

Human Rights Impact Assessments in a Brazil Land Conflict: Towards a Hybrid Approach

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I. INTRODUCTION

In recent years there has been a surge in both community- and company-led human rights impact assessments (HRIAs) thanks in part to the due diligence requirements of the United Nations Guiding Principles on Business and Human Rights (UNGPs).¹ Community-based HRIAs, by nature, analyse impacts from the perspective of a local community. Oxfam America has promoted a community-based HRIA methodology found in Rights & Democracy's *Getting It Right* tool, an approach that emphasizes a community's human rights concerns rather than starting from a company's perspective.² Communities conduct HRIAs in order to shape a project, mitigate impacts, and/or outline remedies.

Companies have also developed tools and processes to assess the potential impact of their projects; however, they often fail to seek out the expectations or assertions of the very people whose rights they may be adversely impacting. This oversight undermines the very purpose of HRIAs. Common pitfalls of company-led HRIAs include heavy reliance on desk research or failure to extend interviews beyond government officials and non-governmental organizations (NGOs). Although governments and international NGOs offer unique perspectives, they are not substitutes for strong community engagement, particularly those of rights-holders.

In any given investment project, either a company-led or a community-based HRIA may have been conducted. In Brazil, however, these two processes recently occurred in parallel providing a unique opportunity for comparison. In viewing these two processes, this piece suggests that company and communities work together, when possible, in a hybrid approach to assess human rights in order to create a shared understanding of impacts, solutions and remedies.

II. LAND CONFLICT IN BRAZIL

In 2013, Oxfam investigated a decades-long land conflict case in Brazil involving communities who had lived on the islands of the Sirinhaém estuary and a sugar mill, Usina Trapiche. As early as 1914 these fishing communities lived off the land,

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¹ Special Representative of the Secretary-General, UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed 12 May 2017).

² For more information, see: www.oxfamamerica.org/hria (accessed 12 May 2017).

mangroves, and waters on 17 different islands in the estuary. Usine Trapiche had been operating in the same zone since the 1880s. Community and company co-existed side by side without documented conflict for many years.³

During the early 1980s, Trapiche changed its approach towards the local community and began forcefully pushing the fisherfolk off the public lands. Trapiche's private militia threatened families that would not leave, and some community members' homes were burned down. By 2002, all of the 57 families were expelled from the estuary. Some community members received housing, but many did not and the majority moved to an urban slum some distance from Sirinhaém. As a result, these families could no longer rely on living off the land or depend on a clean and thriving mangrove where they used to fish. Community members have documented pollution in the mangrove, which they attribute to Trapiche. Core to the current conflict remains the fight for control of state land that is under a form of concession to Trapiche. According to the families, they continue to experience hardship, including violent actions and death threats perpetrated by Trapiche's private militia.

Communities, with the support of a local organization called the Pastoral Land Commission (known by its Portuguese acronym CPT – *Comissão Pastoral da Terra*), asked the government of Brazil to designate the area as an extractive conservation reserve, or RESEX.⁴ The RESEX would allow the communities to return to their way of life while at the same time contributing to environmental conservation in the estuary. Trapiche is not known to be growing sugarcane on the contested land. Trapiche, however, seeks to maintain control over the area and opposes a RESEX. For years, federal officials have fought for the community's land rights but Trapiche continues to exert its political influence and local government decisions remain in the company's favour.⁵ CPT has been working with this community since 2003, gathering copious evidence of human rights violations and developing a deep understanding of the conflict over the years.

In 2013, Oxfam's Behind the Brands campaign highlighted land rights risks and impacts to communities like those in Sirinhaém. It pushed Coca-Cola, PepsiCo, and other food and beverage companies to make a commitment to 'zero tolerance' for land grabs in their supply chains. Both Coca-Cola and PepsiCo made the commitment and agreed to conduct impact assessment processes in several of their key commodity sourcing countries, and did so in Brazil in 2015. At the same time that Coca-Cola and PepsiCo committed to conducting their own impact assessments in Brazil, CPT partnered with Oxfam to conduct a community-based human rights impact assessment (HRIA) of the Sirinhaém case.⁶ Although Oxfam was in conversation with the companies and CPT throughout, the assessment processes of Coca-Cola, PepsiCo and CPT were all completely independent exercises.

³ L Schneider (2010), 'A Sweeter Alternative for Whom?', available at: https://www.american.edu/sis/gep/upload/LynnSchneider_SRP_Final_1.pdf (accessed 23 May 2017).

⁴ RESEX is *Reserva Extrativista* in Portuguese. A RESEX is a protected land reserve that is publicly owned but gives the local community the right to access the area and continue its traditional practices living off the land.

⁵ Comissão Pastoral da Terra (2016), 'Starving to Death Little By Little Every Day', available at: https://www.cptne2.org.br/downloads/pdf/dossie_sirinhaem_ingles.pdf (accessed 20 March 2017).

⁶ CPT applied the *Getting it Right* human rights impact assessment methodology that Oxfam promotes. More information can be found at www.oxfamamerica.org/hria (accessed 12 May 2017).

III. COMMUNITY-BASED HRIA

From 2015 to 2016, CPT conducted an HRIA in close collaboration with community members and local allies.⁷ Using the *Getting it Right* methodology, the HRIA was designed and conducted with a focus on documenting positive and negative impacts of all duty-bearers in the case. Stakeholder outreach was meant to include all perspectives, even those that might differ from those of CPT or the community. Ultimately, CPT's HRIA included interviews of 60 community members, eight government offices at the state and federal levels, nine civil society organizations, and two companies.⁸ Usina Trapiche declined an interview.

According to the CPT impact assessment, actions taken by Trapiche destroyed the social and cultural fabric of this community.⁹ CPT concluded that the expulsion of community members from the islands was in violation of Brazilian law and international human rights conventions, of which Brazil is signatory. Complaints and court proceedings continue against Trapiche and yet the mill continues to operate under the *status quo*.

As a result of the HRIA, the community recommended that a RESEX encompassing the islands and surrounding areas be the proposed remedy. A RESEX fulfils the following criteria, each a requisite for a solution that would satisfy community members:

- long-term land tenure rights, resulting in stability, security, and guaranteed access;
- preservation of the community's traditional ways of life;
- political feasibility;
- timeliness;
- voted on by community members;
- improved living conditions for displaced families.

However, the local Pernambuco government has yet to express support for RESEX. This is despite the fact that the Brazilian Federal Environmental Department (IBAMA) conducted a robust environmental and social impact assessment in 2008, which concluded the need for a RESEX in order for community members to return to their traditional way of life and to reduce environmental degradation.¹⁰ Although the federal government is supportive of a RESEX, the state government remains opposed.¹¹ Up until now, little action has been taken to address the community's recommendations.

IV. COMPANY-LED IMPACT ASSESSMENTS

Company-led assessment processes, when done well, have the potential to identify salient issues of risk in a company's supply chain and provide a roadmap towards

⁷ See Note 5.

⁸ Ibid. For a full list of interviewed groups, see p. 123.

⁹ Ibid, p. 9.

¹⁰ Ibid, p. 101.

¹¹ Based on Oxfam interview with the Pastoral Land Commission (2013). See also Amnesty International video: <http://www.youtube.com/watch?v=OMzIshWJgOw> (accessed 12 May 2017); and L Schneider (2010), 'A Sweeter Alternative for Whom?', available at: https://www.american.edu/sis/gep/upload/LynnSchneider_SRP_Final_1.pdf (accessed 23 May 2017).

viable solutions. Both Coca-Cola and PepsiCo are global heavyweights in the food and beverage sector with considerable stakes in the sugar supply chain. Brazil is the number one producer of sugar from sugarcane.¹² In 2013, Coca-Cola committed to ‘zero tolerance of land grabs’ and to the principle of Free, Prior, and Informed Consent (FPIC) followed by PepsiCo in 2014 also committing to both.¹³

In 2014, both companies carried out their own versions of impact assessments addressing land issues in Brazil and drafted action plans based on the assessment recommendations.¹⁴ Each company and the consultants hired took a different approach to conducting and publishing the assessments. Coca-Cola used the term *baseline study* and from October 2014 to June 2015 the research team interviewed 111 stakeholder groups, including 21 mill and 120 farm visits, and interviews with 929 workers.¹⁵ The full Coca-Cola report is available on the company’s website. PepsiCo used the term *audit* where three mill sites were selected for a total audit time of three days per site between August and September 2014. PepsiCo only released a summary of the full report on the company website.¹⁶ It is not clear from the summary how many or which stakeholders were interviewed in the process, although the summary highlights that interviews were done with ‘responsible managers, and workers at mills and farms’.¹⁷

Coca-Cola’s report had in-depth analysis of the land and forced labour context in Brazil, citing trends of a decline in the number of these incidents on farms or at mills with no specific incidents being found during interviews with stakeholders. The research team found that there is a need for mills to have policies against forced and child labour, and mechanisms to monitor compliance as well as a grievance system for surrounding communities to alert mills of violations. It was clear from the field research that Coca-Cola should promote its land use guidelines to more mills since they were largely unfamiliar.¹⁸ Finally, on the Usina Trapiche case, there was a 4-page summary of the conflict with community, supplier and government recommendations provided.

PepsiCo took a different approach from Coca-Cola, using the Bonsucro standard as the recognized audit baseline.¹⁹ The research team found no evidence of human rights, land rights, health, safety, or environmental violations and concluded that the three suppliers’ mills were in compliance and decent work conditions for men and women were confirmed. The summary does highlight the need to work with first tier suppliers

¹² Food and Agriculture Organization of the United Nations: <http://www.fao.org/economic/est/est-commodities/sugar/en/> (accessed 1 May 2017).

¹³ The Coca-Cola Company Commitments Land Rights and Sugar (2015), <http://assets.coca-colacompany.com/6b/65/7f0d386040fcb4872fa136f05c5c/proposal-to-oxfam-on-land-tenure-and-sugar.pdf> and PepsiCo Land Policy (2015), https://www.pepsico.com/Assets/Download/PepsiCo_Land_Policy.pdf (both accessed 12 May 2017).

¹⁴ Coca-Cola called their assessment a *baseline study* and PepsiCo framed it as an *audit*. Neither company actually used the term Human Rights Impact Assessment.

¹⁵ Arch Advisors (2015), ‘Child Labor, Forced Labor, and Land Use in Brazil’s Sugar Industry’, <http://www.coca-colacompany.com/content/dam/journey/us/en/private/fileassets/pdf/human-and-workplace-rights/TCCC-Brazil-Report.pdf> (accessed 1 May 2017).

¹⁶ PepsiCo (2015), Summary Report of the Social, Environmental, and Human Rights aspects of PepsiCo’s Sugarcane Supply Chain in Brazil, based on Third Party Audits. See: <http://www.pepsico.com/docs/album/policies-doc/pwp/pepsico-brazil-sugarcane-supply-chain-assessment.pdf?sfvrsn=0> (accessed 1 May 2017).

¹⁷ Ibid.

¹⁸ Arch Advisors (2015); see Note 15.

¹⁹ More information about Bonsucro available at: www.bonsucro.com

and growers to make improvements.²⁰ The Trapiche case was not considered in this audit. At the time of publishing, PepsiCo added an addendum to the summary that ‘Usina Trapiche acted within Brazil’s legal framework regarding the utilization of their land’.²¹ However, since then, PepsiCo has changed how it is approaching the case and fulfilling its responsibility to incorporate the community’s interests. In 2016 it stated, ‘we will continue to engage with Oxfam, the local community, our supplier in Recife and other companies in efforts to make progress in a land rights dispute that has been identified in the North East of the country’, in clear reference to Trapiche.²²

In 2016, Oxfam commissioned an external evaluation of both company assessments in Brazil basing analysis on public information.²³ The evaluator concluded that between the two companies, Coca-Cola had a more thorough process, with a deeper understanding of the issues and a robust stakeholder engagement process.²⁴ Before Oxfam published its own analysis of the external evaluation, both Coca-Cola and PepsiCo made new commitments to improve their approaches.²⁵ Below are the main areas from the evaluation where these two companies were on the right or wrong track when it comes to due diligence in assessing land rights risks.²⁶

Coca-Cola assessment	
What worked well?	How should the company improve? ²⁷
<ul style="list-style-type: none"> ✓ Research team had expertise of land issues and labour rights with extensive field experience and independence from Coca-Cola ✓ Goals of the study’s methodology were clear and outlined in the assessment ✓ Robust stakeholder engagement from the range of mills identified and local stakeholders interviewed 	<ul style="list-style-type: none"> • Engage with mills that have the highest prevalence of human rights impacts • Need for a more robust analysis of land tenure, legal framework and policies in Brazil • Take into account the in-depth information that organizations like CPT have published on land issues in Brazil • Develop and publish studies and action plans in languages that are accessible to local stakeholders

²⁰ PepsiCo (2015). Summary Report of the Social, Environmental, and Human Rights aspects of PepsiCo’s Sugarcane Supply Chain in Brazil, based on Third Party Audits; see Note 16.

²¹ Ibid.

²² <http://www.pepsico.com/Purpose/Policies> (accessed 12 May 2017).

²³ External evaluator was John Wilkinson, Associate Professor at the Graduate Center for Development, Agriculture and Society (CPDA), Rural Federal University, Rio de Janeiro (UFRRJ).

²⁴ John Wilkinson, ‘Independent Evaluation of Land Issues in TCCC’s baseline study: *Child Labor, Forced Labor and Land Use in Brazil’s Sugar Industry* and in PepsiCo’s summary report: *The Social, Environmental and Human Rights Aspects of PepsiCo’s Sugarcane Supply Chain in Brazil Based on Third Party Audits*’, October 2016; available at: https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/tr-independent-evaluation-land-issues-brazil-201016-en.pdf (accessed 20 March 2017).

²⁵ Coca-Cola: <http://www.coca-colacompany.com/coca-cola-ubottled/land-rights-the-path-forward-on-coca-cola-s-sugar-studies> and <https://www.oxfam.org/sites/www.oxfam.org/files/bn-land-rights-soda-giants-brazil-201016-en.pdf>. PepsiCo: <http://www.pepsico.com/Purpose/Policies> and <https://www.oxfam.org/sites/www.oxfam.org/files/bn-land-rights-soda-giants-brazil-201016-en.pdf> (all accessed 12 May 2017).

²⁶ John Wilkinson (2016); see Note 24.

²⁷ The company has already made commitments to make these improvements in future efforts. For more information, see: <http://www.coca-colacompany.com/coca-cola-ubottled/land-rights-the-path-forward-on-coca-cola-s-sugar-studies> and <https://www.oxfam.org/sites/www.oxfam.org/files/bn-land-rights-soda-giants-brazil-201016-en.pdf> (both accessed 12 May 2017).

<ul style="list-style-type: none"> ✓ Clear company commitment to land rights and FPIC ✓ Willing and active participation in a strategy meeting with CPT and local community members to discuss the conflict and identify solutions 	<ul style="list-style-type: none"> • Make interview questionnaires transparent (these were not published as part of the annex so it is unclear what the consultants asked in the interviews) • More emphasis on women's land rights in the Brazil context²⁸
PepsiCo audit	
What worked well?	How should the company improve?²⁹
<ul style="list-style-type: none"> ✓ Clear company commitment to sustainability in its supply chains, starting with the 'zero tolerance' and Sustainable Farming Initiative (SFI) commitments ✓ Some consultant expertise for the audit process ✓ Willing and active participation in a strategy meeting with CPT and local community members to discuss the conflict and identify solutions 	<ul style="list-style-type: none"> • Conduct a deeper assessment process, and publish the full assessment • Ensure engagement with a wide range of stakeholders, especially local communities, and spend adequate time gathering testimony • Assess additional mills beyond the region it initially focused on. It should pay particular attention to areas where risk to communities is high. It should also include mills like Trapiche where there is an active and known conflict • Publish commitments, assessment results, and action plan in relevant languages for stakeholders • Use a methodology that will promote a better understanding of issues and emphasize action • Provide increased transparency about the authors of the assessment and overall process undertaken • Employ different approach from an audit, which is limited in scope and only provides a snapshot • More emphasis on women's land rights in the Brazil context³⁰

As the external evaluator notes in his report, it is difficult to compare the two companies side by side; however, it is possible to draw on some common themes of a strong versus weak assessment. Company assessment best practice should include a quality research team that applies a robust analysis and understanding of the context, and use of publicly available information, including a recognition of company commitments. Companies should look to engage a wide range of stakeholders to learn from and improve their human rights impacts for all affected stakeholders. Addressing the assessment recommendations with a time-bound plan is essential in taking the necessary steps towards improvements. Companies should be transparent with their findings.

²⁸ This is a recommendation made by Oxfam, which was absent from the company and external evaluation analysis. Oxfam (2016), 'Land Rights and Soda Giants, Reviewing Coca-Cola and PepsiCo's land assessments in Brazil.'

²⁹ The company has already made commitments to make these improvements in future efforts. For more information, see: <http://www.pepsico.com/Purpose/Policies> and <https://www.oxfam.org/sites/www.oxfam.org/files/bn-land-rights-soda-giants-brazil-201016-en.pdf> (both accessed 12 May 2017).

³⁰ This is a recommendation made by Oxfam, which was absent from the company and external evaluation analysis. Oxfam (2016), 'Land Rights and Soda Giants, Reviewing Coca-Cola and PepsiCo's land assessments in Brazil.'

V. CONCLUSION: AN IMBALANCE IN APPROACHES

At present, one important limitation of company-led assessment processes is community engagement. Companies appear to be out of their element when it comes to interviewing communities. They often do not know who is in these communities, how to contact them and even when they do, how to gain their trust in order to understand the impacts fully. This is a major pitfall of company-led HRIAs as outlined in Oxfam's paper *Community Voice in Human Rights Impact Assessments*.³¹ This is precisely the area where community-led assessments are strongest, providing an opportunity to bring the approaches together.

The Brazil land conflict provides a unique look at a community-based HRIA process that ran in parallel with two company-led HRIAs. Unfortunately the findings from each did not necessarily inform the other's outcomes: they started as completely unique and independent processes. A collaboration to conduct due diligence together could have led to a more thorough process. In future, further collaboration, where parties are consciously conducting parallel processes to inform one another's outcomes or even conducting an HRIA together that equitably involves all stakeholders in the process and recognizes the unique strengths that each brings could have the potential of creating shared solutions and remedies. This proposal is not to say that each actor will have identical responsibilities in a hybrid approach – business maintains the primary responsibility to respect, and remedy human rights violations – but the parties should collaborate to increase the likelihood that these rights are respected.

Co-ownership over impact assessments – in which community members have a prominent voice and participation in highlighting their concerns, while active company participation enables them to assimilate HRIA knowledge into their organization – could enable communities and companies to realize human rights goals in the short term (e.g., avoiding adverse human rights impacts in this particular project) and the long term (e.g., improving company interaction with local communities). In addition, ensuring that companies are co-leading the HRIA increases the likelihood that they will address the findings that come out of the assessment. That makes them more beneficial to communities than purely community-based HRIAs, whose findings are often ignored or denied by the company or simply not fully owned. Such an approach would also benefit companies' bottom lines, as it diminishes the likelihood of costly community conflict.

The land rights conflict in Brazil comes close to a hybrid approach, although the parties did not explicitly intend it as such but was rather orchestrated through Oxfam's interventions. Nevertheless, it has resulted in having both PepsiCo and Coca-Cola be more open to the community's concerns and solutions, including a plan for the companies to support the community in achieving a RESEX. While this remedy has not yet come to fruition, the case does make it clear that due diligence processes where both the community and the company are actively engaged in assessing impacts and providing solutions for remedy, allow for more opportunities to collaborate on achieving results in the future.

³¹ Oxfam America (2015), 'Community Voice in Human Rights Impact Assessments,' <https://www.oxfamamerica.org/explore/research-publications/community-voice-in-human-rights-impact-assessments/> (accessed 20 March 2017).