Indigenous Peoples and the Extractive Sector: Towards a Rights-Respecting Engagement
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Key Messages

Growth in Extractive Sector

- Despite the slowdown in the extractive sector following the global financial crash in 2007, there are signs of recovery in a number of industry sub-sectors, in particular, in unconventional energy and for resources such as nickel and copper. This is expected to occur irrespective of their substantial contribution to CO2 emissions and environmental harms, in particular, to water sources.
  - In the oil and gas industry, oil production from conventional oilfields is declining at an average annual rate of over four percent (equivalent to a reduction of 47 million barrels per day). It is increasingly likely that supply will come from countries that are non-Organization of the Petroleum Exporting Countries (OPEC).
  - The global mining industry is larger than the GDP of over 150 countries.
  - Canada and Australia are the world’s top-rated countries for exploration spending, with about 13% each of global spending. In the regional global share, Latin America leads (at 27%, with Chile and Mexico coming in fifth and sixth positions in the country rankings, respectively), with the Southeast Asia-Pacific region next, with North America coming in third (20%) and Africa fourth (16%).
  - In May 2014, the National Development and Reform Commission, China’s powerful economic planning agency, established a new regime to govern overseas investment which makes it much easier for domestic companies to make acquisitions and establish joint ventures abroad.

- According to Price Waterhouse Cooper, new “emerging markets” have become increasingly prominent over the last decade, with these regions accounting for 60-80 percent of new reserves globally in 2013. Companies exploring in these regions frequently face new risks, caused by the relatively uncharted nature of political, legal and business practices, as indeed do the communities who will be affected by them.

Impacts on Indigenous Peoples

- Given the high correlation of indigenous territories and subsoil resources, many new extractive projects are predicted to have a negative impact on indigenous peoples’ enjoyment of their rights.

- Major negative impacts of the extractive sector’s expansion since the colonial era on Indigenous Peoples across the world include:
  - Destruction of territories;
  - Displacement;
  - Undermining traditional governance structures;
- Loss of traditional livelihoods;
- Devastating effects on self-determination, territorial and cultural rights.

- A few Examples from around the world of such impacts:
  - The 2014 report on the impact of Canadian mining companies in Latin America points to cases of increased respiratory disease in Argentina and health issues arising from increased levels of metals such as lead, mercury, zinc, arsenic, and copper in the blood of community members in Honduras and Guatemala.
  - Two recent gender-focused publications from Asia have highlighted the continuing trends of loss of livelihood, increased prostitution and sexual predation, community division, loss of social status and increased domestic violence, as well as increased marginalization of indigenous women in the development process.
  - ABColombia reported increased sexual violence in conflict areas in Colombia where mining was taking place.
  - In India, Korean company POSCO has been battling with residents, including local Adivasi, in the town of Kalinganagar, Jajpur, since 2004 in order to build a vast “steel hub” with local company Tata. Despite protests, which have resulted in the killing of community members, and a refusal by the State to provide “land for land” compensation, the foundation stone was laid for the plant in May 2010.

- Two core issues demanding immediate attention by the international community, in particular countries with indigenous populations and the home states of extractive industry companies, include:
  - The absence of a broad-based good faith participatory process aimed at addressing the serious legacy and ongoing issues associated with the sector.
  - The failure to ensure indigenous peoples’ full and effective participation during strategic resource-use planning and in the negotiation of trade and investment agreements or contracts pertaining to extractive industry activities in their territories.

- While there is evidence of a few emerging good practices, many of these have been the result of long-standing indigenous resistance, and the leverage which indigenous peoples have exerted through developments in national and international legal frameworks and norms. In general, extractive industry companies are taking the issue of community relations, particularly with regard to indigenous peoples, more seriously than in previous decades, though there is a long way to go before good practices uniformly become the norm.

- With regard to the oil sector, increasing challenges around stakeholder engagement, including indigenous rights-holder engagement, are translating into rising costs for companies. In 2008, a Goldman Sachs study of 190 international oil projects found that it took almost twice as long to bring projects online as it had 10 years earlier.
• While significant developments have also taken place in national legislation addressing both indigenous peoples’ rights and the regulation of the extractive industries, these are frequently not aligned, and in many instances run contrary to each other, thereby limiting the potential for indigenous rights, recognized under law, to be realized in practice.

• Although there have been major advances with regard to indigenous rights in international norms and international or regional court decisions—in particular, following the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)—it is the manner in which these advances are implemented—or not—at the national level, which tends to most directly impact upon indigenous peoples. There is frequently a great deal of disparity in that implementation between countries or across global regions.

• The zero draft of the Post-2015 Sustainable Development Goals (SDGs) raises serious concerns around the manner in which it addresses, or rather fails to address, human and indigenous peoples’ rights. From the perspective of indigenous peoples’ rights, the draft is fundamentally flawed as it includes no reference to indigenous “peoples,” and instead refers to “indigenous and local communities,” thereby failing to recognize the relevance of indigenous peoples’ right to self-determination—a concern shared by UN’s own indigenous rights experts.

• Indigenous peoples can play an active role in pressuring governments and the international community to take tangible steps towards establishing agreements and mechanisms, which provide necessary assistance to those most immediately impacted by climate change and environmental harm.

  • Through the recognition and assertion of their rights to control development in their territories and their pursuit of self-determined development, Indigenous Peoples, through the operation of the principle of FPIC, are in a position to contribute towards the much needed slow-down in extractive industry-generated carbon emissions, and also to reduce the extent of environmental harms associated with the sector.

Proposal for an international extractive industry governance regime

• The proposed regime would be aimed at monitoring and regulating extractive industry operations, including those in indigenous peoples’ territories. It would be founded on human rights and sustainable development principles.

• The proposed regime’s founding principles would include Free, Prior, and Informed Consent (FPIC), respect for Indigenous Peoples’ self-governance and territorial rights as recognized in the UNDRIP, and indigenous customary laws and legal systems. It should have regional and national nodes, and operate under the auspices of the United Nations human rights system and national human rights institutions, and would guarantee Indigenous Peoples’ effective participation in oversight of the sector.
Part of the regime’s oversight role would involve a grievance mechanism with powers to adjudicate on disputes involving State or corporate actors, which fail to adhere with indigenous rights.

The regime would consider four elements:

- Legacy issues pertaining to extractive operations in indigenous territories and the extent and nature of compensation to provided by the industry;
- Harmonizing existing international trade and investment agreements related to the extractive sector with indigenous rights and effective indigenous participation so as to guarantee that future negotiations of such agreements are based on the principles of self-determination and FPIC;
- Existing multilateral and stakeholder initiatives and standards such as the Extractive Industries Transparency Initiative (EITI), the Global Compact, the Organization for Economic Cooperation and Development (OECD) Guidelines on Multinational Enterprises, and the UN Guiding Principles on Business and Human Rights; and
- Establishing and resourcing a dedicated independently managed fund providing financial and technical support to indigenous peoples.

**Overarching recommendations:**

1. Establish participatory mechanisms for oversight of the extractive sector at the local level, and consider, in conjunction with indigenous peoples, the establishment of an international rights-based governance regime for the sector.
2. Ensure recognition of indigenous peoples’ rights in the post-2015 sustainable development agenda and guarantee full and effective participation of indigenous peoples in the formulation and implementation of the Sustainable Development Goals.
3. Increase self-determination-based participation of indigenous peoples in the UN on issues affecting them, including by granting their governments observer status at the General Assembly and ECOSOC consultative status to their representative bodies;
4. Consider the establishment, with full and effective participation of indigenous peoples, of an agreed and adequately-resourced mechanism within the UN human rights regime to monitor and promote implementation of indigenous peoples’ rights.
5. Promote greater attention of existing UN human rights mechanisms and environmental and development bodies to the issue of extractive sector impacts on indigenous peoples’ rights, including those recognized in the UNDRIP.
7. Ensure full compliance with the recommendations of international human rights bodies and regional court and commission decisions pertaining to indigenous peoples’ rights and the ratification of, and compliance with, ILO Convention 169.
8. Recognize that indigenous peoples’ right to self-determination constitutes a right to determine the outcome of decision-making processes in relation to extractive projects in their territories, and imposes a duty on States and corporations to obtain their FPIC and to ensure participatory social, cultural, spiritual, environmental, and human rights impact assessments.
9. Initiate comprehensive participatory reviews of the regulation of extractive industries in both home and host states with the aim of ensuring that regulatory frameworks are fully consistent with international human rights standards, including the UNDRIP.