CHAPTER 13

Human Rights Compliance in Investment Activities: Some Challenges from the New Latin American Constitutionalism

Fernando Bruno Escobar Pacheco

1 Introduction

Considering some paradigmatic cases such as the Watergate case or scandals like Enron, Parmalat, Siemens, Lehman Brothers, Odebrecht, etc., there is a growing global trend that allows us to affirm that we are in the Century of Compliance.[1]

Defining Compliance is practically impossible because it has a multitude of applications and meanings that exceed the possibility of having a definition that encompasses all the practical implications of this concept.

In Part 1 of the book "The Handbook of Compliance," regarding the approaches to Compliance, we can see aspects as diverse as a matter of cost and benefits, ethical behavior, operational management, and liability risk management.[2]

For example, the article "Constructing the Content and Meaning of Law and Compliance" argues that compliance is not simply a matter of following the rules but also involves the social construction of what is considered legal and legitimate.[3]

In that context, compliance is how social actors, regulators, companies, and citizens influence the construction of the content and meaning of law. A very interesting place to identify these components is the jurisprudence of the courts.

1 Benjamin van Rooij and D. Daniel Sokol, "Introduction: Compliance as the Interaction between Rules and Behavior," in *The Cambridge Handbook of Compliance*, eds. Benjamin van Rooij and D. Daniel Sokol (Cambridge: Cambridge University Press, 2021), 1–11.

2 *Id.*

3 Shauhin A. Talesh, "Constructing the Content and Meaning of Law and Compliance," in *The Cambridge Handbook of Compliance*, eds. Benjamin van Rooij and D. Daniel Sokol (Cambridge: Cambridge University Press, 2021), 77–94.

 | DOI:10.1163/9789004715158_015

Beyond the discussions and implications, compliance has two practical effects to highlight: (1) it allows companies to take preventive measures to minimize risks related to non-compliance with regulations, and (2) it enables companies to anticipate the existence of potential litigation and, if it occurs, minimize its unfavorable consequences.

Under this perception, compliance is a risk prevention mechanism, but it is also a strategic way to deal with litigation from its earliest stage, with the aim of having an advantageous position from the beginning.

This chapter does not intend to clarify the theoretical problem of the nature of compliance. Instead, it addresses a trend that will continue to grow in the coming years, usually referred to as the "business and human rights" (B&HR) phenomenon.

This chapter addresses this phenomenon in two dimensions: first, the scope of research will be limited to Latin American countries and secondly, and more specifically, to the right to a healthy environment and its interconnection with human rights. These parameters have been chosen for several reasons. First, investments in Latin America will continue to increase in the coming years, especially in relation to the exploitation of natural resources. Second, Latin American constitutionalism and international developments and jurisprudence on environmental protection are growing. Third, this narrow right is considered an area of special exposure for transnational companies that invest in Latin America due to the implications that the right to a healthy environment can have on their investments.

For these reasons, the main objective of this research focuses on considering certain aspects of "due diligence" work on B&HR that companies must take into account when assessing the possible implications of the right to a healthy environment on their operations.

Being aware that the right to a healthy environment, in practical terms, can encompass numerous imaginable cases and situations, I specify the scope of the analysis in three specific themes:

(i) The recognition of the right to a healthy environment as an autonomous and justiciable right by the Inter-American Court of Human Rights, including the protection of nature as a holder of subjective rights;
(ii) The interrelation between the protection of the right to a healthy environment and the rights of indigenous peoples; and
(iii) The interrelation between the right to a healthy environment, the sovereignty over natural resources of states, and the potential impact on dispute resolution systems.

In these three areas of analysis, one theoretical reality cannot be overlooked, and that is the current focus of constitutionalism on the justiciability of fundamental rights and its horizontal effect between individuals.

If we analyze human rights in its historical context, we will find that it is associated with citizen prerogatives aimed at containing the power of the State; that is why human rights are traditionally distant from considerations of relationships between individuals.

The phenomenon of constitutionalization[4] of the law has generated a new perspective on human rights, which have become legal institutes that coexist alongside the traditional structures of Civil Law.

There are legal systems exposed to this phenomenon of constitutionalization, but undoubtedly, it is a global one. Today, fundamental rights play an essential role internationally and locally in understanding the functioning of the law.

In this process of positioning fundamental rights in legal systems, the discursive phenomenon of Business & Human Rights has emerged in the last three decades. The evolutionary process grew from ideas of corporate social responsibility, through voluntary compliance standards, to the current state where the existence of obligations to respect and comply with fundamental rights by companies is becoming increasingly evident.

In that sense, it can only mean that Civil Law, which is important for our traditionally Roman-inspired legal systems, is experiencing a displacement of constitutional procedural mechanisms that have an increasingly greater impact on the relationships between individuals.

In this context, governments are progressively assuming more responsibilities in terms of respecting national and international human rights standards. This global trend makes considerations related to fundamental rights substantial for any transnational operation or international business. Therefore, today, provisions on human rights and/or fundamental rights can be seen as "risk" scenarios for companies.

The lack of anticipation by companies of the "risks" associated with human rights and/or fundamental rights can result in liabilities like potential

4 "Constitutionalisation involves the attempt to subject all governmental action within a designated field to the structures, processes, principles, and values of a 'constitution'. Loughlin, Martin, 'What is Constitutionalisation?'" in Petra Dobner, and Martin Loughlin (eds), *The Twilight of Constitutionalism?*, Oxford Constitutional Theory (Oxford, 2010; online edn, Oxford Academic, 1 May 2010), https://doi.org/10.1093/acprof:oso/9780199585007.003.0003, accessed 24 May 2024.

administrative and criminal sanctions, civil consequences, loss of financing, increased operating costs, and damage to corporate image.

Technical and specialized knowledge focusing on the prevention of human rights issues can be indispensable for any company with intentions to operate globally. In this context, as previously mentioned, we will analyze three specific topics in the context of the right to a healthy environment. However, it is important to contextualize the theoretical position of Latin American constitutionalism beforehand.

2 The Right to a Healthy Environment in Latin America

2.1 *The Context of the New Latin American Constitutionalism*

The new Latin American constitutionalism is a phenomenon of recent years that describes the latest wave of constitutional reforms that took place in the late 20th century and early 21st century.[5] This new constitutionalism is characterized by the inclusion of new social, economic, and cultural rights in the constitutions of the region, as well as greater citizen participation and increased protection of human rights.

However, as Roberto Gargarella points out, it is not only innovation, in many cases it is seen as a continuation of the "old" constitutionalism in terms of the organization of the state, with the inclusion of rights that have not necessarily changed the reality.[6]

In that sense, there is continuity with the "old" constitutionalism in Latin America because despite the more recent constitutional reforms, the organization of power remains elitist and authoritarian in many constitutions of the region. Additionally, although new social, economic, and cultural rights have been included in the constitutions, they are not always effectively protected or guaranteed by the states.

Some of the paradigmatic countries in the implementation of the new Constitutionalism are Colombia, Ecuador, Bolivia, and Venezuela. However, in the practice of the courts, there is evidence of the influence of the new Constitutionalism in other countries of the region such as Argentina or Brazil,

5 Constitution of Colombia 1991; Constitution of Venezuela 1999; Constitution of Ecuador 2008; and the Constitution of Bolivia 2009.

6 Roberto Gargarella, "Sobre el 'Nuevo constitucionalismo latinoamericano'," Revista Uruguaya de Ciencia Politica 27, no. 1 (May 2018): 109–29, http://www.scielo.edu.uy/scielo.php?script=sci_arttext&pid=S1688-499X2018000100109&lng=es&nrm=iso>. ISSN 0797-9789.

or judicial practices that have common features among certain legal rules that tend to assign a central role to fundamental rights in legal systems.

Indeed, as Gargarella points out:

> In any case, the truth is that during these years, the second major 'hallmark' of regional constitutionalism emerges: robust, extensive, and generous declarations of rights. Gradually, different countries in the region began to produce declarations of rights inspired by the Mexican example: Brazil in 1937, Bolivia in 1938, Cuba in 1940, Ecuador in 1945, Argentina in 1949, and Costa Rica in 1949 were some of them.[7]

The author agrees with Gargarella (2018) that this "new constitutionalism" is not as innovative as some present it and is rather a reflection of the process of constitutional transformations in Latin American countries since their independence.[8] The so-called "new constitutionalism" simply reinforces some of the features already well present in the constitutional framework of Latin America. After the last wave of reforms, we find that the organizational part of the new constitutions continues to be characterized by a politically concentrated and territorially centralized power structure, while the doctrinal part continues to stand out due to the presence of robust, generous, and extensive declarations of rights that combine various types of individual and social rights. In other words, the "double hallmark" that began to define Latin American constitutionalism from the early 20th century remains as relevant as ever.

Stating the above does not imply that the "new" Latin American constitutionalism has achieved little, that it has not sufficiently innovated, or that it has not accomplished anything significant. The author simply points out that the old structures remain intact, which is very relevantto recognize the institutional stage in which Latin American countries are and the kind of constitutional problems they face. Next, the author will briefly review what today's Latin American constitutionalism offers before delving into its critical analysis.

However, there is no doubt that there are some new elements in the Latin American Constitutions, including – particular to my research – the existence of new fundamental rights such as the rights of nature and indigenous peoples. There is a stronger rhetoric defending national sovereignty, the protection of

7 *Id.*
8 *Id.*

natural resources, the environment, human rights, and prioritizing "national" interests over "foreign" interests.

It is particularly valuable that these Constitutions have a reinforced vision of protecting the rights of indigenous peoples and nature as rights-holders. However, there is a conceptual difficulty in showing how these new incorporated rights are linked to pre-existing rights.

This existential difficulty of conflicting conceptions is present in Bolivian constitutional jurisprudence and manifested with extreme clarity. Despite the creation of a "new" and "plurinational" institutional structure in Bolivia in 2009, the majority of constitutional jurisprudence developed between 1999 and 2011 by the Constitutional Court of Bolivia is based on the Political Constitution of the State of 1967 with reforms in 1994, and continues to be an essential source of inspiration for the judgments issued by the Plurinational Constitutional Court of Bolivia.[9]

Likewise, this existential difficulty is manifested in normative contents that appear irreconcilable and require at least a series of reflections. In this case, we will analyze some intersectional novelties of Bolivia's 2009 Constitution, such as the right to a healthy environment, the rights of indigenous peoples, the rights of nature, and the constitutional approach to foreign investment, including methods of dispute resolution.

To organize these ideas, this research is summarized into three components: (1) the rights of nature and indigenous peoples; (2) the regime of foreign investment; and (3) the rights to private property, legal security, and access to justice for foreign companies. These sections will analyze the reality of Bolivia's constitution and incorporate criteria that are transversal to the so-called vision of Latin American constitutionalism.

---

9 This was something that inspired a book in 2009 (Fernando Escobar Pacheco, *Jurisprudencia constitucional en la nueva constitución política del estado: primera parte: consideraciones sobre democracia, estado de derecho, derechos humanos y derecho procesal constitucional* (Ediciones Mi Jurisprudencia, 2009), in which the author systematized the constitutional jurisprudence prior to the 2009 Constitution and aligned it with the normative developments of the new Constitution. Time proved the book right in the sense that, after 12 years of its implementation, these jurisprudential criteria are still being used by the Constitutional Court of Bolivia. The book's position was criticized by Bartolomé Clavero in his work Bartolomé Clavero Salvador, "Tribunal Constitucional en Estado plurinacional: el reto constituyente de Bolivia," *Revista española de derecho constitucional* 32, no. 94 (January–April 2012): 29–60, who argued that the legitimacy of post-2009 constitutional jurisdiction comes from a plurinationality that was previously lacking (referring to the previous Constitution). Hence, he stated, "[n]o value can finally preserve the previous Bolivian constitutional jurisprudence for the work of the TCP, although there are those who insist that not only should it be retained but also that it should be prevalent" (referring to the reflections contained in the mentioned 2009 book).

This section will address three topics considered special and important from the perspective of B&HR with a particular focus on Latin American constitutionalism. Section 2.2 details the right to a healthy environment. Section 2.3 speaks to the applicability of consultation as a human right of indigenous peoples. Finally, Section 2.4 outlines the relationship between constitutional law and arbitration.

2.2 *The Right to a Healthy Environment in Latin America*

The right to a healthy and sustainable environment constitutes a paradigmatic link to the foreseeable change in human rights in the coming years. This right has the potential to generate a paradigm shift in the overall understanding of fundamental rights.

What practical effects can the right to the environment have? First, it is important to note that the right to a healthy environment is considered a third generation right. The concern for environmental protection initially emerged at the international level due to the need to regulate technological development, which began posing significant threats to human health and life on a global scale.

This international concern, which manifested through the recognition of an associated human right (such as the Rio Declaration's principle 1, Article 11 of the Additional Protocol to the American Convention on Economic, Social, and Cultural Rights, or Article 24 of the African Charter on Human and Peoples' Rights), has been subsequently incorporated into constitutions, starting with Greece, Portugal, and Spain, that paved the way for the widespread inclusion of provisions on environmental protection since the 1980s.

The right to a healthy environment is recognized as a fundamental right in many constitutions around the world, and has been gaining international recognition as an autonomous human right. The United Nations Human Rights Council's approval of Resolution A/HRC/48/L.23/Rev.1 on October 5, 2021, which explicitly recognized the right to a safe, clean, healthy, and sustainable environment as an important human right for the enjoyment of other human rights, signifies the recent international establishment of this right. Considering recent events and the complex reality of the planet, it can become a central fundamental right.[10]

10 "The human right to a safe, clean, healthy and sustainable environment," United Nations Human Rights Council, October 5, 2021, 3, available at https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/48/L.23/Rev.1 ("1. Recognizes the right to a safe, clean, healthy and sustainable environment as a human right that is important for the enjoyment of

The right to a healthy environment has a newer origin compared to other fundamental rights. This is because the right was not taken into account at the time of drafting the Universal Declaration of Human Rights and the International Covenants on Human Rights I and II. Its emergence came later, primarily at the national level. There are many Constitutions that recognize it, although not always with the same wording. Over 100 states have recognized the right to a healthy environment in some form through international agreements, their constitutions, laws or policies, among other instruments.

In practice, other recognized human rights, such as the right to life and health, have been applied to address environmental issues. Human rights bodies have identified that environmental damage affects the full exercise of human rights and have established that states have human rights obligations to protect human beings from environmental harm.

Indeed, the United Nations Human Rights Council's adoption of Resolution A/HRC/RES/37/8, on April 9, 2018, that recognized or incorporated Resolutions A/HRC/RES/34/20, 28/11 of March 26, 2015, and 31/8 of March 23, 2016, presents an interesting international normative panorama of recognizing the environment from a human rights perspective to justify the protection of the right to the environment due to its interrelation with other human rights.

In light of these considerations, there is no doubt about the existence of the right to a healthy environment at the national and international levels as an autonomous right. In fact, it refers to a global environmental constitutionalism, which signifies the growing trend in many countries to recognize that citizens have the right to a healthy environment and that constitutions should guarantee certain environmental rights. This phenomenon represents the convergence of constitutional law, international law, human rights, and environmental law. National and constitutional courts are showing increasing interest in environmental rights, and this momentum is likely to increase as courts become more aware of what its peers are doing.

The new Latin American constitutionalism comprises Constitutions that establish that nature has the right to exist, persist, maintain, and regenerate its vital cycles, structures, functions, and evolutionary processes. Additionally, under these constitutional regimes, any person can take legal actions to defend the environment without prejudice to the obligation of public institutions to act ex officio in the face of attacks against the environment.[11]

---

human rights; 2. Notes that the right to a safe, clean, healthy and sustainable environment is related to other rights that are in accordance with existing international law").

11 Eugenio Raúl Zaffaroni, "La Pachamama y el humano," in *La Pachamama y el humano*, (Buenos Aires: Ediciones Madres de Plaza de Mayo, 2011), 21.

Indeed, according to Zafarroni, Latin American constitutionalism protects the environment by recognizing the rights of nature and allowing any person to take legal action to defend them. In that regard, it is worth noting that the economic and political model in Latin America has stimulated the flow of investments and the development of extractive activities involving raw materials such as hydrocarbons, oil, mining, etc.[12] The activities of extractive companies in Latin America can have serious impacts on the environment, like the disaster caused by the mining company Samarco in Brazil in 2015, among many others.

The Samarco scandal was due to the rupture of a tailings dam in Brazil, which caused the largest ecological disaster in the history of the country. When the Samarco's Fundão dam ruptured in November 2015, it released 39.2 million cubic meters of tailings waste into the Doce River basin and killed 19 people.

Samarco, a joint venture between BHP Group Limited (BHP) and Vale SA (Vale), closed for five years after the rupture. During that time, BHP and Vale focused on repairs, compensations, and cleanup efforts. BHP announced that it had lost an appeal in a London court seeking to block a lawsuit of over £5 billion (over $6 billion) filed by 200,000 Brazilians for the deadly dam failure. The lawsuit is ongoing, and the trial will continue throughout 2023.[13]

Under international law, States have the sovereign right to exploit natural resources within their jurisdiction or under their control. The sovereign right is granted in accordance to their own environmental and developmental policies, Principle 21 of the Stockholm Declaration on the Human Environment, Principle 2 of the Rio Declaration on Environment and Development, and the preamble of the United Nations Framework Convention on Climate Change.

Neither the American Declaration of the Rights and Duties of Man (American Declaration) nor the American Convention on Human Rights (American Convention) explicitly include references to environmental protection, although 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) of 1988 recognizes the right by establishing that every person has the right to live in a healthy environment.

The Inter-American Court of Human Rights' Advisory Opinion 23/17 on the environment and human rights constitutes a milestone in environmental

12 *Id.*

13 "Justicia británica reconsidera una demanda contra BHP por la peor catástrofe ambiental en Brasil," Radio France Internationale, December 11, 2022, https://www.rfi.fr/es/m%C3%A1s-noticias/20221211-justicia-brit%C3%A1nica-reconsidera-una-demanda-contra-bhp-por-la-peor-cat%C3%A1strofe-ambiental-en-brasil.

protection. Advisory Opinion 23/17 reaffirmed the Court's extensive jurisprudence on the matter, recognizing the undeniable interdependence and indivisibility between the environment and human rights.

Relevant conclusions from this Advisory Opinion[14] include:

(1) States party to the American Convention have the obligation to respect and guarantee the rights enshrined in that instrument to every person under their jurisdiction;
(2) A State's exercise of jurisdiction includes its responsibility for conduct attributable to it and alleged violations of the rights enshrined in the American Convention;
(3) The jurisdiction of a State, regarding the protection of human rights of individuals under the American Convention, is not limited to its territorial space. The term "jurisdiction" in the American Convention is broader than the territory of a State and includes situations beyond its territorial limits. States are obligated to respect and guarantee the human rights of all persons under their jurisdiction, even if they are not within their territory;
(4) The exercise of jurisdiction under Article 1.1 of the American Convention, outside the territory of a State, is an exceptional situation that must be analyzed on a case-by-case basis and in a restrictive manner;
(5) The concept of jurisdiction under Article 1.1 of the American Convention encompasses any situation in which a State exercises authority or effective control over one or more persons, whether within or outside its territory;
(6) A State must ensure that its territory is not used in a way that may cause significant harm to the environment of other States or areas beyond the limits of their territory. Therefore, States have an obligation to prevent transboundary harm;
(7) A State is obligated to take all necessary measures to prevent activities carried out within its territory or under its control from affecting the rights of individuals within or outside its territory; and
(8) Regarding transboundary harm, a person falls under the jurisdiction of the State of origin if there is a causal relationship between the event that occurred in its territory and the violation of human

14 Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of November 15, 2017, Requested by the Republic of Colombia (text available in English online at https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf).

> rights of persons outside its territory. The exercise of jurisdiction arises when the State of origin exercises effective control over the activities that caused the harm and the consequent violation of human rights.

In this context, the Inter-American Court of Human Rights recognized in Advisory Opinion 23/17 that the right to a healthy environment is an autonomous and justiciable right. The Court has used Article 26 of the American Convention to uphold the right.[15]

In the February 2020 judgment of the case *Indigenous Communities Members of the Association Lhaka Honhat* (*Our Land*) *v. Argentina*, the Inter-American Court of Human Rights used Article 26 to declare that Argentina was responsible for violating the right to a healthy environment and other interdependent rights.

In this regard, the Court noted that in certain circumstances, States have an obligation to establish adequate mechanisms to monitor and supervise certain activities in order to guarantee human rights, protecting those rights from the actions of public entities as well as private individuals. The state's obligation to protect human rights is a means or behavior obligation, and its breach is not demonstrated solely by the fact that a right has been violated. Because this principle applies to the entirety of the rights recognized in the American Convention, it is worth noting that it also refers to the rights to adequate food, water, and participation in cultural life.

In *Lhaka Honhat* (*Our Land*) *v. Argentina*, the petitioners argued that the State's failure to prevent the installation of fences, cattle grazing, and illegal logging in the territory of indigenous communities, grouped under the association Lhaka Honhat, constitutes a violation of the right to a healthy environment and other rights contained in Article 26.

The Court emphasized that in specific environmental matters, it should be noted that the principle of prevention of environmental damage is part of customary international law and requires States to take measures that are necessary to prevent environmental damage ex ante because, due to the particularities of environmental harm, it will often not be possible to restore the pre-existing situation after such damage has occurred.

---

15 "Art. 26 The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires".

In accordance with the duty of prevention, the Court stated that States are obligated to use all means at their disposal to prevent activities carried out under their jurisdiction from causing significant harm to the environment. This obligation must be fulfilled under a due diligence standard, which should be appropriate and proportional to the degree of environmental risk. Although it is not possible to provide a detailed enumeration of all the measures that States could take to fulfill this duty, the Court mentioned some measures including regulation, monitoring and supervision, requiring and approving environmental impact studies, establishing contingency plans, and mitigating environmental damage once it occurs.

The *Lhaka Honhat* (*Our Land*) *v. Argentina* clearly expressed that the environment is strictly linked to the rights of indigenous peoples, and that specific norms mandate the safeguarding of their environment, the protection of the productive capacity of their lands and resources, and the consideration of traditional activities and those related to their subsistence economy as "important factors in the maintenance of their cultures."[16] Therefore, the judgment establishes the basis for future similar cases in the Inter-American System.

The Court highlighted that the lack of access to territories and corresponding natural resources can expose indigenous communities to various violations of their human rights, in addition to causing suffering and harming the preservation of their way of life, customs, and language. The Court also warned that States must protect the close relationship that indigenous peoples have with the land and their life project, both individually and collectively.

Lhaka Honhat (*Our Land*) *v. Argentina* sets an important precedent in the region since indigenous communities in other countries are also similarly affected by environmental degradation caused by business activities.

Another jurisprudential advancement was evidenced in Judgment T-622 of the Constitutional Court of Colombia in 2016, which recognized the Atrato River as a subject of rights. The Atrato River is the most voluminous river in Colombia and the third most navigable in the country. It originates in the western part of the Andes Mountain range, specifically in Cerro Plateado, at an altitude of 3,900 meters above sea level, and flows into the Caribbean Sea. It stretches for 750 kilometers, of which 500 are navigable. The widest part of the river has a length of 500 meters, and the deepest part is estimated to be close to 40 meters. It receives more than 15 rivers and 300 streams, including

16 *The Indigenous Communities of the Lhaka Honhat* (*Our Land*) *Association v. Argentina*, Inter-American Court of Human Rights, Judgment of February 6, 2020, (text available in English online at https://www.corteidh.or.cr/docs/casos/articulos/seriec_400_ing.pdf) ("*Lhaka Honhat* (*Our Land*) *v. Argentina*").

Andágueda, Baté, Bojayá, Buchadó, Cabí, Cacarica, Capá, Domingodó, Napipí, Neguá, Muguindó, Murrí, Opogodó, Puné, Quito, Salaquí, Sucio, Tagachí, and Truandó.

The banks of the Atrato River are home to multiple Afro-Colombian and indigenous communities, including mestizo communities, descendants of migrants from various Colombian regions, and the plaintiffs in Judgment T-622, who have inhabited the Atrato River banks ancestrally. Traditional forms of life and sustenance practiced by these communities include artisanal mining, agriculture, hunting, and fishing, which have ensured a complete supply of their food needs for centuries.

The plaintiffs in the Atrato River case argued that the writ of tutela seeks to stop the intensive and large-scale use of various illegal mining and logging methods, including heavy machinery such as dredges and backhoes, and highly toxic substances such as mercury, in the Atrato River (Chocó), its basins, marshes, wetlands, and tributaries. The plaintiffs alleged that the use of these methods and substances have intensified over several years and had harmful and irreversible consequences on the environment, therefore affecting the fundamental right to a clean environment for ethnic communities and the natural balance of the territories they inhabit.

In response, the Colombian Constitutional Court recognized the Atrato River, its basin, and tributaries as entities subject to rights of protection, conservation, maintenance, and restoration by the State and ethnic communities, based on the following grounds:

(1) Justice with nature must be applied beyond the human realm and allow nature to be the subject of rights. Under this understanding, it is necessary to take a jurisprudential step forward towards the constitutional protection of one of the most important sources of biodiversity: the Atrato River. This interpretation finds full justification in the superior interest of the environment, which has been extensively developed by constitutional jurisprudence and is constituted by numerous constitutional clauses that form what has been called the "Ecological Constitution" or "Green Constitution." These provisions affirm the significance of a healthy environment and its interdependence with human beings and the State;

(2) The aforementioned reasoning implies a series of obligations to protect and guaranties to the environment on the part of the State, which is primarily responsible for its protection, maintenance, and conservation, to be materialized through responsible environmental public policies (sustainable governance);

(3) The duty of protection and care is also incumbent upon civil society and the communities themselves to safeguard natural resources and biodiversity. In this sense, it is pertinent to call on the ethnic communities inhabiting the Atrato River basin to protect, within the exercise of their customs, practices, and traditions, the environment of which they are the primary guardians and responsible parties; and

(4) The actions taken by competent state entities, both at the local and national levels, have mostly been welfare-oriented and isolated, without sufficient coordination to guarantee the care, maintenance, or recovery of the Atrato River basin and its tributaries, as evidenced by the lack of response to these concerns by the Governorate of Chocó or the acknowledgment of the lack of personnel and administrative capacity of Codechocó, as corroborated by the Chocó Regional Prosecutor's Office, the Office of the Ombudsman, and the General Comptroller's Office during the judicial inspection carried out in the area where the events occurred, regarding the serious threat to the Atrato River basin due to illegal mining activities.

2.3 *Indigenous Peoples' Rights and the Human Right to Prior Consultation*

The right to consultation constitutes an extremely relevant element in the consideration of human rights in Latin America, but considering the impact it has on associated rights like land, territory, culture, and living in a healthy and sustainable environment, the right to consultation is especially relevant in its interrelation with the environment.

In the case of Bolivia, the concept of indigenous people since the enactment of the new Constitution is complex but very important to understand the Bolivian reality. The complexity lies on the lack of clarity about what is understandood by indigenous under the definition provided by Article 30.I of the Political Constitution of the State, also known as *Constitución Política del Estado* (CPE).

From the cited constitutional definition, it is necessary to mention the following aspects:

(1) The Constitution bases the recognition of indigenousness on the convergence of three inseparable and interrelated defining elements: indigenous, *originario*, and *campesino*. The Constituent Assembly's intention is that the three components must converge simultaneously, with none of them alone being sufficient to "categorize" a group or individual as "indigenous."

(2) To affirm the existence of an indigenous *originario campesino* people, the concept of indigenous identity must be constructed based on several factors, including ethnic self-identification, language (which can be one of the 35 official languages recognized by Article 5 of the CPE), historical tradition (the existence of a collective memory), institutions (referring to the existence of political institutionalism under their own customs), territoriality (the place where their socio-economic activities take place), and worldview (the existence of an ancestral collective philosophy of how the world is understood and interpreted).

(3) The third component of the definition is that the indigenous *originario campesino* people must predate the "Spanish colonial invasion," and this idea is associated with the notion of *originario*, meaning their origin is precolonial, as stated in the Preamble of the Political Constitution of the State. The rights recognized for these peoples are:
   (a) Right to their traditional medicine system (Articles 35.II and 42 of the CPE).
   (b) Freedom of spirituality in education, referring to the worldview of the indigenous *originario campesino* people (Article 86 of the CPE).
   (c) Right to the use of ancestral knowledge of the indigenous *originario campesino* people in higher education (Article 91.I of the CPE).
   (d) Right to preserve their culture (Articles 98 and 100 of the CPE).
   (e) Right to administer their own justice system (Articles 190 and following of the CPE).
   (f) Their own forms of representative election (Article 211 of the CPE).
   (g) Existence of their own territories with administrative and political autonomy (Article 289 and following of the CPE).
   (h) Promotion of community tourism (Article 337.II).
   (i) Right to prior and informed consultation (Article 352 of the CPE).

The concept of "indigenous" in the constitutional text has both a "constituent impulse," as a source of inspiration for the process of restructuring the state's institutions, and an impulse to protect a particularly vulnerable human group in the country's colonial and republican history: the indigenous communities. The current definition of "indigenous" in Bolivia is the result of a long-standing

historical process, in which the last years have been particularly significant due to the magnitude of the changes brought about by the current Constitution regarding indigenous issues.

As Bartolomé Clavero, Professor at the Faculty of Law of the University of Seville in Spain and one of the most renowned authors in the field, points out: "[t]he Constitution of Bolivia in 2009 is the first Constitution in the Americas that lays the foundations for access to rights and powers for everyone, adopting a resolute and consistent anti-colonial position. It is the first one that decisively breaks with the typically American trait of constitutional colonialism or colonial constitutionalism since the times of Independence."[17]

On the other hand, Judgment 1422/2012 of the Constitutional Court of Bolivia stated that despite the influence of organizational elements inherent to the process of mestizaje in Bolivia, which specifically refers to neighborhood associations, if any of the aforementioned elements of collective cohesion are identified, the persons involved will be entitled to collective rights. In this case, all the effects of Article 30, including its two paragraphs, of the Constitution will apply to them. This also includes the effects of the principle of self-determination inherent to indigenous, native, and peasant peoples, as enshrined in Article 2 of the Constitution.

In this context, we can observe that there is a gap between the constitutional text and its interpretation, aimed at promoting a broader understanding of indigeneity. We consider this to be an extremely dangerous position, as loosening and relativizing the conceptual definition of indigenousness may allow for harmful uses of the definition. The greatest danger lies in the instrumentalization of the term to support decisions that promote legal uncertainty in Bolivia.

The right to prior consultation is provided for in Article 30.II.15 of the Constitution as a fundamental right of indigenous, native, and peasant peoples. This right recognizes a series of powers in favor of these peoples, including the right to be consulted through appropriate procedures, the right to be consulted through their institutions, the right to be consulted whenever legislative or administrative measures that could affect indigenous, native, and peasant peoples are foreseen, the right to prior and binding consultation, and finally, the right for the consultation to be managed and conducted by the State in good faith and in agreement with the involved indigenous, native, and peasant peoples.

17 Bartolomé Clavero, as quoted in *Bolivia – Nueva Constitución Política del Estado: Conceptos elementales para su desarrollo normativo* (La Paz: Vicepresidencia del Estado Plurinacional de Bolivia, 2010), 11.

A literal reading of Article 30.II.15 of the Constitution might give the impression that mandatory prior consultation in Bolivia only applies when it concerns the exploitation of non-renewable natural resources. However, the SCP (Plurinational Constitutional Judgment) 0300/2012 interpreted the constitutional norm more broadly, stating that this provision has two parts. The first part asserts that indigenous, native, and peasant peoples have the right to consultation whenever legislative or administrative measures that could affect them are foreseen, without specifying the types of measures involved. The second part establishes that prior consultation is guaranteed by the State regarding the exploitation of non-renewable natural resources, without using a term that affirms that prior consultation only applies in such cases. Therefore, this provision is not limited to non-renewable natural resources alone.

In this context, any decision that may affect an indigenous, native, and peasant people is subject to prior consultation, regardless of whether non-renewable natural resources are at stake or not. This understanding of constitutional jurisprudence is consistent with the International Labor organization (ILO) Convention 169, whose Article 6.1 states that when applying the provisions of the Convention, governments shall "consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever legislative or administrative measures may affect them directly."

An important element of the right to consultation in Bolivia, as mentioned before, is that the consultation must be carried out in accordance with the traditions and customs of the involved indigenous, native, and peasant peoples. This was determined by Bolivian constitutional jurisprudence through SCP 0300/2012 in the *Tipnis* case, which drew on the jurisprudence of the Inter-American Court of Human Rights in the Case of the *Saramaka People v. Suriname*.

In relation to the inter-American jurisprudence, it is important to recall the *Saramaka People v. Suriname*, which arose from the construction of the Afobaka dike in Suriname as a response to a flood in the 1960s. The construction resulted in the displacement of the Saramaka people from their territories, creating so-called "transmigration" communities. Delving into the merits of the case, the Inter-American Court of Human Rights ruled that the State had violated Article 21 of the American Convention on Human Rights by failing to consider that members of the Saramaka people have the right to use and enjoy the natural resources within their traditionally occupied territory necessary for their survival. The Court also decided that the State could restrict this right by granting concessions for the exploration and extraction of natural resources within Saramaka territory only if the State guaranteed the effective

participation and benefits of the Saramaka people, conducted or supervised prior environmental or social impact assessments, and implemented appropriate measures and mechanisms to ensure that these activities did not have a greater impact on Saramaka traditional lands and natural resources. Lastly, the Court concluded that the concessions already granted by the State did not comply with these guarantees.

The *Tipnis* case in Bolivia emerged from the government's decision to construct the Villa Tunari – San Ignacio de Moxos road. The construction of the road was determined through a State Law (Law 3477 of September 22, 2006), which declared its construction a national priority, crossing the territory of the indigenous peoples of Tipnis. On the other hand, Law 222 was issued with the purpose of convening the consultation process with the indigenous peoples of Tipnis and establishing the content and procedures of this process. Based on these circumstances, a motion of unconstitutionality was presented to the Plurinational Constitutional Court of Bolivia, arguing that the road construction plan violated the indigenous inhabitants' fundamental rights, including the right to consultation, because consultation was not carried out prior to the administrative activities the State had already undertaken that directly affected the indigenous communities.

The Plurinational Constitutional Court, through the SCP 300/2012, sided with the State and declared Law 222 constitutional, and established that the lack of prior consultation does not render the law unconstitutional. In the Constitutional Judgment, the Court extensively developed the norms for the right to prior consultation. The court determined that the essential elements of the right to consultation are:

(1) The consultation must be prior: This means that consultation must take place before the execution of the project, plan, measure, or act that affects the rights of indigenous peoples or before the approval of the law or other norm that may also affect them;
(2) The consultation must be informed: This means that indigenous peoples must have knowledge of the possible risks, including environmental and health risks, in order to accept the proposed development or investment plan voluntarily and with knowledge; the informed nature of the consultation is linked to the obligation to carry out social and environmental impact studies prior to the execution of development or investment plans or extractive concessions that may affect indigenous peoples;
(3) The consultation must be participatory: The right to participate in the prior consultation and the right to access information are

fundamental elements to support and enhance people's capacity to safeguard and assert their rights to life and personal integrity in situations of serious environmental risk, and thus contribute to achieving effective protection against ecological conditions that constitute a threat to human health; and

(4) The consultation must be conducted in good faith: Good faith is linked to the purpose of the consultation, which is to reach an agreement or consensus. It constitutes a safeguard against purely formal consultation processes. Therefore, it requires the absence of coercion by the State or agents acting with its authorization or acquiescence.

Despite having defined the essential elements of the right to consultation, the Plurinational Constitutional Court, in the SCP 300/2012, declared the constitutionality of the law. The Court argued that although prior consultation was not carried out in the construction of the TIPNIS road and the rights of indigenous peoples were violated, declaring the law unconstitutional would not repair the injury to the rights of indigenous peoples. To the contrary, finding the law unconstitutional would lead to the absurdity of perpetuating the unconstitutional state of affairs indefinitely – a situation that is neither accepted nor desired by the constitutional order or the norms contained in international human rights treaties.

2.4 *Arbitration and Human Rights*

Bolivia, Ecuador, and Venezuela have withdrawn from the International Centre for Settlement of Investment Disputes (ICSID), and several other countries in the region are reflecting on which model of Investment Agreement will be adopted in the future. However, regardless of whether countries are part of the ICSID or not, there is an increasingly strong discussion in the region about adopting a more assertive rhetoric regarding the protection of natural resources. In Bolivia, for example, the Arbitration and Conciliation Law, Law 1770, which was based on the model law of the United Nations Commission on International Trade Law (UNCITRAL), has been replaced by the Conciliation and Arbitration Law, Law 708. This new law aspires to establish a comprehensive legal framework for international investment arbitration.

States are increasingly using constitutional provisions as part of regulations that companies must comply with. In this regard, this section will provide an overview of what constitutional compliance for a company might look like in Bolivia.

The notion that fundamental rights are reserved exclusively for the State has changed significantly, and individuals are now subject to the horizontal effect

of fundamental rights (Drittwirkung). In this sense, there are constitutional provisions such as Articles 13 and 14 of the Bolivian Constitution that establish the inviolability of fundamental rights, recognition of legal personality, prohibition of discrimination, free development of personality, equality, and other provisions that may have jus cogens status. These provisions are binding on everyone, including private entities.

On the other hand, the Bolivian Constitution also ensures private compliance with provisions related to the environment and natural resources. For example, Article 342 states that it is the duty of the State and the population to protect the environment. Constitutional compliance that includes both fundamental rights and norms for environmental protection and natural resources is absolutely admissible.

Today, there are works of reflection on B&HR that have a direct relationship with arbitration. This can be seen through the current multilateral discussions on B&HR. The discussion arises from a very complex relationship between arbitral decisions, decisions of ordinary jurisdiction, and the impossibility of enforcing international decisions, among other factors.

In *Chevron/Texaco v. Ecuador*, discussions revolved around acts of pollution and environmental damages allegedly caused during more than 30 years of oil exploitation in the Ecuadorian Amazon. An Ecuadorian national court ruled that Chevron/Texaco was responsible for ecological damage and human rights violations, particularly in the case of *Lago Agrio*, and imposed damages of over 9 billion dollars. However, an Arbitral Tribunal, the Permanent Court of Arbitration in The Hague, later declared that the decision was the product of corruption and therefore rendered it unenforceable.

The Arbitral Tribunal ordered Ecuador to "[t]ake immediate steps, of its own choosing, to remove the status of enforceability from the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation, and Constitutional Courts)." Ecuador tried to enforce the *Lago Agrio* decision in five countries but failed to do so after more than 15 years of litigation.

The paradox here is determining who has the final say. Can an arbitral tribunal oversee the enforcement of public norms by a State? The author believes there is an inseparable future between the commensurability of decisions that must consider Human Rights and Business Law and the exercise of domestic and international arbitral functions as part of the equation. This global phenomenon has generated relevant developments across different jurisdictions, such as the popular vote in Switzerland on the executive responsibility of transnational operations, the decision of the French Constitutional Court on this matter, and the Rio Tinto scandal in Australia.

In *Azurix v. Argentina*, the relationship between human rights and arbitration was a central issue. Azurix, a subsidiary of the United States (U.S.) energy company Enron, invested in a water concession in Argentina. Following the economic crisis in 2001, the government of Argentina implemented measures to address the crisis, including changes to the regulatory framework for water services. Azurix claimed that these measures amounted to expropriation and sought compensation through arbitration.

During the arbitration proceedings, Azurix argued that Argentina's measures violated its human rights, including its right to property. However, the tribunal rejected these arguments, stating that the human rights treaties invoked by Azurix were "outside the scope of the protection of investment."[18] The tribunal also noted that the human rights treaties invoked by Azurix did not contain provisions that were "directly applicable" to the dispute. Despite rejecting Azurix's human rights arguments, the tribunal considered other international legal instruments like the European Convention on Human Rights in its decision. Specifically, the tribunal relied on the principle of proportionality, which it borrowed from European human rights law, to limit the scope of regulatory expropriation.

Overall, the Azurix case highlights the challenges of incorporating human rights considerations into investment law and arbitration. While the tribunal in this case did not accept Azurix's human rights arguments, it did rely on human rights norms in its decision-making process.

Similarly, in *Suez v. Argentina*, the relationship between human rights and arbitration was also a central issue. Suez, a French water company, invested in water concessions in Argentina. Argentina changed the regulatory framework for water services, and Suez claimed that the new measures amounted to expropriation and sought compensation through arbitration.

During the arbitration proceedings, Argentina argued that its measures were justified based on the human right to water. Argentina claimed that its human rights obligations to ensure its population the right to water took precedence over its obligations under the Bilateral Investment Treaties (BIT), and that the existence of the human right to water also implicitly gave Argentina the authority to take actions in disregard of its BIT obligations.

18 In *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, the Tribunal stated that: "261. The Respondent has also raised the issue of the compatibility of the BIT with human rights treaties. The matter has not been fully argued and the Tribunal fails to understand the incompatibility in the specifics of the instant case. The services to consumers continued to be provided without interruption by ABA during five months after the termination notice and through the new provincial utility after the transfer of service."

The tribunal rejected Argentina's argument, holding that Argentina was subject to both international obligations, i.e., human rights and treaty obligations, and must respect both of them. The tribunal held that Argentina's human rights obligations did not give it the authority to take actions in disregard of its BIT obligations.

The Suez case highlights the challenges of balancing human rights considerations with investment protection in arbitration. While Argentina argued that its measures were justified on human rights grounds, the tribunal ultimately held that Argentina was bound by both its human rights obligations and its BIT obligations.

In *Santa Elena v. Costa Rica*, the tribunal considered the relationship between environmental protection and investment protection. The case involved a mining concession held by Santa Elena, a subsidiary of the Canadian mining company Vanessa Ventures, in Costa Rica. In 2002, the Costa Rican government cancelled the concession, citing concerns about the environmental impact of the mining project.

Santa Elena brought a claim against Costa Rica under the Canada-Costa Rica BIT, arguing that the cancellation of the concession amounted to expropriation and violation of its rights under the BIT. Costa Rica argued that the cancellation was justified on environmental and human rights grounds, specifically the right to a healthy environment.

Approaching the question of compensation for the Santa Elena Property, the tribunal bore in mind the following considerations:[19]

(a) International law permits Costa Rica to expropriate foreign-owned property within its territory for a public purpose and against the prompt payment of adequate and effective compensation. This is not in dispute between the parties.

(b) While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference.

19 *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1.

(c) Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a State may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the State's obligation to pay compensation remains.

In *Metalclad v. Mexico*, the tribunal again considered the relationship between environmental protection and investment protection. The case involved a hazardous waste facility operated by Metalclad Corporation, a U.S. company, in Guadalcazar, Mexico. In 1996, the Mexican government denied a permit for the facility, citing concerns about the environmental impact of the project. Metalclad brought a claim against Mexico under the North American Free Trade Agreement (NAFTA), arguing that the denial of the permit amounted to expropriation and a violation of its rights under the treaty. The tribunal ultimately sided with Metalclad, holding that the denial of the permit was a violation of the company's rights under NAFTA.

The tribunal held that the denial of the permit amounted to expropriation under NAFTA, which includes not only open, deliberate, and acknowledged takings of property, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property. The tribunal found that the denial of the permit had the effect of depriving Metalclad of the use or reasonably-to-be-expected economic benefit of the facility, and therefore amounted to expropriation.

The Metalclad case is significant because it highlights the potential tension between environmental protection and investment protection in international law. The case also underscores the importance of balancing environmental and investment considerations in investment arbitration, and the need for a more nuanced approach to resolving these competing interests.

The Tribunal established that:[20]

99. Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA.

20 *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1.

100. Moreover, the acts of the State and the Municipality – and therefore the acts of Mexico – fail to comply with or adhere to the requirements of NAFTA, Article 1105(1) that each Party accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment. This is so particularly in light of the governing principle that internal law (such as the Municipality's stated permit requirements) does not justify failure to perform a treaty. (Vienna Convention on the Law of Treaties, Arts. 26, 27).
101. The Tribunal therefore holds that Metalclad was not treated fairly or equitably under the NAFTA and succeeds on its claim under Article 1105.

In *Bayview Irrigation District v. Mexico*, the tribunal considered the property rights of 28 US citizen and 17 US irrigation districts regarding the use of irrigation water of the Rio Grande River based on a bilateral US-Mexico treaty. Claimants alleged that between 1992 to 2002 Mexico captured and diverted more irrigation water of the Rio Grande River than that to which the country had right under that treaty, depriving claimants of their water rights.

The Tribunal decided that it was not competent to resolve the case, reasoning that:[21]

115) There is an evident and inescapable conceptual difficulty in positing the existence of property rights in water up-river in Mexico in a context where the entitlement of each Claimant depends upon the apportionment of a certain volume of water, measured over a five-year period (or possibly longer, if the possibility of repayment of water debts in subsequent cycles is taken into account), which can be determined only by reference to the volume of water that actually reached the main channel of the Rio Bravo / Rio Grande.
116) One owns the water in a bottle of mineral water, as one owns a can of paint. If another person takes it without permission, that is theft of one's property. But the holder of a right granted by the State of Texas to take a certain amount of water from the Rio Bravo / Rio Grande does not 'own', does not 'possess property rights in' a particular volume of water as it descends through Mexican streams and rivers towards the Rio Bravo I Rio Grande and finds its way into

21 *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1.

the right-holders irrigation pipes. While the water is in Mexico, it belongs to Mexico, even though Mexico may be obliged to deliver a certain amount of it into the Rio Bravo / Rio Grande for taking by us nationals.

117) Thus, the Claimants do not own any of the water within Mexico. Nor do the Claimants possess any water rights in Mexico and enforceable against the State of Mexico. Their water rights are granted by the State of Texas. Those rights are created in Texas and exercised in Texas.

118) Furthermore, it is plain that under the Mexican Constitution and Mexican law, the Claimants could have no such property rights in water in Mexican rivers. Article 27 of the Mexican Constitution stipulates that the ownership of waters within the boundaries of the national territory originally belongs to the Nation, and that water from its rivers and tributaries are the property of the nation. Exploitation or use of those waters can only be carried out through concessions granted by the Federal Executive. The Mexican Law of National Waters confirms the need for the grant of a concession for the exploitation or use of waters, and specifies that a concession does not guarantee the existence or permanence of the water that is the subject of the concession. And Mexico's General Law of National Assets stipulates specifically, in Article 16, that concessions do not create ownership rights (derechos reales) but simply grant a right of use and exploitation, without prejudice to third parties, and subject to conditions imposed by law and by the concession.

Aguas del Tunari v. Bolivia was a case that involved water privatization in Bolivia and is considered significant under both human rights and arbitration considerations.[22] The case involved a water concession held by Aguas del Tunari, a subsidiary of the International Water Limited (IWL), in Bolivia. In 1999, the Bolivian government granted a concession to Aguas del Tunari for the provision of water and sanitation services in the city of Cochabamba. The concession was granted for a period of 40 years and included a provision that allowed Aguas del Tunari to increase water rates by up to 200%.

The concession was highly controversial, and in 2000, massive protests erupted in Cochabamba against the concession and the rate increases. The protests were led by a coalition of local groups, including labor unions,

22 Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2015) p. 215.

indigenous organizations, and environmental groups, and were supported by international nongovernmental organizations (NGOs).

The Bolivian government eventually cancelled the concession, citing concerns about the human right to water and the lack of public consultation in the granting of the concession. Aguas del Tunari brought a claim against Bolivia under the ICSID , arguing that the cancellation of the concession amounted to expropriation and a violation of its rights under the Bolivia-Netherlands BIT.

Aguas del Tunari is significant because it highlights the growing recognition of the importance of human rights in investment arbitration. The case also underscores the challenges of balancing human rights considerations with investment protection, and the need for a more nuanced approach to resolving these competing interests. The case also highlights the role that NGOs can play in investment arbitration, both in terms of bringing attention to human rights concerns and in terms of intervening in arbitrations through amicus curiae briefs.

Sornarajah argues that *Aguas del Tunari* represents a turning point in investment arbitration because it highlights the growing recognition of the importance of human rights in investment disputes. He notes that the case is significant because it recognizes that investment protection cannot be pursued at the expense of human rights, and that states have a duty to protect fundamental human rights, including the right to water.[23] Sornarajah also criticizes the narrow approach taken by some investment tribunals in interpreting investment treaties, arguing that this approach leads to a lack of accountability for multinational corporations and a disregard for human rights. He notes that the Aguas del Tunari case represents a departure from this narrow approach, as it recognizes the importance of balancing investment protection with human rights considerations.

As Thielborger mentioned,[24] in considering the case in light of the right to water, one should first acknowledge that one of the main problems in the *Aguas del Tunari* case, as in the *Azurix* case, is the missing guarantee of stable prices and the equity of pricing in the concession contract. This is in clear conflict with General Comment No. 15 of the Committee on Economic, Social and Cultural Rights (CESCR), which clearly demands that "services, whether publicly or privately provided, are affordable for all, including socially

23 *Id.*

24 Pierre Thielborger, "The Human Right to Water Versus Investor Rights: Double–Dilemma or Pseudo–Conflict?," in *Human Rights in International Investment Law and Arbitration*, eds. Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (Oxford: Oxford University Press, 2009), 487–510.

disadvantaged groups." Equity in this sense means that poorer households cannot be disproportionately affected by water expenses. Given that the prices increased so dramatically after the privatization in Cochabamba and poorer households had to spend an enormous part of their budget on water expenses, the right to water was clearly violated in this sense.

Aguas del Tunari teaches a public participation lesson. From a formal point of view, no participation by interest groups or civil leaders is possible: only the state and the company in question are eligible as parties to the arbitration. However, substantive rights need to be procedurally reflected in order to be effective.[25] It is likely that the right to water would have been brought forward in the arbitration process by interest groups or representatives of civil society. However, if the voice is not given the chance to speak, how is the message to be heard? Hence, procedural rights often ultimately lead to a violation of substantial rights.

Bolivia should have made sure that its BITs allow participation of third parties in the arbitration process or should have tried to make an effort to convince the investor to allow third-party participation. Finally, the right to water was also invoked as a substantive argument by the petitioners. They relied in their reasoning on a 'direct interest' in the matter, which should award them standing in the dispute. Although stated indirectly, this is clearly another implication of the right to water. It is exactly the above-mentioned link between substantive law and procedural rights that the petitioners refer to.

It would have been a stronger argument if the petitioners clearly stated that the "direct interest" was related to their right to water, however, given the ambiguous legal status of the right to water, it might also have been considered an invitation for the arbitrators to reject the argument by simply reasoning that the right is not clearly accepted in international law. Hiding behind the fuzzy 'direct interests' term seemed to be more reliable for the petitioners in their attempt to get party status. At the same time, it was nevertheless a missed opportunity for the right to water to play a decisive role in the settlement of an international water dispute.[26]

Additionally, in the *Achmea* case, the European Court of Justice (ECJ) held that an arbitration clause in an investment treaty between two EU member states was incompatible with EU law.

The *Achmea* case, also known as *Slovakia v. Achmea*, was a landmark case in investment arbitration that raised important questions about the relationship

25 *Id.*
26 *Id.*

between investment law and EU law. The case involved a dispute between the Dutch insurance company Achmea, which invested in the Slovak health insurance market after its liberalization, and the Slovak Republic.

Achmea initiated arbitration proceedings against Slovakia under the BIT, seeking compensation for losses it claimed to have suffered as a result of measures taken by the Slovak government towards reversing the liberalization of the health insurance market, which affected the company's prior investments.

Slovakia argued that the arbitration clause in the BIT was incompatible with EU law, and that the tribunal lacked jurisdiction to hear the case.

The case was ultimately referred to the ECJ, which issued a landmark ruling in March 2018. The ECJ held that the arbitration clause in the BIT was incompatible with EU law, and that it had the effect of undermining the autonomy of EU law and the role of the EU courts in interpreting and applying that law.

The ECJ's ruling was significant because it called into question the validity of hundreds of investment treaties between EU member states and third countries. The ruling was also seen as a victory for EU institutions and member states, which had been seeking to limit the scope of investment arbitration and to promote the role of the EU courts in resolving disputes.

Following the ECJ's ruling, several EU member states announced that they would terminate their BITs with other EU member states, and that they would seek to renegotiate their investment treaties with third countries to ensure that they were compatible with EU law. The ruling also had implications for ongoing investment arbitration cases, many of which were put on hold pending the outcome of the case.

3 Challenges of Due Diligence and Human Rights in Latin America

In early 2020, the IACHR (Inter-American Commission on Human Rights) and its Special Rapporteurship on Economic, Social, Cultural, and Environmental Rights published a report titled 'Businesses and Human Rights: Inter-American Standards.' The report clarified which obligations a State must adhere to in order to respect and guarantee human rights in the context of business activities.

While the report does not delve into the obligations of States to protect the right to a healthy environment in the face of extractive activities, it does provide important guidance that, together with Advisory Opinion 23/17, articulates an essential framework in light of the conduct that companies must follow in their activities in Latin America.

The responsibility of companies to respect human rights and protect the environment has undergone significant development within the Organization of American States (OAS). Private responsibility now seeks to move beyond the voluntary approach of corporate social responsibility to ensure that companies respect human rights and protect the environment through standards articulated in regulatory frameworks related to state obligations. In this regard, the OAS has proposed the development of National Action Plans (NAPs) on human rights and business as a means of national implementation of the United Nations Guiding Principles on Business and Human Rights (UNGPs).

While the UNGPs do not address the obligations and responsibilities of states and companies to respect or protect the right to a healthy environment for the enjoyment of other interdependent human rights, it is evident, through the three thematic axes of this article, that the complex relationship between the national jurisdiction of states and the International Human Rights Corpus gives rise to human rights obligations for companies.

Thus, the Guide to Principles on Corporate Social Responsibility in the Field of Human Rights and the Environment in the Americas, adopted by the Inter-American Juridical Committee of the OAS in 2014, recommends that States implement effective policies for oversight and supervision of companies in the development of their activities to ensure respect for the environment.

At that time, no binding instrument promoting corporate conduct in relation to the environment and human rights existed within the OAS or the European Union.[27] However, it is evident that the Constitutions of the new Latin American Constitutionalism have an approach in which the environment, human rights, and the rights of indigenous peoples become essential considerations when contemplating any type of investment in the region.

Companies in the region have a significant active participation in the extraction and exploitation of natural resources. For example, in *Comunidad de La Oroya vs. Peru*, before the IACHR, one can observe the historical contribution of a public extractive company to the violation of human rights due to environmental degradation. In *Sarayaku vs. Ecuador*, the State Oil Company of Ecuador participated in the exploration of hydrocarbons and oil exploitation through a contract signed with Compañía General de Combustibles S.A. and Petrolera Ecuador San Jorge S.A. In this case, the IACHR determined the State's responsibility for violating the rights of the indigenous people by allowing companies to carry out oil exploration activities in indigenous peoples'

27 This scenario changed recently in the European context with the adoption of the EU Corporate Due Diligence Directive (EU CSDDD) in May 2024.

territory without prior consultation and allowing environmental damage directly affecting their means of subsistence.

More recently, mandatory due diligence frameworks have been adopted and proposed in a number of European countries. Some of these normative developments have the potential to implement the precautionary and preventive environmental principles. Therefore, due diligence processes can complement and enrich a company's environmental management systems. In addition to the aforementioned measures, in order to guarantee the right to a healthy environment in the face of extractive activities, States must ensure that individuals have access to resources, substantiated in accordance with the rules of due process, to:

(1) challenge any norm, decision, act, or omission of public authorities that contravenes or may contravene environmental law obligations; and
(2) ensure the full realization of other procedural rights, such as the right to access information and participate in public affairs regarding the environment; and
(3) remedy any violation of their rights resulting from non-compliance with environmental law obligations.

In *Olivera Fuentes v. Peru*, the Inter-American Court of Human Rights, building upon the developments in the *Miskitos vs. Honduras* case before the same Court, stated:

> [T]he Court highlighted the three pillars of the Guiding Principles, namely: (i) the state's duty to protect human rights, (ii) the responsibility of companies to respect human rights, and (iii) access to effective mechanisms for redress, as well as the foundational principles derived from these pillars, which are fundamental in determining the scope of state and corporate human rights obligations.[28]

Likewise, the Court also established in that case that companies are primarily responsible for behaving responsibly in their activities since their active participation is essential for respecting and upholding human rights.

Therefore, within the framework of the obligations to adopt provisions of domestic law derived from Articles 1.1 and 2 of the American Convention,

28 *Olivera Fuentes v. Peru*, Inter-American Court of Human Rights, Judgment of February 4, 2023 (text available in English at https://www.corteidh.or.cr/docs/casos/articulos/seriec_484_ing.pdf).

States have a duty to prevent human rights violations committed by private companies. They must adopt legislative and other measures to prevent such violations and investigate, punish, and repair violations when they occur. This obligation must be adopted by companies and regulated by the State.

It is important to note that the UNGPs state that as part of the duty to protect against human rights abuses committed by companies, States must ensure access to effective remedies – state judicial and non-judicial redress mechanisms, as well as non-state mechanisms – and must eliminate any barriers to access redress for affected individuals.

In summary, in pursuing the aforementioned goals, States must take measures to ensure that companies have appropriate policies for the protection of human rights, incorporate practices of good corporate governance with a stakeholder approach, which involves actions aimed at guiding business activities towards compliance with norms and respect for human rights, have due diligence processes for the identification, prevention, and correction of human rights violations, and for guaranteeing decent and dignified work, and have processes that allow the company to remedy human rights violations that occur as a result of their activities, especially when they affect people living in poverty or belonging to vulnerable groups.

The international B&HR phenomenon is a process that articulates the obligations that States have in terms of human rights and their potential impact on companies. Through B&HR, one can determine the due diligence processes for the identification, prevention, and correction of human rights violations and for guaranteeing decent and dignified work. On the other hand, we have the phenomenon of obligations that companies have at the national level in complying with human rights, which we will refer to as B&HR in the national context.

In the international context, the B&HR phenomenon considers the international commitments that States undertake to ensure the enforcement of human rights. In this regard, we have three different approaches: firstly, negotiations for the establishment of a binding international treaty that generates obligations for companies. Secondly, an approach in which international commitments are assumed by States to monitor the enforcement of human rights in business operations. Thirdly, States obligating companies to comply with human rights in their extraterritorial operations.

In the national context, the B&HR phenomenon refers to the existence of fundamental rights recognized at the national level that have an impact on transnational business relationships, even though their effects occur within one state.

In the book *The International Law on Foreign Investment*, Sornarajah discusses the obligations that multinational corporations must follow to abide by human rights standards in the course of their activities in a host state. The author notes that there is increasing literature on obligations required for multinational corporations to respect human rights, and that there is a shift away from the old position that shielded multinational corporations from liability for violations of human rights. Instead, the field is moving towards a position that imposes liability through obligations that guarantee the human rights of the host state's population.[29] The author notes that there are several treaty-based methods that international law has developed to protect foreign investments. These include BITs, multilateral investment treaties, and investment chapters in free trade agreements. The author argues that these treaties have been used to protect the interests of multinational corporations, but they have not been effective in protecting the human rights of the people of the host state.

The author notes that there are several reasons why these treaties have not been effective in protecting human rights. First, the treaties are drafted in a way that gives priority to the interests of multinational corporations over the interests of the people of the host state. Second, the treaties are enforced through investor-state dispute settlement (ISDS) mechanisms, which allow multinational corporations to sue host states for damages if their investments are expropriated or if they are subject to discriminatory treatment. The author argues that these mechanisms are biased in favor of multinational corporations. The right to regulate foreign investment from entry to exit lies at the root of conflicts concerning the making of an investment instrument. It runs through every aspect of the provisions of the instrument from definition to dispute settlement. Customary international law recognized that the entry of foreign investment was entirely a matter for the sovereign prerogative of the state. Liberalizing instruments on foreign investment seeks to change this view.[30]

4 Conclusions

The analysis of compliance and its practical effects leads to the understanding that we are currently in the "Century of Compliance." Compliance is a multifaceted concept with a wide range of applications and meanings, making it difficult to define comprehensively. However, it is increasingly recognized

29 Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2010), p. 200.

30 *Id.*

as a crucial mechanism for companies to prevent risks associated with non-compliance with regulations and to strategically handle potential litigation.

Within the compliance landscape, the B&HR phenomenon is gaining prominence, especially in Latin America, where investments in the exploitation of natural resources are on the rise. The right to a healthy environment is a significant aspect of B&HR, and its recognition as an autonomous and justiciable right by the Inter-American Commission on Human Rights, its implications for the rights of indigenous peoples, and its impact on the sovereignty of states over their natural resources are key areas of analysis.

In this context, specialized knowledge on the prevention of human rights issues becomes indispensable for global operations. The analysis of the right to a healthy environment in Latin America considers the theoretical position of Latin American constitutionalism and aims to provide insights into the potential implications of this right on businesses operating in the region.

The right to a healthy and sustainable environment is a paradigmatic link in the evolution of human rights. It is considered a third-generation right that emerged internationally to regulate technological development and address threats to human health and life on a global scale. The right to a healthy environment has been progressively incorporated into constitutions worldwide, recognizing its importance in protecting human well-being and preserving the environment.

At the international level, the right to a safe, clean, healthy, and sustainable environment has gained recognition as an autonomous human right, as seen in the United Nations Human Rights Council's Resolution A/HRC/48/L.23/Rev.1. Environmental constitutionalism, a growing trend in many countries, recognizes citizens' right to a healthy environment and the obligation of constitutions to guarantee certain environmental rights.

Courts in Latin America have played a significant role in recognizing environmental rights, with some constitutions explicitly acknowledging the rights of nature and allowing individuals to take legal action to defend the environment. Advisory Opinion 23/17 by the Inter-American Court of Human Rights reaffirmed the interdependence between the environment and human rights, recognizing the right to a healthy environment as an autonomous and justiciable right.

Court judgments, such as the *Indigenous Communities Members of the Association Lhaka Honhat v. Argentina* and Judgment T-622 of the Constitutional Court of Colombia, set important precedents in recognizing the environment as a subject of rights and obliging States to prevent environmental harm and protect the rights of indigenous and affected communities.

The recognition and protection of the right to a healthy environment can have significant practical effects, including the establishment of obligations on states to prevent environmental damage, implement responsible environmental policies, and coordinate efforts for environmental protection and restoration. By acknowledging the interdependence of human rights and the environment, courts and international bodies have paved the way for safeguarding both the well-being of communities and the natural world.

In Bolivia, the concept of indigenous people is complex and involves the confluence of three defining elements: indigenous, *originario*, and *campesino*. Indigenous identity is constructed based on ethnic self-identification, language, historical tradition, institutions, territoriality, and worldview. The right to prior consultation is a fundamental right for indigenous, native, and peasant peoples in Bolivia. It must be carried out in accordance with their traditions and customs and applies to any decision that may affect them, not limited to cases involving non-renewable natural resources.

Constitutional jurisprudence has broadened the interpretation of the right to consultation, considering it applicable to various legislative and administrative measures, not restricted solely to the exploitation of non-renewable natural resources.

The inter-American jurisprudence, particularly the *Saramaka People v. Suriname* case, has influenced Bolivia's understanding of prior consultation, emphasizing the need for effective participation and benefits for affected indigenous communities and conducting environmental or social impact assessments. The *Tipnis* case in Bolivia highlighted the need for prior consultation and the essential elements of this right, such as being prior, informed, participatory, and conducted in good faith.

Bolivia, Ecuador, and Venezuela have withdrawn from ICSID, signaling a trend towards a more assertive approach in protecting natural resources in the region. In Bolivia, the replacement of the Arbitration and Conciliation Law with the Conciliation and Arbitration Law reflects the country's efforts to establish a comprehensive legal framework for international investment arbitration. There is an increasing focus on constitutional compliance for companies in the region, with constitutional provisions on fundamental rights, environmental protection, and natural resources becoming essential considerations.

The relationship between human rights and business law, as well as the exercise of domestic and international arbitral functions, is becoming more intertwined, leading to discussions on how to commensurate decisions in this regard. Several investment arbitration cases involve the Latin America region, such as:

- *Chevron/Texaco v. Ecuador* and *Santa Elena v. Costa Rica*, have highlighted the tension between investment law and human rights, with the challenge of balancing these competing interests.
- The *Aguas del Tunari v. Bolivia* case stands as a turning point in investment arbitration, recognizing the growing importance of human rights considerations in investment disputes and the duty of states to protect fundamental human rights, even in the context of investment protection.
- The *Achmea* case raised significant questions about the relationship between investment law and EU law, demonstrating the need for a more integrated approach to investment arbitration and prompting several EU member states to reevaluate their investment treaties.

Overall, the region is experiencing a shift towards a more comprehensive and assertive approach to protect natural resources, human rights, and the environment in the context of investment activities. The complex relationship between investment law and human rights is increasingly being recognized, and there is a growing emphasis on finding a balanced approach that respects both investor rights and the obligations of states to safeguard the welfare of their populations and natural resources.

The Guide to Principles on Corporate Social Responsibility in the Field of Human Rights and the Environment in the Americas recommends effective policies for oversight and supervision of companies' activities to ensure environmental respect. Within the OAS, no binding instrument promoting corporate conduct in relation to the environment and human rights has been adopted, but the Latin American constitutionalism emphasizes the need of taking consideration of the environment, human rights, and the rights of indigenous peoples in investment decisions.

States have a duty to prevent human rights violations committed by private companies and must adopt legislative and other measures to prevent, investigate, punish, and repair such violations when they occur. States must ensure access to effective remedies for those affected by human rights violations, including state judicial and non-judicial redress mechanisms, eliminating barriers to access to redress for affected individuals.

The B&HR phenomenon encompasses obligations that states have in terms of human rights in the international and national context, as well as the responsibility of multinational corporations to respect human rights in host states.

Treaty-based methods, such as bilateral investment treaties (BITs) and investor-state dispute settlement (ISDS) mechanisms, have been insufficient in protecting the human rights of the people of the host state due to biases

in favor of multinational corporations. The right of the host state to regulate foreign investment is essential, and developing countries should maintain screening legislation to exclude investments they perceive as harmful to their economies.

Conflicts concerning the creation of investment instruments arise from differing views on the right to regulate foreign investment, and this issue should be addressed in international law to achieve a balance between investment disciplines and other public policy concerns. Overall, the conclusions drawn from this contribution emphasizes the need for a comprehensive framework that ensures companies' adherence to human rights and environmental standards in their activities, with states taking responsibility for enforcing these obligations and providing effective remedies for violations. Additionally, there is a recognition of the importance of host states' right to regulate foreign investment to protect their economies and public interests.