social, cultural, religious and spiritual values and practices; the right to decide their own priorities for the process of development as it affects them; the special relationship of indigenous peoples with their lands or territories; and the right to maintain, control, protect and develop their cultural heritage, as set out in Articles 5, 7 and 13 of Convention no. 169 of the International Labour Organisation and Articles 5, 11 and 31 of the UN Declaration on the Rights of Indigenous Peoples.

⁷ General Comment No. 15, Committee on Economic, Social and Cultural Rights, E/C.12/2002/11, para. 8.

⁸ UN Guiding Principles on Business and Human Rights, Principles 11-24.

⁹ For more on this case, please refer to http://www.prodesc.org.mx/en/?wpfb_dl=18; <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2013&dliid=220457#wrapper>, Section 7.

There are several laws in place to prevent such violations from occurring. Under Federal Mining, Water, and Environmental Law, and Durango State Environmental and Water Law, Excellon is required to treat all extracted and disposed water.¹⁰ Excellon has a right to take water out of the mine under mining law but must treat it before releasing it onto other lands.¹¹ However, the reality is that these laws and similar laws in other states are rarely enforced, allowing mining companies to infringe upon the right to water with impunity.

The UN treaty bodies have repeatedly insisted that States must take measures to prevent business enterprises under their jurisdiction from violating human rights abroad. In relation to the right to water, the UN Committee on Economic, Social and Cultural Rights has been very clear in this regard: “Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.”¹² Similarly, in 2012, in its Concluding Observations on Germany, the Human Rights Committee stated that the State should “set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations” and should “take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad”.¹³

Notwithstanding these obligations, in our experience foreign mining companies operating in Mexico almost always operate with the unconditional support of the State where they are based. Of the 285 foreign mining companies operating in Mexico, over 70% are based in Canada.¹⁴ The Canadian Government has been roundly criticised for its failure to uphold its human rights obligations with respect to the activities of Canadian mining companies abroad. For instance, in the damning 2013 report *Corruption, Mining and Canadian Mining in Mexico: The Case of Blackfire Exploration and the Canadian Embassy*, the Canadian authors emphasise that “... the objectives of the Canadian Embassy in Mexico are narrowly aligned with those of Canadian mining companies, and are clearly out of step with its CSR strategy and Canada’s international obligations to promote universal respect for human rights.”¹⁵ In that particular case, the mining activities had impacted on the right to water by causing

¹⁰ See Art. 27 Ley Federal de Minera (LM); Art. 124 Reglamento de la Ley de Aguas Nacionales (RLAN); Art. 416 Código Penal Federal; Art. 86, 88, 90, and 94 Ley de Gestión Ambiental Sustentable para el Estado de Durango (LGASED); Art. 146, Ch. III LGASED.

¹¹ Art. 27, LM.

¹² General Comment No. 15, Committee on Economic, Social and Cultural Rights, E/C.12/2002/11, para. 33.

¹³ Human Rights Committee, Concluding Observations: Germany, UN Doc. CCPR/C/DEU/CO/6, para. 16.

¹⁴ http://www.economia.gob.mx/files/comunidad_negocios/industria_comercio/informacionSectorial/minero/anuario_mineria_mexicana_2012_ed2013.pdf

¹⁵ J Moore and G Cosgrove, *Corruption, Mining and Canadian Mining in Mexico: The Case of Blackfire Exploration and the Canadian Embassy*, p. 31, available at http://www.miningwatch.ca/sites/www.miningwatch.ca/files/blackfire_embassy_report_eng_0.pdf.

several streams which provided drinking water to dry up and by contaminating several rivers, thereby impacting on the health of the local people.¹⁶

2. What do you regard as the structural causes and underlying determinants of the human rights violations you have identified? How do these relate to power relationships between various groups and sectors of society?

The UN Committee on Economic, Social and Cultural Rights has made it clear that States are responsible for protecting the right to water from interference by third parties.¹⁷ However, despite the fact that Federal Law requires mines to treat all extracted and disposed water, these laws are often not implemented or enforced. General Comment No. 15 highlights the failure to enforce relevant laws as a violation of the right to water.¹⁸

Another cause of the systematic violation of the right to water as a result of mining activities is the failure of mining companies to exercise due diligence or to meaningfully engage with stakeholders, for example in respecting the right to free, prior and informed consent of indigenous communities, thereby failing to comply with several international instruments, such as the OECD Guidelines for Multinational Enterprises.

In Mexico, the power relationships are stacked completely in favour of large businesses. With regards to mining, some of the most influential Mexican businessmen own controlling stakes in large mining companies. Carlos Slim's Minera Frisco is a case in point. As for foreign mining companies, the unconditional support of the Canadian Government for companies based in Canada has already been mentioned. This bias is also evident in the delaying tactics employed in relation to freedom of information requests made in Canada in relation to alleged human rights abuses suffered as a result of mining operations.¹⁹

To compound this situation, the Peña Nieto administration has demonstrated the clear intention to support the interests of big business since entering office in December 2012. One need only consider the raft of reforms which have been passed in the last year to see the truth of this statement. These reforms have, among other things, opened up the energy sector to increased private investment and made the hiring, firing and subcontracting of workers much easier for employers, severely impacting on labour rights in the process. Meanwhile, any attempts to include measures to combat corruption have been struck down.

¹⁶ Ibid p. 16.

¹⁷ General Comment No. 15, Paragraph 23 states, "The obligation to protect requires State parties to prevent third parties from interfering in any way with the enjoyment of the right to water. Third parties include individuals, groups, corporations and other entities as well as agents acting under their authority. The obligation includes, inter alia, adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems."

¹⁸ General Comment No. 15, Committee on Economic, Social and Cultural Rights, E/C.12/2002/11, para. 43.

¹⁹ <http://www.newswire.ca/en/story/1197339/harper-government-withholds-documents-on-controversial-canadian-mining-company>.

The make-up of the Mexican National Contact Point (NCP) to the OECD provides a further example of this unbalanced power dynamic. NCPs are responsible for, inter alia, promoting the OECD Guidelines for Multinational Enterprises and investigating complaints regarding alleged violations of the Guidelines. Governments are afforded much flexibility in the way they organise NCPs,²⁰ and the Mexican Government has organised its NCP with the clear intention of preventing the NCP from restricting the operations of business enterprises in Mexico, regardless of whether or not they are in line with the Guidelines. It is no surprise that the Mexican NCP regularly decides that complaints do not warrant further investigation in processes laden with procedural flaws,²¹ given the fact that it operates under the supervision of the Mexican Ministry of the Economy in the General Directorate for Foreign Investment.

According to General Comment No. 15, “Water should be treated as a social and cultural good, and not primarily as an economic good.”²² However, the focus of the Mexican authorities on attracting foreign investment and the prioritisation of business operations over human rights, allied with the unconditional support of foreign governments for companies based under their jurisdiction and the refusal of these companies to comply with their human rights obligations, all combine to prevent this aspiration from becoming reality.

3. Have you identified particular groups and individuals whose rights have been violated disproportionately? Which individuals and groups?

In our experience, mining activities in Mexico disproportionately affect the right to water of indigenous and other rural communities. 61% of mining concessions in Mexico are concentrated in the northern states of Sonora, Durango, Chihuahua, Zacatecas and Coahuila.²³ According to official statistics, 28.3% of Mexico is made up of arid land and a further 23.7% is semi-arid.²⁴ Much of this arid land is situated in the north of the country, including the five states mentioned above where much of the mining activity in Mexico takes place. The mines in these states are located in rural areas, usually populated by indigenous peoples or other communities that rely on farming for their subsistence.

In this regard, special attention ought to be paid to Paragraphs 7 and 8 of General Comment No. 15. Paragraph 7 states, “Attention should be given to ensuring that disadvantaged and marginalized farmers, including women farmers, have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology.”²⁵ Per Paragraph 8, “Taking note of the duty in article 1, paragraph 2, of the Covenant, which provides that a people may not “be deprived of

²⁰ See OECD Guidelines for Multinational Enterprises, 2011 Edition, p. 71.

²¹ For instance, see <http://www.prodesc.org.mx/en/?p=596>.

²² General Comment No. 15, Committee on Economic, Social and Cultural Rights, E/C.12/2002/11, para. 11.

²³ http://www.economia.gob.mx/files/comunidad_negocios/industria_comercio/informacionSectorial/minero/anuario_mineria_mexicana_2012_ed2013.pdf

²⁴ See http://www.conabio.gob.mx/institucion/cooperacion_internacional/doctos/dbt_mexico.html.

²⁵ General Comment No. 15, Committee on Economic, Social and Cultural Rights, E/C.12/2002/11, para. 7.

its means of subsistence”, States parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples.”²⁶

As you will be aware, mining operations use enormous quantities of water for the exploitation of minerals. In La Platosa mine in Durango, the Canadian company uses between 1,000- 1,200 litres of water per second in carrying out its activities. The local water authority SEDEAPA has expressed concern regarding the effect this is having on regional supplies of potable water; however, nothing has been done to put a halt to this situation.²⁷ This is despite reports stating that the mine is using half of the total amount of water being used in this arid region which is suffering from a multi-year drought.²⁸

Companies’ unfettered access to water supplies, even in arid areas, reduces the amount of water available for consumption, sanitary and agricultural purposes. The State thus risks failing to uphold one of its basic obligations with respect to guaranteeing the right to water: “In particular, States parties should take steps to ensure that: (h) Groups facing difficulties with physical access to water, such as older persons, persons (...) living in arid and semi-arid areas (...) are provided with safe and sufficient water.”²⁹

As mentioned above, the violation of the right to water of these rural and indigenous communities leads to a whole host of other human rights violations, thereby threatening the survival of entire communities.

4. What activities do you undertake to monitor the realization of the human rights to water and/or sanitation and alleged violations?

Within the broad range of actions we take for the defence of economic, social and cultural rights, we have on occasion commissioned independent studies of water being emitted by mines. In the case of La Platosa mine, the study we commissioned found that the water had five times more arsenic than it should for human consumption and that it had very high levels of salt. The study found that this water could render land unsuitable for agricultural production.

5. Have you taken any cases on the rights to water and/or sanitation to court? If yes, please elaborate.

We are currently representing the Ejido La Sierrita de Galeana in their suit for the rescission of the land rental contract with Excellon Resources Inc. Although this lawsuit is centred on the multiple contract breaches committed by the company, we are also arguing against the numerous human rights breaches that are involved, including the violation of the right to water. This lawsuit is currently approaching its conclusion.

²⁶ General Comment No. 15, Committee on Economic, Social and Cultural Rights, E/C.12/2002/11, para. 8.

²⁷ See <http://www.elsiglodetorreon.com.mx/noticia/955000.pediran-ayuda-a-conagua-para-frenar-a-la-platosa.html>.

²⁸ See http://tv.milenio.com/region/Mina-Platosa-gasta-agua-municipio_3_230407005.html.

²⁹ General Comment No. 15, Committee on Economic, Social and Cultural Rights, E/C.12/2002/11, para. 16(h).

6. Have you been involved in procedures before other accountability mechanisms? If yes, please elaborate.

We previously filed a complaint (*denuncia popular*) before the Federal Attorney for Environmental Protection (PROFEPA) in relation to the damage being caused due to the dumping of residual water from Excellon's mine onto the surrounding land. The expert appointed by PROFEPA to investigate found that there were environmental irregularities that could lead to sanctions against the company and he initiated the corresponding administrative proceeding. However, the delegation of the Ministry for the Protection of the Environment (SEMARNAT) in Durango immediately closed the administrative proceeding, declaring that there was not sufficient damage to warrant a sanction.

In relation to the same case in Durango, ProDESC filed a complaint against Excellon before the Mexican and Canadian NCPs in 2012. Among the allegations made in this complaint was the violation of the right to water arising out of the company's refusal to build a water treatment plant. The Mexican NCP took the lead in investigating the complaint and demonstrated clear bias in favour of the company throughout the flawed investigation which did not respect the OECD Guidelines. In its initial assessment, the Mexican NCP ruled that although the matters raised were material, they were not sufficiently substantiated, and decided not to offer its good offices.³⁰

7. Have you sought to address the lack of policy design or policy implementation, the failure to take steps, the failure to take targeted measures, the lack of sufficient budgetary allocation or similar failures? How have you framed these failures as human rights violations? What standards of review have you relied on?

ProDESC's activities in the case involving La Platosa mine in Durango have included an important advocacy element. This advocacy has included dialogue with Federal and Durango State authorities and it has centred on the human rights violations being suffered by the communal landowners of La Sierrita and La Platosa mine workers as a result of the actions and omissions by the Mexican State and the company. Furthermore, ProDESC has also met with Canadian authorities on several occasions in order to discuss their human rights obligations in relation to the actions of Canadian companies operating in Mexico. These efforts have encompassed a whole range of human rights, among them the right to a healthy environment and right to water.

8. Have you sought to address and seek remedies for discriminatory practices? Have you sought to address structural inequalities in the realization of the rights to water and/or sanitation? If yes, please elaborate.

All of ProDESC's work seeks to bring about structural changes to improve the realisation of economic, social and cultural rights. ProDESC seeks to address and seek remedies for human rights violations

³⁰ After visiting Mexico to investigate the complaint and its handling, the Trade Union Advisory Committee to the OECD (TUAC) was particularly scathing in its assessment of the Mexican NCP's handling of the complaint: <http://www.tuaoecdmguidelines.org/CaseDescription.asp?id=163>.



being suffered by marginalised groups of people by providing them with the tools they need to defend their rights and by assisting them with legal, community-organising, training, advocacy and other activities.

ProDESC takes on cases of a landmark nature which have the potential to set important precedents and to generate real change. In relation to the right to water, our case in Durango seeks to set a precedent requiring mining companies to respect the human rights of the communities where their operations are located. In these arid areas, clean water is vital in creating the necessary conditions to lead a dignified life.