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### **Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries**

#### *Summary*

In the present follow-up report, the Expert Mechanism on the Rights of Indigenous Peoples examines the issue of indigenous peoples and the right to participate in decision-making, with a focus on extractive industries. It examines, inter alia, the Guiding Principles on Business and Human Rights endorsed by the Human Rights Council, relevant provisions of the Declaration on the Rights of Indigenous peoples, and policy considerations. Advice No. 4 provides guidance for States, extractive industries and indigenous peoples in relation to indigenous peoples' participation in decision-making.

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## I. Introduction

1. The present follow-up report is aimed at enhancing the ability of States, indigenous peoples and other stakeholders, including business, to implement the right of indigenous peoples to participate in decision-making, in particular in relation to the extractive industry. It builds on the Expert Mechanism on the Rights of Indigenous Peoples' study on indigenous peoples and the right to participate in decision-making (A/HRC/18/42). Clarity will be provided by outlining pertinent international human rights law, particularly the United Nations Declaration on the Rights of Indigenous Peoples,<sup>1</sup> and policy.

### A. Mandate for the report

2. In the report on its fourth session, the Expert Mechanism proposed to the Human Rights Council that it request the Expert Mechanism "to continue its work on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries, in cooperation with the thematic work of the Special Rapporteur on the rights of indigenous peoples, and to communicate and to share knowledge and good practices with the Working Group on the issue of human rights and transnational corporations and other business enterprises" (A/HRC/18/43, pp. 3-4).<sup>2</sup>

3. In its resolution 18/8, the Human Rights Council welcomed the completion by the Expert Mechanism of its final study and the inclusion of the examples of good practices at different levels of decision-making therein, including those in connection with the activities of extractive industries, and requested the Expert Mechanism to continue to build on its previous studies, including its study on indigenous peoples and the right to participate in decision-making.

### B. Coordination with the Special Rapporteur on the rights of indigenous peoples and the Permanent Forum on Indigenous Issues

4. The Special Rapporteur on the rights of indigenous peoples is currently focusing his thematic work on extractive industries operating in or near indigenous territories (see A/HRC/18/35). The Permanent Forum on Indigenous Issues has engaged in a number of substantive activities related to indigenous peoples and the impact of extractive industries upon them.<sup>3</sup>

5. In resolution 18/8, the Human Rights Council also welcomed the ongoing cooperation and coordination among the Special Rapporteur on the rights of indigenous

<sup>1</sup> This is particularly timely given that there is now overwhelming support for the Declaration.

<sup>2</sup> This focus was called for by observers of the Expert Mechanism's fourth session, including representatives of indigenous peoples' organizations.

<sup>3</sup> This includes the international expert group meeting on the theme "Indigenous peoples and forests" (see the report thereon, E/C.19/2011/5); the international expert group meeting on the theme "Indigenous peoples: development with culture and identity: articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples" (E.C.19/2010/14); the international expert group workshop on the theme "Indigenous peoples' rights, corporate accountability and the extractive industries" (E/C.19/2009/CRP.8); and the international workshop on the theme of "Methodologies regarding free, prior and informed consent and indigenous peoples (E/C.19/2005/3).

peoples,<sup>4</sup> the Permanent Forum on Indigenous Issues and the Expert Mechanism, and requested that such coordination continue. In that spirit, the present follow-up report was prepared after consulting their previous work.

6. Additionally, the Expert Mechanism, the Permanent Forum on Indigenous Issues and the Special Rapporteur on the rights of indigenous peoples have had initial discussions in relation to indigenous peoples and extractive industries, including in meetings at the Expert Mechanism's fourth session and in the annual coordination meeting among the Expert Mechanism, the Permanent Forum and the Special Rapporteur. Further, the topic was discussed during the interactive dialogue between the Special Rapporteur and the Expert Mechanism and the Human Rights Council, held within the framework of the eighteenth session of the Council. In addition, the Working Group on business and human rights has been consulted.

### **C. Ongoing work on the relationship between the Guiding Principles on Business and Human Rights and the rights of indigenous peoples**

7. The Expert Mechanism will invite the Working Group on business and human rights, the Special Rapporteur on the rights of indigenous peoples and the Permanent Forum on Indigenous Issues to work together on the relationship between the Guiding Principles on Business and Human Rights and indigenous peoples' rights.

## **II. International legal and policy framework**

### **A. Law**

#### **1. Permanent sovereignty of indigenous peoples over natural resources and the United Nations Declaration on the Rights of Indigenous Peoples**

8. The right to participate is indivisible from and interrelated with other rights of indigenous peoples, such as their right to self-determination and their rights to their lands, territories and resources (A/HRC/18/42). Thus, although the right to participate is the focus of the present follow-up report, it should be read holistically and be understood as a coherent whole in the light of the rights of indigenous peoples relating to extractive industries more broadly.

9. As a fundamental inherent right, self-determination is best exemplified and fully enjoyed by indigenous peoples when exercised in relation to lands, territories and resources, especially in regard to extractive industries. In the implementation of articles 1 and 3 of the United Nations Declaration on the Rights of Indigenous Peoples, indigenous peoples have the right to the full enjoyment of common article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which states, in part:

(a) All peoples have the right of self-determination. By virtue of that right they...*freely pursue their economic...development;*

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<sup>4</sup> The Special Rapporteur's study covers a broader range of subject matter and rights, beyond the right to participate in decision-making, and also is more empirical in focus, consistent with his mandate to undertake country visits and respond to communications.

(b) All peoples may, for their own ends, *freely dispose of their natural wealth and resources...In no case may a people be deprived of its own means of subsistence*;

(c) *The States Parties to the present Covenant...shall promote the realization of the right of self-determination* [emphasis added].

10. The Human Rights Committee has called upon States to act in accordance with article 1, paragraph 2, of the International Covenant on Civil and Political Rights, emphasizing, in relation to indigenous peoples, that “the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence”.<sup>5</sup>

11. While only paragraph 1 of common article 1 of the Covenants appears in article 3 of the United Nations Declaration on the Rights of Indigenous Peoples, the content of paragraphs 2 and 3 of common article 1 are found in articles 23 and 32 of the Declaration. Further, article 3 needs to be read together with a cluster of articles (10, 11, 12, 20 and 25-31) in the Declaration, which generally relate to lands, territories and resources. Article 3 must also be read in the light of the articles specific to extractive industries, which include article 26, article 28 and, of particular importance, article 32. The latter article provides protection analogous to that provided under common article 1, paragraphs 2 and 3, ensuring that the free, prior and informed consent of indigenous peoples is obtained prior to approval of the use by private industries of indigenous peoples’ lands, territories and resources.

12. Furthermore, treaties and treaty principles must be considered in the development of extractive industries, consistent with both the Declaration on the Right to Development and preambular paragraphs 7, 8, 14, 15 and articles 3, 32 and 37 of the United Nations Declaration on the Rights of Indigenous Peoples, as stated by the Permanent Forum on Indigenous Issues in its report on its ninth session (E/2010/43-E/C.19/2010/15, para. 7).

13. Related to this, international law has developed a clear principle of the right of indigenous peoples to permanent sovereignty over natural resources. This is based, inter alia, on common article 1, paragraph 2, of the two International Covenants on Human Rights and on the United Nations Declaration on the Rights of Indigenous Peoples. The principle of permanent sovereignty is an integral part of the right of self-determination of indigenous peoples; in recognition thereof, the Special Rapporteur on indigenous peoples’ permanent sovereignty over natural resources noted that “nowadays the right to self-determination includes a range of alternatives including the right to participate in the governance of the State as well as the right to various forms of autonomy and self-governance. In order to be meaningful, this modern concept of self-determination must logically and legally carry with it the essential right of permanent sovereignty over natural resources” (E/CN.4/Sub.2/2004/30, para. 17).

14. Recognition of indigenous peoples’ permanent sovereignty over lands, territories and resources is a prerequisite for “meaningful political and economic self-determination of indigenous peoples” (ibid., para. 8).

## **2. Sustainable development and environmental responsibility and rights**

15. Globally, a fundamental concern of indigenous peoples regarding extractive industry development, in addition to that of the dispossession of their lands, territories and resources, has been the ensuing unsustainable development and environmental degradation.

<sup>5</sup> See, for example, the Committee’s concluding observations on the fourth periodic report of Canada (CCPR/C/79/Add.105), para. 8.

Such patterns contrast with indigenous peoples' traditional models of development and are rooted in a lack of recognition of indigenous peoples' international human rights.<sup>6</sup>

16. The link between the rights of indigenous peoples to culture and to sustainable development models has been commented upon by the Human Rights Committee in relation to article 27 of the International Covenant on Civil and Political Rights:

Culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.<sup>7</sup>

17. The Permanent Forum on Indigenous Issues has also linked violations of cultural and treaty rights to unsustainable development, in particular, policies and programmes that ignore the cultural integrity, treaty relationships and rights of indigenous peoples and that, as a consequence, have had negative effects on their lives and livelihoods.<sup>8</sup> It outlines several solutions to unsustainable development that can be instructive for indigenous peoples, States and extractive industries. These include promoting self-determination through collective economic activities, maintaining the integrity of indigenous governance, implementing models of development where the intended outcome is considered in terms of improving the quality of life, enriching the notion of balance with Mother Earth, and promoting spiritual practices and the knowledge institutions of indigenous peoples (E/C.19/2010/14, para. 28).

18. Related to the promotion of indigenous peoples' development with culture and identity is the promotion of treaty rights and treaty principles in accordance with articles 3, 32, 37, preambular paragraphs 7, 8, 14, 15 of the United Nations Declaration on the Rights of Indigenous Peoples and the Declaration on the Right to Development (E/2010/43-E/C.19/2010/15, para. 7).

19. Indigenous peoples have proclaimed several declarations that are relevant to development.<sup>9</sup> These all seek balance and harmony and merit particular consideration for implementation. For example, the Manila Declaration<sup>10</sup> states:

<sup>6</sup> In *State of the World's Indigenous Peoples* (United Nations publication, Sales No. 09.VI.13), the authors state:

In many regions, the experience of indigenous peoples has been 'that inadequate legal frameworks resulted in disruption to their traditional land tenure and use patterns, fragmentation and loss of traditional land, changes in settlement patterns, privatization of communal lands, degradation of land and/or resources, lack of recognition of territorial rights, insufficient and inequitable land allocation, lack of effective mechanisms for conflict resolution, inefficient land registers, and difficult procedures for land demarcation and titling. These factors have generated local tensions over land tenure and lack of access to productive lands, which impact on the economic and socio-cultural stability of indigenous peoples and their communities' (p. 87).

...

Indigenous peoples feel that many development policies are either directly or indirectly geared toward weakening or eradicating their traditional modes of production. (p. 88)

<sup>7</sup> Communication No. 1457/2006, *Poma Poma v. Peru*, Views adopted on 27 March 2009, para. 7.2.

<sup>8</sup> E/C.19/2010/14, para. 23.

<sup>9</sup> For example, see the Cochabamba Peoples' Agreement and the Universal Declaration on the Rights of Mother Earth, as well as the Bemidji Statement on Seventh Generation Guardianship and the Precautionary Principle.

Our cultural diversity has also been grossly eroded because of the destruction of biological diversity and lands, territories and resources by extractive industries upon which our cultures are based. This erosion of our cultural diversity is also a result of the imposition of colonial systems and the settlement of non-Indigenous Peoples. Corporations enter into our territories with the promise of “development” through employment, infrastructure building and payment of governmental taxes. Despite these promises, there still exists a situation of dire poverty in those living close to extractive industry projects. This situation has fuelled conflicts between Indigenous Peoples and the State and extractive industry corporations, as well as causing divisions within the Indigenous communities themselves.

20. Another critical cultural rights concern is the need to protect sacred sites in the context of extractive industrial development, as noted in the report of the international expert group meeting on extractive industries, indigenous peoples’ rights and corporate social responsibility:

Destruction of Indigenous Peoples’ sacred sites and areas of spiritual and cultural significance by extractive industries has to stop. States parties to the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage have to address the urgent need for the genuine recognition of indigenous religious, cultural and spiritual rights, including their sacred sites in the context of extractive projects.<sup>11</sup>

### 3. **The Guiding Principles on Business and Human Rights as they relate to indigenous peoples and the right to participate in decision-making, with a focus on extractive industries**

21. International standards on the respective roles and responsibilities of States and business actors with regard to the human rights impacts of business-related activities, which are also applicable to situations often facing indigenous peoples in the context of extractive industry operations, have been clarified in recent years. In its resolution 17/4, the Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy Framework” (A/HRC/17/31, annex). This endorsement effectively established the Guiding Principles as the authoritative global standard for addressing business-related human rights challenges.

22. The Framework rests on three main pillars: (a) the State’s duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation and adjudication; (b) the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved; and (c) the need for greater access to remedy, both judicial and non-judicial, for victims of business-related human rights abuse (A/HRC/17/31, para. 6).

23. The Guiding Principles apply to all States and business enterprises in all operational contexts, including in contexts where business activities have a bearing on indigenous peoples. Some States and business enterprises are starting to take the first steps towards

<sup>10</sup> Adopted at the International Conference on Extractive Industries and Indigenous Peoples, Manila, 23-25 March 2009. For an example of how to respect the cultural practices and traditional knowledge of indigenous peoples, see Canadian International Development Agency, *Local and Indigenous Traditional Knowledge: Engagement and Use for Sustainable Development* (2010).

<sup>11</sup> E/C.19/2009/CRP.8, para. 42.

implementing the Guiding Principles; however, guidance on and assessment of the implementation of the Guiding Principles in specific contexts is at a preliminary stage.<sup>12</sup>

24. It is important for all States and all business enterprises to apply all of the Guiding Principles specifically to indigenous peoples “in a non-discriminatory manner” (A/HRC/17/31, annex, p. 6).

25. The following provides some initial reflections on how aspects of the Guiding Principles may relate to the exercise of the right of indigenous peoples to participate in decision-making with respect to extractive industries.<sup>13</sup> The list of elements is not exhaustive, and the further elaboration of these and related issues is a longer-term project that should be undertaken in collaboration with others.

26. As regards the first pillar of the Guiding Principles, the State duty to protect against human rights abuse by third parties, the following key points may be especially relevant to business activities that affect indigenous peoples:

(a) States may be in breach of their international human rights obligations where human rights abuse by private actors can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors’ abuse. In fulfilling the duty to protect with regard to business activity having potential or actual impacts on the situation of indigenous peoples, measures taken by States should conform to relevant international laws, norms and standards relating to indigenous peoples, such as the United Nations Declaration on the Rights of Indigenous Peoples and International Labour Organization (ILO) Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries;

(b) The State duty to protect the human rights of indigenous peoples in the context of business activities also applies when granting development licences and permits relating to indigenous peoples’ lands, territories and resources. As provided by relevant standards on the specific rights of indigenous peoples, the State should take into account the full participation of indigenous peoples at all stages of decision-making in such processes;

(c) Meeting the State duty to protect implies that the State should enforce laws that are aimed at requiring business to respect human rights and ensure that other business-focused laws and policies do not constrain but enable business respect for human rights, including in the context of indigenous peoples. It also requires that the State provide effective guidance for business enterprises, including State-owned enterprises, on how to respect human rights throughout their operations, particularly in conflict-affected areas;

(d) Under their international human rights obligations, States have a duty to establish legal and policy frameworks that effectively monitor and enforce relevant international laws, norms and standards, including the right to free, prior and informed consent. Departments specifically mandated to address indigenous affairs should provide mandatory information, training and support.

27. In relation to the second pillar of the Guiding Principles, the corporate responsibility to respect human rights, the following key points may be relevant in the context of business operations that affect indigenous peoples:

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<sup>12</sup> In resolution 17/4, the Human Rights Council also decided to establish the Working Group on business and human rights with the mandate to, inter alia, promote the effective and comprehensive dissemination and implementation of the Guiding Principles.

<sup>13</sup> For a full analysis, please see the Expert Mechanism’s conference room paper on the topic, to be distributed at the fifth session.



(a) The responsibility to respect human rights requires that business enterprises avoid causing or contributing to adverse impacts through their own activities, and address such impacts when they occur; and that they prevent or mitigate adverse human rights impacts with which they would be or are involved through their business relationships;

(b) The responsibility of business enterprises to respect human rights applies to all business enterprises regardless of their size, sector, operational context, ownership and structure;

(c) The responsibility of business enterprises to respect human rights refers to internationally recognized human rights including, in the context of indigenous peoples, ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples;

(d) In order to meet their responsibility to respect human rights, business enterprises must have in place appropriate and effective policies and processes. This includes a policy commitment to respect human rights; due diligence processes to identify, prevent, mitigate and account for how they address their adverse human rights impacts; and processes to enable remediation of any adverse human rights impacts that they cause or contribute to. When operating in the context of indigenous peoples' lands, territories and resources, due diligence processes must pay particular attention to the risks faced by indigenous peoples, including the different risks that may be faced by women and men. Due diligence processes should also be undertaken in a manner that enables meaningful engagement with indigenous peoples when their human rights may be affected. This includes taking into account language and other potential barriers to effective engagement. A company with a footprint in indigenous areas should develop a policy to address how it engages with indigenous peoples. Any company that utilizes the cultural heritage of indigenous peoples should do the same. Due diligence processes should take into account the right of free, prior and informed consent of indigenous peoples;

(e) In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of indigenous peoples. If there are risks of human rights impacts, the business enterprises should report formally on how they address them. In addition to considering whether to include relevant information in formal reporting, business enterprises should also take into account the situation of affected stakeholders, and communication could also take the form of in-person meetings and consultations with those affected;

(f) Where business enterprises identify that they have caused or contributed to adverse impacts on indigenous peoples, they should provide for or cooperate in the remediation of those impacts through legitimate processes. Criteria for grievance mechanisms at the operational or site level have been developed, some of which are particularly relevant in the context of impacts on indigenous peoples, such as ensuring accessibility, by providing adequate assistance for those who may face particular barriers to access, and equitability, by ensuring that aggrieved parties have access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms. Processes involving the business enterprise to enable remediation for adverse impacts on indigenous peoples should also be informed by relevant international standards, particularly articles 1, 27, 28, 32 and 40 of the United Nations Declaration on the Rights of Indigenous Peoples and articles 3, 5, 8, 9, paragraph 2, 10, paragraph 1, 11, 12, 13, and 15 of ILO Convention No. 169.

28. In relation to the third pillar of the Guiding Principles, access to remedy, the following points may be of particular relevance to indigenous peoples:

(a) As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur, those affected, including indigenous peoples, have access to remedy;

(b) In determining appropriate access to remedy for indigenous peoples, reference should be made to articles 27, 28, 32 and 40 of the United Nations Declaration on the Rights of Indigenous Peoples;

(c) A critical barrier to access to remedy for indigenous peoples is their exclusion from access to effective judicial mechanisms. To overcome this, particular attention should be paid to the rights and needs of indigenous peoples at each stage of the remedial process: access, procedures and outcome;

(d) Grievance mechanisms may be mediation based and should be culturally appropriate and rights based. In the establishment of grievance mechanisms, traditional indigenous mechanisms, such as justice circles and restorative justice models involving elders and other traditional knowledge keepers, should be taken into account where so sought by the indigenous peoples in question;

(e) Special measures should be implemented in relation to indigenous peoples to overcome barriers to access, including those relating to a lack of awareness of the grievance mechanism, language, literacy, costs, physical location and fears of reprisal.

## **B. Policy**

### **1. Rationale**

29. The importance of ensuring the participation of indigenous peoples in decision-making with respect to extractive activities is sourced not only in human rights and pragmatism. It is also derived from an historical understanding of indigenous peoples' experiences of oppression and colonization including, in many cases, forced assimilation, theft of their lands, territories and resources, profound discrimination and illegitimate, often including force, assertions of political control over them. The potential for extractive activities to continue to exacerbate those historical disadvantages is very real given the often very significant power imbalances, such as in financial resources, as has been borne out by indigenous peoples' sometimes negative experience of extractive activities. The human rights risks associated with extractive activities in or near indigenous peoples' territories are aggravated by the ongoing marginalization of indigenous peoples in many States.

30. The need to address the barriers to the right of indigenous peoples to fully participate in extractive industry development on their lands and territories remains a pressing concern, as outlined in advice No. 2 (A/HRC/18/42, annex).

#### *(a) Urgency and importance of the issues*

31. As the Special Rapporteur on the rights of indigenous peoples has noted, based on communications received by him and his country visits, extractive industries operating in or near indigenous territories can have a negative, "even catastrophic" impact on indigenous peoples' rights.<sup>14</sup> He has also noted that "the implementation of natural resource extraction

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<sup>14</sup> See the statement of the Special Rapporteur to the Third Committee at the sixty-sixth session of the General Assembly (17 October 2011). Available from <http://unsr.jamesanaya.org/statements/statement-of-special-rapporteur-to-un-general-assembly-2011>.

and other development projects on or near indigenous territories has become one of the foremost concerns of indigenous peoples worldwide, and possibly also the most pervasive source of the challenges to the full exercise of their rights” (A/HRC/18/35, para. 57).

(b) *Need for clarity of ownership of natural resources*

32. States and private industries often note the lack of certainty in policy and legislative frameworks when reconciling the rights of indigenous peoples in the context of extractive industries. Central to this uncertainty is the issue of ownership over natural resources; in many cases, States claim these resources as “State-owned” without regard to the rights of indigenous peoples, leading to the dispossession of their lands, territories and resources.<sup>15</sup>

33. The Special Rapporteur on the rights of indigenous peoples has “observed significant legal and policy gaps and lack of coherence in standards related to extractive industries in countries across all regions”.<sup>16</sup> Moreover, many private enterprises responding to his questionnaire survey on extractive industries “expressed concern over the significant level of uncertainty surrounding consultation procedures. A survey of business responses suggest that questions remain regarding the scope and implications of consultations, as well as the specific circumstances that may trigger the duty to consult. Uncertainty also remains for Governments and businesses regarding the identification of communities with whom it is necessary to consult, in particular indigenous communities whose lands have not been demarcated by the State and communities in which both indigenous and non-indigenous peoples live” (A/HRC/18/35, para. 45). Furthermore, uncertainty in regulations can be costly (ibid., para. 48).

34. The Special Rapporteur also noted that there is a lack of clarity among various actors about the content and scope of the right to participate in decision-making and the precise requirements of the principle of free, prior and informed consent. He states that “differing or vague understandings persist about the scope and content of indigenous peoples’ rights and about the degree and nature of the responsibility of the State to ensure the protection of these rights in the context of extractive industries” (ibid., para. 60).

35. In addition to the lack of clarity, non-compliance with indigenous peoples’ right to participate in decision-making appears to lie as much with a lack of political will as with uncertainty in the practical steps necessary to respect indigenous peoples’ rights.

(c) *Procedural versus substantive rights*

36. Concern has been expressed that indigenous peoples’ procedural rights must not have priority over indigenous peoples’ substantive rights (E/C.19/2011/5, paras. 18 and 36) in relation to indigenous peoples’ right to participate in decision making. Indigenous peoples’ rights to participate in decision-making in relation to extractive enterprises that affect them must not be understood as a trade-off for or exchangeable with indigenous peoples’ substantive rights to their lands, territories and resources. Rather, the procedural aspects of the right (such as consultation) exist to promote the substantive right (such as self-determination and underlying rights relating to lands, territories and resources). In this regard, it has been recognized that there has been too much attention paid to the procedural aspect (A/HRC/18/43, para. 31).

<sup>15</sup> See E/CN.4/Sub.2/2004/30 and E/C.19/2009/CRP.8.

<sup>16</sup> Special Rapporteur on the rights of indigenous peoples, statement (note 14 above).

(d) *Indigenous women and girls and the right to participate in decision-making in the context of extractive industries*

37. There are several unique considerations relating to indigenous women and the right to participate in decision-making in the area of extractive industries, as identified at the recent international expert group meeting on the theme “Combating violence against indigenous women and girls: article 22 of the United Nations Declaration on the Rights of Indigenous Peoples”. Participants at the expert group meeting identified violence against indigenous women and girls by State and non-State actors and corporate actors in the public domain as including: “militarization and the activities of multinational corporations and extractive industries that operate with impunity on indigenous peoples’ territories. Those actors and their activities have a detrimental impact on indigenous women and girls, which manifests itself in sexual assault, sex trafficking, prostitution, bonded labour, the exploitation of overseas contract workers, the internal displacement of women and environmental violence” (E/C.19/2012/6, para. 21). Furthermore, unsustainable extractive industry development can have unique ecological, economic and spiritual impacts on indigenous women in their role as traditional caretakers of the environment (*ibid.*, para. 27). Those unique impacts and forms of violence against indigenous women and girls must be resolved through an understanding of the structural nature of violence against indigenous women, through the full participation of indigenous women in all aspects of decision-making and through consideration of this problem by indigenous communities as an integral part of self-determination (E/C.19/2012/6, paras. 46 and 50).

## 2. Current examples

### *Partnership*

38. Extractive industries on or near indigenous territories would benefit from the building of indigenous peoples’ trust and working in partnership with indigenous peoples.

39. Where States and/or business enterprises have consulted with indigenous peoples, the results of the consultation must be taken into account.<sup>17</sup>

40. The following areas are illustrative of essential areas in which the right to participate needs to be implemented: (a) oil and gas, (b) forestry, (c) hydro development, (d) mining, (e) other forms of energy development (for example, oil palm and soya plantations), (f) bitumen (heavy oil), and (g) pipeline developments. As an example, for oil and gas, the key areas for examination include indigenous peoples’ involvement in legislation; seismic studies and surveys, from the initial stages to the results; and adequate compensation for access permits, leases, exploration, development and reclamation, which may sometimes best be outlined in impact benefit agreements. Such compensation may take the form of royalties or equity or ownership in the company. In terms of pipeline developments, examination will include the right of indigenous peoples to participate at all stages (granting of rights of way, access permits, construction, flow-through agreements, all safety measures and reclamation of lands). Throughout all stages, obligations relating to sustainable development, environmental protection and the free, prior and informed consent of indigenous peoples must be respected.

41. Further elaboration of the requirements to be examined in relation to forestry, hydro development, mining and other activities<sup>18</sup> is required. Some key organizations can be researched for potential existing guidelines and standards.<sup>19</sup>

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<sup>17</sup> The Special Rapporteur on the rights of indigenous peoples reported that “a considerable number of indigenous respondents maintain that extractive companies carry out consultations as a mere formality in order to expedite their activities within indigenous territories” (A/HRC/18/35, para. 47).

42. As highlighted in the report on the international expert group meeting on indigenous peoples and forests, forests constitute more than 30 per cent of the Earth's land area, and are the traditional territories of many indigenous peoples. Moreover, forests are "often considered as belonging to the Government for the public, without any recognition that they are also home to indigenous peoples" (E/C.19/2011/5, para. 9). The experts noted that "extractive industries must respect the rights of indigenous peoples and recognize that they may enter indigenous peoples' territories only following an agreement reached through good-faith negotiations based on international human rights standards" (ibid., para. 47).

43. Consultation with, and free, prior and informed consent of, indigenous peoples are necessary in relation to benefit-sharing arrangements and they must accord with indigenous peoples' own understanding of benefits.<sup>20</sup> While the International Finance Corporation Performance Standard 7 on Indigenous Peoples could be strengthened, it makes the important point that "identified opportunities should aim to address the goals and preferences of the Indigenous Peoples, including improving their standard of living and livelihoods in a culturally appropriate manner" (para. 20).

### III. Conclusion

44. **The right of indigenous peoples to participate in decision-making in the area of extractive industries is dependent upon the recognition of their rights to self-determination and to permanent sovereignty over their lands, territories and resources. The guarantee of these rights, in turn, will be of benefit for all in terms of promoting sustainable development and environmental protection, as noted by the Special Rapporteur on indigenous peoples' permanent sovereignty over natural resources:**

**Indeed, increased extractive activities on indigenous peoples' traditional lands, territories, and resources without guarantees for their rights often create public disorder, health concerns, political and social instability, and legal uncertainty.**

...

**The analysis of relevant international law shows that there have been substantial developments in international law and State practice with respect to the rights of indigenous peoples to own, use, control, and manage their lands,**

<sup>18</sup> Other activities of interest in relation to development outside the realm of extractive industries include tourism activities that may have a detrimental effect on the right of indigenous peoples to self-determination and rights relating to lands, territories and resources. In this context, the Guiding Principles on Business and Human Rights are applicable with the goal of safeguarding the rights of indigenous peoples from impacts or potential impacts caused by tourism developments.

<sup>19</sup> In Canada, these include the National Aboriginal Forestry Association, the Mining Association of Canada and the James Bay Cree (in the area of hydro development) and the recently established Centre for Excellence in Corporate Social Responsibility. In Asia, these include the Asian Development Bank for development projects in general. Also, the Malaysian Forest Dialogue brings together corporate partners, indigenous peoples and government in an attempt to institute acceptable standards on forestry. The work of the Permanent Forum on Indigenous Issues, including the international expert group meeting on the theme "Indigenous peoples and forests" and the international expert workshop on the theme "Indigenous peoples' rights, corporate accountability and extractive industries" can also be sources of reference.

<sup>20</sup> The Special Rapporteur has noted that benefit sharing is not a top priority for some indigenous peoples, who might, for example, prefer a pollution-free environment rather than economic development (A/HRC/18/35, para. 55).

**territories, and resources... In most instances, these developments reflect greater recognition of indigenous peoples' rights to authority over their lands, territories, and resources and to their own decision-making power regarding their use and development.<sup>21</sup>**

45. **The result is increased recognition of the right of indigenous peoples to give or withhold their free, prior and informed consent.**

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<sup>21</sup> E/CN.4/Sub.2/2004/30, paras. 34 and 38. The Special Rapporteur also notes that further study is needed of possible measures that can effectively protect against oppressive and unjust transactions concerning indigenous peoples' natural resources, without diminishing indigenous peoples' rights to use and govern their lands, territories and resources (ibid., para. 66).

## Annex

### **Advice No. 4 (2012): Indigenous peoples and the right to participate in decision-making, with a focus on extractive industries**

#### **A. Background**

1. The present advice is in follow-up to advice No. 2,<sup>1</sup> and is based on relevant law and policy relating to, inter alia, the permanent sovereignty of indigenous peoples over natural resources, sustainable development and environmental responsibilities and rights; an analysis of the Guiding Principles on Business and Human Rights (A/HRC/17/31, annex); and the United Nations Declaration on the Rights of Indigenous Peoples and other key international laws, norms and standards.

2. One emerging trend in the context of resource extraction on indigenous lands and territories is the application for licences and permits by small-scale enterprises that are then sold to large-scale enterprises prior to or during development. In some cases, the larger the corporation, the greater the likelihood for adverse human rights impacts, given the imbalance of power. This can be somewhat guarded against by ensuring that agreements regarding human rights protections adopted by the small-scale corporations are incorporated into the terms of the sale to, or takeover by, the large-scale corporations. The responsibility to respect human rights applies fully and equally to all business enterprises, including those owned and operated by indigenous peoples or corporations.

3. The advice is necessarily expressed at a general level; it should be interpreted flexibly in the light of the specific context within which an extractive activity is taking place or is being planned, and purposively.<sup>2</sup>

#### **B. Law**

##### **1. Scope of the right of indigenous peoples to participate in decision-making**

4. The right of indigenous peoples to participate in decision-making in relation to extractive industries is interrelated with the right to self-determination, the right to autonomy, the right to be consulted and the duty of States to seek to obtain the free, prior and informed consent of indigenous peoples, as set out by the Expert Mechanism on the Rights of Indigenous Peoples (see A/HRC/18/42).

##### **2. States should provide clarity on consultation and consent seeking**

5. States are under an obligation to provide businesses and indigenous peoples with clarity on how the right of indigenous peoples to participate in decision-making can be

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<sup>1</sup> Final report of the study on indigenous peoples and the right to participate in decision-making (A/HRC/18/42, annex).

<sup>2</sup> Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (A/HRC/12/34), paras. 37 and 43.

realized.<sup>3</sup> Such clarity must be provided with a view to ensuring business respect for the international human rights framework applicable to indigenous peoples.

**3. Right to participate is not confined to recognized legal entitlements to lands, territories and resources**

6. The right of indigenous peoples to participate in decision-making in relation to extractive activities is not confined to situations where indigenous peoples have a State-recognized title to the lands, territories and resources on or near which the extractive activity is to take place.<sup>4</sup> It extends to situations where indigenous peoples have traditionally owned or otherwise occupied and used land, territories and resources under their own indigenous laws. This applies to areas near or on which extractive activities take place or are proposed to take place.<sup>5</sup>

7. Indigenous peoples have a right to participate in decision-making in relation to extractive enterprises on or near territories which are of importance to them, including where they have not possessed or do not permanently possess, traditionally and/or currently, those lands, territories and resources.

**4. Range of duties, from consultation to consent**

(a) *Consultation*

(i) Duties of the State and/or extractive enterprise

8. States must take full responsibility in ensuring that adequate consultation is undertaken to obtain consent. A State cannot delegate its responsibility, even where it engages third parties to assist in consultation mechanisms (A/HRC/18/35, para. 63). Consultation is often the starting point for seeking the free, prior and informed consent of indigenous peoples. If the potential impact or impact is minor, the requirement to seek the free, prior and informed consent of indigenous peoples may not necessarily be required. Nonetheless, as stated in advice No. 2, “the objective of consultations should be to achieve agreement or consensus” (A/HRC/18/42, annex, para. 9).

9. While the State is the primary bearer of duties under international human rights law, business enterprises also have a responsibility to respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.<sup>6</sup>

10. Accordingly, business enterprises, including those in extractive industries, should take steps to avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur, and seek to prevent or mitigate adverse human rights impacts with which they are involved through their business relationships, including with State entities. When operating in relation to the lands,

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<sup>3</sup> See Guiding Principles on Business and Human Rights, principle 3.

<sup>4</sup> A/HRC/12/34, para. 44. Note also the comment by the tripartite committee of the International Labour Organization (ILO) Governing Body, cited by the Special Rapporteur, that under ILO Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries “consultations... are required in respect of resources owned by the State pertaining to the lands that the peoples concerned occupy or otherwise use, whether or not they hold ownership title to those lands” (ibid.).

<sup>5</sup> Report of the Special Rapporteur on the rights of indigenous peoples on extractive industries operating within or near indigenous territories (A/HRC/18/35).

<sup>6</sup> Guiding Principles on Business and Human Rights, principle 11.



territories and resources of indigenous peoples, they should pay special attention to risks of adverse impacts on the rights of indigenous peoples, with a view to prevent or mitigate such risks and effectively address adverse impacts that do occur. In particular, if enterprises in extractive industries are not able to prevent or mitigate such risks or address impacts, including infringements on the right of indigenous peoples to participate in decision-making, when operating in the context of their lands, territories or resources, the activities should not proceed. Thus, there is an onus on business enterprises in their assessments and own stakeholder engagement processes to ensure that indigenous peoples have participated in decision-making in relation to the proposed or ongoing extractive activities consistently with their rights, outlined below.

(ii) Jurisprudential basis for the right of indigenous peoples to consultation

11. The human rights treaty bodies have reiterated on numerous occasions the right of indigenous peoples to consultation in the context of extractive enterprises.<sup>7</sup>

(iii) When the duty to consult with indigenous peoples arises

12. As the Special Rapporteur on the rights of indigenous peoples has noted, special processes to consult with indigenous peoples may not be strictly necessary in relation to all State decisions that may affect them, but instead “whenever a State decision may affect indigenous peoples in ways not felt by others in society...even when the decision may have a broader impact” (A/HRC/12/34, para. 43). The appropriate starting point from which to make this assessment is the perspective of indigenous peoples on the potential broader impact, as noted in advice No. 2.

13. To meet this duty, States would be well advised to establish permanent mechanisms to assess when and how indigenous peoples should be consulted consistent with international standards.

(iv) Design of the procedures to consult with indigenous peoples

14. Indigenous peoples should be engaged at all stages in the design of appropriate consultation mechanisms.<sup>8</sup> Consultation with indigenous peoples in relation to proposed extractive activities should begin at the earliest stages of the planning process, including its proposal and design.<sup>9</sup>

<sup>7</sup> See, inter alia, concluding observations of the Committee on the Elimination of Racial Discrimination: CERD/C/304/Add.76, para. 16; CERD/C/ECU/CO/19, para. 16; CERD/C/COD/CO/15, para. 18; CERD/C/USA/CO/6, paras. 19 and 29; CERD/C/NIC/CO/14, para. 21; CERD/C/NGA/CO/18, para. 19; CERD/C/GTM/CO/12-13, para. 11; and decision 1 (68) (United States of America). Human Rights Committee concluding observations CCPR/CO/80/COL, para. 20; communication No. 1457/2006, *Poma Poma v. Peru*, Views adopted on 24 April 2009. Committee on Economic, Social and Cultural Rights concluding observations E/C.12/1/Add.74, para. 33; E/C.12/CO/MEX/4, para. 28; and E/C.12/IND/CO/5, para. 31. The issue of consultation with indigenous peoples has also been addressed during the Human Rights Council’s universal periodic review (A/HRC/16/6, para. 69.32).

<sup>8</sup> Guiding Principles on Business and Human Rights, principle 18.

<sup>9</sup> International Finance Corporation (IFC) Performance Standard 7: Indigenous Peoples (effective 1 January 2012), para. 11. The Inter-American Court of Human Rights clarifies that consultation is not only necessary “when the need arises to obtain approval from the community”. Inter-American Court of Human Rights, *Saramaka People v. Suriname*, Judgement of 28 November 2007, para. 133.

(v) With whom to consult: representation of indigenous peoples

15. States, extractive enterprises and others must bear in mind that indigenous peoples have the right to determine their own representatives themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions. Furthermore, account should be taken of potential changes in the traditional authority structures of indigenous peoples as a result of outside influences.

16. Indigenous peoples should make clear to governments and extractive enterprises who should be consulted and from whom to seek consent.<sup>10</sup> Where there are conflicting views on the legitimate representatives and/or representative structures of an indigenous people, the group should establish its own appropriate procedures to determine with whom governments and extractive enterprises should consult and/or seek consent. If necessary and desired, indigenous peoples can seek outside, independent assistance, including financial, to determine disputes.

17. Where indigenous peoples have conflicting views on proposed or ongoing extractive activities, they should seek to work together to determine their joint response.

(b) *Free, prior and informed consent*

18. Depending on the indigenous peoples' decision-making processes concerned and the nature of the activity concerned, consent may not always require indigenous peoples to reach a unanimous consensus agreement to the extractive activity for it to proceed.<sup>11</sup> On the other hand, and again dependent on the particular decision-making processes of the indigenous peoples concerned, majority support may also not be adequate. There may be traditional mechanisms that set out other requirements.

19. At the start of a consultation process indigenous peoples should make clear, and agree on, how they will make a collective decision on the extractive activity, including the threshold to indicate there is consent.

(i) Mandatory requirement to obtain indigenous peoples' consent

20. In some cases, the duty to obtain the free, prior and informed consent of indigenous peoples is mandatory. Article 10 of the United Nations Declaration on the Rights of Indigenous Peoples prohibits the forcible removal of indigenous peoples from their lands or territories, which includes forcible removal in relation to proposed or ongoing extractive activities. It states: "No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return." Equally, article 29, paragraph 2, states that "States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent".

(ii) Contextual requirement to obtain indigenous peoples' consent

21. In other cases, such as where the approval of projects will affect indigenous peoples' lands, territories and resources although they are not situated on such lands, territories and

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<sup>10</sup> The Special Rapporteur on the rights of indigenous peoples states, "indigenous peoples may also need to develop or revise their own institutions, through their own decision-making procedures, in order to set up representative structures to facilitate the consultation processes" (A/HRC/18/35, para. 52).

<sup>11</sup> IFC Performance Standard 7 states that "free, prior and informed consent does not necessarily require unanimity and may be achieved even when individuals and groups within the community explicitly disagree" (para. 12).

resources, the requirement to obtain indigenous peoples' consent will depend on context. Article 32 states that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources".

22. In the final report on its study on indigenous peoples and the right to participate in decision-making, the Expert Mechanism provides further clarification:

The Declaration on the Rights of Indigenous Peoples requires that the free, prior and informed consent of indigenous peoples be obtained in matters of fundamental importance to their rights, survival, dignity and well-being. In assessing whether a matter is of importance to the indigenous peoples concerned, relevant factors include the perspective and priorities of the indigenous peoples concerned, the nature of the matter or proposed activity and its potential impact on the indigenous peoples concerned, taking into account, inter alia, the cumulative effects of previous encroachments or activities and historical inequities faced by the indigenous peoples concerned.<sup>12</sup>

23. The potential impact of the proposed activities is also relevant in an assessment as to when indigenous peoples' consent is necessary. The Special Rapporteur on the rights of indigenous peoples has stressed that "a significant, direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent" (A/HRC/12/34, para. 47).

24. Similarly, the Inter-American Court of Human Rights has also determined that the impact on the indigenous peoples' territory is relevant when assessing when indigenous peoples' consent is necessary. It stated in one case that "regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior and informed consent, according to their customs and traditions".<sup>13</sup>

25. The Committee on the Elimination of Racial Discrimination has repeatedly noted the obligation on States to ensure adequate consultation and the acquisition of indigenous peoples' free, prior and informed consent in relation to development activities and especially resource extraction.<sup>14</sup> Its jurisprudence is highly instructive, as it has set out the factual circumstances in which it has found that indigenous peoples' consent is required.

<sup>12</sup> A/HRC/18/42, para. 22.

<sup>13</sup> *Saramaka People v. Suriname* (note 9 above), para. 134. This approach was endorsed by the African Commission on Human and Peoples' Rights in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v. Kenya* (Case 276/2003), para. 227.

<sup>14</sup> See, for example, the Committee's concluding observations CERD/C/IND/CO/19, para. 19; CERD/C/ARG/CO/19-20, para. 26; CERD/C/PHL/CO/20, paras. 22 and 26; CERD/C/CHL/CO/15-18, para. 22; CERD/C/PER/CO/14-17, para. 14; CERD/C/CMR/CO/15-18, para. 18; CERD/C/GTM/CO/11, para. 19. See also the Committee's Urgent Action-related activity (<http://www2.ohchr.org/english/bodies/cehd/early-warning.htm>) in relation to India (communications dated 15 August 2008 and 12 March 2010); Peru (communications dated 3 September 2007 and 7 March 2008); Canada (communication dated 13 March 2009); Suriname (Decision 1 (69), adopted on 18 August 2006). See also jurisprudence from other United Nations human rights treaty bodies, including the Committee on Economic, Social and Cultural Rights, concluding observations E/C.12/NIC/CO/4, para. 11 and E/C.12/COL/CO/5, para. 9; and the Human Rights Committee, concluding observations CCPR/C/PAN/CO/3, para. 21.

26. In its Performance Standard 7 (paras. 13-17), the International Financial Corporation describes a number of situations in which indigenous peoples' free, prior and informed consent is required, including those involving:

- (a) Impacts on lands and natural resources subject to traditional ownership or under customary use (including where the indigenous peoples do not hold legal title to those lands and resources);
- (b) Relocation of indigenous peoples from lands and natural resources subject to traditional ownership or under customary use;
- (c) Impacts on certain cultural heritage, such as sacred sites.

27. In summary, the factors relevant to assessing whether the duty to obtain indigenous peoples' consent arises in the context of proposed and ongoing extractive activities include:

- (a) Matters of fundamental importance to rights, survival, dignity and well-being, assessed from the perspective and priorities of the indigenous peoples concerned, taking into account, inter alia, the cumulative effects of previous encroachments or activities and historical inequities faced by the indigenous peoples concerned;
- (b) The impact on indigenous peoples' lives or territories. If it is likely to be major, significant or direct, indigenous peoples' consent is necessary;
- (c) The nature of the measure.

(iii) Mutual consent, as set out in treaties

28. The fundamental requirement for mutual consent to be obtained is foundational to treaties between indigenous peoples and States, as recognized by numerous United Nations studies. This has been affirmed by article 37 of the United Nations Declaration on the Rights of Indigenous Peoples and preambular paragraphs 14 and 24, which underscore the importance of forming partnerships between indigenous peoples and States.

29. In advice No. 2, the Expert Mechanism noted that "several treaties between States and indigenous peoples affirmed the principles of indigenous peoples' consent as an underpinning of the treaty relationship between States and indigenous peoples" (para. 12).

## **C. Policy**

### **1. States should provide clarity on consultation and consent seeking based on the legal framework identified above**

#### *(a) Objective of consultations*

30. Consent should always be the objective of consultations, as noted in advice No. 2 (para. 9).

#### *(b) How to consult, collaborate and build partnerships*

##### **(i) Clarity of information**

31. Information about the potential impact of extractive activities should be presented in a way that is understandable to indigenous peoples (A/HRC/12/34). Depending on the circumstances, this may require that the information be presented orally to indigenous peoples with interpretation into indigenous languages.

- (ii) Provision of information
32. As stated by the Inter-American Court of Human Rights:<sup>15</sup>
- (a) Information must be provided and accepted also;
- (b) Indigenous peoples must be informed of the possible risks, “including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily”.
- (iii) Ongoing communication
33. The duty to consult with indigenous peoples “entails constant communication between the parties”.<sup>16</sup>
- (iv) Culturally appropriate procedures
34. Consultation procedures should be culturally appropriate for the indigenous peoples concerned;<sup>17</sup> information sharing is required during the planning stages of the consultation process. In addition, consultation should take into account the indigenous peoples’ traditional methods of decision-making.<sup>18</sup>
- (v) Good faith
35. Consultations must be undertaken in good faith.<sup>19</sup>

**2. The need for independence in the assessment of the potential scope and impact of extractive activities on indigenous peoples, their lives and territories**

36. The interests of indigenous peoples and those of the State and business in extractive activities may not align, complicating the capacity of the State and business to assess and evaluate the impact of extractive activities on indigenous peoples. Thus, it is advisable to ensure independent assessments of the potential scope and impact of extractive activities on indigenous peoples, their lives and their lands, territories and resources.<sup>20</sup>

**3. Limitations on indigenous peoples’ rights relating to their lands, territories and resources**

37. Participation is relevant to an assessment of the degree to which States may limit indigenous peoples’ rights in relation to their lands, territories and resources.

38. In accordance with the decision of the Inter-American Court of Human Rights in *Saramaka People v. Suriname*,<sup>21</sup> limitations on indigenous peoples’ rights to their resources are permissible only where the State:

<sup>15</sup> *Saramaka People v. Suriname* (note 9 above), para. 133.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.* See also A/HRC/12/34.

<sup>20</sup> IFC similarly holds that where free, prior and informed consent is necessary, “the client will engage external experts to assist in the identification of the project risks and impacts” (Performance Standard 7, para. 11).

<sup>21</sup> Note 9 above, para. 129.

(a) Ensures the effective participation of members of the indigenous peoples, in conformity with their customs and traditions, regarding any development, investment, exploration or extractive plan;<sup>22</sup>

(b) Guarantees that the indigenous peoples will receive reasonable benefit from any such plan within their territory;

(c) Ensures that no concession will be issued within indigenous peoples' territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment.

## **D. Conclusion**

### **1. Practical advice for States on how to meet their obligations to consult and seek the consent of indigenous peoples in the context of extractive industry**

39. The Expert Mechanism advises States to establish, together with indigenous peoples, (permanent) mechanisms<sup>23</sup> to enable consultation with indigenous peoples which can provide guidance on:

(a) When the context requires consultations with indigenous peoples in line with the present advice;

(b) How to reach indigenous peoples;

(c) Identifying the representatives with which consultation should take place;

(d) How to ensure an independent assessment of consultation practices;

(e) How to undertake the requisite environmental and social impact studies associated with proposed and ongoing extractive activities;

(f) Providing translation and interpretation services so that information relevant to indigenous peoples' decisions and interests can be provided for indigenous peoples in an understandable way;

(g) Enabling indigenous peoples to obtain expert independent and technical assessments of the potential impact of extractive activities on them, including on their lives, lands and territories;

(h) How to ensure that indigenous peoples' perspectives on the extractive activity are taken into account, including their ideal benefit-sharing arrangements if they so choose;

(i) How to ensure that the permitting and monitoring boards of State corporations and extractive enterprise include indigenous peoples' representation and

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<sup>22</sup> This is consistent with the decision of the Human Rights Committee in communication No. 547/1993, *Mahuika et al. v. New Zealand*, Views adopted on 27 October 2000, where the Committee stated that "the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy" (para. 9.5).

<sup>23</sup> The Special Rapporteur on the rights of indigenous peoples has stated that "One excellent way to ensure that companies respect indigenous peoples' right to participate in decisions concerning the measures affecting them is to establish permanent institutional fora for consultation and dialogue, in which the peoples and communities concerned, companies and local authorities are appropriately represented" (A/HRC/15/37, para. 69).

effective participation, which will also ensure human rights accountability at the corporate level.

**2. Practical advice for extractive industries on how to meet the requirement to respect the right of indigenous peoples to participate in decision-making in the context of extractive industry**

40. States retain the primary obligation to ensure indigenous peoples' right to participate is respected; nevertheless, to meet their own responsibility to respect human rights, extractive businesses should ensure, and make their own assessment as to, compliance with the right of indigenous peoples to participate in decision-making. Indeed, positive experience illustrates that extractive industries should work in partnership with States and indigenous peoples at all planning and implementation stages of extractive activities that might impact on indigenous peoples' interests.

41. Enterprises in extractive industries should, together with indigenous peoples, assess the risks and actual impacts on the rights of indigenous peoples arising from their activities and business relationships. Commitment to respecting the rights of indigenous peoples should be reflected in the business enterprise's policies and processes; such policies and processes should be put in place by the enterprise in order to meet its responsibility to respect human rights. Enterprises are advised to assess company compliance with indigenous peoples' rights and establish a company policy on how best to meet their responsibility to respect such rights, where possible by including indigenous peoples affected by their operations. When activities may affect indigenous peoples, the business enterprise must take adequate steps to ensure meaningful and effective engagement with indigenous peoples. As part of implementing their responsibility, business enterprises engaged in extractive activities must ensure that employees have an understanding of the content of indigenous peoples' rights, including their right to participate in decision-making.

42. The Special Rapporteur on the rights of indigenous peoples notes that

companies must exercise due diligence by identifying, prior to commencing their activities, various matters relating to the basic rights of indigenous peoples, and by paying adequate attention to those matters as the activities are being carried out. Such matters include recognition of the existence of indigenous peoples and of their own social and political structures; indigenous possession and use of land, territory and natural resources; exercise by the State of its duty to consult indigenous peoples in relation to activities that might affect them, and the related responsibility of business; impact studies and mitigation measures; and benefit sharing with indigenous peoples.<sup>24</sup>

43. Extractive industries are encouraged to support, including financially, mechanisms to ensure that the right of indigenous peoples to participate in decision-making is respected. This can include:

- (a) Devoting human and financial resources to appropriate consultation mechanisms;
- (b) Establishing partnerships with indigenous peoples;
- (c) Ensuring that corporate boards or board advisory panels include indigenous peoples' representation and effective participation in order to promote human rights accountability at the corporate level.

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<sup>24</sup> A/HRC/15/37, para. 46.

**3. Practical advice for indigenous peoples on how to meet their responsibilities and protect their human rights in relation to extractive industries**

44. Indigenous peoples who choose to extract resources can continue to play a positive role in sustainable development by asserting their international human rights relating to extractive industries, with an emphasis on forming equal partnerships with States and business enterprises to engage in sustainable development where adequate environmental protections are in place.

45. Given indigenous peoples' permanent sovereignty over natural resources and the United Nations Declaration on the Rights of Indigenous Peoples, as set out in the international legal and policy framework of the present report, the right of indigenous peoples to participate in decision-making also includes the right not to consent to extracting resources as an exercise of their sovereignty.

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