

Business and human rights – access to remedy

Sweden - Case study 2019

FRANET Contractor: Emerga Institute

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1. Country where the incident took place	Chile
2. Country where the remedy was sought	Sweden
3. Type of remedy used (reasons why this remedy was used)	<p>Punitive damages.</p> <p>Monetary damages remain the only available redress mechanism in Swedish courts. Other possible remedies were not advocated for in the ongoing legal process. However, other remedies, which would have been possible in this case could focus on addressing the remaining negative impact of the company's actions, such as requesting Boliden to transfer the hazardous waste out of Chile and back to Sweden. Furthermore, on national level, the company would also be responsible to ensure that similar actions with such negative impact will not happen in the future. Boliden could, for example, be made responsible for decontaminating the ground, which has been contaminated, in order to prevent further poisoning of the groundwater.</p>
4. Deciding body - (in original language /and in English)	The Court of Appeal for Northern Norrland (<i>Hovrätten för Övre Norrland</i>)
5. Date (month/year) when the remedy was initiated Date, if available, of the (final) decision	The case was initiated in the District Court of Skellefteå (<i>Skellefteå tingsrätt</i>) in September 2013 and was later appealed to the Court of Appeal for Northern Norrland (<i>Hovrätten för Övre Norrland</i>), which ruled in favour of Boliden in March 2019. The plaintiffs have requested appeal to the Supreme Court (<i>Högsta Domstolen</i>). At the time of reporting, they still wait for the court's decision whether to allow for a review of the case.
6. Reference details, (type and title of court/body; in original language and English [official translation, if available])	The Court of Appeal for Northern Norrland (<i>Hovrätten för Övre Norrland</i>)
7. Web link to the decision/procedure (if available)	Not available online but can be requested by contacting the Court of Appeal for Northern Norrland at hovratten.ovrenorrland@dom.se and ask for the case number T 294-18
8. Did the incident receive media attention? If so, please provide links	<p>Sweden, Radio Sweden (2017) "Swedish mining company Boliden in court over toxic waste in Sweden", 17 October 2017, available here</p> <p>Sweden, Swedish Television SVT (2019) Regional news of Västerbotten, "The victims in Chile loses in the Court of Appeal against the mining company Boliden" (<i>Offren i Chile förlorar i hovrätten mot gruvbolaget Boliden</i>), 27 March 2019, available here</p>
9. Legal basis in national/EU /international law of the rights under dispute	<p>Tort Liability Act (<i>Skadeståndslag [1972:207]</i>)</p> <p>Act on Limitation (<i>Preskriptionslag [1981:130]</i>)</p> <p>Article 6 of the European Convention on Human Rights</p>

10. Parties	The company Arica Victims KB represented the victims and filed a claim against Boliden Mineral AB.
11. Form of abuse/violation, and rights involved ¹	In 1984 and 1985, 20,000 tons of toxic waste from Boliden’s smelting factory in Skellefteå, Sweden was shipped to Arica, a town in northern Chile as a consequence the Arica population has suffered severe health problems. Right to health and right to effective remedy and fair trial.
12. Type of business involved	Extractive industry. Boliden Mineral AB is a Swedish mining company.
13. Profile of the victim(s) - individuals /population affected - can be broader than actual parties to the proceedings <i>(e.g. country of origin, belonging to a particular minority – ex. ethnic, gender, age, occupation, social status, relations with the responsible company)</i>	796 The victims are all Chilean citizens who have all lived in the town of Arica, Chile after the toxic waste arrived and as a consequence are suffering from severe health problems.
14. Any legal or institutional factors in the Member State that facilitated the abuse of the (fundamental) rights in questions?	The Court of Appeal stated that that a case (such as the case in question) concerning events which took place over 10 years ago, are statute-barred (<i>preskriberade</i>). Consequently, the court considered that it had to rule against the plaintiffs with reference to the period of limitation since the actual export of the toxic waste to Chile did indeed take place more than 30 years ago. The case was initiated rather late because 1) the link between the toxic waste and the health problems brought on by heavy metal poisoning, such as miscarriages and malformations, nerve, brain and skeletal damages did not become public knowledge until at the earliest 1998 – when Chilean media raised the issue; 2) Even after the link between the toxic waste and the deteriorating health of the Arica inhabitants had become common knowledge, it was not common knowledge that the health of children born decades after the toxic waste arrived in their town also would be affected. The majority of the Arica victims engaged in the court case are children suffering from cancer, aches in bones and joints, chronic coughs and breathing difficulties; 3) Even after the generational damage had become public knowledge, the Arica inhabitants were not aware of their possibility to claim damages from Boliden until quite recently. It was only when the Arica inhabitants were contacted by the US-based organization Environmental Defender Law Center (EDLC) that they decided to initiate the lawsuit.

¹ The rights affected may include the entire spectrum of internationally recognised fundamental rights – civil and political rights, as well as economic, social and cultural rights; for example: the right to non-discrimination, the right to private and family life, freedom of expression, the right to health, the right to protection of life and physical integrity, property rights, consumer rights or environmental rights.

	<p>According to interviewees, a ruling against Boliden would by itself be a symbolically important and have a redressing effect. Furthermore, the ruling would also establish that the company – by paying damages to the victims – is and has been responsible for the health problems of the plaintiffs, both in theory and in practice. The court’s reasoning concerning statute-barred cases was surprising. In a case like Arica victims against Boliden the damages emanating from a certain action only become visible after a long time, which was one of the reason why the case was initiated so late. To refer to the period of limitation in such cases implies that companies cannot be held responsible for very harmful actions if the damages of their actions only appear after a while.</p>
<p>15. Key facts of the case</p>	<p>Nearly 800 people in Chile sued the Swedish mining company Boliden for damages after the company exported a pile of toxic waste to Chile in the 1980s. In 1984 and 1985, 20,000 tons of toxic waste from Boliden’s smelting factory in Skellefteå, Sweden was shipped to Arica, a town in northern Chile. Boliden paid the Chilean company Promel 10 million SEK (€ 942 100) for extracting arsenic and gold ore from the waste. In reality, no extraction was done, and the waste was left open in a pile close to a residential area. For several years, children were playing on the pile which contained large amounts of arsenic and lead. In the 1990’s, many people in the affected city developed seriously illnesses. They suffered from cancer, chronic coughing and aching joints. Boliden claimed that they followed all the laws and rules regulating the field at the time. Furthermore, the company stated that both Chilean and Swedish authorities were aware about the export. The company’s standpoint was that the damages should be paid by 1) the Chilean authorities, which had allowed the toxic waste to be placed so close to a residential area; and 2) Promel, the company, which had agreed to take care of the waste.²</p> <p>The case was appealed to the Court of Appeal. However, the case was dismissed with reference to the period of limitation, so the court ruled against the plaintiffs.</p>
<p>16. With respect to the case described in this template - <u>what worked well</u> from the standpoint of the complainant/victim? What were the reasons for it?</p>	<p>The interviewees claimed that it is important to be able to sue a legal person/company in its home country also for its actions in other countries. This is a necessary part of the safeguarding of human rights. This safeguarding of human rights is facilitated by EU regulations, such as the Brussels regulation, which stipulates that a court has jurisdiction not only over its own territory, but also over offences carried out in other countries by companies, which has their headquarters in the country of the court in question. This regulation has enabled legal processes such as the one against Boliden.</p>
<p>17. With respect to the case described in this template – <u>what did not work well</u> from the standpoint of the complainant/victim? What were the reasons for this?</p>	<p>As previously stated in section 14</p> <p>The Court of Appeal stated that that a case (such as the case in question) concerning events which took place more than 10 years ago, are statute-barred (<i>preskriberade</i>) and consequently the court had to rule against the plaintiffs with reference to the period of limitation. However, a ruling against Boliden would have been symbolically important and would have redressing effect. It would also establish that the company – by paying damages to the victims – is and has been responsible for the</p>

² Sweden, Radio Sweden (2017) ‘Swedish mining company Boliden in court over toxic waste in Sweden’, 17 October 2017, available at: <https://sverigesradio.se/sida/artikel.aspx?programid=2054&artikel=6799981>

	<p>health problems of the plaintiffs, both in theory and in practice. The interviewees maintained that the act of paying damages can be considered another form of remedy, which is important, not because the victims' concerns and problems will disappear after a monetary compensation, but rather because the act of paying damages remains the only available redress mechanism in Swedish courts.</p>
<p>18. Main reasoning / argumentation <i>(of the parties and the court: key issues /concepts clarified by the case)</i></p>	<p>As the case unfolded, the Court of Appeal did not question the jurisdiction or the extra-territorial dimensions of the case but rather the period of limitation. The Court of Appeal reasoned that the case is statute-barred since the export of the toxic waste took place over ten years ago. Consequently, the court ruled in favour of Boliden Mineral AB and dismissed the claims of Arica Victims KB.</p> <p>The plaintiffs had argued that the period of limitation should be interrupted from the time the case was brought before the District Court in 2013. They considered that it was a violation of the right to a fair trial as of article 6 of the ECHR to allow the period of limitation to continue during the processing of the case. This argument was dismissed by the Court of Appeal.. However, the court considered if it was possible to be more flexible when interpreting the period of limitation, e.g. by counting the period of limitation from the time the injured party was notified of the damage. However, the Court of Appeal did not find this to be good practice, since it considered that such reasoning would undermine the predictability of the substantive law – a corner stone of the rule of law.</p> <p>In its ruling, the District Court spent several pages discussing the correct use of limitation periods in Swedish case law. The Court argued that there were indeed many legal reasons why the event in focus – the export of toxic waste – should be considered to be time-barred. However, there were also extraordinary reasons e.g. the number of victims, the serious damages etc. which made the Court decide that the case could not be considered to be time-barred.</p> <p>The Court of Appeal also spent time discussing the limitation periods in its ruling. The Court stated that although the Arica Victims has argued that to calculate the limitation period from the injurious event would be contrary to the right to fair trial under Article 6 of the ECHR, the argument was not relevant in this case. The Court argued that the Limitations Act (<i>Preskriptionslag [1981:130]</i>) is not part of procedural law but rather of substantive law. According to the Court, nothing prevents an injured party from seeking an action for a time-barred claim and indeed an action for a statutory claim shall not be dismissed but resolved after a substantive examination. However, the action will be dismissed if the defender/debtor demands that the action in question should be considered to be time-barred. Consequently, the Court of Appeal considered that the application of the limitation rules (counting the limitation period from the injurious event) does <i>not</i> conflict with the European Convention. Instead, the Court of Appeal argued that both Swedish legislation such as the Limitations Act (<i>Preskriptionslag [1981:130]</i>), jurisprudence and case law are clear on this point, also in relation to events such as the exporting of toxic waste. These types of cases do not allow for a different calculation of the limitation period. Furthermore, the Court of Appeal</p>

	<p>argued that to calculate the limitation period differently in the case in question would go against the rule of law (predictability).</p>
<p>19. What was the outcome?</p>	<p>The Court of Appeal ruled against the plaintiffs with reference to the period of limitation. The plaintiffs must pay their own costs accumulated during the court processes in the District Court and in the Court of Appeal. Furthermore, they must also pay the defendant's costs accumulated during the same processes. The defendant's costs for the process in the District Court amount to 32.5 million SEK (€ 3,060 000) and approximately 12.5 million SEK (€ 1,178,000) for the process in the Court of Appeal). The US-based organization Environmental Defender Law Center (EDLC) has been responsible for other expenses during the case, but all lawyers involved have prepared the lawsuit application and followed the court through the Swedish courts without charging any fees. The hope has been that it will be Boliden that will have to carry all costs in the end. If the Arica Victims do not win the case in the end – and instead have to pay not only their own costs but also the costs of Boliden, it remains unclear how the plaintiffs will be able to cover these cost.</p> <p>At the time of reporting the case was pending as the plaintiffs waited for the Supreme Court's decision regarding their appeal and review permit (<i>prövningstillstånd</i>).</p>
<p>20. Did the case lead to legislative or policy developments? <i>(including more general measures introduced to stop future incidents)</i></p>	<p>No, but as stated in section 21, the case is still ongoing as the plaintiffs still wait for the District Court decision on their appeal and review permit (<i>prövningstillstånd</i>).</p>
<p>21. In case the remedy sought was not of a judicial nature, was there eventually any follow up on the case in the court? Or followed by a different type of procedure?</p>	<p>Not applicable.</p>
<p>22. Any other comments relevant to case?</p>	