Update of OECD Guidelines for Multinational Enterprises:
Informal expert meeting on human rights issues
25 January 2011, 09:00-13:30
OECD Conference Centre, Paris, Room CC15

Summary of remarks of invited experts

1. Professor James Anaya, UN Special Rapporteur on the Rights of Indigenous Peoples

*Indigenous peoples’ rights as affirmed by the UN Declaration and other instruments: part of the contemporary human rights system*

- In the past it was queried whether indigenous peoples’ rights were human rights under international law, because they were not seen as “typical” human rights (in particular, because such rights may attach to groups rather than individuals).
- However, over decades, a genuine consensus on indigenous peoples’ rights has developed amongst states, and indigenous peoples’ collective rights are now agreed to be the subject matter of human rights.
- Indigenous peoples’ collective and individual rights are affirmed in international instruments, including the UN Declaration on the Rights of Indigenous Peoples. This Declaration was adopted in 2007 by the UN General Assembly by a positive vote of an overwhelming majority of UN member states. Only 4 states voted against the Declaration at that time, and each of these states has now reversed its position. President Obama announced the USA’s endorsement of the Declaration in December 2010. Of 11 states abstaining from the 2007 vote, at least 2 have now formally stated their full endorsement of the Declaration and others have stated that their abstentions did not reflect any objection to the basic content of the Declaration in principle.
- The UN Declaration on the Rights of Indigenous Peoples thus represents consensus amongst states and frames indigenous peoples’ rights within the rubric of human rights.
- Indigenous peoples’ rights to land and resources, self-government, culture and equality are human rights within the contemporary understanding of human rights in the UN system.
- So any discussion of the responsibilities of multinational enterprises in relation to human rights must include indigenous peoples’ rights, as articulated by the UN Declaration on the Rights of Indigenous Peoples, and as consistently protected through regional-level human rights mechanisms.
The need for differentiated treatment of the human rights of indigenous peoples in accordance with articulated standards

• In dialogue with government officials and CEOs, it is frequently stated, “We respect the human rights of all, not just the rights of indigenous peoples”. This intended to mean that no distinction is drawn between indigenous people and others, but in practice this is a way of ignoring the specific rights of indigenous peoples as expressed in the UN Declaration on the Rights of Indigenous Peoples.

• Of course there is an apparent conceptual tension, in that human rights are universal, but certain articulated rights attach only to specific groups.

• However, this tension is resolved by the fact that indigenous peoples’ rights are grounded in fundamental human rights precepts of universal applicability, and the function of the special regime of indigenous peoples’ rights is to contextualize these and articulate a series of specific standards with respect to the realities and world views of indigenous peoples.

• For example, the right to property is included in the Universal Declaration of Human Rights and various regional human rights instruments. In these regimes, the right to property comprises various elements, such as the right to control those things that one legitimately possesses. However, for indigenous peoples, the right to property assumes a specific character. The American Court of Human Rights, on the basis of the American Convention on Human Rights, has found that, for indigenous peoples, the right to property is based on historical use and occupancy of land, and includes cultural and spiritual dimensions. This illustrates how universal human rights have a particular meaning for indigenous peoples.

• Likewise, historically, understandings of the human right to equality have been based on implicit assumptions that all rights-holders are individuals similarly situated within homogenous societies. But for indigenous peoples, it must be taken into account that achieving true equality entails specific regimes in relation to diversity, educational provision, languages, and culture. These must be delivered in line with the particular cultural attributes communal bonds of their peoples, which differ from those of majority society.

• The human rights to participation in government and self-government also require embodiment in particular arrangements and processes for indigenous people that differ from those of the predominant society.

• So, is it imperative that this OECD process include indigenous peoples’ rights within the human rights that businesses have responsibility for, and need to conform to.
The need to provide more specific guidance on indigenous rights within the OECD Guidelines

- The current draft Commentary to the Guidelines refers only to certain human rights instruments – the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic and Social Rights. This carries the mistaken implication that all other human rights instruments (e.g. UN Declaration on the Rights of Indigenous Peoples, ILO Convention 169) are secondary to the instruments that are explicitly mentioned.

- Extractive companies, for instance, already know that they are likely to encounter indigenous peoples' issues in many operating locations. Such companies will not deal with those issues effectively if they say, "We respect the human rights of all". Indeed, such companies will make significant mistakes if they do not engage adequately with indigenous peoples' rights standards and issues.

- Mining, oil and gas companies require much greater clarity on the basic standards that are relevant and which they need to observe. For example, in relation to indigenous peoples, human rights “due diligence” requires an assessment of land title – which will not be self-evident to companies in many cases.

- Thus, for example, if they remain unaware of the human rights of indigenous peoples, companies might simply enter into an agreement with the relevant government to remove indigenous people from the lands within their concession, instead of consulting and obtaining the informed consent of the indigenous people in occupation of the land. Eventually this may lead to disruption of operations, and shareholder agitation. Such a pattern can be observed at present across many jurisdictions, many of which I have visited in my capacity as UN Special Rapporteur, and involving companies based in OECD countries.

The principle of free, prior and informed consent: The IFC precedent in the making

- Parallel to this OECD process, the International Finance Corporation’s (IFC) Performance Standards, which must be an important point of reference, are undergoing review. IFC Performance Standard Number 7 is dedicated to indigenous peoples’ rights.

- In the most recent draft of the revised Performance Standards, Performance Standard 7 includes a robust recognition of indigenous peoples’ rights that is more or less in line with ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples, and which includes the principle of free, prior and informed consent (FPIC), in particular contexts. FPIC has been a contentious issue for many countries, for the reason that it has been thought that observing it could, for instance, obstruct the progress of development projects that might bring benefits to the country as a whole.

- However, the understanding of FPIC has developed to avoid extremist interpretations, and it does not entail that indigenous peoples have an absolute right of veto over all matters. FPIC is the antithesis of the imposition, violence, and expropriation to which indigenous peoples have historically been subject. FPIC requires consensus, based on mutual understanding, dialogue, and with consent as the objective of consultation.
• Under FPIC, indigenous consent should be a requirement in certain circumstances. In the draft revised IFC Performance Standards, consent is a requirement where:
  o i) A project is within indigenous peoples’ territories, as defined by traditional use and occupancy. Here, to satisfy FPIC additionally requires a process of negotiation and a properly documented agreement;
  o ii) A project requires any removal of indigenous peoples
  o iii) A project affects important cultural resources of indigenous peoples.
• This revised IFC standard in relation to FPIC sets an important precedent, and should be duly considered by this OECD Guidelines Review Working Party.

The need for consultations with indigenous peoples on the OECD Guidelines review process
• Regarding this OECD Guidelines Review process, it must be observed that, indigenous peoples are clearly interested stakeholders in the process: multinational enterprises are affecting the lives of indigenous peoples in very significant ways, across the world, on a daily basis. Yet there has, so far, been no consultation directly with indigenous peoples as part of the process, concerning the proposed human rights chapter or otherwise. Neither should my own participation in this meeting today be viewed as a proxy for consultation with indigenous peoples. I do not represent indigenous peoples, either specifically or generally. Proper consultation with indigenous peoples in this process needs to be undertaken.
• The IFC, even if imperfectly, did engage in direct consultation with indigenous peoples over precisely these issues, which has led to the development of the current draft, including FPIC.

The need for effective dispute resolution mechanisms
• Regarding implementation of the Guidelines, available dispute resolution mechanisms may not be sufficient in all cases. In the UN system, there are various non-judicial mechanisms which can make a determination of responsibility for human rights abuses, but which have little capacity to facilitate resolution of disputes. Most such mechanism in practice to little more than issue wofor example, by issuing through the use of condematory words. As UN Special Rapporteur on Indigenous Peoples’ Rights, I have very little capacity to undertake dispute resolution. Likewise, the UN treaty monitoring bodies lack the necessary resources. It is thus imperative that the OECD Guidelines make proper provision in this regard. Conflicts involving indigenous peoples’ human rights and corporations are typically complex, requiring expertise of various kinds. If National Contact Points (of the OECD) are to be effective in mediation, they must be equipped with necessary competences and capacities. ILO dispute resolution processes should be consulted as instructive examples.