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**INTERNATIONAL WORKSHOP ON NATURAL RESOURCE COMPANIES,
INDIGENOUS PEOPLES AND HUMAN RIGHTS: SETTING A
FRAMEWORK FOR CONSULTATION, BENEFIT-SHARING
AND DISPUTE RESOLUTION**

Moscow, 3-4 December 2008

**Report of the Office of the United Nations High Commissioner
for Human Rights***

* Late submission.

I. INTRODUCTION

1. The international workshop entitled “Natural resource companies, indigenous peoples and human rights: setting a framework for consultation, benefit-sharing and dispute resolution” was held in Moscow on 3 and 4 December 2008. The workshop was organized by the Office of the United Nations High Commissioner for Human Rights (OHCHR), with support from the Ministry of Foreign Affairs of the Russian Federation and in cooperation with the Russian Association of Indigenous Peoples of the North and Far East (RAIPON).

2. The purpose of the workshop was to review the relationship between indigenous peoples and extractive industries from a human rights perspective, focusing on three main themes: (a) processes of consultation among all parties; (b) ways in which benefits from economic activity are shared with indigenous peoples; and (c) the means for resolving disputes, should they arise. In particular, the workshop provided an opportunity to learn of examples of cooperation between indigenous peoples and companies, and the lessons learned from those experiences. It was anticipated that participants would comment on a draft framework, prepared by OHCHR, for consultation, benefit-sharing and dispute resolution that would guide companies seeking to engage in natural resource extraction in areas inhabited by indigenous peoples.

3. Prior to the meeting, participants were invited to review the reports of the workshop on indigenous peoples, private sector natural resource, energy and mining companies and human rights, convened by OHCHR in December 2001 (E/CN.4/Sub.2/AC.4/2002/3), and of the workshop on perspectives of relationships between indigenous peoples and industrial companies organized by the Permanent Forum on Indigenous Issues in Salekhard, Russian Federation.¹

4. In its background note for the workshop, OHCHR drew attention to recent developments relevant to the discussions, including the adoption by the General Assembly, in September 2007, of the United Nations Declaration on the Rights of Indigenous Peoples, a document that could be used to orientate negotiations among States, the private sector and indigenous peoples on the basis of recognized human rights standards for indigenous peoples. The Expert Mechanism on the Rights of Indigenous Peoples, which held its first session in October 2008, also offered a framework for the future elaboration of guidance through its capacity to undertake studies. It was noted that a number of companies, including those participating in the United Nations Global Compact, had developed relevant guidelines and practices aimed at applying human rights standards to their work and, in particular, improving their relations with indigenous peoples and local communities. Note was also taken of the work of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises and the relevance of his policy framework “Protect, Respect and Remedy” to the workshop.

II. OPENING OF THE WORKSHOP

5. The workshop was opened by the senior human rights adviser to the United Nations country team, Dirk Hebecker. Welcoming statements were made by a representative of the Ministry of Foreign Affairs of the Russian Federation, Mikhail Todyshev, representing

¹ See the website of the Permanent Forum at the www.un.org/esa/socdev/unpfii.

RAIPON, and Pavel Sulyandziga from the Permanent Forum on Indigenous Issues. The Coordinator of the Indigenous Peoples and Minorities Unit at OHCHR, Julian Burger, set out the objectives of the workshop. Experts and observers were given the opportunity to introduce themselves. The first day of the workshop was facilitated by Mr. Hebecker and the second day by Mr. Burger, for OHCHR, and Mr. Sulyandziga, for RAIPON. It was agreed that OHCHR would prepare a summary of the workshop and circulate it for comments and approval to the invited experts.

III. CASE STUDIES

A. Russian Federation

6. Two case studies were presented by the Russian Federation. The first case study concerned Novatek, the second largest natural gas company in the country working in the Autonomous District of Yamal Nenets. The second case study related to Rosgidro, a major Russian hydroelectric company, whose activities affect Evenks peoples. The Chairman of the Novatek Management Committee, Leonid Mikhelson, described the challenges faced by the company with respect to environmental issues and labour relations in their operations in the Yamal Nenets Autonomous District. In 2005, the company had elaborated a socio-economic programme for the Nenets peoples affected by its activities. The programme was in line with performance standard 7 of the International Finance Corporation on indigenous peoples, and was a requirement for financial support from the Corporation. Alexander Mironov explained that the arrangements made with the Nenets associations drew on meetings with community members and leaders. He noted that Corporation staff monitored the project. In November 2008, an agreement was signed with the local Nenets organization defining the cooperation between the company and indigenous peoples. The company was providing support for infrastructure, such as housing, transport and roads, health and socio-economic projects.

7. The Chairperson of the Purovsky branch of the Association of Indigenous Peoples in Yamal-Nenets Autonomous District and Vice-President of RAIPON, Mariya Klimova, pointed out that a significant percentage of the gas and oil wealth of the Russian Federation was derived from the regions traditionally inhabited by indigenous peoples. Until the 1990s, development in these areas was environmentally destructive and had a negative impact on indigenous peoples' livelihoods. Initially, indigenous peoples had no other choice than to organize protests to raise their issues, as there were no mechanisms for negotiation. This had changed in recent years, in particular since 2000, when the company had agreed to meet directly with the community to discuss their concerns. Ms. Klimova explained that Novatek was now doing a lot to help indigenous peoples, and that lands were not allocated for development by the company without the consent of the Nenets people. The objective was to achieve mutually advantageous development allowing indigenous peoples to maintain their traditional livelihoods and economy while benefiting from job opportunities in oil and gas developments.

8. Certain factors seem to have contributed to the present improved situation. The role played by the Governor and local authorities was cited as providing an enabling environment for negotiation and reconciliation. International Finance Corporation was also able to exert some pressure through its guidelines and role as shareholder in the company's project. In the absence

of a clear land rights regime for indigenous peoples, the willingness of the company to engage directly with indigenous peoples and the organizational capacity of the Nenetz associations were requirements for a conciliatory approach based on good faith.

9. The representative of Hydro-OGK (Rosgidro) presented the case of a large-scale hydroelectric project due to be developed in the period 2017-2018 in the Siberian region. The area to be affected is inhabited by about 7,000 Evenk indigenous people, many of whom live traditionally as reindeer herders. Public hearings had begun but no environmental impact assessment had yet been made. At present, there was no dialogue with the indigenous peoples, which was a source of frustration, since the project needed to be advanced in 2009. He argued that the project was essential to the long-term energy needs of the Russian Federation. He also pointed out that the local communities had few job opportunities and would benefit from economic activities of the company. Pavel Sulyandziga, representing RAIPON, indicated that discussions with the company had been attempted three years previously, but without results, and that trust between the company and indigenous peoples was low. He stated that the Evenk were being removed from their lands without any say and their traditional way of life would be affected.

B. New Caledonia

10. A case study from New Caledonia was presented by Raphael Mapou representing the Rheebeu Nuu Committee, an indigenous Kanak association; Jérôme Bouquet-Elkaim, lawyer for the Committee; and Rafael Benke, Vice President of Corporate Affairs and International Relations of Vale Inco, the company concerned. In September 2008, an agreement entitled the *Pacte pour un développement durable du Grand Sud*, had been signed between the company and four Kanak organizations. The presenters considered that it was important to understand the context of the agreement, notably the history of conflict between the indigenous Kanak population and the Government of France, particularly in the 1980s, and the decision taken in 1998 (*l'accord de Nouméa*) that provided for greater autonomy for the Kanak and a referendum on full independence in 2014.

11. The authorities of France had given a nickel mining concession in Goro in the south of the island to the company Inco through a subsidiary company, Goro Nickel, in 1992. In 1999, the company began construction of the mine and infrastructure. According to Mr. Mapou, there ensued serious conflicts with the company, which led in turn to confrontations with the police and army. In 2006, the Kanak decided to internationalize their case and also make use of French environmental laws in the courts to oppose the operations of the company. The courts decided in favour of the Kanak. It was at about this time that Inco was taken over by Vale to form a new company, Vale Inco, which sought a more conciliatory approach. Following several years of negotiations, an agreement was reached between Vale Inco and the affected indigenous peoples.

12. The agreement provided a mechanism for compensation to the local communities for social and cultural impact and funding for sustainable development projects. To implement the agreement, a foundation was created by the company, whose board is composed of eight indigenous representatives, two representatives of the company and a representative of the staff of the mine. The company is committed to providing funds for a period of 35 years: \$6.9 million

for the first five years, and \$1.4 million annually thereafter. The agreement includes about \$25.9 million for financing a programme of reforestation for the region over a 30-year period, which will be managed by the local community. The agreement also allows for the possibility of future negotiations.

13. The presenters drew attention to a number of factors that they considered to be relevant to the objectives of the seminar. They pointed out the absence of any formal recognition by the authorities of France of the indigenous peoples of New Caledonia or of their rights to their traditional lands. As such, the Kanak people were not required, according to French law, to give their consent to the mine operation, since the land was in the public domain. The Kanak opposing the mine were therefore obliged to report to protests and the courts rather than direct negotiation with the company. It was pointed out by Mr. Mapou that the rights established internationally for indigenous peoples, in particular article 32 of the United Nations Declaration on the Rights of Indigenous Peoples, and examples of the legal regimes and agreements from countries such as Canada, were used to build their case both with the courts and in their dealings with the company.

14. The role of Vale Inco and its negotiator was also recognized as contributing to a mutually acceptable result. Mr. Benke described his own efforts to understand the culture of the community and its concerns, and recognized that building trust with the community was critical. Mr. Mapou stated that there was a gap between what the law required and engaging in a process that gave dignity to indigenous peoples on the basis of partnership.

15. Commenting on the case, the representative of Greece, Ms. Daes, stated that the serious conflicts, which led in turn to confrontations with the police and the army, should be condemned as gross violations of the human rights of the Kanak peoples. Indigenous peoples should be respected and their rights protected in accordance with the Declaration on the Rights of Indigenous Peoples. Efforts should be made to respect the principles of good faith and of free, prior and informed consent of indigenous peoples.

C. South Africa

16. The case from South Africa was presented by Henk Smith, attorney at the Legal Resources Centre in Cape Town, which represented the indigenous community concerned. The example concerned court judgements in favour of the Richtersveld community of Nama indigenous peoples under the Restitution of Land Act of 1994, and was unique in that it was the first time that the doctrine of indigenous land title had been considered in South Africa. The essence of the case was that the community was able to demonstrate to the three tribunals concerned - the Land Claims Court, the Supreme Court of Appeal and the Constitutional Court - that it had been dispossessed of its lands as a result of racially discriminatory laws.

17. When diamonds were discovered on the traditional lands of the community in the 1920s, mining was begun on what was declared Crown lands. Subsequently, mining rights were passed on to the Alexander Bay Development Company and later to Alexkor Ltd. The court found that, at the time of annexation of the lands for diamond mining, the Richtersveld community had common law ownership of the land and the minerals. The land was not deemed to be

terra nullius. In 2003, the Constitutional Court found that the right of communal ownership under indigenous law was a part of South African law and subject to the protection of the Constitution. The Court found that the Richtersveld community was entitled to restitution of the right of ownership over the lands, including its minerals and compensation.

18. Following the judgement by the Constitutional Court, the Richtersveld Community Land Settlement Agreement was negotiated and signed in 2007 by the Richtersveld community, the Government of South Africa and Alexkor. Under the Agreement, the ownership of 84,000 hectares of land and mineral rights was restored to the community, which also took a 49-per cent share of equity of Alexkor's Alexander Bay operations (the other 51 per cent belonging to the State). The community was also given reparations for the mining of diamonds over 70 years, equivalent to about \$19 million.

19. The Agreement between the Nama community and Alexkor was possible because the highest court in South Africa had recognized the land and mineral rights of the indigenous peoples concerned. This resulted in the company being required to enter into negotiations with the community as equals with a view to obtaining its consent. The legal case and negotiations took nine years, from 1998 to 2007, when a final arrangement was made. Mr. Smith remarked that the decision by the Court had changed the indigenous peoples from stakeholders to rights holders and increased their bargaining position.

D. Canada

20. In Canada, indigenous peoples have rights established under the Constitution, including a special fiduciary relationship with the federal Government and the protection of treaty or land claims agreements. A number of court cases have affirmed the ownership rights of indigenous peoples over their lands and resource development. In the case presented by Isabelle Pain, who negotiated the agreement for her community and also represented the company Vale Inco, the Innu and Inuit indigenous communities were negotiating a land claims agreement with the Government at the time when nickel was discovered. The reconciliation of indigenous and company interests was achieved even though a final land claims agreement had not been reached.

21. Ms. Pain noted that the involvement of indigenous peoples in the environmental assessment to consider the possible impact of the proposed nickel mine was critical to success. The impact and benefits agreements negotiations identified specific concerns of indigenous peoples related to their cultural practices and traditional relationship with the lands and livelihoods, and also served as a tool to build trusting relations with the company. The community wanted training, employment and business opportunities as well as involvement in environmental matters. One issue of particular concern was the proposed transport arrangements by ship, which in the winter months would mean breaking the sea ice that was considered vital for harvesting by the indigenous community.

22. The agreement took seven years to negotiate and was voted on by the local Innu and Inuit communities, with more than 75 per cent voting in favour. The agreement includes a compensation package administered through a trust, employment opportunities with the objective of hiring 50 per cent of the workforce from the local communities (54 per cent of the workforce is now indigenous), workplace conditions that take into account cultural diversity,

such as a cultural leave policy, business opportunities for site services, air transportation and maintenance, and a role for indigenous governments in environmental protection. The impact and benefits agreements contain a dispute resolution mechanism, which begins with discussions by a joint implementation committee and can be referred upwards to the president of the company and the chiefs of the Innu and Inuit communities, and, if necessary, to the courts. To date, disputes have been resolved by the committees.

23. The lessons learned from the project were that all parties needed to feel that they would obtain benefits. Ms. Pain noted that communities must know that their voices had been heard and taken into account, that building the capacity of indigenous peoples was good company policy, and that communications needed to be honest and realistic in order to build credibility. She pointed out that social and environmental issues were as important as the financial ones, and underscored the importance of taking time to develop good relations.

24. The presentation of the Voisey Bay case and other examples of agreements between companies and indigenous peoples elicited a number of questions and comments. In answer to a question regarding the advantages for business of such agreements, Ms. Pain stated that, in general, the company considered that the results were very positive leading to a production capacity of 80 per cent in the mine after five months, low levels of absenteeism and good company-workforce relations. In addition, the project had generated about \$100 million in returns for Aboriginal business.

25. There was some discussion about the advantages of negotiating equity arrangements for indigenous peoples. It was noted that there could be certain risks in the event that the company did not generate profits for a long period. It was also observed, however, that unless communities had a stake in the company, they may not enjoy the longer-term benefits. Giving preferential treatment to indigenous employment needed to be understood within a wider context of employment and required obtaining trade union support and understanding.

26. Doug Paget from the Indian and Northern Affairs Canada made a general presentation on impact and benefits agreements in his country. While such agreements were not legally required unless they are a part of lands claim process, the Government encouraged companies to make them. He gave examples from different types of agreements currently in place in Canada.

27. Hugh Attwater, representing BG Group, talked about its governance framework and social performance standards in relation to indigenous peoples, which is based on performance standard 7 of the International Finance Corporation. He stated that BG operated in four countries where there were indigenous communities affected by their projects: Australia, Bolivia (Plurinational State of), Canada and India. In Australia, the company had undertaken ethnographic studies and identified eight potential indigenous land claims and was negotiating indigenous land use agreements with these groups. He noted that the policy of the company was to adopt an “as if” policy with regard to indigenous peoples’ land claims, considering them valid notwithstanding legal recognition in the country concerned. Discussions were centred on questions of equity and capital expenditure. In the case of Bolivia (Plurinational State of), where BG had a small operation, negotiations were in relation to a social investment package that was being discussed in the context of the recently adopted hydrocarbon law, which provided for participation by local communities. As part of its policy, BG required socio-economic baselines

to be in place, early identification of the key issues for indigenous peoples, understanding of the nature of indigenous peoples' lands, consultation with experts on indigenous issues and independent review of the level of indigenous support for the project.

28. Oleg Bazaleev, representing Sakhalin Energy, Russian Federation, spoke about Sakhalin II project, one of the largest natural gas operations in the world and which indigenous peoples had actively opposed. The criticism from local communities had led to negotiations and eventually to a tripartite agreement signed by the company, the Sakhalin authorities and the local organization of indigenous peoples. Under the terms of the agreement, a number of socio-economic activities would be supported, some specifically to support cultural and language revival. The speaker underlined the key role played by RAIPON and noted that the World Bank and the European Central Bank were active partners in the agreement.

29. Roman Novozhilov, representing the International Finance Corporation, provided information about the Corporation's performance standard 7 on indigenous peoples, adopted in 2006. He stated the objective of performance standard 7 was to minimize risks and impact and to ensure that development did not harm the poorest, marginalized and underrepresented groups, which indigenous peoples often constitute, and described the Corporation's process of project review to ensure compliance with performance standard 7. He also underlined the fact that the Corporation did not fund projects that were not compliant with its policies and that had no concrete action plans agreed with the Corporation for compliance with performance standard 7. He stated that the standard incorporated the commitments of the World Bank's extractive industry review with regard to broad community support for projects, and that they promoted the concept of free, prior and informed consultations with indigenous peoples. He added that similar requirements were incorporated in the Equator Principles, a set of voluntary principles for project finance organizations, developed on the basis of the Corporation's performance standards.

30. Yana Dordina, representing the Batani International Development Fund for Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation, explained that her organization had been established to liaise with the private sector. Its main task was to organize regional seminars with companies and local authorities, to encourage them to be more socially responsible, respect environmental standards and encourage direct discussions with indigenous communities. She concluded by observing that there were still difficulties in developing good relations with Russian companies because of their past record and pointed out that, while indigenous peoples' rights were recognized in the Constitution, specific measures to give legal recognition to the land of indigenous peoples had not advanced, thus leaving them disadvantaged when dealing with companies.

31. Following the conclusion of the part of the workshop dedicated to cases, Stefania Tripodi, on behalf of OHCHR, provided an overview of the work of the United Nations on business and human rights, and in particular presented the policy framework entitled "*Protect, respect and remedy: a framework for business and human rights*", developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. The framework, endorsed by the Human Rights Council, comprised three fundamental principles, all of equal weight and importance: the State's duty to

protect against human rights abuses by third parties, including business; the responsibility of companies to respect human rights; and the need to create more effective remedies to address corporate-related human rights disputes.

32. There ensued a general discussion as to the value of OHCHR developing a human rights framework for companies working with indigenous peoples. In general, there was support for the initiative, but it was recommended that note be taken of the work being done by other bodies, such as the Permanent Forum, existing company guidelines and the policy guidance arising from the Special Representative's mandate. It was also recommended that the framework address key strategic issues where problems remained unsolved.

IV. RECOMMENDATION

33. The workshop concluded by recommending that OHCHR continue to work on the issue of human rights, indigenous peoples and extractive industries. It also requested that OHCHR continue to work on the elaboration of guidelines, which would serve as a framework for implementation of a human rights perspective, in line with the United Nations Declaration on the Rights of Indigenous Peoples and other relevant human rights standards, for extractive industries wanting to undertake activities on the land and territories of indigenous peoples.
