PROMOTING HUMAN RIGHTS, ENSURING SOCIAL INCLUSION AND AVOIDING CONFLICT IN THE EXTRACTIVE SECTOR[1]

Prepared for the UNDP - Government of Brazil Conference:
The Extractive Sector and Sustainable Development - Enhancing Public-Private-Community Cooperation in the Context of the Post-2015 Agenda

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PART I | INTRODUCTION TO THE SCOPE AND PURPOSE OF THE PAPER

The economic significance of the extractives sector is well recognised – it provides significant revenue for development to a wide range of countries and is set to become even more significant as new "emerging producers" come on line. If managed effectively extractive sector revenues can make significant contributions to sustainable and equitable human development. But it is other impacts that have brought the sector under increasing, intense scrutiny – issues such as revenue transparency, corruption, human rights impacts, weak linkages into the local economy, environmental impacts, and newly emerging issues like lobbying and tax policies. These issues have all risen up the agenda as societies seek to understand the broader pluses and minuses and full cost of resource extraction. It is this broader balance sheet that the Sustainable Development Goals (SDG) seek to capture globally in the Post-2015 world. The SDGs appear set to recognise a broader role for the private sector in achieving a more sustainable world, grounded in a dual approach of responsibility for impacts and positive contributions to development, including through public-private partnerships and other forms of collaborative engagement.

BOX 1

UNDP - Government of Brazil Conference: The Extractive Sector and Sustainable Development - Enhancing Public-Private-Community Cooperation in the Context of the Post-2015 Agenda, Brasilia, 3-5 December 2014

UNDP commissioned four papers from independent experts to address the broader context for the operation of the extractive sector and to situate the sector within the Post-2015 Agenda for the joint UNDP - Government of Brazil conference in Brasilia in December 2014. The papers focus on key challenges and opportunities to reduce the risks and realise the benefits of resource extraction. The three other papers in the series in addition to this one address: (i) promoting sustainable economic growth and employment generation through industrialization; (ii) ensuring access to public services; and (iii) protecting the environment.

Purpose of this Paper and Links to the draft Sustainable Development Goals (SDG)

This paper focuses on promoting human rights, ensuring social inclusion and avoiding conflict in relation to extractive operations. While much of the media attention on human rights and the extractives sector has been prompted by violent, iconic events around extractives operations, this is only a very limited window on the far wider relevance of human rights to the governance and operation of the extractive sector. This paper seeks to paint a much broader and more comprehensive picture of the interaction between human rights, social inclusion and avoiding conflict in the extractive sector. The paper **traces through each step of the extractives value chain, setting out key challenges, opportunities and the added value of improving the enjoyment and protection of human rights, improving social inclusion and reducing conflicts at each step.** The paper **highlights areas of action** for governments, the private sector and communities for each step in the extractives value chain.

Although the final SDG framework is still under discussion, there are clear goals and themes emerging that link to the extractive sector issues addressed in this paper.[1] In a major global survey *My World* leading up to the drafting of the SDGs, the 1.5 million people who responded consistently placed protection against violence and crime and honest and responsive government among their top six general development priorities.[2] Those same priorities underpin consistent societal concerns about the governance of the extractive sector, but equally reflect responsible extractive companies concerns about operating conditions in fragile states where many natural resources are found. Many extractive operators have consistently argued their preference for operating in countries with a strong rule of law, accountable institutions, and access to justice systems that are fair and reliable. The targets in **proposed SDG Goal 16 on promoting peaceful and inclusive societies** should underpin approaches to strengthening natural resources governance where both the population and business benefit from a country's natural endowments: strong rule of law and equal access to justice, inclusive, participatory decision making, ensuring public access to information and the protection of fundamental freedoms, reducing bribery and corruption and illicit financial flows.

Proposed SDG Goal 17 on global partnerships for sustainable development calls for enhanced partnerships, combining the strengths of the public and private sector to advance sustainable development, and playing a complimentary role to international cooperation. Companies in the extractive sector has particular impacts on socio-economic development given the scope, scale and location of operations and are therefore interesting partners for governments in development. Such partnerships are not new[3] but what is new is the increasing clarity of standards of behaviour for private sector actors engaged in those partnerships. The SDGs clear emphasis on human rights as a cross-cutting and underpinning theme provides the opportunity to unite the focus on private sector contributions to sustainable development with the theme of taking responsibilities for its human rights impacts. This could accomplished by including a clear reference in the SDGs to the UN Guiding Principles on Business and Human Rights.[4]

Summary of Key Concepts Explored in the Paper

This paper will examine issues related to human rights, social inclusion and conflict in the extractive sector. The section below briefly sets out key concepts. These concepts are relevant to all the actors in the extractive sector: government, large multinational oil, gas and mining companies, privately held or publicly traded; worker-owned cooperatives; national and locally owned extractive companies; state-owned companies; the wide range of contractors typically employed for larger-scale extractive operations; and individual and small-scale artisanal miners.

1. Human Rights

The **core content of human rights** is set out in a wide range of instruments, but for the purposes of this paper, "human rights" refers to the rights contained in the "International Bill of Human Rights" - the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.[5] Internationally-recognised human rights also include the principles concerning fundamental rights set out in the International

1   This paper uses the Outcome Document setting out a set of draft Sustainable Development Goals issued by the Open Working Group on Sustainable Development Goals - 19 July 2014, http://sustainabledevelopment.un.org/focussdgs.html.
2   See, http://vote.myworld2015.org/.
3   The 2002 World Summit on Sustainable Development in Johannesburg launched a series of business-to-government partnerships [accessed 6 November 2014].
4   UN Special Representative of the Secretary General on Business and Human Rights, UN Guiding Principles on Business and Human Rights (2011).
5   UN General Assembly, *International Covenant on Civil and Political Rights* (16 December 1966) [accessed 6 Nov. 2014]

Labour Organisation's (ILO) Declaration on Fundamental Principles and Rights at Work.[6] In addition, some potentially vulnerable or marginalised individuals and groups are the subject of international human rights instruments that help provide clarity on how human rights apply to them, including the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) [7] and ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989).[8]

A human rights-based approach (**HRBA**) to development refers to the methodology that is commonly used to mainstream human rights considerations into development cooperation by development actors, using human rights standards contained in, and principles derived from, the UDHR and other human rights instruments. The human rights principles referred to include: (i) equality and non-discrimination; (ii) participation and inclusion; (iii) accountability and rule of law.[9] Development programmes should be aimed at promoting the enjoyment and fulfillment of human rights, following human rights principles and standards in designing the processes and in identifying the goals for the programme. In a HRBA, there is also a focus on making sure that the "duty-bearers" (often, but not exclusively states) have the capacity to meet their obligations and/or rights-holders (individuals and sometimes groups) to claim their rights.[10]

Human rights treaties are addressed to and adopted by governments but the impact of private and public sector operations in the extractive sector was one the early sparks of the business and human rights movement.[11] After six years of global discussions involving government, business, civil society, trade unions, and academia, the UN Protect, Respect, Remedy Framework[12] and the UN Guiding Principles on Business and Human Rights[13] that provide implementation guidance for the Framework have definitively clarified the complementary but distinctive roles of government and business with respect to human rights. The unanimous endorsement by the UN Human Rights Council in 2011 of the UN Guiding Principles on Business and Human Rights is widely seen as irreversibly validating the concept that companies of all sizes have a basic responsibility to respect human rights.

The **three pillars of the UN Protect, Respect, Remedy Framework** are:
- The **state duty to protect** against human rights abuses by third parties, including businesses, through effective policies, legislation, regulations and adjudication;
- The **corporate responsibility to respect** human rights, meaning that companies should avoid infringing on the rights of others and address negative impacts with which they are involved. A company's responsibility to respect human rights applies across its own business activities and throughout its business relationships;
- The need for **greater access to effective remedy for victims** of business- related human rights abuses, through both judicial and non-judicial means.

The UN Guiding Principles on Business and Human Rights set the fundamental framework and processes that **create a rights-based context for the state management of natural resources.** They make clear that the state should manage natural resource exploitation in a way that protects the population from

6   UN General Assembly, International Covenant on Economic, Social and Cultural Rights,16 December 1966) [accessed 6 Nov. 2014].
7   http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169
8   UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples (2 October 2007) A/RES/61/295 [accessed 6 November 2014].
9   See: UNDP, "Conceptual Framework: Mainstreaming Human Rights in Development" (2012).
10   See id for further explanation and references.
11   The execution by the Nigerian military in 1995 of Ken Saro-Wiwa, who led a nonviolent campaign against environmental degradation in Nigeria's Ogoniland by the operations of the multinational petroleum industry, especially the Royal Dutch Shell company, is viewed by many as one of the iconic incidents that mobilized many human rights organisations to focus their attention to the role and impacts of the private sector.
12   UN Special Representative of the Secretary General on Business and Human Rights, Protect, Respect and Remedy: a Framework for Business and Human Rights (2008).
13   UN Special Representative of the Secretary General on Business and Human Rights, UN Guiding Principles on Business and Human Rights (2011).

any adverse impacts created by the exploration and exploitation of those resources and to offer effective avenues for remedy to victims where human rights abuses occur. States have additional obligations under international human rights law to take additional steps - what is referred to as "fulfilling" human rights -- that is also relevant to its broader management of the sector. For example, a state's human rights obligations to fulfilling rights like education or health should be an important consideration in making decisions about expenditure of extractive revenues.

For the private sector, human rights instruments define "what" rights they must respect, while the UN Guiding Principles on Business and Human Rights offer a values-based framework to guide the "how" – the design of processes to identify, manage and remediate the impacts of their business activities on human rights. **Companies are expected to "do no harm" to human rights -- i.e to respect human rights. But "do no harm" does not equate to "do nothing."** Companies are expected not only to ensure that they do not directly or indirectly have negative impacts and that they do not limit or generate impediments to the general enjoyment or exercise of human rights. They should do this by following the steps set out in the UN Guiding Principles: (i) adopt a policy commitment to human rights; (ii) carry out human rights due diligence; and (iii) provide remedies for human rights impacts. While based on corporate concepts of due diligence and impact assessment familiar to the extractives sector, the **key conceptual difference in human rights due diligence is its focus on the potential for creating risks to people and their enjoyment of human rights, rather than creating risks for the company.** The two types of risks (one created by the company and the other a risk to the company) are often interlinked as social risks create business risks. Companies will need a view of human rights and other social risks to get a complete view of risks to the business. This responsibility to respect human rights applies to all operators – large and small, [14] with the scale of actions expected to be scaled to the severity of impacts created, which can create particular challenges in addressing impacts created by artisanal miners. [15]

In clarifying the basic obligations expected of business, the UN Guiding Principles drew on long-standing business practices, including from the extractive sector where operators set the terms of reference for and supervise **business relationships.** Oil, gas and mining companies typically use third party contractors to execute various activities required by their operations including shooting seismic, civil works, labor camp management, labor recruitment and hire, security, etc. To manage the full scope of potential human rights risks and impacts related to an extractive project or operation, companies must extend human rights assessments and risk mitigation (and where relevant remediation) to its business relationships. [15]

2. Social Inclusion

There are numerous definitions of social inclusion. This paper uses a recent expression of the concept: the process of **improving the ability, opportunity and dignity of people who are disadvantaged on the basis of their identify, to take advantage of and participate in society's economic, social and political processes.** [16] Eradicating poverty and hunger is an essential part of social inclusion, as excluded groups are often among the poorest. However, social inclusion also refers to many different challenges, often interrelated to poverty and inequalities, but not always. [17] Social inclusion matters for itself, but it also matters because it is the foundation for shared prosperity. Excluded groups are often prohibited or limited from participating actively in labour and credit markets, from services such as education and health, and are often excluded from the political space, from making their voices and issues heard and holding governments accountable for exclusionary policies.

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14   See for example, a guide for small and medium-sized enterprises (SMEs) on business and human rights: European Commission, "My Business and Human Rights," http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/human-rights-sme-guide-final_en.pdf" (2012).
15   For a further explanation, see the sections on "business relationships" throughout this guidance document: European Commission, "Oil & Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights" (2013).
16   World Bank, "Inclusion Matters" (2013), p. 4.
17   Id.

Government policy can have **profound impacts on social inclusion or exclusion** around the extractive sector. It is the obligation of government to have an inclusive approach in the development of a country's mineral, oil and gas resources for the benefit and protection of all populations, from artisanal mining to large-scale modern extractive businesses. This starts with an inclusive approach to developing extractive policy and legislative frameworks.[18]

Indigenous peoples are often subject to social exclusion, with the roots of that exclusion throughout the world resulting in large part from the taking of indigenous land and resources. As such, indigenous people are particularly impacted by extractive activities, as mineral, oil and gas rich areas are often located on indigenous lands. Land policies such as Colombian Ley (Law) 70/1993, which seeks to protect the rights of Afro-Colombian communities or separate institutions to address indigenous issues such as Te Puni Kokiri (Ministry for Maori Development) in New Zealand, can help to address such social exclusion.

BOX 2

Inclusive Consultation to Develop Kenya's Mining Bill

Kenya's steps to engage a wide range of stakeholder in a year-long consultation from the first to final drafts of its Mining Bill, in line with its revised constitution that requires public participation in policy making and governance matters[20] is an example of promoting inclusion in the political sphere. Through written memorandum as well as public hearing forums, different interests groups were able to give their comments directly to the Mining Ministry, to the Commission for Implementation of the Constitution and to the Parliamentary Committee on Environment and Natural Resources. The Parliamentary Committee also actively promoted public participation by directly seeking views from mining communities through reconnaissance visits to communities.

Participatory budgeting that includes specific analysis of the impacts on excluded groups can help ensure an inclusive approach to the management and use of revenues generated by extractive activities to create opportunities for all of its populations, especially the excluded.[19]

The **processes the private sector uses to develop and manage extractive operations** – starting from its approach to community engagement at the earliest stages – through to how it plans for exiting and closing operations, can promote social inclusion if done well or reinforce existing stereotypes and exclusion (see Part II, Steps 2-4). Community opposition to development can prove to be especially costly for companies. When companies engage in robust and continuing efforts to establish consent throughout the duration of development projects, it becomes a mutually beneficial endeavour with comparative minimal relative cost to the company.[21]

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18   NRGI, "Natural Resource Charter", Precept 1 (2014): "*Resource management should secure the greatest benefit for citizens through an inclusive and comprehensive national strategy, clear legal framework and competent institutions.*"
19   See for example the analysis and advocacy around budgetary impacts on particular groups carried out by the International Budget Partnership, http://internationalbudget.org/budget-analysis/sectors-issues-demographic/.
20   National Council for Law Reporting, The Constitution of Kenya, Article 10, (2010).
21   See for example the case of the Malampaya Deep Water Gas-to-Power project, which was a collaborative initiative of Royal/Dutch Shell, Chevron Texaco, and the Philippine National Oil Company- a successful example of FPIC in the Philippines. Herz, Steve. (2007). *Development without conflict: The business case for community consent.* Washington, DC: World Resources Institute. (Page 19-26).

3. Conflict

Conflict arises when two or more groups believe their interests are incompatible. Conflict becomes problematic when societal mechanisms and institutions for managing and resolving conflict break down. The **exploitation of oil, gas and minerals has often been cited as a factor that may contribute to triggering or escalating conflicts** around the globe.[22] The price paid by societies is often heavy: lives lost or impaired, fractured relationships, weakened institutions and destroyed infrastructure. Extractive activities can create significant change for local communities, populations and governments. This change can exacerbate existing disagreements, rivalries and hostilities, and create new ones.

The United Nations (UN) and the European Union (EU) have **identified six primary drivers of extractive industry related conflicts:** (i) poor engagement of communities and stakeholders; (ii) inadequate benefit-sharing; (iii) excessive impact on the economy, society and the environment; (iv) mismanagement of funds (corruption) for personal gain and financing conflict; (v) inadequate institutional and legal frameworks; and (vi) unwillingness to address use of natural resources in peace agreements.[23] This set of elements offers a preliminary understanding of the complex issues related to disputes on natural resources exploitation. Some of these elements also create opportunities to prevent conflict, particularly, but not exclusively through government action. In its important work on conflict sensitive approaches for businesses in the extractive sector, the international non-governmental organization (NGO) International Alert has developed a series of tools for macro-level conflict risk and project-level conflict risk and impact assessment and identified a series of "flashpoints" that commonly arise at the company-conflict interface.[24]

The need for **early assessment and action to identify opportunities to avoid and mitigate violent or destructive conflict** through a range of interventions is well recognized. Governments can make strategic choices about the governance of the sector that addresses potential drivers present in the country. Neutral parties can play important mediating roles.[25] Businesses can implement conflict sensitive business practices.[26] Conflict risk assessments are also useful tools for broadening the human rights risk assessment scope. Taking into account the specific circumstances of each context, they can contribute to better evaluating how the presence of extractive activities may exacerbate existing conflicts or stimulate new ones.

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22   International Alert, "Conflict-sensitive business practice: Guidance for extractive industries" (2005).
23   EU and UN, "Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflict: Extractive Industries and Conflict" (2012).
24   The flashpoints identified are: stakeholder engagement, resettlement, compensation, indigenous peoples, social investment, dealing with armed groups, security arrangements, human rights and corruption and transparency. International Alert, "Conflict-sensitive business practice: Guidance for extractive industries" (2005).
25   See the identification of key roles that each party can play in: EU and UN, "Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflict: Extractive Industries and Conflict" (2012).
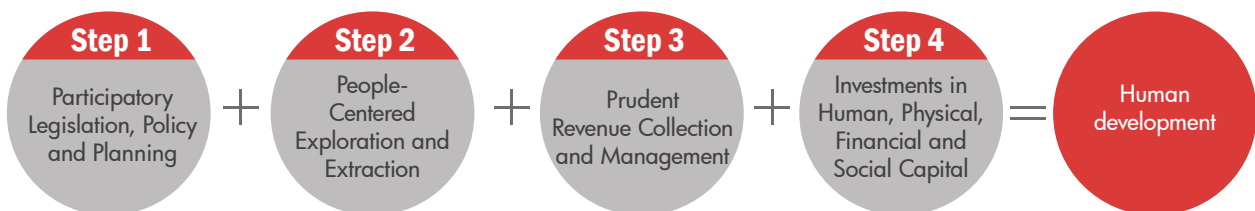26   Id.

PART II DRIVERS OF EXTRACTIVE SECTOR IMPACTS AND AREAS FOR FURTHER ACTION ACROSS THE EXTRACTIVE SECTOR VALUE CHAINACTION

Introduction

Natural resources governance is an important issue on the global agenda.[27] With the wide range of organisations working on the issue at international and regional levels (plus many others at the country level), there is hope that the "resource curse" thesis[28] so often associated with the sector could become a term of the past. As this paper and the others in this series show, however, there are many different dimensions to sustainable management of natural resources that must be considered. It is only comparatively recently that the social dimension of extractive resources is taking more of a centre stage alongside economic and environmental dimensions, and it is more recent still that many of those issues are being framed and expressed in the language of human rights. This section of the paper **looks at why and how an approach to extractives governance that incorporates a focus on human rights, social inclusion and conflict prevention will add value** and outlines areas for further action to improve each step in the extractives sector value chain. It is organised according to the UNDP Extractives Strategy that reflects the extractives value chain.

Figure 1: A Framework for Extractives Industries and Human Development[29]

Step 1 Participatory Legislation, Policy and Planning + **Step 2** People-Centered Exploration and Extraction + **Step 3** Prudent Revenue Collection and Management + **Step 4** Investments in Human, Physical, Financial and Social Capital = Human development

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27   It is a regular topic of discussion for the G7/8 and G20. UNDP recently adopted its first ever Extractives Strategy, the World Bank is revising its strategy for its long-running involvement in the sector. Among regional organisations, the OECD recently launched a Policy Dialogue on Natural Resource-based Development, the Africa Union launched its Africa Mining Vision in 2009 and the African Commission on Human and Peoples' Rights has a Working Group on Extractives Industries, Environment and Human Rights Violations , ASEAN is working on a regional framework to better govern the extractives industry. The merger of the Natural Resource Charter and Revenue Watch Institute into the Natural Resources Governance Institute has created an even more powerful independent voice in the natural resource space, together with other important think tanks such as the Columbia Center for Sustainable Investment, the International Institute for Environment and Development and the International Institute for Sustainable Development. A wide range of advocacy NGOs, including Global Witness and Oxfam are active in the natural resources governance space. The Extractive Industry Transparency Initiative, which brings together government, business and civil society recently carried out a major overhaul of its standard, expanding its focus on the extractive value chain and continues to expand its country membership.
28   The term was coined by British economist Richard M. Auty in 1993 to describe the phenomenon of how countries with rich resources often develop more slowly, more corruptly, more violently and with more authoritarian governments than others. Richard M. Auty,"Sustaining Development in Mineral Economies: The Resource Curse Thesis." Routledge (1993). Since then, the phenomenon and its many dimensions have been extensively studied. The "Resource Governance Index" measures the transparency and accountability in the oil, gas and mining sector of 58 countries worldwide. While the 2013 Index reveals a governance deficit in many countries on how transparent and accountable countries are with their natural resources, it points to reforming states and to solutions to address the "tired notion of the deterministic 'resource curse'". NRGI Press "Release, Secrecy in Oil, Gas and Mining Conspires Against Economic Development", 15 May 2013.
29   UNDP's Strategy for Supporting Sustainable and Equitable Management of the Extractive Sector for Human Development (2013).

Step 1: Building Better Policy, Legislative and Contractual Frameworks for Extractives

Step 1

Participatory Legislation, Policy and Planning

A. Current Context – Challenges and Gaps

1. Developing a Comprehensive Sector Strategy Based on Full Consideration of the Costs of the Sector

The complex mix of issues necessary to responsibly manage the entire extractive industries value chain underlines the **need for a coherent national strategy for the sector.** A sector strategy (or national plan or policy as appropriate) provides the opportunity for producer governments to address that complex mix of issues in a comprehensive way, setting out core objectives for the management of the sector.[30] Without such a strategy, human rights, social inclusion and conflict prevention principles are unlikely to be built into the backbone framework and subsequent laws and policies relevant to the sector. And yet, many countries currently take a more technocratic approach through a mining code or a hydrocarbons law that fails to express fundamental core objectives for linking management of the sector to improving national sustainable development and human development outcomes. The discussion below **sets out five (5) key challenges** for developing better strategies for the extractive sector.

• **Challenge 1: Expressing a Vision for an Extractive Sector Strategy**

Moving from a technocratic to a governance approach, a sector-wide strategy can set out important objectives to underpin the governance of the sector: long-term stewardship of resources for the benefit of the entire population to promote sustainable and equitable human development, together with commitments to anti-corruption and transparency and to addressing the environmental, social and human rights impacts of the sector. Objectives play an important signaling role to the wider population and incoming operators, set a context for interpreting subsequent laws, and are an accountability checkpoint.

BOX 3

Setting out a Vision for the Extractives Sector

African heads of state adopted the Africa Mining Vision (AMV) at the February 2009 African Union summit. In addition to setting objectives around the optimisation of tax revenues and wise spending of income, the AMV advocates the need to incorporate the following objectives into national minerals policy and planning: integrating mining into local, national, and regional development policy; ensuring workers and communities benefit from mining; protecting the environment; enhancing government capacity to negotiate contracts to deliver fair resource rents and local opportunities;

and helping Africa shift from raw material export to providing both local manufacturing expertise and knowledge services.

In Colombia, the Avina Foundation convenes the Permanent Dialogue Committee with the goal of developing trust between the mining sector and civic organizations to create a new mining model based on responsible use of natural resources, human dignity and economic development that benefits society. A recent outcome has been an inclusive set of proposed changes to the forthcoming mining chapter of the National Development Plan.[31]

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30   See for example NRGI, "Natural Resource Charter", Precept 1 (2014) calling for a national strategy process to guide extractive resource management decisions.

31   See, Fundación Avina's permanent dialogue roundtable on responsible mining at http://mesadedialogopermanente.org/grupo-de-dialogo-latinoamericano . Avina has also promoted a network of dialogues on mining across the Latin American region.

- **Challenge 2: Considering the Full Costs and Benefits of the Sector**

An extractive sector strategy should start with a clear set of criteria that drive decisions to develop or preserve resources in the ground. The weighing of costs and benefits underpinning those decisions should take account of the full set of environmental, social and human rights costs of the extractive sector to establish a comprehensive balance sheet of costs and benefits.[32] "Costs" can be calculated in many ways and include the financial and economic costs, but costs here also means the wider costs to human development that are expressed through a wider set of measures. In the competitive approach to attract capital, governments may perceive that imposing environmental, social standards and human rights standards will drive away bidders. But where national law does not require extractive operators to internalize the costs of environmental protection, labour protection, respecting human rights, maintaining social capital, etc., those costs spill over onto the local communities and local governments who may be ill prepared and ill financed to deal with them.[33]

BOX 4

Weighing up Environmental and Social Costs of the Extractive Sector

The cost of longer term impacts on the country's natural and social endowments are increasingly being recognized. Environmental cost / natural capital accounting[34] is gaining some acceptance. For example, in a recent report on the "Top 100 Externalities of Business," Trucost noted that "[w]hen looking at natural capital risk in financial terms the world's 100 biggest risks are costing the economy around $4.7 trillion per year in terms of the environmental and social costs of lost ecosystem services and pollution."[35] However, nothing similar exists in the social arena, even in the extractives sector, despite the heavy burden that many may local communities carry. For example, the broader costs of resettlement is the area where measuring social costs would be the most obvious, but even this is extremely under-researched.

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32   See, Chatham House, "Conflict and Coexistence in the Extractive Industries" (2013), recommending: "Conduct a comprehensive assessment of the benefits and risks of resource developments under proposal. Countries with low institutional capacity to manage, regulate and benefit from extractives resources, especially those still mired in or just emerging from conflict, might be better off postponing resource exploitation. This is a hard choice to make in view of spending priorities, but patiently developing the sector that employs most of the national workforce, be it agriculture, services or manufacturing, is a sensible option for many countries. Even for those with sophisticated institutions and experience, careful choices need to be made where projects would degrade national assets such as major forest or sea ecosystems."

33   There is also an emerging literature on the cost of human rights abuses on business that is in only a nascent stage, that serves to quantify costs but also prompt businesses to consider some of the wider implications of human rights abuses in the communities where they operate: See, Caroline Williams, "How to calculate the cost to business of gender based violence in Papua New Guinea" (2014) and David Walker, "Resettlement funds to support victims of sexual and gender-based violence in Papua New Guinea: a review of indicative lessons and relevance to business" (2014).

34   See for example the work of Trucost, assessing environmental footprints across company operations, supply chains and product lifecycles including measurement of carbon, water, waste, pollutants, land use and commodity flows.

35   Trucost, Natural Capital at Risk: The Top 100 Externalities of Business, (2013). The study looked at a wide range of sectors, including the extractives sector.

New approaches in research are helping quantify the wider cost of conflict to society and to business linked to resource development – whether wider scale violent conflict or more localized conflict around extractive operations.[36] However, this work focuses primarily on cost to companies; the work around cost to communities and society remains outstanding, and is an important area for research. Such explicit costing of losses to the private sector, society and to the government can help move these issues up the extractive sector agenda, so that they become an equally important part of a considering when it is appropriate to extract resources and how to manage resource exploitation.

Measuring the wider benefits of the extractive sector is also an important part of the equation and has been the focus of industry attention. In May 2004, the International Council on Mining and Metals (ICMM) initiated its long-term "Resource Endowment Initiative" to better understand how large scale mining activity in low and middle income countries can enhance the social and economic development of host countries, as a response to the "resource curse" literature that ICMM noted "fails to explore solutions".[37]

- **Challenge 3: Developing Extractives Strategies Fit for Purpose**

National sector strategies also need to be fit for purpose, with differentiated approaches to effectively manage different types and scales of extractive activities from artisanal mining and oil extraction[38] to supermajors. Explicit requirements or at least clear expectations that operators and their contractors apply relevant international environmental, social and human rights standards is appropriate for large and medium-sized operators but will not be for artisanal miners. Despite the rising attention to the artisanal mining sector (ASM) as a potentially significant dimension of the extractive sector in many countries, extractive discourse, policy and law tends to be dominated by a large-scale, multinational enterprise paradigm. The lack of alternative livelihood options for those involved in artisanal mining indicates that an ASM-specific strategy that takes a livelihoods approach may be far more appropriate than approaches that criminalises these activities. At the same time, policy makers need to look for innovative approaches to incentivising responsible, sustainable development approaches at this micro level on issues such as health and safety, child labour, and discrimination.

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36   Rachel Davis and Daniel Franks, "Costs of Company-Community Conflict in the Extractive Sector," (2014).
37   ICMM, Resource Endowment Initiative, http://www.icmm.com/page/84152/our-work/projects/articles/resource-endowment-initiative
38   Myanmar is one of the few countries in the world with artisanal oil extraction.

BOX 6

Artisanal and Small-Scale Mining

Globally, artisanal and small scale mining (ASM) employs many millions of people, with artisanal and small-scale gold mining employing 15 million people alone. ASM is believed to provide a livelihood for over 100 million, almost all of whom live in developing countries. ASM incorporates both formal and informal activities, where informal activities also include those that operate outside the legal framework of the host country (often referred to as "illegal" mining). ASM can make positive contributions towards poverty eradication through direct job creation and contribution to local economies. These benefits are typically offset by poor performance in environmental management, low standards for health and safety that affect workers and communities, negative boomtown effects, child and forced labor and security risks to neighbouring communities and operations, among others.[39]

Recognising this gap, the Institute for Environment and Development (IIED) has launched a collaborative programme including governments, large-scale mining companies, international mining initiatives, ASM representative organisations, donors, technical experts and NGOs to help improve knowledge, policy and practice among the ASM sector, or whose activities affect it.[40]

- **Challenge 4: Linking Extractive Strategies to Wider Strategies Relevant for the Sector**

National strategies for extractive resources management should be nested within the wider national policy context such as National Development Plans or Poverty Reduction Strategies that puts the sector's contributions to national development into its proper context. This also provides stronger integration between the sector's planning and policy frameworks and those in other relevant policy areas – environment, labour and employment, social protection, justice and indigenous affairs in particular. There are important considerations to be weighed in choosing to specifically integrate environmental, social and human rights considerations into oil and gas or mining frameworks or rely on more directive cross-referencing to human rights and social requirements vested in other policy frameworks. There are also important trade offs to considering whether to specifically incorporate environmental, social and human rights requirements into law or contracts.[41]

This horizontal policy coherence should be matched by vertical policy coherence, matching extractive sectoral plans (which are often mostly driven from the country political and economic center by variables such as the drive to attract foreign direct investment and fiscal imbalances) to territorial plans for local development (which are often driven by territorial visions, including community and local values and aspirations). For example, major extractive investments leading to in-migration, "boomtown" effects can overwhelm the regional and local government capacity to manage and continue to provide appropriate services that are a core government human rights obligation – health, education, social protection.[42] Equally, the "ghosttown" effects from the closure of major operations can lead to widespread social disruption and impacts at the regional level.

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39   Content and definitions adapted from: CASM, CommDev, ICMM, IFC, World Bank, "Working Together, How large scale mining can engage with artisanal and small-scale miners", Pilot Version (2010)
40   See IIED, Artisanal and Small Scale Mining Program [accessed 6 November 2014].
41   See NRGI, "Natural Resource Charter", Precept 1 (2014) and see IHRB, "Policy, Law, Contracts, and Sustainable Investments Colloquium" (2014).
42   See, IFC, Projects and People: A Handbook for Addressing Project-Induced Immigration.

BOX 7

Linking Extractives and Land Policy

Land is a vital resource in many countries, particularly for the most marginalised and excluded people. It provides a foundation for dignified employment, often providing vital livelihood functions and a safety net for the poorest, while also serving vital ecosystem functions and a capital function in markets. In many land-based cultures, such as for indigenous peoples, land and natural resources are the foundation for cultural identity, survival, sustainable livelihoods and collective coexistence. Key concerns around land include human rights impacts on the right to access to land, territories and natural resources, housing, food and an adequate standard of living, elite capture, displacement, disenfranchisement, corruption, conflict and food insecurity.

Access to and use of land is also necessary for extractive operations but too often there is a lack of coordination between extractive policies and land policies. Considerations include:

- The need for a comprehensive approach to integrated land use planning that requires an inclusive process that fully considers the portfolio of alternative uses for land and consideration of social, economic, environmental and cultural values and impacts versus benefits over generations.
- The need for formal frameworks, policies and laws that promote fair, equitable transparent land acquisition/use processes by the public or private sector. Expropriation "in the public interest" should be clearly defined and include the safeguards that derive from the right to housing to avoid forced evictions.[43]
- Access to and use of land as a trigger for conflict where: land ownership or claims are unclear, or where land is critical to livelihoods, where operations limit mobility and access to additional key resources such as water, forests.
- Imbalances in the supply of basic staples for local communities derived from changes of land use driven by large projects or scarcities induced by unplanned immigration for a project.
- Further provoking conflict by granting concessions in conflict areas.
- Appropriate national legal frameworks and public policies to apply UN Declaration on Indigenous Peoples and the principle of free prior and informed consent for the use of land and natural resources (see Box 10 on Indigenous Peoples).
- A lack of clarity by government around land rights places the onus on the private sector to lead in land access/acquisition issues, leading at times, to unfair and harmful business practices.

- **Challenge 5: Using Wider Sets of Incentives and Disincentives to Prompt Better Outcomes from the Sector**

Consistent concerns on lack of enforcement by government of even well-designed extractive strategies, whether due to lack of capacity, lack of political will or an active undermining of governance structures, indicates a need for more innovative approaches. The recent push for transparency represents one such innovation that is an important step in improving accountability in the sector. But transparency is one tool among many in the government "toolbox" to enhance compliance with national law and where appropriate, adherence to international standards. Other options include linking company performance to government procurement options or export credit insurance.[44]

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43   OHCHR, Fact sheet 25: Forced Evictions and Human Rights.
44   IHRB, "State of Play: Human Rights in the Political Economies of States" Part Two, Chapter Five "Reinforcing Human Rights in Trade and Investment" (2014).

In addition, the international investment or free trade agreements that governments sign to attract foreign direct investments (FDI) into their extractive sector can bring much needed financial, technical and human capital, competition, employment and consumer benefits. They also provide another avenue for building in appropriate human rights incentives and disincentives while attracting extractive sector investment.[47]. They have the potential to mobilise investment to provide for inclusive and sustainable development if the rights of investors to investment protection under these agreements can be appropriately balanced with responsibilities to respect national laws protecting human rights, social capital and the environment. Yet under most existing models, there are few if any

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BOX 8

The UN Principles on Responsible Contracting

These set of principles, adopted as a part of the final report under the UN SRSG on Business and Human Rights mandate, set out a step-by-step process for governments and the private sector to integrate attention to human rights into investment agreements and other government – private sector contracts.[45] Such contracts are "a strategic arena where the state's 'duty to protect' human rights and the corporate 'responsibility to respect' those rights come directly into contact."[46]

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responsibilities imposed on investors;instead the focus has been on protecting investment. New research and investment models seek toaddress growing concerns that existing investment frameworks unduly restrict host governments' ability to make or update policies and regulate around core sustainable development issues, including human rights.[48] "Stabilisation" clauses that freeze the laws applying to an investment can disincentivise or even prohibit governments from adapting their legal systems to bring them in line with their human rights obligations.[49] International arbitration is the usual avenue for dispute settlement under investment treaties yet this has been criticised for its often closed proceedings, failure to take account of broader government obligations and the lack of a similar avenue of redress for persons in country whose human rights may have been harmed by an investor claiming protection.[50] Recent attention by the World Investment Forum[51] and the opening of UNCITRAL arbitration tribunals to the public to promote accountability indicates that the integration of human rights considerations into international investment law is beginning to find purchase.[52]

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45   OHCHR, "Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators" (2011).

46   IIED, "Human rights should be at the heart of investment policy making", Commentary (October 2014).

47   Yet recent research from UNCTAD and others has shown that while such agreements can influence a company's decision on where to invest, other determinants interact to enhance or reduce any country's investment attractiveness. As such, IIA, FTA and other agreements need to be embedded in broader FDI policies covering all host country determinants, aimed at attracting high-quality FDI that will maximize development contributions. UNCTAD, "World Investment Report 2014" (2014).

48   See in particular, UNCTAD, *Investment Policy Framework for Sustainable Development*. See also OECD, "Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey" (2014 See, L Cotula, "Foreign Investment, Law and Sustainable Development, A Handbook on Agriculture and Extractive Industries," (2013).

49   UN, IFC "Stabilisation Clauses and Human Rights: A research project conducted for IFC and the United Nations Special Representative of the Secretary-General on Business and Human Rights" (2009).

50   See L Petersen, "Human Rights and Bilateral Investment Treaties, Mapping the role of Human Rights Law within Investor-State Arbitration" (2009). And see, Columbia Center for Sustainable Investment, Research Series on New Trends in and Development Impact of International Investment Law.

51   See the 2014 UNCTAD World Investment Forum Meeting that included a panel on the integration of human rights into investment frameworks: http://unctad-worldinvestmentforum.org/programme/sessions/human-rights-and-investment-policy-making-relevance-and-integration/

52   See also UNCITRAL's "Rules on Transparency in Treaty-based Investor-State Arbitration" (in force as of April 2014) and the draft UN Convention on Transparency In Treaty-Based Investor-State Arbitration, anticipated to be open for signature from March 2015, which would enable application of the Rules to disputes arising under the 3,000+ investment treaties concluded before April 2014.

2. Creating Space for Debate and Dialogue around Extractives Management

The resource curse literature is replete with analysis focused on the political economy of the extractive sector – the often-present links to entrenched elites, corruption, conflict, diminishing or absent accountability by government or business. The recent groundswell of transparency initiatives seek to put in place frameworks that will make maintaining the opaque practices that characterize the sector in too many countries ever more difficult.[53]

This highlights a worrying trend that EITI has been well-placed to observe: a closing rather than opening space for civil society actors in the natural resources governance space, with rising hostility to civil society actors and growing evidence of criminalisation of dissent.[55] The OHCHR UN Special Rapporteur on Human Rights Defenders drew attention to the at times severe risks to human rights defenders in the extractive sector, where defenders working on such issues can face a high risk of violations to

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Kenya Strategic Environmental and Social Impact Assessment (SESA) for its Oil and Gas Framework

Kenya plans extensive consultations with a wide range of stakeholders who may be impacted by forthcoming oil and gas developments as part of the strategic environmental and social impact assessment of the sector.[54] It is taking an inclusive approach to consultation that provides opportunity to highlight concerns of vulnerable groups who may particularly at risk of impacts. This could serve a model for other strategic assessments in the region. While the assessment includes a focus on social issues, it does not include any specific references to human rights.

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theirphysical integrity including attempted killings, killings, excessive use of force, death threats and different forms of intimidation.[56] The International Centre for Non-Profit Law has noted a trend in "increased control and undue restriction" for CSOs.[57] There is legitimate government interest in understanding who is benefiting from a waiver of taxes.[58] However there is an even far greater public interest in stimulating an open and robust exchange of information on the governance of the extractive sector. This can happen only in an environment where rights to freedom of speech, association and assembly are well protected, where those carrying out investigations or presenting them to the public do not need to fear harassment,

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53   The EITI has found that the technical dimensions of the revenue collection and management process, as important as they are, requires an active and robust civil society to put those into practice and has consequently strengthened the protections for civil society even further in the revised 2013 EITI Standard. https://eiti.org. IIED draws attention to the strong potential linkages between building local capacity of CSOs to engage in EITI and to understand ESIAs, as a way of better "enable people to work out the true costs and benefits of a project in the context of an ESHIA". IIED, "Localising Transparency: Exploring EITI's Contribution to Sustainable Development" (2014), p. 53.

54   See, World Bank, Kenya - Petroleum Technical Assistance Project: terms of reference for strategic environmental and social assessment for the oil and gas sector (English), [accessed 6 November 2011] which includes references to indigenous peoples.

55   See for example, EITI's expression of "deep concern" on the problematic situation facing civil society in Azerbaijan. EITI, "Statement by EITI Chair Clare Short on Azerbaijan" (2014).   See also the UN Permanent Forum on Indigenous Peoples statement: "Indigenous peoples have frequently faced detention due to the criminalization of social protest activities. One of the most serious shortcomings in human rights protection in recent years is the trend towards the use of legislation and the justice system to penalize and criminalize social protest activities and legitimate demands made by indigenous organizations and movements in defence of their rights."

56   UN General Assembly, "Report of the Special Rapporteur on the situation of human rights defenders" A/HRC/19/55 (21 December 2011).

57   International Centre for Non-Profit Law, "The Legal and Regulatory Framework for Civil Society: Global Trends in 2012-2013" (2013) [accessed 6 November 2014].

58   See for example: UN General Assembly, "Report of the Special Rapporteur on human rights defenders to the Human Rights Council on safe and enabling environment for defenders", A/HRC/25/55, (2013) and International Centre for Non-Profit Law, "Assessment Tools for Measuring Civil Society's Enabling Environment", Volume 5, Issue 1 (2014).

imprisonment or even disappearance, criminalization of speech, or accusation of tax evasion. A judiciary equipped and willing to enforce these rights is also a key requirement. Freedom of information laws can also play an important role in improving accountability.

Maintaining an open space for dialogue is a first step but actively encouraging and promoting public participation in decision-making that affects the population is an important fulfillment of the right to participation. Giving the population a voice and a stake in discussions on policymaking that affects their lives creates inclusive and responsive democratic institutions and improves transparency and accountability.[59] It also helps flesh out key concerns and potential prevention and mitigation approaches early on. Such dialogues provide an opportunity for members of society and their advocates to raise human rights issues that had previously not played a role in technocratic approaches to extractive sector governance and management. Reaching out to socially excluded groups to engage them in decision-making that will affect them will help in identifying impacts unique to the group or impacts that may fall disproportionally on the most vulnerable, while at the same time signally important messages about social inclusiveness.

BOX 10

Indigenous Peoples and the Extractives Sector

There has been a long and often contentious history of interaction between extractive companies, governments and indigenous people around extractive operations. The worldwide drive to extract natural resources, with much of the remaining resources on the lands of indigenous peoples, means there are increasing and ever more widespread effects on indigenous peoples' lives with at times "devastating consequences".[60] It is not the case that all extractive resource development is incompatible with indigenous peoples development;[61] the UN Special Rapporteur on Indigenous Peoples draws attention to alternative business models for the sector.[62]

The adoption of international instruments on indigenous peoples rights,[63] increasing sensitivity of governments, private sector companies, IFIs and CSOs, combined with improved environmental and social management processes, has meant that at least in some operations, impacts of extractive operations have been prevented or minimized. As significant as these developments are in bringing improvements, there remains in many countries significant challenges for indigenous peoples in exercising their rights to "determine priorities and strategies for the development or use of their lands and territories"[64] and for protection of their wider set of rights. That process should start with the participation of indigenous peoples through appropriate representative arrangements in the development of a national extractives strategy (as has been done at least to some extent by a number

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59   See J Vieyra and M Mason, *Transparent Governance in an Age of Abundance: Experience from the Extractives Industries in Latin America and the Caribbean* (2014) which focuses on improving governance in a way that promotes inclusive growth and takes account of concerns of citizens, in particular through governance mechanisms that include checks and balances to ensure the needs of local communities are taken into account.

60   UN General Assembly "Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples", A/HRC/24/41 (1 July 2013).

61   Although note that a survey of IP, governments and private sector companies indicated that "Most indigenous peoples and organization responses underscored the adverse effects on their environment, culture and societies, which they said outweighed the minimal or short-term benefits arising out of extractive operations." UN General Assembly,
"Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries operating within or near indigenous territories" A/HRC/18/35 (11 July 2011).

62   *Id*. p. 4. He draws attention in particular to examples of indigenous-controlled resource extraction.

63   Notably *ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples* (UNDRIP)

64   UNDRIP, Article 32.

of States or their political subdivisions). Extractive strategies and the planning of extractive investments that follows, set in motion decisions that can prejudice or reinforce indigenous peoples' ability to set their own priorities for the development of their lands and territories. As an example, the Colombian Constitutional Court declared Law 1382 on mining code reform unconstitutional because it had not been consulted with indigenous peoples and Afro-American communities.[65]

The principles of consultation and free, prior and informed consent (FPIC) are instrumental to rights of participation and self-determination and are part of a wider process of engagement with indigenous peoples on the wider set of rights that may be impacted by extractive operations. FPIC is also part of a wider set of safeguards, including the use of impact assessments, prevention and mitigation measures, benefit-sharing and compensation schemes.[66] The FPIC process envisioned between indigenous peoples, the government and companies seeks to provide an important process to enable indigenous peoples to set their own priorities and strategies for development. Where extractive projects will go ahead subject to FPIC (or within limited scope of exceptions to FPIC)[67], the process can set the terms for sustainable relationships between indigenous peoples and extractive companies based on genuine partnerships.

The path to recognition of FPIC and the broader suite of rights of indigenous peoples by governments and extractive companies had been a long and at times fraught discussion both in principle and in practice, but with some significant improvements in the overall recognition of indigenous peoples rights and in particular examples of laws that seek to provide a consent process and wider recognition in company policy and practice.[68] For example, after a long process of dialogue and deliberations between indigenous peoples and the Peruvian State, the government approved a law on prior consultation in 2011. UNDP has supported strengthening the capacities of the Peruvian State to implement the prior consultation processes, including through the development of several methodological guides: step- by-step actions to carry out a prior consultation process for facilitators of the prior consultation processes, for the identification of indigenous populations, and for the identification of impacts over collective rights.[69]

Application of the concept of FPIC by companies, especially where it is not recognized in national law remains challenging on numerous levels.[70] A continuous, open, and meaningful engagement of governments and indigenous communities constitutes the sine qua non for FPIC to fulfill its purpose. The absence of such government-indigenous interaction shifts responsibilities from the government to companies and burdens the FPIC process with demands that often are unrelated to projects impacts or beyond the competencies of companies. Yet there is a worrying trend to unload such responsibilities on companies, weakening the guarantor and arbitration role the government must play. This is an area where continued, collaborative dialogue involving government, the private sector and indigenous peoples is needed to continue to evolve new models that can provide broader benefits to indigenous peoples.

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65   Colombian Constitutional Court, Sentence C-366/ 2011.
66   UN General Assembly, "Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya", Summary of activities: Progress report on study on extractive industries, A/HRC/21/47 (6 July 2012).
67   Id. pp. 10-11
68   IFC, "Performance Standard 7: Indigenous Peoples" (2012) and UN Global Compact "A Business Reference Guide: UND-RIP" (2013).
69   http://www.presidencia.gob.pe/ley-de-consulta-previa-promulgada-hoy-en-bagua
70   Kemp, Owen "Free prior and informed consent', social complexity and the mining industry: establishing a knowledge base" (2014).

Other communities who share similar land-based livelihoods to indigenous peoples, but not their recognized identities, and who similarly often lack a formal voice or process for involvement in decisions to license extractive projects, are advocating for a similar FPIC process for access to or use of their lands. Several companies in the food sector with extensive agricultural supply chains have recently made unilateral corporate commitments to "no land grabbing" through a process of FPIC of local communities.[71]

B. Recommendations

1. Strengthen requirements around and options for transparent participation of all parties in shaping policy and laws for the extractives sector.

- **Government** action to develop or reinforce processes for open and transparent participation in policy and lawmaking for extractives is an important avenue in fulfilling the right to participation. Recent events indicates that numerous governments need to step up action to protect CSOs and human rights defenders working on natural resources and ensure that space for CSO voices at the local and national levels remain open to promote an active debate on natural resource governance.

- The **private sector** has a legitimate role in participating in the policy and lawmaking process, but like other parties, should be transparent about their positions and ensure that those positions are aligned with their responsibility to respect human rights.[72]

- There is a need to draw together lessons learned from different approaches to incorporating indigenous peoples rights into national policy and planning frameworks and contracting processes for the extractive sector, including by adopting laws or other national processes that protect indigenous peoples rights to FPIC. This clearinghouse might usefully be hosted in the **UN Permanent Forum for Indigenous Peoples**[73].

- **UN agencies working on indigenous peoples issues**[74] **and other indigenous peoples organizations**[75] might usefully focus on strengthening indigenous peoples capacity and providing opportunities to engage further "upstream" in debates on national strategies and policies for the extractives sector. This will contribute to national processes that are better equipped to address at times competing objectives between national development and indigenous peoples aspirations to control their own development.

2. Include human rights protections in the investment protection frameworks that reflect an appropriate balance of investor protection and investor responsibility, including the responsibility to respect human rights.

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71   Notably, Coke, Pepsi. See: The Coca Cola Company, "The Coca Cola Company Commitment: Land Rights and Sugar" (2014); Pepsi Co., "PepsiCo Land Policy" (2014) [accessed 6 November 2014].

72   The UN Guiding Principles (UN GP) specifically notes that all company activities, including lobbying are part of the responsibility to respect. UN GP 16, Commentary. The lobbying positions of extractive companies is an area of increasing focus of attention.   See University of Aberdeen, *Borderless Politics: Corporate Lobbying in Multiple Arenas* [accessed 6 November 2014].

73   See: http://undesadspd.org/indigenouspeoples.aspx

74   See: UNDG Guidelines on Indigenous Peoples Issues (2009).

75   See the capacity building tools available from the UN Permanent Forum on Indigenous Peoples.

- The UN Principles for Responsible Contracts provide guidance for **both governments and the private sector** when negotiating investment agreements or other state-private sector contracts.

- When renewing their investment agreement frameworks, **governments** can build in sustainable development considerations and human rights, drawing on new models developed by UNCTAD and OECD.[76]

3. Integrate robust operating requirements on environmental protection, social and human rights into extractive sector policy and laws through direct references or reinforced policy coherence.

- International organisations providing technical advice to governments on extractive sector policy such as UNDP are well placed to develop a "clearing house" that brings together examples of policies and laws that specifically incorporate social and human rights issues into extractive policies and laws.
- Governments should consider strengthening attention to early social risk assessments that cover human rights, as an early step in the licensing process. The results of the assessment can then influence how an extractive project will be designed and operated; if left to the ESIA phase, this is often too late in the design process to affect major choices such as location or bigger design issues. ESIAs for extractive projects are compulsory in many countries, but for those countries that have not yet made them compulsory, they should consider making ESIAs a routine requirement for all but small-scale extractive projects. The "S" issues in E(S)IA legislation are often weak or non-existent or given cursory treatment as fulfillment of a requirements to obtain a permit.[77] The challenge is also oversight of social impacts because as compared with environmental impacts, the former often fall under a wide array of agencies with different capabilities, standards, resources and political will to grapple with the at times complex social issues in the sector.

4. Integrate human rights and social issues into extractive sector contracts between the private sector and governments.

- Recent initiatives to disclose and explain extractive contracts (mostly focused on fisal terms)[78] provides a welcome opportunity to consider more systematically whether sustainable development considerations are appropriately reflected in contractual arrangements.[79] There is the opportunity to develop a new suite of model provisions on sustainability, including human rights, that can be incorporated into existing model agreements that often form the starting basis for government negotiators with extractive operators.[80] T**he recent G8/G20 initiative to provide more systematic negotiation**

76   UNCTAD, *Investment Policy Framework for Sustainable Development*; OECD, "Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey" (2014).

77   See for example the draft EIA Procedures and Guidelines in Myanmar, which include only sporadic attention to some social issues. MCRB, IHRB, DIHR, "Myanmar Sector-Wide Impact Assessment for the Oil and Gas Sector", Part 3 (2014).

78   Columbia Centre for Sustainable Investment, *Making Resource Contracts Publicly Accessible An online database of contracts from around the world* [accessed 6 November 2014]. Allen & Overy, "Guide to Extractive Industries Documents (Oil and Gas)" (2013); Open Oil, "How to read and understand them" (2012).

79   OHCHR, "Principles for Responsible Contracts: Integrating the management of human rights risks into State-investor contract negotiations - Guidance for negotiators" [accessed 6 November 2014]; IIED, "Investment contracts and sustainable development: How to make contracts for fairer and more sustainable natural resource investments" (2010); Global Witness, "Copper Bottomed? Bolstering the Aynak contract: Afghanistan's first major mining deal" (2012). See also, the Association of International Petroleum Negotiators recently commissioned a report on the UN Guiding Principles. The IBA, MMDA, "Model Mine Development Agreement" (2011).

80   IHRB, "Policy, Law, Contracts, and Sustainable Investments Colloquium" (2014).

support for developing countries for extractive sector projects provides an important leverage point and for building government capacity around these innovations.[81]

- Where national requirements on environmental, social and human rights are absent or changing or where there is little capacity to enforce environmental, social and human rights requirements around complex extractive operations, contractual provisions that require adherence to international sustainable development standards, such as the IFC Performance Standards, may be an important interim safeguard. Where those contracts are disclosed, this provides the opportunity for civil society, home governments, and investors, to demand accountability around these contractual requirements.[82] This is an area where **forward- looking companies and their legal counsel** can make a contribution to developing new models that incorporate sustainable development goals in ways that make sense to and can be operationalized by business.

Step 2: Improving People-centred Extractive Operations

Step 2
People-Centered Exploration and Extraction

A. Current Context - Challenges and Gaps

1. Operating in Weak Enabling Environments through Robust Application of International Standards

Extractive operations are carried out in all range of governance settings - from well-regulated settings to fragile states to hostile operating environments with limited economic activities but major societal needs. As highlighted above, governments play a significant role in establishing - or not - an enabling framework for operations. As an expression of the significance of these risks, for some mining companies, their above grounds risks (social and governance risks) now exceed their technical, below ground risks to extract minerals.

Research conducted during the development of the UN Guiding Principles revealed that the most egregious business-related human rights abuses take place in conflict-affected areas and other situations of widespread violence.[83] Poor governance provides the environment in which human rights abuses occur either through direct state abuses or because the state is unable to provide protection against the abuses of others. Where governments cede responsibilities to companies to engage with communities to explain incoming operations, manage expectations, and provide local public services, "complying with local law" is not a sufficient answer either under the UN Guiding Principles[84], or from an operational point of view.[85]

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81   Columbia Center for Sustainable Investment, "Support for Host Country Governments in the Planning, Preparation for, Negotiation, Implementation, and Monitoring of Large-Scale Investments"

82   See, MCRB, IHRB DIHR, "Myanmar Oil & Gas Sector-Wide Impact Assessment", "Part 7: Annex to the Recommendations" (2014), that includes a review of the Myanmar model production sharing contract and a recommendation to include a requirement to apply the IFC Performance Standards as an interim measure, until the Government has in place more robust environmental and social laws.

83   UN General Assembly, "Business and human rights in conflict-affected regions: challenges and options towards State responses", Report of the Special Representative on business and human rights, A/HRC/17/32 (7 May 2011).

84   The expectation under UN GP 23 is that business enterprises comply with all applicable laws and respect internationally recognized human rights wherever they operate and seek ways to honour the principles of internationally recognized human rights when faced with conflict requirements under national law.

85   "In high-risk countries, … the law is a beginning, not an end." IHRB, "From Red Flags to Green Flags: The Corporate Responsibility to Respect Human Rights in High Risk Countries" (2011), p. 34

Improving extractive operations in challenging circumstances requires enhanced due diligence that can help operators understand the direct and indirect risks that arise from poor governance and how to manage and address those risks, supporting appropriate state interventions as necessary. The range of considerations and actions to respond to the situation often goes well beyond the scope of a classic ESIA and must be considered far earlier.[86] Operators, especially smaller, "juniors"[87] who are often the first face of the sector in interacting with communities, may be ill prepared to deal with the social complexities of their operating environments, particularly where there is a governance void.[88] For companies operating in fragile states, actively promoting responsible policy approaches and capable institutions in national and local government (see Part I above), putting in place their own rigorous management systems that reflect international standards, including on human rights, and building in approaches that promote social inclusion, is a starting point but not an ending point.

Many of the major companies and industry associations in the sector are now devising or revising policies and procedures on human rights or broader social issues in line with the UN Guiding Principles.[89] As highlighted in the UN Protect, Respect, Remedy Framework, national oil companies, as a state-owned enterprise, sit at the nexus between the state and the private sector, and are well placed to take a lead in demonstrating good practice in incorporating human rights requirements into their policies and processes. There is increasing human rights guidance emerging to support extractive companies in integrating attention to human rights.[90] Some extractive companies have robust environmental and social management systems in place to help them understand, prevent and mitigate a wide range of impacts. The ESIA process is one "home" for much but not all of the human rights due diligence on complex extractives projects; companies are increasingly finding it is important to integrate human rights due diligence into mergers and acquisition processes (such as in buying out exploration concessions), capital approval and other corporate approvals processes, as well as other due diligence processes such as in the human resources area.

Guidance on the need for early conflict risk assessment is not new for the sector.[91] But even with the best guidance in the world, practice shows the frequent tension between the time required to engage with local communities and other stakeholders to begin to develop the relationships needed for in-depth assessment of key concerns and potential impacts[92] and the need to progress exploration. This tension often mean that more in-depth assessments, including conflict, social impact assessments and newer approaches to human rights due diligence are squeezed between other operational imperatives. There are important lessons to be learned for social and human rights issues from the largely successful integration of health, safety and environmental into management systems.[93]

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86   Id, which addresses what is expected of companies in high risk circumstances, using an "essential," "expected" and "enhanced" set of steps to define responsibility.

87   F&C Investments, "Do You Know What Junior is Doing? Managing ESG Risks in 'Independently Managed Operations' in the Mining Sector" (2007) See IFC, CommDev, "A Strategic Approach to Early Stakeholder Engagement: A Good Practice Handbook for Junior Companies in the Extractive Industries" (2014).

88   Kemp, Owen "Free prior and informed consent', social complexity and the mining industry: establishing a knowledge base" (2014), p. 91.

89   ICMM, "Human rights in the mining and metals industry: Integrating human rights due diligence into corporate risk management processes" (2012); see IPIECA resources on human rights: http://www.ipieca.org/topic/human-rights/resources

90   See European Commission, "Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights" (2013) and the extensive list of resources in the annex; DIHR and IPIECA "Integrating human rights into environmental, social and health impact assessments: A practical guide for the oil and gas industry" (2014).

91   See International Alert, "Conflict-sensitive business practice: Guidance for extractive industries" (2005).

92   Although this is term commonly used in the extractive sector, it is not clear that there has been enough internalizing about what the term means beyond vague notions of community acceptance. Kemp, Owen "Free prior and informed consent', social complexity and the mining industry: establishing a knowledge base" (2014).

93   C Ortega, K Ravishankar, LF de Angulo, Integrating Social Responsibility into the Health, Environment, and Safety Management System (HESMS) SPE Americas E&P Environmental & Safety Conference held in San Antonio, Texas, USA, 23–25 March 2009.

2. Making Community Engagement a Core Part of Operations

While there is recognition from the industry of the importance of making relations with local communities a core operational imperative[94] that extends beyond transactional approaches focused on simply completing consultation requirements for ESIAs or dealing with a crisis, the transition is incomplete. And this is despite the growing recognition that 'prevention is better than cure'[95]. Despite well-developed social and environmental assessments and management procedures, impacts on communities and the environment continue to be a source of social tension. Disputes between communities and extractive companies are on the rise[96] (as are disputes between governments and extractive companies).[97] Key flashpoints include control over, access to and compensation for land[98] and water, compensation and resettlement (see Box 11 below), environmental impacts,[99] security (see Box 11 below),[100] local employment and financial benefits, and the undermining of traditional livelihoods. These tensions are more likely to escalate in countries with low institutional capacity, where weak legal and governance frameworks fail to protect the rights and interests of affected communities, and where there is a lack of a political voice for local residents.

BOX 11

On Resettlement as a Flashpoint

Extractive operations can require significant resettlement – both voluntary or involuntary. Without appropriate resettlement laws and company practices that follow rights-based safeguards, resettlement can result in a wide range of human rights violations that can be a flashpoint for localized or even broader violent conflict.

Updated IFC Performance Standard 5 on Land Acquisition and Involuntary Resettlement and its accompanying Guidance Note[101] provide an updated and authoritative standard on involuntary resettlement that is widely used by governments, many extractive companies and associations,[102] and multilateral, bilateral and private sector banks financing large

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94   Kemp and Owen, "Community relations and mining: Core to business but not "core business"", *Resources Policy* 38 (2013) calling for companies to advance community relations and development (CRD) and corporate social responsibility (CSR) into the 'core business' of the company, beyond its current position instead as a 'core competence'.
95   Chatham House, "Revisiting Approaches to Community Relations in Extractive Industries: Old Problems, New Avenues?" (2013), p. 4 where the speaker noted that the 'cost ratios on the old adage 'prevention is better than cure' can sometimes be as high as ten to one'. Others agreed and noted that the cost ratio may be even higher.
96   FSG, "Extracting with a Purpose - Creating Shared Value in the Oil and Gas and Mining Sectors' Companies and Communities" (2014) p. 15.
97   Arbitration cases between governments and oil and gas companies increased more than tenfold between 2001 and 2010, while those for mining increased nearly fourfold. Chatham House, "Conflict and Coexistence in the Extractives Industries: Industry Study" (2013), Executive Summary, p. 2. In Peru, one of the world's largest recipients of foreign investment in mining, the government has identified 129 active community disputes in the mining industry.29   But such disputes are not limited to developing countries or challenging circumstances, community protests around proposed shale gas operations in the US and Europe are an example.
98   See, IIED "MMSD+10: Reflecting on a Decade" (2012), p. 16 on land and the Munden Project, "Communities as Counterparties: Preliminary Review of Concessions and Conflict in Emerging and Frontier Markets" (2014) which analysed almost 73,000 concessions for mining, logging, agriculture, oil and gas in eight tropical forested countries, and found that more than 93% of these developments were found to involve land inhabited by Indigenous Peoples and local communities, often generating conflict with local communities.
99   See Chatham House, "Conflict and Coexistence in the Extractives Industries: Industry Study" (2013), pg. 26-30
100   For a fuller discussion of flashpoints, see International Alert, "Conflict-sensitive business practice: Guidance for extractive industries" (2005).
101   See: IFC Performance Standard 5 and Guidance Note 5 (2012).
102   See for example, the recent Rio Tinto resettlement guidance that notes that it is "steered by the principles and content of the IFC Performance Standard 5" or the Responsible Jewelry Council Resettlement Guidance that cites IFC Performance Standard 5.

extractive projects.[103] Performance Standard 5 is underpinned by the right to housing and requires the provision of adequate housing with security of tenure for those who are physically displaced.[104] With respect to the standard of living, the IFC standard requires that resettlement "improve, or restore, the livelihoods and standards of living of displaced persons."

Despite many years of examples from around the world, there is still a relatively poor understanding of livelihood impacts or broader social costs of resettlement.[105] And because "decades of resettlement research have shown that involuntary resettlement associated with public and private sector projects frequently results in the impoverishment of affected households and communities"[106] resettlement operations often come in for increased scrutiny. A recent example of a resettlement in Mozambique indicates the often complex interplay between government policy and company actions. Governments often make the decisions about where and how resettlement takes place, which then can place serious constraints on resettlement planning.[107] The case also illustrates concerns about the division of responsibility between government and private sector for long-term impacts of resettlement and local communities falling between the cracks, as one of the mining projects has been sold to three different private sector companies during the course of the resettlement.

As a recent report noted, "a 'non-technical risk management approach,' the prevailing one in this field, is not an effective long-term community engagement strategy, nor does it deliver meaningful societal outcomes."[108] In the extractive sector, where social "soft" skills are often not valued as highly as harder skills[109] companies are often not sufficiently oriented or effectively staffed to deal with complex operating environments and the long-term commitment to community engagement from exploration to closure. And this is even when they increasingly recognise that they need to be.[110] As result, engagement with locals has a tendency to be reactive and geared towards managing disputes rather than proactively focused on creating strong partnerships.[111] While many companies have extensive corporate guidelines and procedures for community engagement, corporate practice can be more focused on the implementation of processes than on the achievement of results. In order to achieve substantial improvements in community relations, tinkering with corporate policies and generating new guidelines is unlikely to be sufficient. Rather, deep-seated attitudes and business cultures need to change across company departments. It remains to be seen whether the development of normative frameworks such as the UN Guiding Principles that frames community relations around the rights of communities affected by extractives projects can prompt such cultural change.

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103   The Equator Principles, used by at least 80 global banks, are based on the IFC Performance Standards.
104   The Guidance Note also draws on the UN Guiding Principles on Internal Displacement and the
UN Basic Principles and Guidelines on Development-Based Evictions and Displacement.
105   The longer term risks around resettlement have been well known for a long time (see for example, M Cernea http://communitymining.org/attachments/254_population_resettlement_IRR_MODEL_cernea.pdf) but as the recent symposium on this issue shows, it is still a topic of current reflection and debate on appropriate models. See for example the recent symposium by the International Association of Impact Assessment (IAIA) on Resettlement and Livelihoods (South Africa, 21-22 October 2014). As noted earlier, there is a need to develop better tools for social cost accounting; resettlement is the area where this is most obvious, but even this is extremely under-researched.
106   IFC Guidance Note 5 id.
107   In this case, the government designated a resettlement zone in an arid area far from rivers and markets. Human Rights Watch Report, "'What is a House without Food?' Mozambique's Coal Mining Boom and Resettlements," (2013).
108   FSG, Shared Value Initiative, "Extracting with Purpose, Creating Shared Value in the Oil and Gas and Mining Sectors' Companies and Communities" (2014), p. 3.
109   Kemp and Owen, "Community relations and mining: Core to business but not "core business", Resources Policy 38 (2013) p. 527.
110   Chatham House, "Conflict and Coexistence in the Extractives Industries: Industry Study" (2013), p. 25. See also: ICMM, "Community Development Toolkit" (); IPIECA, Community Engagement [accessed 6 November 2014].
111   Davis and Franks, "Costs of Company-Community Conflict in the Extractive Sector" (2014).

A Sequence of Events where Community and Stakeholder Engagement is Weak or Non-existent:[112]

- Exploration activity begins and discoveries are made without adequately informing local communities, leading to speculation and conspiracy theories about the nature of the development and who will benefit from it. A few locals do benefit and seem to know what is happening while others are negatively affected: traditional forms of economic activity and transportation may be disrupted. Many people are hopeful that the development will bring prosperity and benefit to the communities while a minority are opposed to any development at all. There is limited or no discussion of whether the development should proceed.

- Concessions are defined and allocated without consultation creating legal rights to development and land use that are in conflict with existing uses, customary rights and traditional values. Those that oppose the development increase in number and their arguments become more persuasive as the fear of suffering from impacts without gaining any benefits becomes a more likely outcome.

- Construction begins and there are significant impacts on the environment and the traditional economy. Some locals benefit by getting construction jobs but most of the jobs go to people who are perceived as outsiders. It is widely believed that the benefits are flowing to those that support the development; and that those who do not are marginalized. Lack of information about the extent of the actual impact, how benefits are allocated and who is benefitting creates a void that is filled with uninformed speculation, fear and animosity. Those who oppose the development form an organization, and opposition to the development becomes a unifying force that bridges the gaps between those that are perceived as radicals and those that are moderates within the community.

- A large influx of workers and people seeking employment overwhelms local infrastructure. Criminal behaviour and prostitution increases. The security personnel brought in to protect the development infrastructure do not understand or respect local customs and leadership. Violent incidents start to increase. Protestors against the development seem to get more attention and benefits than the traditional leadership and those adopting a more constructive approach to resolving the many problems. Moderate voices are subdued by more extreme views and those who would be supportive of the development are afraid to speak out.

- Many in the communities are now alienated by the development and more radical political movements gain popularity. The company is widely seen as a proxy for the government and targeted as such.

The dynamics of responding to demands for FPIC internally and with stakeholders (whether as a result of legislation, financing requirements, company policy or social pressure) where "no development" is an option[113] may prompt further reflection on better integrating community engagement into core

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112   This scenario has been reproduced from the EU and UN, "Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflict: Extractives Industries and Conflict" (2012), p. 14.

113   IIED, "Localising Transparency: Exploring EITI's Contribution to Sustainable Development" (2014), p. 53, draws attention to the links between EITI and FPIC, "…there are potential linkages to the free, prior, and informed consent (FPIC) agenda …The processes of eliciting FPIC locally requires 'informed' consent, which effectively equates to enabling local people to understand the full information about a project, before making a decision together with the government and industry on how the development will proceed."

considerations. Other innovations have focused on the "back end" of community relationships where grievances have already arisen. Examples include the Tintaya mine in Perú where innovative dialogue methodologies were used to address collective grievances.[114] And Azerbaijan's Civic Response Network, which assists in the resolution of citizen grievances through monitoring, research, and audits of corporate and government decisions that affect resource extraction communities in five regions.[115]

3. Strengthening the Range of Accountability Mechanisms and Approaches

One of the innovations introduced by the UN Guiding Principles on Business and Human Rights is putting victims of human rights impacts on the same footing as government and business.[116] The UN Guiding Principles draw attention to the current dearth of options for many victims of human rights abuse to obtain remedy, even for the most egregious human rights violations. The Office of the High Commissioner for Human Rights is currently conducting a global study on judicial remedies for gross violations of human rights by or linked to companies. The initial study highlighted the weaknesses of judicial remedies (unavailable, lengthy, costly) and the limited options under many country systems, north and south, to hold companies liable under criminal or civil law.[117] Credible enforcement and an independent judiciary are crucial in holding both public sector and private sector actors to account.[118]

Non-judicial mechanisms could help address the clash of rights between businesses that have administrative authorisation to exploit a resource and the rights of communities whose livelihoods depend from the same resource. This is a frequent source of conflict with limited ways of prevention or remediation.

The UN Guiding Principles call for the strengthening of judicial, non-judicial and other avenues, including operational level grievance mechanisms in which the private sector can play a part. Extractive industry associations and individual companies have been actively engaged in testing mechanisms that correspond to the UN Guiding Principles' "effectiveness criteria" for operational level grievance mechanisms.[119] In this context it is important to distinguish between accountability for remedying a human rights harm and sharing of benefits with local communities. The former is a clear right to remedy under human rights law and therefore should not be subsumed under a social investment programme. Human rights harms cannot be "offset" by positive impacts promoted elsewhere in operations.[120] he regular flow of claims of human rights impacts involving extractive companies,[121] the continued debate

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114   Brook D Barton: "A Global/Local Approach To Conflict Resolution In The Mining Sector, The Case Of The Tintaya Dialogue Table" Fletcher School 2005.

115   Id.

116   Each is assigned its own "pillar" in the "Protect, Respect, Remedy" Framework underpinning the Guiding Principles.

117   Zerk, "Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies", a report prepared for the OHCHR (2014) and see: http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx

118   NRGI, "Natural Resource Charter", Precept 1 (2014).

119   ICMM, "Human Rights in the Mining & Metals Industry Handling and Resolving Local Level Concerns & Grievances" (2009); IPIECA "Community Grievance Mechanism Toolbox" (2014).

120   UN Guiding Principle 11 confirms business enterprises may undertake commitments and activities that support and promote human rights, but this does not offset a failure to respect human rights throughout their operations.

121   The Business and Human Rights Resource Centre hosts articles and reports from civil society, companies, governments from around the world on business and human rights concerning natural resources (and other sectors).

about the finality of recourse under operational level grievance mechanisms,[122] and the inability of operational level mechanisms to address wider, systemic[123] or more serious human rights abuses[124] indicates the need to stimulate further debate, models and options for victims.

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BOX 14

Operational Grievance Mechanisms

The capabilities to prevent adverse impacts on human rights are closely related with the depth and breadth of stakeholder engagement, the disposition of companies to listen and understand how operations are seen, and how "do no harm" is understood by communities and other stakeholders potentially affected. Operational grievance mechanisms can provide not only an effective means to respond to negative social and human rights impacts but also can work as a preventive resource to generate continuous learning and improvements in social performance.

During the preparation of the UN Guiding Principles, a number of companies piloted the "effectiveness criteria" for non-judicial grievance mechanisms. The Colombian coal project El Cerrejon experience shows the importance of involvment at the highest company level, the value of stakeholder engagment in the design and implementation process of a grievance mechanism, how to deal with internal push back, challenges of involving "technical áreas" of the company in the process and how third expert party review adds legitimacy and objectivity to the grivance process.[125]

IIED's recent study of company-led grievance mechanisms adds the important dimensión of the community perspective with a focus on their effectiveness and impacts on sustainable development and livelihoods locally. The study offers examples of successful approaches for enhancing dialogue, systems innovations that facilitate the monitoring and management of grievances and offers local perspectives on the implementation of standards and processes.[126]

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Transparency can play a significant role in improving accountability. A recent book on the extractive sector in Latin America and the Caribbean noted that "[w]hile it is not the solution to all problems, transparency is a key component in the resolution of the fiscal, institutional, and social challenges surrounding the sector. People in the region are demanding greater openness and accountability in this critical area, which drives growth in many countries."[127] The challenge will be to harness the growing flood of extractives data to better translate this into accountability. Big data requires the effectively deliver information in an accessible way that responds to stakeholder needs and addresses information asymmetries.[128]

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122   See for example the recent Opinion issued by OHCHR in response to letters regarding the Porgera remediation framework.
123   Kemp, Owen, Gotzman and Bond "Just Relations and Company–Community Conflict in Mining", Journal of Business Ethics, Volume 101 (2011).
124   Where the grievances concern serious, severe human rights abuses that are crimes under national or international law, these should be handled by the police.
125   See C Rees et al. "Piloting Principles for Effective Company-Stakeholder Grievance Mechanisms: A Report of Lessons Learned" (2011), p. 32.
126   E Wilson and E Blackmore, "Dispute or Dialogue? Community Perspectives on Company-Led Grievance Mechanisms," (2013).
127   JC Vieyra and M Masson, "Transparent Governance in an Age of Abundance, Experiences from the Extractives Industries in Latin America and the Carribean," (2014), p. xix.
128   M Jarvis, "Where Next for Governance of Extractives? Old Metal, New Polish" (2014).

Accountability can also be strengthened at the operational level through a variety of mechanisms that do not wait until concerns have matured into grievances. Innovative approaches such as joint monitoring and reporting on operational dimensions, joint evaluations, community advisory groups, independent advisory groups, independent expert panels,[129] etc. can building capacity and accountability simultaneously and are to be encouraged as they help supplement, but not replace the need to build regulatory capacity in many regions to effectively enforce operating requirements.

BOX 15

The Role of NHRIs in Addressing the Business and Human Rights Agenda

National Human Rights Institutions (NHRI) are increasingly playing a role in addressing business and human rights challenges, from hearing complaints, conducting inspections, to engaging with businesses, recommending legislative changes and providing guidance to stakeholders.[130] Furthermore, NHRIs can play a key role in facilitating and convening dialogue and decision-making around extraction initiatives with affected populations. Mechanisms include formal and informal participatory decision-making fora and grievance mechanisms established to engage representatives of communities in the management of extractive industries.

The Edinburgh Declaration - adopted in 2010 by the International Coordinating Committee on National Human Rights Institutions (ICC) and endorsed by over 80 National Human Rights Institutions - lays down the foundations of their involvement in the promotion and protection of human rights in relation to business enterprises. The NHRIs have developed an active programme of training on business and human rights, with an initial round of four regional trainings on business and human rights to strengthen their capacity to address these issues within their mandate.[131]

4. Deepening Attention to Groups at Risk

One of the added values of using a human rights and social inclusion lens is the focus it brings to dealing with individuals and groups most at risk of marginalization and of violation of their rights.
Vulnerable or marginalized individuals typically experience negative impacts more severely than others but may also be particularly disempowered from raising complaints. The extractive sector often has many interfaces with a wide range of groups at risk, because of the remote locations where resources are found. Box 10 provides a brief summary on indigenous peoples which is underpinned by extensive initiatives and literature on the topic.[132] Interactions with a wider set of potentially marginalized groups - ethnic minorities, women, children, landless, disabled – have been the subject of investigation and guidance to varying degrees and are themselves often living in broader context of communities that are

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129   See for example a review of the Independent Advisory Group for the Chad Cameroon pipeline financed with World Bank Group funding: World Bank Oil, Gas, Mining Unit, *Extractive Industries Review Reports: Chad-Cameroon Project Visit*. See Oxfam, "Watching the watchdogs: Evaluating independent expert panels that monitor large-scale oil and gas pipeline projects" (2014), Appendix 2 for details of the TOR, pages 81-89.
130   International Coordinating Committee (ICC) of NHRIs, *Business and Human Rights*.
131   International Coordinating Committee (ICC) of NHRIs, *Business and Human Rights: NHRI Capacity Building*.
132   See for example the UN Permanent Forum on Indigenous Peoples, the resources on the site of OHCHR and work from the extractive industry associations ICMM, IPIECA and ARPEL on indigenous peoples.

already marginalized, with an overwhelming dependence on land-based livelihoods that are highly vulnerable to impacts that disrupt their livelihoods.

Company policies and processes can further reinforce exclusion which can be a trigger for controversy (see below) if it pays insufficient attention to cultural dynamics. Equally companies can promote and demonstrate inclusive practices throughout its operations: its engagement, land policies, impact assessment processes,[133] hiring and promotion practices,[134] contracting local businesses, and its benefit sharing. In line with the corporate responsibility to respect human rights, companies are expected to respect the right to be free of discrimination. An inclusive approach means an active approach to ensure that the company has disaggregated information about the various sub-groups among its affected stakeholders and is culturally informed about local norms and prejudices around identity. Companies can take active measures to reach out to excluded groups, consider their input, and design differentiated prevention and mitigation measures that respond to their often greater vulnerability to impacts. They can also design differentiated opportunities to permit them to participate in benefits as others do. Monitoring of project impacts should track impacts on these individuals or groups on a disaggregated basis.

> ### BOX 16
>
> **Temporary and Migrant Workers in Extractive Operations and Business Relationships**
>
> While large-scale extractive companies have on the whole significantly improved health and safety for workers, there is a continuing need to emphasize safe and healthy places to work for all workers across all type of extractives players and for all types of workers -- permanent and temporary, direct and indirect. There are often a significant number of temporary workers providing services on extractive operations (and depending on the country circumstances, a significant number of temporary migrant workers). These workers at operations and in value chains are often at greater risk of violation of their rights, given their temporary status, but are often overlooked.[135] Workers with overlapping vulnerabilities, such as female migrant workers, may be particularly at risk of exploitation.

5. Enhancing security for all around extractive operations

Insecurity and extractive operations have often gone hand-in-hand in many parts of the world. Extractive operations have fueled violent conflict, with associated gross violations of human rights, in some parts of the world. Global outrage over such practices led to multiple initiatives to address conflict minerals – from US[136] and proposed EU[137] legislation, to OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas that provides detailed recommendations to help companies respect human rights and avoid contributing to conflict through their mineral purchasing decisions and practices,[138] to the multi-stakeholder Kimberley Process[139] to address "conflict diamonds"

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133   See for example approaches to looking at impacts of projects on particular groups: IFC, "Gender Dimensions of the Extractive Industries: Mining for Equity" (2009) and M Wachenfeld, "The hidden impacts of large infrastructure projects on children", the Guardian (3 May 2012).

134   Such as programmes to target increasing women's labour participation in non-traditional roles in the extractive sector can help address women's exclusion in the workforce, IFC, "Promoting Gender Equality in the Private Sector -- Hiring Women in Mining Production Jobs" (2006).

135   ILO, "Working Conditions of Contract Workers in the Oil and Gas Industries" Working Paper No. 276 (2010).

136   See s 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010.

137   See http://europa.eu/rapid/press-release_IP-14-218_en.htm

138   See http://www.oecd.org/fr/daf/inv/mne/mining.htm

139   See http://www.kimberleyprocess.com/

and a range of other initiatives to address commodities linked to fueling conflict.[140] At their heart, these initiatives put in place systems to trace the provenance of minerals and commodities to try to ensure they were extracted in a manner that neither contributes to human rights abuses nor fuels conflict. The breadth of the initiatives responding to severe human rights abuses is evidence of the power of the human rights message when aligned with market forces that make targeting those commodities feasible.[141]

BOX 17

Multi stakeholder Initiatives (MSI) in the Extractive Space

The multistakeholder approach of many of the initiatives in the extractive sector attests to the importance of active involvement of all three groups (government, business and civil society) to maintaining the credibility of these initiatives. This also presents on-going challenges in maintaining coalitions in the face of alternative perspectives on methods and mechanisms to achieve tangible results. Many MSIs were established in significant part due to specific governance gaps. Closing such gaps requires greater engagement from the MSI with governments to strengthen the effectiveness of in-country efforts, including through strengthening legal and regulatory oversight in specific countries. This also requires active civil society voices to engage in policy and regulatory issues. But as MSIs have evolved - from standard setting to implementation - so have power dynamics. For example, global civil society organizations involved in the early stages of MSI development were principally advocacy oriented and focused on issues such as accountability and reporting. As these initiative moved to implementation, these civil society groups in some cases left in part because companies would not adopt the reporting standards/monitoring they considered necessary for the credibility of the exercise.[142] At the same time, civil society organisations well-placed to engage on implementation challenges on the ground to be able to test and challenge implementation and at times support capacity building are needed for the implementation phase. So the point of what set of civil society actors need to be involved in MSIs to ensure positive results from start-up through to implementation and how their involvement should be funded is becoming a key concern for MSIs in the human rights space.

Security of operations is a core operational concern that has often enough developed into human rights concerns for extractive operators, given the wide-ranging situations of extractives operations - from active conflict to local conflict to routine security and safety concerns. Human rights abuses carried out by security forces protecting operations, primarily but not exclusively involving public security forces, prompted the development of one of the first multistakeholder initiatives in the business and human rights area - the Voluntary Principles on Security and Human Rights[143] and the more recent International Code

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140   For example: The EICC/GeSI Conflict Free Smelter Programme; the ITRI Tin Supply Chain Initiative; the World Gold Council's Conflict Free Gold Standard; the Solutions for Hope Programme; the Conflict-free Tin Initiative; the Public-Private Alliance for Responsible Minerals Trade; and the International Conference of the Great Lakes Region's minerals certification mechanism.
141   For example, the successful "blood diamonds" campaign.
142   See for example Global Witness, "Why we are leaving the Kimberley Process - A message from Global Witness Founding Director Charmian Gooch" (2011).
143   The Voluntary Principles on Security and Human Rights have developed Implementation Guidance Tools but have not yet developed measures to verify implementation of the Principles. The 2013-2016 strategy states that "the objective is to have a credible process to verify fulfilment by all Participants of their Voluntary Principles Initiative roles and responsibilities including public reporting and engagement, where applicable." The Swiss Government reports that the verification mechanism was to have been approved at the March 2014 plenary (see Federal Council of the Swiss Confederation - Background Report on commodities: Status report on the implementation of recommendations (2014), p. 19) but this was not noted in the Press Release – 2014 Annual Plenary Meeting (28 March 2014).

of Conduct for Private Security Service Providers[144]. The continued expansion of the Voluntary Principles initiative to new countries and new operators attests to the usefulness of bringing all three parties around the table to address security and human rights dilemmas.

More recently concerns have focused on public and private security operations within communities in dealing with dissent.[145] Rather than leaving it to security providers alone to deal with dissent on the front lines, discussion and analysis needs to mature, moving beyond the at times narrow focus on public order/installation protection to a more informed understanding of needed structural solutions that often require a longer-term, multi-party approach to address the underlying conflict dynamics. There is also an emerging recognition of the need for a more inclusive approach to security as a fundamental right that should be accessible to all community members, not only companies. An approach that identifies the risks associated with providing public security to projects while leaving communities unprotected, can leave feelings of resentment that public security forces are only interested in the company.

B. Recommendations

1. Adjust approaches and tools to understand and engage with the operating contexts through a human rights and conflict prevention lens.

- **Extractive company** plans should be aligned with a country's development plans at the start of a project,[146] building on existing frameworks and aligning projects with broader regional and national development plans. In the absence of such plans, a company should be part of a process to define how its project can be integrated into, and support, the long-term development objectives for that region and community.
- **Extractive companies and their advisers** often have a wide range of tools to analyse complex operating environments.[147] Addressing human rights requires a shift to ensure that the focus is on risk to people rather than risks to the company although the two may converge in many cases and may require a fuller adaption of existing tools (such as conflict risk assessments) or the use of new tools, such as sector wide impact assessment.[148]
- Recognising that individual operators may face challenges in highlighting governance gaps with the government because of political exposure, competitive disadvantage or both, other organisations should be encouraged to develop approaches to fill gaps between domestic and international standards in a transparent way -- rather than just accepting and exploiting gaps. This can be an area where **collaborative approaches between the private sector** (**including business associations**), **civil society and development partners** can foster innovative approaches.

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144   The International Code of Conduct for Private Security Service Providers (ICoC) is a multi-stakeholder initiative that aims to both clarify international standards for the private security industry operating in complex environments, as well as to improve over-sight and accountability of these companies. The Code sets-out human rights based principles for the responsible provision of private security services.

145   UN General Assembly, "Report of the Special Rapporteur on the situation of human rights defenders", A/65/223 (4 August 2010).

146   ICMM, *Mining's contribution to sustainable development at the core of Intergovernmental Forum* [accessed 6 November 2014].

147   See for example the ICMM "Resource Endowment Toolkit" (2008)

148   See, MCRB, IHRB and DIHR, "Sector Wide Impact Assessment of the Oil & Gas Sector in Myanmar" (2014), that looks at the extractive sector through a responsible business lens using all three pillars of the UN Guiding Principles: (i) the Pillar I/Government Duty to Protect analysis looks at whether policy, law, regulations, contracts and government practice for the sector prompt or impede responsible business practices; (ii) the Pillar II/Corporate Responsibility to Respect Analysis looks at key human rights concerns for businesses and highlights implications for operations; and (iii) the Pillar III/Remedy analysis looks at country wide channels for seeking remedies and options for strengthening access to remedy.

The Colombian Petroleum Association

The Colombian Petroleum Association has developed a self-regulatory system based on 10 principles to address the challenges related with transparency, sustainability, social and human rights issues. This system called RED (Responsibility, Ethics, Diligence) references many of the international standards used by the oil industry (IPIECA, ICMM, ISO 26000, UNGPs) and includes a guide on social practices recently released by the Colombian Ministry of Mines. The RED system includes an externally verified self-assessment procedure.

2. Reinforce the importance of adherence to the UN Guiding Principles on Business and Human Rights.

- As part of their duty to protect human rights under the UN Guiding Principles, **governments** are expected to consider a "smart mix" of measures from binding laws to setting clear expectations of business. Some governments have already begun to incorporate requirements to report on human rights due diligence in particular operating contexts.[149] Governments have several avenues open to require or promote adherence to the UN Guiding Principles - through regulatory means, contractual requirements, providing incentives (such as through public procurement or export credit) or through active promotion.[150]
- **Extractive sector companies** have been more active than many other sectors in responding to the UN Guiding Principles, with action at the industry association and large company level but with remaining challenges within large operators of moving from policy to practice, integrating and operationalizing policy commitments into daily operations. Their often extensive web of business relationships provide an opportunity to drive these changes through a wide range of contractors involved in typical extractive sector operations.[151]

3. Improve practices around long-term community engagement.

- **Government** has an important role to play in ensuring that community engagement is a requirement in concession / licensing agreements and in engaging itself with the community prior to issuing the concession / license. It should make the company aware of any agreements made by the government with the community that the company will be responsible for.
- **Local governments / authorities** should often take the main role in leading and ensuring effective community engagement, with support from and involvement by companies. They may have a formal role, such as under ESIA procedures, but can often serve as an important point of contact between local communities and companies. However, in areas where there is a long legacy of mistrust between communities and the local government or companies, trusted intermediaries may be required. Companies

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149   For example, the US Government adopted reporting requirements for certain companies operating in Myanmar/Burma that requires companies to report on: "Due diligence policies and procedures (including those related to risk and impact assessments) that address operational impacts on human rights, worker rights, and/or the environment in Burma."

150   For a review of the steps different governments have taken to implement the UN Guiding Principles, see, IHRB, "State of Play 3: Human Rights within the Political Economies of States – Avenues for Application (2013).

151   IHRB, "State of Play 2: the Corporate Responsibility to Respect in Business Relationships," (2012).

must also be particularly sensitive to undermining or exposing human rights or land defenders to potential arrest and imprisonment where government attitudes or actions may put them at risk.

- By doing the baseline research and stakeholder mapping to gain a full understanding of the social, economic, political and cultural dynamics with a team of community and social professionals to contextualize the information, **companies** will be better placed to apply it to the company's operations. Companies should engage early with broad sector of community stakeholders (not just leaders) to understand issues, concerns and expectations, and social risks, communicating what the company is willing to do. This should lead to collaboration with communities, government and civil society to address development issues and manage risks and impacts.[152]

4. Strengthen accountability of extractive operations.

- Given the rise in conflicts between communities, governments and extractive operations, there is a need to develop and strengthen a variety of alternative avenues for dialogue and conflict management through mediation, dialogue platforms and other traditional and non-traditional avenues. Some options must operate at the local level, working in the community long-term to rebuild trust between operators, government and communities. In countries emerging or still engaged in long-term conflict where extractive operations have become instrumentalized for one side or the other, more structured, and empowered alternatives may be needed to address and change structural drivers of conflict that would allow renewed and responsible exploitation of resources. Where operations are burdened by unresolved legacies, government commissions or similar types of investigative inquiries may be needed to achieve a working solution. This is an area that may require active **collaboration from governments, business and civil society.**
- **Company and industry association** work to build lessons learned on operational level grievance mechanisms should be supported and encouraged,[153] as these mechanisms can help prevent impacts from increasing or disputes from arising or escalating. It is also important to recognize that these mechanisms may be unable or even inappropriate avenues to address broader controversies in the sector. Instead, operational level mechanisms can usefully be seen as one part of an ecosystem of remediation processes which complainants should be free to choose among.[154]
- **Governments** might consider other options such as an independent, high-level ombudsman for the extractives sector, especially in emerging producer countries, to help defuse company–government tensions at an early stage, and to conduct public investigations into allegations of legal breaches.[155]

152   See IFC, Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets (2007).
153   ICMM, "Human Rights in the Mining & Metals Industry Handling and Resolving Local Level Concerns & Grievances" (2009); IPIECA "Community Grievance Mechanism Toolbox" (2014).
154   European Commission, "Oil & Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights" (2013), Section VI.
155   Chatham House, "Conflicts and Coexistence in the Extractives Industries" (2013) Executive Summary p. 5.

Step 3: Prudent Revenue Collection and Management

Step 3

Prudent Revenue Collection and Management
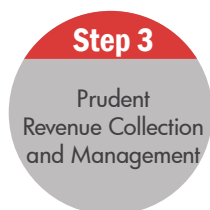
A. Current Context - Challenges and Gaps

Other papers in this series have addressed many of the challenges around improving revenue management and collection. The current push for transparency and accountability all the way through the extractives value chain, as exemplified in the new EITI standard, has the potential to significantly change the accountability of governments. This is so, particularly when twinned with other efforts to address accountability loopholes: corruption, tax evasion and avoidance,[156] money laundering. The June 2013 G8 particularly emphasised the linkages between transparency, taxation, and trade in the extractives sector.[157] These efforts are described in companion papers but are highlighted here because these actions have the potential to significantly affect human rights in a number of ways as set out below.

The failure to address the widespread corruption evident in many resource cursed countries has been a clear driver for conflict in which human rights abuses figure prominently.[158] High levels of corruption can also be a direct driver for human rights violations, even absent the intermediation of conflict, not least where funds from natural resource extraction intended to provide public services to fulfill human rights are siphoned into private bank accounts.[159] On the positive side, initiatives to promote transparency and accountability in the management of extractive revenues can have a "knock on" effect of strengthening the rule of law and accountability more generally and help to open space for civil society dialogue.[160]

There are three dimensions of equity that should be considered in the otherwise technocratic revenue distribution discussion:

- Intergenerational equity between existing and future generations may already be a consideration in establishing oil revenue funds,[161] reflecting the need to distribute benefits of depleting assets across generations.[162] Intergenerational equity becomes a human rights issue when viewed through the lens of the Convention on the Rights of the Child that puts the best interest of the child at the heart of considerations involving present and future generations of children.
- Building a climate justice approach[163] into those considerations would add an important new dimension to intergenerational considerations. It would shift the focus not just from how revenue from extractive operations should be shared across generations, to a more profound

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156   According to the 2013 Africa Progress Report, tax avoidance and opaque natural resource deals cost Africa 25 billion GBP annually – twice as much as the continent receives in aid (Africa Progress Panel, 2013). The contributions of tax justice to improved human rights outcomes has become a hot topic of discussion in both financial transparency and human rights worlds. See for example: Tax Justice Network, *Human Rights* and Open Democracy, *Human Rights and Just Taxation* [accessed 6 November 2014].
157   UK Government, *G8 and developing countries will work together to make the use of natural resources more transparent* [accessed 6 November 2014].
158   Extractive companies may be both the source and victims of corruption. See: E Bickham, *Operating Responsibly in a Corrupt Environment* [accessed 6 November 2014].
159   For a fuller discussion of the many links between corruption and human rights see: Study for UNDP, "In-Depth Study on the Linkages between Anti-Corruption and Human Rights" (2007) and International Council on Human Rights Policy and Transparency International, "Corruption and Human Rights: Making the Connection" (2009).
160   A key achievement of EITI is the empowerment of civil society.
161   See Columbia Center for Sutainable Investment, *Managing the Public Trust: How to Make Natural Resource Funds Work for Citizens*
162   ODI, "Special fiscal institutions for resource-rich developing economies: The state of the debate and implications for policy and practice" (2013).
163   See for example, the Mary Robinson Climate Justice Foundation.

consideration of whether extractive resources should be extracted at all in light of climate change impacts on the next generation. And if they are extracted, it could prompt consideration of whether revenues can be invested in cleaner energy infrastructure for future generations.

- A "localized equity" dimension to the discussion would seek to balance localized impacts on communities with localized benefits.[164]

Revenue distribution choices must also be seen through a conflict lens, as distribution can play a crucial role in exacerbating conflict or promoting social inclusion, such as in Myanmar where long-running ethnic conflicts are intimately tied to resolution of revenue sharing arrangements with the central government.[165] Distribution of extractive revenue to regional levels where extractive operations are located has a logical appeal, but can introduce new layers of corruption and patronage.[166]

B. Recommendations

1. Support international initiatives to improve revenue transparency and management.

- Robust implementation of the increasing range of initiatives, such as EITI, including EITI's recommendations for disclosure of beneficial ownership and contracts, legislation such as the Dodd Frank Act, EU Directive on country-by-country reporting to improve revenue transparency and management, should be supported by **human rights advocates** as part of the broader effort to improve extractive outcomes. To date, transparency initiatives and human rights initiatives have often been operating in silos, rather than providing reinforcing messages around what are often common agendas.

2. Build equity considerations into revenue management and distribution considerations.

- Where they do not do so already, government revenue distribution models could consider core equity considerations in managing extractive revenue: intergenerational equity, climate justice, and "localized equity" that seeks to balance out local impacts with appropriate compensation.
- In addition, there is a need to develop lessons learned on revenue distribution models that help governments and the population make informed choices about the pluses and minuses of revenue distribution options. Important actors such as the Norwegian Oil for Development Programme or the Natural Resources Governance Institute are playing an important role in documenting and sharing those lessons. While the system underpinning any choices must be technically and monetarily sound, the choice is ultimately a political one in which the population should have a say.

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164   The World Commission on Dams developed a useful framework for recognizing entitlements and sharing benefits through an equity lens that would be useful to revisit.
165   Thet Aung and Mari Oye, "Natural Resources and Subnational Governments in Myanmar: Key Considerations for Wealth Sharing" (June 2014).
166   In 2012 Colombia reformed revenue sharing through the implementation of a comprehensive institutional reform to introduce into the system principles of interregional solidarity, equitable access to resources and efficiency in resource allocation and use. See, https://www.sgr.gov.co/QuiénesSomos/SobreelSGR.aspx

Step 4: Using Extractives Revenue to Invest in Human, Physical, Financial and Social Capital

Step 4
Investments in Human, Physical, Financial and Social Capital

A. Current Context - Challenges and Gaps

1. Enhancing Budgeting through Participatory, Human Rights Based Approach Budgeting

As has been noted repeatedly in this and other papers, one of the most significant benefits of the extractive sector is its potentially significant contribution to government revenue that can in turn contribute to supporting human and sustainable development if used wisely. In countries that have joined the EITI initiative or otherwise adopted laws on revenue transparency, it brings a welcome transparency to the "supply side" of the revenue equation, making information about revenue paid to and received by government transparent. The EITI does not extend to the "demand side" of the equation -- i.e. the demand from the population for information on how revenues received are budgeted and spent.[167] Other initiatives are stepping into that space - most notably the Open Government Partnership and International Budget Partnership[168] - to bring the similar levels of transparency to government expenditure. In many countries, there is a lack of access to information on even the most basic budget information, and a lack of dialogue and structured options for participation in defining national priorities for investment.

A human rights based approach to budgeting helps strengthen the links between extractive revenue, income and expenditure, both through an inclusive and participatory process around budget development and review, as well as a more explicit focus on budgeting to meet state obligations to protect and fulfill human rights – such as for education, health, social protection and justice systems. Participatory budgeting links the results of budget analysis to shaping budget choices, informing the public, and holding the government accountable once budgets are published to ensure that expenditures are made in accordance with the budget.[171]

BOX 19

Social Accountability Approaches in Improving Transparency around Extractive Expenditure

Other social accountability approaches play an important role providing extra sets of checks and balances on the state[169] such as the Committees For Monitoring the Use Of Royalties (CSIR) in Colombia.[170] This is a multistakeholder initiative promoted by the Office of the Comptroller in Colombia that involves citizens participation in monitoring the use of royalties.

2. Improving Corporate Social Investment Initiatives through the Application of Core Principles

In addition to revenue payments made to the government,[172] extractive companies may decide to make

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167   See World Bank, _Social Accountability and Demand for Good Governance_ [accessed 6 November 2014].
168   EITI has links with both these broader transparency initiatives, which can help reinforcing the same messages through broad alignment.
169   UNDP, "Fostering Social Accountability: From Principle to Practice" (2010).
170   A Gonzales: "Citizen Accountability in Royalties Management" Science-Po, Paris 2009.
171   See for example the range of case studies on the International Budget Partnership website on using budget analysis and advocacy to reshape budgeting priorities in line with government human rights obligations.   See also, UNICEF, "From Natural Resources to Human Capital: Practical, Feasible, Immediate Resourcing Solutions for Myanmar's Children," (2013).
172   ICMM has been documenting the contribution of mining activities in each of the world's 214 national economies. See "The role of mining in national economies" (2nd edition) (2014).

or may be required to make additional contributions to economic and social development, which can take many different forms (collectively referred to in the paper as "social investment initiatives"). The discourse is moving from "CSR programmes" that are a vehicle for corporate philanthropy to developing and testing new models to share some level of local benefits with communities in the immediate area or region. Social investment initiatives focusing on local communities (or regional programmes) may be prompted by company policy, negotiations with local communities as a part of access or consent agreements (such as community benefit agreements), contractual commitments or legal requirements for compulsory "CSR spend", a perceived "social license to operate"[173], or simply operational necessity, given remote operating locations.

- **Challenge 1: Linking Social Investment Programmes to Local, Regional and National Development Plans**

Because of the often remote areas where they operate, extractive companies more frequently than other sectors find that they operate in areas that lack basic levels of services and institutions such as roads, schools, health services that play an important role in improving human development. There is often a clear tension between local governments and local community expectations that extractive operators provide local services and the risk of weakening or distracting government from providing basic public goods and being accountable for fulfilling this basic duty, especially in those cases when local government shares revenue from extractive operations. This is an often-cited concern of extractive companies and one for which there is often no easy answer. Ensuring that social investment programmes are aligned with at least local government planning or even regional or national development plans (NDP) or poverty reduction strategies (PRSP) is an important objective.[174] Those plans should set priorities that then help guide private sector social investment to avoid the all too-often repeated scene of empty schools built by companies but with no teachers due to little consultation with local communities and even less with local government and no funding beyond bricks and mortar construction.   Coordination with local, regional and national government and with relevant plans provides the opportunity to combine resources to provide better quality infrastructure, ensure that infrastructure or services are integrated into wider planning, that the government plays the oversight role it should - for example in the provision of health or education services.

The shift towards a social investment approach grounded in the business and its operations, rather than philanthropy, and in involving communities, is a welcome change. Yet there is often an equal level of opacity about expenditure, lack of clarity on principles driving priority setting and weak levels of participation by those most affected by company operations in social investment programmes. Just as there is a need for transparency around government expenditure of extractive revenue to promote accountability, there is an increasing recognition of the need for transparency in social investment programmes. Without transparency, even well-intentioned social investment programmes can fuel local corruption, exacerbate conflict among community members competing for access to or control of funds.

The new focus on creating shared value (defined as "policies and activities that measurably improve socio-economic outcomes and improve related core business performance and/or an improved business environment") provides a framework to identify opportunities that both address societal issues and deliver real business value.[175] This provides another driver for investing in human, physical, financial and social capital.

173   See Owen and Kemp, "Social licence and mining: A critical perspective"(2012).
174   See the discussion at ICMM, *Mining's contribution to sustainable development at the core of Intergovernmental Forum*
175   FSG, "Extracting with a Purpose: Creating Shared Value in the Oil and Gas and Mining Sectors' Companies and Communities"
(2014), p. 19

• **Challenge 2: Making Compulsory "CSR" Spend Work for Human Development**

Increasingly, governments are introducing social investment clauses into the exploration or exploitation contracts. Their scope varies from just being indicative on processes, priority investments and practices to establishing fixed percentages and obligatory procedures for the planning and measurement of outcomes. The discussion on such obligatory provisions is profound as it is closely related with establishing the boundaries of state duties on the provision of public goods, strengthening institutions and keeping companies focused on avoiding harm as a first priority. Nevertheless, governments, communities and companies can align their efforts and duties around common goals without weakening their core duties and responsibilities if designed carefully.

BOX 20

Examples of Aligning Business and Community Investment Around Common Goals

Colombia´s new oil contract requires that 1 % of the exploration costs incurred by the contracting company must be allocated for social investment[176] in the area of influence of exploration projects - referred to as "programs for the benefit of communities" (PBCs). UNDP produced guidance to anchor the program towards addressing poverty alleviation and driving the PBCs to play a role in human development, while providing specific guidance on adequate stakeholder participation in the preparation of the PBCs, prioritising the PBCs content and goals, implementation and monitoring.[177]

In Peru, the Defensoría del Pueblo (Peruvian Ombudsman Office), Ministry of Energy and Mining, UK Department for International Development (DFID) and Canadian International Development Agency (CIDA) are supporting a project to improve the local development impact of extractive industries in Peru by helping build and train a sustainable mechanism – the Independent Monitoring Mechanism (MIM) for tracking municipal management of mining royalties flows. This initiative is part of the National Program on Mining Royalties, that works in one hand directly with local governments to

build capacity in investment management and execution and on the other hand with civil society organizations to establish effective transparency and social accountability mechanisms.[178]

In Ghana, the UK Department for International Development (DFID) is supporting a programme that will be known as the Coastal Foundation to organise and support effective dialogue between the oil companies, the communities and government agencies, and to make effective use of corporate social responsibility funds that private sector companies have for development. The oil and gas industry is currently spending more than £4 million per annum on corporate social responsibility (CSR) projects in the Western Region. However, the benefits of these resources could be higher for all parties. The aim of the progamme is to increase transparency and to deepen accountability between stakeholders, to improve the impact of available development funds, to help residents earn more income and more local businesses to supply the large multinationals operating in the Western Region. The Coastal Foundation will help ensure good practice and that the programmes respond to local residents' priorities, most notably to earn more income.

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176   See Columbia Exploration and Production Contracts, Annex F
177   See Guía para la gestión de los PBC con enfoque de desarrollo humano y reducción de la pobreza extrema en Colombia. See also http://commdev.org/extractives/capacity-building-managing-oil-royalties-colombia
178   See also http://commdev.org/extractives/participatory-monitoring-mining-royalties-peru

- **Challenge 3: Learning Lessons on Community Development Agreements to Improve Outcomes**

The move towards more specific agreements between communities and companies has been prompted by legislation in some areas of the world, such as in Papua New Guinea, Chile, and South Africa, and in others, a wish to arrive at more concrete, shared understandings of expected benefits. These agreements have many different names - Community Development Agreements, Community Benefit Agreements, Native Title Agreements, Impact and Benefit Agreements, etc. They can provide practical mechanisms in many circumstances to formalise benefit commitments, increase accountability and transparency, recognise rights and promote inclusive engagement, document FPIC.

BOX 21

What Does a "Successful" Community Development Agreement (CDA) Look Like?

In a review of past experiences of CDAs[179] considered "successful," (achieved a stable base of local support for a project and contributed to local economic and social development), the World Bank identified a series of key "building blocks" of successful CDAs covering both content- and process-related factors. The Guide sets out key learnings around each of these six crucial points for a CDA: [180]

- Responsibilities and Obligations
- Timeframe and Process
- Identification of Qualified Communities
- Stakeholder Participation and Engagement
- Stakeholder Capacity
- Funding and Expenditure Requirements
- Grievance and Dispute Resolution Mechanisms
- Reporting, Accountability, and Transparency

- **Challenge 4: Using Well-Designed Local Content Policies to Spread Benefits**

Local content requirements that set out targets for the hiring of nationals and use of national supplies and services are on the rise and a renewed area of focus for the sector.[181] Local content policies can be an important tool in advancing social inclusion and creating benefits through job creation, boosting the domestic private sector and creating linkages into local SMEs, facilitating technology transfer and build a competitive local workforce if done right. Local content programmes can reduce the risk for conflicts - or exacerbate them if they are seen to enrich local elites and fuel corruption. A number of recent assessments across a range of countries capture lessons learned about the objectives, design and costs and benefits of such policies.[182] In addition to the potentially important contributions to poverty alleviation,

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179   See also, Otto, *Community Development Agreements: Model Regulations and Example Guidelines* (2010); *ERM, Mining Community Development Agreements: Practical Experiences and Field Studies* (2010); Centre for Social Responsibility in Mining, University of Queensland, *World Bank Extractive Industries Sourcebook, Good Practice Notes: Community Development Agreements* (2011); IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements (2010)

180   World Bank, Mining Community Development Agreements Sourcebook (2012), Table 2.2 Building Blocks of Community Development Agreements.

181   See for example, NRGI "Local Content Initiatives: Enhancing the Subnational Benefits of the Oil, Gas and Mining Sectors" (2013) and IPIECA which is launching a new work programme on local content. Note the Chatham House recommendation: *"Public–private partnerships should be established to channel targeted investment in local capacity, including small and medium-sized enterprises, to strengthen forward and backward linkages from the extractives sector to the rest of the economy. Blunt approaches such as unrealistically high local content requirements should be avoided."* Chatham House, "Conflict and Coexistence in the Extractives Industries" (2013), Executive Summary p. 6.

182   See, Columbia Center for Sustainable Investment, Local Content Laws & Contractual Provisions See S Tordo, et al, Local Content Policies in the Oil and Gas Sector (2013), C Fruman, Blog, "Developing local industries connected to the gas value chain: What can Tanzania learn from Malaysia?" and V Bowman, Local Content – Learning from Experience Elsewhere' (2014).

if well-designed, they can be an important pull factor in improving the availability and quality of national education systems.

- ### Challenge 5: The Push for Public-Private Partnerships

In addition to these push factors, there has been a significant and renewed shift towards involving and even integrating the private sector in a wide range of sustainable development initiatives that is expected to pull companies into this space.[183] The proposed inclusion of public-private partnerships as part of SDG Goal 17 on global partnerships for sustainable development is just one reflection of this shift. Large extractive operators and their industry associations have already recognized the necessity of documenting the sector's contribution to national development through revenue contributions, but also through highlighting and quantifying the many other avenues of contribution, with an increased focus on quantifying and measuring impacts.[184] The private sector clearly has a critical role to play in sustainable development, but the benefits of involving the private sector in the SDGs will not be automatic. Businesses' contribution to to socially sustainable and equitable development starts with respecting the rights of people affected by their activities.

- ### Challenge 6: Applying Core Principles

In total, these various types of programmes have the potential to make significant contributions to sustainable development, including human development and human rights, if structured well and integrated into broader relevant government initiatives where appropriate. Because extractive companies live side-by-side with communities for significant lengths of time the sector as a whole has learned and is still learning many lessons about interacting with communities.[185] As the sector moves from shorter-term CSR programmes that feature in company sustainability reports to a more development oriented approach that is increasingly evident among some corporate leaders, there is an opportunity to build in social development approaches grounded in human rights and social inclusion. The responsibility to respect human rights under the UN Guiding Principles applies equally to social investment initiatives as to operations, with the opportunity to move beyond a "do no harm" approach to having a positive impact on human rights, although there currently are no clear frameworks for what positive approaches from a private sector point of view should look like.[186] An approach aligned with human rights has the added value of finding useful development partners for companies in implementing social investment programmes.[187]

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183   The recent EU policy on involvement of private sector in fostering development is indicative of a wider shift among at least OECD DAC donors in reinforcing and broadening their focus on the private sector. See Communication From the European Commission, "A Stronger Role of the Private Sector in Achieving Inclusive and Sustainable Growth in Developing Countries" *COM(2014) 263 final* (2014); OECD, "Development Co-operation Report 2014: Mobilising Resources for Sustainable Development" (2014) p. 250.

184   See for example: ICMM and the Brazilian Mining Association (IBRAM), "The mining sector in Brazil: building institutions for sustainable development" (2013).

185   As the ten-year review of MMSD project highlighted, that while understanding of sustainable development had increased dramatically in the mining sector, the effective implementation of standards was still lacking and highlighting the need to develop more sophisticated approaches to local development issues. IIED, "MMSD+10: Reflecting on a Decade" (2012).

186   It is important to note as stated earlier, social investment programmes should not be conflated with procedures to remedy human rights harms through some form of grievance mechanism.

187   All the OECD DAC donors have moved to a human rights based approach to development as have many of the large development NGOs. A common approach and terminology helps bridge the gap where companies seek to partner with or build on other relevant initiatives.

B. Recommendations

1.Continue the linkage between human rights and extractives through to the budgeting process for extractives revenue, using a human rights based approach to budgeting.

2. Infuse company social investment initiatives with a human rights based approach.

- Build social initiatives around core human rights principles of participation and inclusion. When it comes to social investment which is specifically for the community or workers or regional government, they are no longer just affected stakeholders but more akin to partners and should have a corresponding role in the development of ideas, plans and implementation. Inclusive processes that involve and support workers or community members or local governments and build their capacity to develop and administer their own priorities is one approach aligned with human rights. In many settings, sustained capacity-building on the community side will be necessary for such engagement, and the mechanisms through which such activities can be funded on a sustained basis present a key challenge.

- Transparency for such programmes are equally important but potentially a harder gap to bridge with corporate cultures that may see social investment programmes as "mine" within their discretion to give, take away and operate as the funder's prerogative. Yet given the increasingly interwoven nature of social investment programmes and broader community engagement, the shift from "mine" to "ours" better reflects the dynamics of relationships in many cases and a better alignment with the responsibility to respect human rights.[188]

BOX 22

Examples of Integrating a Human Rights Based Approach into Local Development Programmes

The former UN Special Rapporteur on Indigenous Peoples Rights drew attention to the opportunities to promote models of local ownership of extractive operations by indigenous peoples.[189]

Programmes that supporting local governments to deliver schools that are grounded in a human rights based approach -- accessible and open to all and that provide an integrated package of services to promote child development[190] or developing training and employment programmes grounded in the protection of labour rights for all workers, including temporary contract workers[191] are examples that build on a human rights based approach.

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188   See IIED, "Localising Transparency: Exploring EITI's Contribution to Sustainable Development" (2014), pg. 31-32, which draws on case studies, highlights the challenges around Newmont Mining's Newmont Ahafo Development Foundation in Ghana and noting that *"challenges around transparency and accountability of social investment spending, especially where revenues from mining royalty disbursements are combined with the social investment funds. The Newmont case highlights the need for greater citizen participation and demand for accountability at the level of disbursement of social investment funds."*
189   "Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries operating within or near indigenous territories" A/HRC/18/35 (11 July 2011).
190   See UNICEF, *Child Friendly Schools* [accessed 6 November 2014].
191   ILO, "Working Conditions of Contract Workers in the Oil and Gas Industries" Working Paper No. 276 (2010).

- Accountability mechanisms, such as operational level grievance mechanisms, are an important part of coherence with the corporate responsibility to respect human rights and importantly, can provide useful feedback on the effectiveness of the programme. Social investment initiatives, in kind or money, can be beneficial but can also be a stimulus to further weakening state accountability for the provision of services. They can impact the independence and impartiality of local public officials and can constitutes opportunities to co-opt opposing voices. Check and balances are required in the social investment dimension of extractive projects.
- Use human rights due diligence approaches in the design and operation of social investment initiatives. Even initiatives designed to promote positive human rights outcomes can have unintended consequences that should be addressed in design and operation.
- As many social investment initiatives are targeted to promoting human development objectives that are themselves human rights (education, health, decent work, access to water), a human rights based approach means using the content of the right to help guide the programming of the initiative. The relevant international human rights standards and the often-extensive guidance around each right can help provide useful direction in shaping and implementing initiatives.

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