

Legal Companion to the UN-REDD Programme Guidelines on Free, Prior and Informed Consent (FPIC)

International Law and Jurisprudence
Affirming the Requirement of FPIC



*Empowered lives.
Resilient nations.*



Acknowledgments

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The UN-REDD Programme is the United Nations collaborative initiative on Reducing Emissions from Deforestation and forest Degradation (REDD+) in developing countries. The Programme was launched in 2008 and builds on the convening role and technical expertise of the Food and Agriculture Organization of the United Nations (FAO), the United Nations Development Programme (UNDP) and the United Nations Environment Programme (UNEP). The UN-REDD Programme supports nationally-led REDD+ processes and promotes the informed and meaningful involvement of all stakeholders, including indigenous peoples and other forest-dependent communities, in national and international REDD+ implementation.

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INTRODUCTION

The following is a non-exhaustive compendium of the existing international law and emerging State practice which affirms that indigenous peoples have the right to effective participation in the decisions, policies and initiatives that affect them and that Free, Prior and Informed Consent (FPIC) is a legal norm that imposes duties and obligations on the States.

At this time many advocates and members of the international community are rightfully looking to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as perhaps the latest consensus on indigenous peoples' human rights (including the requirement to secure FPIC before said rights may be affected). It is worth recalling, however, that UNDRIP was possible because in its three decades of development, States, indigenous peoples and their supporters did not invent law, nor create a document that is mere aspiration, but in fact articulated new understanding of how the existing human rights framework applies to indigenous peoples and how it should be implemented by States to protect communities and find new ways to work together with indigenous peoples and mark a new kind of relationship where mutually beneficial goals can be achieved. These goals can span a range of issues including health, intellectual property rights, cultural diversity, traditional civil and political rights and freedoms, the environment, sustainable development, conservation and/or the management of lands and natural resources.

More than 200 States have ratified numerous international and regional treaties and covenants that expressly provide for, or are now interpreted to recognize, a State duty and obligation to obtain FPIC where the circumstances so warrant. Provided below are excerpts from these instruments as well as the many authoritative decisions of the committees, commissions, working groups and international tribunals established by the States themselves to interpret these instruments and review States' compliance with their terms.

Also, the reader will find several excerpts from relevant public statements and guidelines issued by officials and international agencies and institutions charged with creating awareness around human rights, monitoring and facilitating compliance with international and regional duties and obligations of States, and advancing the law and our understanding of human rights (such as the Expert Mechanism on the Rights of Indigenous Peoples).

As stated above, the references included in this *Legal Companion* are by far an inclusive list. The Companion has drawn extensively from the compilations of UN treaty body decisions, comments and observations published by Forest Peoples Programme from 2005 to 2012.

(See A COMPILATION OF UN TREATY BODY JURISPRUDENCE AND THE RECOMMENDATIONS OF THE HUMAN RIGHTS COUNCIL, VOLUMES I-V, available at www.forestpeoples.org/faceted_search/results/compilation%20of%20UN). The UN-REDD Programme has also drawn from known case law issued by regional commissions and courts and various other secondary sources.

This document should be considered a work in progress that may be expanded from time to time by the UN-REDD Programme as deemed appropriate. It is offered merely as an introduction to the vast and extensively developed international and regional law and jurisprudence on the requirement of FPIC.

INTERNATIONAL TREATIES, CONVENTIONS AND DECLARATIONS

International Covenant on Civil and Political Rights

● *Concluding Observations*

Canada, CCPR/C/CAN/CO/5, 20 April 2006, para. 22

22. The Committee notes with concern that the Canadian Human Rights Act cannot affect any provision of the Indian Act or any provision made under or pursuant to that Act, thus allowing discrimination to be practised as long as it can be justified under the Indian Act. It is concerned that the discriminatory effects of the Indian Act against Aboriginal women and their children in matters of reserve membership have still not been remedied, and that the issue of matrimonial real property on reserve lands has still not been properly addressed. While stressing the obligation of the State party to seek the informed consent of indigenous peoples before adopting decisions affecting them and welcoming the initiatives taken to that end, the Committee observes that balancing collective and individual interests on reserves to the sole detriment of women is not compatible with the Covenant (arts. 2, 3, 26 and 27).

Panama, CCPR/C/PAN/CO/3, 17 April 2008, para. 21

21. The Committee expressed its concern at the information included in the State party's report and received from non-governmental sources on the existence among the general population of racial prejudices against indigenous people and also on the many problems that affect indigenous communities, including serious shortcomings in health and education services; the lack of an institutional presence in their territories; the absence of a process of consultation to seek the prior, free and informed consent of communities to the exploitation of natural resources in their territories; the ill-treatment, threats and harassment to which members of the communities have reportedly been subjected on the occasion of protests against hydroelectric infrastructure construction projects, mining operations or tourism facilities on their territory; and the non-recognition of the special status of indigenous communities that are not within a comarca (articles 1, 26 and 27 of the Covenant). The State party should: ... (c) Carry out a process of consultation with the indigenous communities before granting licenses for the economic exploitation of the lands in which they live, and to ensure that in no case shall such exploitation violate the rights recognized in the Covenant;

Nicaragua, CCPR/C/NIC/CO/3, 12 December 2008, para. 21

21. The Committee voices concern regarding the existence among the general public of racial prejudice against indigenous peoples, especially in the Autonomous Regions of the Atlantic coast, and the many problems affecting indigenous peoples, including serious shortcomings in health and education services, the fact that institutions have few or no branches in their areas, and the absence of a consultation process to secure free, informed prior consent to the exploitation of natural resources on indigenous communities' lands. The Committee also notes that more than six years after the ruling handed down by the Inter-American Court in the Awas Tingni case, the community still has no title of ownership, while the Awas Tingni region continues to be prey to illegal activity by outside settlers and loggers (arts. 26 and 27). The State party should: ...(c) Conduct consultations with indigenous peoples before granting licenses for the economic exploitation of the lands where they live, and ensure that such exploitation in no circumstances infringes the rights acknowledged in the Covenant;...

Colombia, CCPR/C/COL/CO/6, 4 August 2010, para. 25

25. The Committee is concerned that the Afro-Colombian and indigenous population groups continue to be discriminated against and to be particularly exposed to the violence of armed conflict. Despite legal recognition of their right to collective land ownership, in practice those population groups face enormous obstacles in exercising control over their lands and territories. The Committee also regrets that no progress has been made on the adoption of legislation to criminalize racial discrimination or on the adoption of legislation for holding prior consultations and guaranteeing the free, prior and informed consent of the members of the relevant community (arts. 2, 26 and 27).

The State party must strengthen special measures in favour of Afro-Colombian and indigenous people in order to guarantee the enjoyment of their rights and, in particular, to ensure that they exercise control over their land and that it is restituted to them, as appropriate. The State party should adopt legislation criminalizing racial discrimination and adopt the pertinent legislation for holding prior consultations with a view to guaranteeing the free, prior and informed consent of community members.

El Salvador, CCPR/C/SLV/CO/6, 27 October 2010, para. 18

18. The Committee is concerned about the situation of marginalization in which different indigenous peoples have been living in the State party, the lack of full recognition of these indigenous peoples, the lack of their statistic acknowledgment in the 2007 census, the absence of special measures to promote the realization of their rights as indigenous peoples, and the lack of measures to protect indigenous languages.

The State party must promote the full recognition of all the indigenous peoples and consider ratifying ILO Convention No. 169 on Indigenous and Tribal Peoples. With the free, prior and informed consent of indigenous peoples and through prior consultation, the State party should include questions in the next census that allow the identification of such peoples, design and implement public policies to effectively achieve their rights, and take special measures to overcome the marginalization that they have experienced. In the same way, the State must, with the prior consent of all indigenous peoples, adopt measures for the revitalization of their languages and cultures.

Togo, CCPR/C/TGO/CO/4, 11 March 2011, at para. 21

21. The Committee observed “with concern that neither the existence of indigenous peoples in Togo nor their right to free, prior and informed consent is recognized (arts. 2 and 27),” and recommended that the State party should “ensure that indigenous peoples are able to exercise their right to free, prior and informed consent.”

● *Jurisprudence under Optional Protocol I*

Angela Poma Poma v. Peru, CCPR/C/95/D/1457/2006, 24 April 2009, at para. 7.6

7.6 ...the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community 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. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community.

Togo, CCPR/C/TGO/CO/4, 18 April 2011, para. 21

21. The Committee is concerned that minorities are underrepresented in the civil service and the army in particular. It also notes with concern that neither the existence of indigenous peoples in Togo nor their right to free, prior and informed consent is recognized (arts. 2 and 27).

The State party should take the necessary steps to guarantee the recognition of minorities and indigenous peoples. It should also ensure that indigenous peoples are able to exercise their right to free, prior and informed consent. The State party must also give minorities in Togo the means for better representation in public life and positions of responsibility.

Guatemala, CCPR/C/GTM/CO/3, 19 April 2012, para. 27

27. While recognizing the measures taken by the State party, such as the 2009–2012 Programme for the Development of Indigenous Peoples and the constitutional reforms of 2001 designed to ensure respect for indigenous rights, the Committee regrets that indigenous peoples are not effectively consulted by the State party during decision-making processes that affect their rights (arts. 2, 25 and 27).

The State party should comply with its international commitment to carry out prior and informed consultations with indigenous peoples for all decisions relating to projects that affect their rights, in accordance with article 27 of the Covenant. The State party should also recognize and take due account of all decisions taken by indigenous peoples during such consultations.

Kenya, CCPR/C/KEN/CO/3, 31 August 2012, para. 24

24. The Committee is concerned at reports of forced evictions, interference and dispossession of ancestral land by the government from minority communities such as the Ogiek and Endorois communities who depend on it for economic livelihood and to practice their cultures. The Committee is further concerned at reports that the Ogiek community are subjected to continued eviction orders from the Mau forests complex. The Committee notes that the State party has not implemented the decision of the African Commission on Human and Peoples' Rights in the case *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (arts. 12, 17, 26 and 27).

The Committee recommends that, in planning its development and natural resource conservation projects, the State party should respect the rights of minority and indigenous groups to their ancestral land and ensure that their traditional livelihood that is inextricably linked to their land is fully respected. In this regard, the State party should ensure that the inventory being undertaken by the Interim Coordinating agency with a view to obtaining a clear assessment of the status and land rights of the Ogiek community should be participatory and that decisions should be based on free and informed consent by this community.

International Covenant on Economic, Social and Cultural Rights

● **Concluding Observations**

Ecuador, E/C.12/1/Add.100, 7 June 2004, paras. 12 & 35

12. The Committee is concerned that, although the Constitution recognizes the rights of indigenous communities to hold property communally and to be consulted before natural resources are exploited in community territories, these rights have regrettably not been fully implemented in practice. The Committee is deeply concerned that natural extracting concessions have been granted to international companies without the full consent of the concerned communities. The Committee is also concerned about the negative health and environmental impacts of natural resource extracting companies' activities at the expense of the exercise of land and culture rights of the affected indigenous communities and the equilibrium of the ecosystem.

35. The Committee strongly urges the State party to ensure that indigenous people participate in decisions affecting their lives. The Committee particularly requests that the

State party consult and seek the consent of the indigenous people concerned prior to the implementation of natural resources-extracting projects and on public policy affecting them, in accordance with ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. The Committee strongly recommends that the State party implement legislative and administrative measures to avoid violations of environmental laws and rights by transnational companies.

Brazil, E/C.12/1/Add.87, 23 May 2003, para. 58

58. The Committee calls upon the State party to ensure that indigenous peoples are effectively protected from threats and danger to their lives and from eviction from their lands. The Committee particularly urges the State party to seek the consent of the indigenous peoples concerned prior to the implementation of timber, soil or subsoil mining projects and any public policy affecting them, in accordance with ILO Convention No. 169.

Colombia, E/C.12/1/Add.74, 30 November 2001, paras.12 & 33

12. The Committee notes with regret that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem.

33. The Committee urges the State party to ensure that indigenous peoples participate in decisions affecting their lives. The Committee particularly urges the State party to consult and seek the consent of the indigenous peoples concerned prior to the implementation of timber, soil or subsoil mining projects and on any public policy affecting them, in accordance with ILO Convention No. 169.

Mexico, Future E/C.12/CO/MEX/4, 17 May 2006, para. 28

28. The Committee urges the State party to ensure that the indigenous and local communities affected by the La Parota Hydroelectric Dam Project or other large-scale projects on the lands and territories which they own or traditionally occupy or use are duly consulted, and that their prior informed consent is sought, in any decision-making processes related to these projects affecting their rights and interests under the Covenant, in line with ILO Convention No. 169 on Indigenous and Tribal Peoples. The Committee also urges the State party to recognize the rights of ownership and possession of indigenous communities to the lands traditionally occupied by them, to ensure that adequate compensation and/or alternative accommodation and land for cultivation are provided to the indigenous communities and local farmers affected by the construction of the La Parota Dam or other construction projects under the Plan Puebla Panama, and that their economic, social and cultural rights are safeguarded. In this regard, the State party is referred to the Committee's General Comments Nos. 14 and 15 on the right to the highest attainable standard of health and on the right to water.

Philippines, E/C.12/PHL/CO/4, 1 December 2008, para. 6

6. The Committee also notes with satisfaction the various legislative, administrative and policy measures adopted by the State party to recognize, protect and promote the individual and collective rights of the indigenous peoples living in the territory of the State party, including ... (b) The Free and Prior Informed Consent Guidelines, adopted by the National Commission on Indigenous Peoples in 2002, which emphasise the right of indigenous peoples to participate in decisions affecting them; ...

Nicaragua, E/C.12/NIC/CO/4, 28 November 2008, para. 11

11. The Committee expresses its concern at the existence of racial prejudice against indigenous people, especially in the Atlantic Autonomous Regions and in particular against indigenous and Afro-descendant women. The Committee also regrets the many problems affecting indigenous peoples, including serious shortcomings in the health and education services; and the lack of an institutional presence in their territories; and the absence of a consultation process to seek communities' free, prior and informed consent to the exploitation of natural resources in their territories. In this regard, the Committee notes that, more than six years after the Inter-American Court's judgement in the Awas Tingni case, that community still does not have title to its property. Furthermore, the territory of Awas Tingni is still exposed to unlawful acts by settlers and loggers (art. 2, para. 2). The Committee recommends that the State party should:...(c) Conduct a process of consultations with indigenous peoples before granting concessions for the economic exploitation of the lands where they live, and guarantee that in no case does such exploitation violate the rights recognized in the Covenant;...

Colombia, E/C.12/COL/CO/5, 21 May 2010, para. 9

9. The Committee is concerned that infrastructure, development and mining megaprojects are being carried out in the State party without the free, prior and informed consent of the affected indigenous and afro-colombian communities. The Committee is also concerned that, according to the Constitutional Court, the legitimate representatives of the afro-colombian communities did not participate in the process of consultation and the authorities did not provide accurate information on the scope and the impact of the mining mega-project of Chocò and Antioquia. The Committee is further concerned that the Presidential Directive 001 aimed at establishing a general framework for prior consultation may not be sufficient and that indigenous and afro-colombian peoples were not consulted regarding the draft bill elaborated by the Working Party on Prior Consultation of the Ministry of the Interior that, therefore, does not create the adequate framework for the process of genuine consultation (art.1).

The Committee recommends that the State party take concrete measures to review the processes concerning infrastructure, development and mining projects and fully implement decisions of the Constitutional Court in this regard. The Committee also recommends that the State party review the Presidential Directive 001 and the draft bill elaborated by the Working Party on Prior Consultation of the Ministry of the Interior. The Committee further recommends that the State party adopt legislation in consulta-

tion with and the participation of indigenous and afro-colombian people, that clearly establishes the right to free, prior and informed consent in conformity with ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, as well as the relevant decisions of the Constitutional Court.

Russian Federation, E/C.12/RUS/CO/5, 22 May 2011, para. 7

7. While taking note of the measures taken by the State party, in particular the adoption in February 2009 of a policy framework for the sustainable development of the indigenous peoples in the North, Siberia and the Far East of the Russian Federation, the corresponding action plan for 2009-2011, and the federal target programme for the economic and social development of the indigenous peoples until 2011, the Committee is concerned at the lack of concrete outcomes of the new policy, action plan and target program. The Committee is also concerned that changes to federal legislation regulating the use of land, forests and water bodies, in particular the revised Land (2001) and Forest (2006) Codes and the new Water Code, deprive indigenous peoples of the right to their ancestral lands, fauna and biological as well as aquatic resources, on which they rely for their traditional economic activities, through granting of licenses to private companies for development of projects such as the extraction of subsoil resources (art. 2.2).

The Committee recommends that:

- a. The State party incorporate the right of indigenous peoples to their ancestral lands into the revised Land Code and the new revised draft Law on Territories of Traditional Nature Use, and the right to free access to natural resources on which indigenous communities rely for their subsistence into the Forest and Water Codes;
- b. Seek the free informed consent of indigenous communities and give primary consideration to their special needs prior to granting licences to private companies for economic activities on territories traditionally occupied or used by those communities;...

Argentina, E/C.12/ARG/CO/3, 14 December 2011, para. 9

9. The Committee is concerned about the persisting threats, displacements and violent evictions of indigenous peoples from their traditional lands in numerous provinces. The Committee also regrets the shortcomings in consultation processes with affected indigenous communities, which in some cases have led to the exploitation of natural resources in the territories traditionally occupied or used by them without their free, prior and informed consent and without just and fair compensation being paid to them, in violation of the Constitution (art. 75) and International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. The Committee is particularly concerned by the negative consequences of lithium exploitation in Salinas Grandes (Salta and Jujuy provinces) on the environment, access to water, way of life and subsistence of indigenous communities (arts. 1, 11 and 12).

The Committee recommends that the State party undertake the necessary measures to stop violations of the rights of indigenous peoples and that it hold accountable those

responsible for such unlawful acts. It urges the State party to always enter into effective consultations with indigenous communities before granting concessions for the economic exploitation of the lands and territories traditionally occupied or used by them to State-owned companies or third parties, fulfilling the obligation to obtain the free, prior and informed consent of those who are affected by the aforementioned economic activities. The Committee also recommends that the State party guarantee that in no case will such exploitation violate the rights recognized in the Covenant and that just and fair compensation is granted to indigenous communities. ...

New Zealand, E/C.12/NZL/CO/3, 31 May 2012, para. 11

11. The Committee is concerned that the State party does not give sufficient protection of the inalienable rights of indigenous people to their lands, territories, waters and maritime areas, and other resources, as manifested by the fact that Māori free, prior and informed consent on the use and exploitation of these resources has not always been respected (arts. 1, para.2; and 15).

The Committee calls on the State party to ensure that the inalienable rights of Māori to their lands, territories, waters and marine areas and other resources as well as the respect of the free, prior and informed consent of Māori on any decisions affecting their use are firmly incorporated in the State party's legislation and duly implemented. ...

Peru, E/C.12/PER/CO/2-4, 30 May 2012, para. 23

23. The Committee is concerned that effective consultation and prior informed consent of indigenous peoples is not systematically sought in decision-making processes relating to the exploitation of natural resources in their traditional territories (art. 15).

The Committee recommends that the State party ensure that the implementation of the National Environmental Policy, Section 5, on mining and energy, as well as Act No.29785 on the Right of Indigenous or Aboriginal Peoples to Prior Consultation, involves effective consultation and prior informed consent of indigenous peoples relating to the exploitation of natural resources in their traditional territories.

Tanzania, E/C.12/TZA/CO/1-3, 30 November 2012, paras. 22 & 29

22. The Committee is concerned that several vulnerable communities, including pastoralist and hunter-gatherer communities, have been forcibly evicted from their traditional lands for the purposes of large scale farming, creation of game reserves and expansion of national parks, mining, construction of military barracks, tourism and commercial game hunting. The Committee is concerned that these practices have resulted in a critical reduction in their access to land and natural resources, particularly threatening their livelihoods and their right to food (art.11).

The Committee recommends that the establishment of game reserves, the granting of licences for hunting, or other projects on ancestral lands is preceded by free, prior and

informed consent of the people affected. It recommends that the State party ensure that vulnerable communities, including pastoralist and hunter-gatherer communities, are effectively protected from forced evictions from traditional lands. It also recommends that past forced evictions and violations that have taken place during those evictions are properly investigated, that perpetrators are brought to justice, that the findings are made public, and that those evicted are offered adequate compensation. The Committee draws the attention of the State party to its General Comment No.7 (1997) on forced evictions.

29. The Committee is concerned that restrictions to land and resources, threats to livelihoods and the reduced access to decision-making processes by vulnerable communities, such as pastoralist and hunter-gatherer communities, pose a threat to the realization of their right to culture life (art.15).

The Committee recommends that the State party take legislative and other measures to protect, preserve and promote the cultural heritage and traditional ways of life of vulnerable communities, such as hunter-gatherer and pastoralist communities. It recommends that it ensure their meaningful participation in the debates related to nature conservation, commercial hunting, tourism and other uses of the land, based on free, prior and informed consent.

Ecuador, E/C.12/ECU/CO/3, 30 November 2012, para. 9 (*unofficial translation*)

9. The Committee urges the member State that in the sphere of the activities of exploration and mining and of hydrocarbons, to carry out consultations that include the free consent or no consent at the beginning of a project, space and sufficient times for the reflection and taking of decisions such as around measures to safeguard cultural integrity and remediation. The processes of consultation should respect the protocols of community consultations already developed and the decisions that arise from the same.

● *General Comments*

General Comment No. 17 (2005). The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant), para. 32

32. With regard to the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of indigenous peoples, States parties should adopt measures to ensure the effective protection of the interests of indigenous peoples relating to their productions, which are often expressions of their cultural heritage and traditional knowledge. In adopting measures to protect scientific, literary and artistic productions of indigenous peoples, States parties should take into

account their preferences. Such protection might include the adoption of measures to recognize, register and protect the individual or collective authorship of indigenous peoples under national intellectual property rights regimes and should prevent the unauthorized use of scientific, literary and artistic productions of indigenous peoples by third parties. In implementing these protection measures, States parties should respect the principle of free, prior and informed consent of the indigenous authors concerned and the oral or other customary forms of transmission of scientific, literary or artistic production; where appropriate, they should provide for the collective administration by indigenous peoples of the benefits derived from their productions.

Committee on Economic, Social and Cultural Rights, General comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), adopted at the Committee's Forty-third session, 2–20 November 2009. UN Doc. E/C.12/GC/21 (21 December 2009), at paras. 36 & 37

7. Indigenous peoples

36. States parties should take measures to guarantee that the exercise of the right to take part in cultural life takes due account of the values of cultural life, which may be strongly communal or which can only be expressed and enjoyed as a community by indigenous peoples. The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity. States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.

37. Indigenous peoples have the right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games, and visual and performing arts. States parties should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights.

III. States parties' obligations

55. In its general comment No. 3 (1990), the Committee stressed that States parties have a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights set out in the Covenant. Thus, in accordance with the Covenant and other international instruments dealing with human rights and the protection of cultural diversity, the Committee considers that article 15, paragraph 1 (a), of the Covenant entails at least the obligation to create and promote an environment within which a person individually, or in association with others, or within a community or group, can participate in the culture of their choice, which includes the following core obligations applicable with immediate effect:

...

- (e) To allow and encourage the participation of persons belonging to minority groups, indigenous peoples or to other communities in the design and implementation of laws and policies that affect them. In particular, States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.

Convention on the Elimination of all Forms of Racial Discrimination

● *Concluding Observations*

Argentina, CERD/C/65/CO/1, August 2004, para. 18

18. The Committee takes note that the Co-ordinating Council of Argentine Indigenous Peoples envisaged by Act No. 23,302 to represent indigenous peoples in the National Institute of Indigenous Affairs, has still not been established. The Committee recalls its General Recommendation 23 on the rights of indigenous peoples which calls upon State parties to ensure that no decisions directly relating to their rights and interests are taken without their informed consent and urges the State party to ensure that the Council is established as soon as possible and that sufficient funds are allocated for the effective functioning of the Council and the Institute.

Bolivia, CERD/C/63/CO/2, 10 December 2003, para. 13

13. While welcoming the State party's efforts aimed at ensuring the enjoyment and exercise of the rights of indigenous peoples through the adoption of constitutional, legal and institutional reforms, the Committee notes with concern the information received on the issue of indigenous lands allegedly allotted to private companies, especially in the communities of Chiquitano, Beni and Santa Cruz. The Committee invites the State party to implement consistently in practice the commendable legislation it adopted in order to recognize the fundamental rights of indigenous peoples and to improve their living conditions. In this regard, the Committee draws the attention of the State party to its general recommendation XXIII which, inter alia, calls upon States parties to recognize and

protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.

Ecuador, CERD/C/62/CO/2, 21 March 2003, para. 16

16. As to the exploitation of the subsoil resources of the traditional lands of indigenous communities, the Committee observes that merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee's general recommendation XXIII on the rights of indigenous peoples. The Committee therefore recommends that the prior informed consent of these communities be sought, and that the equitable sharing of benefits to be derived from such exploitation be ensured. Detailed information on land titles of indigenous communities, as well as on remedies available to indigenous people claiming compensation for the environmental depletion of their traditional lands, should be included in the State party's next periodic report.

Botswana, A/57/18, 1 November 2002, para. 304

304. The Committee expresses concern that the ongoing dispossession of Basarwa/San people from their land and about reports stating that their resettlement outside the Central Kalahari Game Reserve does not respect their political, economic, social and cultural rights. The Committee draws the attention of the State party to its general recommendation XXIII on indigenous peoples and recommends that no decisions directly relating to the rights and interests of members of indigenous peoples be taken without their informed consent. The Committee recommends that negotiations with the Basarwa/San and non-governmental organizations on this issue be resumed, and that a rights-based approach to development be adopted.

Costa Rica, CERD/C/60/CO/3, 20 March 2002, para. 13

13. The Committee notes with concern the shortcomings of the State party in its activities on behalf of indigenous peoples, as reported by the Office of the Ombudsman, in particular the failure on the part of the authorities to maintain communication with the indigenous population and the absence of specific government plans for them. In this context, the Committee wishes to refer to its general recommendation XXIII, in which it calls upon States parties to ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.

United States of America, A/56/18, 14 August 2001, para. 400

400. The Committee notes with concern that treaties signed by the Government and Indian tribes, described as "domestic dependent nations" under national law, can be abrogated unilaterally by Congress and that the land they possess or use can be taken without compensation by a decision of the Government. It further expresses concern

with regard to information on plans for expanding mining and nuclear waste storage on Western Shoshone ancestral land, placing their land up for auction for private sale, and other actions affecting the rights of indigenous peoples. The Committee recommends that the State party ensure effective participation by indigenous communities in decisions affecting them, including those on their land rights, as required under article 5 (c) of the Convention, and draws the attention of the State party to general recommendation XXIII on indigenous peoples which stresses the importance of securing the “informed consent” of indigenous communities and calls, inter alia, for recognition and compensation for loss. The State party is also encouraged to use as guidance the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.

Australia, CERD/C/304/Add.101, 19 April 2000, para. 9

9. Concern is expressed at the unsatisfactory response to decisions 2 (54) (March 1999) and 2 (55) (August 1999) of the Committee and at the continuing risk of further impairment of the rights of Australia’s indigenous communities. The Committee reaffirms all aspects of its decisions 2 (54) and 2 (55) and reiterates its recommendation that the State party should ensure effective participation by indigenous communities in decisions affecting their land rights, as required under article 5 (c) of the Convention and General Recommendation XXIII of the Committee, which stresses the importance of securing the “informed consent” of indigenous peoples. The Committee recommends to the State party to provide full information on this issue in the next periodic report.

Cambodia, CERD/C/304/Add.54, 31 March 1998, para. 19

19. The Committee recommends that the State party recognize the citizenship of the indigenous peoples, as well as their use of lands, forests and other natural resources, and their distinct and unique identity, culture and way of life. The Committee further recommends that the State party take steps to fully implement its General Recommendation XXIII which addresses the rights of indigenous peoples under the Convention. In particular, the State party should ensure that no decisions directly relating to the rights and interests of indigenous peoples are taken without their informed consent.

Laos, CERD/C/LAO/CO/15, 18 April 2005, para. 18

18. The Committee notes that the State party has adopted a policy of resettling members of ethnic groups from the mountains and highland plateaux to the plains (art. 5). The Committee recommends that the State party describe in its next periodic report the scope of the resettlement policies being implemented, the ethnic groups concerned, and the impact of these policies on the lifestyles of these groups and on their enjoyment of their economic, social and cultural rights. It recommends to the State party that it study all possible alternatives with a view to avoiding displacement; that it ensure that the persons concerned are made fully aware of the reasons for and modalities of their displacement and of the measures taken for compensation and resettlement; that it endeavour to obtain the free and informed consent of the persons and groups concerned; and that it make remedies available to them. The State party should pay particular attention to the close cultural ties

that bind certain indigenous or tribal peoples to their land and take into consideration the Committee's general recommendation XXIII of 1997 in this regard. The preparation of a legislative framework setting out the rights of the persons and groups concerned, together with information and consultation procedures, would be particularly useful.

Australia, CERD/C/AUS/CO/14, 14 April 2005, paras. 11 & 16

11. The Committee is concerned about the abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC), the main policy-making body in Aboriginal affairs consisting of elected indigenous representatives. It is concerned that the establishment of a board of appointed experts to advise the Government on indigenous peoples' issues, as well as the transfer of most programmes previously provided by the ATSIC and the Aboriginal and Torres Strait Islander Service to government departments, will reduce the participation of indigenous peoples in decision-making and thus alter the State party's capacity to address the full range of issues relating to indigenous peoples (arts. 2 and 5). The Committee recommends that the State party take decisions directly relating to the rights and interests of indigenous peoples with their informed consent, as stated in its general recommendation XXIII. The Committee recommends that the State party reconsider the withdrawal of existing guarantees for the effective representative participation of indigenous peoples in the conduct of public affairs as well as in decision- and policy-making relating to their rights and interests.

16. The Committee notes with concern the persistence of diverging perceptions between governmental authorities and indigenous peoples and others on the compatibility of the 1998 amendments to the Native Title Act with the Convention. The Committee reiterates its view that the Mabo case and the 1993 Native Title Act constituted a significant development in the recognition of indigenous peoples' rights, but that the 1998 amendments roll back some of the protections previously offered to indigenous peoples and provide legal certainty for Government and third parties at the expense of indigenous title. The Committee stresses in this regard that the use by the State party of a margin of appreciation in order to strike a balance between existing interests is limited by its obligations under the Convention (art. 5). The Committee recommends that the State party refrain from adopting measures that withdraw existing guarantees of indigenous rights and that it make every effort to seek the informed consent of indigenous peoples before adopting decisions relating to their rights to land. It further recommends that the State party reopen discussions with indigenous peoples with a view to discussing possible amendments to the Native Title Act and finding solutions acceptable to all.

Guatemala, CERD/C/GTM/CO/11, 15 May 2006, paras. 17 & 19

17. The Committee is highly concerned at indigenous peoples' lack of access to land, the lack of respect shown for their traditional lands, such as community forests, and the problems in relation to the restitution of lands to indigenous peoples displaced as a result of armed conflict or economic development plans (art. 5, subpara. (d) (v)). Bearing in mind its general recommendation 23 on the rights of indigenous peoples, in particular paragraph 5 thereof, the Committee calls upon the State party to take steps to recognize

and protect the rights of indigenous peoples to own, develop, control and use their communal lands and territories. In cases where they have been deprived of their lands and territories traditionally owned, or such lands and territories have been otherwise used without their free and informed consent, the Committee recommends that the State party take steps to return those lands and territories. The Committee also urges it to ensure the effective implementation of the national land register law so that indigenous community lands can be identified and demarcated.

19. The Committee notes with concern that mining licenses have been granted by the Ministry of Energy and Mines to concession enterprises and regrets that indigenous peoples were not consulted or informed that the permission to exploit the subsoil of their territory had been awarded to such enterprises. The Committee likewise expresses its concern at the draft legislation on consultative procedures which, if adopted, would infringe indigenous peoples' right to participate in decisions affecting them. (art. 5, subpara. (d) (v)). The Committee recommends that when taking decisions having a direct bearing on the rights and interests of indigenous peoples the State party endeavour to obtain their informed consent, as stipulated in paragraph 4 (d) of its general recommendation 23. The Committee also recommends that before adopting the draft legislation on consultative procedures, the State party include a clause referring to the right of indigenous peoples to be consulted whenever legislative or administrative measures are contemplated that may affect them with a view to securing their consent to such measures.

Botswana, CERD/C/BWA/CO/16, 4 April 2006, para. 12

12. The Committee notes with concern the discrepancy between the information provided by the State party that residents of the Central Kalahari Game Reserve have been consulted and have agreed to their relocation outside the Reserve, and persistent allegations that residents were forcibly removed, through, in particular, such measures as the termination of basic and essential services inside the Reserve, the dismantling of existing infrastructures, the confiscation of livestock, harassment and ill-treatment of some residents by police and wildlife officers, as well as the prohibition of hunting and restrictions on freedom of movement inside the Reserve. (Articles 2 and 5). The Committee reiterates its recommendation to the State party that it resume negotiations with the residents of the Reserve, including those who have been relocated, as well as non-governmental organizations, with a view to finding a solution acceptable to all. The Committee, while welcoming the delegation's statement that there is no legal impediment to such process, recommends that a rights-based approach be adopted during the negotiations. To that end, the State party should, in particular, (a) pay particular attention to the close cultural ties that bind the San/Basarwa to their ancestral land; (b) protect the economic activities of the San/Basarwa that are an essential element of their culture, such as hunting and gathering practices, whether conducted by traditional or modern means; (c) study all possible alternatives to relocation; and (d) seek the prior free and informed consent of the persons and groups concerned.

Guyana, CERD/C/GUY/CO/14, 4 April 2006, paras. 14, 17, & 19

14. While noting that the Constitutional Amendment Act of 2000 establishing the Ethnic Relations Commission does not require the representation of any particular ethnic group on the Commission, the Committee is nevertheless concerned about the absence of any indigenous representatives on that Commission. (Art. 5 (c)) The Committee recommends that the State party ensure that the ethnic composition of the Ethnic Relations Commission be as inclusive as possible, and that the representatives of indigenous communities be consulted, and their informed consent sought, in any decision-making processes directly affecting their rights and interests, in accordance with the Committee's General Recommendation No. 23.

17. The Committee notes with concern the extensive exception to the protection of property in Article 142(2)(b)(i) of the Constitution of Guyana, authorizing the compulsory taking of the property of Amerindians without compensation "for the purpose of its care, protection and management or any right, title or interest held by any person in or over any lands situated in an Amerindian District, Area or Village established under the Amerindian Act for the purpose of effecting the termination or transfer thereof for the benefit of an Amerindian community." (Art. 5(d) (v) and 6). The Committee recommends that the State party afford non-discriminatory protection to indigenous property, in particular to the rights of ownership and possession of indigenous communities over the lands which they traditionally occupy. It also recommends that the State party confine the taking of indigenous property to cases where this is strictly necessary, following consultation with the communities concerned, with a view to securing their informed consent, and to provide these communities with adequate compensation where property is compulsorily acquired by the State, as well as with an effective remedy to challenge any decision relating to the compulsory taking of their property.

19. The Committee is deeply concerned that, despite the State party's efforts mentioned in paragraph 6 above, the average life expectancy among indigenous peoples is low, and that they are reportedly disproportionately affected by malaria and environmental pollution, in particular mercury and bacterial contamination of rivers caused by mining activities in areas inhabited by indigenous peoples. (Art. 5 (e) (iv)). The Committee urges the State party to ensure the availability of adequate medical treatment in hinterland areas, in particular those inhabited by indigenous peoples, by increasing the number of skilled doctors and of adequate health facilities in these areas, by intensifying the training of health personnel from indigenous communities, and by allocating sufficient funds to that effect. Furthermore, it recommends that the State party undertake environmental impact assessments and seek the informed consent of concerned indigenous communities prior to authorizing any mining or similar operations which may threaten the environment in areas inhabited by these communities.

India, CERD/C/IND/CO/19, 5 May 2007, paras. 19 & 20

19. The Committee notes that the State party does not fully implement the right of ownership, collective or individual, of the members of tribal communities over the lands traditionally occupied by them in its practice concerning tribal peoples. It is also concerned that large scale projects such as the construction of several dams in Manipur and other north-eastern States on territories primarily inhabited by tribal communities, or of the Andaman Trunk Road, are carried out without seeking their prior informed consent. These projects result in the forced resettlement or endanger the traditional lifestyles of the communities concerned. (art. 5 (d) (v) and 5 (e)). The Committee urges the State party to fully respect and implement the right of ownership, collective or individual, of the members of tribal communities over the lands traditionally occupied by them in its practice concerning tribal peoples, in accordance with ILO Convention 107 on Indigenous and Tribal Populations (1957). The State party should seek the prior informed consent of communities affected by the construction of dams in the Northeast or similar projects on their traditional lands in any decision-making processes related to such projects and provide adequate compensation and alternative land and housing to those communities. Furthermore, it should protect tribes such as the Jarawa against encroachments on their lands and resources by settlers, poachers, private companies or other third parties and implement the 2002 order of the Indian Supreme Court to close the sections of the Andaman Trunk Road that run through the Jarawa reserve.

20. The Committee is concerned about reports that Dalits are often denied access to and evicted from land by dominant castes, especially if it borders land belonging to such castes, and that tribal communities have been evicted from their land under the 1980 Forest Act or in order to allow private mining activities (art. 5 (d) (v) and 5 (e) (i) and (iii)). The Committee recommends that the State party ensure that Dalits, including Dalit women, have access to adequate and affordable land and that acts of violence against Dalits due to land disputes are punished under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (1989). The State party should also ensure that tribal communities are not evicted from their lands without seeking their prior informed consent and provision of adequate alternative land and compensation, that bans on leasing tribal lands to third persons or companies are effectively enforced, and that adequate safeguards against the acquisition of tribal lands are included in the Recognition of Forest Rights Act (2006) and other relevant legislation.

Ethiopia, CERD/C/ETH/CO/15, 20 June 2007, para. 22

22. While acknowledging the provisions of article 40 (5) of the constitution, the Committee remains concerned about the consequences for indigenous groups of the establishment of national parks in the State party and their ability to pursue their traditional way of life in such parks (article 5 (c), (d) and (e) of the Convention). In the light of its general recommendation No. 23 (1997) on the rights of indigenous peoples, the Committee recommends that the State party provide, in its overdue report, information on the

effective participation of indigenous communities in the decisions directly relating to their rights and interests, including their informed consent in the establishment of national parks, and as to how the effective management of those parks is carried out. The Committee also recommends that the State adopt all measures to guarantee that national parks established on ancestral lands of indigenous communities allow for sustainable economic and social development compatible with the cultural characteristics and living conditions of those indigenous communities.

Indonesia, CERD/C/IDN/CO/3, 15 August 2007, para. 17

17. The Committee notes with concern the plan to establish oil palm plantations over some 850 kilometers along the Indonesia-Malaysia border in Kalimantan as part of the Kalimantan Border Oil Palm Mega-project, and the threat this constitutes for the rights of indigenous peoples to own their lands and enjoy their culture. It notes with deep concern reports according to which a high number of conflicts arise each year throughout Indonesia between local communities and palm oil companies. The Committee is concerned that references to the rights and interests of traditional communities contained in domestic laws and regulations are not sufficient to guarantee their rights effectively. (arts. 2 and 5) The Committee, while noting that land, water and natural resources shall be controlled by the State party and exploited for the greatest benefit of the people under Indonesian law, recalls that such a principle must be exercised consistently with the rights of indigenous peoples. The State party should review its laws, in particular Law No. 18 of 2004 on Plantations, as well as the way they are interpreted and implemented in practice, to ensure that they respect the rights of indigenous peoples to possess, develop, control and use their communal lands. While noting that the Kalimantan Border Oil Palm Mega-project is being subjected to further studies, the Committee recommends that the State party secure the possession and ownership rights of local communities before proceeding further with this Plan. The State party should also ensure that meaningful consultations are undertaken with the concerned communities, with a view to obtaining their consent and participation in the Plan.

Ecuador, CERD/C/ECU/CO/19, 15 August 2008, para. 16

16. While the Committee takes note of the adoption of the Consultation and Participation Act as a supplement to article 84 of the current Constitution that require prior and informed consent, the Committee reiterates its concern at the exploitation of the subsoil resources of the traditional territories of the indigenous peoples, and the fact that in practice the right of the indigenous peoples to be consulted prior to the exploitation of natural resources in their territories is not fully respected. It also expresses its concern at the negative health and environmental effects produced by extractive activities at the expense of the exercise of the right to land and the cultural rights of the indigenous peoples (art. 5 (d)(v)). The Committee urges the State party to enforce the Consultation and Participation Act fully in practice and that in light of its General Recommendation 23,

section 4(d), consult the indigenous population concerned at each stage of the process and obtain their consent in advance of the implementation of projects for the extraction of natural resources. The Committee also encourages the State party to ensure that oil companies carry out environmental impact studies in the areas where they plan to begin operations before obtaining licences in accordance with the 2002 Government decree.

Russian Federation, CERD/C/RUS/CO/19, 20 August 2008, para. 24

24. The Committee notes with concern that recent changes to federal legislation regulating the use of land, forests and water bodies, in particular the revised Land (2001) and Forest (2006) Codes and the new Water Code, deprive indigenous peoples of their right to preferred, free and non-competitive access to land, fauna and biological as well as aquatic resources, on which they rely for their traditional economic activities, and that the grant of licenses to private companies for activities such as logging, extraction of subsoil resources and the construction of pipelines or hydroelectric dams leads to privatization and ecological depletion of territories traditionally inhabited by indigenous peoples (art. 5 (d)(v)). The Committee recommends that the State party take legislative and other effective measures to implement the Federal Law on Territories of Traditional Nature Use (2001); reinsert the concept of free-of-charge use of land by indigenous peoples into the revised Land Code and the Law on Territories of Traditional Nature Use, and the concept of preferential, non-competitive access to natural resources into the Forest and Water Codes; seek the free informed consent of indigenous communities and give primary consideration to their special needs prior to granting licences to private companies for economic activities on territories traditionally occupied or used by those communities; ensure that licensing agreements provide for adequate compensation of the affected communities; and withdraw support for the Evenkiiskaya dam and other large scale projects threatening the traditional lifestyle of indigenous peoples.

Suriname, CERD/C/SUR/CO/12, 3 March 2009, para. 14

14. The Committee is concerned that the draft Mining Act 2004 is still in Parliament and, according to information before the Committee, that mining licences continue to be granted by the Ministry of Natural Resources to enterprises without prior consultations with or providing information to indigenous and tribal peoples. (Art. 2 & 5). The Committee invites the State Party to update and approve the draft Mining Act in conformity with the Committee's previous recommendations (2004 and 2005). While noting that the District Commissioners are involved with and consult the indigenous and tribal communities concerned before granting concessions, the Committee recommends that when taking legislative or administrative decisions which may affect the rights and interests of indigenous and tribal peoples, the State Party endeavours to consult and obtain their informed consent.

Colombia, CERD/C/COL/CO/14, 28 August 2009, para. 20

20. The Committee, while noting efforts of the State party to conduct consultations with affected communities, is nevertheless concerned that the right to prior consultations and

consent is frequently violated in conjunction with megaprojects relating to infrastructure and natural resource exploitation, such as mining, oil exploration or monocultivation. The Committee recommends that the State party adopt and implement in a concerted manner legislation which regulates the rights to prior consultation in accordance with ILO Convention No. 169 and relevant recommendations of the CEACR of the ILO, in order to ensure that all prior consultations are undertaken in a manner which respects the free and informed consent of the affected communities. The Committee recommends that the State party seek technical advice from the OHCHR and the ILO for this purpose.

Philippines, CERD/C/PHL/CO/20, 28 August 2009, para. 24

24. The Committee, while noting the increasing efforts of the National Commission for Indigenous Peoples (NCIP) to implement IPRA, is nevertheless concerned that consultation processes are not always adequately implemented when securing the Free, Prior and Informed Consent of indigenous peoples (FPIC) with regard to infrastructure and natural resource exploitation projects. The Committee recommends that the State party verify that the current structures and guidelines/procedures established to conduct FPIC are in accordance with the spirit and letter of the IPRA and set realistic time frames for consultation processes with indigenous peoples. It recommends that the State party verify that the apparent lack of formal protests is not the result of a lack of effective remedies, the victims' lack of awareness of their rights, fear of reprisals, or a lack of confidence in the NCIP.

Chile, CERD/C/CHL/CO/15-18, 7 September 2009, para. 22

22. While noting the measures taken by the State party to regulate investment in indigenous lands and indigenous development areas, the Committee notes with concern that indigenous peoples are affected by the exploitation of subsoil resources in their traditional lands and that in practice the right of indigenous peoples to be consulted before the natural resources of their lands are exploited is not fully respected. The Committee urges the State party to hold effective consultations with indigenous peoples on all projects related to their ancestral lands and to obtain their consent prior to implementation of projects for the extraction of natural resources, in accordance with international standards. The Committee draws the State party's attention to its general recommendation No. 23.

Peru, CERD/C/PER/CO/14-17, 3 September 2009, paras. 9 & 14

9. The Committee welcomes the bill on the consultation and participation of indigenous peoples in environmental matters, which aims to ensure that any infrastructure projects or works that might affect the rights of indigenous peoples have the prior, free and informed consent of these peoples and that national legislation is adapted in order to provide for the right of indigenous peoples - recognized in the International Labour Organization (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) - to prior, free and informed consultation.

14. While noting the positive steps taken by the State party in this area, the Committee

reiterates its concern at the considerable tension, even leading to violence, generated in the country by the exploitation of the subsoil resources of the traditional territories of the indigenous peoples. The Committee also notes that in some cases the right of indigenous peoples to be consulted and to give their informed consent prior to the exploitation of natural resources in their territories is not fully respected in practice. It further expresses concern at the negative impact on health and the environment of companies' extractive activities conducted at the expense of the exercise of the right to land and the cultural rights of the indigenous peoples concerned. The Committee urges the State party to adopt the bill on the consultation and participation of indigenous peoples in environmental matters, taking into account the Committee's general recommendation No. 23 (para. 4 (d)), in which it urges States parties, to ensure with reference to indigenous peoples "that no decisions directly relating to their rights and interests are taken without their informed consent". In the light of that general recommendation, the Committee urges the State party to consult the communities of the indigenous peoples concerned at each step of the process and to obtain their consent before plans to extract natural resources are implemented.

Argentina, CERD/C/ARG/CO/19-20, 29 March 2010, para. 26

26. The Committee is deeply concerned at information that, although the law explicitly prohibits eviction, indigenous communities have recently been expelled from their ancestral lands. The situation is made even more serious when violence is used during evictions. The Committee is greatly concerned at the incidents that occurred recently in the course of the evictions of the Chuschagasta indigenous community in Tucumán Province and of the Currumil community in Aluminé, in Neuquén Province. It is also gravely concerned that, notwithstanding the State party's ratification of the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), the State party has not set up effective consultation mechanisms in order to obtain the free, prior and informed consent of communities that might be affected by development projects or the exploitation of natural resources. The Committee recommends that the State party take the necessary effective steps to ensure that the law prohibiting forced eviction is applied equally throughout the national territory. The Committee recommends that the State party establish appropriate mechanisms, in accordance with ILO Convention No. 169, to consult with communities that might be affected by development projects or the exploitation of natural resources in order to obtain their free, prior and informed consent. It also recommends that, where it is determined that eviction is necessary, the State party ensure that those evicted from their lands receive adequate compensation, and that it provide relocation sites equipped with basic services, such as drinking water, electricity, washing facilities and sanitation, and adequate social services, including schools, health centres and transport. The Committee also recommends that the State party investigate recent occurrences of evictions of indigenous peoples, punish those responsible and offer compensation to those affected.

Cambodia, CERD/C/KHM/CO/8-13, 1 April 2010, para. 16

16. The Committee recognizes the recent and significant economic growth experienced

by the State party and the benefit such growth brings to the country. The Committee is concerned, however, that the quest for economic growth and prosperity is pursued, in some cases, to the detriment of particularly vulnerable communities such as indigenous peoples. The Committee is particularly concerned about reports of the rapid granting of concessions on land traditionally occupied by indigenous peoples without full consideration, or exhaustion of procedures provided for, under the land law and relevant sub-decrees (arts. 2 and 5).

The Committee recommends that the State party ensure that a proper balance between development and the rights of its citizens is achieved and that its economic development does not come at the expense of the rights of vulnerable persons and groups covered by the Convention. It also recommends that the State party develop appropriate protective measures, such as a delay in the issuance of a concession on lands inhabited by indigenous communities who have applied to be registered legally in order to obtain land titles until the issue of collective ownership titles and indigenous peoples' rights to possess, develop, control and use their communal lands, where at issue, has been assessed and determined, and after consultation with and the informed consent of the indigenous peoples. The Committee further encourages corporate business entities when engaging in economic land concessions to take into consideration their corporate social responsibility as it relates to the rights and well-being of local populations.

Cameroon, CERD/C/CMR/CO/15-18, 30 March 2010, para. 18

18. While taking note of the steps taken by the State party on behalf of indigenous forest-dwelling groups, the Committee is concerned by the attacks on indigenous people's land rights. It regrets that the land ownership legislation in force does not take into account the traditions, customs and land tenure systems of indigenous peoples, or their way of life. The Committee is particularly concerned by the abuse and assaults suffered by indigenous people at the hands of civil servants and employees of the national parks and protected areas. Furthermore, the Committee notes with concern that the course of the Chad-Cameroon pipeline has made indigenous populations more vulnerable and that only a small fraction of the Bagyeli indigenous population has benefited from the compensation plan (art. 5 (b) and (d)). The Committee recommends that the State party take urgent and adequate measures to protect and strengthen the rights of indigenous peoples to land. In particular, bearing in mind general recommendation No. 23 (1997) on the rights of indigenous peoples, the Committee recommends that the State party: (a) Establish in domestic legislation the right of indigenous peoples to own, use, develop and control their lands, territories and resources; (b) Consult the indigenous people concerned and cooperate with them through their own representative institutions, in order to obtain their free and informed consent, before approving any project that affects their lands, territories or other resources, in particular with regard to the development, use or exploitation of mineral, water or other resources;...

Guatemala, CERD/C/GTM/CO/12-13, 19 May 2010, para. 11

11. The State party's ratification of the International Labour Organization (ILO) Convention

concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) and its support for the United Nations Declaration on the Rights of Indigenous Peoples, notwithstanding the Committee, is deeply concerned about the growing tension among indigenous peoples occasioned by the exploitation of natural resources in the country. The situation surrounding the establishment of a cement plant in San Juan Sacatepéquez is a particularly serious case of this sort. The Committee reiterates its concern at the fact that the State party continues to allow indigenous peoples to be dispossessed of land that has historically belonged to them, even though title to the property in question has been duly recorded in the appropriate public registries, and that indigenous peoples' right to be consulted prior to the exploitation of natural resources located in their territories is not fully respected in practice. The Committee is also concerned that the traditional form of land tenure and ownership is not recognized under the State party's domestic laws and that the State party has not adopted the necessary administrative measures to guarantee this form of tenure (art. 5 (d) (v)).

The Committee recommends that the State party: (a) Establish suitable procedures, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169, to effectively consult the communities that may be affected by development projects or the exploitation of natural resources with a view to obtaining their free, prior and informed consent. The Committee reminds the State party that the absence of implementing regulations for Convention No. 169 does not prevent it from conducting prior consultations. In the light of its general recommendation No. 23 (para. 4 (d)), the Committee recommends that the State party consult the indigenous population groups concerned at each stage of the process and that it obtain their consent before executing projects involving the extraction of natural resources; ...

Panama, CERD//C/PAN/CO/15-20, 19 May 2010, para. 14

14. The Committee notes with concern that on several occasions consultations concerning projects for the exploitation of resources, construction and tourism have been left in the hands of the private firms carrying out such projects. The Committee also notes with concern that the agreements reached through such consultations are partial and not in conformity with the international standards that should govern such agreements. It notes with serious concern that the balance of power in the negotiations and agreements weighs heavily against the indigenous communities. The Committee would like to cite as an example the case of the Chan 75 hydroelectric project. The Committee expresses its serious concern at the lack of effective mechanisms for consultation with the indigenous peoples, and highlights in particular the need to obtain prior, informed and voluntary consent for development projects, resource exploitation and tourism affecting their way of life.

The Committee recommends that the State party institute appropriate mechanisms, in conformity with international standards, and in particular article 5 of the International Labour Organization Indigenous and Tribal Populations Convention, 1957 (No. 107), which the State party has ratified, to conduct consultations with communities potentially affected by development projects and the exploitation of natural resources so as to obtain their prior, informed and voluntary consent. The Committee also recommends that the State

party should not delegate its responsibility in the process of consultation, negotiation and compensation in such situations to the third party concerned, the private enterprise.

Bolivia (Plurinational State of), CERD/C/BOL/CO/17-20, 8 April 2011, para. 20

20. While recognizing the existence of the constitutional right to consultation of the indigenous original campesino and Afro-Bolivian peoples and nations, the Committee is concerned at the difficulties surrounding the exercise of this right in practice. It is concerned at the lack of regulations governing consultations with the above-mentioned peoples and nations in all sectors other than the hydrocarbons industry. It is also concerned at the fact that, even where mechanisms have been set up for consultations for the purpose of obtaining the free, prior and informed consent of the communities, such consultations are not carried out systematically with regard to natural resource development projects or regional infrastructure projects. In this connection, the Committee expresses its concern at the violation of the constitutional right of consultation in respect of the Coro Coro mining project (arts. 5 and 6).

The Committee urges the State party to establish practical mechanisms for implementing the right to consultation in a manner that respects the prior, free and informed consent of the affected peoples and communities and to ensure that such consultations are carried out systematically and in good faith. It also recommends that impact studies be carried out by an independent body before authorization is given for natural resource exploration and production in areas traditionally inhabited by indigenous original campesino and Afro-Bolivian peoples and nations. It also recommends that the State party request technical assistance from the Office of the United Nations High Commissioner for Human Rights and from the International Labour Organization to that end. The Committee further recommends that the indigenous original campesino and Afro-Bolivian peoples and nations be guaranteed access to the courts or to any special independent body established for this purpose so that they may defend their traditional rights, their right to be consulted before concessions are awarded and their right to receive fair compensation for any harm or damage suffered.

Canada, CERD/CAN/CO/19-20, 9 March 2012, para. 20

20. The Committee is concerned about reports according to which the right to consultation as provided in legislation and the right to prior, free and informed consent to projects and initiatives concerning Aboriginal peoples, are not fully applied by the State party, and may be subject to limitations. It is also concerned that Aboriginal peoples are not always consulted for projects conducted on their lands or which affect their rights and that treaties with Aboriginal peoples are not fully honoured or implemented. The Committee is further concerned that Aboriginal peoples incur heavy financial expenditures in litigation to resolve land disputes with the State party owing to rigidly adversarial positions taken by the State party in such disputes. While acknowledging that the Special Claims Tribunal constitutes a positive step, the Committee is concerned at reports that

this tribunal does not resolve disputes on treaty rights for all First Nations and does not provide for all guarantees for a fair and equitable settlement (art. 5).

In light of its General Recommendation no. 23 (1997) on the rights of indigenous peoples, the Committee recommends that the State party, in consultation with Aboriginal peoples:

(a) Implement in good faith the right to consultation and to free, prior and informed consent of Aboriginal peoples whenever their rights may be affected by projects carried out on their lands, as set forth in international standards and the State party's legislation;

(b) Continue to seek in good faith agreements with Aboriginal peoples with regard to their lands and resources claims under culturally-sensitive judicial procedures, find means and ways to establish titles over their lands, and respect their treaty rights;

(c) Take appropriate measures to guarantee that procedures before the Special Tribunal Claims are fair and equitable and give serious consideration to the establishment of a Treaty Commission with a mandate to resolve treaty rights issues.

Laos, CERD/LAO/CO/16-18, 9 March 2012, paras. 17 & 18

17. The Committee regrets that it has not been given information during the dialogue as to how communities' free prior and informed consent is ensured in practice in the implementation of projects that affect the use of their lands and resources, in particular in the implementation of development projects, such as the building of hydropower stations, extractive activities or in the context of land concessions and the establishment of economic special zones (art. 5(e)).

The Committee urges the State party to ensure that the right of communities to free prior and informed consent is respected in the planning and implementation of projects affecting the use of their lands and resources. The Committee calls upon the State party to ensure that communities have the capacity to effectively represent their interests in decision-making processes. The Committee also recommends that the State party take all measures to ensure that communities have effective access to redress. ...

18. The Committee notes the development objective of the relocation policy which aims to cluster and settle scattered ethnic communities of the mountainous areas in lowland villages with better access to public services and infrastructure. The Committee further notes the affirmation by the State party that communities concerned by relocation projects have been consulted prior to resettlement and that these relocations have been made on a voluntary basis. At the same time, the Committee is seriously concerned that the implementation of the policy has uprooted communities who have also been forced to adopt new lifestyles and livelihoods. Moreover, the Committee regrets that it has not received information as to how alternatives to relocation as well as consideration of ethnic groups' ties to land have been taken into account in the implementation of the policy (arts. 5(e) and 1).

consider all possible alternatives to relocation and to pay attention to the cultural ties of certain ethnic groups to their land. Moreover, the Committee recommends that the State party provide opportunities for smaller ethnic groups to define development in their own terms and to contribute to decision-making as to how development is operationalized. ...

Mexico, CERD/C/MEX/Q/16-17, 4 April 2012, para. 17

17. The Committee notes that the National Commission for the Development of Indigenous Peoples has a system for consultations with indigenous peoples, based on articles 2 and 26 of the Constitution and the Act on the National Commission for the Development of Indigenous Peoples. However, it is concerned that this consultation system does not incorporate the concept of “free, prior and informed consent”. The Committee expresses its deep concern at the growing tensions between outsiders and indigenous peoples over the exploitation of natural resources, especially mines. The Committee reiterates its concern at reports of conflict on lands traditionally owned by indigenous peoples and at the failure, in practice, to fully respect their right to be consulted before work starts on exploiting the natural resources in their territories. The Committee also notes that there are three proposals for laws on the subject and regrets that it has been given no detailed information on them. The Committee is also concerned about the need for administrative measures to safeguard traditional forms of land tenure and ownership (art. 5 (d) (v)).

In light of its general recommendation No. 23 (1997), the Committee recommends that the State party should:

- (a) Ensure that effective consultations are carried out at each stage of the process with communities likely to be affected by projects to develop and exploit natural resources, with the aim of obtaining their free, prior and informed consent, particularly in the case of mining projects. It also recommends that everything possible be done to expedite the adoption of a law on the subject, and reminds the State party that the absence of implementing regulations for the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169), is no obstacle to holding prior consultations;
- (b) Promote forums where government representatives can actively participate in different discussion groups with indigenous peoples, ensuring that these lead to concrete, viable and verifiable agreements that are properly implemented; and also encourage the use of alternative dispute-settlement methods in line with international standards in the field of human rights and the rights of indigenous peoples; ...

Vietnam, CERD/VNM/CO/10-14, 9 March 2012, para. 15

15. The Committee notes with concern the displacement of minorities and the confiscation of ancestral lands without prior consent and appropriate compensation for confiscated lands (art. 5).

The Committee calls on the State party to adopt measures to safeguard indigenous rights over ancestral lands and pursue efforts, together with communities affected, towards adequate resolution of land disputes including the provision of appropriate compensa-

tion, giving due consideration in this respect to general recommendation No. 23 (1997).

Fiji, CERD/FJI/CO/18-20, 31 August 2012, para. 17

17. The Committee regrets that the Draft Law on Consultation and Participation faces an impasse in the National Assembly. The Committee reminds the State party that the lack of regulation for ILO Convention 169 does not preclude its application, and it notes with concern the absence of a systematic and regulated implementation of effective consultation with indigenous peoples, with the aim of obtaining their prior, free and informed consent relating to natural resource extraction or other issues that may affect them. The Committee is also concerned about public declarations on the importance of extraction projects for the economic development of the State party and justifying the lack of consultation with Indigenous Peoples, Afro-Descendants, Montubios and other relevant groups. Despite the absence of convictions, the Committee is concerned about a tendency towards arbitrary detentions and unfounded allegations facing mainly indigenous leaders when organising or taking part in social protests, particularly in the context of laws and policies that govern the use of natural resources and the right to effective consultation with a view to obtaining consent (Article 5 (b), (d) inc. v, ix and (e)).

In the light of its general recommendation No.23 (1997) on the rights of indigenous peoples, the Committee calls upon the State party to increase its efforts to establish mechanisms for constructive dialogue and participation, and urges it to implement the necessary measures to establish effective consultation processes with affected communities, according to international standards, for any project that may affect indigenous people's territory or have an impact on their livelihood. ...

Finland, CERD/FIN/CO/20-22, 31 August 2012, para. 13

13. While noting information provided by the State party, in particular the adoption of the Mining Act and the Water Act and the intention of the State party to clarify the legislation on the land rights of the Sámi people, the Committee is concerned that the land rights of the Sámi people have not been satisfactorily settled and that various projects and activities, such as mining and logging, continue to be carried out in the traditional lands of Sámi people without their prior, free and informed consent. The Committee is also concerned that Finnish law empowers reindeer cooperatives, the majority of whose members practice modern reindeer farming rather than traditional Sámi reindeer husbandry, to take decisions by majority vote that can severely undermine the ability of Sámi reindeer herders to carry out their traditional occupations. The Committee is particularly concerned by the decision of the Ivalo reindeer cooperative, recently upheld by the Supreme Administrative Court, to require four Sámi reindeer herders in the Nellim area to slaughter almost their entire herds (art. 5).

In line with its General recommendation no. 23 (1997) on the rights of indigenous people, the Committee recommends that the State party find an adequate negotiated solution to the dispute regarding the rights of Sámi people in their traditional lands, including by

revising its legislation on this issue. In doing so, the Committee recommends that the State party take into account the ILO Convention no. 169, which the State party has committed to ratify. The Committee further recommends that the State party take appropriate measures to protect the Sámi traditional livelihood of reindeer husbandry.

Thailand, CERD/THA/CO/1-3, 31 August 2012, para. 16

16. The Committee is concerned that the various forestry and environment protection laws may have a discriminatory effect on ethnic groups living in forests. The Committee is also concerned that it has not been assured how their free and prior informed consent is guaranteed in decision-making processes affecting them (arts. 1, 2 and 5).

Notwithstanding the Constitutional Court decision No. 33/2554 of November 2011, the Committee urges the State party to review the relevant forestry laws in order to ensure respect for ethnic groups' way of living, livelihood and culture, and their right to free and prior informed consent in decisions affecting them, while protecting the environment.

● **Decisions**

Decision 2 (54) on Australia: A/54/18, 18 March 1999, para. 9

9. The lack of effective participation by indigenous communities in the formulation of the amendments also raises concerns with respect to the State party's compliance with its obligations under article 5(c) of the Convention. Calling upon States parties to "recognize and protect the rights of indigenous peoples to own, develop, control and use their common lands, territories and resources," the Committee, in its general recommendation XXIII, stressed the importance of ensuring "that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent."

Decision 1(67) on Suriname: CERD/C/DEC/SUR/4, 18 August 2005 (Early Warning & Urgent Action Procedure), para. 3

3. The Committee expresses deep concern about information alleging that Suriname is actively disregarding the Committee's recommendations by authorizing additional resource exploitation and associated infrastructure projects that pose substantial threats of irreparable harm to indigenous and tribal peoples, without any formal notification to the affected communities and without seeking their prior agreement or informed consent.

Decision 1(69) on Suriname: CERD/C/DEC/SUR/3, 18 August 2006 (Early Warning & Urgent Action Procedure), para. 1

1. The Committee, recalling its Decisions 3 (66) of March 2005 and 1 (67) of August 2005 on Suriname, reiterates its deep concern about information alleging that the State party has authorized additional resource exploitation and associated infrastructure projects that pose substantial threats of irreparable harm to indigenous and tribal peoples,

without any formal notification to the affected communities and without seeking their prior agreement or informed consent.

● **Early Warning & Urgent Action Procedures (EW/UA)**

Australia, 18 August 2006, (EW/UA)

In this spirit, the Committee would like to draw the State party's attention to the observations mentioned below. The Committee requests that comments and responses on action taken from the State party on these issues be included in its 15th to 17th periodic reports, to be submitted in a single document on 30 October 2008. ... *Paragraph 11 of the Concluding observations.* The Committee takes note of the new forms of consultation of indigenous peoples carried out by the Australian authorities, in particular the Regional Partnership Agreements and the Shared Responsibility Agreements. It remains concerned, however, that the abolition of ATSIC resulted in an overall lessening of the participation of indigenous peoples in decisions concerning them. The Committee further reiterates its recommendation that the State party, due to the specific situation of indigenous peoples, should take decisions directly relating to their rights and interests with their informed consent, and draws again the attention of the State party to its General recommendation 23 (1997) in this regard. The Committee takes this opportunity to reiterate the importance of a continuous dialogue between governmental authorities and indigenous peoples, and recommends that the State party ensure that relevant fora are available for such dialogue.

Belize, 7 March 2008, (EW/UA)

According to this information, the Maya people of Belize suffer from a persistent pattern of racial discrimination, and Mayan subsistence, culture and way of life may suffer irreparable harm. In particular, the Committee is preoccupied by reports regarding privatization and leasing of land without the prior consultation or consent of the Maya people, as well as the granting of concessions for oil development, logging and the production of hydro-electricity.

..the Committee requests the State party to submit replies to the following questions as a matter of urgency and no later than 1 July 2007:...3. Please provide information on measures taken by the State party to consult and seek consent of the Maya people in decisions affecting them and their land;...

Brazil, 7 March 2008, (EW/UA)

In view of the information at its disposal, however, the Committee remains extremely preoccupied by the situation of the RSS which has not improved since the Committee last considered the matter during its previous session in August 2007 and wishes to receive clear information from the State party on the following:... 4. The process to obtain the free, prior and informed consent of the indigenous peoples in the RSS with regard to the project to explore hydroelectric resources in this indigenous land. While noting that the State party considers that this project has "a very limited possibility of being constructed" (last paragraph of the information received on 5 March), the Committee wishes to be

informed if this consultation has been completed prior to presenting the project to the House of Representatives of the National Congress, pursuant to paragraph 3 of article 231 of the Brazilian Constitution.

Brazil, 15 August 2008, (EW/UA)

The Committee would like to recall its letter of 7 March 2008, by which, in accordance with article 9 (1) of the Convention and article 65 of its Rules of Procedure, it requested the State party to provide detailed information, no later than 30 June 2008, with respect to issues in connection with the indigenous land of Raposa Serra do Sol, in particular regarding remaining legal or judicial impediments that might prevent the full implementation of the Presidential Decree of 15 April 2005; measures taken to ensure a peaceful removal of all illegal occupants, and the exact dates for the completion of this process; as well as the process to obtain free, prior and informed consent of the indigenous peoples concerned with regard to the project to explore hydroelectric resources in this indigenous land. ...

Canada, 15 August 2008, (EW/UA)

To date, the Committee has not received any information from the State party in this respect. Meanwhile, however, the Committee has been made aware of the unresolved dispute concerning the North Central Corridor Pipeline (TransCanada Corporation) between the Lubicon Lake Indian Nation and the federal and provincial governments. The information received points to a lack of clarity with regard to the land rights over territory through which the Pipeline would be routed, and therefore to doubts as to whether the Government of Alberta and the Alberta Utilities Commission may legitimately authorise the construction of a pipeline across Lubicon Territory without prior Lubicon consent.

Guatemala, 15 August 2008, (EW/UA) (unofficial translation)

In regard to paragraph 19 of the concluding observations: The Committee accepts the information presented by the State party regarding the legislative framework for the consultation procedure. However, the Committee notes that the State party does not directly refer to the recommendation contained in paragraph 19. As such, the Committee requests information on (i) the efforts that the State party has made to obtain informed consent from indigenous peoples in regard to decisions that are directly related to their rights and interests; (ii) the progress that has been made on the adoption of the Regulatory Law on the Consultation Procedure; (iii) the result of the consultations made thus far; and (iv) whether or not the State party has respected the communities' decisions.

Guyana, 24 August 2007, (EW/UA)

The Committee, therefore, wishes to recall the following: ... In paragraph 19 of its concluding observations, the Committee urged the State party to ensure the availability of adequate medical treatment in hinterland areas, in particular those inhabited by indigenous peoples, by increasing the number of skilled doctors and of adequate health facilities in these areas, by intensifying the training of health personnel from indigenous communities, and by allocating sufficient funds to

that effect. Furthermore, the Committee recommended the State party to undertake environmental impact assessments and seek the informed consent of concerned indigenous communities prior to authorizing any mining or similar operations which may threaten the environment in areas inhabited by these communities. The Committee has not received any specific information on the access to health services in the mentioned areas. It has received, however, information that would indicate a continued lack of respect for the interests of the indigenous population in a clean environment. The Committee has for example been informed that small – and medium – scale miners have been granted one more year of grace from provisions regulating the discharge of waste water into rivers and creeks used by indigenous communities. The Committee has also received information about large scale mining projects in territories traditionally used by indigenous peoples where consent was not sought, for example in the North Pakaraima Mountain area. (Note: The same was reiterated again in *Guyana, 24 August 2007 Follow Up (Letter)*)

India, 15 August 2008, (EW/UA)

To date, the Committee has not received any information from the State party in this respect. On the other hand, the Committee has been made aware of the imminent construction of the Tipaimukh dam in Manipur, the Lower Subasiri dam in Arunchal Pradesh and other dams on indigenous territories, allegedly without the free prior informed consent of the affected indigenous communities, resulting in the forced resettlement and endangering of the traditional lifestyles of those communities. In this regard, the Committee recalls paragraph 19 of its concluding observations, in which it recommended that the State party “seek the prior informed consent of communities affected by the construction of dams in the Northeast or similar projects on their traditional lands in any decision- making processes related to such projects, and provide adequate compensation and alternative land and housing to those communities.”

Peru, 7 March 2008, (EW/UA) (unofficial translation)

In this sense, and in order to guide the review of the situation by the Committee under its early warning and urgent action procedures, the Committee hereby requests information on the following matters:...c) Please provide detailed information on current legislation on the exercise of the right to consultation and free and informed consent in the exploration and exploitation of natural resources in traditional territories and its application.

Philippines, 24 August 2007, (EW/UA)

The Committee notes with appreciation the adoption of the Indigenous Peoples Rights Act in 1997 which requires the free, prior and informed consent of indigenous communities for any development projects on their ancestral lands. The Committee notes with concern, however, that, according to the information received, the Act has not been implemented to date...

The Committee would welcome the initiation of a constructive dialogue with the State party on these issues and, in accordance with article 9, paragraph 1, of the Convention and rule 65 of its Rules of Procedure, wishes to receive detailed responses and comments to the questions below: ...3. Please comment on the information according to which

amendments introduced in 2002 and 2006 to the 1998 Implementing Rules and Regulations impose restrictions in relation to the time- frame and process required to obtain the free and prior informed consent the phrase again of indigenous communities which are not in conformity with the customs, laws and traditional practices of these communities.

Philippines, 7 March 2008, (EW/UA)

In view of new information at its disposal, however, the Committee remains preoccupied by the situation of the community of the Subanon of Mount Canatuan. It notes with concern that the situation has not improved and, in accordance with article 9 (1) of the Convention and article 65 of its rules of procedure, it requests from the State party further clarification and additional information in relation to the following issues already raised in August 2007:... whether the amendments introduced in 2002 and 2006 to the 1998 Implementing Rules and Regulations impose restrictions in relation to the timeframe and process required to obtain the free and prior informed consent of indigenous communities;... Furthermore, the Committee is concerned about information suggesting that the situation of the community of the Subanon of the Mount Canatuan is not an isolated case, but that it is rather indicative of similar situations faced by other indigenous communities in the State party. In this context, the Committee wishes to recall that the free, prior and informed consent of indigenous communities for any development projects on their ancestral lands is required under the State party's 1997 Indigenous Peoples Rights Act.

Canada, 13 March 2009, (EW/UA)

The following issues have recently been brought to the attention of the Committee: (1) increased development in indigenous territories in British Columbia without the informed consent of Indigenous Peoples and (2) the privatization of traditional lands for the benefit of mining and energy companies with informed consent of the citizens of Kitchenuhmanykoosib Inninuwig:

(1) Concerning the developments in indigenous territories in British Columbia, the Committee has been made aware of the following situations:

- According to information submitted, "Sun Peaks Ski Resort Real Estate Market Area", in connection with the 2010 Winter Olympics, wishes, to enlarge ski resorts in British Columbia on Aboriginal land and build a large number of houses and apartments. According to the reports, this is taking place without the informed consent of Indigenous Peoples and indigenous people participating in protests have been arrested;
- According to information submitted, the British Columbia Treaty Commission is engaged in a process of negotiation with Indigenous Peoples which would result in the modification of aboriginal land rights and their conversion into fee simple titles, e.g. for Xaxli's First Nation, Lhedili Tènnèh and Tsawwassen. Questions have been raised as to whether the negotiation processes meet the standards of fairness and transparency.

(2) Concerning the privatization of traditional lands, the Committee has been made aware of the Kitchenuhmanykoosib Inninuwig case, whereby it is claimed that the State party

and the province of Ontario are intent on privatizing traditional lands and turning them over to mining and energy companies. The Committee was informed that these actions are being taken without the informed consent of the citizens of Kitchenuhmanykoosib Inninuwig. Furthermore, the sources report that several citizens of Kitchenuhmanykoosib Inninuwig were jailed for failure to remove themselves from their traditional territory.

India, 13 March 2009, (EW/UA)

The construction of several dams in the region of Northeast India remains an issue of concern for the Committee with regard to the consequences for the indigenous communities of the region. Indeed, it has recently been brought to the attention of the Committee that the Indian government (Ministry of Environment and Forests) has issued an “environmental clearance permit” allowing for the construction of the Tipaimukh dam without meaningfully seeking to obtain prior consent of the affected indigenous peoples. The Committee therefore reiterates its request for the State Party to submit comments on the implementation of the recommendations contained in paragraph 19 of its concluding observations and in particular to provide detailed information on the compensation measures for the affected persons.

Indonesia, 13 March 2009, (EW/UA)

In this regard, the Committee recalls paragraph 17 of its concluding observations, in which it recommended that the State party “secure the possession and ownership rights of local communities before proceeding further” with the Kalimantan Border Oil Palm Mega-project. The committee also recommended in paragraph 17 that “the State Party should ensure that meaningful consultations are undertaken with the concerned communities, with a view to obtaining their consent and participation in [the project].”

Nepal, 13 March 2009, (EW/UA)

In this regard, the Committee wishes to recall its General Recommendation No. 23 on Indigenous Peoples (18/08/97). By paragraph 4 (d) of this General Recommendation, States parties are reminded to “ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent”.

Peru, 13 March 2009, (EW/UA)

In reference to the case of the Pueblo Achuar and other affected indigenous peoples by the exploitation of hydrocarbons in the Corrientes River, the Committee is still worried by the alleged and continuous violations to the rights of the Achuar people and the slowness that characterizes the measures taken by the State party to remedy such situation. According to certain information, to this moment no action has been taken by the State party to implement the Dorissa Accord of October 2006 between the government, the oil company Pluspetro and the indigenous communities of the Corrientes river aimed to remedy the health problems of the inhabitants of the Achuar people and its environment. According to

the same source, the government has not taken any type of action to reform the internal law that still does not comply to the rights of indigenous peoples to their lands, natural resources and to consultation and free, prior and informed consent. Such information indicates that the State also has not issued a moratorium at the start or continuation of the additional hydrocarbon activities in the lands of the Achuar concerning the lots 101, 102, 104, 106, 123, 127 and 143. In this regard, the Committee would thank to receive a response, information or clarification of the above-mentioned situation, before July 31st 2009.

Niger, 28 September 2009, (EW/UA)

In light of the above, the State Party is requested to furnish the Committee with the necessary information to enable it to gain a better understanding of the situation of the Tuareg peoples and of the uranium mining on their territory. In particular, the Committee would appreciate receipt of information on the environmental and social impact assessments carried out for the new agreement with AREVA, as well as on the measures taken to conduct consultations with the affected communities in order to obtain their prior and informed consent to these mining activities.

Indonesia, 28 September 2009, (EW/UA)

In the letter, reference was made in particular to the “Regulation on Implementation Procedures for Reducing Emissions from Deforestation and Forest Degradation” (REDD), adopted within the framework of the United Nations Framework Convention for Climate Change. According to information received, the property rights of indigenous peoples over traditional lands were not appropriately taken into account in the formulation of the forest Carbon Partnership Facility without having secured the meaningful participation or consent of indigenous peoples. Thus, the Committee, after having preliminarily considered the matter under its early warning and early action procedure, expresses concern that indigenous peoples’ rights to their lands, territories and resources may not be sufficiently recognized and protected in the process.

India, 28 September 2009, (EW/UA)

The Committee wishes to reiterate its concern with regard to the impact of dam projects on the indigenous communities of that region, in particular in light of information that the Government has not issued an “environmental clearance permit” allowing for the construction of the Tipaimukh dam without meaningful efforts to obtain proper informed consent of the affected communities. Also, with regard to the application of the Armed Forces Act (Special Powers), the Committee wishes to reiterate its call to repeal it. The Committee thus reiterates its request for comments from the State party on the issues that have been highlighted in the aforementioned letters.

Niger, 12 March 2010, (EW/UA)

In light of the above, I request that you furnish the Committee with the supplementary informa-

tion it requires to gain a complete understanding of the situation of the Tuareg peoples and the uranium mining activities on their territory. The Committee would appreciate the State Party's clarification of the extent to which the Tuareg peoples were consulted and of the extent to which their free and prior consent was explained and sought with regard to their approval of the planned mining activities. The Committee would also appreciate receipt of information indicating whether, within the context of the above-mentioned plans as well as with regard to mining activities, the Tuareg indigenous peoples have received any form of compensation as provided for in the State Party's mining legislation and if so, the extent of such compensation. With regard to the impacts on health and the environment, the Committee advises the State Party to conduct an independent study and, in particular, to use the services of an independent international institution. Finally, the Committee would appreciate receiving information from the State Party with regard to the submission of its overdue periodic reports.

Botswana, 12 February 2010, (EW/UA)

The Committee recalls that, in 2005, it was already concerned about the persistent allegations that residents of the Central Kalahari Game Reserve were forcibly removed through such measures as the termination of basic and essential services inside the Reserve, the dismantling of existing infrastructures, the confiscation of livestock, harassment and ill-treatment of some residents by police and wildlife officers, as well as the prohibition of hunting and restrictions on freedom of movement inside the Reserve. It then recommended the State party to pay particular attention to the close cultural ties that bind the San/Barsawa to their ancestral land; to protect the economic activities of San/Barsawa that are essential elements of their cultural life, such as hunting and gathering practices; to study all possible alternatives of their relocation; and to seek the free, prior, and informed consent of the persons and groups concerned (CERD/C/BWA/CO/6, par. 12).

Brazil, 31 May 2010, (EW/UA)

The Committee wishes to further remind the State party of the importance of obtaining free, prior and informed consent of the indigenous peoples in the RSS with regard to any measure or project that might affect their livelihood. In this light, it requests information from the State party as to whether their consent has been sought regarding plans to build new dams along the Cotingo River (based on legislative decree No. 2540/2006), plans to build the Paredao hydroelectric facility on the Mucajai River in Roraima, and the establishment of Monte Roraima National Park.

India, 12 March 2010, (EW/UA)

In this regard, the Committee reiterates its request to the State party to provide, in accordance with article 9(1) of the Convention on the Elimination of All Forms of Racial Discrimination and article 65 of its rules of procedure, information on the situation of the Dongria Kondh people and on natural resource exploitation projects in the area concerned. The Committee would similarly appreciate to be informed on whether environmental and social impact assessments have been carried out for the new bauxite mine, and which measures or mechanisms have been taken to consult the affected communities in order

to seek and clearly and fully obtain their prior free and informed consent to these mining activities. In addition, the Committee would appreciate to be informed on measures taken to ensure adequate representation of the Dongria's views in legal proceedings, as well as plans to allow their continued access to their religious site.

Peru, 13 March 2010, (EW/UA)

The Committee wishes, to recall that in its concluding observations adopted on 24 August 2009 (CERD/C/PER/CO/14-17; par. 21), it encouraged the State party to make every possible effort to ensure that the Dorissa Agreement concerning the Achuar people affected by oil-drilling in the Rio Corrientes area is implemented without delay and to prevent similar cases from occurring in future oil-drilling projects. The Committee wishes also to recall that in its concluding observations (par 14 and 15), it reiterated its concern about the considerable tension due to the exploitation of subsoil resources of the traditional territories of the indigenous peoples who, in some cases, have not been consulted or given their prior, free and informed consent to mining activities.

Niger, 27 August 2010, (EW/UA)

Following its 76th session, the Committee wrote to you on 12 March 2010, requesting Niger to furnish the supplementary information required to gain a complete understanding of the situation of the Tuareg peoples and of the uranium mining activities on their territory. The Committee requested the State Party to clarify the extent to which the Tuareg peoples had been consulted and the extent to which their free and prior consent had been explained and sought with regard to their approval of the planned mining activities. The Committee also asked for information indicating whether, within the context of the planned mining activities, the Tuareg indigenous peoples have received any form of compensation as provided for in the State Party's mining legislation and if so, the extent of such compensation. With regard to the impacts on health and the environment, the Committee had advised the State Party to conduct an independent study and, in particular, to use the services of an independent international institution. Finally, the Committee had sought information from the State Party regarding the submission of its overdue periodic reports.

Chile, 27 August 2010, (EW/UA)

With regard to paragraph 22 of the concluding observations: the Committee happily welcomes the information given by the State party on the legislative framework for the recognition of indigenous peoples right to natural resources within their lands and territories. However, the Committee notes that the State party makes no direct reference to the recommendation in paragraph 22 on effective consultation with indigenous peoples. The Committee reiterates that the State party should consider the Committee's general recommendation 23. Likewise, the Committee would be grateful to receive additional information on (i) efforts made by the State party to undertake affective consultation with indigenous peoples; (ii) obtaining prior, informed consent from the indigenous peoples when taking decisions directly related to their rights and interests before implementa-

tion of projects for the extraction of natural resources, in accordance with international standards. Finally, the Committee would appreciate it if the State party could include in its next report information relating to the regulatory framework for state investments and the exploitation of the subsoil resources on indigenous lands.

With regard to paragraph 23 of the concluding observations: the Committee thanks the State party for the information regarding the environmental impacts affecting the indigenous peoples, and for the recently established Ministry of Environment and the Environment Superintendency, which establish the procedures for the evaluation of the environmental impacts. The Committee notes with satisfaction that the studies commissioned by the State party with four universities reflect a willingness to better adjust the national legislation on land, water, mining and other sectors to the Indigenous Peoples Law (No. 19.253) and to guarantee that the protection of the rights of indigenous peoples prevails over commercial and economic interests.

The Committee regrets that the follow-up report does not include information with regard to consultation or consent from persons in affected communities. The Committee would appreciate updated information on new and various initiatives to enable consultation with indigenous peoples, in order to facilitate their participation in decision making-processes, obtain their consent, as well as new legislation and reports on the evaluations of environmental impacts and their findings. The Committee notes with concern that there are still situations where there is no consultation and participation, and recommends the State party find ways to facilitate this participation. Likewise, the Committee recommends that the State party take into account the participation of indigenous peoples and guarantees the provision of internal remedies in cases of violations of indigenous peoples' rights. Likewise, the Committee reiterates its urgent recommendation that Chile adopt immediate measures to resolve the problem of waste dumps established without the prior consent Mapuche communities about which the Committee has not obtained updated information.

Costa Rica, 27 August 2010, (EW/UA)

The committee requests that the State party provide information on the measures taken to ensure the effective participation of the Térraba people and the other indigenous peoples whose decisions regarding all aspects and stages of the dam Diquís plan has been affected, and to obtain the free, prior and informed consent in relation to this project. In this regard, the Committee requests the State party to provide additional and updated information on efforts taken to implement the concluding observations in regard to the Térraba people.

Costa Rica, 11 March 2011, (EW/UA)

Therefore, the Committee requests that the State party provides information about the progress of the Diquis project and the decisions taken in that regard. In this context, it is required that the State party pays special attention and informs about the measures taken to guarantee the rights of indigenous peoples, including their consultation, prior and informed consensus and participation in all the stages of the project, and the respect to their territories and culture.

Ethiopia, 2 September 2011, (UA/EW)

The committee requests the State party to provide information on measures taken to conduct an independent assessment of the negative effects of the construction of the Gibe III dam and the Kuraz Sugar projects on the livelihood of the South Omo peoples; as well as details on measures taken to consult them or to seek their prior, free and informed consent before carry out such projects.

The committee also requests the State party to provide information on the situation of Mazenger and other indigenous peoples of Gambella and on measures taken to consult them in effective and appropriate manner.

Indonesia, 2 September 2011, (EW/UA)

I write to inform you that in the course of its 79th session, the Committee considered the information on allegations on the threatening an imminent irreparable harm for the Malind and other indigenous people of the District of Meruake, Papua Province, due to the reportedly massive and non-consensual alienation of their traditional lands by the Meruake Integrated Food and Energy Estate project (called the MIFEE project), on a preliminary basis, under its early warning and urgent action procedure, in light of information submitted by a non-governmental organization...

In light of this information, the committee would like to request information on measures taken by the State party to implement the recommendations set out in paragraph 22 of its concluding observations (CERD/C/IND/CO/3) of 15 August 2007, as well as information requested in its letter dated 28 September 2009. The Committee would also like to request information on measures taken to effectively seek the free, prior and informed consent of Malind and other indigenous peoples in Papua before carrying out the MIFEE project; and as to whether the State party has conducted an environmental impact assessment on the traditional habits and livelihood of Malind and others, as well as the impact of the transmigration over their capacity to survive as a minority. The committee would further like to request that the State party consider inviting the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples.

Papua New Guinea, 11 March 2011, (EW/UA)

The Committee urges the state party to provide information to the Committee on measures taken or envisaged to ensure that the application of the Land Act (1996) does not result to alienation of lands belonging to indigenous peoples; measures to ensure that all leases are granted with prior and informed consent of indigenous peoples; and measures taken to grant indigenous landowners access to justice and an effective remedy in case of violation of their rights.

Peru, 2 September 2011 , (EW/UA) (unofficial translation)

I am writing to thank you for the information provided to the Committee on the 21st of February 2011, in reply to the letter dated 27 of August 2010 in which the Committee

referred to the review of the situation of Indigenous Peoples in Urania District, Loreto Province, in the Peruvian Amazon.

In this respect, the Committee, during its 79th session, continued its review of the situation under the CERD's early warning and urgent action procedure and expresses its serious concern about the fact that all the measures taken to remedy the spill have been left in the hands of the companies, and that the Committee didn't receive a report on the water quality studies relating to the Marañón River. The Committee also expresses its serious concern regarding the fact that indigenous communities were apparently not consulted prior to the activities carried out in their territories by the mentioned companies, and also about the possibility that such a situation might continue in the future. The Committee expresses its extreme concern at reports indicating that the Contingency Plans of the companies responsible for the oil spill did not have the approval of the Ministry of Environment of the State party.

In this respect, the Committee respectfully requests the State party to provide it with information on:

- Measures adopted to monitor and ensure the water quality of the Marañón River;
- Measures taken to ensure the right to free, prior and informed consent of the indigenous communities affected by the activities of companies like Pluspetrol, in particular taking into account the fact that the State party has ratified ILO Convention 169; ...
- Measures adopted or to be adopted to ensure that consultations and dialogues with indigenous communities are held in a way that will protect their rights and involve measures necessary to remedy any power differential which may arise.

Suriname, 20 September 2011, (EW/UA)

The Committee would like to recall its decisions 3 (62) of 3 June 2003, 1 (67) of 18 August 2005 and 1 (69) of 18 August 2006 (copies attached for ease of reference) adopted under its early warning and urgent action procedures related to the serious violations of the rights of indigenous peoples, the failure to recognize their rights to lands and resources, the refusal to consult them and to seek their prior, free and informed consent when granting mining concessions to foreign companies whose activities would have threatened their livelihood, as well as recommendations made accordingly.

Finland, 11 March 2011, (EW/UA)

Paragraph 14 of the Concluding Observations. The Committee thanks the State party for the information provided and appreciated the frankness of its response. The Committee welcomes the efforts taken by the state party to enact laws which take into account the rights of Sami. In particular, the Committee notes with appreciation that the Mining and water Acts contain provisions to strengthen the right to participate of the Sami as

indigenous peoples and allow them to appeal against decisions which do not take into account their rights. The Committee encourages the State party to continue with legislative reforms reinforcing the rights of the Sami and requests the State party to include updated information in its next periodic report on the reforms implemented.

The Committee regrets the absence of information on the proposed establishment of a new preparatory body in charge of reaching a solution for the issue of the right to land use in the Sami Homeland. In this regards, the committee encourages the State party to take into account the Committee's general recommendation No.23 on the rights of indigenous peoples which calls upon States parties to recognize and protect the rights of indigenous peoples own, develop, control and use their communal lands, territories and resources and requests further information to be included in the next periodic report.

Peru, 3 November 2011, (EW/UA) (unofficial translation)

With respect to paragraph 20 of its concluding observations: While the Committee thanks the State Party for the information submitted, it regrets that no information has been included on the rights to consultation, nor on remedies or compensation with respect to damages suffered by the Ancomarca community. The Committee is concerned at the apparent failure of measures undertaken by the State party to ensure that there will be no further negative effects on those communities that have traditionally used resources around Tacna. The Committee reminds the State party that it is essential to obtain the free, prior, and informed consent of those communities affected, and urges the State party to consider its General Recommendation. The Committee respectfully requests that the State party include information on remedies for damages to the community in its next periodic report...

The Committee welcomes additional information on (i) efforts made by the State party to conduct effective consultation with indigenous peoples; (ii) obtaining informed consent of indigenous peoples, in line with international norms, when taking decisions directly related to their rights and interests, prior to the implementation of natural resources extraction projects; (iii) the regulatory framework for State investments in indigenous peoples' lands and the exploitation of subsoil resources.

Panama, 9 March 2012, (EW/UA) (unofficial translation)

The Committee refers to paragraph 20 of its Concluding Observations on Panama, adopted at its 76th session, in which the Committee urges the State party to step up measures to ensure the safety of indigenous leaders and communities faced with intimidation and persecution for asserting indigenous peoples' rights, specifically in connection with their opposition to major hydroelectric, mining and tourism projects. The Committee reiterates the recommendation to the State party in paragraph 14 of its Concluding Observations "to conduct consultations with communities potentially affected by development projects and the exploitation of natural resources with the objective of obtaining their free, prior and informed consent."

The Committee recalls the appeal of the Special Rapporteur on Human Rights, Professor James Anaya, and urges the State party to continue the dialogue with indigenous communities to resolve the current conflict in a peaceful way. The Committee also requests the State party to submit information on measures adopted to ensure the effective participation of indigenous communities in all decision-making processes that affect them, including discussions regarding the revision of the Mining Code, which allows the construction of hydroelectric dams in indigenous territories.

United States of America, 9 March 2012, (EW/UA)

In light of the information at its disposal, the Committee remains concerned at the potential impact of the Ski Resort Project on indigenous peoples spiritual and cultural beliefs. The Committee requests information about the process by the State party to obtain the free, prior and informed consent of indigenous peoples with regard to the project.

Australia, 9 March 2012, (EW/UA)

Paragraph 16 of the concluding observations. The Committee thanks the State party for the extensive information provided. It welcomes, in particular, the reinstatement of the Racial Discrimination Act and the State Party's commitment to organize consultations with Aboriginal peoples and communities on future plans to tackle disadvantage. Nevertheless, the Committee reiterates the need for the State party to always guarantee the free, prior and informed consent of the communities concerned notably by ensuring that these consultations are inclusive, translated into languages of indigenous peoples, and that they provide sufficient time for them to send their inputs.

Costa Rica, 31 August 2012, (EW/UA)

The Committee welcomes the positive measures implemented by the State party, especially by the Costa Rican Institute of Electricity (ICE), following concerns expressed by the Committee and recommendations issued by the Special Rapporteur on the Rights of Indigenous Peoples with regard to the situation of the Terraba people. The Committee notes ICE's initiatives to resume an open dialogue with the Terraba people and urges the State party to continue to take adequate measures to ensure that consultations are carried out with them in order to obtain their free, prior and informed consent with regard to El Diquis dam and the construction of related infrastructure.

● General Recommendations

General Recommendation No. 23: Indigenous Peoples (August 18 1997), para. 4(d)

"The Committee calls in particular upon States parties to (d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent"

Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169)

Article 6

1. In applying the provisions of this Convention, Governments shall:

(a) Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

(b) Establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

(c) Establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Article 15

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Article 16

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.

2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public

inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

Article 35

The application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.

(Guaranteeing that any State party to ILO 169 that has ratified other instruments requiring consent --like CERD or the ICCPR or ICESCR-- would need to comply with those instruments and their respective Committee jurisprudence requiring free, prior and informed consent)

The Convention on Biological Diversity

Art. 8(j): “Access to traditional knowledge, innovations and practices of indigenous and local communities should be subject to prior informed consent or prior informed approval from the holders of such knowledge, innovations and practices.”

United Nations Declaration on the Rights of Indigenous Peoples

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. 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.

Article 11(2)

States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 28(1)

Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories

and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

Article 29(2)

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.

Article 30(1)

Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

Article 32(2)

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.

REGIONAL TREATIES, CONVENTIONS AND DECLARATIONS

African Charter on Human and Peoples' Rights (Banjul Charter)

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (February 2010), paras. 226 and 291, available at <http://www.minorityrights.org/9587/press-releases/landmark-decision-rules-kenyas-removal-of-indigenous-people-from-ancestral-land-illegal.html> (interpreting State obligations under the Banjul Charter):

“In terms of consultation, the threshold is especially stringent in favour of indigenous peoples, as it also requires that consent be accorded;” and “the African Commission is of the view that any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.”

American Convention on Human Rights

Inter-American Commission of Human Rights, Report No. 27/98 (Nicaragua), at para. 142, cited in, The Mayagna (Sumo) Awas Tingni Community Case, Judgment on the Preliminary Objections of February 1, 2000, Inter-Am. Ct. H.R. Ser. C, No. 66 (2000).

The State of Nicaragua is actively responsible for violations of the right to property, embodied in Article 21 of the [American] Convention, by granting a concession to the company SOLCARSA to carry out road construction work and logging exploitation on the Awas Tingni lands, without the consent of the Awas Tingni Community.

Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of 28 November 2007. Series C No. 172, paras. 127, 129, 133-34, & 158.

A State may restrict the use and enjoyment of the right to property where the restriction “does not deny their survival as a tribal people” and where the limitations are: “a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society.” (para. 127)

- To guarantee that such restrictions do not amount to a denial of their traditions, customs and endanger their survival, the State must:

- a. Ensure the “effective participation” of indigenous peoples “in conformity with their customs and traditions;”

- b. Guarantee indigenous peoples receive a “reasonable benefit” from the plan or project;
- c. Guarantee that an concessions do not take place “until independent and technically capable entities, with the State’s supervision, perform a prior environmental and social impact assessment;” and
- d. Implement “adequate safeguards and mechanisms in order to ensure that these activities do not significantly affect the traditional [indigenous]...lands and natural resources” (paras. 129, 158).

“In this particular case, the restrictions in question pertain to the issuance of logging and mining concessions for the exploration and extraction of certain natural resources found within Saramaka territory. Thus, in accordance with Article 1(1) of the Convention, in order to guarantee that restrictions to the property rights of the members of the Saramaka people by the issuance of concessions within their territory does not amount to a denial of their survival as a tribal people, the State must abide by the following three safeguards: First, the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan (hereinafter “development or investment plan”) within Saramaka territory. Second, the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State’s supervision, perform a prior environmental and social impact assessment. These safeguards are intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people.” (para. 129)

● Effective participation means the carrying out of “good faith” consultations “with the objective of reaching an agreement””, in which the State must:

- a. actively consult with said community according to their customs and traditions;
- b. accept and disseminate information;
- c. maintain “constant communication;”
- d. conduct consultations in “in good faith;”
- e. carry out consultations “through culturally appropriate procedures;”
- f. commence consultations at the “the early stages of a development or investment plan, not only when the need arises to obtain approval from the community;”
- g. carry out consultations “with the objective of reaching an agreement;”
- h. ensure “early” consultations “provides time for internal discussion within communities and for proper feedback to the State;”

- i. ensure that consultations make communities “aware of possible risks, including environmental and health risks;”
- j. guarantee that “proposed development or investment plan” must be “accepted knowingly and voluntarily;” and
- k. guarantee that consultations “should take account of the [indigenous]...people’s traditional methods of decision-making” (para. 133).

In the case of “development or investment plans that may have a profound impact on the property rights of the members of the [indigenous]...people to a large part of their territory” the State must obtain the free, prior and informed consent (FPIC) of the affected indigenous peoples (para. 134).

Saramaka People v. Suriname. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of 12 August 2008. Series C No. 185, paras. 17, 18 & 29.

17. The Court gave specific guidelines as to what issues must be the subject of consultation, when the consultation must take place, why the Saramaka people must be consulted, and how the consultation must be carried out. Accordingly, the State has a duty, from the onset of the proposed activity, to actively consult with the Saramaka people in good faith and with the objective of reaching an agreement, which in turn requires the State to both accept and disseminate information in an understandable and publicly accessible format. Furthermore, depending upon the level of impact of the proposed activity, the State may additionally be required to obtain consent from the Saramaka people. The Tribunal has emphasized that when large-scale development or investment projects could affect the integrity of the Saramaka people’s lands and natural resources, the State has a duty not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent in accordance with their customs and traditions.

18. The Court deliberately omitted from the Judgment any specific consideration as to who must be consulted. By declaring that the consultation must take place “in conformity with their customs and tradition,” the Court recognized that it is the Saramaka people, not the State, who must decide which person or group of persons will represent the Saramaka people in each consultation process ordered by the Tribunal.

29. Regarding the meaning and scope of the State’s obligation to guarantee the survival of the Saramaka people, the Commission understood the State to be asking the Court to confirm that there are acceptable levels of “impact” a proposed development plan may have on the Saramaka, as long as that impact does not amount to a denial of their survival. The Commission also considered that “when the Court uses the term ‘survival’ it does not refer only to the obligation of the State to ensure the right to life of the victims, but rather to take all the appropriate measures to ensure the continuance of the relationship of the Saramaka People with their land or their culture.” (Emphasis added).

American Declaration on the Rights and Duties of Man

Report No. 96/03, *Maya Indigenous Communities and their Members (Case 12.053 (Belize))*, 24 October 2003, at para. 141

Articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed consent on the part of the indigenous community as a whole. This requires, at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives. In the Commission's view, these requirements are equally applicable to decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories.

***Mary and Carrie Dann (United States)*, Dec. 27, 2002. OEA/Ser.L/V/II.116, Doc. 46, at paras. 130-31 & 140**

Where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property...

Based upon the foregoing analysis, the Commission is of the view that the provisions of the American Declaration should be interpreted and applied in the context of indigenous petitioners with due regard to the particular principles of international human rights law governing the individual and collective interests of indigenous peoples. Particularly pertinent provisions of the Declaration in this respect include Article II (the right to equality under the law), Article XVIII (the right to a fair trial), and Article XXIII (the right to property). As outlined above, this approach includes the taking of special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation. ...

Articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole.

Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009, at paras. 329-334 (internal citations omitted)

329. Regardless of the fact that every consultation process must pursue the objective of consent, in some specifically defined cases, the Inter-American Court's jurisprudence and international standards legally require states to obtain indigenous peoples' free and informed consent prior to the execution of plans or projects which can affect their property rights over lands, territories and natural resources.

330. The Inter-American Court has underscored "the difference between 'consultation' and 'consent' in this context," stating the obligation of obtaining consent in the following terms: "the Court considers 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." In its subsequent interpretive judgment in the Saramaka case, the Court added: "the State has a duty, from the onset of the proposed activity, to actively consult with the Saramaka people in good faith and with the objective of reaching an agreement, which in turn requires the State to both accept and disseminate information in an understandable and publicly accessible format. Furthermore, depending upon the level of impact of the proposed activity, the State may additionally be required to obtain consent from the Saramaka people. The Tribunal has emphasized that when large-scale development or investment projects could affect the integrity of the Saramaka people's lands and natural resources, the State has a duty not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent in accordance with their customs and traditions."

331. The Court has observed that "other international bodies and organizations have similarly considered that, in certain circumstances, and in addition to other consultation mechanisms, States must obtain the consent of indigenous and tribal peoples to carry out large-scale development or investment projects that have a significant impact on the right of use and enjoyment of their ancestral territories", citing in this regard a decision of the Committee on Elimination of Racial Discrimination concerning Ecuador.

332. As the Inter-American Court noted, the United Nations Rapporteur on the situation of human rights and fundamental freedoms of indigenous people has also spoken to this obligation, observing that: "[w]herever [large-scale projects] occur in areas occupied by indigenous peoples it is likely that their communities will undergo profound social and economic changes that are frequently not well understood, much less foreseen, by the authorities in charge of promoting them. [...] The principal human rights effects of these projects for indigenous peoples relate to loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence."

333. The requirement of consent must be interpreted as a heightened safeguard for the rights of indigenous peoples, given its direct connection to the right to life, to cultural identity and other essential human rights, in relation to the execution of development or investment plans that affect the basic content of said rights. The duty to obtain consent responds, therefore, to a logic of proportionality in relation to the right to indigenous property and other connected rights.

334. The development of international standards on indigenous peoples' rights, including those set by the Inter-American system, makes it possible to identify a series of circumstances where obtaining indigenous peoples' consent is mandatory.

1. The first of these situations, identified by the UN Special Rapporteur, is that of development or investment plans or projects that imply a displacement of indigenous peoples or communities from their traditional lands, that is, their permanent relocation. The requirement of consent in these cases is established in Article 10 of the UN Declaration: "Indigenous peoples shall not be forcibly removed from their lands or territories. 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."
2. Indigenous peoples' consent is also required, according to the Inter-American Court in the Saramaka judgment, in cases where the execution of development or investment plans or of concessions for the exploitation of natural resources would deprive indigenous peoples of the capacity to use and enjoy their lands and other natural resources necessary for their subsistence.
3. Another case in which, as pointed out by the Special Rapporteur, indigenous peoples' consent is required, is that of storage or disposal of hazardous materials in indigenous lands or territories, as established in Article 29 of the UN Declaration.

STATEMENTS OF INTERNATIONAL INSTITUTIONS AND OFFICIALS

Expert Mechanism on the Rights of Indigenous Peoples, *Final report on the study on indigenous peoples and the right to participate in decision-making*. Expert Mechanism advice No. 2 (2011): *Indigenous peoples and the right to participate in decision making*. UN Doc. A/HRC/18/42, 17 August 2011, paras. 3, 20-25 (internal citations omitted)

3. This spectrum of rights is well illustrated by the Declaration on the Rights of Indigenous Peoples, which contains more than 20 general provisions pertaining to indigenous peoples and decision-making. These rights range from the right to self-determination encompassing a right to autonomy or self-government to rights to participate and be actively involved in external decision-making processes. Other provisions establish specific duties for States to ensure the participation of indigenous peoples in decision-making, inter alia, to obtain their free, prior and informed consent; to consult and cooperate with indigenous peoples; and to take measures in conjunction with them.

20. As mentioned above, the right to free, prior and informed consent is embedded in the right to self-determination. The procedural requirements for consultations and free, prior and informed consent respectively are similar. Nevertheless, the right of free, prior and informed consent needs to be understood in the context of indigenous peoples' right to self-determination because it is an integral element of that right.

21. The duty of the State to obtain indigenous peoples' free, prior and informed consent entitles indigenous peoples to effectively determine the outcome of decision-making that affects them, not merely a right to be involved in such processes. Consent is a significant element of the decision-making process obtained through genuine consultation and participation. Hence, the duty to obtain the free, prior and informed consent of indigenous peoples is not only a procedural process but a substantive mechanism to ensure the respect of indigenous peoples' rights.

22. 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 for 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. Premised on the right to self-determination, article 10 of the Declaration prohibits the forcible removal of indigenous peoples from their lands and territories. In contrast, ILO Convention No. 169, article 16(2), includes procedural elements

that permit forced relocation as an exceptional measure, without the consent of the indigenous peoples concerned. The Declaration moreover requires States to obtain the free, prior and informed consent of indigenous peoples in certain other situations, as reflected in its articles 11(2), 19, 28(1), 29(2), 32(2) and 37.

23. The duty to obtain the free, prior and informed consent of indigenous peoples presupposes a mechanism and process whereby indigenous peoples make their own independent and collective decisions on matters that affect them. The process is to be undertaken in good faith to ensure mutual respect. The State's duty to obtain free, prior and informed consent affirms the prerogative of indigenous peoples to withhold consent and to establish terms and conditions for their consent.

24. The elements of free, prior and informed consent are interrelated; the elements of "free," "prior" and "informed" qualify and set the conditions for indigenous peoples' consent; violation of any of these three elements may invalidate any purported agreement by indigenous peoples.

25. The element of "free" implies no coercion, intimidation or manipulation; "prior" implies that consent is obtained in advance of the activity associated with the decision being made, and includes the time necessary to allow indigenous peoples to undertake their own decision-making processes; "informed" implies that indigenous peoples have been provided all information relating to the activity and that that information is objective, accurate and presented in a manner and form understandable to indigenous peoples; "consent" implies that indigenous peoples have agreed to the activity that is the subject of the relevant decision, which may also be subject to conditions.

Expert Mechanism on the Rights of Indigenous Peoples, Advice No. 3 (2012): Indigenous peoples' languages and cultures, A/HRC/21/53, 16 August 2012 (internal citations omitted)

12. Indigenous peoples have the right to cultural self-determination, including the right to cultural autonomy, together with the right to advance their cultures within mainstream societies. This right includes duties to obtain indigenous peoples' free, prior and informed consent when developing and implementing laws and policies related to indigenous languages and cultures, including to promote indigenous peoples' control over the development of their languages and cultures and their traditional knowledge.

20. States should establish mechanisms, including monitoring, to ensure that indigenous peoples' traditional knowledge is not expropriated without the free, prior and informed consent of indigenous peoples and provision is made for appropriate access and benefit sharing arrangements.

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).

(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).

(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.

(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. 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.

(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. 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. 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 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.

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."

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. Its jurisprudence is highly instructive, as it has set out the factual circumstances in which it has found that indigenous peoples' consent is required.

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 wellbeing, 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:

(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.”

(iv) Culturally appropriate procedures

34. Consultation procedures should be culturally appropriate for the indigenous peoples concerned; 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.

(v) Good faith

35. Consultations must be undertaken in good faith.

Final report of the study on indigenous peoples and the right to participate in decision-making, Report of the Expert Mechanism on the Rights of Indigenous Peoples, A/HRC/18/42, (17 August 2011), para. 63

63. Although a relatively new concept internationally, free, prior and informed consent is one of the most important principles, as a right, that indigenous peoples believe can further protect their right to participation...

Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, A/HRC/21/47, (July 6 2012), paras. 47-53 (internal citations omitted)

Need for an approach that comprehensively takes account of the rights that may be affected by extractive operations

47. A common point of departure for examining the issue of extractive industries affecting indigenous peoples is discussion about the meaning of the principles of consultation and free, prior and informed consent that are articulated in international instruments and the jurisprudence of international bodies. This discussion has become highly contentious, with conflicting points of view about the scope of the duty of States to consult indigenous peoples and about the need to obtain their consent to extractive projects that may affect them.

48. The Special Rapporteur is of the view that the pre-eminent focus on consultation and consent is blurring understanding about the relevant human rights framework by which to discern the conditions under which extractive industries may legitimately operate within or near indigenous territories. It is simply misguided to tend to reduce examination of the rights of indigenous peoples in the context of resource development projects to examination of the contours of a right to be consulted or a right to free, prior and informed consent. To be sure, understanding the contours of the principles of consultation and consent is of critical importance. Arriving at such understanding cannot be adequately achieved by framing the discussion within these principles alone, however.

49. A better approach appreciates, first, that neither consultation nor consent is an end in itself, nor are consultation and consent stand-alone rights. As instructed by the Inter-American Court of Human Rights in *Saramaka v. Suriname*, principles of consultation and consent together constitute a special standard that safeguards and functions as a means for the exercise of indigenous peoples' substantive rights. It is a standard that supplements and helps effectuate substantive rights, including the right to property, which was the focus of the Court's judgement in that case, and other rights that may be implicated in natural resource development and extraction.

50. The primary substantive rights of indigenous peoples that may be implicated in natural resource development and extraction, as has been extensively documented include, in particular, rights to property, culture, religion, and non-discrimination in relation to lands, territories and natural resources, including sacred places and objects; rights to health and physical well-being in relation to a clean and healthy environment; and rights to set and pursue their own priorities for development, including development of natural resources, as part of their fundamental right to self-determination. These rights are grounded in multiple international instruments, including binding multilateral human rights treaties that have been widely ratified, and are articulated in the United Nations Declaration on the Rights of Indigenous Peoples.

51. By their very nature, the rights that are potentially affected by natural resource extraction entail autonomy of decision-making in their exercise. This is especially obvious with regard to the rights to set development priorities and to property, but it is also true of the other rights. Accordingly, the consultation and consent standard that applies specifically to indigenous peoples is a means of effectuating these rights, and is further justified by the generally marginalized character of indigenous peoples in the political sphere, but it is a standard that certainly does not represent the full scope of these rights (A/HRC/18/35, para. 82).

52. Furthermore, it is important to comprehend that the consultation and consent standard is not the only safeguard against measures that may affect indigenous peoples' rights over their lands, territories and natural resources, among others. Such additional safeguards include but are not limited to the undertaking of prior impact assessments that provide adequate attention to the full range of indigenous peoples' rights, the establishment of mitigation measures to avoid or minimize impacts on the exercise of those rights, benefit-sharing and compensation for impacts in accordance with relevant international standards. All these safeguards, including the State's duty to consult, are specific expressions of a precautionary approach that should guide decision-making about any measure that may affect rights over lands and resources and other rights that are instrumental to the survival of indigenous peoples.

53. Consultation and consent and related safeguards are instrumental to securing indigenous peoples' rights in the face of extractive industries that operate or seek to operate on or near their territories, but understanding the reach of those underlying substantive rights and the potential impacts on those rights must be a starting point for solving the many questions that arise in this context.

Large-scale land acquisitions and leases: A set of core principles and measures to address the human rights challenge. Mr. Olivier De Schutter, Special Rapporteur on the Right to Food, 11 June 2009, at p. 15, para. 10 (citing Human Rights Committee, *Concluding Observations: Sweden*, 7 May 2009 (CCPR/C/SWE/CO/6))

Indigenous peoples have been granted specific forms of protection of their rights on land under international law. States shall consult and cooperate in good faith with the indigenous peoples concerned 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.

Special Rapporteur on the Right to Food, Mission to Mexico A/HRC/19/59/Add.2, 17 January 2012, para. 36 (internal citations omitted)

36. With regard to indigenous peoples, the right to full and prior informed consent regarding relocation is explicitly provided for in the Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization (ILO), which Mexico has ratified, as well as in the United Nations Declaration on the Rights of Indigenous Peoples, which provides 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.” Although the right to free, prior and informed consent is specific to the case of indigenous peoples, the principle is increasingly seen as central to all local populations.

Special Rapporteur on the Right to Food, Mission to Canada, 6-16 May 2012. End of Mission Statement (internal citations omitted)

VIII. Indigenous Peoples

The Special Rapporteur notes the existence of “Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult,” a Government policy document on aboriginal consultation and accommodation. In this context, he recalls article 19 of the United Nations Declaration on the Rights of Indigenous Peoples, which establishes that, in general, consultations with indigenous peoples are to be carried out in “good faith ... in order to obtain their free, prior and informed consent.”

Permanent Forum on Indigenous Issues, Report on the tenth session (16-27 May 2011), Economic and Social Council Official Records, 2011, Supplement No. 23, E/2011/43-E/C.19/2011/14, paras. 34-42

Free, prior and informed consent

34. The common understanding of the right to free, prior and informed consent is that consent should be given freely, without coercion, intimidation or manipulation (free); sought sufficiently at all stages, including from inception to final authorization and implementation of activities (prior); based on an understanding of the full range of issues

and implications entailed by the activity or decision in question (informed); and given by the legitimate representatives of the indigenous peoples concerned.

35. Free, prior and informed consent has been explicitly affirmed in the United Nations Declaration on the Rights of Indigenous Peoples in relation to the relocation of indigenous peoples from their lands and territories (article 10); redress with respect to the appropriation of their cultural, intellectual, religious and spiritual property (article 11, paragraph 2); obtaining such consent before adopting and implementing legislative and administrative measures that may affect indigenous peoples (article 19); redress for their lands or resources taken without their consent (article 28, paragraph 1); disposal of hazardous materials in their territories (article 29, paragraph 2); and obtaining of such consent prior to the approval of development projects affecting their lands or territories and other resources (article 32, paragraph 2).

36. As a crucial dimension of the right of self-determination, the right of indigenous peoples to free, prior and informed consent is also relevant to a wide range of circumstances in addition to those referred to in the Declaration. Such consent is vital for the full realization of the rights of indigenous peoples and must be interpreted and understood in accordance with contemporary international human rights law, and recognized as a legally binding treaty obligation where States have concluded treaties, agreements and other constructive arrangements with indigenous peoples. In this regard, the Permanent Forum emphatically rejects any attempt to undermine the right of indigenous peoples to free, prior and informed consent. Furthermore, the Forum affirms that the right of indigenous peoples to such consent can never be replaced by or undermined through the notion of “consultation.”

37. Given that the right of indigenous peoples to free, prior and informed consent is recognized and affirmed in the United Nations Declaration on the Rights of Indigenous Peoples, questions have arisen concerning its implementation. In the light of such fundamental concerns, the Permanent Forum has decided to prioritize free, prior and informed consent. Therefore, in the context of future work, the Permanent Forum will explore the potential for the development of guidelines on the implementation of free, prior and informed consent. The Permanent Forum will endeavour to do so in collaboration with the Expert Mechanism on the Rights of Indigenous Peoples and the Special Rapporteur on the rights of indigenous peoples, who are specifically mandated to address the human rights of indigenous peoples.

This initiative, as well as those referred to immediately below, are fully consistent with articles 38, 41 and 42 of the Declaration.

38. The Permanent Forum also notes the number of interventions by indigenous peoples alarmed at the denial of their right to free, prior and informed consent in relation to extractive industries and other forms of large- and small-scale development. Therefore, the Permanent Forum recommends that States and international financial and aid institutions systematically monitor, evaluate, assess and report on how free, prior and informed consent has or has not been recognized and applied with respect to the lands, territories and resources of the indigenous peoples concerned.

39. Given the importance of the full range of the human rights of indigenous peoples, including traditional knowledge, culturally appropriate procedures to ensure communication, information, and scheduling, the Permanent Forum calls on all United Nations agencies and intergovernmental agencies to implement policies, procedures and mechanisms that ensure the right of indigenous peoples to free, prior and informed consent consistent with their right to self-determination as reflected in common article 1 of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, which makes reference to permanent sovereignty over natural resources.

40. The Permanent Forum confirms its intention to participate in the 35th session of the World Heritage Committee (Paris, 19 to 29 June 2011). The objective of such participation is to encourage a review of existing procedures with regard to rights related mechanisms, norms and standards in the preparation and processing of world heritage nominations by States parties.

41. The Permanent Forum welcomes the initiative of UNESCO, the International Union for Conservation of Nature (IUCN), the International Council on Monuments and Sites (ICOMOS) and the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM) to review current procedures and capacity to ensure free, prior and informed consent, and the protection of indigenous peoples' livelihoods, tangible and intangible heritage. During this review process, it would be advisable to review the inconsistency of approaches to natural world heritage and cultural world heritage. The Permanent Forum makes itself available to assist in the review and revision of UNESCO operational guidelines with regard to nominations and site assessments. The Permanent Forum further recommends that UNESCO invite indigenous peoples' representatives and experts to contribute to deliberations on and recommended changes to procedures and operational guidelines.

42. The Permanent Forum recommends that the UNESCO World Heritage Committee, and the advisory bodies IUCN, ICOMOS and ICCROM, scrutinize current World Heritage nominations to ensure they comply with international norms and standards of free, prior and informed consent.

United Nations Development Group Guidelines on Indigenous Peoples (February 2009)

International human rights instruments are not enough to guarantee the survival, wellbeing and dignity of indigenous peoples, even if they have a great importance for the protection of their rights. Most international human rights instruments (with the exception of the UN-DECRIPS) protect the rights of the individual. Indigenous peoples need the recognition of specific collective rights for their survival as human groups. These rights include indigenous peoples' rights to their lands, territories and resources, to maintain their cultures, to recognition of their distinct identities, to self-government and self determination, and to be asked for their free, prior and informed consent in decisions that may affect them. Such rights are considered the minimum standards for the protection of their survival as distinct peoples and are intended to address the challenges most indigenous peoples face around the world... The right to self-determination may be expressed through...[r]espect for the principle of free, prior and informed consent...

In the case of state owned sub-surface resources on indigenous peoples' lands, indigenous peoples still have the right to free, prior and informed consent for the exploration and exploitation of those resources and have a right to any benefit-sharing arrangements...

Permits for extraction and even prospecting of natural resources on indigenous land should not be granted if the activity hinders indigenous peoples to continue to use and/or benefit from these areas or where the free, prior and informed consent of indigenous peoples concerned has not been obtained...

The spiritual relationship of indigenous peoples to their lands and territories and environmentally sustainable practices have been recognized and conservation efforts on indigenous lands, including the establishment of new and management of existing protected areas, have to take place with the free, prior and informed consent and full participation of the communities concerned...

The exploitation of resources on indigenous peoples' lands should be permitted only with their full consultation, participation and, free, prior and informed consent...

Indigenous peoples shall not be relocated without their free and prior informed consent. In the case of forced relocation, fair and acceptable compensation and damage measures should be taken.

Report of the Commission on Transnational Corporations to the Working Group on Indigenous Populations. UN Doc. E/CN.4/Sub.2/1994/40, at para. 20

20. Concluding that multinational companies' "performance was chiefly determined by the quantity and quality of indigenous peoples' participation in decision making" and "the extent to which the laws of the host country gave indigenous peoples the right to withhold consent to development...."

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