

**UN Working Group on the Issue of Human Rights and
Transnational Corporations and Other Business Enterprises**
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Large-scale, Industrial Methods of Extraction, Production, and Development and their Impacts on the Rights of Indigenous Peoples and Local Communities

**[Joint] Submission by Natural Justice: Lawyers for Communities and the Environment¹ and
the Centre for Indigenous Knowledge and Organisational Development²**

The industrial extraction of natural resources, large-scale energy and infrastructure development projects, and industrial production systems such as agriculture and fishing (collectively termed hereafter as “large-scale, industrial methods of extraction, production, and development”) have long-term, significant, and deleterious impacts on indigenous peoples and local communities, including but not limited to the violation of human rights, environmental destruction, disempowerment, poverty, displacement, and adverse effects on health, local development, cultures, and traditions. These impacts have consistently been reported by a number of United Nations mechanisms such as Special Rapporteurs, as well as international financial institutions such as the World Bank³ and the OECD⁴ and a range of studies conducted by intergovernmental organisations, academics, and civil society organisations.

As noted in more detail below, a vast number of international human rights, particularly those of Indigenous peoples and local communities, and environmental law instruments are violated through large-scale, industrial methods of extraction, production and development. The rights violated include (but are not limited to): the right to a high standard of physical and mental health, the right to self-determination, the right to own property, the right not to be subjected to forced assimilation or destruction of culture, the right not to be forcibly removed from lands, the right to free, prior and informed consent on matters affecting

¹ Natural Justice is a non-profit organization registered in South Africa (057-611-NPO), with representation in South Africa, Malaysia and, as of 2012, New York, that works to support the self-determination and the full and effective participation of Indigenous peoples and local communities in the development and implementation of laws and policies that relate to the conservation and customary uses of biodiversity and the protection of associated cultural heritage. Towards this aim, we work with communities, community-based and non-governmental organizations, governments, and intergovernmental organizations in Africa, Asia, Latin America, and internationally. For more information, please visit www.naturaljustice.org.

² The Centre for Indigenous Knowledge and Organisational Development (CIKOD) is a non-governmental organisation based in Ghana. Its main purpose is to develop methodologies for the strengthening of traditional authorities and civil society organizations to facilitate sustainable grassroots organizational development that gives voice to the poor and vulnerable rural families. CIKOD partners with a number of international organizations, including CARE International, Konrad-Adenauer-Stiftung, and COMPAS International. For more information, please visit www.cikod.org.

³ See World Bank policy OP 4.10 on Indigenous peoples at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564187~pagePK:64709096~piPK:64709108~theSitePK:502184~isCURL:Y~isCURL:Y~isCURL:Y,00.html>.

⁴ See OECD Guidelines for Multinational Enterprises at <http://www.oecd.org/dataoecd/43/29/48004323.pdf>.

them, the right to just and fair compensation and equitable sharing of benefits, and the protection of knowledge, innovations and practices of indigenous peoples and local communities who traditionally conserve their environment. In addition, there are a number of rights directly violated but often outside the contemplation of such projects, including the right to maintain, protect and develop the past, present and future manifestation of culture (including historical sites) and more generally, the right to life, the right to an adequate standard of living, the freedom from torture or cruel, inhumane or degrading treatment or punishment, and the freedom of expression, including the freedom to *receive* information.

Indigenous Peoples, Local Communities, and the Environment

Millions of members of Indigenous peoples and local communities around the world depend directly upon their territories, areas, and natural resources for survival, cultural identity, and livelihood security. Growing recognition of the correlations between cultural and linguistic diversity and biological diversity, including in biodiversity hotspots, highlights the interdependence between communities' ways of life and the conservation and sustainable use of environmental resources.⁵ Thus, the realization of their fundamental rights and freedoms is contingent upon sustaining the inter-linkages between their ways of life and environmental security.

It is well-documented that biological diversity and cultural and linguistic diversity alike are declining at alarming rates.⁶ The Convention on Biological Diversity attributes this to a range of direct drivers caused in large part by large-scale, industrial methods of extraction, production, and development, particularly habitat loss and degradation, human-induced climate change, pollution, over-consumption and unsustainable use, and invasive alien species, as well as the positive feedback loops initiated by their combined pressures.⁷ Indigenous peoples and local communities are recognized as most vulnerable to and most affected by these pressures and the subsequent loss of biodiversity and threats to cultural and linguistic diversity and other fundamental human rights.⁸

Recent UN Recognition of the Impact of Industrial Methods of Extraction, Production, and Development on the Rights of Indigenous Peoples and Local Communities

This Working Group was established largely because of the work of John Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.⁹ His recent report sets out a number of guidelines outlining the responsibilities and obligations of states and corporations alike with respect to a State's inherent duty to protect human rights (as it is the State with the

⁵ Maffi, Luisa, "Linguistic, Cultural, and Biological Diversity" in (2005) 34 *Annual Review of Anthropology* 599-617.

⁶ Secretariat of the Convention on Biological Diversity (2010). *Global Biodiversity Outlook 3*. Montréal.

⁷ Id, 55-69.

⁸ UN Department of Economic and Social Affairs (2009). *State of the World's Indigenous Peoples*. New York.

⁹ Human Rights Council, Seventeenth session, Agenda Item 3, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy" Framework* dated 21 March 2011 (A/HRC/17/31).

ultimate responsibility in international law to protect such rights).¹⁰ This includes the requirements of States to take appropriate steps to prevent, investigate, and redress abuses, enforce laws, and provide guidance to corporations as to how to respect human rights within their territories.¹¹ The guidelines also discuss the responsibility of corporations to avoid the violation of human rights by seeking to prevent or mitigate human rights impacts, the need for internal policies and commitments to human rights, and the responsibility to perform human rights due diligence.¹²

In his latest report to the Human Rights Council, James Anaya, the Special Rapporteur on the Rights of Indigenous Peoples, devoted a significant portion of his discussions and analysis to the impact of extractive industries operating within or near indigenous territories, asserting that *“these projects and industries are becoming the greatest challenges to the exercise of the rights of indigenous peoples”*¹³ (emphasis added). This, the Rapporteur reported, is exacerbated by the lack of understanding *“of basic minimum standards on the effects of extractive industries affecting indigenous peoples and about the role and responsibility of the State to ensure protection of their rights”*.¹⁴

In addition, the 2010 interim report of the UN Special Rapporteur on the Right to Food, Olivier de Schutter, recognizes the necessity of access and security of tenure to land, water, grazing and fishing grounds, forests, and other traditional resources for the livelihood security and wellbeing of the world’s one billion hungry, many of whom are Indigenous peoples, small farmers, livestock keepers and pastoralists, and artisanal fisher folk.¹⁵ The report identifies underlying pressures and wide-ranging impacts of large-scale industrial agricultural production systems, including “violent land-grabbing” and undermining of Indigenous peoples’ and local communities’ customary sustainable governance and management systems.¹⁶ It argues for the strengthening of customary land tenure systems and calls for development models that do not lead to evictions, disruptive shifts in land rights, or concentration of land (for example, in monoculture plantations for food, energy, and cash crops for export).

Further Information about the Impacts of Large-scale, Industrial Methods of Extraction, Production, and Development on the Rights of Indigenous Peoples and Local Communities

Large-scale, industrial methods of extraction, production, and development fundamentally alter the environmental landscapes, areas, and natural resources upon which Indigenous peoples and local communities directly depend for survival, cultural identity, and livelihood

¹⁰ United Nations General Assembly, Human Rights Council, Eighteenth session, Agenda Item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, *“Report of the Special Rapporteur on the rights of indigenous Peoples, James Anaya – Extractive industries operating within or near indigenous territories”*, 15.

¹¹ Above note 8, paragraphs I A(1) and B (a) and (c).

¹² Ibid, paragraphs II A(12), (13), (15) and (17).

¹³ Above, n9, 1.

¹⁴ Ibid.

¹⁵ United Nations General Assembly, 65th session, Agenda item 69(b), *Promotion and protection of human rights: human rights questions including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms*, dated 11 August 2010 (A/65/281).

¹⁶ Ibid, 13.

security.¹⁷ These methods include, among others, mining, oil and natural gas extraction, industrial agriculture and fishing, large-scale forestry, and large-scale infrastructure and development projects such as dams, deep-sea ports, and roads. The impacts on the rights of Indigenous peoples and local communities are numerous and wide-ranging, including, among others:

- Degradation of the environment (including all ecosystems, habitats, and natural and genetic resources) traditionally owned, used and/or occupied by indigenous peoples and local communities.¹⁸ This undermines the common natural heritage of humankind and their rights to self-determination, to a healthy environment, and to practice traditional cultures and customary sustainable livelihoods;
- Threats to health, local productivity and livelihood security, and cultural traditions due to the introduction of foreign diseases and social practices by migrant workers and environmental refugees,¹⁹ various kinds of pollution such as mercury contamination in fresh water sources due to mining, invasive alien species (particularly through industrial agricultural production systems),²⁰ and increased competition for scarce resources amongst communities who are often displaced into limited or marginal lands;²¹
- Social and cultural upheaval and disempowerment within communities, including active undermining of traditional practices and customary decision-making values and structures and the destruction of sites of cultural and spiritual significance.²² The Special Rapporteur noted that loss of lands can *“jeopardize the survival of indigenous groups as distinct cultures that are inextricably connected to the territories they have traditionally inhabited.”*²³
- Related to the above point, the subsequent loss of, among other things, traditional knowledge, indigenous livestock breeds and crop varieties, and the place-based capacity to ensure food security and adapt to environmental changes has the effect of marginalising indigenous peoples and local communities within their own territories. It also represents a significant loss of global cultural heritage, as traditional knowledge and indigenous languages contain unique, context-specific, and non-translatable understandings of the environment and how people can live within natural limitations, including adapting to social-ecological shocks such as climate change and natural disasters;
- Physical dislocation and displacement within and across national boundaries, including through coercive and forcible means. Dislocation and displacement often

¹⁷ United Nations Permanent Forum on Indigenous Issues, Sixth session. Victoria Tauli-Corpuz and Parshuram Tamang, *“Oil Palm and Other Commercial Tree Plantations, Monocropping: Impacts on Indigenous Peoples’ Land Tenure and Resource Management Systems and Livelihoods”*, dated 7 May, 2007 (E/C.19/2007/CRP.6) Banks, Glen, *“Activities of TNCs in extractive industries in Asia and the Pacific: Implications for development”* in (2009) 18(1) *Transnational Corporations* 43-60.

¹⁸ Above, n9, 9.

¹⁹ *Ibid*, 10. The Rapporteur also noted the examples of an increase in alcoholism and prostitution in the Democratic Republic of Congo as well as an increase in drug trafficking and militarization of such areas in Colombia.

²⁰ *Id*; Secretariat of the CBD pp. 55-69.

²¹ Above n 14, de Schutter.

²² Above, n9, 10-11, UNPFII 6th session, Tauli-Corpuz and Tamang.

²³ *Ibid*, 10.

occur without compensation or contemplation of the future of these communities, particularly affecting those most vulnerable such as women and children, and causing additional conflict in areas into which they are displaced. Even if there is some sort of compensation for relocation, this occurs all too often through manipulation and coercion and without free, prior and informed consent of all members of the community;

- Social inequality, violence, and undermining of customary decision-making processes in cases “*when economic benefits are transferred directly to individuals or limited jobs are available*” and in circumstances involving the bribery and coercion of individual within communities²⁴; and
- Violence and abuse by governments and private security forces and general repression of communities that resist large-scale, industrial methods of extraction, production, and development projects.²⁵
- Increased conflict within and between indigenous peoples and local communities as well as with project proponents, primarily due to lack of fair and effective consultation, lack of full processes to seek free, prior and informed consent (including the right to say “no”), and the role of coercive and manipulative tactics employed by companies and host governments alike to ensure “consent” . .

It is clear that large-scale, industrial methods of extraction, production, and development have significant negative impacts upon the rights of Indigenous peoples and local communities. These rights are found in a number of international human rights and environmental law instruments and include (but are not limited to):

- *United Nations Declaration on the Rights of Indigenous Peoples*: The right to self-determination and autonomy/self-government in management of their own affairs (Articles 3 and 4), the right to maintain and strengthen their political, legal, economic, social and cultural institutions (Article 5), the right *not* to be subjected to forced assimilation or destruction of culture (Article 8(1)), the right to effective mechanisms for the prevention of and redress for any action with the aim or effect of dispossession of lands, territories or resources or forced population transfer that violates or undermines rights (Article 8(2)(b) and (c)), the right not to be forcibly removed from lands and territories and if relocation does take place, it must do so with the free, prior and informed consent of the relevant affected parties, after agreement on just and fair compensation (Article 10), the right to maintain, protect and develop the past, present and future manifestations of their culture (including historical sites) and effective redress with respect to cultural, intellectual, religious and spiritual property taken without free, prior and informed consent or violation of their laws, traditions and customs (Article 11), the right to maintain, protect and access (in private) religious and cultural sites (Article 12), the right to participate in decision-making in matters affecting their rights according to their own procedures (Article 18), and the responsibility of states to consult and cooperate with indigenous

²⁴ Ibid, 11.

²⁵ Id.

communities in good faith in order to obtain free, prior and informed consent before the implementation of measures that will affect them (Article 19);

- *International Labour Organisation Convention Number 169 concerning Indigenous and Tribal Peoples in Independent Countries:*²⁶ The requirement that governments consult people affected by legislative or administrative measures to freely participate in decision-making in good faith (Article 6), the right of indigenous communities to decide their own priorities for the process of development affecting their lives, beliefs, institutions, spiritual wellbeing and lands and resources occupied (Article 7(1)), the responsibility of governments to ensure meaningful social, spiritual, cultural and environmental impact assessments and protect and preserve environments and territories inhabited by such indigenous communities (Article 7(3) and (4)), respect for the importance of cultures and spiritual values to indigenous peoples with respect to the relationship with their environment (Article 13(1)), recognition and protection of rights of ownership, possession, management and conservation of lands and natural resources they have traditionally occupied or had access to for subsistence and traditional activities (Article 14(1) and (2)) and, where states own mineral, sub-surface resources, etc., consultation procedures with indigenous and local communities will be established or maintained before such exploration and participate in the benefits of such projects and receive fair compensation for any damage suffered (Article 15(2));
- *Universal Declaration of Human Rights:* The right to own property and not be arbitrarily deprived of their property (Article 17) and the right to a standard of living adequate for health and well-being (Article 25(1));
- *International Covenant on Civil and Political Rights:* The freedom from torture or cruel, inhuman or degrading treatment or punishment (Article 7), freedom of thought, conscience or religion, including the freedom to religion or belief in worship, observance, practice or teaching (Article 18),²⁷ the freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds (Article 19), and the right of minorities to enjoy their culture and religion (Article 27);²⁸
- *International Covenant on Economic, Social and Cultural Rights:* The right to self-determination (Article 1),²⁹ the right to an adequate standard of living (Article 11(1)), the right to a high standard of physical and mental health including the improvement of environmental and industrial hygiene (Article 12), the right to take part in cultural life and the corresponding responsibility of the state to take necessary steps for the conservation and development of culture (Article 15);³⁰
- *The Convention on Biological Diversity:* The protection, respect, preservation and maintenance of knowledge, innovations and practices of indigenous peoples and local communities who live in traditional lifestyles (relevant for conservation and

²⁶ See <http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm>.

²⁷ It is submitted that the cultural and spiritual ties to the environment of indigenous peoples and local communities is recognised within this particular article.

²⁸ Articles 7, 18 and 19 are also found within the Universal Declaration of Human Rights in Articles 5, 18 and 19 and similar provisions can be found with respect to children in the Convention on the Rights of the Child.

²⁹ This right is also found in Article 1 of the International Covenant on Civil and Political Rights;

³⁰ Articles 11(1), 12 and 15 are also found within the Universal Declaration of Human Rights in Articles 25 and 27 and similar provisions can be found with respect to children in the Convention on the Rights of the Child.

sustainable use) and equitable sharing of benefits arising from such knowledge, innovations and practices (Article 8(j)), and protection and encouragement of the customary use of biological resources in accordance with traditional cultural practices (compatible with conservation and sustainable use) (Article 10(c)). The Parties to the Convention on Biological Diversity (CBD) have also developed the *Akwé:Kon Guidelines for the conduct of cultural, environmental and social impact assessment regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities*.³¹ These guidelines are voluntary, though they provide useful guidance in the development and implementation of cultural, environment and social impact assessments. In addition, the Parties to the CBD adopted the *Tkarihwaí:ri Code of Ethical Conduct*³² to ensure respect for the cultural and intellectual heritage of indigenous and local communities. These were developed, taking into consideration recommendations arising from the United Nations Permanent Forum on Indigenous Issues, to provide guidelines on procedures and principles to be taken into account by researchers and others working with such communities. It includes general ethical and specific considerations and methods, including participatory approaches.

- *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)*: The rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the convention (Article 1), ensuring officials and authorities assist and provide guidance to the public in seeking access to information and facilitating participation in decision-making and in seeking access to justice in environmental matters (Article 3(2)), the right to information made available within a specific timeframe (Article 4(2)), the responsibility of the State to ensure in the event of any imminent threat to human health or the environment that all information relevant to prevent or mitigate harm is disseminated to the affected public (Article 5(1)(c)), the responsibility of the state to make appropriate and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment within a transparent and fair framework (Article 7), the responsibility of the State to promote effective public participation at appropriate stages (Article 8), and access to justice if a request for information under article 4 has been ignored or refused (Article 9).
- *Voluntary Guidelines for Good Governance in Land and Natural Resource Tenure*.³³ Produced by the Food and Agriculture Organisation of the United Nations, these guidelines provide some guidance as to the good governance of land tenure and natural resources.

The nature and extent of the coupled violations of human and environmental rights noted above substantiate the inextricable links between upholding the fundamental rights and freedoms of indigenous peoples and local communities and their customary stewardship and sustainable governance of traditional territories, areas, and natural resources.³⁴

³¹ <http://www.cbd.int/doc/publications/akwe-brochure-en.pdf>

³² <http://www.cbd.int/decision/cop/?id=12308>

³³ See <ftp://ftp.fao.org/docrep/fao/011/ak280e/ak280e00.pdf>.

³⁴ See CBD, Article 8(j).

Biodiversity hotspots are and have often been inhabited by indigenous peoples serving as stewards of their customary territories. These links are increasingly recognized in international fora, as shown by the current parallel United Nations Decades on Biodiversity and on the World's Indigenous People. Echoing recent reports and analyses by various UN bodies and mechanisms outlined above, it is now only pragmatic and efficient that **the rights of indigenous peoples and local communities and large-scale, industrial methods of extraction, production, and development** be addressed in a meaningful way by considering it a key thematic priority of the Working Group.

Duty to Consult and Seek the Free, Prior and Informed Consent of Indigenous Peoples and Local Communities

At the heart of the issue of human rights and large-scale, industrial methods of extraction, production, and development is the very lack of consultation with communities likely to be affected by such projects prior to and throughout project implementation. In addition, lack of accurate information (despite inquiries), lack of thorough and accurate environmental impact assessments, lack of "good faith consultations" with communities³⁵, and an inability to counter the power and resource imbalance between stakeholders exacerbates an already complex situation. This issue is of such importance that it was highlighted in recent advice by the Expert Mechanism on the Rights of Indigenous Peoples, on the topic of indigenous peoples and the right to participate in decision making.³⁶ Noting the already excessively vulnerable status of indigenous peoples, the advice strongly states that "decision-making rights and participation by indigenous peoples in decisions that affect them is necessary to enable them to protect, inter alia, their cultures, including their languages and their lands, territories and resources."³⁷ The advice referred to a plethora of human rights instruments and jurisprudence to support the duty to consult and the right to free, prior and informed consent, as well as the links between these rights and the ultimate right to self-determination, which is essentially the right to determine the outcomes of decisions that will affect them.³⁸

The lack of meaningful dialogue and consultation is not only detrimental to the rights and ways of life of indigenous peoples and local communities, but responses to the Rapporteur's questionnaire on extractive industries and human rights suggest that many companies, despite their efforts, also found engaging in consultations with indigenous peoples and local communities fraught with issues. This is as a result of a lack of certainty about consultation procedures (including scope and implications of and when to engage in consultation procedures) with indigenous peoples and local communities,³⁹ difficulties in ascertaining which communities and individuals therein to consult, and land ownership and boundary issues.⁴⁰ In its article entitled "Responsible Mining: Companies Can't Go It Alone", Human Rights Watch acknowledged that companies involved in the extractive sector require

³⁵ Above n9, 12.

³⁶ Expert Mechanism on the Rights of Indigenous People, *Advice No. 2 (2011): Indigenous Peoples and the right to participate in decision making*. Located at http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Advice2_Oct2011.pdf.

³⁷ Ibid, para. 1.

³⁸ Ibid, para 10-12 and 34.

³⁹ Above, n9, 12.

⁴⁰ Id.

assistance in operating responsibly in troubled and poorly-governed countries, in dealing with negligent host governments, and in preventing abuses and responding to same.⁴¹

The reasons for the lack of success of consultations (or lack of consultations altogether) are numerous. These include, among other things: the lack of will of companies to partake in such consultations, largely due to imbalances between perceived costs (i.e. financial and time) and benefits (i.e. offers of significant financial investment), and lack of respect for local concerns; the lack of legal and institutional infrastructure and overall governance in host countries, as well as the continuing sentiment within governments that they “know what is best for the poor”; the lack of free and fair media and third party monitoring systems; and the lack of capacity of indigenous peoples and local communities to partake in meaningful consultations, largely due to the undermining of procedural rights such as access to information, participation in decision-making, and free, prior and informed consent. Third party compliance and monitoring system in particular may assist in ensuring relevant groups are consulted and their free, prior and informed consent is granted, where appropriate. It is in companies’ best interests to incorporate good practices such as obtaining free, prior and informed consent and fair and equitable consultation measures, as corporate complicity in bad practice can impose reputational costs and a decrease in investment.⁴² Conflicts with and within communities can also inflict significant short- and long-term costs upon both companies and governments, including through the need for increased security measures, “face-saving” public relations campaigns, and lost revenues through damage to or forced closures of project infrastructure or sites.

Government and Corporation Collaboration

Impediments to realising effective corporate responsibility arise primarily in countries with negligent or abusive governments⁴³ and limited relevant legislation protecting indigenous peoples and local communities from the ill-effects of such activities. As a response, and in recognition of the growing importance of upholding human rights standards, institutions such as the World Bank have established policies for borrowers to ensure that the dignity, human rights, economies, and cultures of Indigenous peoples are respected, including the requirement of free, prior and informed consent and the use of impact assessments for impending projects⁴⁴ (though the World Bank’s current policies dated to 2005 do not take into consideration the UN Declaration on the Rights of Indigenous Peoples). Other organisations such as the United States Agency for International Development (USAID) and the International Council on Mining and Metals (ICMM) have released guidance papers on consultation. In Canada, tools such as Impact Benefit Agreements are used to ensure a transfer of benefits from projects to communities in potentially affected areas. In addition, some countries such as Colombia, Peru and Bolivia are enacting laws to ensure

⁴¹ See Human Rights Watch, <http://www.hrw.org/news/2011/02/10/responsible-mining-companies-cant-go-it-alone>.

⁴² Human Rights Council, Eighth session, Agenda Item 3, “Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development. Protect, Respect and Remedy: A Framework for Business and Human Rights”, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*.

⁴³ Ibid

⁴⁴ World Bank OP 4.10 at paragraph 1.

consultations with indigenous and local communities in such situations. However, it is yet to be seen whether these laws will be implemented in accordance with the highest principles and standards of free, prior and informed consent.

A good entry point to collaboration between governments, corporations, and indigenous peoples and local communities is through progressive national legislation that addresses key international principles and standards such as free, prior and informed consent and environmental impact assessments. It is noted that the latter must also be undertaken alongside social and cultural assessments.

Corporations have voiced their concerns that they are, in some cases, unable to rely on domestic regulatory frameworks of some developing countries for assistance in, for example, the implementation of public consultations, protections regarding access and benefit sharing, and to ascertain the existing land (and other) rights of relevant indigenous peoples and local communities.⁴⁵ Governments and corporations must work in collaboration with communities to ensure the best outcomes for communities, ensuring effective dialogue between the parties, and clarifying the roles and responsibilities in such development activities. This includes the governments of host countries as well as the governments in which the corporations are registered.

Community Protocols as a tool facilitating 'good practice' for collaboration with Indigenous peoples and local communities

Community protocols are a tool that indigenous peoples and local communities can use towards realising their rights to territories, resources and ways of life under various customary and positive legal frameworks. Drawing on legal empowerment and endogenous development methodologies, the process of developing and using community protocols can enable indigenous peoples and local communities to engage constructively with relevant parties in accordance with locally defined plans, priorities, and terms. Communities often include in their protocols descriptions of their identity and stories of origin, history, boundaries, beliefs and values, customary laws, decision-making processes, and traditional practices in relation to the customary stewardship of their environment. Usually with focused legal support, community members also gain awareness of rights and responsibilities under national and international frameworks and use them as a basis for engagement with external actors and agencies. A number of communities around the world have documented and developed community protocols in response to large-scale, industrial methods of extraction, production, and development that are undermining their rights, and are currently using them as a basis for interaction with business, government and other relevant parties.

The Supreme Community Council of Alto San Juan ASOCASAN in Chocó, Colombia, is one such community that has recently developed a community protocol. This protocol⁴⁶ sets out the community's long relationship with the land and the future challenges they face with illegal, mechanised mining and logging taking place on their traditional lands without their free, prior and informed consent. The community's protocol sets out their requirements for

⁴⁵ Above, n9, 12.

⁴⁶ Located at http://naturaljustice.org/wp-content/uploads/pdf/Alto_San_Juan_BCP-English.pdf.

processes, projects, programmes, and activities taking place in their territory, making it a useful tool for companies in their efforts to liaise with communities prior to the beginning of a project.

The Ghanaian organisation, the Centre for Indigenous Knowledge and Organisational Development (CIKOD), has also recently supported the Tanchara community to develop a community protocol in response to prospecting activities by an Australian mining company. The company was granted permission by the Ghanaian government to prospect for gold in the area without consultation of the local communities likely to be affected. The community protocol is one of several organisational tools with which CIKOD has assisted the community to strengthen its organisation, legal empowerment, and knowledge of national and international rights such as the right to free, prior and informed consent. It has been used as a tool with which to address the mining company and rid the area of illegal mining.

Save Lamu, a coalition of civil society organisations based in Lamu, Kenya, is in the process of developing a community protocol with local and indigenous communities in and around Lamu in response to the proposed development of a multi-billion dollar project known as Lamu Port, South Sudan, Ethiopia Transport Corridor (LAPSSET), which includes a port, an oil refinery and pipeline to South Sudan and Ethiopia, a transportation hub including rail, air and highway, and a resort city in the area. This major development project is planned to proceed without the consultation or free, prior and informed consent of the indigenous peoples and local communities living in the area's traditionally-held lands and waters. The community protocol will be one of several tools used to open up a dialogue with the Kenyan Government and other actors in a forthcoming facilitated multi-stakeholder process.

Recommendations

Protecting against and redressing the impacts of large-scale, industrial methods of extraction, production, and development on the rights of indigenous peoples and local communities is clearly within the ambit of this Working Group.

In light of the above, the following recommendations are made:

- 1) The impacts of large-scale, industrial methods of extraction, production, and development on the rights of indigenous peoples and local communities should be a key thematic priority for the current Working Group. In prioritising this issue, the Working Group should work in close collaboration with relevant UN bodies and mechanisms, particularly the Special Rapporteur on the Rights of Indigenous Peoples, given his current research priorities.⁴⁷ This is a significant opportunity to liaise with the Special Rapporteur in light of his plans to formulate guidelines/principles “that will provide specific orientation to Governments, indigenous peoples and corporations regarding the protection of indigenous peoples’ rights in the context of resource extraction or development projects.”⁴⁸ One issue in particular that could be explored is appropriate and effective ways to ensure

⁴⁷ Above, n9, 2. Indeed, the Rapporteur has proposed to draft a set of relevant guidelines or principles on natural resource extraction in or near indigenous territories by 2013.

⁴⁸ Ibid, 17.

compliance of states and corporations and business enterprises to obligations under various levels and forms (including customary) of law and policy.

- 2) In order to uphold the highest international standards, norms, and principles, the Forum should further draw from a wealth of relevant discourse that has emerged under other UN Conventions and processes, including:
 - a. The Convention on Biological Diversity (1997): acknowledges the crucial role indigenous peoples⁴⁹ and local communities have played in biodiversity conservation and sustainable use. Article 8(j) in particular calls on government to protect, maintain and conserve traditional lifestyles that have led to conservation and sustainable use of biodiversity. Thus, where large-scale, industrial methods of extraction, production, and development threaten the continuation of such lifestyles, governments may fall short of its obligations under the CBD. Furthermore, a number of related and more specific guidelines have been signed by CBD member states that are of direct relevance for the work of the transnational corporations. These include in particular the 'Akwé:Kon guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities' and 'The Tkarihwaí:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities'.
 - b. The United Nations Permanent Forum on Indigenous Issues: the United Nations Declaration on the Rights of Indigenous Peoples⁵⁰ was adopted in 2007 by 144 member states, and during the Durban Review Conference in April 2009, 182 States agreed on an outcome document in which they "Welcome[d] the adoption of the UN Declaration on the rights of indigenous peoples which has a positive impact on the protection of victims and, in this context, urge[d] States to take all necessary measures to implement the rights of indigenous peoples in accordance with international human rights instruments without discrimination..."⁵¹. UNDRIP includes a number of rights that are relevant to the work of the Forum and should be integrated into its work, particularly indigenous peoples' rights to self-determination, territorial integrity, and free, prior and informed consent.
- 3) The Forum should consider the use of community protocols as a good practice tool for supporting and enabling communities to protect their human and environmental rights against irresponsible investment and enter into an empowered dialogue with third parties. It is obvious that the duty to consult and seek the free, prior and informed consent of indigenous peoples and local communities is not always adhered to and that there now needs to be a conscious effort to build capacity for such dialogues between relevant stakeholders of host countries, home countries (if appropriate), indigenous peoples and local communities, civil society and third-party

⁴⁹ Although the CBD terminology uses only "indigenous and local communities", this submission follows the universally accepted (through UNDRIP) nomenclature of "indigenous peoples".

⁵⁰ <http://www.un.org/esa/socdev/unpfii/en/declaration.html>

⁵¹ (UN Office of the High Commissioner for Human Rights, Outcome document of the Durban Review Conference, 24 April 2009, para. 73). See: <http://www.un.org/esa/socdev/unpfii/en/declaration.html>

monitors, and companies involved in large-scale, industrial methods of extraction, production, and development.

- 4) The Forum should consider including the following stakeholder groups into the constituency of the working group:
 - a. representatives of Indigenous peoples and local communities; they are among the most marginalised groups of peoples in the global community and time and again bear the brunt of human rights violations, as they often do not have a voice. To give them a voice in the context of the Forum they should form an integral part of the Working Group.
 - b. lending banks and insurance companies; the role that these institutions play in funding, driving, and managing risks of large-scale, industrial methods of extraction, production, and development is crucial. Good consultation is effectively a risk management tool and, as mentioned above, failure to consult can have critical effects on investment and consumer and shareholder confidence, among other things. In the current economic climate, managing risks such as these are vital for economic sustainability.

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