STATE ADMINISTRATIVE

LAWSUIT

Between

Hendrikus Woro ..... PLAINTIFF

Against

Head of Papua Province Investment Service and One Stop Integrated Service .....DEFENDANT

AMICUS CURIAE BRIEF BY KUBERAN HANSRAJH KUMARESAN & CLAUDIA NYON SYN YUE
IN SUPPORT OF THE PLAINTIFF FOR THE ASSISTANCE OF THE INDONESIAN SUPREME COURT

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Executive Summary

1. For any and all projects impacting indigenous communities, there exists, at a minimum, a general duty to engage in consultation aimed at obtaining the free, prior and informed consent ('FPIC') of affected indigenous tribes[1]. Where projects have the potential for significant impact on indigenous peoples, there exists an additional specific duty to secure FPIC for the project in question[2].

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[1] *Case of Kichwa Indigenous People of Sarayaku v Ecuador* IACtHR Series C No 245 (27 June 2012) [164] finding, by analysing jurisdictions all across the world including but not limited to Brazil, Peru, Colombia, Canada, the United States and New Zealand, that: 'In other words, the obligation to consult, in addition to being a treaty-based provision, is also a general principle of international law.'

[2] *Case of Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations and Costs, Ser. C, No. 172 (Inter-Am, Ct. H.R. Nov 28, 2007)[134]**'the Court considers that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions.'** ; see also [137] 'Most importantly, the State has also recognized that the "level of consultation that is required is obviously a function of the nature and content of the rights of the Tribe in question." The Court agrees with the State and, furthermore, considers that, in addition to the consultation that is always required when planning development or investment projects within traditional Saramaka territory, the safeguard of effective participation that is necessary when dealing with major development or investment plans that may have a

2. At the outset, we opine that the present case falls within the ambit of projects likely to significantly affect indigenous peoples, thereby necessitating not only consultation, as required for all projects, but also the acquisition of FPIC.

3. We observe that FPIC was not obtained in the instant case. The facts show there was a complete absence of consultation with certain affected communities, notably the Awyu tribe as represented by the Plaintiff. Neither duty, both general and specific, have been fulfilled in the present case.

4. We therefore advance four broad points.

    4.1. First, there is a general duty to adequately consult indigenous communities, a duty which was not fulfilled in the following respects:

        A. Duty to consult those whose resources are affected was not fulfilled.

        B. Duty to consult in good faith and with the objective of reaching an agreement was not fulfilled.

        C. Duty inappropriately delegated to the proponent company.

        D. Duty to engage in constant communication with the affected indigenous communities and active consultation was not fulfilled.

        E. Duty to consult representative institutions was not fulfilled.

    4.2. Second, there is an additional and specific duty to obtain FPIC where the project is likely to have significant impact on an indigenous community; this consent was not obtained in the instant case.

    4.3. Third, the Environmental Feasibility Recommendation is justiciable and its illegality renders the Dispute Object void.

    4.4. Fourth, the complex issues of fact and law in the present case, in particular those concerning the limitation period applicable to the Plaintiff's suit, must be analysed

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profound impact on the property rights of the members of the Saramaka people to a large part of their territory must be understood to additionally require the free, prior, and informed consent of the Saramakas, in accordance with their traditions and customs'

in light of the *in dubio pro natura* (when in doubt, in favour of nature) principle.

I. General duty to consult affected indigenous communities

5. There are a number of components to this obligation that are of direct relevance to the present case.

A. Duty to consult those whose resources are affected was not fulfilled

6. Indigenous communities are recognised by international law as being sufficiently affected such that duties incumbent on a state to consult them arise *not only* when an indigenous community occupies the land in question, but also when a community's resources are to be affected. This is because the economic, social and cultural development of a community may be dependent on a resource.

7. Being persons whose rights are 'frequently the first victims of development activities in indigenous lands'[3], the obligation for states to consult indigenous communities in good faith and obtain their FPIC before and during the commencement of a development project is as per **Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP')**[4], of which Indonesia is a signatory to[5]:

> '*States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.*'

7.1. Of note is the fact that **Article 19 of the UNDRIP** speaks to projects that *'may affect*' indigenous peoples as already being instances when the duty to consult in good faith is at play.

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[3] Navi Pillay, August 2013. Foreword. In: *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions*. Australia: Asia Pacific Forum & Switzerland: Office of the United Nations High Commissioner for Human Rights, iii. <https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/UNDRIPManualForNHRIs.pdf> accessed 1 June 2024

[4] United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) A/RES/61/295

[5] United Nations Digital Library, United Nations Declaration on the Rights of Indigenous Peoples': resolution / adopted by the General Assembly <https://digitallibrary.un.org/record/609197?ln=en> accessed 1 June 2024

8. In amplification, the rights of indigenous people to be consulted and to have their FPIC obtained are not confined to instances when lands occupied by them but also extends to instances when the resources are used by indigenous people.

8.1. **Article 27 of the UNDRIP** makes clear the nexus between indigenous people and their natural resources, as well as their lands and territories, and obliges states to ensure that a fair system of adjudication exists in connection to this:

> '*States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process*.'

8.2. Indigenous peoples are also recognised under **Article 26 of the UNDRIP** as having the right to own and possess lands and resources they traditionally used and not just those they occupy:

> *'Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired'*.

8.3. **Articles 25, 27 and 28 of the UNDRIP** reaffirms a state's obligations to indigenous people who have traditionally used certain resources, by mandating that states owe obligations to consult, restitute and compensate indigenous communities whose lands, territories and resources have been interfered with by a proposed development.

9. The same is enforced through other international legal instruments related to indigenous rights[6].

[6] See also, The Committee on the Elimination of Racial Discrimination, 'General Recommendation XXIII: Indigenous Peoples' (18 August 1997) A/52/18, annex V, [5] '… to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands, territories traditionally owned or **otherwise inhabited or used** without their free and informed consent, to take steps to return those lands and territories.'

9.1. **The UN Committee on Economic, Social and Cultural Rights**[7] explains that the International Covenant on Economic, Social and Cultural Rights (as ratified by Indonesia[8]) seeks to protect rights to resources traditionally used:

> *'The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.'*

9.2. **Article 14(1) of the ILO Convention 169** is also instructive:

> *The rights of ownership and possession of the peoples concerned over the lands which* **they** *traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.'*

10. The aforementioned enshrinements of indigenous peoples' rights to natural resources, which goes beyond their rights to land claimed through long and continuous occupation, necessarily exists *'because the indigenous ownership of the resources is associated with the most important and fundamental human rights, including the right to life, food, the right to self-determination, to shelter, and the right to exist as a people*[9].

11. As put by the Inter-American Court of Human Rights ('IACtHR') in the case of ***Saramaka v Suriname***[10]*:*

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[7] Committee on Economic, Social and Cultural Rights , General Comment 21: Right of Everyone to Take Part in Cultural Life (Art. 15, para. 1(a), of the ICESCR), UN Doc E/C.12/GC/21 (21 December 2009) [36]
[8] United Nations Human Rights Treaty Bodies, UN Treaty Body Database <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=80&Lang=EN> accessed on 1 June 2024
[9] Nazila Ghanea and Alexandra Xanthaki (2005) (eds). 'Indigenous Peoples' Right to Land and Natural Resources' in Erica-Irene Daes 'Minorities, Peoples and Self-Determination'(Martinus Nijhoff Publishers 2004); this statement by the Special Rapporteur was also adopted by the African Commission on Human And People's Rights in *Centre of Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (4 February 2010) ACommHPR 276/2003
[10] *Case of the Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations and Costs, Ser. C, No. 172 (Inter-Am, Ct. H.R. Nov 28, 2007), [122]

'..... *Accordingly, the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land. That is, the demand for collective land ownership by members of indigenous and tribal peoples derives from the need to ensure the security and permanence of their control and use of the natural resources, which in turn maintains their very way of life. This connectedness between the territory and the natural resources necessary for their physical and cultural survival is precisely what needs to be protected under Article 21 of the Convention in order to guarantee the members of indigenous and tribal communities' right to the use and enjoyment of their property. From this analysis, it follows that the natural resources found on and within indigenous and tribal people's territories that are protected under Article 21 are those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life.*'

12. After recognising indigenous peoples' special rights to their natural resources, the aforesaid Inter-American Court went on to further hold that in order to guarantee that restrictions to property rights of the Saramaka people via the issuance of concessions *'does not amount to a denial of their survival as a tribal people'*[11], the state must abide by three safeguards, briefly summarised below. In the court's view, the safeguards *'are intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people'*.[12]

    12.1. First, the state must ensure effective participation of members of the indigenous tribes, in conformity with their customs and traditions, regarding any development plan. It is submitted that this is essentially the procurement FPIC.

    12.2. Second, the state must guarantee that indigenous peoples will receive reasonable benefit from any such plan within their territory.

    12.3. Third, the state must ensure that no concession will be issued within the indigenous territory unless and until independent and technically capable entities, with the state's supervision, perform a prior environmental and social impact assessment.

[11] Ibid., [129]
[12] Ibid., [129]

13. What is therefore clear is that the right to traditionally used resources is inextricably linked to many other fundamental rights guaranteed to indigenous peoples. When such traditionally used resources are foreseen to be affected, the running theme is that there is a duty to consult all communities who have traditionally used these resources.

    13.1. As noted[13] by the Inter-American Court after citing ***Apirana Mahuika et al v New Zealand***, restrictions to rights may validly exist where the community itself participated in the decision to restrict such right, for the *'acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends… on whether members… have had the opportunity to participate in the decision-making process'*.[14]

    13.2. Where such an essential right is affected, namely the right of indigenous peoples to their traditionally used resources that are necessary for their physical and cultural survival and development, the duty to consult said peoples in good faith arises and must be diligently fulfilled.

14. Indeed, the Indonesian Constitution[15] guarantees similar rights to its people, the *'right to life… that cannot be limited under any circumstances'*[16], the right to live in physical and spiritual prosperity[17], the right to enjoy a good and healthy environment[18], the right to protection of property[19] and the right to own personal property[20], among others.

15. We also take note of the fact that the instant case involves the interference of the Awyu tribe's access to water and submit that the involvement of access to water

[13] Ibid., [130]
[14] Ibid., [130], quoting Human Rights Committee , *Apirana Mahuika et al. v. New Zealand* (Seventieth session, 2000), U.N. Doc. CCPR/C/70/D/547/1993, November 15, 2000, [9.5]
[15] The 1945 Constitution of the Republic of Indonesia
[16] Ibid., Art 28I(1)
[17] Ibid., Art 28H(1)
[18] Ibid., Art 28 H(1)
[19] Ibid., Art 28G(1)
[20] Ibid., Art 28H(4)

imposes an even more onerous duty on states to fulfil[21], due to the essentiality of water as a resource.

16. The duty to consult indigenous tribes is well established where bodies of water are involved[22]. Per **Article 32(2) of the UNDRIP**[23]:

> '*States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*'

17. Such a duty to consult where water is involved is illuminated by the right enshrined in **Article 25 of the UNDRIP,** where the right of indigenous peoples to strengthen their distinctive spiritual relationship with bodies of water is recognised[24].

18. It is clear here that the proposed development will negatively impact the river such that the indigenous tribes who live downstream will no longer be able to use the river as a sustainable source of livelihood by simple reason of the way a river flows: action upstream will affect the river downstream. Indeed, **the 2018**

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[21] *Case of the Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations and Costs, Ser. C, No. 172 (Inter-Am, Ct. H.R. Nov 28, 2007), [137] '**Most importantly, the State has also recognized that the "level of consultation that is required is obviously a function of the nature and content of the rights of the Tribe in question." The Court agrees with the State** and, furthermore, considers that, in addition to the consultation that is always required when planning development or investment projects within traditional Saramaka territory, the safeguard of effective participation that is necessary when dealing with major development or investment plans that may have a profound impact on the property rights of the members of the Saramaka people to a large part of their territory must be understood to additionally require the free, prior, and informed consent of the Saramakas, in accordance with their traditions and customs'

[22] Article 25 of UNDRIP: 'Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.'

[23] See also identical American Declaration on the Rights of Indigenous Peoples Art 29: 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources**, particularly in connection with the development, utilization or exploitation of mineral, water, or other resources**.'

[24] UNDRIP Art 25

Brisbane Declaration sets out that environmental flows, which include rivers, *'support human cultures, economies, sustainable livelihoods, and well-being.'*[25]

19. Factually, the negative impacts on the river in question is as below:[26]

    19.1. As a result of a wide opening of the natural forest, there will be less catchment of water during rainfall, causing rainwater to flow massively into lower areas to cause floods in low-lying areas and overflowing of rivers.

    19.2. The Mappi River is important for regulating water quality and acts as a natural sponge that absorbs and slows down water during heavy rains which reduces the risk of flooding. If the ecosystem of the Mappi River and its tributaries is disrupted, the risk of flooding will increase and the livelihoods of the people dependent on the Mappi River's ecosystem will suffer.

    19.3. Apart from the Mappi River, there exists the Edera River, the Kia River, the Digoel River, the Lebah River, the Berah River, the Tagemon River, the Pasma River, the Sumsu River and the Asi Rivers. These rivers are part of life of the indigenous peoples located on or outside the location of the planned business and will be negatively impacted by flooding and a decrease in quality of forest clearing to become palm oil plantations.

20. The loss of livelihood suffered by the Awyu people is as below:[27]

    20.1. Indigenous Papuans have high social and cultural wisdom values regarding the existence of the natural forest ecosystem of Papua, because it is in this ecosystem that they depend for all their daily needs, including food and drink, sacredness and health.

    20.2. The existence of the forest provides the basic benefit of clean water to local communities. Clean water also facilitates basic household needs and traditional rituals.[28]

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[25] Arthington, A. H., Bhaduri, A., Bunn, S. E., Jackson, S. E., Tharme, R. E., Tickner, D., Horne, A. C., Kendy, E., McClain, M. E., & More Authors (2018). The Brisbane Declaration and Global Action Agenda on Environmental Flows (2018). Frontiers in Environmental Science, 6(JUL), Article 45. <https://pure.tudelft.nl/ws/portalfiles/portal/54943134/fenvs_06_00045.pdf> accessed on 1 June 2024

[26] Number 6/G/LH/2023/PTUN.JPR, page 45

[27] Number 6/G/LH/2023/PTUN.JPR, page 94

[28] Number 6/G/LH/2023/PTUN.JPR, page 97

20.3. The indigenous communities at Kampung Bangun, Kampung Kowo, Kampung Kowo Dua, Kampung Afu, Kampung Hello, Kampung Kaime, Kampung Memes, Kampung Piyes, Kampung Watemu, Kampung Obinangge, Kampung Uji Kia and Kampung Metto use the river flow area for hunting/fishing, catching crocodiles as well as a source of water.

21. The importance of access to clean water for indigenous communities has long been recognized. This is clear from cases such as ***Angela Poma Poma v Peru***[29] where the UN Human Rights Committee held that deprivation of water for the grazing of livestock constituted a breach of **Article 27 of the ICCPR** establishing the right for minorities to enjoy their own culture and in ***Mary and Carrie Dann v United States***[30] where gold mine prospecting polluted the Dann's water and therefore was a violation of their right to property[31].

22. By adopting a good faith interpretation of the above provision in light of the UNDRIP's object and purpose to protect indigenous rights[32] and in light of the central importance of the indigenous peoples' right to the ownership of resources, it is clear that where development projects affect the rights enshrined by the UNDRIP, those whose rights are affected *must* be consulted.

23. Therefore, indigenous communities whose resources are affected, especially where such resources are obtained from interconnected bodies of water, must be adequately consulted pursuant to the general duty to consult in good faith under international law. In the present case, the fact the Aywu tribe has not been consulted adequately or at all renders the Dispute Object void due for non-compliance with the aforementioned duty.

B. Duty to consult in good faith and with the objective of reaching an agreement not fulfilled

24. The duty to consult must occur 'in good faith with indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent'[33].

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[29] Human Rights Committee, Communication No. 1457/2006, Doc. CCPR/C/95/D/1457/2006 of 27 March 2009
[30] Mary and Carrie Dann v United States, Inter-American Commission on Human Rights, Case 11.140, Report No 75/02 (27 December 2002)
[31] Ibid., [40],[172]
[32] As mandated by international law; see Article 31 of Vienna Convention on Law of Treaties,
[33] UNDRIP Art 19

24.1. What this means is that consultations must be 'carried out in good faith …. with the aim of reaching an agreement or obtaining consent regarding the proposed measures'[34].

24.2. Consultations must serve as 'a true instrument for participation'[35] and 'respond to the ultimate purpose of establishing a dialogue between the parties based on principles of trust and mutual respect, and aimed at reaching a consensus between the parties'.[36]

25. A dialogue requires *'*more than just the provision of information'[37] and attempts must be made with the intention of 'substantially addressing concerns'[38] of indigenous communities.

26. We respectfully opine that these facets of dialogue were not achieved in the instant case.

27. Here, it is clear no such dialogue was achieved considering members of the indigenous communities testified that at these meetings, they were 'o*nly invited to be be present, seat, listen, keep quiet and go home*', ' *were not given any opportunity to respond'*[39] and were *'pressured…to welcome the company'*[40] by the host of the meeting.

28. This runs contrary not only to clear principles of international law but as put by the **Indonesian Constitutional Court** itself previously, is contrary to the requirement of 'a*ctive participation of the community in the form of direct involvement in the expression of opinions in the process of stipulation of Mining Areas which is facilitated by the state*' especially considering such participation constitutes '*a concrete form of the implementation of Article 28H paragraphs (1) and (4) of the 1945 Constitution'*[41]. What is noteworthy is that international law was relied on by the Indonesian Constitutional Court to make this point:

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[34] ILO Convention No. 169; this formulation was also cited by the Inter American Court of Human Rights in *Case of Kichwa Indigenous People of Sarayaku v Ecuador*, IACtHR Series C No 245 (27 June 2012) [185]
[35] *Case of Kichwa Indigenous People of Sarayaku v Ecuador*, IACtHR Series C No 245 (27 June 2012) [186]
[36] Ibid.,
[37] Human Rights Council, 'Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya' (18 Aug 2011), UN A/HRC/18/35/Add.7, [20]
[38] *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511, para 42
[39] Number 6/G/LH/2023/PTUN.JPR, page 142 (Witness 1 Testimony)
[40] Number 6/G/LH/2023/PTUN.JPR, page 146 (Witness 6 Testimony)
[41] Number 32/PUU-VIII/2010, page 244

'*One important event related to the recognition and strengthening of indigenous peoples internationally began with the results of the Earth Summit in Rio de Janeiro in 1992 with the issuance of the Rio Declaration on Environment and Development. Principle 22 states that indigenous and tribal peoples have an important role in environmental management and development due to traditional knowledge and practices. Therefore, the state must recognize and support its entities, cultures and interests and provide opportunities to actively participate in achieving sustainable development*'[42].

C. Duty inappropriately delegated to company

29. It is well established that the duty to consult affected communities lies with the state and cannot be delegated to a company to fulfil. This is best put by the Inter-American Court of Human Rights in ***Kichwa Indigenous People of Sarayaku v Ecuador***[43]:

> *'It should be emphasised that the obligation to consult is the responsibility of the State; therefore the planning and executing of the consultation process is not an obligation that can be avoided by delegating it to a private company or to third parties, much less delegating it to the very company that is interested in exploiting the resources in the territory of the community that must be consulted.*'

30. The framing of this duty as exclusively being incumbent on a state was also emphasised by the **UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people**[44]:

> '*In this connection, the State itself has the responsibility to carry out or ensure adequate consultation, even when a private company, as a practical matter, is the one promoting or carrying out the activities that may affect indigenous peoples' rights and lands. In accordance with well-grounded principles of international law, the duty of the State to*

[42] Number 35/PUU-X/2012, page 273
[43] *Case of Kichwa Indigenous People of Sarayaku v Ecuador*, IACtHR Series C No 245 (27 June 2012), [187]
[44] Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, A/HRC/12/34 15 July 2009, para 54

protect the human rights of indigenous peoples, including its duty to consult with the indigenous peoples concerned before carrying out activities that affect them, is not one that can be avoided through delegation to a private company or other entity'

31. As the IAtCHR observes, a proponent company in question will always have a vested interest to brush away the concerns of the indigenous communities in their interest to secure the success of the project. The proponent company cannot be expected to reconcile impartially the conflict between their interests of profit against their interest in indigenous rights being safeguarded; conversely, a state is best placed to mediate such conflict.

32. It is therefore why a crucial component of the duty to consult involves a state being the entity that carries out the consulting. Delegation of a state's authority to a private party proponent, as was done in this instance, is a significant cause for concern. Again, greater emphasis ought to be placed on the testimony that that in some of the meetings, there was reportedly no local government representatives present[45].

D. Duty to engage in constant communication and active consultation was not fulfilled

33. The Jayapura State Administration Court placed great reliance upon a Letter of Investment Support from Indigenous Community Institutions Boven Digoel in finding that the principle of meaningful participation was complied with[46].

34. It is clear that what is required for there to be meaningful and effective participation is constant communication and active participation from the communities in question[47]:

'*First, the Court has stated that in ensuring the effective participation of members of the Saramaka people in development or investment plans within their territory, the State has a duty to actively consult with said community according to their customs and traditions (supra para. 129).*

[45] Number 6/G/LH/2023/PTUN.JPR, page 142 (Witness 1 Testimony)
[46] Number 6/G/LH/2023/PTUN.JPR, page 173: 'Considering, that in relation to the arguments of the Plaintiff, Intervention Plaintiff 1 and Intervention Plaintiff 2 regarding the Dispute Object which is contrary to the principle of meaningful participation, there has been a Letter of Investment Support from the Indigenous Community Institutions Boven Digoel Regency Number: 30/LMA-BVD/VIII/2018 dated 29 August 2018 (Exhibit T-31) therefore this argument is not relevant to the merits of the dispute.'
[47] *Case of the Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations and Costs, Ser. C, No. 172 (Inter-Am, Ct. H.R. Nov 28, 2007), [133]

This duty requires the State to both accept and disseminate information, and entails constant communication between the parties. '

35. While there is no clearly defined benchmark of what *'constant communication'* entails, it is submitted that reliance on one letter of support is insufficient, especially when multiple letters of rejection were written to the relevant authorities and protests in the form of red crosses being planted on the subject land.

36. Indeed, consultations should be done '*not only when the need arises to obtain approval from the community'*; consultations must be regularly done and the relevant authorities cannot turn a blind eye to multiple rejections of the project simply because there was one letter of support in favour of the project.

    36.1. This point is made by the **Supreme Court of Belize**[48], who in finding that the project was void due to lack of consultation and violation of the FPIC principle, noted they were *'struck by the repeated requests for information from the Defendants which apparently fell on deaf ears*…'

    36.2. In the present case, the same problem persisted; the repeated rejections and repeated requests for information made by the indigenous communities too '*fell on deaf ears*'.

37. The Indonesian Constitutional Court very poignantly makes the same point[49]:

    '*In accordance with the legal considerations above, the Court places stronger emphasis on the implementation of the obligation to involve the community's opinions, instead of the written consent from every person as petitioned by the Petitioners, since in the Court's opinion, the form of active participation of the community in the form of direct involvement in the expression of opinions in the process of stipulation of Mining Areas which is facilitated by the state c.q. the Government, constitutes a concrete form of the implementation of Article 28H paragraphs (1) and (4) of the 1945 Constitution, which is more valuable than mere formality which can be proven by written statements which are not always truly made by the person concerned.'*

[48] Supreme Court of Belize, Claim No 394 of 2013, Decision of 3 April 2014, page 35
[49] Number 32/PUU-VIII/2010, page 244

E. Duty to consult representative institutions not fulfilled

38. The duty to consult requires that *'representative institutions'*[50] of indigenous people are consulted. The procedures by which the consultations take place must be '*culturally appropriate*'[51].

39. Indeed, the Indonesian Constitution recognizes *'regional authorities that are special and distinct'*[52] and ' *traditional communities along with their traditional customary rights'*[53]. It further explains that the *'cultural identities and rights of traditional communities shall be respected in accordance with the development of times and civilisations*.'[54]. It is therefore respectfully submitted that the recognition and use of representative institutions when consulting indigenous communities are firmly embedded and recognised in Indonesian law as well, and stands in line with international legal standards.

40. In the present case, such institutions were unfortunately not consulted. Even the plaintiff as head of the Woro Marga, an essential member of the community, was not consulted about the planned development. Indeed, the singular letter of support the court refers to, written by the Boven Digoel Regency Indigenous Community Institution, is insufficient due to the Institution's dubious status as a *representative institution*. On this facet too we contend that FPIC from the Awyu tribe was not obtained.

II. Specific duty to obtain FPIC where project likely to have significant impact on community

41. Whilst arriving at an agreement should be the goal of every consultation with indigenous peoples, in some cases there will be a heightened additional specific duty to obtain FPIC depending on the impact of the proposed activity, as put in ***Saramaka People v Suriname***[55].

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[50] UNDRIP Art 19 ; see also Art 6(1)(a) ILO Convention No.169
[51] *Case of the Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations and Costs, Ser. C, No. 172 (Inter-Am, Ct. H.R. Nov 28, 2007), [133]
[52] Art 18B(1)
[53] Art 18B(2)
[54] Art 28I(3)
[55] *Case of the Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations and Costs, Ser. C, No. 172 (Inter-Am, Ct. H.R. Nov 28, 2007), [134]: 'the Court considers that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions.'

42. Indeed, the duty to obtain FPIC where projects cause substantial impacts is repeatedly affirmed:

42.1. The UN Human Rights Committee in ***Poma Poma v Peru***[56] stated:

> *'In the Committee's view, the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy.* ***The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members.*****'**

42.2. The **Committee on the Elimination of Racial Discrimination (CERD)** in issuing recommendations on interpreting the International Convention on the Elimination of All Forms of Racial Discrimination (which Indonesia has ratified[57]) emphasised that state parties should:

> '*Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;*'

43. The specific duty to obtain FPIC from indigenous people arise by reference to the *scale of the impact* (significant or not) on the community of the proposed development, irrespective of the *size* of the project. A large scale development project will have significant impact but a small scale project can also cause significant impacts for certain indigenous peoples.

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[56] Human Rights Committee, Communication No. 1457/2006, Doc. CCPR/C/95/D/1457/2006 of 27 March 2009, para 7.6

[57] United Nations Human Rights Treaty Bodies, UN Treaty Body Database <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en> accessed on 1 June 2024

43.1. The IAtCHR in ***Saramaka People v Suriname*** established the presumption that large-scale development will have significant impact and thus trigger the requirement for FPIC. Yet, it does not rule out the possibility that small scale developments impacting discrete parts of indigenous territories may have significant impact on an indigenous community.

44. Therefore, what international case law has shown is that the impact of the activity on an indigenous community, its cultures and territories, irrespective of scale of the development, ought to be the reference point for when FPIC is required.

45. Two specific factors cause a specific duty to obtain FPIC to arise and encumber itself on a state so as to bring the concerns of indigenous peoples to the forefront of any core deliberations by the state.

45.1. First, the current situation of the community including its current vulnerabilities and historical inequities (i.e., cumulative effects of past violations).

45.2. Second, the views of indigenous peoples themselves in respect of the development in view of their rights in the territory.

46. The rights protected under the umbrella of the duty to obtain FPIC are strongly connected to the right to life, to cultural identity and the cultural and physical subsistence of the community as such, as well as indigenous peoples' right over land and natural resources. From this, it can be reasonable to expect the state to not execute a plan that will violate those rights.

47. Given that the requirement for consent is a heightened safeguard for the rights of indigenous peoples, a project therefore cannot go ahead without the affected indigenous peoples' consent. The Court should insist that the duty to FPIC is a safeguard that ensures that when there is a conflict of interest between development or investment and indigenous peoples' cultural or physical survival, indigenous peoples rights have stronger protection under international law and thus the state cannot go ahead with the proposed project without the consent of the affected indigenous people.

III. Justiciability of the EIA process

48. With regard to the justiciability of the environmental impact assessment ('EIA') process, it is useful to reproduce the court's exact finding below:

> '*Considering, that in relation to the Plaintiff's argument, Intervention Plaintiff 1 and Intervention Plaintiff 2 regarding the Dispute Object are contrary to the principles of local wisdom, the principles of preservation and continuity, harmony and balance, precaution, ecoregion, biodiversity, the principle of orderly state administration, the principle of precaution, the principle of justice, and the principle of benefit, the Court is of the opinion that this argument is not relevant considering that there has been an assessment or test of the EIA by the Environmental Feasibility Test Team or in this case the Head of the Papua Province Forestry and Environmental Service as Chair of the EIA Committee in the form of a Recommendation'... So these principles have been embodied in Environmental Feasibility Recommendations or Recommendations on feasibility test results... The court will not examine further the substance and procedures of the environmental feasibility recommendations (recommendations resulting from the feasibility test) or the EIA assessment because it is not the object of the dispute being tested in this case.'*[58]

49. It has been held that the relevant principles have been automatically embodied in Environmental Feasibility Recommendations such that these recommendations can no longer be challenged nor examined by a court for non-compliance with those principles. It implies a reasoning that the production of an Environmental Feasibility Recommendation becomes, by operation of law, unchallengeable.

50. Respectfully, this cannot be correct.

    50.1. It is well established that whether Environmental Impact Assessments are prepared in compliance with the necessary legal principles is for a court of law to determine. This is best reflected by the IAtCHR's judgement in ***Kichwa Indigenous People of Sarayaku v Ecuador*** where it was held that the Environmental Impact Plan was not adequately done[59]*:*

> '*In this case, the Court observes that the environmental impact plan: (a) was prepared without the participation of the Sarayaku*

[58] Number 6/G/LH/2023/PTUN.JPR, page 171

[59] *Case of Kichwa Indigenous People of Sarayaku v Ecuador*, IACtHR Series C No 245 (27 June 2012) [207]

People; (b) was implemented by a private entity subcontracted by the oil company, without any evidence that it had subsequently been subject to strict control by State monitoring agencies, and (c) did not take into account the social, spiritual and cultural impact that the planned development activities might have on the Sarayaku People. ***Therefore, the Court concludes that the environmental impact plan was not implemented in accordance with its case law or the relevant international standards***.'

50.2. As was the case with the indigenous people of Sarayaku above, it is similarly submitted here that the Environmental Feasibility Recommendation (a) was prepared without the participation of the Aywu tribe; (b) consultations were implemented by the private entity proponent but without sufficient evidence that it had been subject to strict control by State monitoring agencies, and (c) did not sufficiently take into account the spiritual and cultural impact the planned development activities might have on indigenous peoples.

51. Being able to evaluate the EIA process is a component of good governance which is explicitly recognized as justiciable in Indonesian law[60].

51.1. UNDRIP, too, links environmental assessments requiring consultation with indigenous peoples with principles of justice, democracy, and good governance, among other principles.[61]

52. As put by the Supreme Court of India in ***Andhra Pradesh Pollution Control Board v Nayudu and Others*** **[2000][62]**:

'Good governance is an accepted principle of international and domestic law. It comprises of the rule of law, effective state institutions, transparency and accountability in public affairs, respect for human rights and the meaningful participation of citizens, including scientists, in the political processes of their countries and in decisions affecting their lives. (See Report of the Secretary General on the work of the Organization, Official records of the UN General Assembly, 52 session, suppl I (A/52/1) (para 22)). It includes the need for the state to take the necessary

[60] Art 53 paragraph (2) letter b of Law 9 Year 2004 on the Amendments to Law No. 5 Year 1986 on State Administrative Courts stating that "*The State Administrative Decision is contrary to the general principles of good governance*".
[61] UNDRIP Art 46 (3)
[62] Andhra Pradesh Pollution Control Board v Nayudu and Others [2000]1 LRC 578 at page 594

'legislative, administrative and other actions' to implement the duty of prevention of environmental harm, as noted in art 7 of the draft approved by the Working Group of the International Law Commission in 1996. (See Report of Dr Sreenivasa Rao Pemmaraju on 'Prevention of transboundary damage from hazardous activities') (paras 103, 104). Of paramount importance, in the establishment of environmental courts, authorities and tribunals is the need for providing adequate judicial and scientific inputs rather than leave complicated disputes regarding environmental pollution to officers drawn only from the executive.'

53. It is therefore clear that good governance necessitates judicial inputs from the courts; the state cannot be left to their own devices and be presumed to have accounted for all necessary considerations. Nor can a state properly delegate its authority.

54. As the Land and Environment Court of New South Wales in ***Bentley v BGP Properties Pty Ltd*** **[2006] NSWLEC 34** further affirmed:

> *'142 This message has added urgency in relation to the need to achieve ecologically sustainable development. As the Chief Justice of the Republic of Kenya recently stated:*
>
> > *"There is therefore a clear correlation between the rule of law, good governance and development. In the field of environmental law, sustainable development is only achievable if there is compliance with the environmental law. It is the role of the courts to ensure this compliance and support good governance for the sustainable development for the welfare of our generation and for generations to come": Speech by the Honourable Mr Justice J. E. Gicheru, Chief Justice of the Republic of Kenya on the Official Opening of the Kenya National Judicial Colloquium on Environmental Law and Access to Environmental Justice , Mombasa, Kenya, 10 January 2006, p. 3.'*

55. Indeed, at all junctures, it is the court's duty to take judicial notice of any illegalities in the public authority's decision. It is not sufficient for the lower court to say that it will not examine the substance and procedure of the environmental feasibility recommendation.

56. Judicial examination is especially incumbent considering the Environmental Feasibility Decree made is premised upon the Environmental Feasibility

Recommendation. Therefore, if the Recommendation is tainted by illegality, so too will the Decree.

57. As explained by the Malaysian Federal Court in ***Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals*** **[2023][63]**], it is the court's duty to take notice of any illegality particularly in planning cases:

> '*[547] This transitions to an important point, namely that the courts do not condone contraventions of the law, be it under the FT Act or any other law. The fact that a material issue was not disclosed by the parties does not preclude this Court, upon becoming appraised of the issue, whether from its own research or it having been pointed out by the parties, to raise and rule on the same, at any stage of the proceedings, particularly where it relates to a possible contravention of the law.*
>
> *[548] This is an established position of law, particularly in relation to illegality. Illegality encompasses contraventions of statute. This is particularly pertinent in the case of planning cases, where the court's supervisory role in relation to judicial review is to ascertain whether acts or omissions have occurred outside the purview of the relevant statute…'*

58. While not explicitly said in respect of EIAs, Justice Syed Refaat Ahmed in Bangladesh spelt out how to treat administrative decisions that are premised upon each other in ***King Kong Leather Wear (BD)***[64] :

> '*... it is this Court's finding that SRO No. ... read with all superseding SROs down to the impugned SRO No. ...* ***together represent an organic whole in which the contents of each preceding and repealed SRO have dissolved into or merged as necessary seamlessly with each successive one with the last most recent SRO representing to this Court the final manifestation of an illegality as has continued unabated all through****. Such wrong, found to be shorn of all legal basis, ... once detected and struck down by this Court has the effect of bringing down the entire edifice of illegality from start to finish and it matters not that each constituent statutory regulatory order of that organic whole has not individually been impugned for the Court's singular attention and remedial action. It is, therefore, the organic whole that this Court is concerned with in such a scenario and it is quite irrelevant that a single*

[63] *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals* [2023] 3 MLJ 829, [547] - [548]
[64] *King Kong Leather Wear (BD) Ltd. Vs. Government of Bangladesh and Ors*. 29 BLC (2024) 5

component has not been impugned when the organic whole is declared as representing a gross illegality.'

59. The Environmental Feasibility Decree, premised upon the Environmental Feasibility Recommendation, forms part of an organic whole. Once the Environmental Feasibility Recommendation is recognized as illegal and being shorn of all legal basis, the entire edifice of illegality from start to finish ought to be struck down even if each constituent administrative decision/order has not been individually impugned.

60. For completeness, the courts in Europe do not stray far from the principles affirmed by their counterparts in Asian and American jurisdictions.

61. After the Irish High Court's dismissal of an application for leave to bring judicial review proceedings against an electricity interconnection development for the reason that the application had been brought prematurely, the question of costs arose. The applicants' argued that costs incurred in bringing certain review proceedings should not be prohibitively expensive and referred to Article 11(5) of Directive 201/92/EU on the assessment of the effects of certain public and private projects on the environment.

62. In the **Opinion of Advocate General Bobek delivered on 19 October 2017 (*North East Pylon Pressure Campaign Limited and Maura Sheehy v An Bord Pleanála and Others*)** concerning the question of such costs, it was opined that litigants ought not be exposed to prohibitively expensive procedures when bringing review proceedings. The opinion further expressed that review challenges need not be confined to trying to protect a specific right of participation in the process but also can concern the process in relation to which participation is guaranteed,[65] expressing again the justiciability of the EIA process.

> *'70. The words 'subject to' in Article 11(1) are translated in various ways but generally convey the idea that the relevant challenges do not necessarily need to be aimed at protecting a specific right of participation in the process but rather must concern the process in relation to which participation is guaranteed. Thus, by way of example, other language versions translate 'subject to' as 'relevant de' (covered by); 'dentro del ámbito' (within the scope of); 'vallend onder' and 'podléhající' (falling under); 'gelten' (pertaining to) the public participation provisions.*

[65] Case C-470/16, Opinion of Advocate General Bobek, [70]

63. The substantive rights that procedural aspects of EIAs try to enshrine was also spelt out in the **Opinion of Advocate General Kokott delivered on 8 September 2016 (*Stadt Wiener Neustadt v Niederösterreichische Landesregierung)***, exemplifying how EIAs when properly carried out can be a facet of good governance and hence their justiciability.[66]

> '*46. … While it is to be hoped that the identification of significant environmental damage will lead to the adoption of preventive measures or the abandonment of the project, where this is not the case, an environmental impact assessment still has the function of collecting, documenting and disseminating information on the environmental effects of the project..'*

64. Reference therein was also made to the **Opinion of Advocate General Kokott delivered on 8 November 2012 (*The Queen, on application of David Edwards and Lilian Pallikaropoulos v Environment Agency and Others*)**,[67] wherein the function of mandating the procedural requirements of public participation in EIAs was expressed to serve 'a warning function' to 'identify environmental effects in good time'. Therefore, where there was a breach of the EIA Directive that adversely impairs this function, a claim for damages arises.

> *'50. Public participation serves primarily to identify environmental effects in good time, but it also has a warning function vis-à-vis the public concerned. Public participation serves primarily to identify environmental effects in good time, but it also has a warning function vis-à-vis the public concerned.*
>
> *51. Therefore, regardless of whether individuals express an opinion on the project, they can obtain information on its environmental effects directly from the environmental impact assessment or through the media. Consequently, they can adapt their future behaviour, for example by taking steps to avoid potential harm. In the directive this function is evident particularly from the fact that under Article 9 the public is to be informed of the decision at the end of the consent procedure and of the main reasons therefore.*
>
> *52. A breach of the EIA Directive which adversely affects this warning function must in principle be capable of giving rise to claims for damages.*'

[66] Case C-348/15, Opinion of Advocate General Kokott, [46]
[67] Case C-420/11, Opinion of Advocate General Kokott, [50] - [52]

IV. *In dubio pro natura* and Limitation Periods

65. There are a number of issues in the present case that concern principles of domestic procedural law, in particular the issue of whether the Plaintiff's lawsuit was filed within the relevant limitation periods.

66. While we do not profess an opinion on the intricacies of limitation, it is submitted that the analysis on limitation, as well as all other factual and legal issues in the case, must be conducted with the *in dubio pro natura* principle in mind.

67. The Indonesian Supreme Court has clearly set out that the maxim of *in dubio pro natura* is a fundamental tenet of Indonesian law[68] derived from a number of statutorily prescribed principles:

> *'Penggunaan doktrin "in dubio pro natura" dalam penyelesaian perkara lingkungan hidup keperdataan dan administrasi bukan suatu pertimbangan yang mengada-ada karena ternyata sistem hukum Indonesia telah mengenal doktrin ini yang bersumber pada asas-asas yang tercantum dalam Pasal 2 Undang-Undang Nomor 32 Tahun 2009 yaitu kehati-hatian (precautionary) , keadilan lingkungan (environmental equity), keanekaragaman hayati (biodiversity) dan pencemar membayar (polluter pays principle).'*

68. As the **World Declaration on the Environmental Rule of Law 2016**[69] sets out, the principle of *in dubio pro natura* means the following:

> *'In cases of doubt, all matters before courts, administrative agencies, and other decision-makers shall be resolved in a way most likely to favour the protection and conservation of the environment, with preference to be given to alternatives that are least harmful to the environment. Actions shall not be undertaken when their potential adverse impacts on the environment are disproportionate or excessive in relation to the benefits derived therefrom.'*

69. This principle has also been adopted in a number of jurisdictions:

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[68] Putusan Mahkamah Agung Nomor 651 K/Pdt/2015, page 73
[69] Principle 5 of the World Declaration on the Environmental Rule of Law

69.1. As further re-enforced by the **Supreme Court of Mexico**[70], the *in dubio pro natura* principle is *'not merely limited to the precautionary principle, i.e., not only applicable to scientific uncertainty, but as a general requirement for ensuring environmental justice, in the sense that in any conflict the interpretation that favors the preservation of the environment must always prevail*'.

69.2. As held by the **Lahore High Court in Pakistan in** *Maple Leaf Cement Factory v. Envtl. Prot. Agency*[71]:

> '*Another emerging environmental principle and perhaps more appropriate in this case, declared as Principle 5 of the IUCN World Declaration on the Environmental Rule of Law (2016) is In Dubio Pro Natura i.e., " in cases of doubt, all matters before courts, administrative agencies, and other decision makers shall be resolved in a way most likely to favour the protection and conservation of the environment, with preference to be given to alternatives that are least harmful to the environment. Actions shall not be undertaken when their potential adverse impacts on the environment are disproportionate or excessive in relation to the benefits derived therefrom.‖ Taking a precautionary approach and relying on the principle of In Dubio Pro Natura, as it is uncertain what the survey of the Salt Range might hold, the courts must favour nature and environmental protection. This approach is also constitutionally compliant as the courts are to protect the fundamental rights of the public and in this case right to life and dignity of the community*…..'

69.3. **Article 395 of Ecuador's Constitution** states: "*In case of uncertainty regarding the reach of legal provisions on environmental matters, such provisions shall be applied in the sense most favorable to the protection of nature."*

70. It is therefore submitted that the limitation period ought to be interpreted liberally in favour of the Plaintiff. Where there is doubt about whether the environmental

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[70] First Section of the Supreme Court of Justice of Mexico, Decision No. 307/2016, 14 November 2018. A summary of this decision is available at https://www.scjn.gob.mx/derechos; original judgement in Spanish but phrase translated in Serena Baldin and Sara De Vido, ' *The In Dubio Pro Natura Principle: An Attempt of a Comprehensive Legal Reconstruction*', Revista General de Derecho Público Comparado 32/2022, page 168

[71] *Maple Leaf Cement Factory v. Envtl. Prot. Agency, Case No. W.P. No. 115949/2017* , [19]

impacts were sufficiently considered, the interpretation of the law that ensures environmental impacts are most thoroughly considered must be adopted in order to ensure the environment is best protected.

Conclusion

71. This amicus curiae brief has illustrated how the factual instances of this case warranted the application of safeguards to enforce rights of indigenous peoples recognised under international law and advanced that the inapplication and non-recognition of such rights and safeguards has resulted in the the Dispute Object being void. As explained, **Article 19 of the UNDRIP** of which Indonesia is signatory to, and other provisions of international law, ought to have driven the manner in which FPIC, if at all, was obtained from the Awyu people. This was not done in this instant case.

72. Further, this brief submits that EIAs are justiciable: being able to evaluate the EIA process is inherent to good governance for it cannot be *de facto* presumed that the state has accounted for all necessary considerations. If at all, the facts in the present case highlight why it is necessary that EIAs be subject to judicial examination in the face of clear unequivocal breaches by the proponent company's (and implicitly, by the state) of basic tenets of international law which incidentally align with precepts of Indonesian law.

73. Lastly, the limitation period ought to be interpreted under the auspices of the *in dubio pro natura* principle.

Respectfully submitted,

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