BALANCING THE SCALES

Community Protocols and Extractive Industries

Lessons from Argentina, India, Kenya and Zimbabwe

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ACKNOWLEDGMENTS

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INTRODUCTION

With the start of a commodity boom cycle in the early 2000s, many resource-rich countries reaped benefits as prices for commodities increased over the ensuing decade. Many of these countries see mining as a central element of modernising their economies, and actively promote investment in the mining and extractives sector. Indeed, between 2000 and 2012, investment spending by global oil, gas, and mining companies increased five-fold, especially in Latin American and sub-Saharan Africa[1].

However, the increase in commodity prices and investment was not necessarily good news for indigenous peoples and local communities. More investment means more extractive activity and there is a well-documented overlap between communities' traditional territories and the location of minerals, fossil fuels and other natural resources. The problems that arise when natural resources are discovered and exploited include environmental destruction, involuntary displacement, loss of livelihoods, and other human rights violations. Although the commodities market has recently cratered, with 2016 prices for oil and metals 50 to 70 percent below their 2011 levels[2], it remains to be seen whether this drop in prices will have any long-lasting effect on the level of extractive activity that takes place on communities' lands. Regardless, an end to the rush for natural resources is currently not in sight.

The basic issues that give rise to the problems posed by extractive activities are well documented. Lack of inclusion of affected communities in planning, failure to obtain their timely and informed consent, including their right to say no to projects, power imbalances between communities on the one hand and companies and government on the other, and corruption are just some of these issues. At the same time, however, communities are increasingly finding ways to engage with external parties and to ensure that their rights are respected in the context of large extractive and infrastructure projects. A "community protocol" is a tool that can help communities to mobilise and reach their own decisions about how development should take place and how to ensure the protection of their fundamental rights.

To build an understanding of the ways in which community protocols can be effective in the context of extractive industries, Natural Justice and the Heinrich Böll Foundation have partnered in an action research project with organisations and communities in Argentina, India, Kenya and Zimbabwe. The project, which commenced in 2013, has followed and supported community protocol processes in each of these countries. It has supported the sharing of information about protocols among all of the communities, as well as with the public, and resulted in the creation of a **Community Protocols Toolbox**[3] that sets forth guidance on what facilitators should consider before and while embarking on a protocol process.

This paper provides an overview of what has taken place over the last three years in each of the four community protocol processes and captures lessons that can be applied to future processes, should other communities and civil society actors wish to engage in them. The paper is organised in four sections: Section I provides background on the project, including a brief overview of the community protocol concept and the overall project that gave rise to this publication. Section II, which briefly describes each of the four community protocol processes that are part of the project, should be read in conjunction with the more detailed Annexes. In Section III, the six research questions posed at the beginning of the project are discussed in turn, along with good practices and lessons learned from each process. Section IV provides recommendations for those interested in developing community protocols and offers concluding remarks.

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1 *World Bank, Commodity Markets Outlook (April 2016), 13.*
2 *World Bank, Commodity Markets Outlook (April 2016), 10.*
3 *The Toolbox is available at http://naturaljustice.org/community-protocols-toolbox/.*

I. BACKGROUND

Natural Justice first began working with community protocols in 2007, when they were used to support communities in affirming their rights to traditional knowledge (TK) and associated genetic resources (aGRs) as part of access and benefit sharing (ABS) negotiations. Community protocols were then included in the text of the Nagoya Protocol[4], in recognition that they can help to articulate customary laws and procedures for accessing TK/aGRs and provide additional assurances for appropriate prior informed consent processes. Since that time, Natural Justice has supported protocol processes in a variety of different contexts. For example, we have worked with communities developing protocols in

- India, where communities were claiming rights to their traditional knowledge of breeding techniques for cattle and sheep and anticipating their entry into ABS agreements with companies[5]
- South Africa, where traditional healers were seeking access to plants that had been placed off limits due to the creation of a protected area by the government[6]
- Colombia, where communities faced a number of challenges, including opencast mining, and wanted a management tool to open up dialogue and guarantee the community's collective territorial rights[7].

Such protocols have proven useful in several ways, including creating space for dialogue between communities and external parties, such as government agencies; helping communities to articulate processes for giving or withholding consent; and providing a framework for deciding their own development priorities.

Community Protocols

Indigenous peoples and local communities[8] can be profoundly impacted by the effects of national policy and development projects. Often, decisions related to these policies and projects are made without meaningful input from the communities that will bear the most direct impacts. This lack of involvement in the planning and implementation of projects can lead to a number of problems, including serious human rights violations. Over the last few decades, there has been increasing recognition that communities' rights must be protected and respected, and that this protection and respect can be facilitated by appropriately engaging with communities and allowing them to meaningfully participate in decisions that affect them. The principle of engagement and participation is often referred to as free, prior and informed consent (FPIC).

While national legislation to support large infrastructural, extractive, agricultural and other projects expresses the state's approach to development (often supported by an urban middle class, investors and international development organisations), local communities (often in rural or remote areas) may have their own vision for development. They also have cultural heritage that includes rich histories, traditions, worldviews, deep connections to their land and natural resources, and customary rules and procedures to regulate their own conduct and interactions with others. This cultural heritage is manifested in many ways, such as oral story traditions and folklore, dances, carvings and designs.

For external parties to meaningfully engage with local communities, and for communities to express their own internal development strategies, the challenges are numerous. One way to address these is to support communities to come together to articulate the information they deem relevant in forms that can be

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4 *The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity is a 2010 supplementary agreement to the 1992 Convention on Biological Diversity (CBD).*

5 *See Raika Bio-cultural Community Protocol (2009), available at http://www.community-protocols.org/wp-content/uploads/documents/India-Raika_Community_Protocol.pdf.*

6 *The Bushbuckridge BCP: traditional health practitioners organise for ABS in South Africa (IIED PLA 65), available at http://pubs.iied.org/G03403.html.*

7 *See Biocultural Community Protocol for the Territory of the Supreme Community Council of Alto San Juan, Columbia, available at http://www.pnuma.org/english/documents/BCP ASOCASAN_english_2012.pdf*

8 *The concept of "community" is complex and plays an important role in the overall process. For more discussion of this issue see the Community Protocols Toolbox and discussion in this publication.*

understood by external parties. This can put external actors on notice about the community's identity and ways of life, customary values and laws, and procedures for engagement. Importantly, it can also catalyse constructive dialogue and collaboration to support the community's plans and priorities in locally appropriate ways. There are many ways to describe the forms that such articulation can take. We use the term "community protocol" to describe both the process and the outcome of collecting the relevant information and setting it out.

Each community protocol will be unique to the community that develops it, but there are a few steps common to many processes that can be mentioned here. Generally, the process begins with the concept of community protocols being introduced to a community that might find it useful for addressing their particular needs. The community's needs could be defensive: for example, to address challenges from an extractive industries project. They could also be aspirational: for example, to obtain recognition of their ways of life and relationships with their territories. Very often, the introduction will come through a local NGO that has heard about community protocols and already has some understanding of and credibility with a particular community. The community would then undergo a process of deciding whether they want to develop a protocol.

If the community decides in favour, the process then moves into a phase of meetings. At some early point in the process, a group will be assigned with compiling the information gathered at the meetings. The meetings provide an opportunity for community members to come together to share information, discuss issues, and decide what they want the protocol to focus on and what goals they want to achieve. The meetings can also include trainings on relevant legal frameworks, negotiations techniques, or other issues the community deems important.

At a certain point, the community will feel prepared to make the output of the process, such as a document, public. Many communities have held a public event to share the new community protocol with the press and to call for its recognition by external parties.

# COMMUNITY PROTOCOLS IN THE CONTEXT OF EXTRACTIVE INDUSTRIES

It is against this background that Natural Justice, in collaboration with the Heinrich Böll Foundation, designed a project to determine whether and how community protocols could be used to address impacts caused by extractive activities. The overall aim of the project was to identify good practices for the development and utilizisation of community protocols as an instrument to better enable communities to proactively and constructively engage with extractive industries to safeguard their rights and uphold others' responsibilities. The project sought to answer six research questions, which during the course of the project were organised into five broad areas, namely 1) its support of community engagement with external parties; 2) its benefits at different stages of a development project; 3) its usefulness in accessing redress mechanisms; 4) its capacity to address internal conflicts and 5) its overall contribution to good practice in the field of extractives and communities.

Methodology

To help answer these questions, we wanted to support and monitor community protocol processes in a broad range of contexts involving national and regional legal frameworks, stages of mining activity, and types of companies. We hoped that this diversity would allow us some initial conclusions as to whether and when protocols were most effective for engaging with external parties and whether the stage of the extractives project or the specific resource being extracted made a difference. Thus, we looked for communities in different countries that were interested in using protocols to respond to such challenges.

Natural Justice identified four suitable locations for piloting the protocol approach. In each country, local partner organisations organised community meetings and legal empowerment trainings, steered the drafting of the protocol document, and provided other assistance according to each community's needs. The four pilot processes are briefly outlined in the following section.

II. THE PROTOCOL PROCESSES
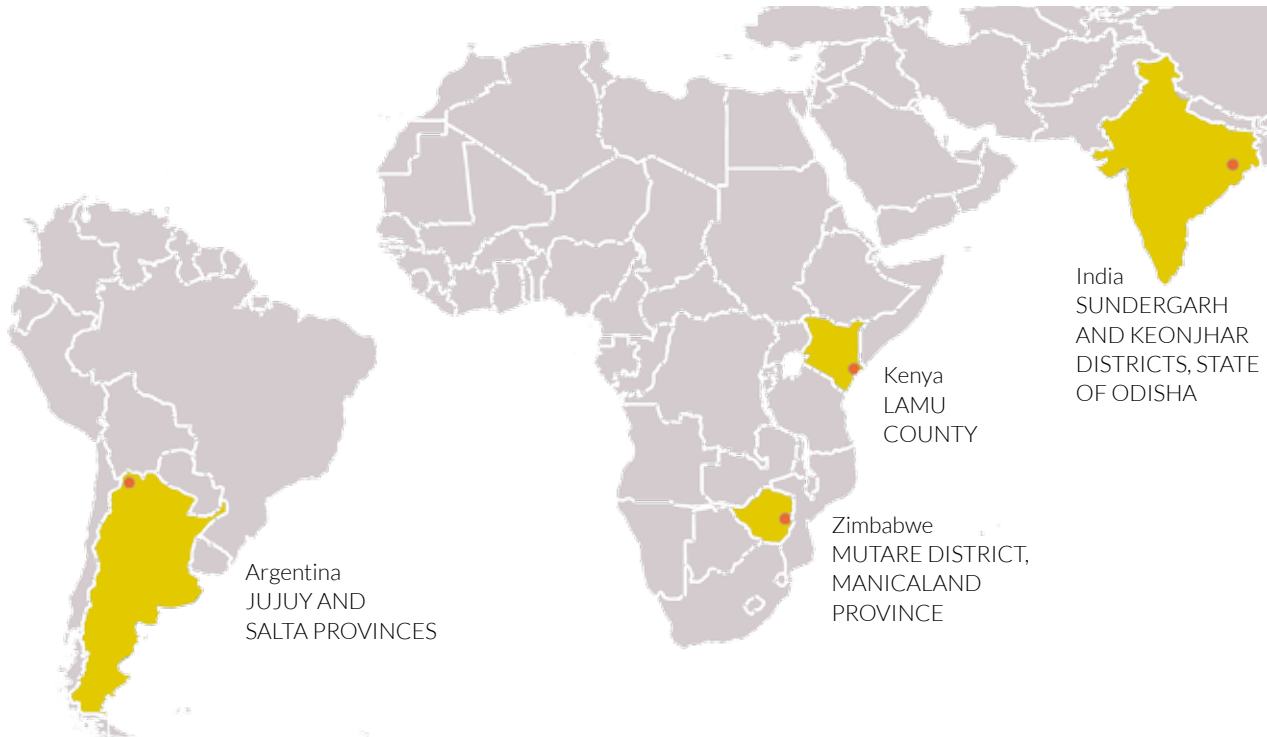
This section provides a brief overview of the protocol process in each country. See the accompanying Annexes for detailed discussion of the processes, with background information on the communities, a description of the process as it moved forward, and the major outcomes from each process.

A. Argentina: Jujuy and Salta Provinces
(ANNEX A)

The protocol process in Argentina is taking place in the remote northwestern part of the country where lithium is abundant. It involves 33 separate communities who live in a geographically defined area in relatively close proximity to each other, and who share similar ancestries, livelihoods and language. The communities are threatened by the possibility of lithium mining taking place in their territories, as well other challenges that generally relate to a central problem: the government does not adequately consult the communities about decisions that could impact them. As a result, the communities decided to focus their protocol process on articulating what free, prior and informed consent means to them.

In December 2015, the communities publicly released their protocol document, "Kachi Yupi: Tracks in the Salt". The document, which took approximately 21 months to develop, has recently received recognition from the Argentinian National Ombudsman.[9] To date, this is the only process of the four that has issued a public protocol document.

Local partner organisations: Fundación Ambiente y Recursos Naturales (FARN), Obra Claretiana para el Desarrollo (OCLADE), Equipo Nacional de Pastoral Aborigen (ENDEPA).

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9 http://natural-justice.blogspot.com/2016/05/argentinian-national-ombudsman-issues.html.

B. India: Sundergarh and Keonjhar Districts, State of Odisha (ANNEX B)

The protocol process in India took place in the state of Odisha, in the central-eastern part of the country. Villages in that region are inhabited by different "scheduled tribes," including the Paudibhuyan, who are comparatively marginalised, and the Munda, who are also marginalised but generally more empowered than the Paudibhuyan. The process over the last three years can be divided into three main phases, with the third phase currently on-going. In phase one, the process began as a way for the Paudibhuyan in the area to respond to impacts from various forms of mining, including iron ore and bauxite. However, for several reasons that are discussed in more detail in Annex B, the approach utilised in phase one did not alleviate existing divisions between the Paudibhuyan and the Munda, and in fact it may have added to those divisions. As a result, Natural Justice stopped participating in that phase. In phase two, a more inclusive approach was utilised, where members of both tribes were invited to participate in a single protocol process. That approach also faced challenges and was brought to a close. Lessons learned from phase two were then applied to the current on-going phase. In phase three, the two tribes are engaged in their own separate processes, but in a manner that is not adding to pre-existing tensions.

Of the four processes in this project, the one in India faced the biggest challenges. As a result, a protocol process did not materialise as it did in the other countries. Despite the challenges, positive outcomes have been achieved and both tribes are currently using elements of the community protocol process to address the issues that they face.

Local partner organisation: Keonjhar Integrated Rural Development & Training Institute (KIRDTI)[10].

C. Kenya: Lamu County (ANNEX C)

The protocol process in Kenya is taking place in the archipelago of Lamu County on the northern coast of the country, approximately sixty miles from the Somali border. The Kenyan process differs from the others in two major respects. First, it started off in response to a major infrastructure project—a mega-port planned for construction inside the archipelago—rather than extractive activity. Second, their protocol process began in 2010, long before this project was conceived.

Like India, the process in Kenya has faced many challenges on the ground. These include a change in the governance structure of the country in 2013, conflicts between the Kenyan government and Somalia-based militant group al-Shabab[11], and government-imposed curfews in Lamu County. Nevertheless, the process has resulted in the formation of a community-based organisation called Save Lamu, as well as a number of other outcomes discussed in more detail in the Annex.

Local partner organisation: Save Lamu.

D. Zimbabwe: Mutare district, Manicaland province (ANNEX D)

The protocol process in Zimbabwe is taking place in the eastern part of the country, near the border with Mozambique, where diamond mining has caused severe impacts on the community, both socially and environmentally. Many community members have been forcibly relocated to inadequate homes over forty kilometres away. The process thus far has led to several outcomes, including agreements with mining companies on certain no-go areas of cultural importance, a meeting with parliamentarians on issues of importance to the community, and engagement with the Zimbabwe Environmental Management Agency that has led to a commitment to work together to protect natural resources.

Local partner organisation: Chiadzwa Community Development Trust.

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10 *As described in Annex C, the local partner in India changed during the course of the project.*

11 *http://www.aljazeera.com/news/2016/01/killed-al-shabab-raid-kenyas-lamu-county-16013145837254.html*

III. FINDINGS FROM THE ACTION RESEARCH QUESTIONS

To guide the project and to provide guidance to others wishing to develop similar protocols, we posed six research questions about the utility of protocol processes in support of communities affected by extractive industries. These are:

Engagement with external parties

1. How can community protocol processes support communities in directly engaging and negotiating with companies and/or investors on the basis of free, prior and informed consent, community development agreements and other similar arrangements?
2. How can community protocol processes support communities in engaging with governments to clarify, secure and enforce the protection of their territories, resources and ways of life, including all related rights, affected by extractive industries?

Effectiveness of protocols at different stages of a development project

3. At what stage of project development (i.e. exploration, feasibility and planning, construction, operation and closure and reclamation) can a community protocol have the greatest effect with respect to the engagements set out in questions 1 and 2? At what stage(s) is it least effective?

Support for use of redress mechanisms/legal empowerment

4. How can community protocol processes support communities in using redress mechanisms (for instance, through documentation and legal empowerment)?

Addressing internal conflict

5. How can community protocol processes support communities in addressing internal conflicts that arise in connection with extractive industries and large-scale investment projects (such as exclusion or resource control disputes)? What elements are/ were essential to address the issue in an endogenous manner?

Good practices and lessons learned

6. What are general good practices and methodologies of community protocol processes that apply in this context, irrespective of the status of a project, the actors involved and the nature of the communities' aspirations and expectations vis-à-vis the investment project?

After three years, the project has gathered valuable experience from each community that can help to answer these questions. It is important to note, however, that only part of the story can be reported at this stage. For each community, the process of developing or revising their protocol document and other outcomes is on-going and will continue for as long the communities want them to. Some of the questions also proved difficult to answer comprehensively. Such challenges are noted in the discussions below.

ENGAGEMENT WITH EXTERNAL PARTIES

The last decade has seen increased interest in community engagement with extractive and infrastructure sectors, in terms of both human rights and business risks. Instruments such as the 2007 UN Declaration on the Rights of Indigenous Peoples (UN Declaration) affirm the right of indigenous peoples to maintain their cultural heritage and indicate that their free, prior and informed consent should be obtained in a variety of contexts that can affect their territory or ways of life, such as relocation, legislative measures or industrial projects. Principle 18 of the UN Guiding Principles on Business and Human Rights calls on businesses to engage in "meaningful consultation with potentially affected groups and other relevant stakeholders" in order to gauge the adverse human-rights risks of their operations.

For companies, a growing amount of research demonstrates that community engagement can reduce the project costs that companies incur when they are in conflict with communities. Temporary shutdowns and delays can run into millions of dollars of loss per day. Research has also shown that a company's market value can be positively linked to the quality of its stakeholder engagement.[12] Clearly, governments and companies both have an incentive to engage with communities on major development projects.

It is also important to note that "engagement" is a fluid concept that can mean different things to different people. Furthermore, project proponents may be increasingly willing to engage with communities, but the communities may not share their interest. This could indicate a lack of trust in the process and/ or a feeling that their "engagement" will only be a rubber stamp on decisions that have already been made.

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12 *Rachel Davis and Daniel Franks, Costs of Company-Community Conflict in the Extractive Sector, CSR Initiative at the Harvard Kennedy School (2014).*

A. ENGAGEMENT WITH COMPANIES

Although extractives companies and communities have a troubled history, standards for engagement have proliferated in a number of fora, including international organisations such as the United Nations, the World Bank and its International Finance Corporation (IFC); industry groups, such as the International Council on Mining and Metals (ICMM); and individual company policies[13].

Despite the emergence of standards and policies for companies to follow when engaging with communities, real challenges continue to exist. Communities may lack access to adequate information, timeframes can fail to take the community's own processes into account, and local leaders do not always act in the best interests of the community. Overall, stark power imbalances and the scale of money involved make meaningful and representative engagement difficult. As stated by the former Special Rapporteur on the Rights of Indigenous Peoples, "almost invariably, when State agencies or business enterprises that promote extractive projects enter into consultations or negotiations with indigenous peoples, there are significant imbalances of power".[14]

One of the principles for effective community engagement is to make sure that communities are properly prepared, which in turn can help address inherent power imbalances.[15] Preparation can include obtaining information about the project, understanding their rights and how these may be impacted, and developing discussion and negotiation techniques. Community protocol processes can create an environment for this kind of preparation, and indeed this has been the case for all four communities in this study.

To date, the Marange community in Zimbabwe is the only one of the four to have engaged with companies in the protocol process. Here, the process mobilised the community around its key concerns. During the community visioning process, it became apparent that their understanding of development differed greatly from the one proposed to them by outsiders. Their view was centred on the protection of their collective community

> **TERMS OF ENGAGEMENT**
>
> **UN Guiding Principles on Business and Human Rights**, Principle 17(a): "Human rights due diligence should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships"
>
> **IFC Performance Standards, Assessment and Management of Environmental and Social Risks and Impacts**, PS 1.3.ii: "effective community engagement through disclosure of project-related information and consultation with local communities on matters that directly affect them"
>
> **ICMM Good Practice Guide, Indigenous Peoples and Mining**, Section 2.2: "indigenous communities are informed about, and comprehend the full range (short, medium and long-term) of social and environmental impacts—positive and negative—that can result from mining"

rights, their natural environment and their cultural heritage, and grounded in customary practices of land ownership. For the Bocha people, land does not belong to any one individual but to a collective; not even a chief has the right to dispose of land. Accordingly, their land and cultural heritage are not available for sale. The protocol process reaffirmed this within the community and it became a key element of the protocol. This is the main reason for the protocol's popularity in the community: the joint visioning process united the community.

This was also where the community's engagement with the mining companies was most successful. Even though some companies did not understand the value of protecting sacred sites and chiefs' ancestral graves, the community negotiated with them to designate these sites as off-limits for mining. The community and the companies also agreed that the companies would pay a certain amount of compensation for the relocation of other graves.

In Kenya and Argentina, the communities have not yet felt ready to engage with extractives companies. The community in Argentina is much more focused on the government's legal responsibility to ensure that FPIC is

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13 See also Oxfam Community Consent Index 2015 for publicly available corporate commitments regarding community rights and community engagement in large-scale oil, gas, and mining projects.

14 Report to the Human Rights Council, A/HRC/24/41 (2013).

15 Kirk Herbertson et al., Breaking Ground: Engaging Communities in Extractive and Infrastructure Projects (World Resources Institute 2009).

effectively implemented. They are also broadly sceptical that engagement with companies would lead to any meaningful outcomes. People are aware of the potential for conflict, as well as the companies' tendency to offer individual benefits to community leaders, rather than general benefits to all.

In India, the process did not bring the community into a better position to engage with mining companies. Like the communities in Argentina, and for similar reasons, they are more interested in engaging with the government than with companies.

b. Engagement with government

In general, governments set the conditions for extractive companies to operate within their borders. The state grants licenses to companies and/or enters into joint ventures to exploit natural resources. National regulations also establish entry points for both national and local community engagement in proposed projects.[16] One important example is the requirement for impact assessments, which, at least on paper, offer a voice to affected communities. Governments also bear primary duties under international human rights law, and are charged with respecting, protecting and fulfilling human rights,[17] which are often negatively impacted in the course of extractive activities. For these reasons, all of the communities in this project made engagement with government the primary objective of their community protocol process.

At the time of publication, the communities in Argentina and Zimbabwe have seen the highest level of government engagement of the four communities. There are a few possible reasons for this in Argentina. The first is that the communities were able to produce a protocol document and present it publicly, with a request for its recognition by the National Ombudsman. Another is that, according to the World Justice Project's Rule of Law Index, the rule of law in Argentina is the strongest of the four countries.[18] One principle of the rule of law is that the government, its officials and agents are accountable under the law. Argentina's comparatively higher position on the Rule of Law Index may indicate that public officials are more inclined to give the public, including indigenous communities, their due. Argentina is also the only one of the four countries to have ratified ILO Convention No. 169, an international treaty with provisions for the principle of free, prior and informed consent.

At the other end of the rule-of-law spectrum sits Zimbabwe with endemic government corruption. State security forces have been responsible for widespread human rights violations, NGOs and members of civil society face harassment and arbitrary arrest, and there is limited press freedom.[19] Despite these issues, the protocol process has led to some engagement with Zimbabwean parliamentarians and the Zimbabwean Environmental Management Agency. One reason for this is that the protocol process was seen to be driven by the aspirations of the local communities rather than by a "foreign agenda". It was also not confrontational, which made it much easier for the government to engage and even become advocates for the community.[20] The main demand coming through the protocol process has been to question the government's management of the diamond-mining industry in Marange. Indeed, certain government officials—including the minister of the province where Marange is located—have faced difficult questions from parliament over their behaviour.[21] Whether the government is pursuing this matter has yet to be seen.

The fact that relatively substantive engagement with government has taken place in Zimbabwe demonstrates that protocol processes can be effective even where the rule of law is weak. It provides a platform for organised communities to interact with individual politicians and officials, some of whom may be sympathetic, regardless of where the country ranks on the Rule of Law Index.

Other factors may be equally important to external engagements, such as the level of agreement among community members on a particular issue. This level is high in the Argentinian and Zimbabwean processes, but it has taken longer for the communities in India and Kenya to agree on the focus of their protocols. Communities that speak with a unified voice may give the government more incentive to engage, and be more effective when that engagement takes place.

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16 Emma Wilson et al., *Meaningful Community Engagement in the Extractive Industries* (IIED, 2016), at 19.

17 *UN Guiding Principles on Business and Human Rights, General Principles.*

18 *Rule-of-law rankings are based on eight themes, all of which are relevant to respect for community rights: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice.*

19 *https://freedomhouse.org/report/freedom-world/2015/zimbabwe*

20 *http://allafrica.com/stories/201602291672.html*

21 *http://www.herald.co.zw/mps-grill-mushohwe-over-marange/*

22 Emma Wilson et al., *Meaningful Community Engagement in the Extractive Industries* (IIED, 2016), 28.

EFFECTIVENESS OF PROTOCOLS AT DIFFERENT STAGES OF A DEVELOPMENT PROJECT

Another question that this project sought to answer is at what stage of project development (i.e. exploration, feasibility and planning, construction, operation, etc.) can a community protocol have the greatest effect with respect to engagement with companies and/or government? At the time of publication of this paper we are not able to answer this question definitely as we do not currently have enough information. Nevertheless, we can sketch a few preliminary conclusions about when protocols might be most effective.

a. Early engagement is generally better

It is generally accepted by development proponents that early stakeholder engagement is a best practice, and the earlier this engagement occurs, the more opportunity there is for input on plans.[22] Additionally, "communicating early, often, and clearly with stakeholders helps manage expectations and avoid risks, potential conflict, and project delays"[23]. The crux of the matter lies in the way that "engagement" is defined. How does engagement take place and who is involved? Does the community actually have a voice in the conceptualisation phase of a development project, and do they have enough information for that to be meaningful and timely? This kind of question will help determine whether the engagement was effective, meaningful, and provided communities a fair opportunity to contribute to the project.

It is likely that a protocol process will be most effective if it begins at the earliest stages of a development project. The earlier a community can develop an understanding of the relevant laws and impact assessment processes and then establish their position with regard to a project, the stronger that position will be when engagement begins. Even so, the Zimbabwe process demonstrates that community protocols can be productive at any stage of a development project. Mining had been in progress for several years before the community started the protocol process, but its engagement with the government and companies led to restrictions on mining activity.

Another conclusion is that earlier can also be easier. Unlike the other communities, the Argentinian process began at the earliest (exploration) phase of the extractives project. The community could take the time they needed to engage in their process with relatively little external pressures. Notably, although there are many other factors involved, Argentina is also the only process to have publicised a protocol document.

By contrast, in all of the other processes, some form of project development had already taken place. In Kenya, parts of the port infrastructure—a road and an administrative building—were built shortly after the protocol process began, and some people had received compensation for government-appropriated land. The belief that the port project would bring compensation and other economic opportunities to Lamu made it more difficult for the community to adopt a unified position. However, the good work that was done on the community protocol has now formed the foundation for community engagement on a proposed coal-fired power plant in Lamu. In India, mining activity had been established for decades. A significant portion of the community depends on mining for their livelihoods, even if it is simultaneously responsible for damaging the environment. Again, this made a unified position hard to find, which made the protocol process longer, and they may not develop a protocol at all.

The Zimbabwean process does not fit neatly into this conclusion, as the community was able to agree on a unified position despite the fact that the protocol process started years after mining did. This may be because few, if any, community members have benefitted from the diamond mines. Without the conflict of interests found in Kenya and India, the Zimbabweans were inclined to agree on issues related to impacts from the mines. It is anticipated that a protocol document will be made public by the end of 2016.

b. Community protocols can make engagement more effective & meaningful

At any stage of the project, a protocol process can support many of the factors that make for effective community engagement. These include:

- an inclusive environment for input within the community
- the opportunity to develop opinions and expectations of a particular project
- organisational and negotiation skills
- knowledge about extractive industries in general
- awareness of laws and rights
- understanding the processes where public consultation is provided for, such as impact assessments.

The protocol processes in this project have led to the realisation of many of these factors. All of the communities have also received legal empowerment training to boost their knowledge of relevant laws and rights.

23 IFC, A Strategic Approach to Early Stakeholder Engagement: A Good Practice Handbook for Junior Companies in the Extractive Industries (2014).

24 Emma Wilson et al., Meaningful Community Engagement in the Extractive Industries (IIED, 2016), 28.

25 In the UN Guiding Principle No. 25, on access to remedy, the term is used "to indicate any routinised, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought".

SUPPORT FOR USE OF REDRESS MECHANISMS/LEGAL EMPOWERMENT

"Redress mechanism" broadly refers to any routinised process where grievances regarding the violation of rights, guidelines or standards can be raised.[25] Many such mechanisms exist to provide remedy or resolution for human and/or environmental rights violations or breaches of policies or standards. However, their existence alone is not enough to prevent rights violations. Governance gaps, corruption, and pro-investor trade agreements can thwart access to justice, as can inadequate national judicial systems.[26] Communities also need to understand which rights a particular mechanism has jurisdiction over and the procedural systems of grievance mechanisms demand a certain capacity in order to bring a claim. Protocol processes can support communities by, for example, providing documentation and legal empowerment training.

As noted in **Annex A**, the communities in Argentina accessed redress mechanisms before the protocol process began. In fact, the slow pace of the court system helped motivate their decision to develop a community protocol. At this stage of the project, two of the communities—Kenya and Zimbabwe—have utilised redress mechanisms during the course of the protocol process. In Zimbabwe, the community has preferred to use its widespread community support to instigate dialogue and negotiation with parliamentary committees. In Kenya, Save Lamu submitted a petition to the High Court of Kenya in 2012 concerning the negative environmental and cultural impacts of the proposed port and alleging breaches of the communities' constitutional rights.[27] While it has faced a number of procedural hurdles and the case has yet to be decided, the petition is an important component of the communities' strategy to assert their rights.

We can also conclude at this stage of the project that all of the processes have resulted in increased legal empowerment of the communities. We define "legal empowerment" broadly to mean increasing the capacity of people to understand and use the law.[28] All of the communities received legal training on relevant national and international frameworks during the course of their protocol processes. This has led to increased understanding of their rights and mechanisms for ensuring that those rights are upheld. In India, for example, community members used their training on legal frameworks to successfully demand compen-

> ## EXAMPLES OF REDRESS MECHANISMS
>
> **National level**
> - courts
> - human rights institutions
>
> **Regional level**
> - Inter-American Commission and Court of Human Rights
> - African Commission and Court of Human Rights
> - European Commission and Court of Human Rights
>
> **International Level**
> - World Bank Inspection Panel
> - IFC Compliance Advisor Ombudsman
> - OECD National Contact Points

sation from the government for damage to their farmland and houses caused by elephants. Community members are also using their understanding of forest rights to demand access to forest resources that had been previously denied to them. In Kenya, the community is now using the administrative processes set forth in domestic laws to request information, analyse the adequacy of assessments, and provide input into the planning process in order to highlight alternatives to the project and ensure adequate mitigation or remedy of impacts.

ADDRESSING INTERNAL CONFLICT

It is widely acknowledged that the presence of extractive industries can cause "significant deterioration in communal social cohesion and the erosion of traditional authority structures among indigenous peoples"[29]. This is exacerbated when individuals directly receive economic benefits or the project gives rise to "corruption and bribery of leaders, or even the setting up of false leaders who are more amenable to accepting projects, is prevalent"[30].

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26 *International Federation for Human Rights, Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms (3d ed. May 2016).*

27 *Save Lamu Petition in High Court of Kenya, 2012, available at http://www.savelamu.org/wp-content/uploads/2011/08/LAMU-Petition.pdf.*

28 *See Laura Goodwin and Vivek Maru, What do we know about legal empowerment? Mapping the evidence (2014).*

29 *IWGIA, Pitfalls and Pipelines (2012), available at http://www.iwgia.org/iwgia_files_publications_files/0596_Pitfalls_and_Pipelines_-_Indigenous_Peoples_and_Extractive_Industries.pdf.*

30 *IWGIA, ibid.*

Community protocols in other contexts have showed promise in helping communities to address potential conflicts by providing space to:

- allow sub-groups within the community, such as women and the elderly, to participate in the process
- identify leaders who could speak on their behalf
- develop unified positions with regard to a specific project
- agree on methods for the community as a whole to share in the benefits.[31]

In practice, it is difficult to say conclusively that a community protocol process is responsible for helping the communities to address internal conflicts. For example, we do not have a situation where a pre-existing level of extractives-related conflict was directly alleviated by engaging in the protocol process. However, several developments coming out of the processes demonstrate their potential.

a. Formation of community groups/ organisations

In Kenya and Zimbabwe, the processes led to the formation of community organisations that helped community members gather and share their thoughts on specific issues. This was particularly profound in Kenya, where Save Lamu was formed out of the protocol process itself, bringing many existing grassroots community groups under one umbrella to take the process forward. In Zimbabwe, two new groups were formed: the Zimbabwe Diamond and Allied Workers Union and the Mining Communities Coalition. Although the formation of community groups does not automatically mean that all issues will be dealt with, participation in local associations can empower vulnerable groups to engage in public politics and take collective action.[32]

b. Opportunities for cohesion, but challenges as well

Community protocol processes promote dialogue among a broad array of community members and groups, which has been shown to help alleviate internal conflict.[33] Dialogue here means more than simply talking. It entails self-reflection, empathy toward other participants, and taking a long-term perspective.

Protocol processes promote inclusion of potentially marginalised groups within communities, such as women, youth, the elderly, the disabled, and others. This inclusive approach, however, does not always accord with local custom. In Zimbabwe, a heavily patriarchal society, it was hard for women to fully participate during the early stages of the protocol process. But by holding meetings in places where women traditionally gathered, the facilitators were able to ensure their participation and voice in the development of the protocol.

Sometimes, addressing these traditional power differences can prove extremely difficult. In phase two of the process in India, for example, the facilitators attempted to bring together the Munda and the Paudibhuyan, two tribes living in the same villages, to develop a community protocol together.[34] After several meetings, it became clear to the facilitators that the comparatively dominant social position of the Munda meant that the Paudibhuyan could not participate equally in meetings. As in Zimbabwe, separate meetings were held. However, this revealed that the two tribes faced vastly different issues and that it would not be possible to develop a common protocol for both. Nevertheless, it was important that both tribes were initially part of the same process and later informed about what was being undertaken by both groups. This helped to alleviate feelings of division and exclusion that had surfaced in phase one of the protocol process.

It is also possible for protocol processes—as with other community development processes—to exacerbate rather than alleviate pre-existing internal disagreement and conflict.[35] Perhaps the biggest area of risk is the decision about who will be invited to participate. In the first phase of the process in India, the local NGO external facilitators decided on the participants without adequate input from all members of the community. The feelings of resentment that developed among those excluded only added to pre-existing tensions.

In contrast, the processes in Argentina and Zimbabwe were relatively inclusive of all community members within a defined geographic area who were impacted by the issues at hand. Conflicts did not get in the way of developing the protocols, and any disagreements that arose could be dealt with and even strengthen the protocol. In Argentina, where the protocol community

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31 *For more information on these processes, see IIED Participatory Learning and Action, Parts 3 and 4 (discussing protocol process in South Africa, Ghana, India and other countries).*

32 *Emily Combaz & Claire Mcloughlin, Voice, Empowerment and Accountability: Topic Guide, (University of Birmingham, 2014), available at http://www.gsdrc.org/topic-guides/voice-empowerment-and-accountability/supplements/social-and-economic-empowerment/.*

33 *See United Nations Development Programme, Dialogue and Mediation, at http://www.undp.org/content/undp/en/home/ourwork/democratic-governance-and-peacebuilding/conflict-prevention-and-peacebuilding/dialogue-and-mediation.html.*

34 *For a detailed description of the three phases of the India process, see Annex B.*

35 *Aaron Padilla et al., Community Development and Local Conflict: A Resource Document for Practitioners in the Extractive Sector (CommDev, 2008).*

brought together 33 local communities, they argued about whether all communities should be involved in implementing FPIC processes if the matter in question was likely to affect only one or just a few communities. After due consideration, it was agreed that they should.[36]

GOOD PRACTICES AND LESSONS LEARNED

As we have seen, protocol processes can lead to many different outcomes and changes for communities, such as publicly launching a protocol document, new ways of community organisation, and engagement with external parties. Below we discuss some of the outcomes from each process and examine why they may have taken place.

a. Local partners are essential to support protocol processes

By definition, community protocols rely on the desire of community members themselves to take up such a process. Protocols are done *by* rather than *to* a community. It requires active engagement by a variety of different community groups and is totally dependent on the internal dynamics and leadership.

Community protocols are thus inherently context-specific and local. If an international NGO with little knowledge of local context wants to support the development of a community protocol, one or more local organisations are vital for the viability of that process. In all of the processes in this project, Natural Justice partnered with either national NGOs and/or community-based organisations with the local knowledge and understanding to support protocol processes in a manner that respects community customs.

At the same time, international NGOs can promote inclusivity and the participation of marginalised sub-groups. They need some understanding of the dynamics on the ground in order to make decisions about the integrity of the process they are supporting. The goal is to ensure that the community as a whole can participate and that no one is unfairly excluded.

b. Community ownership over the process is critical

Community protocols are meant to embody an endogenous process, one that is shaped from within the community. Thus, community members have to feel investment in and ownership of the process overall. This project has demonstrated a few critical elements that should be in place to foster community ownership.

Setting own objectives
One important element is ensuring that community members choose the objectives of the protocol process. Objectives selected by external parties may not reflect the realities on the ground or the issues that the community truly wants to address.

This issue arose in phase one of the Indian process, where the purpose of the protocol—that it should focus on the impacts caused by extractive industries—came from outside the community. Mining had actually been going on for decades in the area, and was not the community's primary concern. The other three communities all chose the focus of their protocol for themselves. In Argentina, they considered working towards FPIC solely in the context of extractives, but ultimately decided to include all development decisions with the potential to impact them. The community in Zimbabwe took over a year to decide on the focus of their protocol. And in Kenya, the community already had the port project in mind when they first decided to engage in a protocol process.

Deciding on participants
As noted above, the choice of participants is a critical element, and one with a high potential for conflict. In the first phase of the Indian process, the facilitators decided, without any meaningful consultation with community members, that only one of the tribes (the Paudibhuyan) would participate. This created feelings of exclusion and reduced the sense of community ownership of the process.

In phase two, the facilitators worked to ensure inclusivity, special meetings were held and methodologies used to ensure that members of the Paudibhuyan were heard. The onus must be on the facilitators to go the extra mile to ensure that sub-groups have a space to express themselves comfortably. Even when all groups in a community cannot be brought together in one room, it is important for facilitators to engage with all relevant groups in the area, lest the protocol and its facilitators be perceived as taking sides.

However, there can be a role for external parties in the selection of participants in the process. Within careful limits, outsiders may bring a fresh perspective to the table and advocate for processes to be as inclusive as possible. For example, they might discuss the potential

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36 *See Annex A for further detail.*

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of long-term conflict if only certain people are allowed to participate. They might suggest an integrative approach that includes all those who are potentially impacted by a project, rather than including by community identity. This role, however, must be undertaken cautiously and with full respect for the community's own decision-making processes. In certain situations, it may not be possible to address local differences in power, education, and other factors. These situations present a potential barrier to the community protocol approach—as they do to any approach to community empowerment.

Need for space and time to develop a protocol
It is also critical to recognise the large amounts of space and time that communities will often need to choose the focus of their protocol. This part of the process, however, lays the groundwork for further constructive activities.

c. Development of a public protocol document

While publishing a protocol document is by no means the only goal of a protocol process, it is common to most processes. Even when a document is made public, it is important to think of it as evolving with the communities' needs rather than set in stone. Protocol documents are never final. Argentina is the only community in the project that has publicly released its protocol document. From the time that they were introduced to the idea, that process took around 21 months. Some possible factors for this are discussed below.

Governance structure
In Argentina, the communities had a governance structure that was very conducive for developing a protocol document. The Mesa Grande is a governing body formed by the 33 communities in the watershed spanning Jujuy and Salta provinces. Elected representatives from each community meet regularly to exchange information and discuss strategies to defend their rights and territories. The Mesa Grande was created in 2010, four years prior to the beginning of the protocol process, to respond to the threat of mining. It provided an ideal framework for meetings, workshops, trainings and other activities that led to the drafting of a written document. Community representatives had already been selected, and a system for holding meetings was in place. The communities had methods for documenting views and information, and for organising that into a format that the communities would eventually agree to make public.
Role of writing

The communities in Argentina, probably more than the others in this project, have a strong tradition of writing. This meant they did not have to rely on external facilitators to take notes of meetings or organise them, and could take a large degree of ownership over the process and the development of the protocol document itself. In general, where writing capacity already exists within the community, the chances of developing a written protocol will be higher.

At the same time, it is important to note that a strong tradition of writing is not a prerequisite for creating a protocol document that the community can own. If a written document is a goal, proper facilitation and participatory methods can be used to allow communities with stronger oral than written traditions to develop a written document. Additionally, the physical output of a protocol process does not need to be a document. It could be in any form that the community chooses, such as a video or audio recordings.

Size matters
The number of people covered by the protocol in Argentina (around 6,500) is far fewer than in Kenya (56,000) or Zimbabwe (74,000). From a logistical standpoint, the document had fewer different positions to take into account. But size is not a decisive determinant of how quickly a process will move forward. At the time of writing, the community in Zimbabwe, despite the relatively large number of people involved, is almost ready to publicise their protocol document. In India, where there were fewer people involved in all phases of the protocol process than in Zimbabwe, the community is much further away from that. As described in more detail in Annex B, this is due to several factors, including the manner in which the process was facilitated and dynamics within the community.

The document (or other physical output) isn't everything
One important lesson that has come out of the processes thus far is that a protocol document does not need to be "finished" in order to serve as a basis for engagement with external parties. As we have seen in Zimbabwe and Kenya, the protocol process led to a number of outcomes, including extensive engagement with the government, even though a document has not been made public. In India, legal empowerment took place even at the earliest stages of the process. The goal of developing a protocol allowed the communities to define their priorities and coordinate meetings with government representatives, including parliamentarians and agency staff.

d. Pre-protocol study

Anyone interested in supporting protocols might consider commissioning a pre-protocol study of the socio-political situation in the project area. Such studies could be done by independent consultants who understand the community protocol concept and can identify factors that might contribute to a successful protocol process, or hinder it. This could flag situations where developing a protocol may not be practical or advisable.[37]

e. Costs and resources

Protocol processes do demand a significant amount of resources. By definition inclusive and participatory, they require a great deal of effort to ensure that meetings are held, that a broad spectrum of community members attend, and that information is gathered in a constructive manner. Facilitators can be extremely helpful for incorporating methodologies that keep meetings interesting and community members engaged, but success will ultimately depend on internal community champions who have the energy and dedication to keep the process going.

Above all, this means developing a community protocols takes time and is expensive. How much will be required to achieve certain outcomes will vary widely depending upon each specific context. However, some general features will be common to many situations.

There is no formula to determine how much time a protocol process will take. Outcomes such as increased legal empowerment and engagement with external parties can be achieved relatively quickly. However, an inclusive, holistic public protocol document will likely take at least a year. We are aware of at least one process that developed a protocol document in a matter of months, but taking only the processes that are part of this project as a guide, the one in Argentina was the quickest, issuing their document after 21 months.

Financially, most expenses will stem from the various community meetings, such as transport and food for attendees. Again, there is no formula, but all of the processes in this project held at least 20 meetings, with as many as 100 people attending each meeting. Other costs may include payments for external facilitators as well as lawyers and other experts who can provide the community with relevant information.

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37 *For a discussion of elements to consider in a pre-protocol assessment, see the Community Protocols Toolbox, available at http://naturaljustice.org/community-protocols-toolbox/.*

IV. RECOMMENDATIONS AND CONCLUSION

For those wishing to support the development of community protocols in the future, there are a few things to consider. First of all, it is impossible to escape the fact that all of these entities—communities, local partners, international NGOs and funders—will have their own agendas. It is crucial for those who work together on protocol processes to bring these into alignment. The protocol process will be undermined if external entities have motives that do not align with those of the community.

Communities

- The basic principle of community protocols is that they are inclusive. The protocol should try to include all members of the community, meaning all the smaller sub-groups that make up the community as a whole, such as women, children or the elderly. Communities engagshould seek to include all the sub-groups that make up the community who and will be covered by the protocol.

- Defining specific and reasonable priorities at the outset can help make the process more manageable. Protocol processes often grow to encompass all issues that the community is facing, which can greatly increase the resources required. While that may be how the community wants to proceed over the long term, maintaining focus is important in order to respond to short-term needs. At the same time, the process should be flexible enough to respond to changing realities and community needs over time.

- It can take months or years to develop a protocol document, but many outcomes can be achieved before that time. Even if a document is not complete, communities should be on the lookout for opportunities to engage with government or otherwise advocate for their rights.

Local partners[38]

- Local partners can play a variety of different roles in community protocol processes, such as providing support for meeting logistics, facilitating meetings, and helping external parties to understand local dynamics.

- Local NGOs and other partners must also be aware of the perspective they bring to the process. The objective should be to support the community as a whole.

International NGOs[39]

- Due to the inherently context-specific nature of a community protocol process, NGOs should have some understanding of the local context in order to be able provide appropriate support. They must be aware of the perspective they bring to the table and work to ensure that this perspective shows respect for and an understanding of the community's needs and goals.

- Because it is difficult for outsiders to have a true understanding of the local context, the participation of local partners is essential to navigate complex situations on the ground.

- Community protocol processes ideally support local customs and leadership, as well as inclusivity and participation by all groups that make up the community. Where there is tension between custom and inclusivity, NGOs can help to negotiate—in locally appropriate ways—a balance between the two.

Funders[40]

- Community protocol processes that produce public documents or similar outputs will generally be multi-year endeavours. Support will be needed for meetings, legal training and other expenses, depending on the context.

- Communities must have time and space to decide on their own objectives and determine their priorities.

- Funders must allow a certain amount of flexibility, as the process moves forward at the community's pace and in the direction the community decides to take it.

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38 *Local partners include national NGOs, community-based organisations and other organisations or individuals who may be assisting in the process.*

39 *These recommendations assume that the NGO will have a relatively high level of involvement in the process.*

40 *These recommendations are directed to traditional funders, such as foundations that support community development in general. Further research and understanding would be needed for other potential funders, such as government entities or companies. At the least, protocol processes should never be used to promote external agendas.*

The last three years have provided an important opportunity to learn more about the development of community protocols in the context of extractive industries and associated infrastructure projects. We have seen that protocol processes can be a powerful tool for communities to mobilise and address the challenges they face, and they provide a platform for many different activities in support of this. These include meetings to discuss issues and share information towards developing a unified response to various challenges; processes that build knowledge of relevant rules and laws, etc.; and interactions with external actors, in particular government and company officials, whose decisions impact the community. Once a protocol is in development, it can also provide a foundation for any additional actions that the community decides to undertake. For example, Save Lamu is using the community protocol process in its engagement with the proposed power plant.

We have also seen that the process of developing a protocol is challenging in itself and does not automatically lead to community unity. Where the protocol community consists of different groups living in close proximity, unaligned interests or goals can make a single protocol process even more difficult. Furthermore, since the development of a community protocol document can take a significant amount of time, it may not be the most appropriate way for communities to respond to immediate challenges.

Finally, each process is unique, as it depends on the variety of particular features that are present on the ground. Although this makes it difficult to make any universal claims about community protocols, this project has demonstrated that they can be an effective tool, even in the most complex environments.

ANNEXES: PROCESS DESCRIPTIONS

ANNEX A. ARGENTINA

The protocol process in Argentina is taking place in the remote northwestern Puna region, in the provinces of Jujuy and Salta. The region is part of the so-called "lithium triangle," which—along with parts of Bolivia and Chile—is estimated to hold between 60 and 80 percent of world reserves of lithium brines. Lithium in this area is relatively inexpensive to extract as it occurs in natural brines with a low marginal cost of production.

Argentina is a federal republic divided into provinces that are largely autonomous , each with its own constitution, body of laws, governor, legislative and judicial powers. As a result, they have almost complete authority to grant or deny mining licenses within their boundaries. The provincial government of the province of Jujuy has declared lithium reserves as strategic for the province and set a special procedure to approve exploration and extraction projects which makes no reference to prior consultation or FPIC with the 33 communities who claim the land as their own.

Community profile

The "community" for purposes of the protocol includes 33 individual communities that collectively identify themselves as the indigenous communities of Salinas Grandes and Laguna de Guayatayoc. The combined population is around 6,500 people and 1,300 families. The communities' ancestors have long harvested salt from the salt plains of the watershed, and their culture is based on traditional ways of salt extraction. They also spin cloth and engage in small-scale agricultural and livestock activities. They take part in complex networks of exchange of objects, products and information within the wider region. The 33 communities in the watershed identify with their common struggle against external threats, including lithium mining, and share the same language, ethnicity, and similar livelihoods. Additionally, written documentation plays an important role in the communities' governance processes. They generally keep notes of their meetings, and record the decisions they reach.

Prior to 2010, the 33 communities generally did not engage in coordinated efforts together and interacted on a relatively ad hoc basis. However, in 2010, they learned that exploration for lithium mining was taking place in their territory. They discovered this through anecdotal information, such as news outlets, and because people they did not know were digging holes in the ground. In

response, the communities formed a body called the Mesa de la Cuenca de Salinas Grandes y Laguna de Guayatayoc (referred to as the Mesa Grande, or "Great Table"), with elected representatives from all 33 communities in the watershed that spans Jujuy and Salta provinces.

In the Mesa Grande, representatives meet regularly to exchange information and discuss strategies to defend their rights and territories, and hold monthly meetings to report back to their communities about the discussions. This has led to a number of activities. In 2010, the communities filed a lawsuit before the Argentinian Supreme Court of Justice, claiming a breach of their right to access information and their right to free, prior and informed consent (FPIC) in relation to lithium exploration and exploitation. When the lawsuit was rejected due to lack of evidence, the communities pursued their complaint at the supranational level. They turned to the United Nations Special Rapporteur on the Rights of Indigenous Peoples and filed a complaint with the Inter-American Commission on Human Rights. However, the case moved slowly and, although Argentinian law supports the communities' rights to FPIC, the government claimed that it did not understand how FPIC processes with communities should be undertaken.

Developing the community protocol

In late 2013, the communities heard about community protocols through Fundación Ambiente y Recursos Naturales (FARN), an Argentinean sustainable-development NGO that had worked with them for several years on other projects. At the time, the communities were already developing a short document to express what FPIC meant to them in a way that the government and other actors would understand. When they heard about

the concept of community protocols, they decided to start a broader process that involved more work, discussion and content.

From the outset, the communities agreed that the purpose of the protocol would be to articulate their right to FPIC. The initial discussions focused on whether its scope would be limited to FPIC in the context of mining, or with regard to any decisions that affect the communities. For example, the route of the Dakar Rally, an off-road vehicle race that has been run in South America since 2009, crosses the communities' territories. Hundreds of race vehicles and support vehicles, with all their related impacts, entered the area with no consultation about whether the race could run through their territory or even where the route would be. Ultimately, the communities decided to call for FPIC in relation to any decision has the potential to affect them.

The process began in March 2014, and the communities finalised a written version of their protocol in December 2015. During that time, they held approximately 20 meetings of different types, including general assemblies and smaller workshops and exchanges (Mesa Chica, or "Small Table"). Efforts were made to ensure that each community was represented at the meetings, and the workshops and trainings were held in different places in the watershed to ensure that all the communities were able to participate. Depending on the type of meeting, between 20 and 40 people usually attended, with an even distribution of male and female adults and elderly people. Children and youth did not actively participate in the process.

The community assigned specific members to take written notes during general meetings to document the information that would be included in the protocol. In smaller group discussions, volunteers also took notes and summarised the discussions. The meetings involved participatory discussions at both Mesa Grande and Mesa Chica meetings. This methodology is in general use in other contexts as well, as the communities have a very organised way of addressing issues, with space for everyone to speak.

Results of the process to date

The protocol document that was published in December 2015 is one of the major results thus far in the Argentinian process. The protocol is entitled Kachi Yupi, which means "tracks in the salt" in the communities' indigenous language. It explains who the communities are, their history and way of life. It gives a broad understanding of the different rights of the communities, referencing both national and international legislation. Finally, it indicates to the authorities how an FPIC process should

be undertaken for any project to be carried out on the communities' territory and/or which might affect their rights.

Using the communities' traditional methods of harvesting salt as a framework, the Kachi Yupi protocol establishes a specific procedure for appropriate consultation with the communities and obtaining their FPIC. The protocol highlights aspects of the Andean worldview, integrating the harmonious relationship with Pachamama (the Andean earth mother) and the spirituality and ancient culture of communities. The description of the communities' history includes the struggle over land rights since the arrival of the Spaniards and the formation of the Argentinian state.

The protocol is also meant to strengthen the community members' capacities regarding external decisions, policies, regulation and projects that may affect them or their territories. With regard to the exploitation of natural resources, the Kachi Yupi protocol aligns itself with the tradition of sumak kawsay ("good living"), which proposes the revaluation of ancestral knowledge and expertise and stands as a political and organisational alternative to state-centric development plans and models that do not acknowledge the communities´ history and values.

In addition to the written document, the protocol process led to other outcomes, one of which was to strengthen the Mesa Grande governance system. The concrete goal of developing a protocol was ideal for the Mesa Grande to work toward. Holding meetings and workshops, revising the document, and coming to an agreement on the scope of the protocol all helped to keep the Mesa Grande active and relevant as the process moved forward. Additionally, it led to increased legal empowerment. Many participants in the community meetings were initially not aware of the content and importance of the existing legislation and international standards. The discussions held during the different stages of the protocol process enabled a better understanding of the scope of the standards and how they should be used in the communities' own context. Overall, there is a feeling that communities are in a better and stronger position to defend their rights.

Another major development occurred in May 2016, when Argentina's National Ombudsman issued a resolution recognising the Kachi Yupi protocol, and recommending that national and provincial authorities "recognise and respect" the FPIC process set out in the protocol when they seek to adopt legislative or administrative measures that may affect one or more of the 33 communities.[1] This includes the formulation and implementation of plans regarding development programmes, as well as the authorisation of exploration or exploitation of existing resources on the communities' territory. This marks the

1 For more details, see http://natural-justice.blogspot.com/2016/05/argentinian-national-ombudsman-issues.html.

first time that a community protocol has been recognised by the National Ombudsman.

Additionally, in January 2016, the tourism and environment agencies of Jujuy province signed an agreement with communities impacted by the Dakar Rally to open a consultation process on the route of the 2017 race.

Challenges

Despite the success of the process so far, there were many challenges along the say. Some of the biggest—as is common with many processes—were logistical: finding the time for people to meet and ensuring that the process was inclusive. The communities generally held one-day meetings to work on the protocol, but this often felt insufficient to discuss all the issues as thoroughly as they would have liked. However, it was also difficult to stay away from work for the two-day meetings they would have preferred. Secondly, the steps necessary to ensure that all the communities were represented and that there was broad community buy-in to the process all took a significant amount of time. And thirdly, the younger generation was not equally included in the process. The communities would like to address this in the future.

Another challenge arose when the communities disagreed about the implementation of the protocol and how FPIC processes would work in practice. Some did not want a decision that they believed would affect only their community to be subjected to a process that involved all 33 communities. They feared they would lose their autonomy and freedom to make decisions for themselves. Others felt it would be more beneficial to all communities if all were included. To reach consensus on this required more time for meetings and discussion. Ultimately, the communities decided on a framework in which all communities would be part of a consultation process.

Next steps

Now that the protocol has been made public, the communities want to share information about the document and its development with others. They are thinking of hosting a meeting with other communities in the Puna region of Argentina to discuss the protocol, as well as exchanging experiences with communities in neighbouring countries, such as Chile and Bolivia, that are also feeling the effects of lithium and other mining activities and might find community FPIC protocols very useful. The communities are also interested in interdisciplinary mapping to provide different levels of information, including geographical features, various land uses, and the location of mining concessions. Additionally, FARN wants to develop a legal strategy to use the protocol to respond to the activities of Canadian mining company Dajin Resources Corporation, which has 100 percent interest in mining concessions covering 93,000 hectares in the Salinas Grandes/Guayatayoc basin.

General reflections

When the process of developing the protocol got underway in early 2014, there was a lull in lithium exploration in the communities' territory. This lack of mining activity meant that there was less pressure from external parties and little interference from companies that could negatively impact community dynamics. It was good timing for the protocol process.

At the time of writing, there appears to be increased activity in the mining sector, but it is difficult as yet to evaluate the effect that the development and use of the Kachi Yupi protocol has had and will have on extractive activity in the communities' territory.

This process highlighted the importance of relying on existing community organisations and processes (in this case, the Mesa Grande system). The successful completion of the Kachi Yupi protocol also helped to strengthen the Mesa Grande by providing it with a task that was well suited to its structure and purpose. Overall, the protocol process served to support a broader exercise of community consolidation and empowerment. It gives communities a powerful tool, but they have more work to do in order to conceive their development model, secure livelihoods, and relate to the state and other external actors. It was noted that more time might have been spent setting up the next level of discussion once the protocol was finalised.

ANNEX B. INDIA

Background

The protocol process in India has in certain ways been the most complicated of the four processes in this project. It has taken place in three major phases, with the third phase currently ongoing. The process began in October 2013, in the Sundergarh district of the state of Odisha where, for several decades, villages have been heavily impacted by the mining of various minerals, including iron ore, bauxite, and graphite.

As with other districts in India, Sundergarh is home to several Scheduled Tribes. This is an official, constitutionally-recognised designation for various groups of historically disadvantaged indigenous people in India. Within this designation, there are also Particularly Vulnerable Tribal Groups, characterised as living a pre-agricultural form of existence with zero or negative population growth and low levels of literacy in comparison with other tribal groups.

Developing the community protocol

Phase one (October 2013–October 2014)
As it did in the processes in other countries, Natural Justice partnered with a local NGO to develop a community protocol to address the impacts of mining. The local NGO, which had been working with the members of certain villages in the Sundergarh district for over a decade, selected 20 villages and led the facilitation of the process. The people in the selected villages were mainly members of two different "scheduled tribes", the Paudibhuyan and the Munda. The Paudibhuyan are also a "particularly vulnerable tribal group". They are recognised, by themselves and by other neighbouring tribes, as the original inhabitants of the area, with the Munda having migrated to the region for farming, and later, for jobs

in the mines. The project in India thus encountered a situation where two common concepts of community— tribal (i.e. Paudibhuyan or Munda) and geographic (i.e. specific village)—overlapped significantly.

Despite the geographic overlap of the two tribes, the local NGO leading the protocol process only included the Paudibhuyan in the process. This was due to their designation as a Particularly Vulnerable Tribal Group and the fact that they have faced marginalisation and oppression for many decades, including by other tribal groups. Additionally, the Paudibhuyan have been worse affected by mining activities. The Munda, while having faced their own share of discrimination and marginalisation, have had greater access to employment opportunities and basic services such as education and healthcare.

The local NGO also brought its own anti-mining perspective to the process and promoted a protocol that focused on stopping mining in the area. However, while the Paudibhuyan have suffered impacts from mining, not all members of the tribe are opposed to it. Some are, but others are actually dependent on mining, and thus their relationship with the mines was more complicated.

Meanwhile, and independent of the protocol process, the situation in the villages grew increasingly complex. Court cases led to the shutdown of several mines, which polarised the village inhabitants into pro- and anti-mining groups and led to conflict. In some cases, these were simply verbal expressions of resentment. Others, more serious, included threats of violence, picketing, and sit-ins calling for the mines to reopen. While these conflicts did not result from the exclusion of the Munda and pro-mining groups from the protocol process, in this already tense context, the protocol process began to be viewed as supporting the anti-mining group against the pro-mining group. Furthermore, the local NGO's insistence that the protocol's focus be on stopping mining was diminishing the interest and ownership of the process of many participatants.

Even as these realities began to crystallise, the facilitators from the local NGO did not wish to alter their approach. The process continued with only some members of the Paudibhuyan participating and with the facilitators focusing on those who were heavily impacted by and opposed to the mines. As a result, Natural Justice decided to stop participating in this phase of the protocol process, which appeared to be leading to division rather than consensus within the community. Natural Justice ended

its engagement with the local NGO in October 2014.

Between October and December 2014, Natural Justice reviewed the process from the previous year and examined whether and in what manner to proceed. During that time, Natural Justice connected with another local NGO, the Keonjhar Integrated Rural Development and Training Institute (KIRDTI), which had two decades of experience in Odisha, mainly in a district adjacent to Sundergarh called Keonjhar. In January and February 2015, initial visits were made to the villages where KIRDTI operates, which are not the villages that were involved in phase one. The visits were designed to assess preliminary interest of the community members in the protocol process, and for Natural Justice and KIRDTI to gain a better understanding of each other's methods of operating. In March 2015, Natural Justice officially entered into a partnership with KIRDTI to start a new protocol process in Odisha. We refer to this as phase two of the process.

Phase two (December 2014–March 2016)
Building from the experiences in phase one, the facilitators in phase two explored the question of whether a community protocol could be developed jointly by the Paudibhuyan and the Munda. Similar to the local NGO in phase one, KIRDTI proposed particular villages it knew might be interested in developing a community protocol. Like the villages in phase one, these also had members of both the Paudibhuyan and Munda tribes living in close proximity. In the new villages, however, the conflict over mining was not nearly as pervasive. And unlike phase one, great care was taken to provide all villagers, regardless of tribal affiliation, an opportunity to participate in the process.

Eventually, six villages in Sundergarh decided to participate. As joint meetings with members of both tribes proceeded over several months, it became apparent that there were some barriers to creating an inclusive environment for all participants. The complicated dynamics between the two tribes meant that Paudibhuyan people were uncomfortable speaking and contributing in meetings where Munda were also present. To address this issue, and after agreement among the participants, the Paudibhuyan and the Munda met separately.

In these separate discussions, which took place between October and December 2015, the Paudibhuyan said that their main concern was land rights, since most do not have legal title over their individual or communal lands. Mining is only one of the many issues they face, and it is secondary to the question of land titles. Because the government and companies use land ownership as the basis for participation in community consultation, lack of title means that they do not have a voice in decisions that affect them.

Members of the Munda tribe were not as concerned about land rights because many of them do have legal title to

their land. Instead, they cared about their lack of access to forest resources and basic services such as potable water, health and education. The Munda were most interested in the element of legal empowerment that is generally a part of the protocol process. The Paudibhuyan at that time were not as interested in this.

The facilitators realised that it was unlikely that the Paudibhuyan and the Munda would work together to develop a community protocol. Furthermore, it was clear that any Paudibhuyan protocol would focus on how to get the government to recognise their rights to their traditional territories. The Munda villagers, while interested in legal strategies to increase access to basic services, were less interested in a more involved, full community process that would lead to the development of a protocol document. The facilitators then proposed that any next steps be taken by individual tribes as they saw fit. This brought an end to phase two of the process.

Between January and March 2016, discussions were held with the community on the way forward with the protocol, while continuing the desired legal empowerment workshops.

Phase three (ongoing since March 2016)
In March 2016, the process was adjusted to focus on the priority issues of the different tribes within the villages, using methodologies that they considered most useful and effective. The Paudibhuyan process expanded to include several more tribal members from villages in the Keonjhar district who are also interested in increasing their land rights. KIRDTI continued to provide legal empowerment training to the Munda.

Results of the process to date

Due to these complexities, the process in Odisha is actually still in its early stages. A great deal of energy has been expended to determine how the process would move forward and who would participate. Nevertheless, some results have been achieved. One is that the legal knowledge of both the Paudibhuyan and the Munda has increased. Legal capacity building workshops on frameworks such as the Constitution of India, the Right to Information Act, and laws related to forests and other natural resources have increased the community's understanding of legal processes. Participants have accessed information about government schemes that are relevant for their villages, allowing the communities to begin a limited engagement with government authorities. For example, some of the Munda used the information from these workshops to successfully request and receive compensation from the government for damage to farmlands and houses due to elephant attacks. Damage to life and property caused by elephants is a major problem in Odisha, compounded largely by the disruption of elephant corridors for mining and allied industries. While communities are legally entitled to compensation

for such damage, they rarely if ever receive any from government authorities. The community, both Munda and Paudibhuyan, is also using their understanding of the law to participate more fully in claims to access to forest rights, as provided under the national Forest Rights Act.

Additionally, the process has begun to create a more inclusive and open space where Munda and Paudibhuyan villagers together can express their opinions, issues and priorities openly, and find common ground to work on. The process has also begun to give both tribes the self-confidence to take greater control over external and internal pressures, and to proactively engage with external stakeholders on matters that directly affect them.

Challenges

By far the major challenge of the protocol process was identifying the "community" that would participate in its development. In phase one, the challenges involved feelings of exclusion on the part of the Munda, and lack of buy-in on the part of the Paudibhuyan because the focus of the protocol was chosen by the facilitators rather than by the participants. These challenges were exacerbated by external developments that created conflicts within the villages. In phase two, the challenge was how to turn a process that appeared inclusive on the surface into one that was truly participatory. It took much trial and error to determine that simply putting different tribes in the same room had a negative impact on the actual participation of those involved. Much more work and time was needed to understand the dynamics and develop a process that would allow for as many people in the community as possible to have their voices heard.

Next steps

The focus of the Paudibhuyan protocol process has now been shifted to land rights. Over the next six months, members of the Paudibhuyan tribe from villages in Keonjhar and Sundergarh will, with the assistance of KIRDTI, begin to consolidate information that is relevant to establishing their claims. It is unlikely that this will be completed in that time, but with greater leadership from the Paudibhuyan in Keonjhar and new focus, a fair amount of progress should be made towards a protocol document that can be used to advocate for greater land rights. The facilitators will then review the process and discuss further steps with the community.

KIRDTI will continue to work with the Munda participants who are interested in legal empowerment. This will involve further workshops on the legal framework of rights, procedural aspects of the law, and a process of monitoring and support for community members to engage with various government bodies and the courts. Further support will be provided for community members to facilitate legal empowerment in villages that are not currently covered by the protocol process.

General reflections

The India process involved a number of complexities, some related to the way the process was run and others related to the specific context on the ground. In phase one, the external determination of the focus of the protocol led to a lack of community ownership of the process and feelings of exclusion, as well as potentially exacerbating existing tensions. Efforts to address these issues in phase two, however, ultimately led back to a similar situation, while in phase three, the Paudibhuyan and the Munda are moving forward in separate processes.

It is clear that the facilitators in phase one understood the dynamic between the two tribes, and established a process that took that knowledge into account. However, their direct approach led to the issues described above. The work undertaken in phase two helped to address the feelings of lack of ownership on the part of the Paudibhuyan and of exclusion on the part of the Munda. The Paudibhuyan are involved and interested in the protocol process and have chosen to focus on the issue that is important to them. The Munda know what the Paudibhuyan are doing, were involved in the decision to move forward separately, and are involved in a different process that they find more useful. Even though they are now moving ahead along tribal lines, this has made a major difference by reducing the level of conflict around the process itself within the villages.

What this demonstrates is that sufficient time and space for the process to proceed is extremely important for ensuring inclusivity, understanding different issues that the community wants to address, and finding methodologies and tools to address these. Without this, any document that was eventually developed would have been limited and may have had the potential to further aggravate conflict between community members.

It is also clear that facilitators play a critical role, and their involvement with the community is an important factor that drives protocol development. It is vital to have facilitators who understand often complicated community dynamics, and can also encourage the participation of all groups that should be included in the process. Facilitators must allow communities to reach their own decisions, even if they sense what the ultimate decision is likely to be. The experience in India has demonstrated that creating this dynamic can be a challenge, and that finding local partners who can play this role is important for a robust protocol process.
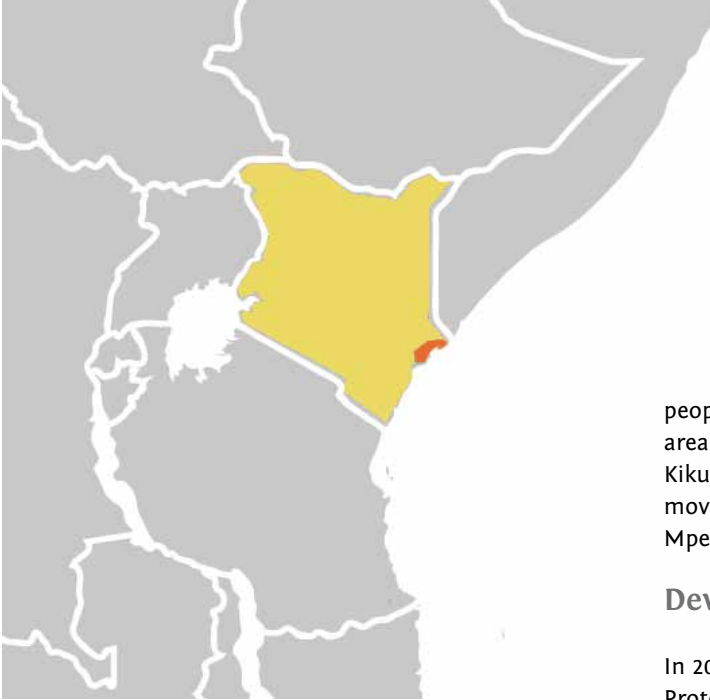
ANNEX C. KENYA

Community profile

The community protocol in Kenya is being developed by a community located in Lamu County, an archipelago on the northern coast of the country. Rich in biodiversity, the area is known as the jewel of coastal East Africa for its coral reefs, mangrove forests and other natural features. It is also home to Lamu Old Town, the oldest and best-preserved Swahili settlement in East Africa and a designated UNESCO World Heritage Site. The county's population, around 100,000 people, is composed of urban and rural communities. Infrastructure in Lamu is poor. Of its 688 kilometres of road, less than one kilometre was tarmacked at the beginning of 2016. One main hospital serves the entire archipelago. The county has been highly marginalised within Kenya, with poverty levels at 45 percent and literacy levels of 50 percent.

However, Lamu is a major part of the national government's Vision 2030, its master development plan to transform Kenya into a middle-income country by 2030. It includes the Lamu Area Port South Sudan Ethiopia Transport Corridor (LAPSSET), a multi-sector infrastructure project with a new mega-port in Lamu. The government has promised that this will bring much-needed jobs and infrastructure to the county. It will also have major environmental and social impacts.

The "community" for purposes of the protocol consists of a number of different ethnic groups who consider themselves indigenous to Lamu and affected by the port development. It includes the Bajun, who are traditionally fisherfolk, farmers, boatbuilders, tour guides and mangrove harvesters; the Sanye, who number less than 500 and are the most marginalised group in Lamu; the Orma, who are pastoralists; the forest-dependent Aweer; and the Swahili, who are merchants, farmers and involved in the tourism sector. It does not include

people from other ethnic groups who migrated to the area after independence in 1963. In particular, landless Kikuyu farmers—members of Kenya's largest ethic group—moved to the Lamu mainland in the early 1970s under the Mpeketoni Settlement Scheme.

Developing the community protocol

In 2009, a local organisation called Lamu Environmental Protection and Conservation (LEPAC) became concerned about the impacts that the port project might have in Lamu. LEPAC sought assistance from civil society groups, which ultimately led to Natural Justice visiting Lamu and presenting the concept of community protocols. LEPAC spearheaded the initial meetings to bring community members together to discuss the process. They expressed interest, and a group of organisations and individuals representing various livelihoods and ethnic groups came together to participate in the community protocol process.

The purpose of the protocol was to address the shortage of available information about the port, and the absence of those who would bear the greatest brunt from the decision-making processes. In 2010, after more meetings, the participants decided to form an umbrella organisation that could lead the overall protocol process. In 2011, Save Lamu was registered as a community-based organisation in Kenya.

From its inception, the community protocol process worked hard to include as many affected people in its discussions as possible. Between 2010 and 2012, the Save Lamu team visited over 40 villages, held approximately 72 community meetings and collected information from over 1500 people. The meetings were representative, including youth, women and elders, as well as civic and religious leaders. The community also sought to ensure that different livelihood groups were represented.

A community protocol writing team was appointed to collate all this information and develop a draft. The writing team returned to the communities in 2013 to record feedback to the draft protocol and collect further information. To strengthen the narrative of the community protocol, Save Lamu also undertook community resource mapping and a participatory video project. The mapping focused on marine resources in the areas of the proposed port and the participatory video explored the views of local people on a proposed coal-fired power plant.

Members of Save Lamu were trained in the relevant international and national laws and administrative

processes, which have been used to support their concerns. They also carried out legal training workshops with community members through the community protocol process. Community representatives, including members of Save Lamu, filed a legal petition in the High Court of Kenya in 2012. With the port project seemingly underway, the petition requested adequate information, including the environmental impact assessment, and consultation in respect of the project. The community protocol set out a large body of evidence, including the desires of community members and their concerns. This provided Save Lamu a clear mandate to meet and negotiate with members of government and business. In 2014, the Kenyan government announced plans to build a 1050MW coal-fired electricity plant in Lamu. Lamu Power, a consortium of Gulf Energy, Centum Investment Group, China Huadian, Sichuan No 3 Power Construction Company and Sichuan Electric Power Design and Consulting Company, won a government tender to build the plant. Much like the port, this will have significant social and environmental impacts in the area. In 2015, the community protocol process was extended to include mitigating the impacts from the coal plant and consultation in its planning.

Results of the process to date

At the time of writing this report, a draft of the protocol document has been developed but is not ready to be made public. Nevertheless, the development of the protocol has been the most comprehensive participatory process ever used to articulate the desires and concerns of local people concerning the development of infrastructure in Lamu. It is also the first time the community groups included in the protocol have formally documented their customary laws and practices. It has generated a much clearer understanding of how the projects could potentially impact local people.

One of the first and strongest results of the process was the formation of Save Lamu. The group has continued to grow and is working on a number of strategies to protect the people and environment of Lamu. It is recognised as the strongest advocacy organisation working on these issues and is involved in discussions with various stakeholders. The community protocol process itself helped to foster unity among various traditional communities and provided an effective means for sharing information. The community is now better organised to deal with infrastructure projects and their likely impacts.

The process has also provided a baseline for discussions with external stakeholders, including government, environmental impact assessors, and independent researchers and consultants. With regard to government, the protocol process led to a meeting in 2012 with the District Authority (DA) and local chiefs (although it should be noted that these institutions no longer exist under Kenya's new governance structure). At that time, the

offices of the DA and chiefs had attempted to undermine the role of Save Lamu in the community because they were under the impression that Save Lamu was "anti-port" and "anti-development". However, the protocol process provided a framework for the parties to meet, which helped Save Lamu promote the protocol and dispel some of the incorrect beliefs about their position.

After the formation of Save Lamu, it also became clear that a direct legal strategy was required, in conjunction with the community protocol process, to address the breaches of the community's constitutional rights, and the negative environmental and cultural impacts of the proposed port. This led to the High Court petition in 2012. While the petition continues to be argued in Kenya's High Court, the protocol process has been used to build awareness of domestic environmental legislation, particularly in relation to environmental impact assessment procedures. These procedures, which are well articulated in the Environmental Co-ordination and Management Act and its regulations, specifically require provision of information and public participation in the formulation and development of projects.

Additionally, Lamu's protocol was utilised as research data by UNESCO's historical impact assessment of the LAPSSET project. It has also proven vital for the litigation research team in a case in which community members are challenging the construction of the port component of LAPSSET.

Challenges

Because there was little community knowledge and organisation on these issues previously, it has been a timely and costly process to arrive at a community agreement. This challenge was intensified by the number of different community groups involved in the process and the geographical distances between each group in the archipelago.

The focus of the community protocol was initially on the port development. However, as more groups became involved, often from outside the potential area of impact, the issues became more numerous and moved the process away from a sole focus on the port. Spreading the focus of the work increased the challenge.

The community also held a range of views on the issues raised. Some welcomed the port project for its potential to bring new livelihood opportunities, to increase the population and to provide badly needed infrastructural support to the county. Further, those owning land on the proposed port site were strongly supportive of it, and at times critical of Save Lamu, given the significant compensation they receive for the sale of their land. Others opposed the project for its potential impact to existing livelihoods, in particular fishing, culture and the local environment.

Recognising these differing views, Save Lamu sought to facilitate the community protocol process without directly engaging in the for-or-against debate but continually pushing for the highest standards in project construction and operation, procedural fairness and adequate benefits for the people of Lamu. This has not been an easy process as Save Lamu had earlier been painted as anti-port. This false allegation and the work needed to counter it undoubtedly hampered the process.

Save Lamu was also challenged by local administrators and elites who perceived it as a threat to their own power. This had an effect on the group's ability to hold town meetings. Then, following the 2014 terrorist attacks in Lamu, parts of the county were placed under curfew, movement was restricted, and some civil society organisations faced increased pressure from the authorities, including Save Lamu. These slowed the community protocol process considerably.

Next steps

Before finalising the community protocol document, the latest draft needs to be updated to capture the most recent community views. Save Lamu is preparing to travel to the relevant villages to discuss ongoing issues with community members. Although the draft document already serves as a baseline for its continuing advocacy efforts, a final updated version could be sent to a number of stakeholders, including civil society groups, to raise awareness of the situation in Lamu. Further, paralegal and project-monitoring programmes will commence to help community members track project developments and ensure that the relevant laws and regulations are followed.

General reflections

The community protocol process in Lamu has been positive but challenging. One of the major challenges was that there was no long-standing community-based organisation to take the process forward. As a result, an organisation was created, and this provided excellent opportunities for community members who had not previously been active. The individuals in Save Lamu must be congratulated for their tireless, mostly unfunded, efforts, which will hopefully continue to serve community members for years to come. However, the need to build an organisation within the community protocol process took up additional time, effort and funding.

Identifying who is to be included in the community protocol is always a key question for community members to answer. In this case, the initial community representatives sought to involve all indigenous communities in Lamu because of their history of marginalisation. This in turn raised two issues. First, the inclusion of communities that were not directly affected

by the port meant that other issues, including land rights, were raised for consideration in the community protocol. The unintended consequence was to weaken the group's response to any one issue, and particularly the port development. Second, the exclusion of non-indigenous migrant groups in the area from the process has the potential to aggravate already existing tensions. In hindsight, the community protocol may have been better served by focusing only on the groups affected by the port, which may or may not have included non-indigenous community members.

Community protocols often designate the relevant community decision-making structures that project proponents should engage with. With the Lamu Community Protocol representing the interests of thousands of community members, it has been challenging to identify and involve all relevant governance authorities. For example, traditional leaders were often consulted in the process. However, again due to the perception that the process was "anti-port", it was harder to involve the administrators who hold a good degree of power at the local level. The community protocol carries strong local support, but this could often be divided by the varying interests of community leaders.

There has certainly been an impressive increase in the legal knowledge of some community members, particularly those who are active in Save Lamu. However, this capacity building has not been as widespread and effective as first hoped. Possible reasons for this include: the increased focus on community organisation and governance rather than legal empowerment; the training often focused on international and regional regimes, which are more difficult for community members to access and use; and we were unable to identify a local legal group to continually support the community legal training. Good knowledge of local laws, particularly local administrative systems, and individuals or groups that are easily accessible to help with the issues identified in the community protocol are fundamental, both to deal with community challenges and to retain motivation in the community protocol process.

ANNEX D. ZIMBABWE

Community profile

The community protocol is being developed by a community affected by diamond mining in the Mutare district of Zimbabwe. The Mutare district is located in the province of Manicaland in the eastern part of the country, near the border with Mozambique. The participating community identifies itself as Bocha people from the Marange area of Mutare district. They are identified mainly through their shared connection to the land in Marange. There are approximately 40,000 families in this community.

The protocol process was inititated to address a number of problems that the community faces because of diamond mining in the area. One is the forcible relocation of families from Marange to Arda Transau, a derelict government farm around 40 kilometres away, to make way for mining. Since 2009, approximately 1 800 out of an original 4 310 families have been relocated. In October 2009, the government, through the office of the district administrator, called a meeting with those to be relocated and promised to provide each family compensation amounting to a house on one hectare of land, one hectare of land under dry cultivation, half a hectare of land under irrigation, common grazing land and the rest of the compensation will be appropriated in monetary terms . When the relocations began, Arda Transau lacked even basic housing, water, sanitation, education or healthcare facilities. In December 2011, one of the mining companies built basic living structures, two schools, and two health clinics in Arda Transau. However, the promised compensation and irrigation system have not yet been provided. Each family lost between 5 and 7 hectares of common lands, including grazing areas. So far the government has only given each family a three-roomed house on less than one hectare.
Another problem caused by mining is environmental degradation. Marange has a dry climate, and its main sources of water are two rivers, the Odzi and the Save. Both artisanal and industrial mining in Marange led to massive land degradation, clogging both rivers with silt and chemicals, harming fragile ecosystems, damaging farming irrigation systems and contaminating drinking water for both the community and livestock. This resulted in the loss of livelihoods, which in turn led to conflict over the use of land. The massive clearing of land has also resulted in loss of forests, including the baobab tree, which is a source of food, medicine and livelihood

Developing the community protocol

In June 2013, Natural Justice introduced the community protocol concept to the Marange community with the assistance of the Chiadzwa Community Development Trust (CCDT), a community-based organisation formed in 2008 in response to the government's actions related to industrial mining. After a consultation workshop with various members of the community, including traditional leaders, women's groups, mineworkers, migrants and others, they decided to develop a community protocol.

Since starting the process, the community has held 32 meetings, training meetings and workshops, with an average of 100 people in attendance. Over the course of the meetings, approximately 60 percent of the participants were women and 10 percent were elderly. The community formed a writing committee, made up of five community members from Marange, the CCDT projects coordinator and a researcher, to draft the community protocol. It represents a cross-section of the community, with two members from the chieftaincy and two representing the people relocated to Arda Transau. CCDT staff served as note-takers and documenters of information during protocol meetings.

Community members raised many issues that they wanted the protocol process to address, and ultimately decided to focus on five main issues: 1) environmental protection: the community's livelihoods, food, sacred sites, ancestral graves and guardian spirits are contained in the natural environment; 2) land rights: the traditional lands of the community are between the Odzi and Save rivers, which they would like to be communally owned and managed; 3) compensation: that adequate compensation be paid, including that other land, of similar value, be provided; and 4), women's rights: relocation has had a massive impact on women, leaving some destitute. This has had a significant cultural impact as women are considered the spiritual custodians of the land.

The community decided not to include other issues, such as working conditions and local employment in the mines. Workers were asked to organise separately and the Zimbabwe Diamond and Allied Workers Union was registered in January 2015 to protect their rights and interests. Protection of cultural sites is covered under the protocol but it was agreed that, by protecting the environment, cultural sites and ancestral graves would also be protected. In November 2014, when the protocol was being developed, traditional leaders and the CCDT secretariat were mandated to speak to the mining companies and government about the destruction of sacred areas and cultural sites. Mbada Diamonds and the government-owned Marange Resources agreed to fence all sacred areas and ancestral graves. However, the Chinese investors dug out the sacred places and ancestral graves.

Results of the process to date

Although a community protocol document has not yet been made public, the process has so far led to several outcomes. For example, the community sought and obtained the replacement of a local leader who had been imposed on them by the national government. The Mutare district, like other districts in Zimbabwe, is headed by a district administrator (DA) chosen by the national government. Each district also has a rural district council, which consists of the DA, leaders of the sub-district divisions (wards), and one representative of the chiefs (traditional leaders appointed under customary law) in the district. In Mutare, the position of chiefs' representative customarily rotates among the sons of seven families who are believed to be descended from the woman who gave birth to the Bocha people. However, at the time the protocol process began, the representative of the chiefs had been selected by the national government rather than the community. Through the protocol process, the community organised itself and raised the issue with the DA, who took the community's views on board and oversaw a process of replacing the representative with one chosen through the community's traditional processes.

Additionally, CCDT used protocol meetings to open space for discussions about the rights of women under customary law. This has been important, given that Marange, once a bi-lineal society is now patriarchal, and its most popular church promotes polygamy and heavily restricts many forms of socialising. In fact, a number of women were excommunicated from the church and branded "disobedient" for attending CCDT meetings.

The protocol process also developed a strategy to monitor the Environmental Management Agency (EMA) on issues of environmental degradation. The mining companies continue to pollute, even after being issued fines for environmental crimes, and the community is concerned that the EMA is failing to properly protect their environmental interests. After continued infractions, the community of Marange took legal action against the mining companies.

CCDT has been carrying out human rights monitoring and documentation since the diamond areas became militarised in 2009. It reported cases of killings by police, which resulted in a number of perpetrators arrested and prosecuted. Once the area was demilitarised, CCDT began the protocol process, focusing its efforts on the environmental, cultural, social and economic rights of the local community. The community was able to define the kind of development they want and started to engage with government and mining companies on this basis. The community has managed to block a diamond mining company from beginning work in one of the villages without community consultation or an environmental impact assessment. Also, working with some journalists, CCDT managed to expose an illegal land-grab by the mining company.

Up to now, the community has engaged with three mining companies. These discussions allowed the community to designate certain no-go areas—such as the graveyards of the community's chiefs and other sacred sites—where the companies agreed not to mine. The community and the companies also agreed on compensation schemes whereby the companies would pay a certain amount for the relocation of non-chief graves.

Additionally, the protocol process in Zimbabwe has led to some engagement with the national government. The community decided to invite members of parliament to a meeting to discuss issues that were important to them. The invitation was accepted, and a meeting took place from 31 March to 3 April 2016. It gave community members the opportunity to tell parliamentarians about their expectations in regard to mining and other issues. Community engagement with the EMA led to the Agency sharing documents that the community used in their lawsuit against mining companies.

The process has also led to the creation of community groups to address issues more systematically. In addition to the Diamond and Allied Workers Union, the community formed the Mining Communities Coalition, with a membership drawn from community-based organisations and groups affected by mining, to work at the national level to influence government mining regulations and policies, as well as to carry out research in communities affected by mining.

Challenges

One of the major challenges that the protocol process has faced is the large number of community members who wanted to participate. This created logistical complexities for meetings, and increased the number of perspectives that the process had to take into account. Another challenge was to ensure that all voices were properly heard. In the initial meetings, it was clear to the facilitators that, although women were present in the room, they were not sharing their thoughts as readily as

the men were. Women-only meetings were held in order to obtain their views.

Politics also presented a challenge to the process. Different community members belong to different political parties, which play a major role in conflicts in Zimbabwe. However, the facilitators consciously took an apolitical approach to the process and did not promote the views of any particular party over another. This helped to mitigate potential conflicts posed by differing political views.

A number of families in Marange have migrated from Mozambique, but, when the question was raised, the community agreed that everyone who is a resident of Marange or Arda Transau should be able to participate in the protocol process. It was agreed that the writing committee should have one person of Mozambican origin in order to protect their interests as former migrants.

Next steps

Now that the major work of gathering information for the protocol has been completed, the next step is to finalise a written draft of the protocol. Additionally, the protocol process has stimulated a desire to develop negotiation skills that will help community members engage with external parties. Workshops on interest-based negotiation and human rights will be organised. Once a certain level of capacity has been built, the community wants to use the protocol as a basis for further engagement with the government and mining companies on the issues addressed in the protocol.

General reflections

The role of traditional leaders has been important in the process in Zimbabwe. They were the point of contact with the mining companies and they were also threatened with relocation. When the mining companies built them beautiful houses in the relocation area, they refused to leave Marange and they continue to resist relocation. This could be because they lose their leadership if they move into another chief's jurisdiction, and would have to submit to the traditional leader of that area. In contravention of custom, the government appointed a chief who supported mining in the area. This was raised as a priority issue during the community protocol process and led to the chief being challenged by the community. He relinquished his post.

The process of developing the protocol was very useful as it mobilised the community around issues that they themselves determined. The protocol enables the community to define their challenges and how they would like to resolve them. Its participatory methodologies are empowering and build the confidence of the community. The protocol speaks to issues of identity, as it is based on the community's definition of how the community is structured and its geographic and social boundaries.

The process drove community members to act on issues that they were passionate about. It was also a process of popular education as the community learned from their own reality and experiences. It took a substantial amount of time, but this was important, considering the number of issues tackled and the participatory format of the process.

In the case of Marange and Arda Transsau, the community has chosen environmental degradation, land, compensation and women's rights as the core issues to address. This is based on their needs and not on some imposed agenda. Meetings with the government and stakeholders are continuing, but it may prove difficult to raise funds to support the process and to realise the community's desired outcomes. However, the community protocol process has laid a strong foundation and the community is hopeful that it will continue to work collectively to achieve its aims.