Legal strategies dealing with negative consequences of extractive projects in Latin America

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1. The study: introduction

This document is a report of a study conducted within the framework of the project for coordination of legal strategies between CIDSE members and their partners for the EPLA (Extractives and Poverty in Latin America) project. The need for the consolidation of collaboration regarding legal strategies and actions in dealing with the negative consequences of extractive projects in Latin America was concluded at the occasion of previous EPLA meetings in Lima, Peru (May 2008), and Belem do Pará, Brazil (January 2009). Initially, the idea was to develop joint activities with a view to strengthen CIDSE partners' capacities for litigation (i.e. to actually undertake litigation). In light of feasibility and cost constraints, ambitions were later adjusted and it was decided to first explore possibilities for undertaking future activities aimed at legal support and capacity building (i.e. in the day-to-day operations of partners). For this reason, it was concluded that it was first necessary to take stock of the recent experiences of partners in the legal field, as well as of problems and needs they identified.

By means of a questionnaire distributed through email, the partners were requested to provide summarized information regarding the violation of the rights of communities in the context of extractive industries as well as the various strategies they had pursued in order to defend/increase the enforceability of these rights (August-December 2009). The questionnaires that were filled out and returned (9 of 12 partners had been invited to participate) were studied and analyzed by a consultant contracted by Cordaid (JvdS). Where necessary information was complemented with additional information collected on the Internet and in university libraries. Finally, some tentative conclusions and recommendations were deduced from the findings of the study (April-August 2010). In the same period, the consultant collected available materials that may serve in legal capacity building activities to be undertaken in the future. These materials have been compiled on CD-ROM and will be made available to the partners through the website of OCMAL (www.conflictosmineros.net/component/docman/cat_view/32-estudios-e-informes/99-legislacion-y-derechos), which does not include most of these documents.

The document at hand consists of the following parts:

- A short discussion of the differences and similarities between the concrete cases and contexts in which the CIDSE partners are involved;
- A brief description of the reported violations of the individual and collective rights of indigenous and local communities by extractive companies and governments;
- An extensive inventory of the various, more and les successful legal defense strategies that have been undertaken by the CIDSE partners in the struggle against the violation of rights of people and communities (including a table in two parts);
- A brief reflection on the collaborations of the CIDSE partners with other civil society organizations, as well as an indication of their needs in terms of knowledge and contacts.

The document also includes two annexes: (a) a matrix with summary information on the cases reported on; (b) a compendium of legal texts and jurisprudence on indigenous peoples' rights.

2. The cases: differences and similarities

Among the nine cases surveyed in the context of this EPLA study, strictly speaking seven are concerned with extractive industries. The cases include five gold or copper mining projects in mountainous areas in Guatemala, Honduras, Colombia and Peru (three in operation and two planned), as well as two hydrocarbon (oil, gas) projects in the tropical lowlands of Ecuador and Bolivia. Another case concerns an electric power project, i.e. hydroelectric dam, in Guatemala. The recent construction of hydroelectric power plants in Latin America is directly linked to the rise of extractive and agro industries because they are meant to generate electricity for nearby mines and plantations. One case falls out of the category of extractive industries as this concerns the production of bio-fuels (sugar cane, oil palm). Technically, this does not concern one particular project and is more related to the growth of agro industry in a certain area – the Polochic Valley in Guatemala – it does not concern the involvement of a transnational company. Although environmental risks as well as the relevant normative frameworks for the agro industry differ considerably from those in the mining, oil and gas (extractive) industries, the social consequences of the rise of bio-fuels for the local population – displacement, violation of (indigenous) human rights – are comparable.

Concerning the cases, it is relevant to distinguish between extractive projects that are in operation and those that are in the process of being developed. Several mining projects, such as the Yanacocha mine in Cajamarca-Peru, the San Martín mine in Morazán-Honduras, and the Marlin Mine in San Marcos-Guatemala, have already been in operation for several years or have already reached the end of their production cycle. The hydrocarbon projects in Orellana-Ecuador and Tarija-Bolivia have been in production for some time as well. This stands in contrast with the Río Blanco and Mandé Norte mining projects, respectively in Peru and Colombia, as well as the Xalalá dam project in Guatemala, which are actually still in the planning or exploratory phase. In the first type of cases, the extractive activity has become part of the everyday reality of the local population and constitutes a source of income for at least a part of the local community. Resistance in these cases is often aimed at demanding compensation for environmental losses and damages, and denouncing human rights abuses by the company or the State. In the second type of cases, the actual extraction activities are yet to begin and resistance by the local population – alarmed by the negative experiences with extractive industries elsewhere – is typically characterized by the rejection of planned projects; resistance is focused on preventing the projects from being developed by pointing to inconformity with environmental and social legislation in force.

Local NGOs (CIDSE partners) supporting and accompanying communities in their resistance against irresponsible extractive industries significantly differ with regard to their background and objectives. Most of them are intermediate NGOs which have focused on the strengthening (i.e. democratic participation) of the community organizations among their constituencies, and which have recently set about to help communities protect themselves against adverse environmental effects and human rights violations in the emerging context of extractive industries. Some of these NGOs bear a catholic signature; in two cases (COPAE and Caritas), they form part of the structures of the Catholic Church. The others are independent, non-confessional organizations. One of the counterparts under scrutiny (Acción Ecológica) is an "ecologist" NGO that emphasizes the "defense of nature and the environment", as well as the protection of the people/communities that help to achieve this objective. Another NGO (IDEAR-CONGCOOP) has specialized in conducting technical studies into agrarian and natural resource issues. Most of the NGOs are not specialized in the legal accompaniment of communities; its personnel is not legally schooled but self-taught in this field (exceptions are CCAJAR-CIJP, FEDEPAZ and, to a lesser degree, SERJUS). Only one NGO (CERDET) is directly representing the affected indigenous communities (its personnel consists of community members), and specifically aims to promote "the internal strengthening and self-determination of the indigenous Guaraní people".

Also, it is important to point out that in seven of nine cases, the affected communities are indigenous peoples[1]. In the case provided by Acción Ecológica, the affected population is mixed, comprising settler and indigenous

[1] In this survey, the "peasant and native communities" of the two Peruvian Andean cases are considered indigenous in view of their communal identity and organization ("rondas campesinas"; see also the Peruvian Constitution, articles 88, 89 and 149).

communities. In the case of Caritas, the population identifies as peasant rather than indigenous[2]. In the context of this study, the fact that indigenous peoples are involved is relevant for various reasons. Indigenous peoples are distinct societies that are culturally different from the dominant, non-indigenous society. They are strongly dependant on their natural environment for their survival, they generally have a collective attachment to a defined territory, and they often have a vision on development that differs from the one that is promoted by the State and markets. Because they have been historically marginalized within larger political and economic systems, they are in a particularly vulnerable position in the face of a rapidly changing context. Because of these reasons, amongst others, today it is internationally recognized that indigenous peoples are entitled to special, collective rights in order to protect, preserve and strengthen their cultures and identities (e.g. ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples). In Latin America, these rights are also increasingly recognized by national States. Although national governments still often act against indigenous peoples' collective rights – out of ignorance or purposefully – to the communities concerned this formal recognition provides new entry points in legal and political struggles for the enforcement of their rights as peoples. Because of this, the involvement of indigenous peoples often gives a special dynamic to popular resistance against irresponsible extractive industries.

Finally, in view of the above, it is important to point to the marked differences between cases regarding national legal frameworks for the recognition of indigenous peoples' rights, as these determine the national legal resources and avenues available to affected indigenous communities to defend their rights and self-determination. Although all countries under consideration have ratified ILO C169, which is therefore binding law in these countries, few states have implemented the rights contained in the Convention. In the cases under study, only Colombia, Bolivia and Ecuador have constitutions that include a significant number of collective rights for indigenous peoples – in Ecuador the translation of these constitutional rights has been lagging behind, however. Guatemala (despite the peace accord on indigenous peoples' rights) and Peru can be characterized as countries with weak recognition; both recognize indigenous peoples' social and cultural rights, but are reluctant to recognize their collective political and economic rights. Honduras scores lowest in terms of recognition of indigenous peoples' rights; its constitution does not even officially recognize the multicultural nature of the country.

[2] If we also consider the three cases that form part of the EPLA network but – for various reasons – were not included in this survey, one case (FRUTCAS) involves indigenous peoples, while another (CEAS) does not; in the other case (ASONOG), this remains unclear.

3. Reported violation of rights, patterns of irresponsible corporate practices and State responses to events

To most CIDSE partners, the collective right to prior consultation, or the right to free, prior and informed consent seems to be the most important right that was violated. Although several companies and governments say to have held prior consultation with potentially affected communities, the latter do not consider these procedures valid. This is because hearings were often held only after environmental and extraction licenses were obtained by the company, and therefore did not constitute prior consultation (COPAE, Caritas[3], FEDEPAZ, CERDET); in some cases of planned projects (SERJUS) or projects that have never been officially inaugurated (IDEAR-CONGCOOP), hearings or consultations have not been held at all. When informative meetings were held after project commencement, these were usually organized by the company (instead of the government), and thus heavily biased. In all of these cases, the information was not disclosed through communities' representative institutions. The same was true for the only case in which consultation occurred prior to the start of the project (CCAJAR-CIJP)[4]. Meetings that are said to be consultations are limited to brief informative meetings that are often inaccessible to a large part of the affected population and do not allow for meaningful participation.

Although all countries involved in this study have ratified ILO C169, most countries have not issued secondary legislation that further regulates the mechanisms for consultation of indigenous peoples in line with the provisions of the Convention (Colombia currently being the only exception; in some countries, like Guatemala and Peru, legislative proposals have been in the making). In many countries, the government tends to delegate the organization of consultations to the company that is interested in developing the project, which clearly is not in the spirit of the Convention. When "consultations" are being held, communities are practically never allowed to decide on the mechanism for consultation that is most appropriate according to their traditional decision-making and governance processes; furthermore, consultation does not take place according to pre-established and mutually agreed upon criteria – this while both requirements are mandatory according to ILO C169.

Six partner organizations report violation of the collective and/or individual right to property, or the right not to be forcibly removed from lands or territories. In Guatemala and Peru, mining companies through use of pressure, intimidation and manipulation have appropriated part of the communal lands of the original inhabitants of the project areas (COPAE, FEDEPAZ); in another Guatemalan case, large landowners are expanding their sugar cane and oil palm plantations to the detriment of indigenous families that lack secure tenure (ownership titles) and are being displaced (IDEAR-CONGCOOP); in the Honduran case, at least 12 individual families have had their land forcibly expropriated and were relocated (Caritas); in Colombia and Bolivia, companies have intentionally disregarded the fact that local indigenous communities are in possession of recognized collective territories, like national governments justifying their actions by appealing to "overriding rights" to subsoil resources (CCAJAR-CIJP, CERDET).

In order to acquire surface rights to a certain project area, companies often ignore customary communal land tenure systems of local communities. While applying aggressive, individual land negotiation strategies, they purposely avoid local traditional authorities, or intentionally obstruct ongoing land regularization and titling procedures that were initiated years before the start of the extractive project. Companies are in the position to act in this way because in many Latin American countries the recognition of indigenous customary land rights is weak or non-existent, or because governments give precedence to large-scale development projects in the name of the "national interest".

Five partner organizations, all of which are working on extractive projects that are in operation, report violation of the right to clean water, right to health and/or right to a healthy environment. COPAE, Caritas and Acción Ecológica report water, soil and air pollution, causing health

[3] The case provided by Caritas does not involve populations that identify as belonging to an indigenous people, and affected communities therefore cannot appeal to the internationally recognized indigenous peoples' right to prior consultations, but only to the right to "citizen participation" insofar as this is enshrined in Honduras' national legislation (Municipal Code)

[4] Up to this date, Colombia is the only country in Latin America that has effectively translated the right to consultation into national legislation (Decree 1320 of 1998); this law is however boycotted by Colombia's indigenous peoples because the legal text was not consulted prior to being adopted by Congress (See ILO [CEACR] 1999, documents GB.276/17/1 & GB.282/14/3).

problems among the local population, skin infections and respiratory diseases being the most common; SER and CERDET more generically report environmental problems that are said to have resulted in decreasing living standards among affected communities. CCAJAR-CIJP and FEDEPAZ, both of which are working on extractive projects that are in the planning or exploratory phase, speak of violation of environmental rights in the context of inadequate, inappropriate, or nonexistent environmental impact assessments and mitigation plans, which points at the State and the company's irresponsible neglect of significant social and environmental risks.

It is often seen that companies downplay risks of adverse environmental and health impacts on the local population, or categorically deny responsibility for environmental and health damages when these have occurred. Companies as well as governments tend to discredit independent environmental (water) monitoring efforts by civil society groups on the grounds that these are not sufficiently scientific, i.e. water samples have not been analyzed by certified laboratories – this while government agencies also often lack the technical capacity, or the political will, to independently monitor projects sites themselves. Based on experiences at hand, the independence of participatory water monitoring efforts by companies and communities must be seriously questioned.

Various CIDSE partners report the violation of the right to (public) information, which relates to the reluctance of governments and/or companies to disclose technical information on projects, as a result of which (potentially) affected communities are kept in the dark regarding environmental effects and risks of planned or ongoing extraction activities. In Guatemala and Bolivia, community authorities requesting information on projects have not received answer from responsible ministries or the company (COPAE, SERJUS, CERDET), which in this way fail to comply with valid legislation[5]. In Honduras, the mining company responsible for a toxic spill failed to warn communities surrounding the mine about it (Caritas). In Ecuador, citizens are forced to pay for public information, with prices that often go above the budget of rural communities (Acción Ecológica).

Conflicts around extractive projects are often exacerbated by the non-transparent and secretive management of information. If information is at all provided, it is not distributed widely and/or not in a form that is intelligible to the local population. Civil society groups suspect that government agencies are reluctant to release certain information on risk/impacts because it may point to the liability of its strategic partner (the company). Apparently, for many governments, the risk of jeopardizing its relation with a company outweighs the environmental and health risks for the local population.

A number of partner organizations report the violation of the right not to be discriminated on the basis of ethnic identity, or the (collective) right to self-determined development. According to COPAE, the mining company ignored the collective attachment of local indigenous communities' to the land, as well as their distinct forms of social organization and traditional authority. SERJUS maintains that, in planning a hydroelectric project, the government has not given affected communities a differentiated treatment, which would allow them to preserve their cultural identity. Acción Ecológica accuses the government and companies of making themselves guilty of "environmental racism" by neglecting environmental impacts that particularly affect poor, indigenous and peasant communities. According to CERDET, the oil company has discriminated the indigenous population by distributing social benefits directly to certain local families and communities, in this way showing disrespect for the legitimate authorities of the Guaraní indigenous people.

A typical pattern of corporate behavior that is in violation of the right of indigenous peoples to self-determined development is the implementation by transnational companies of so-called voluntary social investment programs. Usually these consist of small projects that are primarily oriented towards individuals, emphasizing entrepreneurial development as an alternative source of income instead of being aimed at community building or supporting participatory processes. In this way, these corporate programs often thwart existing communal development projects. Moreover, due to their exclusionary nature, they create divisions among the local population, thus effectively serving to depoliticize the basis for mobilization and collective action. Companies also often

[5] Many Latin American countries over the past few years have recognized the right to public information, which internationally is increasingly considered a fundamental human right; these "transparency" or "right to public information" laws are not equally strong in all countries under study, however (for an overview, see: Michener, G. [2010]. The surrender of secrecy: explaining the emergence of strong access to information laws in Latin America. Austin, University of Texas; see also http://gregmichener.com).

attempt to win over the local population by offering social services the State for many years has failed to deliver (road development, hospitals, schools etc.).

Four partner organizations report violation of the right to life, liberty and security of person, or the right to access justice (Caritas, CCAJAR-CIJP, Acción Ecológica, FEDEPAZ – and COPAE). In Honduras, many of the complaints that were filed by affected communities against the mining company after many years still have not found resolution by the judicial authorities (Caritas); in Colombia, the occupation and militarization of an indigenous territory leading to the displacement of the original inhabitants has caused several uprooted youth to attempt suicide, along with the death of five new-born children (CCAJAR-CIJP). In Ecuador and Peru, mostly peaceful protests against extractive industries have been met with State repression, which has caused a number of deaths and hundreds of wounded; in one case, protesters have been tortured; community leaders and local authorities that organized the protests as well as legitimate community consultations are being criminalized, have been detained and imprisoned on charges of terrorism, or are being legally prosecuted (also in Guatemala, although not reported by CIDSE partners included in the study).

Civil society groups opposing extractive projects accuse companies and/or governments of using "low intensity war tactics" to try to divide them and to erode their opposition. This refers to companies making offensive use of penal codes in order to criminalize social protest, but also to the phenomenon of distributing anonymous pamphlets in which community leaders are intimidated and sometimes even threatened – practices that create strong feelings of anxiety and insecurity among the local population.

In cases where sections of communities, often unaware of potential effects, misguided or under pressure, consented to extractive projects and where a part of the population currently finds employment in the extraction activities, organizations report violation by the company of the right to just and fair compensation and/or of labor rights. According to COPAE, prices obtained in the land sales by community members prior to mine construction are not in proportion to the profits currently made by the mining company, the more so since the people that sold their land made this decision on the basis of false information, i.e. misleading representations. Acción Ecológica claims that hazardous work in the oil industry is characterized by numerable labor conflicts due to breach of labor protection regulations. According to CERDET, compared to other personnel, local Guaraní are only offered deplorable jobs with low wages and without social benefits. (Although not reported, this is also the case in communities COPAE is working with).

4. Organizational responses from affected communities (legal resources used to increase enforceability of rights) and their results – including comments

4a. Evaluating Environmental Impact Assessments relating to extractive projects

In the case of large-scale development projects, like in the extractive industries, it is common that an environmental impact assessment (EIA) is conducted. This assessment has the goal to ensure that decision makers consider the ensuing environmental impacts when deciding whether to proceed with a project. The International Association for Impact Assessments (IAIA) defines an environmental impact assessment as *"the process of identifying, predicting evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made."* EIAs are normally conducted by a specialized government agency (sometimes part of a responsible ministry) or by an independent consultancy firm. In national legislation, EIAs are usually obligated and regulated according to provisions typically contained in land use planning law. Although EIAs are per definition expected to take account of social aspects of projects, the IAIA has moreover specifically determined that: *"Indigenous peoples require unique consideration within the impact assessment framework. Commonly, development projects occur in territories that are occupied for traditional lifestyles of the indigenous people; development projects will have significant impacts on their daily lives. Impact assessment must effectively consider the impacts the project will have on these communities"* (www.iaia.org)[6]. In many Latin American countries, this special consideration for the consequences of development projects for indigenous peoples is mandatory as many States have ratified ILO C169.

However, considering the cases under study, it has become clear that governments in practice have mostly failed to conduct comprehensive, scientific and technical studies of the environmental, social and cultural impacts of extractive projects, and that procedures for such assessments have often been devised in such a way that they favored national and transnational companies (cf. Organizaciones de Pueblos Indígenas de Guatemala 2010)[7]. In some cases, the EIA was completed after important decisions regarding a project had already been taken (COPAE, FEDEPAZ); in many cases, the EIA was not conducted by the responsible ministry, but instead by a consultancy firm hired by the interested company (COPAE, Caritas), thus compromising the independence of the assessment. Apparently without exception, the EIA mainly focused on the environmental effects of the project, and hardly – if at all – on social and cultural impacts on the affected populations; nor did assessments give special consideration to the fact that local populations were indigenous (a point which is emphasized in the case of CERDET). Sometimes, the EIA purposely made the presence of human habitation "invisible". In those cases, the area of direct influence was defined so narrowly that large parts of the local population fell outside of the scope of the EIA (COPAE); in one case, the presence of local habitants was simply denied (SERJUS). Once the assessments had been concluded, affected communities generally had very limited time to respond to the results (EIA reports are usually extensive and not easily understandable); few governments of their own accord informed communities about the assessment results[8].

In providing answers to the questions of this study, most participating CIDSE partners have not taken into consideration the aspect of participation of the local population in EIA processes. However, it seems that in none of the cases studied, potentially affected communities have been consulted or invited to cooperate in the preparation and execution of impact studies on planned projects. This pattern is very problematic, since EIAs are usually conducted by technical experts who often have little knowledge of the particular social and cultural characteristics of the affected communities or indigenous peoples (or they are based on desk studies, without members of the assessment team actually visiting the project site). This contrasts with the trend that governments in relation to EIAs are nowadays expected to also take traditional indigenous knowledge into consideration. According to the IAIA, *"Traditional*

[6] www.iaia.org/iaiawiki/indigenous.ashx.

[7] Organizaciones de Pueblos Indígenas de Guatemala (2010). Una mirada crítica sobre la aplicación de la Convención Internacional sobre la Eliminación de todas las Formas de Discriminación Racial en Guatemala. Guatemala, CEDR (Uk'aslemal Xokopila', PRODESSA, Fundación Rigoberta Menchú Tum, PIDHDD-Guatemala, Moloj, CONAVIGUA, MOJOMAYAS, Waqib' Kej).

[8] From the materials (information) provided by the partners, it does not always become clear whether, when or how an EIA was conducted in a particular case.

Knowledge (TK) […] can augment scientific data related to the development project and the identifications of impacts. […] TK can provide further insight into potential impacts" (www.iaia.org)[9]. ILO C169, which has the status of national law in all countries included in this study, states in this regard: *"Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities"* (article 7.3). ILO C169 considers that the active participation of potentially affected indigenous communities in EIA processes should form part of the broader consultation procedure to which governments are obligated. It is striking that lack of indigenous participation in EIAs is not mentioned as an issue by the NGOs surveyed; probably they are not aware of this obligation of the government.

CBD's Akwé: Kon Voluntary Guidelines

Directly related to the issue of participation, the Working Group on Article 8(j) of the Convention on Biological Diversity (CBD, adopted in 1992) has recently developed a set of normative guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on lands and waters traditionally occupied by indigenous and local communities. In these so-called Akwé: Kon Voluntary Guidelines, which were adopted during the Seventh Meeting of the Conference of the Parties to the Convention, the participation of indigenous and local communities in EIA processes plays a central role. Departing from the recognition that *"traditional knowledge can make a contribution to both the conservation and the sustainable use of biological diversity"* and of *"the need to ensure the equitable sharing of benefits arising from the utilization of traditional knowledge"*, the guidelines are intended to *"provide a collaborative framework ensuring the full involvement of indigenous and local communities in the assessment of cultural, environmental and social concerns and interests of indigenous and local communities of proposed developments. Moreover, guidance is provided on how to take into account traditional knowledge, innovations and practices as part of the impact-assessment processes and promote the use of appropriate technologies"* (Secretariat of the CBD 2004)[10]. Although the adoption of the Akwé: Kon guidelines, which were developed in cooperation with indigenous communities, is being applauded by indigenous representatives to the CBD, little is yet known about their practical application in concrete situations (Van der Vlist, pers. comm., September 2010).

[9] Op.cit.

[10] Secretariat of the Convention on Biological Diversity (2004). The ‹Akwé: Kon› Voluntary Guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities. Montreal, Secretariat of the Convention on Biological Diversity (CBD).

Various CIDSE partners or allied organizations have reviewed or evaluated EIAs concerning particular extractive projects (COPAE, Caritas, CCAJAR-CIJP, FEDEPAZ, CERDET). In most cases, however, they did this after an environmental or extraction license was granted by the government (SERJUS being an exception); these evaluations were mostly used to expose or denounce the neglect of environmental risks by government and companies, or to substantiate proposals for a reform of mining, environmental or other relevant legislation that was in force at the time. In other words, although this could be a legal strategy, none of the NGOs or communities has made a case out of the administrative irregularities around EIA processes in an attempt to force governments to delay or postpone decisions on an extractive project. In the future, this could be a valid avenue for legal action by potentially affected communities – complementary to other strategies employed, such as urging states to comply with prior consultation obligations. A bottleneck in this respect is the fact that national legislation regarding EIA in most countries is still deficient[11]. In some countries, however, this legislation has recently been improved and this offers new perspectives for undertaking such legal action. In this regard, lessons can be learned from the recent experience of the Central Campesina Chortí "Nuevo Día" and local communities in Jocotán y Camotán in Chiquimula, Guatemala, which have managed to postpone – at least for some time – government decisions on a hydroelectric dam project by demonstrating that the EIA had not taken social impacts into account (www.plataformaagraria.org)[12]. Because evaluating EIAs requires time and technical skills, recently published toolkits and IAIA guidelines can be of great use in such processes (eLaw 2010; and www.iaia.org)[13].

The challenge of reviewing or evaluating EIAs relating to extractive industries by NGOs and communities is directly related to the issue of transparency or access to information legislation and the compliance obligations that these laws impose on government agencies. It is important that communities and NGOs know how to use such legislation to their advantage – know what their rights are – in cases where governments are reluctant to disclose information on projects, and, if need be, to push for access to information reform in cases where legal standards on transparency are deficient. In this context the situation in Bolivia as described by CERDET is disturbing. In consequence of the adoption of a new Hydrocarbons Law (Law 3058 of 2005), which imposed stricter obligations on the Bolivian government regarding EIAs and compensation and indemnification measures, the Ministry of Hydrocarbons and Energy (MHE) 2005 conducted several field inspections in the Margarita oil field (block Caipipendi) operated by Repsol. However, despite repeated requests, MHE has refused to share the results of these inspections with the Guaraní communities inhabiting the area (CIDSE 2009)[14].

4b. The organization of community consultations on extractive projects

Indignant about not having been consulted on extractive projects (in conformity with ILO C169), various communities have organized so-called "citizen" or "community consultations", thereby assisted by local and national NGOs (COPAE, SERJUS, Caritas, FEDEPAZ, CCAJAR-CIJP). These consultations were organized through municipal development councils or indigenous authorities and were legally based on national laws and international legal norms that recognize citizen and indigenous peoples' rights to be consulted on government decisions relating to development projects that may affect them. In Guatemala, indigenous communities took recourse to the Municipal Code, the Law on Urban and Rural Development Councils (both from 2002) and ILO C169, as well as their "own [indigenous, traditional] decision-making mechanisms". In Peru "peasant and native" (Andean indigenous) communities appealed to the 1993 Political Constitution, the Organic Law of Municipalities (from 1984) and ILO C169 – they did not explicitly invoke indigenous norms. In Colombia, where the indigenous and afro-Colombian legal systems since 1991 are officially recognized by the State, affected ethnic communities based their consultations in the first place on "norms of indigenous law, the principle of autonomy

[11] Apart from deficient technical requirements, most EIA laws are not harmonized with criteria for consultation and public participation as set out in other national legislation and ILO C169 stipulations, which also has the status of binding law when ratified by States.

[12] www.plataformaagraria.org/guatemala/index.php?option=com_content&view=article&id=137:cartachorti&catid=3:newsflash&Itemid=69; www.plataformaagraria.org/guatemala/index.php?option=com_content&view=article&id=133:nohidroelectricargionchorti&catid=50:cp&Itemid=53.

[13] eLAW (2010). Guía para evaluar EIAs de proyectos mineros (1era Edición). Eugene, Environmental Law Alliance Worldwide (eLAW); www.iaia.org/iaia-climate-symposium-denmark/indigenous-peoples-traditional-knowledge.aspx. For other useful references, see: Wood, Ch. (2010). Environmental impact assessment in developing countries: an overview. Manchester, EIA Centre School of Planning and Landscape University of Manchester. See also: www.eia.nl (Netherlands Commission for Environmental Assessment; select English language page).

[14] CIDSE (2009). América latina: riqueza privada, pobreza pública. Quito, CIDSE/Alai, pp. 128-142.

and the right to territory", as recognized by the 1991 Political Constitution, and only in the second place on "principles contained in ILO C169". In Honduras, affected communities, which do not identify as indigenous, could only appeal to the Law of Municipalities (of 1990); ILO C169 in this context was not relevant.

Without exception, communities that organized community consultations have pronounced themselves against mining and hydroelectric projects on their lands with an overwhelming majority of votes. In most cases, consultations were held ex post facto, i.e. after the government had granted companies an environmental license or exploration license (an exception is the case provided by SERJUS). Nonetheless, all consultations had the explicit goal to stop or reverse the government's decision on allowing the extractive operations. Governments and companies have either ignored the results of the community consultations or declared them invalid, or even – in the case of Peru – illegal (in Peru the judiciary is actively persecuting the organizers of the citizen consultation). In the Guatemalan cases, the Constitutional Court has declared the popular initiatives "valid but not legally binding" on the grounds that municipalities have no competency to decide over State-owned mineral and subsurface resources (constitutional article 125). In Colombia, the Constitutional Court has not pronounced itself on the validity of the community consultation, but has ordered the Ministry of Interior and Justice to redo the "flawed" prior consultation procedure "in good faith and in an appropriate manner". In most countries, the debate between the government and civil society on decision-making on extractive industries is dominated by the question whether the citizen and community consultations are binding, and less on the question of how to legislate appropriate mechanisms for prior consultation[15]. This is problematic and unfruitful.

• Community consultations cannot substitute prior consultation[16]

Frustration among communities over the dismissal of the validity of the results of their community consultations seems to result to a significant extent from a lack of understanding – also among their allied NGOs and their financing agencies – of the meaning of the concept of "prior consultation" as provided for by international standards such as ILO C169 and the UN Declaration on the Rights of Indigenous Peoples. In his most recent visits to Guatemala and Peru, the UN Special Rapporteur for Indigenous Peoples, Professor James Anaya, explained on the matter:

"Consultation implies a negotiation [i.e. dialogue] in which all parties are willing to listen and compromise on their positions, and defend their legitimate interests, and in which agreements are binding on both parties. The State has a special responsibility to balance the various conflicting rights and interests in relation to the proposed measures, following the criteria of necessity, proportionality and the achievement of legitimate objectives in a democratic society. The indigenous party could be justified not to give consent, not on a unilateral right of veto, but as long as the State does not adequately demonstrate that the rights of the affected indigenous community would be adequately protected under the proposed measure or project, or does not demonstrate that the substantial negative impacts would be appropriately mitigated" (Anaya 2010a/b)[17].

Contrary to the claims made by some communities and allied NGOs (see CIDSE [Red Muqui] 2010)[18], this means in essence that community consultations generally have not complied with the principles of prior consultation according to international standards. This is because of two main reasons: (1) the decisions are not the result of a process of dialogue between the State and indigenous peoples, in consequence of which no

[15] This refers to a national law that would establish specific institutional mechanisms for the consultation of indigenous peoples. Such a law lays down the form in which consultative procedures are to be developed, which institution must convoke and organise the consultations, who is entitled to participate, the moment consultations are to be held, as well as the consequences of the results obtained.

[16] Currently there are different interpretations and positions on the methodology used in community consultations and their validity. Further analysis and sharing is needed in order to find the best legal mechanisms to ensure that community's positions are taken into account.

[17] Anaya, S. J. (2010b). Declaración pública del Relator Especial sobre los derechos humanos y libertades fundamentales de los indígenas, James Anaya, sobre la "Ley del derecho a la consulta previa a los pueblos indígenas u originarios reconocido en el Convenio No. 169 de la Organización Internacional de Trabajo" aprobada por el Congreso de la República del Peru (7 de julio de 2010); Ibid. (2010a). Observaciones preliminares del Relator Especial de Naciones Unidas sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas, James Anaya, sobre su visita a Guatemala (13 a 18 de junio de 2010) -- (18 de junio de 2010).

[18] CIDSE [Red Muqui] (2010). Derecho a la participación y a la consulta previa en Latinoamérica: análisis de experiencias de participación, consulta y consentimiento de las poblaciones afectadas por proyectos de industrias extractivas (octubre 2010). Lima, CIDSE. In this publication, Red Muqui writes: "A common problem is that even though the consultations have been carried out following national and/or international standards, they are not always accepted or recognized as legally binding for governments".

agreement or consensus has been reached between the parties; (2) because there is no agreement between the parties, community consultations have not led to the establishment of responsibilities and obligations on the part of the State to compensate communities that are affected by mining and hydroelectric projects. As a result of the latter, they do not adequately protect the legitimate rights of the communities concerned.

This is not to say that community consultations – which are technically referendums – have been held in vain. As Anaya stated during his visit in Guatemala: *"they are a reflection of the legitimate aspirations of the indigenous communities to be heard in relation to a project that has a potential impact on their territories. The refusal expressed by the majority of the communities where these consultations have been held is a sign of the absence of both consent and an appropriate consultation process" (Anaya 2010a)*[19]. However, Anaya also expressed his opinion and concern that *"the celebration of community consultations should not prevent new consultation processes from being undertaken, nor prejudice their contents or result, within the framework of appropriate procedures and in conformity with international standards, and in which the State actively participates in accordance with its obligation" (ibid.)*[20].

In conclusion, it should be clear that community consultations, or other initiatives undertaken by communities affected by extractive industries, cannot substitute the obligation of the State to consult with indigenous peoples. In this light, it is recommendable that organizations working for the defense of communities affected by extractive industries support the organization of new community consultations only insofar as these popular expressions contribute to generating political support (momentum) for the development and adoption of laws that recognize prior or citizen consultation rights. At any rate, care should be taken that the organization of community consultations does not set these communities up against these legislative processes (which among a part of the indigenous populations, e.g. in Guatemala, seems to occur).

- ***State of affairs in legislating prior consultation in a number of cases***

In Guatemala, regional and national indigenous organizations and allied NGOs – amongst which COPAE and the Diocese of San Marcos – have made efforts to get provisions on prior consultation of indigenous communities inserted in a reformed Mining Law, which after more than 5 years is still under debate. At the same time, on the part of community based organizations and civil society, there has been much less attention for the ongoing drafting process of proposals for a special Law on the Consultation of Indigenous Peoples. Over the past years, two proposals have been presented to Congress[21]. However, many local organizations have remained distant from these legislative efforts because they feel the law proposal "competes" with their community consultations. This attitude is worrisome (counterproductive), because it is not likely that one of both proposals will be adopted in Congress without a concerted support effort from civil society.

In the wake of the incidents in Bagua in June 2009, Peruvian indigenous organizations and allied NGOs – amongst which SER – have lobbied for the adoption of a proposed Framework Law on the Right to Consultation of Indigenous Peoples[22], which was passed by Congress on 19 May 2010. In July, however, President Garcia returned the law to Congress to be debated again on the basis of his observations and suggested modifications (in other words he vetoed the law as previously passed by Congress), amongst which the proviso that the right to consultation cannot be a limitation on the exercise of State power[23]. If adopted in its amended form, the law will be significantly weakened in reach and extent, meaning a major setback in the process of legislating prior consultation in line with ILO C169.

As mentioned before, the Constitutional Court of Colombia in October 2009 decided favorably on a citizen complaint case relating to the Mandé Norte mining project, which was filed on behalf of affected indigenous communities

[19] Op.cit.

[20] Op.cit.

[21] The first of these proposals (both called: Iniciativa que dispone aprobar Ley de Consulta a los Pueblos Indígenas) was drafted by the Congressional Commission on Indigenous peoples and presented to Congress on 25 July 2007 (registered as No. 3684); the second was elaborated by the Consejo de Organizaciones Mayas de Guatemala and was admitted by congress on 18 August 2009 (registered as No. 4051). Supposedly, there is another, third legislative initiative developed by the Ministry of Energy and Mining, but this one does not have a congressional registration number (CEACR 2010. Individual observation on ILO C169 [...], Guatemala).

[22] Defensoría del Pueblo (2009). Ley Marco del Derecho a la Consulta de los Pueblos Indígenas (Proyecto de Ley No. 3370-2008-DP; 6 de Julio de 2009). Lima, Defensoría del Pueblo.

[23] This observation reads, literally: *"si no se logra el acuerdo o consentimiento al que hace referencia [la ley], ello no implica que el Estado renuncia al ejercicio del Ius Imperium pues ello supondría la dispersión del carácter unitario y soberano de la República"*.

by CCAJAR-CIJP. The Court ordered, until further notice, the suspension of exploration activities in indigenous territory because it judged that the potentially affected communities had not been properly consulted. Although the sentence of the Constitutional Court develops criteria for appropriate prior consultation in accordance with the principles of ILO C169, until now, it has not led to a revision of Decree 1320 of 1998, which "establishes provisions for the process of consultation with the indigenous and black communities prior to exploitation of renewable natural resources found within their territories".

In Bolivia, a new Hydrocarbons Law was promulgated in May 2005, which recognizes indigenous peoples' right to consultation and participation in the development of projects for hydrocarbon (oil and gas) exploration and exploitation on or near their lands. However, despite the adoption of Bolivia's new Constitution (2009), in which the right of indigenous and afro descendant peoples to prior consultation has been elevated to a constitutional status, indigenous organizations have made little progress in lobbying for the elaboration of a special law on prior consultation. Instead, the Morales administration is considering an amendment to the Hydrocarbons law that would simplify consultation procedures, thus making it more benign to the development of projects for hydrocarbon (oil and gas) exploration and exploitation – says CERDET.

• ***On the use of confusing terminology***

In dealing with the theme of consultation, some NGOs – like COPAE, SERJUS and FEDEPAZ – do not clearly distinguish between "citizen consultation" and "prior consultation"[24]. Not only do both mechanisms have a different legal basis, they also serve a different purpose. In a recent publication on the issue by FEDEPAZ (Red Muqui) it is argued that prior consultation, like citizen consultation, serves the principal purpose of strengthening citizen participation and democratization (other goals mentioned are conflict prevention and improving governance). However, although prior consultation can contribute to democratic participation, it does not in the first place serve this purpose, but instead it serves to guarantee indigenous peoples' collective right to self-determination[25], as an expression of their fundamental right to continue to exist as peoples with a distinct culture and identity. In this way, prior consultation contributes to the institutionalization of a multicultural society in which there is space for diversity and alternative visions on development. NGOs should recognize the different motivations that indigenous peoples and other local populations have in demanding participation in decision-making on development, otherwise they threaten to make the same mistake as national governments that do not recognize indigenous peoples' right to be different.

4c. Strategies for territorial defense (defending land rights)

Many communities that have been defending their rights in the face of extractive industries have at first mainly appealed to their right to prior consultation and participation – as a procedural right –, which had been largely or totally ignored by national governments. Out of concern and indignation, they organized community consultations in which they publicly rejected mining activities in their territories.

Recent experiences in Guatemala and Peru (and to a certain extent in Honduras), however, have learned that governments are reluctant to accept the outcomes of these community consultations as legally binding. In addition, because these popular decisions are not the result of a process of dialogue (i.e. do not equal an agreement), community consultations have not led to the establishment of responsibilities and obligations on the part of the State, and therefore cannot adequately protect the rights of the communities concerned. In the strategies followed by indigenous and local communities and their allies among NGOs, until now much less attention has been paid to defending communities' more substantive rights to land and natural resources. This in spite of the fact that – certainly in the case of indigenous peoples – rights to land, territory and resources form the main justification for their right to prior consultation. The protection of land and resource rights is of fundamental importance for local, rural communities because these rights guarantee their possibilities for a self-determined economic, social and cultural development. In the case of indigenous peoples, these rights moreover ensure their possibilities for practicing and developing their spiritual and religious traditions and customs.

[24] While "citizen consultation/participation" is an individual right of each citizen, "prior consultation" refers to a special, collective right of indigenous peoples.

[25] The term self-determination does not even occur once in the publication "Derecho a la participación en América Latina" by Red Muqui, of which FEDEPAZ is a distinguished member.

That a strategy based only on the right to consultation and participation is not sufficient, is illustrated by the example of the Maya indigenous communities of Sipacapa that are affected by the Marlin Mine Project in San Marcos, Guatemala. Although communities in Sipacapa and San Miguel Ixtahuacán since 2005 have protested against mining activities on their lands – in Sipacapa through the organization of a community consultation –, families in mine-adjacent communities, driven by personal need or ambition, have nonetheless continued to sell individual plots of land to the mining company Montana Exploradora, which eventually has the intention to expand the mine (which is currently almost entirely situated in San Miguel Ixtahuacán). In this way, and despite community consultations, the territorial integrity of these larger indigenous communities is being further affected. In consequence of this realization, in recent years among community leaders attention for complementary strategies for territorial defense has increased considerably.

There is another reason why mining-affected communities would want to strive for (better) recognition and protection of their land rights. According to international law, property rights to land and resources increase the obligation of the State to consult, or as the UN Special Rapporteur on Indigenous Peoples, Prof. James Anaya (2005), formulates it: *"The extent of the duty and thus the level of consultation required is a function of the nature of the substantive rights at stake"*[26]. In other words, the obligation of governments to consult indigenous communities is greater when the substantive rights of these communities, such as land and resource rights, are better recognized and protected in State law. So, for an adequate protection of the rights of native and peasant communities, recognition of the right to prior consultation alone is not sufficient, and it is recommendable to strive for adequate recognition and protection of property rights in relation to land and natural resources.

• COPAE and the OECD complaint and querella lawsuit

The strategy for territorial defense that over the past year has been developed by COPAE and the affected communities in Guatemala (San Marcos) provides an interesting example. After failed attempts to counteract the expropriation of communal lands by Montana Exploradora by making use of the Civil Code (property law), COPAE and the communities enlisted the support of CIEL (Center for International Environmental Law) in Washington, USA, and devised a new strategy towards the mining company: they filed a "specific instance complaint" with the OECD National Contact Point (NCP) in Canada, "regarding the operations of Goldcorp Inc. [the parent company of Montana – JvdS] in the indigenous community of San Miguel Ixtahuacán, Guatemala". Goldcorp in this complaint was denounced for continued breach of OECD's Guidelines for Multinational Enterprises ("MNE Guidelines"). Although this complaint – which was presented in December 2009 – concerns various violations of rights, its formulation places much emphasis on the violation of the property rights of the communities by the mining company, and for the first time in the anti-mining resistance in Guatemala mentions the existence of an old but still valid collective land title. It argues that the company has acted in bad faith by ignoring, during the initial land acquisition process and afterwards, the existence of this valid collective title, while treating plots of land of community members only as individual property.

"In the case of SMI [San Miguel Ixtahuacán, where the project area is located – JvdS], there is significant evidence to suggest that the territory is communally owned. That families have individual lots is not inconsistent with communal tenure, especially, as it appears here, when those families retain only usufruct rights to their lots. In 1999 as Goldcorp was seeking to acquire land in SMI through Peridot, S.A., the municipal mayor of SMI unilaterally sanctioned individuals to sell their lots to the company. However, according to the Municipal Code and international law, only the indigenous authorities of the community can authorize the sale of communal lands, which they have not done in SMI. Thus the original communal title to the land remains intact. The rights that Goldcorp purchased from individual families could only have been use, not ownership, rights. It appears that when the company registered these rights, they were converted to ownership rights on top of the original communal title, resulting in a double title on the land. Consequently, Goldcorp could not and does not have a valid claim to own the property on which it is operating."

[26] Anaya, S. J. (2005). "Indigenous peoples' participatory rights in relation to decisions about natural resource extraction: the more fundamental issues of what rights indigenous peoples have in lands and resources." Arizona Journal of International and Comparative Law 22(7-17). This argument is reiterated in the ruling (judgment) of the IACHR in the Saramaka case: *"El nivel de consulta que se requiere es obviamente una función de la naturaleza y del contenido de los derechos [del pueblo] en cuestión"* (Corte-IDH [2007]. Corte Interamericana de Derechos Humanos, caso del Pueblo Saramaka vs. Surinam. Sentencia del 28 de noviembre de 2007, párr. 138).

OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises (which are annex to the OECD Declaration on International Investment and Multinational Enterprises) are recommendations providing voluntary principles and standards for responsible business conduct for multinational corporations operating in or from countries adhered to the Declaration. They provide voluntary principles and standards for responsible business conduct in areas such as employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation. The Guidelines are legally non-binding. Originally the Declaration and the Guidelines were adopted by the OECD in 1976 and revised in 1979, 1982, 1984, 1991 and 2000. According to the OECD Council decision each adhering country has to set up a National Contact Point (NCP). The National Contact Point is an entity responsible for the promotion of the Guidelines on a national level. An NCP handles all enquiries and matters related to the Guidelines in that specific country, including investigating complaints about a company operating in, or headquartered in that country (www.oecd.org; http://en.wikipedia.org/)[27].

In March 2010, the communities (complainants) received written answer from the Canadian Contact Point. The NCP concluded that "the complaint merits further examination" and in the meantime offered to facilitate alternative dispute settlement in a "closed door meeting" between leaders of the affected communities and Goldcorp in Vancouver, Canada. In their response, the communities declined this offer because in their view there was no basis for dialogue with the company and because a closed-door meeting in Canada would increase suspicion and social tension within the mining-affected communities. Instead, community leaders requested the NCP to first conduct further investigation into the complaint and subsequently bring out a final statement containing *"a summary of the complaint, the company's response, an analysis of whether the Guidelines were violated, including an argued rationale for each conclusion, and recommendations to the company for compliance with the Guidelines"* (FREDEMI 2010)[28]. In this context, they referred to the procedures followed by the NCPs in the UK and the Netherlands in the treatment of previous specific instance complaints[29]. Follow-up of the OECD complaint is pending.

In expectation of the outcome of the OECD complaint procedure, the mining-affected communities in San Miguel Ixtahuacán decided to expand their strategy for the defense of their communal territory on a national level, in this way increasing the pressure on the mining company. In this particular case, community leaders and COPAE sought the support and expertise of human rights organizations FRMT (Fundación Rigoberta Menchú Tum) and ODHAG (Oficina de Derechos Humanos del Arzobispo de Guatemala)[30]. They worked together in preparing a lawsuit against the (former) legal representatives of Montana Exploradora and Peridot[31] – the company that had acquired the lands of the inhabitants of San Miguel Ixtahuacán in the name of Montana – in the form of a "querella", a complaint in which it is alleged that Montana and Peridot have intentionally ignored the republican collective land title of the communities – which is registered in the name of the municipality of San Miguel Ixtahuacán in the National Land Registry and therefore is valid – during the initial land transactions between community members and the mining company as well as at a later stage during the process of regularizing of property. Peridot's representative, who is currently president of the Supreme Court of Justice, is being charged with (lit.): *"the offence to buy land from people who in reality were not the owners" and the representative of Montana with the offence "to buy lands from Peridot without inquiring if they were acquired legally"* (www.resistencia-mineria.org)[32]. On these grounds, the representatives of both companies

[27] www.oecd.org/topic/0,3373,en_2649_34889_1_1_1_1_37439,00.html; http://en.wikipedia.org/wiki/OECD_Guidelines_for_Multinational_Enterprises.

[28] FREDEMI (2010). Re: Response from FREDEMI to the NCP's Letter of March 24, 2010 (April 23, 2010). Frente de Defensa San Miguelense (FREDEMI).

[29] www.bis.gov.uk/policies/business-sectors/low-carbon-business-opportunities/corporate-responsibility/uk-ncp-oecd-guidelines/cases.

[30] In this process, COPAE previously had also counted with the assistance of indigenous lawyer Amílcar Pop of the Asociación de Abogados y Notarios Mayas (ANMG) as well as the legal department of the Centro de Investigación y Proyectos para el Desarrollo y la Paz (CEIDEPAZ).

[31] www.prensalibre.com/noticias/justicia/Denuncian-presidente-Corte-Suprema-ideologica_0_306569510.html?print=1; www.lahora.com.gt/notas.php?key=70835&fch=2010-07-28.

[32] www.resistencia-mineria.org/espanol/?q=node/296.

are being accused of the "crime of misrepresentation" (falsedad ideológica) and the plaintiffs demand that the companies be held responsible for "illegal occupation of indigenous territory". The final purpose of the querella is that the lands be restituted to the communities of San Miguel Ixtahuacán.

The querella lawsuit is very relevant because *"for the first time in Guatemala's judicial history an indigenous community [as a collective subject – JvdS] brings a criminal complaint against a transnational company operating in Guatemala"* (www.resistencia-mineria.org)[33]. Irrespective of its outcome, the querella is a landmark case because it is the first high-profile lawsuit with the explicit purpose to defend the collective land rights of an indigenous community in a country in which the land rights of the indigenous population, despite constitutional provisions and the Peace Accords, are hardly recognized. Possibly the specific case of San Miguel Ixtahuacán contributes to increasing the Maya communities' awareness of the legal status of their historical land rights, as well as bringing the issue of collective land rights of indigenous peoples back on the political agenda (Van de Sandt 2009)[34].

- ***FEDEPAZ and the consolidation of ancestral decision-making***

The property situation of the "native and peasant" communities affected by the Río Blanco Project in Piura, Peru, is strikingly similar to the situation of the Maya communities in San Marcos, Guatemala, described above. Also in this case, the mining company – Río Blanco Copper S.A., subsidiary of Monterrico Metals Plc. – illegally acquired surface rights to the communal lands of the communities, who have registered (collective) title to these lands. According to the "General Law of Peasant Communities" (Law 24656 of 1987, article 14) communal lands only can be alienated to outside parties with the approval of two-third of the votes of the local Communal Assembly. According to FEDEPAZ, the mining company acquired rights by presenting a document of a former concession holder (Minera Coripacha S.A.), which was signed by a number of community leaders that had been "co-opted". Therefore, the company has not complied with the legal norm regarding the acquisition of land rights in peasant communities. Apparently, the company subsequently attempted to convert this document in a "right of way" (derecho de servidumbre) for the duration of the mining license, after which these lands would become unsuitable for agriculture. Following the Peoples Ombudsman of Peru, FEDEPAZ therefore typifies the acquisition of surface rights by Río Blanco Copper S.A. as "usurpation of communal lands". Interestingly, the Office of Public Registry in Piura, was not prepared to formally grant the requested "right of way" to the mining company. In spite of this, the mining company already started with exploration activities in the area.

FEDEPAZ does not mention the option of lodging a formal complaint in order to defend the communal territory of the peasant communities. Instead, the NGO advocates for the consolidation of ancestral forms of decision-making by local communities – as regulated by the previously mentioned Law 24656 of 1987. By officially registering the decisions of the communal assembly, it is hoped that competing claims from mining companies can be warded off in the future. However valid this strategy may be, it does not preclude the possibility, however, that the communities and FEDEPAZ can retroactively challenge the actions of the mining company, in the same way as the communities in San Marcos, Guatemala, have done.

- ***CCAJAR-CIJP and the citizen complaint (tutela) case before the Colombian Constitutional Court***

In Colombia, where the collective land rights of indigenous peoples and afro descendant communities are significantly better protected than in Guatemala and Peru, but where transnational companies and the government in the context of extractive industries still often fail to respect these rights, the Emberá indigenous communities with the support of CCAJAR-CIJP explicitly denounced the violation of their right to territory (i.e. collective property) by the company Muriel Mining in a citizen complaint (tutela) case they had brought before the Constitutional Court. In the decision of the Court – which for these communities was favorable – the magistrates repeatedly refer to the decision of the Inter-American Court of Human Rights in the 2005 Saramaka vs. Suriname case. This precedent case dedicates much attention to indigenous and tribal peoples' to right to territory and natural resources and exhaustively motivates why for these peoples this right is the principal justification for their right to prior consultation.

"In accordance with this Court's (IACHR) jurisprudence [...], members of tribal and indigenous communities have the

[33] Op.cit.

[34] Van de Sandt, J. (2009). Mining conflicts and indigenous peoples in Guatemala. The Hague, Cordaid/University of Amsterdam.

right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land they have traditionally used and occupied for centuries. Without them, the very physical and cultural survival of such peoples is at stake. Hence the need to protect the lands and resources they have traditionally used to prevent their extinction as a people. That is, the aim and purpose of the special measures [prior consultation, amongst others – JvdS] required on behalf of the members of indigenous and tribal communities is to guarantee that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States" (Corte Constitucional 2009)[35].

This argumentation – which was almost integrally taken over by the Colombian Constitutional Court – combined with the fact that indigenous and tribal peoples' right to territory enjoys special protection in Colombia since the promulgation of the 1991 Constitution (a right that was not adequately protected by the government) was reason enough for the magistrates of the Court to order the immediate suspension of all mining exploration activities in the area, at least until impact assessments have been satisfactorily concluded and appropriate prior consultation procedures followed. The decision of the Colombian Constitutional Court gives cause to assume that also in other national contexts it is important to make sustained efforts in achieving better protection of the land rights of indigenous communities that are potentially affected by mining.

- ***CERDET and the situation of the Guaraní communities in southern Bolivia***

The property situation of the Guarani communities in the vicinity of the Margarita gas field in southern Bolivia (Tarija) is ambiguous. In the late 1990s, these communities presented a claim to the Bolivian State for the recognition and titling of their ancestral territory (Itika Guasú) of 216 thousand hectares, thereby making appeal to the Agrarian Reform (INRA) Law of 1996. After more than 10 years, the Guaraní communities have acquired collective title to only 95 thousand hectares while the other part of the land claim remains "under study". According to CERDET, the main reason for the difficulties in getting their territory officially recognized and titled is the intentional obstruction of the land regularization process by oil company Repsol YPF E&P. If it were true that Repsol has violated a "resolution of immobilization" by making private land acquisitions in the claimed territory, then these communities would have sufficient grounds for bringing a lawsuit against the company. However, CERDET and the communities say they have not undertaken legal action because they are not in possession of legal proof, which seems to point to a violation of the right to access to public information. It is however also possible communities have not been willing to take legal steps (in court) because they do not want to compromise the ongoing negotiations with the company regarding benefits and compensation for social and environmental damages.

4d. Legal strategies in fighting individual human rights violations (the criminalization of protest)

Various partner organizations, but most prominently Acción Ecológica and FEDEPAZ, have offered communities support in legally defending members of communities that are prosecuted (legally processed) or physically threatened for their involvement in protests against extractive industries (i.e. cases related to the criminalization of protest). In undertaking these activities, these partners have often sought the collaboration of other civil society organizations (NGOs) more experienced in legal matters. Activities undertaken range from reporting human rights violations and bringing charges against their perpetrators – thereby making use of legal instruments such as the "remedy of amparo" (action for infringement of fundamental rights and freedoms), "habeas corpus" (action based on the UN Covenant on Civil and Political Rights) and "habeas data" (individual complaint presented to a Constitutional Court) – to assembling proof for lawsuits and preparing the defense of human rights victims in the courts of law. Below, a number of alternative or particularly relevant actions are presented in more detail.

- ***Acción Ecológica and the amnesty petition***

During the constitutional reform (Constituent Assembly) for the reform of the Ecuadorian Constitution, in January 2008, Acción Ecológica entered into a collaboration with human rights organization Comisión Ecuménica de Derechos Humanos (CEDHU) and the Fundación Regional de Asesoría en Derechos Humanos (INREDH) and

[35] Corte Constitucional (2009). Sentencia T-769 de 2009. Acción de tutela instaurada por Álvaro Bailarín y otros, contra los Ministerios del Interior y de Justicia; de Ambiente, Vivienda y Desarrollo Territorial; de Defensa; de Protección Social; y de Minas y Energía. Referencia: Expediente T-2315944 (29 de octubre de 2009), República de Colombia.

presented to the Assembly a joint petition for amnesty for unjustly arrested and criminally processed participants of popular protests, in particular persons from communities that had resisted mining and oil projects. The petition included a proposal for a number of articles for the new constitutional text "that guarantee the defense of human rights and peaceful resistance", as well as a proposal for a reform of the Penal Code.

The petition was positively received and on March 14, the Plenary of the Assembly granted amnesty to the individuals detained in the Dayuma/Petroecuador case (83 votes in favor) as well as 357 social leaders who were criminally processed for protesting in defense of their communities and their environment (92 votes in favor) regarding eight mining and petroleum projects, amongst whom the persecuted protesters in the Payamino/ Perenco case (Carter Center 2008)[36]. According to INREDH the granted amnesty signified the recognition by the Constituent Assembly of the right of citizens to protest in the face of "social, economic and military policies that go against human dignity, including those who carry out a task of opposition to the irrational politics of extraction and looting of natural resources that are carried out without prior consultation or informed consent of the affected communities". This way, the Assembly is said to have referred to the 1998 United Nations Declaration on Defenders of Human Rights "as a valid instrument of inspiration and normative content that supports and legitimizes the actions of people in a context of social protest and resistance" (Guaranda Mendoza on www. ecoportal.net)[37].

Although their proposed constitutional articles were not integrally adopted by the Constituent Assembly, the action by Acción Ecológica, CEDHU and INREDH is likely to have led to the inclusion in the new constitutional text, adopted in October 2008, of an article (120.13) that enables Congress to grant amnesty in cases involving "political crimes inspired by human motives" in case two-third of the votes in the National Assembly are in favor. The proposed reform of the Penal Code is still awaiting debate in Congress.

• FEDEPAZ and the Leigh Day & Co law firm

Over the past years, FEDEPAZ has provided legal support to 28 community members that protested the mining project Minera Majaz S.A., subsidiary of multinational mining company Monterrico Metals Plc. – now known as Río Blanco Copper S.A. –, in August 2005 and allegedly were tortured by members of the National Police and the personnel of a private security company at or in the vicinity of the mining site. Three years later, FEDEPAZ and Peru's National Coordinator for Human Rights lodged a formal compliant about these allegations with the Peruvian Prosecutor's Office. According to witness accounts, members of the police during the raid on the protesters acted under the direct command of the mining company – thereby acting as a paramilitary group – and together with agents of a private security company were responsible for the torture, which had resulted in one death. After months of investigation, in March 2009 the members of police were found guilty of torturing protesters at the mining camp but the mining company and its security firm were cleared of wrongdoing. This decision was viewed as unsatisfactory by the victims, and the National Human Rights Coordinator denounced the findings as incomplete.

In response, FEDEPAZ in collaboration with CAFOD and human rights organizations Peru Support Group and the UK Joint Committee on Human Rights prepared a lawsuit against the UK-based parent company Monterrico Metals Plc. These organizations contracted the London-based law firm Leigh Day & Co, which on behalf of 13 alleged victims of illegal detention and torture brought an action against the mining company in the English High Court in London in July 2009, including a multimillion-pound claim for damages for physical and psychological injuries[38]. In October 2009, the High Court granted the claimants a so-called "freezing injunction" against Monterrico until further hearings in court. This prohibits the mining company from moving its assets outside the UK and in this way from evading legal responsibility in the case. (Monterrico was purchased in 2007 by the Chinese Xiamen Zijin Tongguan Investment Co. Ltd and had already shifted its corporate headquarters from London to Hong Kong, Monterrico is however also still registered in the UK). According to Leigh Day, without this freezing injunction, the claimants' "access to justice

[36] Carter Center (2008), Report on the National Constituent Assembly of Ecuador, No. 6 (March 2008). The Carter Center. Quito, Ecuador.

[37] www.ecoportal.net/content/view/full/78292.

[38] Guerrero v. Monterrico Metals PLC, [2009] EWHC 2475 (QB).

would effectively have been denied" (Meeran on www.leighday.co.uk; see also www.cafod.org.uk)[39]. Almost one year later, a final decision in the High Court remains pending.

Irrespective of the outcome of the case, the collaboration between Peruvian human rights organizations and Leigh Day in the international case against Monterrico Metals is an example of the way in which multinational companies can be held legally accountable for human rights violations occurring at their overseas operations. FEDEPAZ in this context speaks of the construction of paradigmatic lawsuits ("casos emblemáticos"), which are: (potential) legal cases *"that could be particularly effective in illustrating the behavior and strategies of multinational corporations and states to the detriment of native and peasant communities and that could create legal precedents for changing the realities confronted by them"* (Javier Jahncke of FEDEPAZ; see also Drimmer 2010)[40].

- ***CCAJAR-CIJP and the Inter-American Commission of Human Rights***

In February 2010, only months after the Constitutional Court issued its decision – in the tutela case T-769 of October 2009 – to order the suspension of exploration activities relating to the Mandé Norte project, the Emberá communities of the Uradá-Jiguamiandó indigenous reserve raised alarm about the remilitarization of their ancestral territory. Since mid-December 2009, army brigades had repeatedly carried out military patrols on the lands of indigenous and afro descendant communities, during which inhabitants were arbitrarily detained and crops of local villagers damaged. On January 30, two helicopters and a plane belonging to the armed forces carried out a machine-gun attack and bombing 300 meters from the community's main settlement, hitting the house of a family where there were three adults and two children, who were wounded. The military activity led the local population to fear a renewal of exploratory activities in their territory. After deliberations with CCAJAR-CIJP the communities decided to report the case to the Inter-American Commission on Human Rights. In particular, the organization on behalf of the communities requested the Commission to urge the Colombian government "to adopt specific 'precautionary measures' to avoid serious and irreparable harm to human rights" among the population of the indigenous reserve.

Inter-American Commission on Human Rights

The IACHR has the principal function of promoting the observance and the defense of human rights. In carrying out its mandate, the Commission has the following functions and powers (amongst others):

a) Receives, analyzes and investigates individual petitions which allege human rights violations, pursuant to Articles 44 to 51 of the Convention.
b) Observes the general human rights situation in the member States and publishes special reports regarding the situation in a specific State, when it considers it appropriate.
c) Carries out on-site visits to countries to engage in more in-depth analysis of the general situation and/or to investigate a specific situation. These visits usually result in the preparation of a report regarding the human rights situation observed, which is published and sent to the General Assembly.
d) Recommends to the member States of the OAS the adoption of measures which would contribute to human rights protection.
e) Requests States to adopt specific "precautionary measures" to avoid serious and irreparable harm to human rights in urgent cases. The Commission may also request that the Court order "provisional measures" in urgent cases which involve danger to persons, even where a case has not yet been submitted to the Court.
f) Submits cases to the Inter-American Court and appears before the Court in the litigation of cases (www.cidh.org)[41].

[39] www.cafod.org.uk/news/peru-2009-06-09; www.leighday.co.uk/news/news-archive/leigh-day-co-issue-proceedings-against-british.

[40] Drimmer, J. (2010). «Human rights and the extractive industries: litigation and compliance trends.» Journal of World Energy Law & Business 3(2): 121-139.

[41] www.cidh.org/what.htm.

On February 25, 2010, the Inter-American Commission granted the requested precautionary measures. The Commission requested that the State of Colombia *"adopt the measures necessary to protect the life and personal integrity of 87 families of the Community of Alto Guayabal-Coredocito; that it come to an agreement with the beneficiaries and their representatives on the measures to be adopted; and that it inform the Commission on actions taken to investigate the events that led to the adoption of precautionary measures so as to remove the risk factors for the beneficiaries"* (www.cidh.org)[42].

4e. Legal actions against environmental damages (Mining Law reform)

Some partner organizations have also assisted communities in taking legal action against governments and companies in cases of (reputed) environmental damages and caused by extractive industries and their impacts on the livelihoods and health and of the local population. These issues particularly play a role in extractive (mining and oil) projects that have already been in operation for some years, such as the San Martin Mine in Honduras (Caritas), oil exploitations in the Ecuadorian Amazon region (Acción Ecológica) and, to a lesser degree, the Marlin Mine in Guatemala (COPAE).

In 2004, Caritas and the protesting communities united in CAVS (Comité Ambientalista del Valle de Siria) have brought action against mining company Entremares Honduras S.A. (a wholly-owned subsidiary of Goldcorp Inc.) for ecological crimes related to water contamination, illegal cutting of forests, and health damages. Concerning these accusations, a condemnatory sentence was obtained in July 2007 from the Public Prosecutor (Ministerio Público), while on the administrative level the Secretariat of Natural Resources and Environment (SERNA) fined Entremares one million lempiras, equivalent in value to about 55,000 USD (at the time) for pollution and damage to the environment.

[The pollution] has resulted in adverse environmental impacts, affecting the quality of the water used by the communities surrounding the San Martin mining project and the course of the Las Casitas gully,» [said SERNA], «…in discharging waters with polluting substances … Entremares … also impacted adversely the Guajiniquil gully (www.devp.org)[43].

Afterwards, Entremares disputed these tests and appealed against the fine. However, in 2008 a new study also found high levels of heavy metals, such as arsenic, lead and mercury in blood samples taken from villagers living close to the mine. Subsequently, the Hondurean government requested the technical support of experts from Newcastle University, who further analyzed the results and published a report. In August 2010, authorities in Honduras filed criminal charges against senior officials of Entremares based on evidence from the Newcastle University report (www.alertnet.org)[44].

Parallel to the water contamination case in Honduras, Caritas in March 2006 assisted the mining-affected communities in undertaking a so-called action of unconstitutionality – an instrument to measure a law against the principles of the Constitution – with regard to the General Mining Law (Decree 292 of 1998). In criticizing this law, community organizations, amongst other things, pointed out that existing mining activities in Honduras cause serious and irreparable damages, contaminating the underground waters, resulting in diverse diseases among the neighboring populations. They also emphasized that the current mining law is not harmonized with the environmental legislation of the country, which contravenes the ratification by the State of various international agreements.

The appellant indicates that the application of the General Mining Law should be done in harmony with other laws such as the General Environmental Law, Forest Law, Code of Health, National Water Use Law and other laws that should be observed by the mining activity, given the high risk for life and health. […] The appellant [moreover] indicates that Honduras signed the Rio Declaration on Environment and Development[45]*, which recognizes the*

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[42] www.cidh.org/medidas/2010.eng.htm. In May 2010, IACHR also granted precautionary measures for the members of 18 Maya indigenous communities living in the vicinity of the Marlin Mine project in San Marcos, Guatemala. The Commission asked the State of Guatemala *"to suspend mining of the Marlin I project and other activities related to the concession granted to the company Goldcorp/Montana Exploradora de Guatemala S.A., and to implement effective measures to prevent environmental contamination. The IACHR likewise asked the State to adopt […] necessary measures to guarantee the life and physical integrity of the members of the communities"* (Ibid.).

[43] http://www.devp.org/devpme/eng/pressroom/2007/comm2007-07-26-eng.html.

[44] http://www.alertnet.org/thenews/fromthefield/217426/128213887765.htm.

[45] Other agreements and instruments that were referred to in the action of unconstitutionality (and signed by Honduras) are: Agenda 21 of the United Nations; Declaration of the United Nations Conference on the Human Environment; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights («Protocol of San Salvador») in relation to the Right to a Healthy Environment.

integral and interdependent nature of the Earth, our home (CSJ 2007)[46].

The Supreme Court was amenable to the complaint and on October 5, 2006, declared 13 articles of the mining law unconstitutional. The Court sent the law back to Congress, saying it must approve a new law that would require the mining companies to pay taxes and to undertake environmental impact studies, and prohibiting the forced expropriation of land for mining and the transfer of mining concessions[47]. In practice, the sentence led to a technical moratorium on granting new mining licenses in Honduras and spurred debate on proposals for a reform of the mining law. This process, in which civil society groups (Civic Alliance to Reform the Mining Law) are also involved, has not yet resulted in the adoption of a new Mining Law, however.

In Guatemala and Ecuador partner organizations COPAE and Acción Ecológica have also strived for a reform of the mining legislation in both respective countries, through their involvement in various kinds of participatory bodies and platforms. In both cases, finally a similar argumentation and legal action strategy was followed: the action of unconstitutionality. In Guatemala the action was brought before the Constitutional Court by the environmental organization CALAS (Centro de Acción Legal Ambiental y Social) in 2007. The action prospered: in June 2008 the Court declared seven articles of Guatemala's Mining Law (Decree 48 of 1997) – almost uniquely related to technical and environmental issues – unconstitutional (www.lahora.com.gt)[48]. Prior to the sentence of the Constitutional Court, a special High Commission on Mining had already debated proposals for reforms to the Mining Law (since 2005). However, up to this day, government officials, legislators and civil society representatives still have not reached a unified position on a definitive proposal for a new Mining Law to be debated in Congress. In Ecuador, the efforts of Acción Ecológica and other civil society organizations (e.g. CONAIE) were less successful: two subsequent actions of unconstitutionality brought against the new Mining Law, which had been adopted by Congress in January 2009 and is meant to stimulate mining, were rejected by the Constitutional Court later that same year (www.accionecologica.org; www.censat.org)[49].

In Ecuador, Acción Ecológica has not played a leading role in filing lawsuits against companies in cases of environmental contamination, although the organization has provided information to befriended legal assistance organizations in ongoing environmental cases against oil companies Texaco/Chevron and Petroecuador (Aguinda v. Texaco and Gonzales v. Texaco; see www.business-humanrights.org). COPAE on behalf of mining-affected communities has conducted independent water quality monitoring and analysis but has until now been unable to assemble sufficient (scientifically corroborated) proof of water pollution and health effects in order to be able to start a civil lawsuit against Montana Exploradora. However, two years of water sampling does seem to indicate that water contamination is caused by the Marlin Mine due to acid drainage. On the basis of these findings, and through their collaboration with COPAE and befriended NGOs (Centro Pluricultural para la Democracía and an independent lawyer), communities living in the vicinity of the mine have recently been granted precautionary measures by the Inter-American Commission on Human Rights. In its decision, the Commission urged the State of Guatemala to investigate and remediate possible contamination of the surface waters near the mine, and requested to suspend mining of the Marlin project and other activities related to the Goldcorp/Montana Exploradora concession, pending the decision of the Comission on the merits of the petition associated with this request for precautionary measures[50] (this particular petition builds on a larger, substantive case before the Commission, which was filed in 2007 and also deals with other negative harms of Goldcorp in the municipalities of Sipacapa and San Miguel Ixtahuacán)[51].

4f. Complementary strategies: international legal protection of human rights (indigenous peoples)

Besides national legal systems and foreign domestic courts (see: *Guerrero v. Monterrico Metals Plc*), indigenous and local communities defending their

[46] Corte Suprema de Justicia (2007). Recurso de Inconstitucionalidad No. 172-06. Tegucigalpa, Corte Suprema de Justicia, Sala de lo Constitucional.

[47] The Metallic Mining Association of Honduras denounced the sentence, saying it created "legal insecurity and fear in investors."

[48] www.lahora.com.gt/notas.php?key=32144&fch=2008-06-16.

[49] www.accionecologica.org/mineria; www.censat.org/noticias/2009/9/23/Ecuador-Sobre-la-Corte-Constitucional-y-la-Ley-de-Mineria.

[50] Comisión-IDH (2010). Comunidades del Pueblo Maya (Sipakapense y Mam) de los municipios de Sipacapa y San Miguel Ixtahuacán en el Departamento de San Marcos -- Medida Cautelar MC-260-07 (20 de mayo de 2010).

[51] Van de Sandt, J. (2009). Mining conflicts and indigenous peoples in Guatemala. The Hague, Cordaid/University of Amsterdam.

rights in the face of State-promoted extractive industries can also seek recourse to several international bodies and quasi-adjudicative tribunals with varying degrees of powers of enforcement over extractive companies (cf. Drimmer 2010)[52]. In the context of this study, two avenues for the international protection of human rights seem to be particularly relevant for extractive industry-affected individuals and communities in view of experiences obtained in several of the cases studied, as well as elsewhere in comparable cases. These are the Inter-American Court on Human Rights (IACHR; CIDH in Spanish), which, like the Commission that was previously dealt with, is part of the Inter-American System of Human Rights (IASHR), and the Committee of Experts on the Application of Conventions and Recommendations (CEACR) of the International Labor Organization (ILO). Furthermore, in recent years the role of the UN Special Rapporteur on Indigenous Peoples Rights has increased in importance in consequence of the adoption by the General Assembly of the UN Declaration of the Rights of Indigenous Peoples.

• ***Inter-American Court of Human Rights***

The Inter-American Court of Human Rights is an autonomous judicial institution (like the European Court of Human Rights and the African Court on Peoples' Rights) based in San José, Costa Rica[53], which was created by the American Convention on Human Rights adopted on November 22, 1969. The Convention went into force in July 1978 and the Court started its operations in 1979. The Inter-American Court has the power to rule on cases brought before it in which a state party to the Convention is accused of having violated any of the rights enshrined or stipulated in the Convention. Most Latin American States (all countries included in this study) have ratified the Convention and acknowledged the Court's jurisdiction[54]. Under the Convention, cases are generally referred to the Court by the Inter-American Commission on Human Rights; individual citizens of the OAS Member States are not allowed to take cases directly to Court (which is possible in the European Court). Cases can only involve human rights violations falling under the responsibility of a State; a person or company cannot be directly accused.

Individuals, communities or organizations that believe their rights have been violated may file a petition with the Commission. If, after examination of the petition, the case is ruled admissible, the Commission will generally serve the State with a list of recommendations to make amends for the violation. If a State fails to abide by these recommendations, the case can be brought before the Court[55]. The proceedings before the Court involve a written phase, in which the case application is filed, including a copy of the background report prepared by the Commission, and an oral phase, in which the parties in the case and witnesses and experts are being heard by a quorum of 5 judges[56]. After analyzing the evidence presented, the Court issues its judgment, which cannot be appealed. When the State is held responsible, it has to make reparations to the victims, either in compensation payments or in various possible forms of non-monetary compensation. The Court has the power to monitor compliance with its judgments. This task is performed through the revision of periodic reports forwarded by the State and objected by the victims and the Commission. Since 2007, the Court also holds hearings in the process of monitoring compliance (www.corteidh.or.cr; http://cejil.org/en)[57].

Over the past 10 years, several indigenous communities (in addition and in contrast to indigenous individuals) have sought recourse to the Inter-American Court to hold the State responsible for the infringement on their special collective rights – in particular their rights to territory and resources – occurring in the context of large scale development projects being undertaken on their lands. In several of these cases, the Court proved sympathetic to their pleas and applied a progressive (evolutionary) interpretation of article 21 of the American Convention regarding the right to property[58]. One of the

[52] Op.cit.

[53] The Commission, the other body of the IAHRS, is based in Washington DC in the United States.

[54] The United States signed but never ratified the Convention.

[55] The presentation of a case before the Court can therefore be considered a measure of last resort, taken only after the Commission has failed to reach a friendly settlement on the matter between the representatives of the victims and the accused State.

[56] The Court in total hosts 7 national judges from OAS Member States, which are elected by the General Assembly of the OAS.

[57] http://www.corteidh.or.cr/denuncias_consultas.cfm?&CFID=764257&CFTOKEN=38216444; http://cejil.org/en/comunicados/inter-american-court-and-inter-american-commission-reform-their-rules-procedure.

[58] Article 21. Right to Property. (1.) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society; (2.) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

first and most groundbreaking cases is the "Case of the Mayagna (Sumo) Awas Tingni Community vs. Nicaragua" in 2001. In this case, the Court held as a general rule that "the concept of property as articulated in the American Convention includes the communal property of indigenous peoples that is defined by their customary land tenure, apart from what domestic law has to say". This means that even in cases where indigenous communities lack legal title to the land where they live and carry out their activities "possession of the land should suffice for [these communities to] obtain official recognition of that property" (Anaya & Grossman 2002: 12)[59]. From this decision it follows that under the Convention, it is the responsibility of the State to protect the indigenous community's collective property rights over its ancestral lands and natural resources. In addition to the demarcation and titling of indigenous lands, this also includes that regarding large scale development projects on indigenous lands, the State should respect indigenous peoples' right to prior consultation. In its more recent decision on the "case of the Saramaka People vs. Suriname" of 2007 the Court emphasized that such consultation is not only a formality but should be held in order to obtain the free and informed consent of the potentially affected indigenous community, i.e. that the consultation should be held with the aim of achieving agreement[60] – and should moreover be held in good faith and through culturally appropriate procedures according to the customs and traditions of the concerned peoples (Brunner 2008)[61].

The growing jurisprudence of the Inter-American Court in relation to the protection of the rights of indigenous peoples, especially with regard to land rights and the right to free, prior and informed consent (www.escr-net.org), is setting strong legal precedents in determining the responsibility of States in these matters and is therefore relevant to indigenous communities that are faced with imposed extractive industries on their lands[62]. Various CIDSE partners included in this study make reference to the decisions of the Court in legitimating their claims to government. COPAE and SERJUS are doing this in Guatemala, CCAJAR-CIJIP (and the Constitutional Court) in Colombia, SER in Peru, and Caritas in Honduras – although the latter not in relation to violation of indigenous rights. In Guatemala, the Maya communities affected by the Marlin Mine project (Guatemala) have filed a case with the Inter-American Commission concerning the validity of the community consultations, which in 2007 was rejected by the Guatemalan Constitutional Court (the presentation of the facts and the merits of the case have been discussed elsewhere; Van de Sandt 2009)[63]. Until now the Commission has not decided on whether the case is admissible to the Court however. In the cases in the other countries, it has not yet been possible to lodge a complaint with the Commission because the involved communities (or persons) and their representatives still have not pursued and exhausted all available remedies (legal avenues) under domestic law, which is a requirement under the American Convention (article 46.1).

At any rate, the Inter-American Court should not be thought of as a way to seek quick remedies for violations of indigenous peoples' human rights. On average it takes 8-10 years before a case submitted to the IASHR, which first has to pass the Commission, is finally decided on by the Court, and it takes roughly the same amount of time before a sentence is implemented by the State. Until now only the Awas Tingni case has been fully implemented; in other cases, such as Saramaka, the government still has to begin (Anna Meijknecht, pers. comm., September 2010). Therefore, for affected communities the most immediate use of the jurisprudence of the Court is the legitimization that the Court's decisions give in domestic legal struggles.

- ***Committee of Experts on the Application of Conventions and Recommendations***

Due to the binding nature of ILO conventions, States that have ratified them are obliged to regularly report to ILO on the measures they have taken to implement them, following a regular system of supervision; this also counts for the ILO Convention 169 on Indigenous Peoples. Governments must regularly report on the steps they have taken in law

[59] Anaya, S. J. and C. Grossman (2002). "The case of Awas Tingni v. Nicaragua: a new step in the international law of indigenous peoples." Arizona Journal of International and Comparative Law 19(1): 1-15

[60] In international law, it is commonly understood, however, that the right to prior consultation or to free prior and informed consent cannot and should not be construed to mean that indigenous peoples have the right to veto the measures the government eventually decides to implement.

[61] Brunner, L. (2008). "The rise of peoples' rights in the Americas: the Saramaka People decision of the Inter-American Court of Human Rights." Chinese Journal of International Law (2008), 7(3): 699–711.

[62] www.escr-net.org/caselaw.

[63] Op cit.

and practice to apply the Convention. The examination of these reports is the work of the Committee of Experts on the Application of Conventions and Recommendations (CEACR). As with other ILO standards, CEACR's role is to provide an impartial and technical evaluation of the state of application of the Convention. Governments must also submit a copy of their report to employers' and workers' organizations. These organizations may comment on the governments' reports; they may also send comments on the application of the Convention directly to the ILO. After having examined the information, the Committee of Experts can make two kinds of comments: observations and direct requests. Observations are comments on fundamental questions raised by the application of a particular convention by a State. Direct requests are more technical questions or requests for further information.

ILO's supervision system and the work of CEACR provide an opportunity for indigenous peoples to generate international pressure on the government to take steps to protect their special collective rights. Through their contacts with labor organizations in their country, many of the indigenous communities involved in the cases included in this study have in the past years criticized the government for making slow progress in the harmonization of mining laws and environmental and social legislation with the principles of ILO C169, as well as in developing and implementing appropriate mechanisms for the prior consultation of indigenous peoples (this happened in all cases, although not necessarily on the initiative of CIDSE partners). In response to these criticisms, CEACR has made repeated observations in which it urges the government to take necessary measures in the near future to give full effect in law and practice to the provisions of the Convention. The observations by CEACR in turn are used by indigenous communities and their allies among NGOs (amongst which CIDSE partners) that seek to legitimate their claims.

Besides the regular system of supervision, ILO also has several special complaint procedures, most important of which is the so-called representation (reclamación in Spanish) procedure.

"The representation procedure is governed by articles 24 and 25 of the ILO Constitution. It grants an industrial association of employers or of workers the right to present to the ILO Governing Body a representation against any member state which, in its view, "has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party". A three-member tripartite committee of the Governing Body may be set up to examine the representation and the government's response. The report that the committee submits to the Governing Body states the legal and practical aspects of the case, examines the information submitted, and concludes with recommendations. Where the government's response is not considered satisfactory, the Governing Body is entitled to publish the representation and the response" (www.ilo.org)[64].

The reports of the tripartite committees that were set up to examine representations – i.e. complaints by indigenous peoples – "alleging non-observance of the Indigenous and Tribal Peoples Convention" – have contributed significantly to the normative interpretation of the principles of ILO 169 and can constitute valuable resources in ongoing legal struggles against the negative consequences of extractive projects[65].

• UN Special Rapporteur on Indigenous Peoples Rights

The advisory role of CEACR is similar to that of the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People. Established by the UN Human Rights Council in 2001, the mandate of the Special Rapporteur is to promote the UN Declaration on the Rights of Indigenous Peoples (UN DRIP), adopted in 2007, as well as other international instruments relevant to the advancement of the rights of indigenous peoples. In conformity with his mandate, the Special Rapporteur is requested to *"examine ways and means of overcoming existing obstacles to the full and effective protection of the human rights and fundamental freedoms of indigenous people, […] and to identify, exchange and promote best practices"*. To this end, the Rapporteur is charged with examining and investigating alleged violations of indigenous peoples' rights, and, on the basis of such investigations, formulate recommendations and proposals – which are normally addressed to States – on appropriate measures and activities to prevent and remedy these violations. Contrary to the CEACR, however,

[64] http://www.ilo.org/global/What_we_do/InternationalLabourStandards/ApplyingandpromotingInternationalLabourStandards/Representations/lang--en/index.htm.

[65] The CD-ROM that comes with this survey includes 5 of such reports by ILO tripartite committees, all of which refer to violations of indigenous peoples rights (non-observance of ILO C169) in the context of extractive industries (mining, oil exploitation and forestry, from cases in Bolivia, Colombia Ecuador and Guatemala).

in his addresses to governments the Special Rapporteur can draw on a much wider range of international human rights standards: UN DRIP, ILO C169, the International Covenant of Civil and Political Rights (ICPPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention n the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child, and the Convention on Biological Diversity.

Prof. S. James Anaya, since May 2008 the new Special Rapporteur on Indigenous Peoples Rights, has recently been very active in defending the rights of communities affected by extractive industries. On the invitation of indigenous communities and organizations, he paid several visits to "zones of conflict". In June 2009, Anaya brought a visit to Peru to examine the events of Bagua, Peru. One year later (June 2010), Anaya visited Guatemala and was received by the Maya communities of the Western Highlands, where he informed himself about the situation surrounding the Marlin Mine. After both visits, the Rapporteur issued reports with recommendations to address the underlying problems related to shortcomings in the protection of the rights of indigenous peoples. In July 2009, he also issued a reaction to the public debate surrounding the adoption of the Framework Law on the Right to Consultation of Indigenous Peoples in Peru. These official reports and statements (excerpts of which have been used in section 3b; Anaya 2009, 2010a/b)[66] provide an adequate overview of the current state of the art in the normative interpretation of ILO C169 and UN DRIP and have contributed to the advancement of national debates on indigenous peoples' rights to consultation and free, prior and informed consent.

[66] Anaya, S.J. (2009). Observaciones sobre la situación de los pueblos indígenas de la Amazonía y los sucesos del 5 de junio y días posteriores en las provincias de Bagua y Utcubamba, Perú (20 Julio de 2009); Op cit.

5. Alliances in defending the rights of affected communities and needs regarding contacts and knowledge

The preceding description of organizational responses and legal actions undertaken by CIDSE partners in the face of extractive industries clearly shows that in order to effectively defend the rights of communities, it is crucial to team up with other civil society organizations – both nationally and internationally – working in the same or related fields. Some partners have been more active or successful in making alliances with other NGOs than others, although in almost all cases some kind of collaboration has taken place at one point or another. Many CIDSE partners have been teaming up with kindred NGOs and/or communities confronted with similar problems in the form of platforms or semi-formalized alliances, especially when in need of organizing protest marches, community consultations or lobby for reform of the mining law and/or other legislation (e.g. Alianza Cívica por la Reforma a la Ley de Minería in Honduras; platform for the adoption of the Framework Law on the Right to Consultation of Indigenous Peoples in Peru). When concerning particular actions involving specialized knowledge of legal procedures and lawsuits, several CIDSE partners entered into collaboration with NGOs more experienced in legal matters (e.g. COPAE with the CIEL in the OECD complaint and with FRMT in the querrella lawsuit; Acción Ecológica with CEDHU and INREDH in the amnesty petition to the Constituent Assembly). Other CIDSE partners collaborated with experts from universities in search of scientific or legal analysis as proof or as argumentation in citizen complaints (e.g. Caritas with Newcastle University; CCAJAR-CIJP with the Grupo de Justicia Global of UNIANDES). It seems that FEDEPAZ and SER in Peru as well as CERDET in Bolivia have had difficulties in finding alliances with legal assistance NGOs and/or research institutes, particularly on a national level. For Peru, FEDEPAZ attributes this situation to national lawyers' preoccupation with human rights violations of the 1990s. The organization has been more successful in finding international allies (e.g. Peru Support Group and UK Joint Committee on Human Rights in the Leigh Day action against Monterrico Metals Plc.). SERJUS and CONGCOOP in Guatemala stand out for seeming to have had problems in linking up with other NGOs that could help them in translating community protests or research findings into a strategy for undertaking concrete legal action.

With a view to developing (new) legal defense strategies and actions, CIDSE partners on their "fichas" have indicated their support needs in terms of contacts and knowledge. Several CIDSE partners mention to want to have more knowledge about strategic litigation, although they do not always seem to have concrete ideas for bringing legal action to court (e.g. CONGCOOP). Caritas mentions to want to link up with CCAJAR and CEJIL (Center for Justice and International Law) to be able to make use of their experience in litigation against transnational companies. In the same context, COPAE specifically mentions Fundación Myrna Mack. CERDET is looking for alliances with independent organizations and institutions that can help the Guaraní communities in constructing legal proof, with a view to bringing legal action against Repsol in court (contacts were being started up with Asso-Sherpa, a French non-profit association of lawyers with experience in transnational litigation). More modestly, however, almost all partners want to have legal capacity training (paralegal education), for their own staff as well as community leaders, in national and international norms, laws and standards. This will enable them to them to sharpen their awareness and understanding of law in their day-to-day work and struggles in defending the rights of extractive industry-affected communities. Specifically, they are looking for documentation on international standards on Free, Prior and Informed Consent mechanisms (SER) as well as analysis and interpretation of relevant precedents in national and international court cases (Caritas, CERDET, CONGCOOP, COPAE, SERJUS). Other partners are looking for contacts that can help them in developing participatory studies into the environmental and socio-cultural impacts of extractive industries (CERDET, FEDEPAZ), again with a view towards constructing legal evidence or proof. Interestingly, CERDET also mentions the need to have training in corporate governance ("how to understand transnational companies from the inside out") and transnational private regulation mechanisms (Corporate Social Responsibility, EITI, Voluntary Principles) – an interest that, in another context, was also expressed by representatives of indigenous communities in Guatemala.

6. Main findings and perspectives for future action in increasing enforceability of communities' rights

The study at hand has shown that legal action for the protection of communities against the negative consequences of extractive projects encompasses much more than litigation in court. Also it goes without saying that legal strategies alone cannot solve the problems confronted by communities affected by extractive industries, and need to be combined with political strategies and social mobilizations. That having been said, it is hoped that this inventory of the many ways in which the use of law can further communities' causes will serve as an inspiration for CIDSE partners in inventing new and increasingly effective strategies, whether they be social, political, cultural or legal.

6a. Main findings

- In relation to Environmental Impact Assessments in the context of extractive and large-scale development projects, CIDSE partners until now have paid relatively little attention to the right of indigenous and local communities to participate in the planning and execution of these assessments (pursuant to ILO C169 and the CBD). In cases where communities are not sufficiently involved in EIA processes, partners could make more proactive use of independent evaluations of EIA processes and results.

- Community consultations have been useful in mobilizing indigenous and local people to defend their right to be heard in relation to projects that potentially affect their livelihoods and their access to resources. However, community consultations should be clearly distinguished from prior consultation. Care should be taken that one-sided support for popular referendums does not lead to the rejection by the communities of legislative efforts to implement free prior and informed consent mechanisms.

- The obligation of governments to consult communities is greater when the substantive rights of these communities, such as land and resource rights, are better recognized by law. For an adequate protection of the rights of native and peasant communities, it is therefore recommendable to strive for adequate protection of property rights in relation to land and natural resources. In several countries, the debate on extractive industries is already having the effect of reinvigorating the debate on collective land rights.

- The work of CIDSE partners has greatly contributed to giving visibility to the criminalization of social protest and human rights abuses committed by the State and private companies. The *Guerrero v. Monterrico Metals Plc*. case illustrates that it can be particularly effective to make joint efforts in the construction of paradigmatic lawsuits, which can illustrate the behavior and strategies of multinational corporations and states to the detriment of native and peasant communities, and are able to create new legal precedents.

- In relation to (potential) environmental damages and health impacts caused by extractive industries, CIDSE partners have employed diversified tactics to force companies to take responsibility for their activities and conduct. The applications of actions of unconstitutionality have been particularly successful, but have not yet resulted in the adoption of reformed mining laws. Meanwhile, more international expertise is needed to find scientific proof of contamination and health effects.

- As a complementary strategy, some CIDSE partners have sought recourse to international bodies and tribunals for the protection of indigenous peoples' human rights, such as the IACHR and ILO oversight systems, as well as the UN Special Rapporteur. Trials before the Inter-American Court, if at all possible, are notoriously slow and costly, however, and their most immediate use – as of ILO's recommendations – is their potential for creating political pressure on States and companies.

6b. Perspectives for future action

- ***Raising awareness and training in indigenous peoples' rights issues***

Requests from CIDSE partners indicate the need to have more knowledge and receive training in legal issues that are relevant to their work in assisting indigenous, native or peasant communities in defending their rights in the face of encroaching extractive industries. Partners most often mention the need for knowledge on existing international legal instruments that can be used to promote and protect the human and environmental rights of indigenous and local communities in the face

of extractive industries. However, such activities would also have to refer to national legislation that recognizes citizen and communities' rights, and focus on the possibilities and scope of particular laws for devising legal strategies to defend such rights. In some countries, progressive legislation and bodies of jurisprudence that recognize and uphold the special, collective rights of indigenous peoples (e.g. Colombia and the rulings of the Constitutional Court) can provide useful resources in legal battles. Although often not specifying who should be the beneficiaries of such legal training on issues related to human and environmental rights, it is clear that this can involve training/awareness raising directed either at partner personnel or at the (leadership of) indigenous community organizations they work with. Both options seem to be equally relevant.

- ***Observatory for monitoring compliance of procedures, regulations and standards***

There seems a need – expressly formulated by FEDEPAZ, but implicitly also by other partners – to develop more capacity, both within organizations and among their beneficiary communities, in accessing and analyzing information concerning the administrative procedures followed by extractive companies and public entities. This matter is intimately related to the issue of timely access to information on administrative decisions regarding the granting of environmental licenses and exploitation permits, as well as the screening of Environmental Impact Assessments (EIA) and – in cases in which extractive projects have already started – Annual Monitoring Reports (AMR) on social and environmental performance that internationally operating companies are normally required to elaborate on their ongoing operations. In this process, partners and communities can make use of their right, as citizens, to access to public information, a right that countries recognize to varying degrees. Monitoring reports by transnational companies are usually made publicly available on companies' websites, but most often have not been distributed to communities in Spanish. Information procured in this way – possibly through the creation of "observatories" for compliance with indigenous and environmental rights – can serve as proof in the construction of legal cases that can force governments and companies to comply with legal standards and procedures.

- ***Strategies for the defense of collective property rights to land and territory***

Legal struggles for the recognition of the right to prior consultation need to be complemented with strategies for the defense of land and territorial rights that are ignored or infringed upon by extractive companies. There are big differences between one country and another in terms of the official recognition of such rights. In some countries (Guatemala or Honduras), collective property rights of indigenous communities are hardly recognized, while in others (Colombia and Bolivia), indigenous territories have been demarcated and titled as collective and inalienable property of indigenous communities. When indigenous land rights are violated, the latter cases offer far more starting points for undertaking legal action, but also in the former cases it is possible to legally defend these rights, although more ingenious strategies are needed, as has been aptly demonstrated in the case of the mining-affected communities in Guatemala. At any rate, in developing such strategies, various questions first need to be answered: What rights in land do affected communities have (formal rights or historical rights; individual or collective rights)? – In what ways have these rights been violated (e.g. sales through intimidation, irregularities in land sales, involuntary displacement)? – What legal resources (national/international) are available to obtain protection, restitution or compensation of land rights?

- ***Exploring possibilities for strategic litigation***

Most CIDSE partners mention the need for forging alliances with specialized legal assistance organizations with the aim of exploring possibilities for strategic litigation against extractive companies or States. Partners are eager to learn about examples of precedent cases in which national or international tribunals have found companies or States guilty of violating the rights of indigenous or local communities, and in which States have been urged to demarcate indigenous territories, to retroactively consult potentially affected communities, or to pay compensation payments for damages or losses suffered by persons and collectivities. Lawsuits are costly and can take years to reach judgments however. If in a particular situation litigation is an option, there should be careful thought about the goal to be reached with litigation, as well as the most suitable strategy to reach it. Some EPLA partners already have some – direct or indirect – experience with litigation, sometimes with success, such as CCAJAR-CIJP (case of Jiguamiandó before

the Colombian Constitutional Court), COPAE (case of Sipacapa before the IACHR), and FEDEPAZ (lawsuit against Monterrico Metals through law firm Leighday in London). It would seem important to exchange these experiences within the EPLA network. Also, contacts should be sought with specialized organizations that have experience with "transnational litigation" (in Latin America)[67].

[67] Some examples of organizations that have experience in this field, or that might know other experienced organisations: Sherpa "concilier globalization et droits de l'homme" (www.asso-sherpa.org); International Rights Advocates (www.iradvocates.org); CIEL "Center for International Environmental Law" (www.ciel.org). Another experienced resource person in this respect is Prof. James Anaya, UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples (anaya@law.arizona.edu).

Annex a

NGO, country	operation	communities	impact study	prior consultation	negotiation	legal action	territorial defense	rights discourse
COPAE, Guatemala (involvement since 2003)	Marlin Mine Project (gold, silver); Montana Exploradora, Goldcorp (Canada); start operation 2003, exploitation in progress + IFC	Sipacapa, San Miguel Ixtahuacán (Maya Sipakapense, Mam); San Marcos	Yes, environmental impact assessment by consultants hired by company (not impartial); revision of EIA by external consultant revealed serious flaws;	No, not prior to granting of exploitation license; affected communities organized "community consultation" (June 2005)	Yes/no, San Miguel Ixtahuacán has been willing to (re)negotiate benefits with company; Sipacapa has refused to negooate; protest marches by affected communities	Constitutional Court (unsuccessful); action of unconstitutionality (successful); IACHR case (pending, cautionary measures); observation CEACR (favourable); observation UN Special Rapporteur (favourable)	OECD Specific Instance Complaint (San Miguel Ixtahuacán) against Goldcorp for "violation of communal property rights" (pending); restitution of title action (under study)	Yes, first implicitly, Later more explicitly; communities & NGO Invoke ILO C169, articles 66 & 67 of Constitution & IACHR Yakye Axa & Awas Tingni Judgments, but speak of "citizen participation"
IDEAR - CONGCOOP, Guatemala (involvement since 2006)	Guadalupe Sugar Mill, Grupo Chaw'il Utz'aj, Turcios Lima Foundation (sugar cane, oil palm); gradual expansion of operation	Tamahú, Tucurú, La Tinta, Panzós, Senahú, El Estor (Maya Q'eqchi' communities of Valle del Polochic); Alta Verapaz & Izabal	No, environmental impact assessment not obligatory in case of land acquisitions by individual landowners	No, not considered obligatory because communities do not have property rights; communities have not publicly expressed themselves	No, due to lack of effective representation; local communities are politically & socially divided (population uninformed or misinformed)	Analytical study not translated in (legal) action program; communities paralyzed by internal division, intimidation & forced displacement	No ("correlation of factors highly unfavourable; low priority on agenda of grassroots organizations")	No, not by affected communities nor by NGO; communities referred to as indigenous, but no mention of indigenous peoples' collective rights
SERJUS, Guatemala (involvement since 2005)	Xalalá Hydroelectric Project (Chixoy River); not yet in operation, bidding phase	Playa Grande, Uspantán, Cobán (Maya Q'eqchi', Mam, Akateko, Kakchiquel of micro Region VII & II); Quiché & Alta Verapaz	Yes, but presence of Local habitants denied; investigation Into environmental & social effects executed by NGO & communities	No; affected communities organized "community consultation" (late 2005)	No, neither with company nor with state; project in bidding phase, companies have not yet started operations; protest marches by affected communities	No legal actions undertaken (Constitutional Court Case regarding Sipacapa also applies to Playa Grande; unsuccessful)	Violation of territorial rights has not yet occurred; case brought to attention of Victor Abramovich, former Commissioner of IACHR (2006--2009)	Yes, first implicitly, later more explicitly; NGO invokes ILO C169, article 66 of Constitution, UN DRIP & IACHR Saramaka Judgment, But speak of "citizen participation"
CARITAS, Honduras (involvement since 2000)	San Martin Mine Project (gold, silver); Minerales Entremares, Goldcorp (Canada); start operation 2000,	Playa Grande, Uspantán, Cobán (Maya Q'eqchi', Mam, Akateko, Kakchiquel of micro Region VII & II); Quiché & Alta Verapaz	Yes, but presence of Local habitants denied; investigation Into environmental & social effects executed by NGO & communities	No; affected communities organized "community consultation" (late 2005)	No, neither with company nor with state; project in bidding phase, companies have not yet started operations; protest marches by affected communities	No legal actions undertaken (Constitutional Court Case regarding Sipacapa also applies to Playa Grande; unsuccessful)	Violation of territorial rights has not yet occurred; case brought to attention of Victor Abramovich, former Commissioner of IACHR (2006 - 2009)	Yes, first implicitly, later more explicitly; NGO invokes ILO C169, article 66 of Constitution, UN DRIP & IACHR Saramaka Judgment, But speak of "citizen participation"

NGO, country	operation	communities	impact study	prior consultation	negotiation	legal action	territorial defense	rights discourse
CCAJAR - CIJP, Colombia (involvement since 2006)	Mandé Norte Mine Project (gold, copper, molybdenum); Muriel Mining (Panamá), Río Tinto (UK); not yet in operation, start exploration 2008	Carmen del Darién/ Jiguamiandó, Murindó (indigenous Embera - KaRo and afro descendents); Chocó & Antioquia	Yes, environmental impact assessment by Ministry of Environment & Territorial Planning, but not in relation to all affected communities & still under revision	Yes, but not through representative indigenous institutions; affected communities (indigenous & afro) organized "community consultation" (February 2009)	No, not attempted, communities opposed against mining exploration & exploitation; protest marches (exploration team expelled from indigenous territory)	Constitutional Court (successful, repeat consultation procedure); IACHR case (pending, cautionary measures); observation CEACR (favourable); case brought to attention of UN Special Rapporteur	Declaration of resguardo as "Zone of Humanitarian & Environmental Refuge"; Constitutional Court recognizes indigenous peoples' collective right to territory (& prior consultation) as a "fundamental right"	Yes, explicitly; communities & NGO invoke ILO C169, jurisprudence of Constitutional Court (fundamental rights of indigenous peoples), UN DRIP & IACHR Yakye Axa & Saramaka Judgments
Acción Ecológica, Ecuador (involvement since 2004)	Various oil blocks, Petroecuador (Ecuador), Perenco (France); start operaKon 2002	15 de Abril, Payamino, Dayamino (colonos, Kichwa, Waorani); Orellana	Unknown on basis of information provided	Unknown on basis of information provided	No, not a]empted; protest marches	Legal defense; action of unconstitutionality (unsuccessful); lobbying Constituent Assembly (partly successful)	No, NGO speaks of "defending territory" but reference to collective rights to territory lacking	Yes, implicitly; discursive emphasis on extraction as ecological problem; discourse CBOs unclear
FEDEPAZ (Red Muqui), Peru (involvement since 2005	Río Blanco Mine Project formerly Minera Majaz (copper, molybdenum); Monterrico Metals (Hong Kong/ UK), Xiamen Zijin Tongguan Investment (China); not yet in operation, start exploration 2003 + IFC	Segunda y Cajas, Yanta ("peasant & native communities"); Huancabamba & Ayabaca, Piura	Yes, environmental impact assessment between 2003 - 2006; procedural revision of EIA & license by NGO revealed irregularities	No, not prior to granting of exploration license; affected communities organized "citizen consultation" (September 2007), which was declared illegal by government (organizers & leaders criminalized)	Yes, with government regarding compensation for damages, in 2006 & a]empted in 2007 (aborted due to lack of commitment by government); protest marches	Legal defense; injunction against Monterrico Metals (torture allegations) through London - based law firm Leigh Day & Co (pending); lawsuit challenging "usurpation of lands" by mining company (pending)	Consolidating ancestral decision - making on alienation of communal lands (territory); Peoples Ombudsman finds "illegal presence of Minera Majaz on communal lands" (irregular procedure)	Yes, explicitly; communities & NGO invoke ILO C169 & UN DRIP; communities referred to as "Comunidades Campesinas y Nativas" (articles 88, 89 & 149 of Constitution), but speak of "citizen participation"
SER, Peru (involvement since 2004)	Yanacocha Mine Project (gold); Buenaventura (Peru), Newmont Mining (USA); start operation 1993	Quilish, La Zanja, Combayo ("peasant & native communities"); Chota & Santa Cruz, Cajamarca	Unknown on basis of information provided	Unknown on basis of information provided	Yes, with government & company regarding benefits & monitoring, in 2004–2005 (aborted); protest marches	No legal actions undertaken; observation UN Special Rapporteur (favorable)	No clear strategy; "strengthening of indigenous territorial rights" (with reference to Amazon region)	Yes, first implicitly, later more explicitly; NGO invokes ILO C169, IACHR judgments; discourse CBOs unclear
CERDET, Bolivia (involvement since 2006)	Caipipendi Block (gas - oil), Margarita Field, construction gas pipeline Margarita - Palos Blancos; Repsol YPF E&P (Spain/Bolivia); start operation 1998	IKka Guasu (Guaraní indigenous territory); Tarija	Yes, but ignored social effects; inspections by Ministry of Hydrocarbons in 2005 & 2006 (results not public); independent investigation of adverse effects by NGOs; community monitoring	No, not prior to granting of exploration license; indigenous authorities conducted investigation into adverse social & environmental effects for consciousness raising in communities	Yes, with company regarding compensation for damages, in 1998–2003 & again in 2006–2007 (aborted due to lack of commitment company); protest marches	No legal actions undertaken ("due to lack of legal evidence"); injunction against Repsol through Paris - based Sherpa network of jurists (under study)	NGO accuses Repsol of obstruction & illegal acts in process of regularization of title to ancestral indigenous territory (but not translated in concrete political or legal strategy)	Yes, explicitly; communities & NGO invoke ILO C169, Hydrocarbons Law (prior consultation), Repsol's code of conduct in relation to indigenous peoples; strangely no reference to UN DRIP (national law in Bolivia)

Annex b

ÍNDICE DE TEXTOS NORMATIVOS Y JURISPRUDENCIA SOBRE LOS DERECHOS COLECTIVOS DE LOS PUEBLOS INDÍGENAS Y LAS INDUSTRIAS EXTRACTIVAS

These materials have been compiled on CD-ROM and are available through the website of OCMAL (www.conflictos-mineros.net).

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