

**Johns Hopkins SAIS**  
**Corporate Sustainability, Business & Human Rights**  
**Professor Nina L. Gardner**  
**Spring 2019**  
**Policy Memo Assignment**

As governments seek to expand trade and investment globally, they are increasingly conscious of the impact companies have on local communities. When companies are complicit in human rights abuses, it reflects poorly on the host government, where the company's operations are located, and the government in which the company is headquartered (home government). Both host and home governments have a unique role to play in fulfilling their duty to protect and facilitating businesses' responsibility to respect human rights. To better understand the interplay of these actors and issues, students are expected to write a [two-page policy memo](#) analyzing a timely business and human rights (BHR) challenge -- implicating allegations of corporate misconduct and providing recommendations for how a home government could mitigate the human rights impacts.

The purpose of this assignment is three-fold:

1. To strengthen student understanding of the role of governments in advancing the UNGPs and how governments work with other stakeholders to advance BHR
2. To strengthen student ability to analyze a BHR issue in the broader economic, social, and political context of the country and explore potential mechanisms to affect change
3. To strengthen student ability to write clearly and concisely, a skill that is highly valued by employers, and to develop a practical writing sample for their job search

The policy memo will be written from the perspective of a diplomat in a foreign mission - most likely as economic or legal counsellor - to your boss, the Ambassador, about the UNGPs and BHR in general. You are free to represent any country you wish, but your primary concern must be about negative human rights impacts of a multinational from your country doing business in the country where you are posted (ie. if you represent France in a foreign mission, you must write about the behavior of a French company or companies, not US ones, in the host country -- though if other country multinationals are also misbehaving you may consider reaching out to your counterpart to consider a coordinated strategy). You will inform the Ambassador about the BHR issue and provide 2-3 recommendations for how your government could address it. Given the multi-stakeholder nature of BHR, students are encouraged to include a multi-stakeholder component in their recommendations. When making the case for addressing this issue, students are advised to consider the social, economic, and political ramifications of inaction. While the officer writing the memo may be attuned to BHR as a field, you should assume the Ambassador is not an expert in BHR and may need further information to demonstrate how taking action aligns with strategic priorities.

When exploring potential solutions, students are encouraged to consider:

- Why would the home government become involved in this particular issue?
- What tools does a home government have to advance BHR?
- How could a home government work with other stakeholders to advance BHR?

- How do you identify the right champions on the ground to leverage to address this issue?
- What might an appropriate remedy look like in this context?

For suggestions regarding policy memo writing and format, please consult the SAIS Policy Memo Writing Guidelines posted in the assignments section of Blackboard.

Successful memos will be shared (with student consent, of course) with the Internet Freedom and Business and Human Rights (IFBHR) team at the U.S. Department of State where one of my former students is working. The team is eager to consider student recommendations on how to address many of these BHR challenges (not only internet freedom ones). Students are encouraged to choose a memo topic aligned with their interests. The team is particularly interested in learning about issues that relate to American companies operating overseas that the U.S. Government could use its leverage to address.

## Johns Hopkins School of Advanced International Studies (SAIS) Policy Memo Guidance

*An effective policy memo should...*

- > Explain why the issue is important, why a decision needs to be made
- > Provide essential facts and supporting evidence
- > Provide clear courses of action
- > Give some assessment of the political environment
- > Be no longer the 1 page (single spaced) – footnotes or references don't count toward page length and can be on a 2<sup>nd</sup> page.
- > Contain all key information in the first paragraph
- > Include the following:
  - > Heading
  - > Summary
  - > Background
  - > Issues
  - > Options
  - > Recommendations
- > Avoid technical jargon – but use key words and concepts

*When writing a memo, ask yourself...*

- > What is the main message?
- > What do I want the policymaker to remember?
- > Are the recommendations feasible? Convincing?
- > What are the political risks to the policymaker if the recommendations are followed?

**To: From: Subject: Date:**

## **Summary**

**Name and title**

Your name and affiliation

Tailor the subject to the decision to be made

The date when you send it to the policymaker

- The Summary should include:
  - The issue
  - Why a decision is needed
  - What key information is contained in the memo
  - What course of action is recommended

## **Background**

- The background should:
  - Consist of brief, essential points
  - Explain how this issue has evolved or become a concern

## **The Issues**

- The issues section should include:
  - Key issues to be addressed by the policymaker
  - 1-3 points maximum
  - What position(s) others have on these issues

## **Options**

- The options section should include:
  - Plausible courses of action
  - Pros and cons of each option
  - Risks/potential opposition that might result from choosing an option

## **Recommendation**

- What do you want the decision maker to do?
- Why are you making this particular recommendation?

**To:** The Honorable Mr. Andrew Gellert, the United States Ambassador to Chile  
**From:** [ ]  
**Subject:** Human Rights Abuses Relating to Albermarle's Lithium Mining in Chile  
**Date:** April 19, 2019

### **SUMMARY & BACKGROUND**

Over sixty percent of the world's lithium deposits are found in a salty brine beneath the salt flats of Argentina, Chile, and Bolivia. This silvery-white metal is a critical component of smart-phone, laptop, solar panel, and electric car batteries. As these devices become increasingly commonplace, demand for lithium can only intensify. The worldwide rush for lithium is just beginning, and, with the largest lithium reserves in the world, Chile is at the heart of it. Continued and future access to lithium is crucial for the success of tech companies in the United States (U.S.), and, therefore, positive economic relations with Chile is imperative.

One of the top five lithium mining companies in the world, Albemarle, is a U.S. incorporated company, operating in the Atacama Desert in Chile. Albemarle, in tandem with SQM, is responsible for supplying over thirty percent of the world's lithium. Albemarle's lithium can be found in Tesla and Amazon products. However, since the onset of Albemarle's operations in Chile, concerns have been raised regarding the company's use of water, interactions with indigenous peoples, and, most recently, payment of its taxes.

### **ISSUES**

Extracting lithium is a water-intensive process involving significant amounts of both fresh and salt water and, though salt water is carefully regulated by local Chilean authorities, freshwater is not. Reserves and the rate of replenishment of fresh and salt water in the Atacama Desert are currently unknown, and the relationship between saltwater and freshwater tables are equally ambiguous. Since 2008, Albemarle has been accused of extracting more than its legal quota of salt water, and both salt and fresh water tables are falling.<sup>i</sup> At the same time, indigenous communities in the Atacama Desert are experiencing severe water shortages affecting their livelihoods and home lives. These indigenous groups largely fault Albemarle and other lithium mining companies for these water shortages. Indigenous lives are not the only lives at stake. Numerous species like the flamingo are also dependent upon the Atacama's salt and fresh waters for survival.

Further, Albemarle's lithium mining in the Atacama Desert occurred without proper free, prior, and informed consent (FPIC) from Atacama's indigenous groups. Albemarle has a duty to provide accurate information to potentially impacted communities in regard to its extraction plans prior to any mining operations take place. After informing these communities, Albemarle needs consent to carry on with operations. In Chile, Albemarle must also provide royalties to impacted communities. However, Albemarle has been accused of misinformation during indigenous consultations, and, in recent years, indigenous groups have asked the company to discontinue mining in response to water shortages.<sup>ii</sup> In 2018, the Chilean government approved Albemarle's plans to expand operations in the Atacama, but according to the Council of the Atacameños Peoples this approval was given without FPIC. This violates the United Nations (UN) Declaration on the Rights of Indigenous Peoples and Convention 169 of the International Labour Organisation. In response, the Council has brought a legal complaint against the Chilean government.<sup>iii</sup>

Finally, according to Chilean government officials, Albemarle has sold Chilean lithium to its subsidiaries in the U.S. and Germany at prices significantly below market value. This practice may constitute as a violation of the Organisation for Economic Cooperation and Development's

transfer pricing rules further implicating Albemarle and its subsidiaries in global tax avoidance or evasion.<sup>iv</sup> In general, the OECD recommends that the ‘arms-length’ principle apply in situations of transfer pricing meaning that Albemarle should transfer lithium to its subsidiaries at its market price.

While the primary duty to protect human rights rests on the Chilean government, corporations have a responsibility to respect human rights according to the UN Guiding Principles on Business and Human Rights. Albemarle has so far failed to become a ‘good corporate citizen’ in line with international environmental, social, and corporate governance norms. Even in terms of the extractive industry, Albemarle is an outlier. The company lacks a public human rights policy, transparent due diligence processes, and membership to any extractive industry multi-stakeholder initiatives. Though problems related to FPIC and water shortages are issues common to lithium mining in South America, it should be noted that Albemarle’s operations in Argentina are equally fraught with similar human rights concerns.

### **OPTIONS & RECOMMENDATIONS**

In light of these serious allegations, the Ambassador should consider prompt recourse in order to safeguard the reputation of U.S. businesses as well as maintain good future relations with Chile. If the government chooses inaction as a response, the U.S. government is complicit with flagrant violation of international norms and risks foreign relations with Chile.

In accordance with the United States’ National Action Plan (NAP) to Promote Responsible Business Conduct, the embassy should first consult with relevant stakeholders including the company, the Chilean government, and concerned indigenous groups to determine a remedy to the immediate situation. This action ought to involve specific consultation with Albemarle to encourage transparency and responsible business practices moving forward such as devising a public human rights policy as well as a robust human rights and environmental due diligence mechanism. Any consultation with Albemarle should encourage the company to comply with Chilean law and international norms including FPIC.

Correspondingly, the Ambassador should also consult with the U.S. Export-Import Bank (EXIM) regarding the provision of credit to Albemarle and other U.S. lithium mining companies seeking to operate in South America. Considering “state responsibility” as outlined in the UNGPs, the EXIM Bank as a U.S. government agency is responsible for any human rights violations it helped finance. Though EXIM Bank’s Environmental and Social Due Diligence Procedures and Guidelines require credit seekers to perform social and environmental due diligence, special attention should be given to water and indigenous rights issues related to lithium mining in the salt flats of South America. EXIM evaluation of lithium mining should be handled with care to preserve relations with Chile as continued foreign direct investment is critical to Chile’s economic development.

Finally, the Ambassador and the Embassy should report Albemarle’s potential violation of the OECD’s price parity rules to the Internal Revenue Service for auditing. The Ambassador should urge Albemarle to comply with Chilean tax inquiries in respect to its transfer pricing practices.

### **CONCLUSION**

By 2025, demand for lithium is expected to double. Maintaining positive foreign relations with countries such as Chile with significant lithium reserves is critical for the U.S. tech industry as well as future high-tech, ‘green’ infrastructure. Supporting responsible business practices abroad is crucial to ensuring the productive foreign relations and continued U.S. lithium mining in South America.

## END NOTES

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<sup>i</sup> Sherwood, D. “In Chilean desert, global thirst for lithium is fueling a ‘water war.’” *Reuters*. 2018. <https://www.reuters.com/article/us-chile-lithium-water/in-chilean-desert-global-thirst-for-lithium-is-fueling-a-water-war-idUSKCN1LE16T>

<sup>ii</sup> Frankel, T. and Whoriskey, P. “Tossed Aside in the ‘White Gold’ Rush.” *Washington Post*. 2016. <https://www.washingtonpost.com/graphics/business/batteries/tossed-aside-in-the-lithium-rush/>

<sup>iii</sup> Cooperativa.cl. “Consejo de Puelos Atacameños se enfrentó a Corfo y SQM por acuerdo del litio.” *Coopertiva*. 2018. <https://www.cooperativa.cl/noticias/economia/materias-primas/litio/consejo-de-pueblos-atacamenos-se-enfrento-a-corfo-y-sqm-por-acuerdo-del/2018-06-22/150344.html>

<sup>iv</sup> Lombrana, M. “Score One for the Flamingos in High-Altitude Fight for Lithium Supplies.” 2018. <https://www.bloomberg.com/news/features/2018-12-22/score-one-for-the-flamingos-in-high-altitude-fight-for-lithium-supplies>