

THE CASE OF CERRO MATOSO, COLOMBIA

WHY ENVIRONMENTAL DUE DILIGENCE MATTERS IN MINERAL SUPPLY CHAINS

IMPRINT

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Brief Summary

The Colombian extraction project of Cerro Matoso is situated in the south of the department of Córdoba. The region is considered the most critical in terms of human rights violations during the internal armed conflict in Colombia. The local communities accuse BHP Group and South 32 (which demerged from BHP in 2015) of contributing to the aggravation of their living conditions. The mine has lacked proper environmental conservation measures for decades, leading to the pollution of water, soil and air with toxins that have devastating consequences for the health of the population. Environmental governance and institutional accountability in this conflict and post-conflict setting is weak.

The study points to the difficulties of holding companies responsible for health damages in the population that are linked to environmental pollution caused by companies. The Cerro Matoso case was heard by the Constitutional Court of Colombia. Here, conflicting assessments were made about the cause-effect relationship between human health, environmental damage and mining activities. Due to the difficulty in establishing a clear link between the damage to health and past corporate activities, the compensation payments initially ordered by the court were subsequently annulled. Further, the environmental licence and defined measures were so unspecific that it was not possible to make Cerro Matoso responsible for the environmental damage it caused.

Better preventive environmental protection by Cerro Matoso might have avoided serious human rights violations in the neighboring communities. A corresponding environmental approach should therefore also be anchored in corporate due diligence obligations. It is important to design environmental due diligence requirements in such a way, that they define concrete and environmental specific obligations for corporates along their value chains. This would make it clear to companies which measures and responsibilities they must take to protect the environment. In the event of damage, it would thus be possible to determine the responsibility of companies in relation to their level of disregard of environmental due diligence. Compared to a solely human rights approach, environment-related due diligence would make complicated procedures for determining the cause-effect relationship between corporate activity, environmental damage and health impact could obsolete.

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1 Quick Facts

Mining details and background information	<p>Operator is Cerro Matoso S.A., subsidiary of Australian company South 32. The latter demerged from the BHP Group in 2015, one of the world's largest resources companies. The mine is one of the largest ferronickel production plants in the world with an area of approx. 84,989 hectares.¹</p> <p>In operation since 1960, the concession was first extended until 2029 and then until 2044, despite protests from the local population and claims of inadequate environmental management of the mining site.</p> <p>South 32 exports its mining products to over 18 countries. South 32 generates 2% of its revenues from Germany.² In 2019, Germany was the fourth largest importer of nickel in the world.³</p>
Operation in a context of conflict and human rights violations	<p>Operation takes place in a context of conflict and weak environmental governance:</p> <p>In the area surrounding the mine, various forms of violence against the civilian population occurred more frequently, with selective killings, massacres, disappearances, abductions and displaced persons. This situation continues today – since the implementation of the Colombian peace agreements in 2016, 37 social leaders have been murdered in Cordoba and more than 200 threats have been reported. In the course of 2020, murders, including of minors, by criminal organisations, displaced persons and a push for territorial control among paramilitary groups have continued to be registered. More than 3,000 members of the army, police, navy and air force are deployed in southern Cordoba.</p> <p>In this kind of (post-) conflict context, public environmental governance is weak. Environmental destruction by the mining company has led to health-related human rights violations.</p> <p>Until 2018, the mining operation has lacked arrangements for consultation, participation and complaint mechanisms for affected communities and other stakeholders.</p>
Documented environmental damages	<p>Beginning October 2012, the Comptroller General's Office contested the validity of Cerro Matoso's environmental license, since it did neither delineate the exploitation area, nor did it define measures for mitigation and environmental compensation. Considerable amounts of carcinogenic heavy metals, polycyclic aromatic hydrocarbons and a variety of complex oxides were detected in the atmosphere; polluting water sources and leading to a loss in biodiversity.</p>

¹ Cinep (2014). Córdoba la tierra y el territorio. Aportes para el debate. [Cordoba the land and the territory. Contributions to the debate]. Available at <https://www.cinep.org.co/publicaciones/PDFS/7.Cordoba.pdf> (accessed 4 September 2020)

² South 32 (2015): Making a Difference from the Ground Up. Roadshow Presentation. Available at https://www.bhp.com/-/media/bhp/documents/investors/reports/2015/150317_south32roadshowpresentation.pdf (accessed 27 November 2020)

³ Statista (2020): The world's leading importers of nickel and nickel products in 2019, by country. Available at: <https://www.statista.com/statistics/1116992/global-nickel-imports-by-country/> (accessed 27 November 2020)

	The local population suffers from serious health damages, which expert reports have linked to the contamination of the environment.
Peculiarity of the case	The case was heard by the Constitutional Court of Colombia. Although South 32 was first ordered to pay reparations and compensation, parts of the ruling were subsequently annulled. South 32 appealed the ruling by doubting the cause-effect relationship between human health damages, environmental pollution and past and present business activities of Cerro Matoso.

2 Background and History of the Cerro Matoso Mine

2.1 Mining operations in the midst of armed conflict

The department of Córdoba is considered an ecologically very valuable region. Bordered by the Sinu and San Jorge rivers, it is home to the protected area known as the Paramillo National Natural Park. However, Cerro Matoso – one of the largest open-pit ferronickel mines in the world – operates in its southern area. In the same region, the National Government has granted 60 valid mining permits and is processing 180 applications for exploitation. Between 2012 and 2018, Cerro Matoso exported ferronickel to 18 countries.⁴ However, this wealth of mining activity does not translate into a greater well-being for the population; on the contrary, in the last years, this region has become a space contested by illegal armed actors who seek to appropriate the lands of rural communities, as denounced by the local inhabitants.⁵

For more than 20 years, the inhabitants of the San Jorge river basin have suffered one of the highest levels of human rights violations during the internal armed conflict in Colombia. Targeted killings, massacres, forced disappearances, abductions and individual and mass displacements⁶ have been on the agenda and, despite the fact that more than three thousand army, police, navy and air force troops patrol this area⁷, the Ombudsman's Office issued 11 early warnings for three of these municipalities between 2016 and 2020. According to the Cordobexia Foundation, since the implementation of the Colombian Peace process, 37 social leaders have been killed in Córdoba and more than

⁴ Cerro Matoso sigue en deuda con los Zenúes [Cerro Matoso still indebted to the Zenú]. Available at: <https://www.el-tiempo.com/datos/cerro-matoso-en-deuda-con-los-zenues-352258> (accessed 7 October 2020)

⁵ Consolidación del extractivismo en el Sur de Córdoba: Afectaciones sobre el derecho a la tierra y el territorio. [Consolidation of Extractivism in Southern Córdoba: Effects on the Right to Land and Territory] Available at: <https://www.pas.org.co/consolidacion-extractivismo-cordoba> (accessed 4 December 2020)

⁶ Cinep (2014). Córdoba la tierra y el territorio. Aportes para el debate. Available at: <https://www.cinep.org.co/publicaciones/PDFS/7.Cordoba.pdf> (accessed 4 September 2020)

⁷ Nueva masacre en Córdoba, esta vez atribuida al Clan del Golfo, deja tres muertos [Another massacre in Córdoba, this time attributed to the Gulf Clan, leaves three dead]. Available at: <https://www.elespectador.com/noticias/judicial/se-registra-la-segunda-masacre-en-cordoba-en-menos-de-una-semana/> (accessed 1st October 2020)

200 threats have been reported.⁸ Information from PAS indicates that 52% belonged to a Communal Action Board, 48% held or had executive positions within it, 71% were in turn members of a regional organisation and 67% were also members of national social organisations which demanded compliance with what was agreed in the Peace Agreement.⁹

2.2 The role of companies in the Colombian conflict

The armed conflict of Colombia has a background of economic interests, in which the armed groups' financing sources are linked to their control over natural resources. Together with the state's inability to manage these resources equitably and effectively, this has led to an exacerbation of violence, land dispossession, forced displacement of communities, and the destruction and pollution of the environment, among others.¹⁰

The United Nations and the OECD have recognised that business-related human rights violations often occur in areas affected by armed conflict and other situations of systematic and/or widespread violence.¹¹ The situation in the south of Córdoba is no exception. Companies like Cerro Matoso are aware that they operate in a risky area.

An important fact to bear in mind is that there are 20 special energy battalions in Colombia securing the economic infrastructure of major hydrocarbon, energy and mining projects. The purpose of these units is not to provide public safety but to safeguard foreign investment.¹² One of these battalions is in charge of the security of Cerro Matoso.¹³

There is no evidence of Cerro Matoso S.A. direct involvement in conflict structures and activities. Nevertheless, the militarization of corporate operations turns the mining company into an indirect actor in a non-transparent conflict. In Colombia, energy battalions have been repeatedly associated with serious human rights violations, including rapes and extrajudicial executions of people who opposed mining projects. Researchers and human rights activists have stated that

⁸ Liderar en medio de la guerra, Situación de defensores y defensoras de Derechos Humanos en Córdoba [Leading in the midst of war, Situation of Human Rights Defenders in Córdoba]. Accessed 4 September 2020. Available at: <https://www.pas.org.co/liderar-en-guerra>

⁹ Pensamiento y Acción Social -PAS. Proteger los Defensores Colectivos de Derechos Humanos un desafío para las Políticas Públicas [Thought and Social Action -PAS. Protecting Collective Human Rights Defenders is a challenge for Public Policies]. Available at www.pas.org.co (from 10 December 2020 onwards)

¹⁰ Lavaux, S. (2007): Natural Resources and Conflict in Colombia: Complex Dynamics, Narrow Relationships. In: Canada's Journal of Global Policy Analysis. Vol. 62 (1), p. 19-30

¹¹ OECD (2016): OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. Available at: <https://www.oecd.org/corporate/mne/mining.htm> (accessed 4 December 2020)

¹² Massé, F. And Camargo, J. (2012): Actores Armados Ilegales y Sector Extractivo en Colombia. Available at: https://www.procuraduria.gov.co/iemp/media/file/Actores_armados_ilegales_sector_extractivo%20Fr%C3%A9d%C3%A9ric%20Mass%C3%A9.pdf (accessed 17 November 2020)

¹³ MINDEFENSA: El Sector Defensa comprometido – Infraestructura: una oportunidad para otros sectores. Available at <http://proyectos.andi.com.co/Documents/CEE/Colombia%20Genera%202015/Viernes/JoseJavierPerez.pdf> (accessed 17 November 2020)

“even though these military units are deployed in areas where the conflict with the guerrilla insurgency has been most serious, which is the argument used by the government for their existence, the key goal is the defense of the transnational companies against the legitimate territorial rights of indigenous, farming and Afro-Colombian communities. This activity provokes major social conflicts, massacres and forced displacements directly related to the invasive policy, much of it carried out in collusion with the army, paramilitaries and companies.”¹⁴

The internal conflict has left its mark on Colombia; weak governance structures lead to inadequate regulation and profound weaknesses in the protection of human rights. Weak regulations give companies also enormous flexibility in (not) implementing environmental protection measures, which can fuel conflicts still further, as is the case for Cerro Matoso.

It is well known that mining, and particularly open-pit operations, cause significant impact and damage to territories, communities, the environment and people's health. After 40 years of operations at Cerro Matoso and almost 60 years of nickel exploitation in the area, the result is that the development of business activity has left aside important environmental measures that would have limited – in part – the scenario that the communities are currently facing.

2.3 History of the Cerro Matoso mine

1963	The former Ministry of Mines and Petroleum and the Richmond Petroleum Company of Colombia sign a contract for the exploitation of nickel and other minerals.
1971	The company Empresa Colombiana de Níquel S.A. Econíquel controls the operation.
1980	The rights are assigned to the company Cerro Matoso S.A., owned by the multinational BHP Group (previously BHP Billiton). ¹⁵
1999	The national government grants Cerro Matoso S.A. the right to exploit the concession areas until 2029. ¹⁶
2012	<p>The right to operate is further extended until 2044.</p> <ul style="list-style-type: none"> • The local communities lodge a complaint that the environmental licence needs to be re-processed by Cerro Matoso, because the contracts had been modified and because the environmental impact would increase.¹⁷ • However, the mine continues to operate without renewing the environmental licence. • This complaint is followed by a court case, brought before the Constitutional Court in 2017.

¹⁴ Gisbert, T. and Pinto, M. J. (2014): Colombia: Militarisation serving extraction. Available at: <https://wri.org/en/story/2014/colombia-militarisation-serving-extraction#sdfootnote4sym> (accessed 4 December 2020)

¹⁵ Listed on the Australian and New York stock exchanges.

¹⁶ Corte Constitucional de Colombia, Sentencia T-733/17, available at <https://www.corteconstitucional.gov.co/relatoria/2017/t-733-17.htm> (accessed 17 November 2020)

¹⁷ Cerro Matoso sigue en deuda con los Zenúes [Cerro Matoso still indebted to the Zenú]. Available at <https://www.el-tiempo.com/datos/cerro-matoso-en-deuda-con-los-zenues-352258> (accessed 7 October 2020)

2015	Spin-off process: South 32 now controls the operation. ¹⁸ This multinational <ul style="list-style-type: none"> • is listed on the Australian stock exchange, • carries out extraction and/or production activities of different minerals in Australia, South America and South Africa at a global level • managed its marketing out of Singapore with support offices in London, South Africa, and Australia
2017-2018	The Constitutional Court rules Cerro Matoso guilty for violating of the fundamental rights of the local population. However, after an appeal of Cerro Matoso, the ruling is annulled in important parts, because (among others) Cerro Matoso challenges the assumed chain of effect between the mining operations and health damages.
<i>Important detail</i>	The company obtained an environmental licence in 1981, which since then has not been updates and is thus not in line with environmental regulation as defined in Law 99 of 1993. The Comptroller General's Office considered the license invalid from October 2012 on, as it did neither delineate exploitation areas nor define measures to mitigate or to compensate for environmental damage.

3 Uncontrolled environmental pollution

3.1 Toxic air pollution and water contamination

The mining operation is placed in the centre of the Alto San Jorge Zenú Reservation. With the construction of thirteen furnaces (185 metres long and 6 metres in diameter) in 1980, "the inhabitants of the municipalities near the mine began to notice a drastic change in their surroundings, feeling the negative impacts on their land, the environment, their water sources and their health".¹⁹ Ferronickel is extracted from open pit mines, where the material is melted in furnaces at high temperatures. Therefore, depending on the conditions of the deposit, considerable quantities of fine dust, heavy metals, metallic nickel, polycyclic aromatic hydrocarbons and a variety of complex oxides are released into the atmosphere. All these compounds, with the exception of metallic nickel, are classified as carcinogenic to humans by the International Agency for Cancer Research.²⁰ *The Ministry of Environment and Sustainable Development* has indicated that "ferronickel production activity is

¹⁸ BHP Billiton Latest News: South32 Demerger Implemented (25 May 2015). Available at <https://web.archive.org/web/20151101014400/http://www.bhpbilliton.com/investors/news/south32-demerger-implemented> (accessed 17 November 2020)

¹⁹ Fallo sobre Cerro Matoso muestra a Corte dividida por indemnizaciones [Ruling on Cerro Matoso shows Court divided over compensation]. Available at: <https://www.eltiempo.com/justicia/cortes/se-cae-reparacion-a-victimas-de-cerro-matoso-271100> (accessed 8 September 2020)

²⁰ Corte Constitucional de Colombia, Sentencia T-733/17, available at <https://www.corteconstitucional.gov.co/relatoria/2017/t-733-17.html> (accessed 17 November 2020)

likely to generate emissions of toxic substances of environmental and public health interest into the air". However, Colombia does not have regulations establishing maximum permissible levels of nickel extraction, nor methods of measurement.²¹

In addition, Cerro Matoso has water concessions for its production process and receives both surface water and groundwater supply at high volumes (over 230 l/s) without any evidence of water-use efficiency and water-saving programmes in the administrative acts of the concession. Compensation is limited to the planting of one hundred trees regardless of the flow rate granted to the company. It has discharge permits to discard wastewater and runoff in volumes of over 108 l/s to the Uré and the San Jorge rivers, as well as emissions permits for the 13 chimneys that correspond to the ferronickel process. This international emissions permit is not based on current environmental regulations, and according to the administrative act, the permit is provisional.²²

The *Attorney General's Office* pointed out that the water coming from the mine, rainwater and in general waste and industrial water, is disposed of in a dump that discharges into the El Tigre river. The Health Secretary of the Puerto Libertador municipality confirms that it "receives environmental pollution from the Cerro Matoso mine". The *Ombudsman's Office* explains that "clouds of dust and slag [...] are going to the communities", and different kinds of environmental damage occur (for example, contamination of water sources such as the San Jorge and Uré rivers, via the Uré and Tigre streams). Species such as herons have disappeared and fish stocks are decreasing; there have been losses of flora and fauna, trees have suffered from pollution, food production has decreased, and there is a danger of food shortages for the affected communities.²³

Cerro Matoso lacks a monitoring network of hydrometeorological variables that would allow for the adjustment of the models of flow patterns of water sources located within the mine's direct area of influence, as well as atmospheric indicators. The environmental compliance reports presented by Cerro Matoso to the environmental authorities do not include evaluations of the indicators in long-term historical series, which is an important aspect when analysing the cumulative impacts caused by the mine.²⁴ The affected communities have demanded the Ministry of the Environment to corroborate the impacts caused by Cerro Matoso and to establish environmental management policies and plans for the area. Communities have further demanded the government to transparently define compensatory measures and mandatory environmental investments to the company, in order compensate for past damages and to mitigate further harm.

²¹ Ibid.

²² Ramírez, N. (2019). Logística de exportación de Escoria de ferróníquel producida por la empresa Cerro Matoso a Estados Unidos [Export logistics of ferronickel slag produced by the company Cerro Matoso to the United States]. Montería: Universidad de Córdoba.

²³ Corte Constitucional de Colombia, Sentencia T-733/17, available at <https://www.corteconstitucional.gov.co/relatoria/2017/t-733-17.html> (accessed 17 November 2020)

²⁴ Ibid.

3.2 Contradictory environmental regulation

The environmental controls of the Cerro Matoso mine are headed by two environmental authorities, the *Corporación de Los Valles del Sinú y San Jorge* (CVS) and the *Agencia Nacional de Licencias Ambientales* (ANLA). However, CVS's role is obsolete, as it does not have the equipment to verify the environmental reports submitted by the company. According to reports from the *Comptroller General of the Republic*, Cerro Matoso lacks a valid environmental licence since 2012, as the outdated license does neither define the limits of exploitation, nor mitigation measures and environmental compensations.²⁵ Furthermore, the mine has an environmental management tool dating from 1981, which for 25 years (between 1981 and 2006) was not supervised by the Colombian government and was not adapted to the current mining operation. The National Mining Agency (ANM), however, disagreed with the assessment made by the *Comptroller General of the Republic*, arguing that the environmental license of Cerro Matoso was still valid. There is thus uncertainty about the environmental legal basis of the mining operation but definitely a weak implementation of the minimum standards.²⁶

However, the true environmental damage is even greater when looking at the indirect environmental costs of the mining project. The mining project is supplied with energy from the Hidroituango dam. The mine consumes more electricity than the nearby city of Barranquilla (with more than one million inhabitants). The construction of the dam has contributed to massive and well-documented environmental damage and human rights abuses. German companies supported the construction technically and financially.²⁷

Cerro Matoso has recognised that the impacts on forestry are irreversible, due to expansive slag deposits²⁸. However, considering that the concession is scheduled to last until 2044, it is worth noting that the company apparently does not have conservation measures to recover the environmental damage existing in operation zone. Assessments and monitoring results by the company on water and air parameters do not exist or are not public.

The only measure taken in response to this worrying situation has simply been to address the damages by staggered planting of native trees, in a ratio of 10 trees planted for every tree felled.²⁹ This type of decision is left to the discretion of the company and there is no authority in Colombia, either at the regional or national level that would call for a progression towards ecological restoration plans including restoration of forest covers and biodiversity conservation programmes or the like. In the absence of national regulations, effective and proper due diligence by international companies significantly addresses and prevent some of these damages.

²⁵ Cerro Matoso sigue en deuda con los Zenúes [Cerro Matoso still indebted to the Zenú]. Available at <https://www.el-tiempo.com/datos/cerro-matoso-en-deuda-con-los-zenues-352258> (accessed 7 October 2020)

²⁶ Morelo, G. and Castillejo, S. (2019). The Zenú village surrounded by a mine. Available at: <https://tier-raderesistentes.com/en/index.php/2020/03/25/el-pueblo-zenu-acorralado-por-el-desarrollo-minero/> (accessed 27 November 2020)

²⁷ Grieger, F. (2020): Kolumbiens Palast der Tränen. Available at: <https://www.berliner-zeitung.de/wirtschaft-verantwortung/rio-cauca-in-kolumbien-palast-der-traenen-li.5167> (accessed 4 December 2020)

²⁸ South 32: Reporte de Sostenibilidad (2018), p. 90, available at <http://www.cerromatoso.com.co/media/ReporteSostenibilidad2018CMSA.pdf> (accessed 4 December 2020)

²⁹ Ibid.

4 The challenge of holding companies accountable for health damages caused by environmental pollution

4.1 Constitutional court ruling confirms human rights violations and enforces remedies

There are nine indigenous communities located in the impact area of the Cerro Matoso mine project.³⁰ However, the company claims that when operation started, communities were not recognised as indigenous (official recognition was granted in 1999). According to the company, this is why consultations and negotiations with these communities were not held in the past, but started from 2018 onwards by order of the Constitutional Court.

The company demanded that the indigenous communities, in order to be valid interlocutors, should constitute themselves as a Reservation [*Resguardo*] before the Ministry of the Interior. This led to the Resguardo Zenú of the Alto San Jorge beginning the process of constitution in 1996 – 18 years later, in 2014, it was recognised as such by the Ministry. During this process, 48 members of the community were killed (between 2004 and 2015), ten of which were local land rights leaders seeking to establish the Reservation.³¹

In 2013, the communities submitted two guardianships or *tutelas*³², in which they warned of the proliferation of cancer, skin diseases and the increase in miscarriages in their communities, demanding protection of their fundamental **rights to health, a safe environment and prior consultation**. The Constitutional Court, in Ruling T-733/17³³, ruled to:

-
- Company level** a. order the company to issue a new environmental licence, based on the obligations assumed in the previous consultation, which includes mechanisms to correct the environmental impacts of its operations until the estimated time of completion, ensuring the health of people, as well as the protection of the environment;
-

³⁰ According to the 2015 Census of the Directorate of Indigenous, Roma and Minority Affairs of the Ministry of the Interior, Colombia, cited in Corte Constitucional de Colombia, Sentencia T-733/17, available at <https://www.corteconstitucional.gov.co/relatoria/2017/t-733-17.htm> (accessed 17 November 2020)

³¹ Cerro Matoso sigue en deuda con los Zenúes [Cerro Matoso still indebted to the Zenú]. Available at: <https://www.eltiempo.com/datos/cerro-matoso-en-deuda-con-los-zenues-352258> (accessed 7 October 2020)

³² A mechanism enshrined in the Political Constitution of Colombia in Article 86, which seeks to protect the fundamental rights of individuals when any of these are violated by acts, facts or omissions of any public authority.

³³ Corte Constitucional de Colombia, Sentencia T-733/17, available at <https://www.corteconstitucional.gov.co/relatoria/2017/t-733-17.htm> (accessed 17 November 2020)

	<ul style="list-style-type: none"> b. order Cerro Matoso to provide comprehensive and permanent health care to people registered in the Ministry of Interior's census, as well as to communities, for diseases related to the company's extraction operations; c. order Cerro Matoso to pay for the damages caused to the members of the communities; d. order Cerro Matoso to finance and put into operation a Special Ethnic Development Fund for the reparation and compensation of victims from a collective and ethnic perspective for the damage caused from decades of mining,
State and company level	<ul style="list-style-type: none"> e. protect the fundamental rights of ethnic communities to prior consultation, health and the enjoyment of a safe environment; f. order that prior consultation be carried out, in which measures of environmental protection, mitigation and compensation are established with respect to the damages that could be caused by the on-going extraction work by Cerro Matoso;
State level	<ul style="list-style-type: none"> g. order the Ministry of Health and Social Protection to set up a health brigade to conduct medical assessments of the communities and build their epidemiological profile; h. order the Ministry of Environment and Sustainable Development to regulate the concentration limit values for water and air, with regard to the chemical substances iron and nickel, to adjust the regulatory instruments where applicable in accordance with the standards of the World Health Organization; and i. order that administrative adjustments are adopted to ensure strict and effective environmental control over extraction activities of Cerro Matoso and compliance with the mitigation, prevention and compensation measures agreed to in the consultation process. It also includes specific protection strategies aimed at decontaminating the ecosystem (air, soil and water bodies); adopting technical methods to prevent the lifting and dispersion of particulate material; restoring the Caño Zaimo water basin; restoring the productive capacity of the affected land; recovering the landscape; and isolating the mining complex by means of artificial and/or natural barriers.

4.2 Annulment of compensations, setback for human rights

This ruling by the Constitutional Court was of great importance as it allowed the National Institute of Legal Medicine and Forensic Sciences to take 1,147 blood samples and record the percentages of mining-related diseases in these samples, which established a correlation between the proximity of the mine and the manifestation of diseases.³⁴

However, after the results of the study were made public, South 32 challenged results and requested the annulment of the orders, arguing it had not failed to comply with its environmental management of the mine.³⁵ It underlined its argumentation by the following:

*The Court misinterpreted the medical report issued by the Colombian Institute of Legal Medicine, which clearly and unequivocally stated that it is not conclusive, since a relationship of direct causality was not established between the impact found in the population and the Cerro Matoso operation.*³⁶

The case was reopened and the judges reassessed the orders based on the medical report and Cerro Matoso's environmental documents. The compensation payments were at the centre of debate and became finally annulled. According to the court and the company, the medical study did not allow systemic conclusions to be drawn about the cause and effect relationship of the mining operation and the environmental impact on the one hand and the health effects on the other hand.

Colombia lacks clear thresholds and regulation on toxic iron and nickel emissions that – together with uncertainties about the validity of the environmental license among the competent authorities – further complicated the legal assessment and made it even more difficult to hold Cerro Matoso liable for environmental damage and the resulting health issues.

The court annulled those parts of its ruling in 2018 that made Cerro Matoso S.A. liable for the damages caused to the communities. This decision included the annulment of the obligation to create an ethno-development fund for the reparation and compensation of the victims. However, it is important to note that judges reaffirmed those orders that obliges Cerro Matoso S.A. to provide ongoing health care to community members and to submit to a new consultative environmental licensing process.³⁷

³⁴ Ibid.

³⁵ Fallo sobre Cerro Matoso muestra a Corte dividida por indemnizaciones [Ruling on Cerro Matoso shows Court divided over compensation]. Available at: <https://www.eltiempo.com/justicia/cortes/se-cae-reparacion-a-victimas-de-cerro-matoso-271100> (accessed 8 September 2020)

³⁶ Morelo, G. and Castillejo, S. (2019). The Zenú village surrounded by a mine. Available at: <https://tieraderesistentes.com/en/index.php/2020/03/25/el-pueblo-zenu-acorralado-por-el-desarrollo-minero/> (accessed 27 November 2020)

³⁷ Ibid.

Nevertheless, the decision runs counter to the aspirations of the affected communities that have linked the annulment of the compensation payments to allegations of corruption. Current investigations against Cerro Matoso indicate that these accusations are likely. The mining company is accused of tax evasion and bribing representatives of the mining authority.³⁸

According to Cerro Matoso, its communication channels maintain a permanent dialogue with its stakeholders and those affected by its business activities, which is in sharp contrast to the claims and lawsuits discussed above. In its sustainability reports of 2018 and 2019, the company refers to the court ruling. In 2019, it reports that it compiled a new environmental impact study as a re-requirement to renew the environmental licence and handed it in to the ANLA; that until the end of 2019 no one requested the health services that the company had to provide according to the sentence and which were offered through the IPS Panzenú Foundation. Accordingly to its report, it also finished the process of “prior” consultation with eight affected communities, declaring that a follow-up committee is in place as a mechanism to verify the company’s compliance with the agreements resulting from the consultations (such as, for example, an environmental monitoring programme).³⁹ During the “prior” consultations, indigenous and Afro-Colombian spokespersons criticised that at least two of the representatives of the company and the participating state institutions had worked for both of them, creating a conflict of interest.⁴⁰

4.3 Environmental due diligence as an approach to prevent human rights violations

The case illustrates the difficulties to hold holding corporations accountable for health damages caused by an environmental pollution that is directly linked to their business activities. Communities and civil society organisation have claimed that contamination of water, soil and air has been the result of insufficient environmental protection measures by the mining company.⁴¹ However, it has been difficult, from a legal perspective, to hold Cerro Matoso liable for health damages caused by cumulative processes of environmental contamination. Since environmental governance is weak (both regulation and implementation) in countries that suffer from (post-) conflicts, environmental

³⁸ Valora Analitik (2020): Millonario proceso de responsabilidad fiscal en mina de níquel de Cerro Matoso en Colombia. Available at: <https://www.valoraanalitik.com/2020/02/18/millonario-proceso-de-responsabilidad-fiscal-en-mina-de-niquel-de-cerro-matoso-en-colombia/> (accessed 4 December 2020)

³⁹ South 32 Cerro Matoso: Reporte de sostenibilidad 2019, p. 26, available at http://www.cerromatoso.com.co/media/ReporteDeSostenibilidad_2019_CMSA.pdf (accessed 4 December 2020)

⁴⁰ El tiempo (23 April 2019): The Zenú village surrounded by a mine (by Ginna Morelo and Sara Castillejo), available at <https://tierraderesistentes.com/en/index.php/2020/03/25/el-pueblo-zenu-acorralado-por-el-desarrollo-minero/> (accessed 4 December 2020). See also the documentary with English subtitles: <https://www.eltiempo.com/datos/indigenas-zenu-acorralados-por-la-mineria-en-cordoba-352240>

⁴¹ Morelo, G. and Castillejo, S. (2019). The Zenú village surrounded by a mine. Available at: <https://tierraderesistentes.com/en/index.php/2020/03/25/el-pueblo-zenu-acorralado-por-el-desarrollo-minero/> (accessed 27 November 2020)

concerns must play a more important role in due diligence measures of companies. Buyers of minerals along the supply chain should push their producers to implement environmental mitigation and compensation measures to avoid negative health impacts to the communities.

Due Diligence regulations that push for preventive environmental action along supply chains, could be crucial to avoid health damages and human rights violations caused by environmental contamination. An environmental due diligence approach should refer to environmental monitoring and management measures, e.g. including references to emission thresholds, while companies need to demonstrate their compliance or check for compliance of their business partners. Environmental due diligence could therefore be a suitable instrument to avoid complicated approaches of mapping the cause-effect relationships between corporate action, environmental damage and its impact on humans. In case of non-compliance with environmental protection measures and monitoring, it could be sufficient for affected people to prove that environmental damage has occurred from corporate activities that ignored environmental due diligence requirements, rather than having to determine and demonstrate the causality to the resulting human rights violations.

5 Conclusions for environmental due diligence

>>Recommendations for International and national environmental due diligence legislation

As the present case shows, the internal conflict has left its mark on Colombia; weak governance structures and corruption contribute to inadequate regulation and profound weaknesses in the protection of human rights and the environment. Weak regulations give companies enormous flexibility in (not) implementing environmental protection measures, which can fuel conflicts even further, as is the case for Cerro Matoso. Corporate due diligences should therefore be seen as an important approach to counteract possible regulatory weaknesses in producing countries. In this context, the UN Guiding Principles for business and human rights acknowledge the responsibility of companies to respect human rights also along their transnational business activities and urge states to enforce compliance with the principles also along transnational relationships. However, most countries have not (yet) integrated the UN Guiding Principles into national legislation.

It is the duty of all states to hold their companies accountable for human rights violation, especially when those companies operate in countries with conflicts and weak governance. South 32 and BHP are based in Australia and Great Britain. These countries have strong capacities to implement legislation and to establish reliable governance structures to ensure compliance of their nationally registered companies with the UN Guiding Principles. Therefore, it is important that the UN Guiding principles are efficiently implemented in national legislation and that companies are required to implement due diligence measures for their procurement practices.

However, the UN Guiding principles address environmental damage only if it leads to human rights violations that are directly linked to specific corporate activities. As this case study shows, human rights violations are often connected to slow processes of environmental deterioration and occur as a consequence of cumulative events and causes. In contrast, environmental due diligence would start earlier and should define obligations to act for companies along the supply chain with the aim of preventing environmental degradation, beyond potential impacts on humans. It is therefore particularly important to establish an explicit environmental reference within due diligence laws. Moreover, it could be useful to establish sector specific requirements and references for due diligence measures.⁴² The OECD Guidelines for Multinational Enterprises (2011) and the OECD Guidance on Responsible Business Conduct (2018) are already pointing the way forward, but require more detailed and sector-specific approaches within binding regulation.

The mining and extractive industries, in particular, are risk sectors for the occurrence of human rights violations and environmental destruction in international supply chains. Therefore, it is welcome that the German government has committed itself to initiate an international process to specify environmental due diligence requirements and measures for the mining sector. Even if these guidelines will only have a voluntary character, it could be a first step into the right direction.⁴³ Special consideration should be given to the definition of thresholds for chemical emissions, as well as the necessary monitoring systems required. Moreover, the guidelines should have an overview of the best available technic, mining-specific protective measures and define requirements for renaturation concepts for the closure phase. Most important the drafting process has to involve civil society perspectives from the supply countries.

Crucial is that environmental due diligence does not remain a guidance and that concrete duties for corporation derive from a binding legislations. Therefore, it is very welcome that the European Council recently agreed that Europe needs to work on a Human Rights and Environmental Due Diligence Legislation and also EU Commissioner for Justice, Didier Reynders, announced such a regulation to be presented in early 2021. It is key that the draft the European Commission will include civil liability.

Another important point is, that the current EU regulation on conflict minerals focusing on 3TG (tin, tungsten, tantalum and gold), which comes into force in 2021, is far too simplified. Ferronickel, while not being covered by the conflict minerals regulation, can play a role in violent conflict. Thus, it is important that in the course of a revision in 2021, more minerals will be incorporated into the scope of the regulation.

⁴² Verheyen, R. (2020): Ein deutsches Lieferkettengesetz. Echte Chance für den Umweltschutz. Stellungnahme mit Schwerpunkt auf materiellen Sorgfaltspflichten und Umsetzung am Beispiel besonders gefährlicher Chemikaliengruppen (Textilindustrie). Available at: <https://www.greenpeace.de/sites/www.greenpeace.de/files/publications/s03111-greenpeace-lieferkettengesetz-stellungnahme-20200818.pdf> (accessed 27 November 2020)

⁴³ German Ministry for Economy (2020). Die deutsche Rohstoffstrategie. Available at: <https://www.bmwi.de/Redaktion/DE/Publikationen/Industrie/rohstoffstrategie-der-bundesregierung.html> (accessed 27 November 2020)

>> What companies need to consider in Environmental Due Diligence

In the case of Cerro Matoso, operators have lacked an updated environmental license for years and compliance with environmental regulations was inadequately monitored by state authorities. Because of lacking environmental management and conservation measures, the mining operations have polluted the environment with toxic substances over decades resulting in serious health damages in the neighbouring communities. Early environmental management and the taking of preventive measures could have prevented human rights violations.⁴⁴

Therefore, also from a human rights perspective, due diligence should include a more preventive approach towards environmental concerns by embedding measures aimed at preventing environmental damage from occurring. As outlined in this paper, we understand environmental due diligence to be such a preventive approach, but one that needs further concretization both legally (as outlined above) and from an implementation perspective. In the following, we would like to present first possible starting points for the implementation of an environmental due diligence in companies.

Risk assessment: Purchaser should assess the most relevant environmental risks along their supply chains. For supply relationships with high environmental risk potentials, such as direct or indirect business relationships with mining companies, further assessment is crucial to develop appropriate measures. These analyses have to take into account the perspectives of those affected, for example through an assessment of documented complaints or through an exchange with local civil society organisations or other representatives.

Measures to avoid or to compensate for environmental damage: National and international purchasers of mining products need to oblige their suppliers to provide concepts and documentation of environmental and social management plans and push for their implementation. They need to evaluate how these management plans assess, prevent, and mitigate (potential) damages of mining operations. An environmental due diligence should verify that government permits are not only valid but that corresponding conservation measures are in line with international standards (for example in terms of emission thresholds).

Since 2001, the European environmental management system EMAS already includes a corresponding supply chain approach to address indirect environmental impacts that arise from business relationships.⁴⁵ Environmental management systems are a good starting point for environmental due

⁴⁴ Morelo, G. and Castillejo, S. (2019). The Zenú village surrounded by a mine. Available at: <https://tier-raderesistentes.com/en/index.php/2020/03/25/el-pueblo-zenu-acorralado-por-el-desarrollo-minero/> (accessed 27 November 2020)

⁴⁵ Henn, EV, and Jahn, J. (2020): Rechtsgutachten zur Ausgestaltung einer umweltbezogenen Sorgfaltspflicht in einem Lieferkettengesetz. Available at: https://lieferkettengesetz.de/wp-content/uploads/2020/07/lieferkettengesetz_rechtsgutachten_umwelt.pdf

diligence but need to be more closely intertwined with the risk approach of human rights due diligence.⁴⁶

As, German companies import 5,400 t of ferro-nickel from Cerro Matoso⁴⁷, a central criterion for potential and future buyers of Cerro Matoso should be an evaluation of the implementation process of the restoration and health measures as defined in the court ruling⁴⁸.

Stakeholder engagement: In the case of Cerro Matoso, until 2018 there has been no consultation or exchange of information with stakeholders, although they have actively and vehemently called for an exchange with the company and participation in decision-making processes, as stated in this document. Only the court ruling and the associated orders to carry out appropriate consultations have changed the situation in recent years. However, it is not yet possible to assess the effectiveness of these measures at this time.

Thus, buyers should take action to ensure that the rights of the communities affected by the mine are respected and protected. To this end, it is essential that the mining company has conducted verifiable and documented consultations with all stakeholders and has disclosed all information about the known and anticipated impacts of the project in an understandable manner. Effective complaint mechanisms need to be in place to enable communities to communicate complaints about (environmental) damages to buyers and to improve stakeholder engagement.

6 Conclusions for duties of the Colombian state

As far as the duty of the Colombian State is concerned, there is a need to create a law that establishes the maximum levels of emissions in the extraction of ferronickel. With regard to corporate environmental accountability, the Colombian authorities should generally implement a stricter process and a more effective system of monitoring mines. Given that the damages caused by Cerro Matoso involve environmental and atmospheric pollution, it is necessary to review its balance in terms of greenhouse gas production, water consumption, measures to prevent pollution, production of waste or residues, and set it in relation to the necessary compensation and benefits for people affected and/or displaced by the mining activity. This includes the implementation of real programmes that generate livelihoods for affected communities, protection and conservation of biodiversity, and improvement of the natural habitat. Companies such as Cerro Matoso should be required to publicly announce and evaluate their mitigation measures; this information should be

⁴⁶ Schwerf et al. (2020): Umweltbezogene und menschenrechtliche Sorgfaltspflichten als Ansatz zur Stärkung einer nachhaltigen Unternehmensführung. Available at: <https://www.umweltbundesamt.de/publikationen/sorgfaltspflichten-nachhaltige-unternehmensfuehrung> (accessed 27 November 2020) ⁴⁷ Chatham House (2020): Resource Trade Earth. Data Available at <https://resourcetrade.earth/> (accessed 27 November 2020)

⁴⁷ Chatham House (2020): Resource Trade Earth. Data Available at <https://resourcetrade.earth/> (accessed 27 November 2020)

⁴⁸ German Industry imports 44% of its ferro-nickel from Colombia. As there only is one ferro-nickel mine in Colombia the ferro-nickel has to be from this mine.

available and known to the communities, beyond their sustainability reports. There should be greater transparency and disclosure of what the company is exploiting and marketing.

Ultimately, this case highlights the need to implement environmental policies in the context of mine closure. Colombian authorities should demand a mine closure plan from Cerro Matoso for the next 24 years that includes the assessment, mitigation and compensation of social and ecological damages caused and the restitution of human rights violated to the surrounding communities and victims of the mining operation. It should also establish the company's responsibility for the renaturation of the mining area. A permanent evaluation of the environmental management system used should be carried out, ensuring the involvement of impact groups, consultation with local communities on how the mine closure should be carried out and, consequently, establishing the responsibilities of the company, with the highest international standards on this matter.

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