**Position Paper: Towards a New Corporate Engagement with the Natural Resource Sector: Extraction and Affected Communities, Indigenous Peoples and Minorities**

1. Human rights obligations for states and companies with strong state-business nexus

As the preceding findings show, uncertainties remain as to who should be consulted, who receives benefits and broad issues of legitimacy and representativity. It could be argued that this lack of clarity allows state and companies to select partners in order to influence the outcome of such processes (Fontana & Grugel, 2016). In the Bolivian case in particular, the Bolivian State has been subjected to severe criticism with regard to its interfering role and attempts to influence the results (Pellegrini & Ribera Arismendi 2012). While the ILO C169 regime provides that consultations could be carried out with non-traditional authorities where representativity and inclusivity are at stake (ILO 2013), UN DRIPS interpreting mechanisms such as EMRIP similarly refrain from pronouncing themselves clearly on such issues: States are merely reminded of assisting indigenous peoples’ governance structures and collective decision-making practices; and supporting the development of such institutions by providing necessary resources (EMRIP 2011). Similar to the ILO position, case-studies reveal that opting for a truly representative institution reflecting all levels of decision-making (local, regional, national) accountable to the lowest level might not be possible (Larson, Cronkleton & Pulhin, 2015). Another problem inherent in such lacking clarity in representation issues is the potential for private gain that might overrule community interests (Masaki, 2010). Local indigenous communities cannot generally considered as representing a common good (Thede, 2011; Yashar, 2007), in fact, one crucial factor for ensuring genuine participation levels are quality and effectiveness of indigenous representative structures and institutions (Agrawal & Gibson, 2007). For the above reasons, the authors propose to clarify and specify provisions on participation and representation in the existing indigenous peoples’ rights framework.

Existing international human rights standards broadly outline engagement with indigenous communities and respective state obligations, and corporate social responsibility to a lesser extent. In general terms, UNDRIPS provides that States are bound to negative obligations by consulting and cooperating with indigenous peoples through their own representative institutions which are chosen by themselves and which comply with their own traditions, customs and procedures (Arts.18 & 32(2)). At the same time, States need to abide by positive obligations in the same context: accordingly, States are obliged to grant the opportunity for indigenous peoples to maintain, develop and promote their representative structures and particular traditions, procedures, practices including judicial systems and the strengthen such institutions (Arts.5 & 34). As brought up earlier, States are explicitly required to assist indigenous peoples’ in maintaining and developing governance structures and collective decision-making practices by means of positive measures including institutional support and resources (EMRIP, 2011). Therefore, the authors propose to specify existing UN DRIPS obligations in the form of legal guidelines or comments adjunct to respective human rights provisions. Thereby, it is distinguished between negative and positive obligations and all recommendations are derived from and a response to observed state and corporate strategies and mechanisms which eventually result in fragmented communities and social tensions.

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| **Negative State Obligations** | **Positive State Obligations** |
| Arts.18 DRIPS:  Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions.  Similarly: Art.32(2) DRIPS:  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.  **States shall attribute competence to indigenous assemblies or ad hoc mechanisms established for that purpose in order for indigenous peoples to decide on issues of representativity, legitimacy and accountability regarding representatives appointed for the process.**  **By respecting indigenous peoples‘ own representative institutions and representatives chosen by themselves, States need to respect organisational, hierarchical (national, regional, local) structures taking due account of local levels that might be undermined by non-representative umbrella organisations.**  **Due account shall be taken with regard to parallel organisations. Prior to the start of the consultation process, extensive communication and collaboration in joint committees shall be undertaken where conflicting organisations exist. External agents such as the National Ombudsman institutions shall be used as a mediating party.**  **Individual negotiations with presumably non-representative leaders shall be avoided by working closely with assemblies and other mechanisms and collective decision-making structures as established by the Guaraní.**  **States shall consider decisions taken at local level without overruling the latter in official meetings with representatives. Such decisions shall not be questioned, conditioned or modified in meetings or final agreements that outline the terms and conditions of the consultation process.**  **Due regard shall be paid to corporate conduct. State shall assume monitoring functions regarding all company-community encounters or issues and comply with due diligence obligations in identifying bribing practices with the utmost rigour. Where appropriate this includes adequate investigation and punishment.** | Art.5 DRIPS:  Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.  **States shall adopt measures to guarantee the inclusive character of local community assemblies in meetings with the State, by e.g. adjusting budget to include larger assemblies, organising meetings in communities or in close proximity, and take agricultural labour-related availability into account. Accordingly, the budget should reflect participation numbers that approximate those at local representatives.**  **Particular attention shall be paid to the time frame in consultation processes: sufficient time shall taken into account for meetings at community level in between activities related to the consultation process in order to allow decisions to be taken at community level. Thereby, Guaraní leaders’ traditional role as spokespersons instead of decision-makers is respected and single-handed decisions are avoided.**  **States shall adopt measures to facilitate long-lasting, sustainable representative structures at community level by e.g. establishing funds to allocate payments to leaders (which are non-remunerable offices) for e.g. transport, food, accommodation and other needs prior and in the aftermath of the process. This would impede blackmailing community leaders by cutting or reducing such allowances in case of objections to the project or other forms of disconsent.**  **Long term funding shall be allocated to conflict mediating mechanisms as a result of project-induced tensions in accordance with indigenous peoples‘ customs and traditions and own conflict resolution mechanisms. Similar mechanisms shall be established in order to administer compensation payments and respective allocation.**  **By allocating project-related funding, particular attention needs to be paid to representative structures and inclusiveness in order to avoid selective payments and comparative advantage for particular individuals or communities only. Utmost attention is needed where parallel leadership structures coexist.** |
| Art.33(2) DRIPS:  Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures  **Prior to any consultation process, indigenous peoples at all levels (local, regional, national) shall be given due consideration, in a secure and timely manner, in selecting ad hoc representatives that enjoy legitimacy at all levels, in particular in affected communities. Ad hoc arrangements shall ensure that consultation processes are adjusted to the particular setting and particularities of the project (geographical scale and varying degrees of impact in the communities depending on the project).** | Art.34 DRIPS:  Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.  **States shall adopt positive measures in order to enable indigenous peoples to develop their customs, spirituality, traditions by explicitly including councils of elders, female representatives and other local mandate holders as established in community charters and in other decision-making customs.**  **All forms of deliberations and decisions reflecting indigenous peoples‘ oral traditions and particularities that are taken in the consultation assemblies, e.g. opinions voiced in their native language, shall be included or, at least taken as a basis for negotiation, in final written agreements.** |

1. Human rights obligations for companies with largely private components

While state obligations to respect indigenous peoples’ organisational structures are at least broadly phrased, the Corporate Social Responsibilities regime reflects more ambiguity and less harmonisation under the respective international mechanisms. EMRIP, for instance, demands special protection in case of a state-business nexus (EMRIP 2012): higher standards need to be met in the case of State-owned companies. Most international mechanisms including the OECD, World Bank or the International Finance Corporation merely mention Free, Prior and Informed Consent without entering into detail. The International Council on Mining and Metals broadly specifies that companies need to show respect for human rights, cultures, customs and values where extractive activities affect people (ICMM 2013). Therefore, the authors propose a new framework including corporate negative and positive obligations that were developed based on observed corporate strategies that would lead to fragmentation of the communities.

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| **Negative Corporate Obligations** | **Positive Corporate Obligations** |
| *Negotiations with leaders*  **Companies shall refrain from negotiating with indigenous local leaders without representative assemblies or prior to the consultation process regarding project approval or compensation payments.**  **Companies shall not provide any other material or non-pecuniary goods such as jobs, money or gifts to communities or side-payments for individual permits in the context of the consultation process.** | *Budget and payments*  **Where the consultation budget is funded by the company, it shall include allowances for representative numbers of community leaders and members in the consultation process, including thematic mandates such as female representatives.**  **Payments and social investment programmes in relation to consultation processes and compensations shall include all communities residing in the TCO, rather than merely presumably most affected communities.** |
| *Relations with advisors, monitors and leaders*  **Companies shall not intervene in the selection process of socio-environmental monitors or involved leaders in the consultation process.**  **It shall be refrained from inciting local leaders against representative / umbrella organisations, threatening critical leaders or any other interference with local affairs.**  **Companies are held not to make attempts to contract indigenous advisors or leaders taking valuable human resources from the communities.** | *Company staff*  **Companies should strive for continuity regarding staff involved in consultation processes that can receive complaints and serve as permanent contacts for the communities, particularly as to social conflict potential and tensions.** |

1. Human rights obligations and their relation to environmental concerns in the case of state and private companies

Monitored consultation processes demonstrate the need for more legally binding commitments towards socio-environmental monitoring and concerns as to water scarcity in resource-rich areas. Exploratory and exploitative operations affect both water quantity and quality in the communities and their surroundings. Making such evaluations including water assessments part of legally binding documents such as consultation agreements is one way of ensuring more considerations of the socio-environmental impact of said projects and more scrutiny and communities’ influence in that regard.

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| **Negative Corporate Obligations** | **Positive Corporate Obligations** |
| *Holistic approach in socio-environmental assessments*  **In all stages of the process (preparation, realisation, monitoring and follow-up) water quantity and quality constitute essential concerns which need to be recognised as such in agreements and general CSR commitments.**  **Specific needs include preventing negative impacts on the flow of water, also the impact of dried out water-points and their negative effect for populations, flora and fauna. More extensive field inspections could be help in that regard.** | *Budget for additional mechanisms*  **Socio-environmental impact assessments with particular emphasis on water concerns require effective follow-up mechanisms and institutionalised procedures rather than limiting such needs to voluntary commitments as part of annexed recommendations or suggestions.**  **In the latter context more rigorous monitoring mechanisms are needed as well as compliance by impartial institutions instead of being linked to corporate entities or resource extraction-prone ministries such as Mining or Hydrocarbon Ministries or departments.**  **Elaborated follow-up processes and preparation are indispensable in that regard: technical information, for instance, is scarce and scientific explanations on magnetotelluric methods are hardly given.**  **More support is need in relation to the accessibility, adequacy, appropriateness and availability of such information for indigenous communities and other affected populations or minorities.** |