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The Accountability and Responsibility Transnational Corporations, Business Enterprises, and Governments have in Promoting and Protecting the Rights of Indigenous Peoples under International Standards

Report to the Expert Mechanism on the Rights of Indigenous Peoples

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I. Introduction

Indigenous Peoples possess a unique and intimate relationship with their ancestral lands. There is no formal definition of Indigenous Peoples that has currently been adopted by any U.N. body. The prevailing view for not adopting a formal definition is due to the unique characteristics each Indigenous community possesses. The thought is that the adoption of a formal definition would potentially be over or under inclusive depending on which Indigenous community it is being applied to. As a result, the international community has adopted a working definition. The most cited and commonly accepted working definition of Indigenous Peoples is provided by Jose R. Martinez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.¹ He outlines the working definition to be as follow:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.

This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:

- a) Occupation of ancestral lands, or at least of part of them;
- b) Common ancestry with the original occupants of these lands;
- c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an Indigenous community, dress, means of livelihood, lifestyle, etc.);
- d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
- e) Residence on certain parts of the country, or in certain regions of the world;
- f) Other relevant factors.

¹ U.N. Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, ¶¶379-382, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (July 30, 1981) (by José R. Martinez Cobo).

On an individual basis, an Indigenous person is one who belongs to these Indigenous populations through self-identification as Indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group).

This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.²

This report will be based on this Sub-Commission's working definition of Indigenous Peoples.

Accounting for most of the world's cultural diversity with approximately 370 million Indigenous Peoples worldwide, Indigenous groups continue to be one of the most marginalized and vulnerable peoples in the world.³ Indigenous Peoples' tradition, culture, religion, and identity is derived from their relationship with the earth. They look to it for their sustenance, spirituality, and cultural survival. This relationship has resulted in Indigenous groups being the most affected by the activities of transnational corporations and business enterprises, especially in the extractive and development industries.

Indigenous peoples predominately reside in lands with an abundance of natural resources. Throughout the world, the majority of valuable natural resources such as timber, minerals, water and crude have been found within Indigenous territories.⁴ Due to living on territories rich with natural resources, large-scale extractive activities and development projects seeking these resources have been the most detrimental on Indigenous peoples as their loss of culture, livelihood, traditions and very survival is threatened by these practices.⁵ Due to environmental

² *Id.*

³ *Environment*, U.N. PERMANENT FORUM ON INDIGENOUS ISSUES, available at <http://undesadspd.org/IndigenousPeoples/ThematicIssues/Environment.aspx>.

⁴ U.N. Secretariat of the Permanent Forum on Indigenous Issues, Training Module on Indigenous Peoples' Issues: Facilitator's Handbook (Nov. 2010), available at http://www.un.org/esa/socdev/unpfii/documents/trainingmodule_en.pdf.

⁵ LAURA WESTRA, ENVTL. JUSTICE & THE RIGHTS OF INDIGENOUS PEOPLES: INT'L & DOMESTIC LEGAL PERSPECTIVES 86 (2008).

damage and loss of traditional lands being a common effect of these types of activities, large-scale extractive and development activities by governments and corporations have presented a serious challenge for indigenous communities throughout the world.

Transnational corporations and business enterprises are instrumental in national and global economies. Not only are jobs, technology, and capital developed from their activities, corporate players can also exert a positive influence in fostering development through the extractive industry, especially for underdeveloped countries. Beyond economic development, corporations and business can contribute to the overall promotion of human rights. With more and more businesses and corporations seeking to leave a positive impact on human rights, these entities can play a vital role in ensuring that individual and collective rights of affected Indigenous communities are protected. State governments are equally important in the promotion and protection of Indigenous Peoples' rights as they set the standards and guidelines for corporations and business on how to conduct and implement projects within a state host's territories. Ensuring that the guidelines and standards set forth for those operating within the state hosts territories are monitored and followed.

The tension between corporations, businesses and Indigenous Peoples arises when extractive activities by corporate and government actors become detrimental to Indigenous communities. There is a recurring theme of the host state granting concessions to a corporation, for an extractive or development project, without the prior consultation and consent of the affected Indigenous community. This has led to an evident disconnect between the host state, the corporation, and the affected community. In turn this has resulted in the exploitation and destruction of the Indigenous community's territory and culture identity. What tends to be the

driving force for these violations is the tension between seeking economic development and the protection of human rights.

This report will elaborate on the current international framework on Indigenous Peoples' right to "free, prior, informed consent" (hereinafter "FPIC") and consultation in the extractive and development industries. It will focus on international instruments such as the International Labour Organization Convention No. 169⁶ (hereinafter "ILO 169") and the United Nations Declaration on the Rights of Indigenous Peoples⁷ (hereinafter the "UN Declaration on the Rights of Indigenous Peoples" or "UNDRIP"). It will also focus on the successes and failures developing countries such as Ecuador, Bolivia and the United States have faced in order to illustrate the difficulties countries have in protecting and promoting the rights of affected Indigenous communities against transnational corporations and business enterprises. Further, this report will continue to support the current implementation of the FPIC framework in the extractive and development industries, as well as propose the need for a binding international instrument on private and government actors in relation to Indigenous communities and the extractive and development industry. This report will look to the current efforts by the United States with its National Action Plan on Responsible Business Conduct as well as Ecuador's efforts with its resolution on the "Elaboration of an International legally binding instrument on transnational corporations and other Business Enterprises with Respect to Human Rights" adopted by the Human Rights Council on June 25th, 2014 to illustrate the global movement for a

⁶ C169-Indigenous and Tribal Peoples Convention, 1989 [ILO 169], *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, Sept. 5, 1991, Geneva, 76th ILC Sess.

⁷ General Assembly, U.N. *Declaration on the Rights of Indigenous Peoples* [UNDRIP], 61st Sess., Oct. 2, 2007, U.N. Doc. A/RES/61/295.

binding treaty to ensure accountability and responsibility by corporations and businesses in the field of human rights.⁸

II. Application of International Standards to Countries

The following section will introduce the international standards providing protection of Indigenous Peoples worldwide as well as their applications to countries such as Ecuador and Bolivia.

A. Standards

International agreements such as ILO 169 and the UN Declaration on the Rights of Indigenous Peoples have established that states have a duty to effectively consult with Indigenous communities on projects and activities that may affect their territory, in order to obtain consent by the affected Indigenous community. These international standards are important as they are the current instruments to explicitly affirm Indigenous Peoples' right to FPIC and consultation when dealing with extractive and development projects. Each instrument has sections that set up the FPIC and consultation framework when dealing with extractive and development projects affecting Indigenous territory.⁹

⁸ H.R Council, *Elaboration of an International legally binding instrument on transnational corporations and other Business Enterprises with Respect to Human Rights*, 26th Sess., July 14, 2014, U.N. Doc. A/HRC/RES/26/9.

⁹ ILO Convention 169 Article 15 states, "1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specifically safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these sources. 2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities."

ILO 169, *supra* note 6, at art. 15.

Although UNDRIP has other sections that involve the legal framework of FPIC (I.E. Article 10, 11 19, 28, and 29), this report will focus only on the articles that focus on the required consent to extractive projects. Specifically, Article 32 "1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water, or other resources. 3. States shall provide effective mechanisms for just and fair redress for any such activities and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural, or spiritual impact."

UNDRIP, *supra* note 7, at art. 32.

ILO 169 is a legally binding international instrument that places certain obligations on states that have ratified this convention. Specifically, when it comes to undertaking extractive projects, there are requirements a government must recognize and adhere to before proceeding with such activities. Bolivia and Ecuador have ratified and incorporated ILO 169 into their domestic law.¹⁰

Under ILO 169, states have the responsibility for developing protections for Indigenous Peoples.¹¹ States are also responsible for carrying out consultations with Indigenous Peoples “in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.”¹² Article 15(2) of ILO 169 sets forth a state’s obligation in consulting on matters pertaining to Indigenous lands. Article 15(2) requires a state to consult with Indigenous Peoples before undertaking or permitting any exploration or exploitation project from taking place, Indigenous Peoples will wherever possible, participate in the benefits of such projects, and also receive fair compensation for damages sustained as a result of these activities undertaken. Although ILO 169 set out a detailed FPIC framework for those states that have ratified this convention, a country’s hesitation in enforcing such a framework has continued to be one of the factors that has contributed to the continuous violation of Indigenous Peoples’ rights.

The UNDRIP, under international law, is not a legally binding instrument. Rather it encourages states to comply and effectively implement state’s obligations to “indigenous peoples under international instruments, in particular those related to human rights, in consultation and

¹⁰ Christian Courtis, *Notes on the implementation by Latin American countries of the ILO Convention 169 in indigenous peoples*, 10 SUR INT’L J. HUM. RTS., available at http://www.surjournal.org/eng/conteudos/getArtigo10.php?artigo=10,artigo_courtis.htm.

¹¹ ILO 169, *supra* note 6, at art. 1.

¹² *Id.* at art. 6(2).

cooperation with the peoples concerned...¹³ Further under Article 32(1) & (2), the UNDRIP sets out the rights Indigenous Peoples have in determining and developing the strategies that will be set up for the development or use of their lands, as well as the state's obligation to "consult and cooperate in good faith with the Indigenous Peoples...in order to obtain their free and informed consent prior to approval" of extractive activities or projects.¹⁴

While these international instruments have been crucial in the development of Indigenous Peoples' rights globally, the application of these instruments both domestically and internationally have fallen short in protecting affected Indigenous community within the extractive and development industries. In looking at the current situation within countries such as Bolivia, Ecuador and the United States, the following sections will present the efforts and challenges that currently plague Indigenous Peoples' right to FPIC for extractive and development projects affecting their lands. These country studies will be presented to show how each respective legal body has dealt with international standards on the right to consultation and FPIC issue when dealing with extractive and development projects within Indigenous territories.

B. Countries

1. Ecuador

In 1996, Ecuador granted a concession for oil exploration and exploitation in the ancestral territory of the Kichwa Indigenous Peoples of Sarayaku, located in El Oriente, an Amazonian region in Ecuador, to Compañía General de Combustibles (hereinafter "CGC"), a subsidiary of Chevron in Argentina.¹⁵ Without providing consultation or obtaining consent from the Sarakuya community, refusal in terms of what would be required, CGC and Ecuador's armed

¹³ UNDRIP, *supra* note 7.

¹⁴ *Id.* at art. 32(1) & (2).

¹⁵ *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Inter-Am. Ct. H.R.(Ser. C) No. 245, (2012), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf

forces entered Sarakuya territory in order to conduct seismic exploration.¹⁶ With the placement of 1.5 tons of explosives in the Amazon, destruction of the Sarakuya's sacred sites and quality and way of life were affected.¹⁷ Due to a lack of protection by the Ecuadorian government and the ongoing violations, on December 2003 the Association of the Kichwa People of Sarayaku filed before the Inter-American Commission on Human Rights (hereinafter "the Commission") against Ecuador.¹⁸

The Commission granted provisional measures for the Sarayaku on June 2004.¹⁹ In June 2012, the Inter-American Court of Human Rights (hereinafter the "Court" or "Inter-American Court") issued an order in favor of the Sarayaku community.²⁰ The Court cited ILO 169 and Ecuador's constitution as instruments that the Ecuadorian government has recognized as protecting the rights of Indigenous Peoples to free, prior, and informed consent and the right to consultation.²¹ The Court stated that not only did the State have an obligation to guarantee the right to consultation in all phases of an extractive project that may affect the territory of the Sarakuya,²² but the state also had a duty to consult the community in a free and informed manner to ensure participation²³ and in a manner that ensured consultations were undertaken in good faith.²⁴ The Court further elaborated that the obligation to consult was the responsibility of the State and that the consultation process is not an obligation that should be delegated to a third party or private company, much less to companies seeking to exploit the resources within the territory of Indigenous communities.²⁵

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at p. 4.

¹⁹ *Id.* at p. 6.

²⁰ *Id.*

²¹ *Id.* at p. 49.

²² *Id.* at p. 45-46.

²³ *Id.* at 32.

²⁴ *Id.* at 50.

²⁵ *Id.* at 56.

Within a short time frame of the Inter-American Court announcing its decision, the current Ecuadorian president, Rafael Correa Delgado, issued Executive Decree 1247 on July 19, 2012.²⁶ Executive Decree 1247 declared that the purpose of consultation did not require consent from the Indigenous communities, rather consultation only required participation. Not only did the Executive Decree seek to regulate Indigenous peoples' consultation rights and FPIC granted by ILO 169, the UN Declaration of Rights of Indigenous Peoples and the Ecuadorian constitution, Executive Decree 1247 also stated that the final decision for oil and mining projects fell within the superior powers of the government which could proceed forward even if the project was rejected by the affected Indigenous community.²⁷

On December 2012, the United Nations Committee on Economic, Social and Cultural Rights (hereinafter the "committee) issued a periodic report of Ecuador highlighting the recent actions by the Ecuadorian government.²⁸ In its report, one of the principal subjects of concern was the failure of the Ecuadorian government in undertaking "consultations as a basis for obtaining the prior, freely given and informed consent of indigenous peoples and nationalities for natural development projects that affect them."²⁹ The committee was especially concerned with the passage of Executive Decree 1247, as it was issued without the consultation of Indigenous Peoples and was not based on "pre-existing public policy measures."³⁰ As a result, it urged Ecuador to comply with the recent ruling of the Inter-American Court regarding the Sarakuya peoples by consulting with Ecuador's Indigenous communities when projects regarding mining

²⁶ I was unable to retrieve the official decree on Ecuador's official gazette, I therefore relied on a different source to find it. Executive Decree N° 1247 (July 19, 2012), *available at* http://www.recursoNaturales.gob.ec/wp-content/uploads/downloads/2012/08/PDF-DECRETO_1247-19-JUL-2012.pdf.

²⁷ *Id.*

²⁸ Comm. on Economic, Social and Cultural Rights, *Concluding observations of the Committee on the third periodic report of Ecuador as approved by the Committee*, 49th Sess. Nov. 14-20, 2012, U.N. Doc. E/C.12/EQU/CO/3.

²⁹ *Id.* at p. 2-3.

³⁰ *Id.*

and hydrocarbon exploration and exploitation arise.³¹ It recommended Ecuador provide sufficient time and opportunity for deliberation and decision-making in order to ensure the affected Indigenous groups are allowed to decide freely whether to consent or not to proposed extractive projects.³² Further, the committee recommended Ecuador consider suspending the Executive Decree 1247 and instead work and consult with the Indigenous communities in order to implement legislation that governs the exercise of Indigenous Peoples' right to be consulted.³³

2. Bolivia

On May 17, 2005, the Bolivian Congress enacted the controversial Hydrocarbons Law without approval of the then-president, Carlos Mesa Gisbert.³⁴ This law created a national policy that returned ownership of all hydrocarbons back to the state. It also provided taxation and royalties for companies and corporations of the petroleum and gas sector who looked to invest in Bolivia's hydrocarbons.³⁵ A notable feature of this law is that it included an article protecting Indigenous Peoples' land and territory. Article 126 of the Hydrocarbons Law protected, amongst other things, Indigenous territory as "territories that could not be expropriated" ("Lugares que no pueden expropiar").³⁶ In accordance with Article 6 and 15 of ILO 169, Article 115 of the Hydrocarbons Law included Indigenous Peoples' right to consultation through good faith and free, prior and informed consent in the cases of development projects planned on lands or territories occupied by Indigenous Peoples.³⁷ The Hydrocarbons Law showcases Bolivia's monumental steps in promoting and protecting their Indigenous Peoples' rights to consultation

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Marci Hoffman, *Bolivia-Indigenous Peoples*, FOREIGN LAW GUIDE, available at http://0-referenceworks.brillonline.com.ignacio.usfca.edu/entries/foreign-law-guide/bolivia-indigenous-peoples-COM_034094#.

³⁵ Ley N° 3058, de 17 de Mayo de 2005, Gaceta Oficial Estado Plurinacional de Bolivia [The Official Gazette of the Plurinational State of Bolivia], Artículo 55°, Dec. 2005 (Bol.).

³⁶ *Id.* at Artículo 126°

³⁷ *Id.* at Artículo 115°

and FPIC in the hydrocarbon industry. Although this was a success for Bolivia's Indigenous Peoples, Bolivia's branches of government were divided as to whether Indigenous Peoples were entitled to this right. Bolivia's Constitutional Tribunal (hereinafter the "Tribunal") made great efforts to revoke the protection of Indigenous Peoples' rights granted by the Hydrocarbons Law.

In June 2006, the Tribunal adopted a decision that made Articles 115 and 126 of the Hydrocarbons Law unconstitutional.³⁸ The Tribunal determined that requiring consent from Indigenous Peoples was unconstitutional on the justification that "the consultation of indigenous peoples must not be understood in the sense of requiring authorization for exploration activities."³⁹ The Tribunal further went on to reason that such consultation and consent was not necessary since, "the subsoil belongs to the State and the interests of the majority cannot be jeopardized by the lack of consent from indigenous peoples."⁴⁰ In this respect, the Tribunal reasoned the purpose for consultation is to quantify damage and not to obtain consent.⁴¹ Although there was a divide between the legislative and judicial branches of Bolivia as to how extractive and development projects should be undertaken, it was not until Supreme Decree 29033 was passed, did Bolivia make steps to ensure consultation and the FPIC procedures within the hydrocarbon industry was protected.

In 2007, Supreme Decree 29033 was passed.⁴² The Supreme Decree 29033 guaranteed Indigenous Peoples' right to consultation and participation in hydrocarbons activities.⁴³ It did so

³⁸ Sentencia Constitucional 0045/2006, Expediente: 2005-12400-25-RDI, 2.6.2006 (Bol.).

³⁹ The complete official communication of the constitutional decision 0045 of June 2, 2006 was unavailable at Bolivia's official Gazette, *Gaceta Oficial*. Instead, I will be referring to the Inter-American Commission's report of the court's reasons for determining these articles unconstitutional.

Follow-up Report- Access to Justice and Social Inclusion: The Road Towards Strengthening Democracy in Bolivia, Inter-Am. Comm'n H.R., OEA/Ser/L/V/II.135, doc. 40, ¶ 247 (Aug. 7, 2009).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Decreto Supremo N° 29033, de 16 de Febrero de 2007, Gaceta Oficial Estado Plurinacional de Bolivia [The Official Gazette of the Plurinational State of Bolivia], Artículo 4, Feb. 2007 (Bol).

⁴³ *Id.*

by laying out the four phases of a hydrocarbon consultation process. It included the right to coordination and information; organization and planning of the consultation; execution of the consultation; and agreement.⁴⁴

The international community has also noted the efforts of Bolivia within the hydrocarbon industry. The Inter-American Commission in a state report on Bolivia, noted and commended Bolivia's efforts in protecting the right of their Indigenous Peoples in the hydrocarbon industry through legislative reform.⁴⁵ Oxfam, an international federation that is comprised of independent non-governmental organizations, also commended Bolivia's progress.⁴⁶ It noted that in accordance with the consultation guidelines set forth by Supreme Decree 29033, in 2010 the Bolivian Ministry of Hydrocarbons and Energy made great strides in successfully applying the free, prior and informed consent principle to a proposed hydrocarbon exploration project involving the Guarani Indigenous People.⁴⁷ These are commendable steps Bolivia has successfully taken in protecting Indigenous Peoples' right to FPIC within the hydrocarbon industry.

3. United States

On December 2014, Congress passed a bill named the "Carl Levin and Howard P. Buck McKeon National Defense Authorization Act for Fiscal Year 2015" (hereinafter the "bill") which included the proposed land exchange that gives 2,422 acres of the San Carlos Apache ancestral lands located in the Tonto National Forest in Arizona, to Resolution Copper Mining, a

⁴⁴ *Id.*

⁴⁵ Inter-Am. Comm'n H.R., *supra* note 15, at 159

⁴⁶ Iván Bascopé Sanjines, *Case Study: Bolivian Government Consultation with the Guarani Indigenous Peoples of Charagua Norte and Isoso- Proposed hydrocarbons exploration project in San Isidro Block Santa Cruz, Bolivia*, OXFAMAMERICA, (Nov. 15 2010), available at <http://www.oxfamamerica.org/static/media/files/oxfam-bolivia-consultation-process-nov-2010-final.pdf>.

⁴⁷ *Id.*

subsidiary of the British-Australian mining company Rio Tinto.⁴⁸ The proposed mining project is said to create over 3,000 jobs and generate over \$60 billion in economic impact.⁴⁹ The bill is set to exchange a large parcel of Apache land to Resolution Copper Mining for lands owned by the company.⁵⁰ The bill requires consultation with the affected Indian tribes regarding concerns for the land exchange as well as finding acceptable measures to address the affected communities concern and minimize adverse effects to the community- but there is concern whether these consultations will actually occur.⁵¹ Further, while the bill sets out required environmental reviews to be conducted under the National Environmental Policy Act of 1969, federal law will no longer be enforceable upon the land being exchanged and becoming private property. This is of great concern to the affected Apaches as this could lead to immense environmental violations. The land exchange includes Apache lands that have been utilized for medicinal, burial and ceremonial purposes and is considered sacred by the tribe.⁵²

This brief example showcases the illusion of sovereignty that Native Americans have in the United States. Although they are federally recognized as Sovereign nations, the Federal government puts forth their economic interest above protecting the rights of Native Americans. Even though the United States has not ratified ILO 169, their responsibility in respecting Native American's rights is important as participants in the international community. As global leaders, being able to be accountable and responsible within their own borders as well transnationally is essential in protecting and respecting Indigenous Peoples rights from violations from transnational corporations and business enterprises.

⁴⁸ H.R.1735, 114th Congress. (2015-2016). Please refer to Sec. 3003(b)(2).

⁴⁹Robert Spence, *Rio Tinto, BHP Billiton Get Approval for \$6-Billion Copper Mine in Arizona*, (Dec. 16, 2014), available at <http://www.miningglobal.com/miningsites/1296/Rio-Tinto-BHP-Billiton-Get-Approval-for-6Billion-Copper-Mine-in-Arizona>.

⁵⁰ *Id.* at 1105-1106.

⁵¹ Michael McAuliff, *Congress Raids Ancestral Native American Lands With Defense Bill*, (Dec. 12, 2014, 12:59 EST), available at http://www.huffingtonpost.com/2014/12/03/ndaa-land-deals_n_6264362.html.

⁵² *Id.*

III. Current Proposed Solutions

For many years, there has been a movement towards creating international instruments that put forth obligations on transnational corporations and business enterprises in being more responsible and accountable in their activities abroad. The following examples show steps that have been taken to address the vital role corporations and business play in the sphere of human rights.

A. The United States- National Action Plan on Responsible Business Conduct

The UN Working Group on Business and Human Rights has encouraged states to develop and enact a National Action Plan on Business and Human Rights as being a part of its responsibility in implementing the Guiding Principles on Business and Human Rights.⁵³ States such as the United Kingdom, Denmark, and Finland have already launched their National Action Plans, while 20 countries, including the U.S., are in the process of developing a National Action Plan.⁵⁴

On September 2014, President Obama made a commitment to develop a National Action Plan on Responsible Business Conduct (hereinafter “NAPs”). The purpose of the NAPs is not only to encourage companies to achieve a higher level of standards of responsible business conduct, but to also highlight the current positive practices companies are partaking in.⁵⁵

The focus of the NAPs is to promote responsible business conduct by U.S. companies, the promotion and protection of human rights, as well as a means to provide access to remedies for affected victims. Currently, the White House has held and continues to hold regional

⁵³ United Nations Human Rights, *State National Action Plans*, available at <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>.

⁵⁴ *Id.*

⁵⁵ U.S. Department of State, *USG National Action Plan on Responsible Business Conduct*, (Feb. 12, 2015), available at <http://www.humanrights.gov/dyn/2015/usg-national-action-plan-on-responsible-business-conduct/>.

consultations on the NAPs throughout the nation.⁵⁶ These consultations have included U.S. government officials, investors, various organizations, as well as academia, in hopes of finding ways to advance not only economic development but also to promote responsible business conduct especially when operating in developing and developed countries. These consultations have aimed for multi-stakeholders being invested in promoting business that are more “reliable, sustainable, and accountable actors overseas that promote human rights, responsible investment, and inclusive growth.”⁵⁷ The importance of the U.S. National Action Plan on Responsible Business Conduct is essential as my research has indicated, it is a majority of U.S. based companies that are the most prevalent in committing human rights violations abroad and not respecting the domestic law in which they are operating in. The need for these NAPs to be obligatory on business and corporations is essential so as to adequately address the need of accountability by these private actors.

B. Ecuador’s Resolution on a Elaboration of an International legally binding instrument on transnational corporations and other Business Enterprises with Respect to Human Rights

In June 2014, the UN Human Rights Council adopted the resolution proposed by Ecuador to elaborate a legally binding instrument on transnational corporations.⁵⁸ It was supported by the African Group, the Arabic Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela and Peru. The proposed international instrument anticipates to “clarify the obligations of transnational corporations in the field of human rights” and “provide for the establishment of effective remedies for victims in cases where domestic jurisdiction is clearly unable to” provide them.⁵⁹

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ H.R Council, *supra* note 8.

⁵⁹ Business & Human Rights Resource Centre, *U.N. Human Rights Council Session*, available at <http://business-humanrights.org/en/binding-treaty/un-human-rights-council-sessions>.

This expected treaty is historic as it would be the first international legal instrument that regulates the activities of transnational corporations with regard to human rights. This proposed treaty highlights the primary responsibility States have in protecting and promoting human rights but also seeks to highlight the responsibility transnational corporations and business enterprises have in respecting human rights. Although the drafting of this treaty has already been met with concerns about going against the goals of the UN Guiding Principles on Business and Human Rights,⁶⁰ the importance and need the international community sees in moving towards a legally binding instrument is noted in the resolution- “transnational corporations and other business enterprises have the capacity to foster economic well-being, development, technological improvement and wealth, as well as causing adverse impacts on human rights.”⁶¹

IV. Conclusion

In a final thematic report on the rights of Indigenous Peoples by Special Rapporteur James Anaya, he noted that although experience has shown a disconnect between extractive projects and Indigenous Peoples, it cannot be assumed that these interests will always be at odds with each other.⁶² Rather, Indigenous Peoples around the world are open to discussions about extractive projects occurring within their lands in ways “beneficial to them and respectful of their rights.”⁶³ Given that there is an opportunity for both economic interests and human rights interests to be realized, it is important to note that in order to achieve this, respecting the rights guaranteed to Indigenous Peoples is paramount. Respecting Indigenous Peoples’ rights does not mean that the interest of a country must be sacrificed. It merely requires balancing both interests

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² H.R. Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*, 3, U.N. Doc. A/HRC/18/35/Add.7.

⁶³ *Id.* The report further notes situations in which indigenous communities have consented to the extraction of natural resources within their territories and also situations in which indigenous communities have themselves taken initiatives for extractive or development projects.

equally. With the current international framework, there have not been sufficient successful outcomes in order for the international community to accept the existing instruments as adequate. The need for a legally binding instrument on corporations and businesses is needed in order to ensure that importance of protecting human rights throughout the world is prioritized.

The need for a legally binding international instrument is due to the failure that soft law such as the UN Guiding Principles on Business and Human Rights have had on protecting human rights. With a movement towards attaining a binding instrument on transnational corporations and business enterprises, developing countries will be better apt in protecting its Indigenous communities. Since most developing countries have fragile environments with little or no means to further enforce and protect the rights within their own borders against corporations and businesses, a binding legal instrument will allow developing countries, especially, to have more control over the restrictions and guidelines it sets for transnational corporations coming in to its borders. Further, a binding international instrument such as what is currently being proposed by Ecuador, will be able to better provide remedies for those affected communities that have been subjected to violations by corporations and business but also further continue to hold states accountable for violations they have committed against their own Indigenous communities.

Human Rights Advocates (hereinafter “HRA”) supports the current FPIC framework in place by ILO 169 and the UNDRIP and applauds the efforts by the international community to protect the rights of Indigenous Peoples throughout the world. HRA recognizes the immense need for a legally binding international instrument to better protect the rights of Indigenous Peoples from violations by transnational corporations and business enterprises in the extractive and development industries.