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COMISIÓN DE DERECHOS HUMANOS
Subcomisión de Promoción y Protección
de los Derechos Humanos
Grupo de Trabajo sobre Poblaciones
Indígenas
20º período de sesiones
22 a 26 de julio de 2002
Tema 7 del programa provisional

DECENIO INTERNACIONAL DE LAS POBLACIONES INDÍGENAS DEL
MUNDO, INCLUIDA INFORMACIÓN RELATIVA AL FONDO VOLUNTARIO
PARA EL DECENIO INTERNACIONAL DE LAS POBLACIONES INDÍGENAS
DEL MUNDO E INFORME DEL GRUPO ASESOR

INFORME DEL SEMINARIO SOBRE LOS PUEBLOS INDÍGENAS, LAS
EMPRESAS PRIVADAS DEDICADAS A LA EXPLOTACIÓN DE
LOS RECURSOS NATURALES, ENERGÉTICOS Y MINEROS,
Y LOS DERECHOS HUMANOS**

Ginebra, 5 a 7 de diciembre de 2001

Presidente-Relator: Sr. Wilton LITTLECHILD

* El resumen del presente informe, que contiene las conclusiones y recomendaciones del seminario, se distribuye en todos los idiomas oficiales. El informe completo figura en el anexo y se distribuye tal como se recibió y solamente en el idioma en el que fue presentado.

** Este informe se presentó con retraso debido a circunstancias ajenas a la voluntad de la Oficina del Alto Comisionado para los Refugiados.

Resumen

CONCLUSIONES, RECOMENDACIONES, SOLUCIONES CONSTRUCTIVAS Y SEGUIMIENTO DEL SEMINARIO

El seminario sobre los pueblos indígenas, las empresas privadas dedicadas a la explotación de los recursos naturales energéticos y mineros y los derechos humanos se celebró en Ginebra del 5 al 7 de diciembre de 2001, de conformidad con lo dispuesto en la resolución 2000/15 de la Subcomisión de Promoción y Protección de los Derechos Humanos. El seminario fue organizado por la Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos (ACNUDH) en colaboración con la Conferencia de las Naciones Unidas sobre Comercio y Desarrollo (UNCTAD), la Organización Internacional del Trabajo (OIT), la Organización Mundial del Comercio (OMC) y otras organizaciones pertinentes.

En el seminario se examinaron diversas cuestiones relacionadas con los pueblos indígenas, las empresas privadas dedicadas a la explotación de los recursos naturales, energéticos y mineros, y los derechos humanos, y en particular los marcos jurídicos internacionales existentes. Se trataron además tres temas importantes para las relaciones entre los pueblos indígenas y las industrias de extracción desde el punto de vista de los derechos humanos. Esos temas son los siguientes: la celebración de consultas con las comunidades indígenas antes, durante y después del desarrollo de proyectos del sector privado; la participación en los beneficios de las actividades del sector privado de las comunidades indígenas; y la solución de conflictos.

Las conclusiones y recomendaciones aprobadas en el seminario se reproducen a continuación.

Conclusiones

1. Se acogió con beneplácito la organización por el ACNUDH del seminario, que fue financiado por el Fondo de contribuciones voluntarias del Decenio Internacional de las Poblaciones Indígenas del Mundo. Se dijo que éste brindaba una oportunidad para intercambiar opiniones y experiencias y para recibir información acerca de casos concretos que permitirían comprender mejor los problemas y preocupaciones de la industria y los pueblos indígenas. Se expresó agradecimiento a la Alta Comisionada para los Derechos Humanos por la organización del seminario y por las observaciones y recomendaciones que formuló tras su conclusión. Asimismo, se expresó agradecimiento a los representantes del sector privado por su participación.
2. Se reafirmó la pertinencia de examinar las normas y disposiciones internacionales, nuevas y existentes, sobre los derechos humanos, entre ellas la Carta de las Naciones Unidas, los tratados de derechos humanos, el Pacto Internacional de Derechos Civiles y Políticos, el Pacto Internacional de Derechos Económicos, Sociales y Culturales, la Convención Internacional sobre la Eliminación de todas las Formas de Discriminación Racial, el Convenio sobre la Diversidad Biológica, el Convenio N° 169 de la OIT sobre pueblos indígenas y tribales en países independientes (1989), la Declaración y Programa de Acción de Viena de 1993, los proyectos de declaración sobre los derechos de los pueblos indígenas que se están examinando en las Naciones Unidas y en la Organización de los Estados Americanos, así como otras normas elaboradas o que se están elaborando para garantizar el respeto de los derechos humanos en relación con las actividades de explotación de los recursos naturales, en el sector privado.
3. Se reconoció que la cuestión de la explotación de recursos extractivos y los derechos humanos entraña una relación entre los pueblos indígenas, los gobiernos y el sector privado. Se reconoció también que una condición indispensable para crear una relación equitativa entre los pueblos indígenas, los Estados y el sector privado es el pleno reconocimiento de los derechos de los pueblos indígenas sobre sus tierras, territorios y recursos naturales.
4. Se observó que los pueblos indígenas sufren las consecuencias negativas de las prácticas de las industrias de extracción y energéticas en sus tierras y territorios.
5. Se reconocieron los esfuerzos que están realizando varias empresas para hacer frente a esos problemas, mejorar el diálogo, trabajar teniendo en cuenta el marco de los derechos humanos, establecer arreglos apropiados de distribución de los beneficios y determinar mecanismos mutuamente aceptables para la solución de controversias.
6. Se reconoció el vínculo existente entre el ejercicio del derecho de los pueblos indígenas a la libre determinación, los derechos sobre sus tierras y recursos y su capacidad de establecer relaciones equitativas con el sector privado. Se observó que los pueblos indígenas a los que se les reconocen sus derechos sobre la tierra y los recursos naturales, así como los pueblos que han establecido tratados, acuerdos u otros arreglos constructivos con los Estados están en mejores condiciones de entablar relaciones provechosas con las empresas privadas que explotan los recursos naturales, con el consentimiento previo, libre y fundamentado de éstos, que otros pueblos a los que no se les reconocen esos derechos.

7. Se recordó el párrafo 20 de la parte I y el párrafo 30 de la parte II de la Declaración y Programa de Acción de Viena, en que los Estados reconocen la importancia de garantizar la total y libre participación de las poblaciones indígenas en las cuestiones que les conciernen, como forma de contribuir a sus derechos y su bienestar.

8. Se afirmó la importancia del desarrollo económico y sostenible para la supervivencia y el futuro de los pueblos indígenas. Asimismo, se consideró, en particular, que el derecho al desarrollo implica que los pueblos indígenas tienen derecho a determinar su propio ritmo de cambio, de acuerdo con su propia visión del desarrollo, y que ese derecho debe respetarse, especialmente su derecho a decir que no.

Recomendaciones

1. Se recomendó que los Estados, las organizaciones del sistema de las Naciones Unidas, los pueblos indígenas y el sector privado siguieran examinando las experiencias relacionadas con la explotación de los recursos naturales por empresas privadas en tierras de los pueblos indígenas, que consideraran la posibilidad de aplicar prácticas idóneas y analizaran los vínculos existentes entre el reconocimiento y el respeto de los derechos de los pueblos indígenas sobre las tierras y esas experiencias positivas.
2. Se recomendó que los Estados, las organizaciones del sistema de las Naciones Unidas, los pueblos indígenas y el sector privado elaboraran un marco para la celebración de consultas, la distribución de los beneficios y la solución de controversias con respecto a los proyectos del sector privado que afectan a los pueblos indígenas.
3. Se recomendó que se realizara un estudio sobre las normas, nuevas y existentes, de derechos humanos, otras normas pertinentes y las directrices de la industria pertinentes para los pueblos indígenas y la explotación de recursos por empresas privadas en sus tierras, teniendo en cuenta las investigaciones y la documentación existentes.
4. Se recomendó que las consultas entre los pueblos indígenas y el sector privado se guiaran por el principio del consentimiento previo, libre y fundamentado de todas las partes interesadas.
5. Se recomendó que la explotación de recursos por empresas privadas en tierras pertenecientes a los pueblos indígenas asegurara una distribución de los beneficios mutuamente aceptable.
6. Se recomendó el establecimiento de mecanismos independientes y mutuamente aceptables para el arreglo de controversias entre los pueblos indígenas y el sector privado.
7. Se recomendó al ACNUDH que:
 - a) Presentara el informe del seminario del Grupo de Trabajo sobre Poblaciones Indígenas en su 20º período de sesiones y del Grupo de Trabajo del período de sesiones sobre los métodos de trabajo y las actividades de las empresas transnacionales, de la Subcomisión, y diera a conocer sus conclusiones y recomendaciones en el primer período de sesiones del Foro Permanente para las Poblaciones Indígenas, la Cumbre Mundial sobre el Desarrollo Sostenible, el sistema de las Naciones Unidas, en particular a la OIT, la UNCTAD, el PNUD, el Banco Mundial y la OMC, y a otras organizaciones rectoras pertinentes del sector industrial;
 - b) Organizara, en cooperación con los pueblos indígenas, el Grupo de Trabajo sobre Poblaciones Indígenas y otros órganos y organizaciones pertinentes de las Naciones Unidas, el sector privado y los gobiernos, y posiblemente representantes de entidades de inversión y de auditoría social con experiencia en la evaluación y la supervisión de las prácticas empresariales, un segundo seminario para elaborar un proyecto de marco para el diálogo y la adopción de medidas sobre consultas, distribución de los beneficios y solución de controversias en los proyectos del sector privado que afectan a los pueblos indígenas;

- c) Compilara los informes de los seminarios y otros materiales pertinentes y los publicara para su distribución a la industria, los pueblos indígenas y los Estados;
- d) Solicitara al sector industrial y a los pueblos indígenas informes de los acuerdos existentes sobre procesos de consulta y distribución de los beneficios entre los pueblos indígenas y el sector privado a fin de efectuar un análisis y preparar un modelo de las prácticas idóneas, y considerar la posibilidad de incluir en el sitio del ACNUDH en la Web los modelos de acuerdos disponibles;
- e) Organizara, a petición de las industrias, cursos de capacitación sobre los derechos humanos de los pueblos indígenas para los representantes y empleados de industrias interesados.

8. Se recomendó a las empresas privadas dedicadas a la explotación de los recursos naturales en tierras pertenecientes a los pueblos indígenas que:

- a) Siguieran manteniendo el diálogo con los pueblos indígenas y las entidades del sistema de las Naciones Unidas sobre esas cuestiones;
- b) Reunieran los códigos de conducta y directrices existentes sobre derechos humanos para ponerlos a disposición de los pueblos indígenas y el ACNUDH;
- c) Participaran en el Grupo de Trabajo sobre Poblaciones Indígenas y en el Foro Permanente para las Poblaciones Indígenas así como en otros foros pertinentes sobre cuestiones indígenas.

9. Se recomendó al Grupo de Trabajo sobre Poblaciones Indígenas que:

- a) Ofreciera la posibilidad de intercambiar opiniones sobre los pueblos indígenas, las empresas privadas dedicadas a la explotación de los recursos naturales, energéticos y mineros y los recursos humanos en relación con el tema de su programa que se refiere a las actividades de establecimiento de normas;
- b) Contribuyera al establecimiento de un marco para la celebración de consultas, la distribución de los beneficios y la solución de controversias en relación con los proyectos privados de explotación de recursos naturales y energéticos que afectan a los pueblos indígenas, basado en los principios de la participación plena y eficaz de los pueblos indígenas en las decisiones que afectan sus vidas en todos los planos, y en el consentimiento previo, libre y fundamentado de esos pueblos para la ejecución de proyectos y actividades en sus tierras.

10. Se recomendó que los pueblos indígenas proporcionaran información sobre los acuerdos celebrados con las empresas privadas y, en particular los mecanismos que habían establecido para los procesos de consulta.

11. Se pidió al Banco Mundial que adoptara una política sobre los pueblos indígenas que exigiera a los prestatarios y clientes que respetaran los derechos de los pueblos indígenas, en particular sus derechos sobre la tierra y los recursos, y el derecho a expresar su consentimiento previo, libre y fundamentado con respecto a las inversiones, los préstamos, las garantías y las operaciones que puedan afectarlos.

12. Se recomendó al Relator Especial sobre la situación de los derechos humanos y las libertades fundamentales de los pueblos indígenas que prestara atención a las repercusiones que tenían en el ejercicio de su mandato las actividades que realizaban las empresas privadas en tierras de los pueblos indígenas.

Annex

INTRODUCTION

1. In its resolution, 2000/15, the Sub-Commission on the Promotion and Protection of Human Rights recommended that the Office of the High Commissioner for Human Rights (OHCHR) organize the workshop in collaboration with the United Nations Conference on Trade and Development (UNCTAD), the International Labour Organization (ILO), the World Trade Organization (WTO), and other relevant organizations.
2. In accordance with the resolution, the High Commissioner, in her capacity as Coordinator for the International Decade of World's Indigenous People, and with the support of the Advisory Group of the United Nations Voluntary Fund for the International Decade of World's Indigenous People, held the workshop in Geneva from 5 to 7 December 2001.
3. A number of indigenous experts, some representatives of the extractive industries, United Nations system organizations, including UNCTAD, UNDP, UNESCO, ILO, and the World Bank, as well as some representatives of observer Governments participated in the workshop. The list of participants is attached.
4. The workshop examined an overview of issues relating to indigenous peoples, private sector natural resource, energy and mining companies and human rights, including existing international legal frameworks. The workshop further explored three major themes in order to discuss relationships between indigenous peoples and the extractive industries from a human rights perspective. These themes include: consulting with indigenous communities prior, during, and following the development of private sector projects; benefit sharing by indigenous communities in private sector activities; and solving disputes.
5. The purpose of the present report is to summarize the general debate of the workshop. The major points of the debate will be highlighted following the order of the workshop agenda. The programme agenda is attached.

OPENING OF THE WORKSHOP

6. The Deputy High Commissioner for Human Rights, Mr. Bertrand Ramcharan, opened the workshop. He thanked ILO and UNCTAD for their invaluable support to the workshop. In his opening presentation, he stated that in the current context of globalization, the issue of corporate social responsibility of companies, particularly that of transnational corporations, came to the fore of the human rights discourse. He told the workshop participants that the challenges ahead of us must enable all peoples to share the benefits from the globalization process equally. He further stated that indigenous peoples felt that they were being left out of the benefits of the globalization process.

7. To meet the challenges posed by globalization in the context of the relationships between indigenous peoples and the private sector, he underscored the importance of the recognition of a special relationship of indigenous peoples to lands, territories, and natural resources. He also pointed out that a holistic approach taking into account the social, economic, and environmental considerations of development activities is now needed.

8. Moreover, he stressed that the purpose of the workshop is to engage an exchange of views and experiences of indigenous peoples and representatives of the extractive industries. In this regard, he encouraged all participants to enter into a true dialogue and mutual understanding by sharing both good and bad experiences, and he wished for the workshop to lead the way forward.

ELECTION OF THE CHAIRPERSON-RAPPORTEUR

9. Mr. Wilton Littlechild was elected by acclamation as Chairperson-Rapporteur.

OBJECTIVES OF THE WORKSHOP AND OVERVIEW OF ISSUES RELATING TO INDIGENOUS PEOPLES, PRIVATE SECTOR NATURAL RESOURCE, ENERGY AND MINING COMPANIES AND HUMAN RIGHTS, INCLUDING EXISTING INTERNATIONAL LEGAL FRAMEWORKS

Objectives of the workshop

10. Mr. Julian Burger of the OHCHR provided a brief explanation as to why the workshop was requested and what are the objectives of the workshop. He stated that the issue of human rights and the private sector has been important in the work of the Working Group on Indigenous Populations. In the margins of the WGIP, numerous informal consultations were made on the issue and one of the recommendations from these consultations was to hold the workshop in the context of the International Decade of the World's Indigenous People.

11. In this regard, the High Commissioner, in her capacity as Coordinator of the Decade, decided to hold the workshop with the support of the Advisory Group of the Voluntary Fund for the Decade consisting of five indigenous persons, the chairperson of the WGIP, and a United Nations expert, which endorsed the idea of holding an expert workshop. He went on to state that this meeting was called a workshop precisely because the purpose of the workshop was to bring together specialists rather than representatives. The idea was to encourage a certain informality and respect for each others' views.

12. He also explained that the workshop agenda was framed in consultation with the private sector, indigenous peoples, and United Nations system organizations such as ILO and UNCTAD. It was thought that three themes are important. Accordingly, the agenda was structured around these three themes: (1) consultations with indigenous communities prior, during, and following

the development of private sector projects: positive experiences, community concerns, and lessons for the future; (2) benefit sharing by indigenous communities in private sector activities: community concerns and needs as well as positive examples relating to economic benefits, training and other forms of community development; and (3) solving disputes: issues of disagreement and constructive experiences to find solutions.

13. He stated that this workshop is an important first and modest step for the OHCHR in the area of human rights of indigenous peoples and the private sector. In this context, he asked for the guidance from the workshop participants as to whether the OHCHR should continue the process of facilitating dialogue and discussions on the topic, and if so, how the OHCHR should proceed in the future.

14. With regard to the report of the workshop, he stated that the responsibility of the report rests with the Chairperson-Rapporteur and it will be presented to the WGIP in 2002.

15. In relation to the Global Compact of the Secretary-General, he stated that this issue should not be discussed at length during the workshop. He further stated that the emerging human rights of indigenous peoples are important and it should be noted that they retain significance in this context as they have some important provisions on the rights of indigenous peoples to their lands, territories, and natural resources.

Overview of issues relating to indigenous peoples, private sector natural resource, energy and mining companies and human rights

16. Ms. Carino made a presentation on the overview of issues relating to the themes of the workshop. She stated that the workshop was extremely timely, given the fact that many companies have been active in the lands of indigenous peoples in recent years, and the exploitation of companies on indigenous peoples' lands will increase in the years to come. Therefore, the central theme of her presentation was to examine the relationships between these companies and indigenous peoples as a great deal of logging and mining are currently taking place on indigenous peoples' territories.

17. She stated that there was a need to build on past experiences on the matter, in which the United Nations had played a central role and is expected to continue to do so. In her examination of issues relating to the workshop, two main areas were identified: first, the process whereby the dialogue on human rights and sustainable development can be advanced; and secondly, various initiatives that have already been taken at the national, regional and international levels as well as by international companies.

18. With regard to the process of dialogue on human rights and sustainable development, she argued that indigenous peoples see human rights and sustainable development as linked or as two sides of the same coin. In this process, the United Nations declaration on the rights of indigenous peoples is currently working its way up to adoption, which might also serve the main goal of the Agenda 21.

19. She stated that the firm principle of the primary responsibility of States in the protection of the rights of indigenous peoples is well established. It is appropriate to discuss how non-state actors have a role to play in the protection of the rights of indigenous peoples. She further stated that mechanisms for regulating violations by non-state actors are, nonetheless, unclear and these should be discussed during the workshop.

20. Another way to advance dialogue on human rights and sustainable development is to look into how already existing norms can be implemented and how the rights in the development process are ensured. She said that free, prior, informed consent has come forward in the previous years, and that this is a demand that indigenous peoples have put forward. However, she explained that the meaning of this concept is not clear and neither is the way it should be used in practice. For instance, she stated that, in the Philippines where the free and prior consent is part of the law and the law explains the meaning of this concept, the practice does not always correspond to the indigenous understanding of free, prior, informed consent. She was of the view that indigenous and industry participants of the workshop can draw on this Philippine example when discussing free, prior, informed consent.

21. Concerning key initiatives at the national, regional and international levels, Ms. Carino noted that the framework for human rights and dialogue is going well through the United Nations. At the national level, she further recognized that advances had been made in many countries. However, she stressed that many countries still have not ratified the most relevant conventions for indigenous peoples. She said that the ILO is doing a good job in promoting the rights of indigenous peoples at the international level and this will help indigenous peoples negotiate with Governments. She further spoke of different regional initiatives, among others, a working group established in Africa to look into the issue of indigenous rights.

22. In addition, she mentioned that the World Commission on Dams had completed important work that was relevant to the issues of the workshop. The Commission has released a widely acknowledged report with a global review of dam projects. This report indicates that indigenous peoples are marginalized in the development of their lands. Hence, the World Commission on Dams had developed a “rights and risk approach” and they have introduced the concept of risk assessment. This assessment looks at “who is at risk?” and it shows that indigenous peoples suffer disproportionately because they lose their lands. This report provides key guidelines on how to proceed when dealing with development on indigenous lands.

23. In concluding, Ms. Carino said that the World Bank, the industry itself, the indigenous communities, NGOs, and the EU have all been involved in this issue and this again corroborated the importance of the workshop.

Existing international legal frameworks in relation to indigenous peoples, lands, territories, and natural resources

24. Mr. Jong-Gil Woo of the OHCHR made a presentation on some of the international human rights standards in relation to indigenous peoples, lands, territories, and natural resources. He stated that the aim of his presentation is to identify some key human rights norms, which might be of help to the general debate of the workshop, particularly in the context of the international legal frameworks.

25. He mentioned that the Preamble of the Universal Declaration of Human Rights enshrines an obligation of companies in relation to the promotion and protection of human rights by proclaiming that every individual and every organ of society shall strive to promote respect for the rights and freedoms set out in the Universal Declaration. He went on to state that although this provides the moral basis for an obligation of companies as organs of society to promote respect for human rights, there is a need to determine what are the concrete ramifications that this obligation entails for companies in relation to human rights.

26. He further stated that as part of efforts to clarify the contours of these legal norms, the United Nations has established the Working Group on the working methods and activities of transnational corporations in 1999 under the Sub-Commission on the Promotion and Protection of Human Rights. The Working Group on TNCs drafted the Draft Universal Human Rights Guidelines for Companies, and they are still under discussion. He summarized the main contents of the Guidelines into the following categories: (1) general obligations; (2) non-discrimination principle; (3) security arrangements; (4) labour standards; (5) collective rights or community-related obligations; (6) consumer protection; (7) environmental protection; and (8) implementation methods. He highlighted some relevant provisions to indigenous peoples by pointing out that the section of the Guidelines on collective rights or community-related obligations stresses the importance of recognizing and respecting national laws, regulations, administrative practices, the rule of law, self-determination, development objectives, social, economic, and cultural policies and authority of the countries in which the companies operate. This requires that companies shall particularly respect the rights of indigenous peoples and similar communities to own, develop, control, protect and use their lands, their other natural resources, and cultural and intellectual property.

27. He further drew attention to some relevant provisions of the ILO Convention 169, the United Nations declaration and the proposed OAS declaration on the rights of indigenous peoples. He stated that free, prior, informed consent often forms the essential part of the right to land. He illustrated that, whereas the ILO Convention 169 does not explicitly enshrine the right to free, prior, informed consent, the United Nations declaration provides that States shall obtain free and informed consent prior to approval of any project affecting indigenous peoples' lands, territories, and other resources, particularly in connection with the development, utilization, or exploitation of mineral, water, or other resources.

28. With regard to relocation, he stressed that it is a well-established principle that relocation can take place only with the free and informed consent of indigenous peoples. If relocation took place, just and fair compensation should be awarded. Compensation shall take the form of the lands, territories, and resources equal in quality, size, and legal status. He noted that the OAS declaration provides the right to return if the displacement causes cease to exist.

29. He further stressed that international standards provide for indigenous peoples the right to determine their development priorities and strategies, and this includes the full and meaningful participation of indigenous peoples in the management of natural resources, including exploration, exploitation, benefit sharing, and compensation.

General discussion

30. Some indigenous participants asked for some clarifications with regard to the workshop agenda as well as its nexus to the upcoming World Summit on Sustainable Development.

31. An indigenous representative noted that there is jurisprudence of various treaty monitoring bodies, including the Committee on Economic, Social and Cultural Rights, the CERD Committee in relation to the notion of ownership of land. The right to ownership of indigenous peoples is being recognized by the ILO Convention 169 and the Convention on Biological Diversity. In this connection, attention was drawn to other ILO instruments that could be considered as they all touch upon non-discrimination, which is important for the debate. The importance of implementation of these international standards, particularly the ILO Convention 169 has also been highlighted. Additionally, the need to translate these indigenous rights into action has been stressed. To achieve this, it was suggested that a human rights training with an indigenous focus be organized for the industry by the Office of the High Commissioner for Human Rights as well as a human rights training by national human rights institutions.

32. A number of participants addressed relevant issues revolving around the free, prior, informed consent. These include: (a) need for a good faith negotiation; and (b) obligation of States to observe international standards on the free, prior, informed consent.

33. Some participants also stressed the importance of involving all stakeholders including indigenous peoples, the private sector, and Governments, when it comes to dealing with complex issues emanating from development activities on indigenous peoples' lands.

34. Some participants have shown great interests in the work of international financial institutions including the World Bank and the IMF with respect to indigenous peoples.

35. Some participants also stressed the importance of positive outcomes at the end of the workshop. To this end, there is a need to strike a balance between indigenous and industry views for fruitful discussions.

CONSULTING WITH INDIGENOUS COMMUNITIES PRIOR, DURING AND FOLLOWING THE DEVELOPMENT OF PRIVATE SECTOR PROJECTS: POSITIVE EXPERIENCES, COMMUNITY CONCERNS, AND LESSONS FOR THE FUTURE

Nishnawbe Aski Nation experience of Canada

36. Mr. Ferris commenced his presentation with a reading of Treaty 9 (1977 Declaration of Independence), which is the basis of their "Indian Law" and their relationship to Canada. Treaty No. 9 or the Declaration of Nishnawbe Aski clearly articulates indigenous rights, as perceived by the Ojibway-Cree Nation. These rights include: the right of self-government; the right to receive compensation for exploited natural resources; the right to receive compensation for the destruction and abrogation of hunting and fishing rights; the right to re-negotiate their treaty; the right to negotiate with the elected governments of Canadian society through appropriate levels of representation; the right to approach the judicial, governmental and business institutions of

Canadian society in the quest for self-determination and local control; the right of elected chiefs to deal with Canadian society's elected cabinets on an equal basis; the right to approach other world nations so as to further the aims of the Cree and Ojibway nations of Treaty No. 9; the right to use every necessary alternative to further the cause of their people; and the right to use all that the Creator has given us to help all of mankind.

37. He urged First Nations to assert their rights and noted that indigenous people are getting more active in the pursuit of their rights. He also noted that the Delgamuuk decision (Delgamuuk v. Queen, 1997 Supreme Court of Canada) was relevant to these discussions as they clearly articulated, in a legal judgment, examples of indigenous rights.

38. He urged workshop participants to consider the NAN consultation policy, which includes certain principles that should be adhered to in the consultation process. He stressed that the process for indigenous peoples is as important as the outcomes. These consultation documents are available through the Nishnawbe Aski web site at www.nan.on.ca. He noted that the NAN consultation process provided a way forward and much sought-after "certainty" for the industry.

39. Mr. Ferris also expressed alarm that the Crown can give away its "obligation to consult" to a third party such as mining companies and if mining companies come up with a consultation document, the Government accepts it without critical analysis. He said that some of the difficulties with consultations included unrealistic time frames of mining companies and lack of resources and expertise of indigenous peoples. He also believes that without the right to say "no", consultations and negotiations mean nothing.

40. There were also concerns expressed that if miners' "claims" were returned to the traditional owners, there was no guarantee of what kind of condition the land would be returned in. He went on to draw out the issue of "rehabilitation" of used mining lands and the need for involvement of indigenous peoples in this rehabilitation process. A further issue revolves around the definition of indigenous territories, which can often be problematic because of overlapping lands and seasonal variances.

41. He also noted that it had been argued by the United States of America in trade negotiations with Canada that the lack of compensation to indigenous peoples can amount to an unfair government subsidy of a particular industry.

42. Mr. Ferris also addressed the issue of "roads" into indigenous lands, which can increase third party interests such as outside hunters and fishing. He said that roads bring both good and bad for indigenous communities, including more settlement of indigenous lands.

43. In conclusion, he noted that the principle of equity must be applied to the benefit sharing. He said that other groups in the country reap the benefits of mining on indigenous lands, but not indigenous peoples.

Discussion of the theme

44. Many participants were concerned that transnational corporations had subverted national Governments and were complicit in human rights abuses. In this connection, they noted the need to look at different modes of operation of TNCs in many different world regions, which depends on a number of factors such as the stability and strength of national Governments and the enforcement of both national and international environmental and human rights laws. The degree of enforcement of environmental responsibilities had a direct effect on company behaviour. However, they also recognized that indigenous peoples may find allies within transnational corporations, and that good alliances can be built to pressure Governments and to promote government action. As such, the industry participants recognized that mining companies can also be used as a lever by indigenous peoples against the Government.

45. A number of participants touched upon the issue of a trilateral relationship among indigenous peoples, the industry, and Governments. There is a recognition that although mining companies are a third-party, they have influence. The deeper issue is to see how the tripartite relationship is changing and see how everyone works out for a change in the relationships. On a related note, an industry participant stressed the fact that mining companies do not focus on social development, and that mining is not just a matter of large companies but also there are many small companies and other entities. Some indigenous experts further noted that indigenous peoples would need to build partnerships with the private sector. Finding common grounds with the private sector would help both parties.

46. It was also noted that the relationship between corporations and States varies greatly depending on the power of the State. Human rights abuses of mining companies are well documented. There is a spectrum of relationships between mining companies and States from legal to illegal.

47. An industry representative suggested that indigenous peoples and industries look at things differently, but could deal with Governments on a combined front. All parties need to be at the table to better understand the practical workings of legislation and regulations, therefore there is a real need for Governments to be present in the workshop. He noted that there are only mining companies present at the workshop and no timber, oil, or fishing companies are present. He said that all players must be at the table. He hoped that we all could come in bona fide at the end of the workshop with some ways trilaterally to move forward.

48. Some indigenous participants drew attention to the Government's dilemma of balancing "equal" rights between indigenous peoples and mining companies. It was noted that the rights of indigenous peoples and mining companies were, in fact, not equal. The rights of the traditional owners are surely superior to those of third-party mining companies. They stated that it is offensive for indigenous peoples to have their rights to land reduced to "stakeholder rights". It was also noted that aboriginal treaty rights are not respected, and Governments are abrogating their responsibilities to indigenous peoples in favour of mining companies.

49. Some indigenous representatives raised the issue of the management of monetary benefits from development activities by indigenous peoples themselves. The Chair noted that the question over whether government can properly manage indigenous peoples' moneys is currently before the Canadian courts, he further acknowledged that moneys may not always be handled well by indigenous peoples but there are solutions such as indigenous financial training packages and education, training and employment packages. Furthermore, an indigenous participant noted that paternalistic ideology from government and industry, suggesting indigenous peoples cannot look after themselves, presents society with a no-win situation. He said that indigenous peoples need win-win situations.

50. Some indigenous representatives also stressed the need to recognize indigenous peoples as peoples. Further, they noted that indigenous peoples needed more resources and access to good quality legal advice, if they were to negotiate fair and just agreements. It was suggested that international monitors and/or United Nations involvement would assist in ensuring fair negotiations and outcomes.

51. Many indigenous participants stressed that problems should be dealt with in a holistic way. Indigenous peoples will be on our traditional land forever, however, other interests do damage and leave, and dangerous toxic substances are permanently damaging indigenous lands. Grappling with the root causes of the exploitation of national resources should be made within the context of self-determination and autonomy.

52. Most participants discussed the issue of the free, prior, informed consent. There is a need to have common terms of reference globally. They noted that the ILO Convention 169 can be useful in understanding the meaning of the free, prior, informed consent. Indigenous peoples as landowners and Governments as resource owners need to have consultations. When indigenous peoples can say "no", which is an established principle, the consultations become real and meaningful. A basic common understanding of the free, prior, informed consent is the right to say "no" to the extractive industries even if they do not own the subsoil. This right to say "no" makes negotiation real. Indigenous peoples must understand the real consequences of proposals and so should companies.

53. An industry representative suggested that as a way forward, a collection of strategies for devising a framework for dialogue is needed to enable local people to understand and approve of what the mining companies do and to identify what is the preferred position of mining companies. In this respect, he believes that we need a common framework of reference to understand various issues including free, prior and informed consent.

54. It was noted that articles 19, 20, and 30 of the United Nations Declaration on the rights of indigenous peoples refer to consent or consultations. Effective participation must occur on indigenous terms. The best way forward is to take account of indigenous peoples as a free independent nation. The right of self-determination does not always imply one meaning or another nor necessarily lead to independent states in the practical sense. Recognition of this principle of self-determination could be a solution not a problem for Governments. Furthermore, it was stressed that participants at this meeting could agree that the free, prior, informed consent of indigenous peoples is a necessary precondition for the agreement of the current participants.

55. Some indigenous participants raised serious issues concerning globalization because government policies based on economic criteria and neo-globalization propel the exploitation of indigenous peoples.

56. An indigenous representative stated that with regard to natural resources, there needs to be a broader scope than just mining. Wildlife is a natural resource and occurs mainly on indigenous lands. In Africa, indigenous peoples are mostly pastoralists or hunters and gatherers. The creation of national parks has become a problem for indigenous peoples because traditional lands are being eroded.

Cordillera people's experiences in the Philippines

57. Mr. Mangili made a presentation on the experience of the Cordillera people with regard to mining companies. He stated that his people have traditionally been involved as small-scale miners. This has changed with the United States colonization of the Philippines, which opened up the country for big international mining companies.

58. He stated that along the same lines, the Philippine Government is opening the country to transnational mining corporations against indigenous peoples' wishes and they are violating their rights. Many rivers have been polluted and poisoned and are biologically dead. The Government does not take into account indigenous peoples' concerns.

59. Small-scale traditional miners practice mining with minimal environmental disruption. Yet small-scale miners have been accused of polluting by the Government when the pollution has been caused by the large mining companies. Indigenous miners do not use chemicals to extract minerals such as gold.

60. He further stated that his community experienced forced projects imposed on their ancestral lands against their will. Indigenous peoples have peacefully protested against mining activities on traditional lands such as peaceful picketing. However, mining companies have physically abused and detained indigenous protestors, and then they are again arbitrarily detained by the police. There were numerous complaints which have led to nowhere.

61. Mr. Mato further corroborated the experience of indigenous peoples in Subanon, Philippines. He stated that there is a report of human rights violations by a Canadian mining company in Subanon; there have been human rights violations of indigenous peoples reported and there was no redress for those violations. Furthermore, he said that the Canadian Government did not assist indigenous peoples' complaints against the large scale Canadian mining company. The Canadian ambassador visited the area without contacting the indigenous peoples.

62. With regard to free, prior, informed consent, his people have a different concept and understanding thereof. A majority does not necessarily mean there is a free, prior, and informed consent by his people according to the traditional rules.

Discussion of the theme

63. Many indigenous participants emphasized the importance of consultations in good faith, which is what makes up free, prior, informed consent including the right to say “no” or the right of veto. Consultations may impose a paradigm that goes against indigenous peoples’ processes. The World Commission on Dams noted that at the commencement of project approval and all the way through, there should be consent of people affected by the projects. As such, management of whole river basins including indigenous peoples’ lands must be considered. This is not manifested in the right of veto, but in the framework whereby conditions are needed to ensure that indigenous peoples’ wishes can be heard. Water and energy development must consider the ILO Convention 169 and must take seriously the position of the community and work for free, prior, informed consent. Some indigenous participants argued that free, prior, informed consent has gained currency as a widely accepted legal principle.

64. It was further noted that free, full participation or consent should be understood as underpinned in all matters of concern to indigenous peoples whether they be negotiations of treaties or contracts or development on their lands. As such, a clear and full recognition of the rights of indigenous peoples makes the process of negotiations easier. To have this full recognition, permanent sovereignty of indigenous peoples over natural resources must be seriously considered.

65. An industry representative raised the issue of whom companies should consult with, and of when companies know that there has been achieved an understanding or consent. Mining companies tend to make decisions against mining operations if they do not have clear ways forward and they will move elsewhere for the operations. He further stated that populations change quickly with industrialization and urbanization. An indigenous participant noted that companies have been accused of establishing indigenous peoples’ organizations with indigenous workers to gain consent. It was also noted that in the Philippines, companies need the free, prior, informed consent of indigenous communities for development on these lands.

66. An indigenous participant addressed the issue of the protection of cultural heritage by Governments. He noted that the obligations have been devolved to a mining company.

BENEFIT SHARING BY INDIGENOUS COMMUNITIES IN PRIVATE SECTOR ACTIVITIES: COMMUNITY CONCERNS AND NEEDS AS WELL AS POSITIVE EXAMPLES RELATING TO ECONOMIC BENEFITS, TRAINING AND OTHER FORMS OF COMMUNITY DEVELOPMENT

Lessons for extractive industries and indigenous peoples: learning from the Freeport experience

67. Mr. Lowry explained that Freeport is currently facing a very complex situation in Irian Jaya, since, on the one hand, there is a desire to support the quest for independence of the indigenous people of West Papua, but on the other hand, Freeport needs to remain supportive of the territorial integrity of the Republic of Indonesia, with which the company has signed the contract of work. Freeport signed its first contract of work with the Indonesian Government

in 1967. The mine that Freeport is working on is expected to last for another 40 years, and it has a throughput that has grown from 5,400 tonnes a day in the first years of the mine's existence to 240,000 tonnes a day today. Just as the throughput of the mine has grown, the number of people living in the area of the mine has expanded. In 1967, on the 320 sq. mile operations area, there were less than 1,000 indigenous people. The workers and families brought in by Freeport increased the population to around 6,000 people. Yet, since the beginning of the 1970s, the population in the operations area has risen enormously, and it amounts to 110,000 today. Out of these 110,000 residents, 20,000 are directly connected to Freeport's operations including 3,500 Papuans, and 50,000 are Papuans that are not directly connected with Freeport's operations. The rest of the residents are Indonesians who are not Melanesians. It is clear that, for the thousand indigenous people who inhabited Freeport's operation field at the time when mining development began, the benefits have been tempered with some negative impacts.

68. He recalled that at the beginning of the operations, community relations were close to non-existent. No one in the local community was consulted about the mine and its operation. At the time, there were no social or environmental impact studies and no cultural baseline studies. Negotiations about land release with local people began in 1995. The final agreement settled that Freeport would support \$20 million of infrastructure enhancement and economic and social development for the local residents. From that time on, Freeport has willingly entered into negotiations with local indigenous peoples. The most important tangible part of this process is an arrangement to move forward with a "Voluntary Trust Fund" that will establish funds for several Amungme and Kamoro villages, the communities that are the most affected by the mine, after the mine closes. Each year, Freeport makes available \$500,000 to the Trust Fund, which can be invested at the discretion of the six village leaders.

69. In 1990, when the "Grasberg deposit" was discovered and it became evident that the production and duration of Freeport's mining activity would greatly increase, Freeport actively started to launch sustainable development programmes. From 1991 to 1996, about \$15 million was spent in these development programmes, which included public health and malaria control, business incubators and infrastructure development. Despite these programmes, riots broke out in 1996. These riots were not led by the Amungme or the Kamoro, but by other Papuans who demanded to be treated the same as the two tribes that were originally the most concerned by Freeport's activities.

70. The Freeport Fund has enabled the funding of numerous local programmes, and Mr. Lowry underlined that the people living on Freeport's operations area now benefit from one of the finest hospitals in all of Indonesia, and an education and scholarship programme. Freeport has also agreed to augment the number of Papuan employees, and also to enable more Papuans to rise to the ranks of management. He further explained that Papuan employees have their own, company-recognized association that deals with employment issues and that meets regularly with the management about Papuan training and employment issues.

71. Freeport is also concentrating its efforts on the environment and on assessing the impact of its activities on land, water, and human health. Freeport has mandated an Environmental Risk Assessment body, which includes members of the local indigenous population to monitor the environmental impacts of the mining operations.

72. Freeport has also laid great emphasis on the respect of human rights in its work-field area. In 1999, it created a social and human rights policy, and has been hiring consultants to help elaborate codes of conduct, so that Freeport employees can communicate better with the local security forces and with the local population.

73. Mr. Lowry concluded his presentation by underlining that Freeport believes that the programmes it has instituted with the local population to bring them social and economic benefits have been beneficial. He however stressed that there was still much progress to be made and that all the parties involved had to listen to each other in order to create projects that will enhance long-term benefit for everyone.

Forest industries, indigenous peoples, and human rights

74. Mr. Colchester presented some of the conclusions of his work on the relationship between forest industries and local indigenous peoples. He started by recalling that there are about 60 million indigenous people worldwide who live and depend on forests for their daily livelihoods.

75. He stressed that international law recognizes the rights of indigenous people to: the ownership, control and management of their traditional territories, lands and resources; exercise their customary law; represent themselves through their own institutions; free, prior, informed consent to developments on their land; control and share in the benefits of the use of their traditional knowledge; and self-determination.

76. He explained that the ILO Convention 169 and the United Nations and OAS Declarations are consolidations of rights that already exist in international law. He went on to explain that, in practice, both large-scale logging and plantations have been carried out in violation of these rights and principles. The land rights of indigenous peoples in forests are commonly denied and resistance to forestry development has often been met with further human rights violations.

77. Modern techniques of forestry, referred to as scientific forestry, were developed in Europe and applied to the world by logging companies. In Indonesia, the State declared 70 per cent of the country to be under forest reserve, and the rights of indigenous peoples living in these forests have been denied and curtailed. In Malaysia 50 per cent of the country should be subjected to indigenous ownership, but concessions on forests have been handed out, thus denying indigenous peoples their fundamental rights linked to their land. Forest concessions in these countries have enabled the emergence of a small elite who rule the country through its tight relationships with logging companies.

78. He recalled the common direct and indirect impacts of logging. Logging activities cause a decline in population, fishing, and nutrition. Logging is also the indirect cause for the increase in diseases and the political marginalization of certain peoples. Also, logging activities cause social and cultural disruption, open denial of land rights, and has a disastrous impact on women and children.

79. He underlined the fact that indigenous peoples were faced with a huge dilemma in these forestry related issues, for human rights standards on indigenous peoples are agreed upon, however they are not practically enforceable. The Forestwardship Council has however established two very important standards: firstly, long-term tenure and use rights, and secondly, the recognition of the legal rights of indigenous peoples to own and use their lands. The Saami community has played a breakthrough role in that domain by successfully negotiating with logging companies. However, he further underlined that certification was costly and many small operators cannot afford it. He insisted on the fact that, where there is no rule of law, it is difficult for certifiers to deal with the communities, and certification overlooks the real interests of the communities. He stated that it must also be noted that some companies may choose to submit only a few of their operations to certification. Certification, if it is to be effective, needs to be backed up with strong and regulatory framework.

80. He also underlined the need for major reforms, on a national level, of social policies and laws on conservation policies. These reforms should accept that indigenous peoples are owners of their forests and as such should have the right to control them.

81. He raised the issue that this process of reform could take years to implement, and that it is difficult to determine what will happen in the meanwhile. He questioned whether there are some other mechanisms by which industries can meet demands of indigenous peoples. Mr. Colchester argued that consultative contracts were perhaps a way forward.

Discussion of the theme

82. Some indigenous participants recognized that indigenous peoples triggered a positive initiative by companies in setting up various funds to help indigenous peoples. Companies also acknowledged that external suggestions and even criticisms had definitely influenced companies in their decisions, but companies would eventually have created a specific fund policy from its own initiative.

83. Many indigenous participants stressed that industry participants were using the expression “benefit sharing”, but that what really interested indigenous people was not so much sharing the benefits, which is only normal since the industries are exploiting indigenous land. The focal point was to share the damages also. When an industry creates damage, the people concerned are rarely compensated. The company can choose to leave the work-field if damage occurs, or if the work is finished, and indigenous peoples are left with ruined land, no farming nor transport facilities.

84. Some indigenous participants were concerned that development activities by companies pose a serious threat to indigenous languages, culture and lifestyle. It was further stressed that indigenous peoples do not drastically refuse development, but that they are asking the Government to help mitigate the negative impacts of development projects. They need to be trained and educated in order to accomplish all the jobs linked to development projects on their land themselves, instead of having people migrating on their land from other parts of the country. Further, indigenous participants spoke of the need to be integrated in the processes of decision-making, and not only customary processes of decision-making.

85. It was underlined that consultations should be undertaken with the traditional customary land users. Development policies must be thoroughly analysed by indigenous communities, as they can often be hidden ways to integrate indigenous peoples into mainstream society, and therefore weaken indigenous communities.

86. Some indigenous participants spoke of the harsh living conditions of indigenous communities such as poverty, political subordination, economic dependency, and severe pollution of the air and water in indigenous-inhabited regions.

87. Some indigenous participants stressed the need to look at the issue of “benefit” from a longer-term perspective and from an indigenous perspective, not necessarily from the western monetary terms. It was also stressed that companies must share the burdens as well as the benefits of projects undertaken on indigenous people’s land. Building all the adequate infrastructure on the work-field, such as schools and hospitals, cannot be considered an act of kindness on the part of the company, it is a normal part of the mining process. Some industry representatives however noted that the construction of health and educational infrastructures was not the role of companies, and that it went well beyond corporate power. Education and health as well as other such infrastructures were under the mandate and responsibility of the State.

88. Some indigenous participants raised the question of benefit sharing and independence of indigenous communities in that process. They stressed the urgent need for mechanisms to ensure independent decisions from indigenous communities in the benefit sharing process. In many cases, indigenous communities cannot even share the benefits with companies, since they are not recognized as the owners of the land, and therefore have no claim to the royalties. Hence, indigenous peoples should be recognized as peoples and benefits should be considered as such from an indigenous point of view.

89. An indigenous participant from the Philippines explained that benefit sharing is only applicable when indigenous communities welcome the arrival of industries on their land. But Philippine indigenous peoples do not welcome large-scale mining, because it damages their ancestral domain, which is preserved and revered because it is considered to be the Promised Land for the future generations. Other indigenous participants recognized the shortage of trust between companies and indigenous peoples. Companies could act in favour of a positive change in the general perceptions indigenous peoples have of mining.

90. Some indigenous participants also spoke of difficulties in discussing specific benefits for indigenous peoples because the elements that were stolen from them are irreplaceable. Environment and water resources were being completely destroyed and the sanctity of indigenous peoples’ health, families and lands cannot be replaced by “benefits” offered by companies. Along the same lines, it was noted that benefits are also indirect economic and social durable development such as sustainable growth.

91. Many indigenous participants stated that benefit sharing was devoid of meaning as long as indigenous right to land was not recognized.

SOLVING DISPUTES: ISSUES OF DISAGREEMENT AND CONSTRUCTIVE EXPERIENCES TO FIND SOLUTIONS

Ok Tedi Mine of Papua New Guinea: Concrete lessons by communities

92. Mr. Kirsch, anthropologist, presented a case study on Ok Tedi mine in Papua New Guinea and expressed his views on concrete lessons learned and efforts made by communities.

93. With respect to the issue of good faith relationship, he stressed the need to address what is enforceable rather than what constitutes the principle of good faith. He stated that his main consideration is to look at the environmental impacts in terms of human rights. He also stated that human rights is contingent on access to the healthy and safe environment, therefore without the healthy environment, other human rights can be jeopardized.

94. Mr. Kirsch stated that Ok Tedi mine is a mining project in Papua New Guinea with large environmental impacts. The negative environmental impacts have been documented by Mr. Townsend in a book entitled, "Giving Away The River". His own 1989 article written after two years' work in the downstream of the Ok Tedi mine found that the Fly river has been reduced to nearly a sewer status. He further stated that the Australian Conservation Foundation described the Ok Tedi river as biologically dead in 1993. He further stated that CEO of BHP in 1999 announced that the Ok Tedi mine was not compatible with environmental values of the corporation, and the managing director said that a study showed that the problems are much greater than anticipated.

95. He also stated that the corporation was officially found guilty for its environmental pollution in an international forum and the company was ordered to stop dumping tailings into the river. Indigenous peoples in the region has settled the case for \$500 million in 1996. Mr. Kirsch further claimed that the company however pulled out its 52 per cent of the investment and set up a trust.

96. After the court settlement, BHP has announced the higher standards with regard to the environmental protection of its mining. The company said that it will work to monitor all risks and work cooperatively in consultations with communities.

97. He further argued that there is a need for the company to construct a structure for tailings containment. The 1984 investigation is still going on and it has been alleged that tailings are not still contained. He further reported that residents protested to the company and made petitions without success, and communities did not get redress. Therefore, local residents contacted the Mine Watch, Asia and Pacific, which helped to bring the case to the International Water Tribunal in The Hague. The Tribunal found the company guilty and ordered the company to contain tailings. The Tribunal further ordered that if the company cannot store tailings, mining operations should cease, but Mr. Kirsch stated that the mining company continued the operations.

98. Mr. Kirsch stated that a 1989 NGO audit from German Lutheran Churches was presented to the German Parliament. He said that although the company argued that it complied with the standards, some other critics disagreed with the company's findings. He further reported that the case has been legally litigated in a court in Melbourne, Australia, and as a result of the Australian media pressure, the company settled the case in 1996 and made compensation to indigenous peoples living downstream. Indigenous peoples found out that international environmental standards are lacking to hold the company accountable and Mr. Kirsch therefore argued that there is a need to formulate normative principles.

99. Mr. Kirsch observed that monetary compensation cannot make up for the loss and damages done in the downstream. Compensation and benefit sharing are not simply to provide industrialized versions of what they had in the past. Damage to potential of human health, algae in river, and to ecosystems will cause the balance to slip. He pointed out that by the time the mining company acknowledged, it was too late to do anything for the ecosystems. He also said that future impacts are also grave, which might well take the next 40 years to recover.

100. He suggested the following elements for potential solution: (1) need to look at policy issues; (2) need to obtain free prior and informed consent. To this end, land rights and resource rights need to be recognized; (3) independent social monitoring for large mining projects; (4) need of government to play a regulating role; (5) regular and external review with mechanisms for ensuring effective implementation of the findings of the review. It should further aim to bring about a change in the behaviour of big mining corporations; (6) need to be open, transparent, and public; (7) indigenous participation in the monitoring of the extractive industry; (8) full disclosure of relevant information is required; (9) effective communication of scientific data and resources, which should, in turn, be made freely available to indigenous peoples; (10) just and reasonable compensation by companies, which should be measured by the impacts on indigenous peoples, not by the monetary yields of the company such as revenue, earnings, or investment, and in assessing environmental impacts, local cultural value systems related to the land such as identity, history, community organizational structure, and local memory should be considered, not the western economic valuation; (11) support should be provided for various mechanisms for dispute resolution including access to courts; (12) criminal responsibility for company's acts of pollution and degradation; (13) need for strong enforcement mechanisms of the International Water Tribunal whereby multilateral financial institutions such as the World Bank should be bound by the international standards; (14) need for normative international legal precedents to regulate the activities of companies; (15) need for devising and promulgating specific environmental human rights standards; (16) need for companies to devise a longer-term time frame for environmental impacts assessment; and (17) fulfilment of host Governments' obligation to protect human rights of indigenous peoples.

Lessons learned in Ecuador in relation to oil development projects on indigenous peoples' land

101. Mr. Viteri presented the experiences that his Kichuwa people have had in Ecuador in relation to oil companies.

102. He stated that the failure to recognize the rights of indigenous peoples on the part of the authority is the source of major contests currently. The ILO Convention 169 recognizes the collective right to land, but this collective right is difficult to implement in reality in the social arena. To address the implications of the Ecuadorian multi-ethnic, multilingual, and multicultural society in this area requires a total change in social structures and patterns. He further argued that strategies to manipulate Indians are being applied in order to exploit communities and their oil resources. People using these strategies are contracted by companies without any consultation with indigenous peoples, thus resulting in avoiding the recognition of indigenous authority and organization. He stated that no information has been shared, no good faith has been shown, no transparency has been ensured, and no democratic agreement has been established. He further stated that oil companies imposed whatever they can on indigenous peoples, using tools, instruments, unilateral programmes, and other means for so-called community relations of companies, in order to better facilitate their operations on the indigenous lands. This has been complicated by the fact that companies are utilizing private services including sociologists and anthropologists to gain power and control. This is the way how oil companies operate.

103. Mr. Viteri argued that the main body responsible for this is Governments. However, he noticed that although States are meant to protect and guarantee the human rights of indigenous people, they are not adequately represented in the workshop.

104. With regard to consultation, he stated that there are no mechanisms for consultation in Ecuador. Oil activities are being carried out based on strategies which attempt to break down the traditional, cultural, political structures of indigenous communities for the purposes of facilitating the integration or assimilation of the oil economy in the country. This further aims to make sure that indigenous peoples assist in these oil developments. He argued that this is a new strategy to assimilate indigenous peoples into the Ecuadorian mainstream society, which was done in collaboration with oil companies and multilateral development cooperation agencies.

105. As this assimilation process took place in Ecuador, he observed the following phenomena, which is relevant to the various themes of the workshop. First, with regard to benefit sharing, there were no adequate benefits shared by indigenous peoples, and by compensating individual land owners, companies failed to recognize the collective nature of the land ownership system of indigenous peoples. He therefore stressed the importance of the pressure from the international community as well as that of domestic struggles, in ensuring the recognition of the collective rights. Secondly, fishing, hunting, and logging rights of indigenous peoples are being violated and various problems such as prostitution and alcoholism were brought into the communities. He further stated that indigenous communities are faced with serious health and educational problems. He stated that the cultural spiritual identity of indigenous peoples have been destroyed.

106. He stated that history has shown that in the process of negotiation, indigenous peoples were often not empowered to make informed decisions which affect the indigenous peoples in Ecuador.

107. He further spoke of an example which established to monitor indigenous environmental standards by creating an indigenous technical committee, and a permanent fund was set up to address indigenous matters.

108. He further observed that there is an absence of the minimum criteria of sustainable development and absence of relevant cultural programmes for indigenous peoples. He stated that various company policies in the area of benefit sharing and community infrastructure building for local communities fell far short of lip-services to improve the image of companies, not producing real results for indigenous peoples.

109. He stated that a number of human rights are recognized by Ecuador with its ratification of the ILO Convention 169 in 1999, and as a result of the ratification, a considerable amount of awareness-raising on the issue has been achieved. He further stated that the Ecuadorian constitution recognizes a package of collective rights. These rights include, among others: the right to preserve the community land, the right to maintain and develop historical and cultural heritage, the right to maintain and develop systems of knowledge and practice traditional medicines, the right to ritual and sacred sites, plants, animals and natural resources, the right to benefits, the right to receive compensation for environmental damages, the right to provide indigenous procedural rules and customary law for the formulation of development policies priorities by Government for the purpose of improving economic and social conditions, and the right to collective intellectual property.

110. He observed that oil activities have direct impacts on the realization of these rights. He noted that codes of conduct of companies flourish as part of so-called voluntary “good-neighbourly” principles, but these codes exclude fundamental human rights of indigenous peoples such as free, prior, informed consent. With regard to prior consultation, he noted that the Ecuadorian constitution recognizes prior consultation, however, it is subject to various subjective interpretations by oil companies. He also pointed out that the procedural aspect of achieving consultation is also problematic in that mere public relations of oil companies can be seen as consultation. He stated that accordingly, indigenous peoples strongly pushed for the concept of free, prior, informed consent in the Ecuadorian constitutional reform process, which was rejected by the Assembly. He noted that no consultation can be democratic if it excludes the right to say “no”. He further stated that consultation should be made prior to any projects by respecting priorities of indigenous peoples for managing their territories. He noted that consultation should be developed in terms of intercultural relations and horizontal participation in key decision-makings. He stated that with regard to constitutional remedy measures for violations of the above enumerated rights, requirement that constitutional “amparo” procedure is problematic.

111. In conclusion, Mr. Viteri has enumerated specific problems that they are facing, such as environmental deterioration, economic development, health, food security, and so on. He stated that mere existence of these problems lead oil companies to presuppose that indigenous peoples are benefactors of solving the problems, but he argued that this assumption is harmful because indigenous people have the potential to solve their own problems if their minimum rights are being recognized. He fleshed out some future challenges: (1) indigenous peoples must be recognized by the Government and companies as part of a future society where legal and ethical guidelines can be implemented; (2) there must be a need to recognize that indigenous priorities

do not necessarily coincide with those of States and companies; (3) there is a need to adopt global ethical principles which respect different societies and lifestyles, world visions, and languages; and (4) it should be recognized that main players in this area are indigenous peoples and States, and adoption of the role of States by companies run counter to the fundamental principle; (5) there is a need to recognize that indigenous peoples are peoples, who can take action on a daily basis in their political, economic, social arenas, and codes of conduct of companies should be based on this recognition; (6) it should be recognized that free, prior, informed consent is a precondition to the recognition of indigenous peoples as peoples; (7) it should also be recognized that the right to natural resources of indigenous peoples in the subsoil is part of indigenous peoples' territories; (8) there is a need to forge a new order or relationship, based on a democratic relationship, democratic administration of resources, and sharing of benefits. The current oil patterns run counter to the autonomy of indigenous peoples; (9) there is a need to speak of the histories, ideologies, cultures, differences, dreams, knowledge, identities, and the spirituality of indigenous peoples. In this regard, a holistic approach should be sought; (10) these indigenous issues relating to oil development must be done in direct relations with indigenous peoples and on the basis of the right to self-determination of indigenous peoples; and (11) there is a need to devise alternative, ethical and moral policies and responsibility.

Discussion of the theme

112. The representative of Ecuador said that with regard to the issue of solving disputes, Ecuador is willing and is indeed legally obliged to take actions to solve disputes arising in connection to the exploitation of oil development activities in Ecuadorian Amazon region. He stated that Ecuador has a legal framework, which should be respected and implemented, and his Government is aware that certain problems have arisen in the past and new difficulties may well arise in the relationship between companies, indigenous peoples, and Government.

113. He went on to state that with regard to a legal obligation to consult indigenous peoples in matters relating to indigenous peoples and activities on their ancestral lands, it can be in no way bypassed by codes of conduct. He stated that Ecuador has gone through various stages in the area of recognizing the collective rights of indigenous peoples like in other countries. However, he argued that there have been improvements since these collective rights of indigenous peoples are recognized in order to progress gradually. He further stated there are indeed some limitations, one of which relates to the ownership of the subsoil. The Ecuadorian State owns the subsoil and the exclusive ownership of the subsoil is not a provision that runs counter to the interests of Ecuadorian indigenous peoples and minorities.

114. In regard to free, prior, informed consent, he stated that the ILO Convention 169 has been ratified by Ecuador and became the law of Ecuador, and it is being applied in his country. He further stated that the Ecuadorian Government took note of the ways and means as to how this free, prior, informed consent can take place in practice and be utilized for dispute resolution as well as for conflict prevention. He acknowledged that there is a need to strengthen this principle. It is also necessary to further the consultation process, which is one of the important themes of the workshop. There is a need to have specific proposals in this area. He also stated that given

the important role of the free, prior, and informed consent in conflict prevention, the Ecuadorian Government is keen to see certain specific practical matters such as representation. The scope of stakeholders in the consultation process should be hammered out, which further needs to be clarified. He stressed that the Ecuadorian State is open to all the possible means of dispute resolution and conflict prevention relating to indigenous peoples, and his Government is fully committed to respecting the international human rights standards and legal obligations relating to indigenous peoples. He further stated that indigenous peoples are recognized in Ecuador.

115. Many indigenous participants spoke of the role of the World Bank and regional development in promoting mining and other extractive industries. Macroeconomic, fiscal, institutional, and legal reforms have facilitated international investment in extractive industries in developing countries. The standards adopted by the World Bank in the revised policy draft is below the international standards and pose a grave concern to indigenous communities. The Bank should abide by the international human rights standards. They further requested that new mechanisms should be required for resolving disputes and addressing grievances incurred by the Bank finance operations.

116. Many indigenous participants raised the issue of lack of adequate resources on the part of indigenous peoples when it comes to taking part in various dispute solving processes. As such, indigenous peoples do not have resources for this judicial process. Empowering indigenous peoples with sufficient resources when it comes to indigenous participation in legal frameworks or legislative process was stressed.

117. An indigenous representative addressed the issue of impunity in relation to dispute resolution. Therefore, the corporate responsibility should be established and the United Nations should support the current move for the establishment of international legal responsibilities of companies for the interests of all parties concerned.

118. Mr. McShane was invited to give an overview of the activities of Mining, Minerals, and Sustainable Development (MMSD). He provided the background on the MMSD project and some of its activities relating to indigenous peoples and the mining industry. It is a two-year project of participatory research and its task is to seek to address the issues related to the contribution of mining, minerals, and metals to society's transition to sustainable development. The project is run by three different groups, namely, the supporters group, the secretariat, and the insurance group. The insurance group is to address and assess the work of the MMSD secretariat and is composed of various experts including some indigenous persons. It has established regional partnerships all over the world, including Australia, South America, Southern Africa, Canada, and North America. He further reported that a number of global dialogues have discussed on the themes such as access to information, the relationship of indigenous peoples and the mining sector. He also stated that its work is to surface both the impacts/implications and benefits of mining for indigenous peoples. It works towards producing a report, which seeks to surface key issues and starts from the basis of recognition that there are five consistent core issues pertaining to indigenous peoples and the wider society. These issues include: (1) identity which is a political concept and the recognition of social networks, place and spirits; (2) territory

including land; (3) autonomy supported by decisions made based on community consensus and indigenous perceptions; (4) participation which acknowledges the right to be involved at all levels in the planning of alternative use of indigenous lands; and (5) the right to self-determination which recognizes the right to possess, control, manage, and develop indigenous territories. He summarized some of the key points to be included in the final report of the MMSD project: (1) recognition that the sector carries with it the legacy of mistrust and it should be emphasized that this mistrust can be overcome only with the recognition of fundamental rights; (2) this recognition will move the sector forward in such a way that the industry can conform to higher and environmental social standards, which will be respected by indigenous communities and by others associated with the sector; and (3) companies and governments must follow the standards which are assumed under the concept of sustainable development.

Closing statement by the High Commissioner for Human Rights, Mary Robinson

119. The High Commissioner stated that she is very pleased with the fact that indigenous experts and representatives of the industry, the United Nations system organizations, and some of government representatives could come together to the workshop. She acknowledged that this is the first time that an indigenous person, Mr. Wilton Littlechild, was a chairperson-rapporteur of an official United Nations workshop.

120. She further stated that the workshop is organised in the framework of the International Decade of the World's Indigenous People, which has a theme of "Indigenous peoples: partnership in action" and an aim of contributing to improvements in the well-being of indigenous peoples. She recalled that the programme of the Decade calls for activities that benefit indigenous peoples and asks for all groups including the private sector to make a contribution to the aim of the Decade.

121. She further made three proposals regarding the three workshop themes on her own behalf. Firstly, with regard to the role of the OHCHR as a facilitator, who will facilitate meetings of industry and indigenous peoples, broaden possibly the range of industry participation as well as involve more directly the relevant departments of governments, she expressed a strong interest in helping to ensure an effective follow-up to the workshop. Secondly, she hopes to have practical outcomes from these discussions. She further stated that the suggested elaboration of a common framework for consultation between industry and indigenous peoples drawing on successful experiences will fall within the mandate of the WGIP and the OHCHR could perhaps supplement these efforts by preparing some technical documentation and organizing a focused workshop on this theme. Thirdly, she stressed the need to maintain a momentum in connection with the workshop themes discussed. In this regard, the OHCHR can explore various means of achieving this such as collection of model agreements in cooperation with industry and indigenous peoples, information posting on the OHCHR web site, and a human rights training on indigenous issues.

CONCLUSIONS, RECOMMENDATIONS, WAYS FORWARD AND FOLLOW-UP TO THE WORKSHOP

122. The workshop participants agreed the following conclusions and recommendations.

Conclusions

1. The workshop welcomed the organization by the OHCHR of the Workshop on Indigenous Peoples, private sector natural resource, energy and mining companies, which was funded by the Voluntary Fund for the International Decade of the World Indigenous People, and considered that it had offered an opportunity to exchange views and experiences, and receive information about specific cases that enhanced understanding of the issues and concerns of industry and indigenous peoples. It expressed its appreciation to the High Commissioner for Human Rights for the initiative to hold the workshop and her comments and recommendations at the conclusion of the workshop. It also expressed appreciation to the private sector representatives for their participation.

2. The workshop affirmed the relevance to the discussions of existing and emerging international human rights norms and standards including the United Nations Charter, human rights treaties, particularly the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of Racial Discrimination, the Convention on Biological Diversity, ILO Convention 169 on Indigenous and Tribal Peoples, the 1993 Vienna Declaration and Programme of Action, the proposed declarations on the rights of indigenous peoples under consideration by the United Nations and the Organization of American States as well as other standards elaborated or being elaborated to ensure human rights in connection with private sector natural resource activities.

3. The workshop recognized that the issue of extractive resource development and human rights involves a relationship between indigenous peoples, governments and the private sector. The workshop also acknowledged that a precondition for the construction of equitable relationship between indigenous peoples, States and the private sector is the full recognition of indigenous peoples' rights to their lands, territories and natural resources.

4. The workshop noted that indigenous peoples suffer negative impacts due to the practices of extractive and energy developments on their lands and territories.

5. The workshop acknowledged the efforts being made by a number of companies to address these issues, improve dialogue, work within a human rights framework, develop appropriate benefit sharing arrangements and find mutually acceptable mechanisms for dispute settlement.

6. The workshop recognized the link between indigenous peoples' exercise of their right to self-determination and rights over their lands and resources and their capacity to enter into equitable relationships with the private sector. It was noted that indigenous peoples with

recognized land and resource rights and peoples with treaties, agreements or other constructive arrangements, were better able to enter into fruitful relations with private sector natural resource companies on the basis of free, prior, informed consent than peoples without such recognized rights.

7. The workshop recalled the Vienna Declaration and Programme of Action (paragraph 20 of the Declaration and paragraph 30 of the Programme) in which States recognize the importance of the free and informed participation of indigenous peoples in matters affecting them as a means of contributing to their rights and well-being.

8. The workshop affirmed the importance of economic and sustainable development for the survival and future of indigenous peoples. It also considered, in particular, that the right to development means that indigenous peoples have the right to determine their own pace of change, consistent with their own vision of development, and that this right should be respected, including the right to say “no”.

Recommendations

1. The workshop recommended that States, United Nations system organizations, indigenous peoples and the private sector continue to review experiences in relation to private sector natural resource development on indigenous peoples’ lands, consider best practices, and explore the links between recognition and respect for indigenous peoples’ land rights and those successful experiences.

2. The workshop recommended that States, United Nations system organizations, indigenous peoples and the private sector elaborate a framework for consultation, benefit sharing and dispute resolution in private sector projects affecting indigenous peoples.

3. The workshop recommended that a study be undertaken on existing and emerging human rights standards, other relevant standards and industry guidelines relevant to indigenous peoples and private sector resource development on their lands, taking into account existing research and documentation.

4. The workshop recommended that consultation between indigenous peoples and the private sector should be guided by the principle of free, prior, informed consent of all parties concerned.

5. The workshop recommended that private sector development on indigenous peoples’ lands ensure mutually acceptable benefit sharing.

6. The workshop recommended that mutually acceptable independent mechanisms be established for resolving disputes between indigenous peoples and the private sector.

7. The workshop recommended that the OHCHR:

- Submit the report of the workshop to the Working Group on Indigenous Populations at its twentieth session and the WG on TNCs, and make available the conclusions and recommendations for the first session of the PFII, the World Summit on Sustainable Development, the United Nations system including the ILO, UNCTAD, UNDP, the World Bank and the WTO and relevant umbrella industry organizations;
- Organize in cooperation with indigenous peoples, the WGIP and other relevant United Nations organs and organizations, private sector and governments, and possibly investment and social auditing representatives with experience of measuring and monitoring company practices, a second workshop to elaborate a draft framework for dialogue and implementation on consultation, benefit sharing and dispute resolution in private sector projects affecting indigenous peoples;
- Compile the workshop papers and other relevant material and make them available as a publication for circulation to industry, indigenous peoples and States;
- Request from industry and indigenous peoples existing agreements of consultative processes and benefit sharing between indigenous peoples and the private sector so that an analysis can be made and model best practices can be developed and consider making model arrangements available on the OHCHR web site;
- Organize, at the request of industry, human rights training on indigenous peoples for interested industry employees and representatives.

8. The workshop recommended that private sector resource companies with activities on indigenous peoples' lands:

- Continue to hold dialogues with indigenous peoples and the United Nations system on these matters;
- Gather existing codes of conduct and guidelines on human rights and make them available to indigenous peoples and the OHCHR;
- Participate in the WGIP and Permanent Forum as well as other relevant forums on indigenous issues.

9. The workshop recommended that the UNWGIP:

- Provide an opportunity to exchange views on indigenous peoples, private sector natural resource, energy and mining companies and human rights under the item of its agenda related to standard-setting activities;

- Contribute to a framework for consultation, benefit sharing and dispute resolution in private sector natural resource and energy projects affecting indigenous peoples guided by the principles of full and effective participation of indigenous peoples in decisions affecting their lives at all levels, and free, prior, informed consent to projects and developments on their lands;

10. The workshop recommended that indigenous peoples:

- Provide information on arrangements they have made with the private sector, in particular mechanisms they have established for consultative processes.

11. The workshop invited the World Bank to adopt a policy on indigenous peoples which requires borrowers and clients to respect indigenous peoples' rights, in particular their land and resource rights and to free, prior, informed consent with respect to investments, loans, guarantees and operations that may affect them.

12. The workshop recommended that the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people pay attention to the impacts of private sector activities on indigenous peoples' lands in the exercise of his mandate.

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THE PROGRAMME AGENDA

Wednesday, 5 December 2001

- | | |
|-------------|---|
| 10.00-10.15 | OPENING STATEMENT
Mr. Bertrand Ramcharan, Deputy High Commissioner |
| 10.15-10.30 | ELECTION OF CHAIRPERSON
Introduction of workshop participants |
| 10.30-10.45 | INTRODUCTORY REMARKS AND OBJECTIVES OF THE WORKSHOP
Office of the High Commissioner for Human Rights, Mr. Julian Burger |
| 10.45-11.45 | OVERVIEW OF ISSUES RELATING TO INDIGENOUS PEOPLES, PRIVATE SECTOR NATURAL RESOURCE, ENERGY AND MINING COMPANIES AND HUMAN RIGHTS
Indigenous Peoples' International Centre for Policy Research and Education, Ms. Joji Carino
Industry perspective |
| 11.45-12.00 | SUMMARY OF THE EXISTING INTERNATIONAL LEGAL FRAMEWORKS IN RELATION TO INDIGENOUS PEOPLES, LANDS, TERRITORIES, AND NATURAL RESOURCES
Office of the High Commissioner for Human Rights, Mr. Jong-Gil Woo |
| 12.00-1.00 | GENERAL DISCUSSION |
| 1.00-3.00 | LUNCH |
| 3.00-3.20 | CONSULTING WITH INDIGENOUS COMMUNITIES PRIOR, DURING, AND FOLLOWING THE DEVELOPMENT OF PRIVATE SECTOR PROJECTS: POSITIVE EXPERIENCES, COMMUNITY CONCERNS, AND LESSONS FOR THE FUTURE
Presentation by:
Nishnawbe Aski Nation, Deputy Grand Chief, Mr. Raymond Ferris |
| 3.20-6.00 | DISCUSSION ON THE THEME |

Thursday, 6 December 2001

- 10.00-10.20 CONSULTING WITH INDIGENOUS COMMUNITIES PRIOR, DURING, AND FOLLOWING THE DEVELOPMENT OF PRIVATE SECTOR PROJECTS: POSITIVE EXPERIENCES, COMMUNITY CONCERNS, AND LESSONS FOR THE FUTURE
- Presentation by:
Cordillera Peoples Alliance, Mr. Edward Mangili
- 10.20-12.00 DISCUSSION ON THE THEME (continued)
- 12.00-1.00 BENEFIT SHARING BY INDIGENOUS COMMUNITIES IN PRIVATE SECTOR ACTIVITIES: COMMUNITY CONCERNS AND NEEDS AS WELL AS POSITIVE EXAMPLES RELATING TO ECONOMIC BENEFITS, TRAINING AND OTHER FORMS OF COMMUNITY DEVELOPMENT
- Presentations by:
Freeport-McMoRan Copper & Gold Inc., Vice President, Mr. David Lowry
Forest Peoples Programme, Mr. Marcus Colchester
- 1.00-3.00 LUNCH
- 3.00-6.00 DISCUSSION ON THE THEME

Friday, 7 December 2001

- 10.00-11.00 SOLVING DISPUTES: ISSUES OF DISAGREEMENT AND CONSTRUCTIVE EXPERIENCES TO FIND SOLUTIONS
- Presentations by:
Ok Tedi/Fly River Environmental and Ecology Association (ENECO), Mr. Stuart Kirsch
The Kichuwa people, Mr. Carlos Viteri
- 11.00-1.00 DISCUSSION ON THE THEME
- 1.00-3.00 LUNCH
- 3.00-3.20 CLOSING STATEMENT
- Mrs. Mary Robinson, High Commissioner for Human Rights
- 3.20-6.00 REVIEW OF FUTURE WORK, WAYS FORWARD, FOLLOW-UP ISSUES, CONCLUSIONS, AND RECOMMENDATIONS
