



Essays and Perspectives

## Free, prior and informed consent: how to rectify the devastating consequences of harmful mining for indigenous peoples'

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### ARTICLE INFO

#### Article history:

Received 6 January 2017

Accepted 29 May 2017

Available online 21 July 2017

#### Keywords:

Extractive industry

Indigenous peoples

Human rights

Free, Prior Informed Consent (FPIC)

Multi-stakeholder initiatives

Mining

### ABSTRACT

The paper focuses on one of the topics of key concern for both indigenous peoples and the mining sector, namely the corporate responsibility to respect indigenous peoples' right to give or withhold their consent to extractive industry projects in their lands and the fundamental role of this principle in altering the predominant and all too frequently devastating model of mining that is imposed in indigenous peoples' territories. The paper traces the emergence of extractive industry standards and initiatives showing how continuing mining disasters and associated human rights abuse have obliged the industry to recognize indigenous peoples' right to give or withhold their Free, Prior and Informed Consent to operations that may affect their customary lands. It examines the development of industry good practice since the World Bank's Extractive Industries Review, the subsequent formation of the International Council on Minerals and Metals while considering the contribution its members have played in recent mining catastrophes involving indigenous peoples. It distills good practice on indigenous consultation and the principle of native title from evolving national and international law and tracks how these have led to the inclusion of Free, Prior and Informed Consent in the recent Initiative for Responsible Mining Assurance and Aluminium Stewardship Initiative standards. The focus on the two most recent multi-stakeholder standard initiatives in the mining sector offers a sense for where further developments may occur while also noting their potential limitations. The paper concludes with recommendations to the extractive industry to recognize and protect indigenous' peoples' rights as a preeminent principle of responsible mining good practices.

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### Introduction

Ever since Cristobal Colon's first visit to the Americas the quest for gold has been a major driver of colonial and post-colonial States' take-over of indigenous peoples' lands (Columbus, 1969). It was the lure of gold that led to the decimation of the Arawaks of Hispaniola (Rouse, 1992), to Cortes' destruction of the Aztec Empire (Diaz, 1963; Thomas, 2003), and Pizarro's subjugation of the Inca (Hemming, 1970). The gold mines of Ashanti led Portuguese explorers to sail round the west coast of Africa (Ley, 2000) and later brought British imperial rule to the area (Robinson et al., 1965). Gold brought speculators onto indigenous lands in California leading to the near elimination of the indigenous peoples there (Kroeber, 1961) and later to shatter the Tlingit during the Klondyke gold rush (Wilkinson, 2005). Famously too it was gold mining that led to the annexation of the Black Hills, sacred to the Lakota (Sioux

(Debo, 1970). These are but some of the most well-known examples of early mining disasters from indigenous peoples' point of view (Moody, 1988; Cocker, 1999).

All these invasions of indigenous peoples' lands occurred contrary to early agreed principles of international law; that native peoples' are endowed with the same rights as other humans (Doyle, 2015a) and their lands should not be taken without their consent (Colchester and MacKay, 2004; Doyle, 2015a). Nascent international law, while ostensibly recognizing that native peoples had inherent rights over their land and to govern themselves, nevertheless provided a series of justifications for infringements on those rights, which when combined with deceit, subterfuge and the legally sanctioned (or otherwise) use of force, served to deprive indigenous peoples of those basic rights.

Since the 1970s, indigenous peoples have been active as a global movement insisting on their rights – equal to other peoples – to self-determination, to ownership and control of their lands, territories and resources and to 'Free, Prior and Informed Consent' (FPIC). Of all industrial sectors, it has been the extractive industries, those involved in natural resource extraction (such as oil, metals,

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minerals and aggregates) and its related processes (ranging from exploration to selling to end consumers) that have been most resistant to acknowledging these rights. Although within the logging, palm oil, and to a lesser extent the sugar sector a subset of actors, since the 1990s, recognized these rights in good practice standards (Colchester and Chao, 2014), even though the effectiveness of these standards remains questionable, the extractive industries has only reluctantly and belatedly accepted this consensus. This despite the fact that United Nations agencies, including the International Fund for Agricultural Development – the first international financial institution to adopt FPIC as an operational standard (IFAD, 2009) – the United Nations Development Programme and the Food and Agriculture Organization of the United Nations, all require or encourage adherence to FPIC in activities that they plan, finance or implement (World Bank, 2003a).

While the focus of the paper is on the emergence of FPIC as the standard with which companies must comply, it does not attempt to engage with the content of FPIC or with the diversity of community perspectives that must inform its implementation. It should also be noted though this paper addresses extractive industries in the broader sense, the primary focus of this paper shall be on the mining sector as this has been to date the most proactive of the extractive sector arms in acknowledging indigenous peoples' rights.<sup>1</sup>

### Early initiatives, including Extractive Industries Review

Extractive industry led initiatives have tended to generate more suspicion than harmony. The first notable initiative was the Mining, Minerals and Sustainable Development Project (MMSD), a research initiative promoted by the industry's Global Mining Initiative (GMI) from 2000 to 2002 to review how the sector could contribute to a global transition to sustainable development, tied into the World Summit on Sustainable Development (MMSD, 2002). While the MMSD clearly had limitations from the perspective of indigenous peoples – and of course constituted an attempt by the industry to rebrand itself as “sustainable” – its “Breaking New Ground” report was relatively progressive, when compared to the establishment of the International Council on Mining and Metals (ICMM) and its initial position statements. The MMSD +10 report summarized the original MMSD position as “Government should recognize and uphold the rights of indigenous people and companies should act ‘as in to gain consent’. Indigenous people need an international body to establish and uphold good practice, and evidence of good practice engagement between mining companies and indigenous people” (Buxton, 2012). One could argue that the MMSD report was the initial step towards acknowledging the relevance of FPIC and the need to ensure respect for indigenous peoples' rights.

Nevertheless, the project was widely criticized for being nothing more than a public relations exercise directed at improving the poor image of mining, rather than offering improvements in on site practice. The lack of meaningful participation from any indigenous representation perpetuated the industry's history of unilateral initiatives and its self-declared and “self-regulated” codes of conduct (Tauli-Corpuz and Kennedy, 2002). Furthermore, the major source of all funding for the project was unsurprisingly the industry, which provided \$7 million (Caruso et al., 2003).

Whilst most civil society groups and indigenous organizations rejected the MMSD and its commitments, the World Bank uncritically accepted its legitimacy, acting as one of the few non-industry

sponsors of the project (Caruso et al., 2003). Strong societal criticism however forced the Bank to commission its own Extractive Industries Review (EIR) in 2003 to examine what role, if any, the World Bank Group should have in the oil, gas and mining sectors. The EIR's Final Report presented a year later to the World Bank, found indigenous peoples warrant additional requirements, including, but not limited to, effective guarantees for territorial rights, the right to self-determination (World Bank, 2003b) and crucially the right to give or withhold their FPIC (MacKay, 2004).

The World Bank rejected many of the EIR's findings, including that FPIC should be the principal determinant of whether there is community acceptance, and failed to incorporate sufficient safeguards to the subsequent revision to its policy on indigenous peoples' (OP 4.10) in 2005. Instead it created a standard of ‘Free, Prior Informed Consultation’ resulting in ‘Broad Community Support’ (BCS), a standard widely rejected by indigenous peoples as inconsistent with their human rights. A similar standard previously used by the World Bank's private sector lending arm, the International Finance Corporation (IFC), of ‘good faith negotiation’ leading to BCS, was removed following a review of BCS which clearly demonstrated the standard is almost impossible to use effectively as a tool to establish certainty of support for a given project (Leake, 2008). Subsequently, the new IFC Performance Standard 7 adopted in 2012 required FPIC for certain categories of projects reflecting the reality that FPIC applies irrespective of national legislation and should be triggered by any project which may effectively impact indigenous peoples' rights (UN General Assembly, 2010). The IFC FPIC standard is now adopted by a number of lending institutions as a condition of loans to the private sector and has played an important role in establishing FPIC as the requirement to be met by the industry and financial actors although effective implementation and verification of compliance with this IFC FPIC standard remain lacking 5 years after its adoption by the IFC. It is essential, however, that its implementation be consistent with indigenous peoples' rights and be flexible enough to cater to local realities and the indigenous conception of FPIC.

The public sector arms of the World Bank (IBRD and IDA) continue to apply standards and guidance which have largely failed to result in the sort of effective participation that the Bank itself seeks to ensure (OPCS, 2011), isolating and undermining traditional authorities, damaging indigenous peoples' cohesiveness and alienating them from decision-making. New standards coming into force from January 2018 will require FPIC under certain project conditions, a welcome step, but have removed key planning requirements, which may serve to undermine the new inclusion of FPIC. A further development of serious concern is the World Bank's recent approvals for a series of projects in East Africa, including two in Tanzania (Chavkin and Ulman, 2016) where the Bank has approved government requests to waive the indigenous peoples' policy. This has sparked real fears that the development lender is setting an unfortunate precedent for future practices, reducing protections for indigenous peoples' rights, particularly in Africa. Responsibility is therefore increasingly passing to the extractive industry to apply industry-focused standards emerging from multi-stakeholder initiatives that safeguard indigenous peoples' rights.

### The International Council on Mining and Metals: policy and practice

In May 2001, building on the work of the MMSD, the GMI created the ICMM, to focus on industry implementation of sustainable development. One of the main objectives of the ICMM was to develop a policy for its members, which became operative in May 2003. The ten principles in the code are phrased in aspirational terms, with heavy emphasis on “intent” on the part of the

<sup>1</sup> The oil and gas sector currently lag behind the mining sector in terms of rights recognition, advocating meaningful consultation with communities over the need for concrete community consent before proceeding with a development project (IPIECA, 2012).

member companies to improve their performance, but were initially devoid of specific requirements for compliance (Sethi and Emelianova, 2006). For example, the third principle states its goal is to “uphold fundamental human rights and respect cultures, customs and values” yet it did not fully embrace FPIC as a right of indigenous peoples. This initial policy offered little effective protection to mine-affected communities and failed to provide a minimal level of performance specific social practices to which all industry members were expected to adhere. Reference to indigenous peoples' is scant at best, the text instead endorses the notion of consent through the ambiguous language of “constructive dialogue”, “respect for communities” and “serious engagement with them” (ICMM, 2002) without committing its members to carry out concrete community engagement procedures.

ICMM's subsequent 2008 ‘position statement’ on mining and indigenous peoples attempted to set a high standard for interactions between mining companies and indigenous peoples, one of cooperation, understanding and respect. The position statement cautioned companies not to rely too heavily on national governments to protect indigenous communities and encouraged companies to point out gaps in implementation of international instruments and standards governments had agreed or ratified. It requested members to consult with communities from “the earliest possible stage of potential mining activities, prior to substantive on-the-ground exploration” (ICMM, 2008) through to closure and recommended projects to avoid, or at the very least minimize adverse impacts as well as make special arrangements to protect indigenous sites of cultural or spiritual importance. Yet crucially, it did not acknowledge indigenous community's right to say no to a mining project, a right embodied in the FPIC standard instead endorsing the lesser standard of BCS for new projects (ICMM, 2010). The 2013 position statement made progress on amending this. Although it does not overtly recognize indigenous peoples' rights to say no, it talks of companies working towards FPIC, noting that “states may also play an important role in supporting. . . companies in the pursuit of FPIC” (ICMM, 2013). These obligations, although not ensuring all council members would obtain consent, set the expectation that indigenous peoples would receive a place at the negotiating table. Interestingly, none of the ICMM position statements refer to the legacy of past mining operations and the need for this to be addressed in order for indigenous peoples' rights to be respected; this tends to be a major blind spot of current good practice.

Unfortunately, it is easy to provide examples of where ICMM members have fallen short of aspired policies, particularly regarding human rights violations. Barrick Gold – the world's largest gold producer – expanded their mining operations into Mount Tenabo and Horse Canyon in Nevada, USA, areas with deep cultural and religious significance for the Western Shoshone peoples, despite local resistance. The UN's Committee on the Elimination of Racial Discrimination (CERD) issued Early Warning and Urgent Action decision 1(68) in 2006 (UN Committee Elimination Racial Discrimination, 2006), calling upon the United States to “freeze” and “desist” all activities conducted on ancestral lands without consultation with the Western Shoshone peoples. In 2008 the CERD reiterated its decision and the Shoshone peoples sought a preliminary injunction to stop the destruction of their sacred sites (IEN, 2010). Despite the judge acknowledging that the project will desecrate the mountain and decrease the community member's spiritual fulfilment from their religion the injunction was rejected on the grounds that the significant financial costs of the injunction outweighed these religious factors (South Fork Band v. US Department of Interior, 2009a). These financial costs could have been avoided had the community been initially consulted and given the opportunity to show their unwillingness to consent to exploitation. Later injunctions were successful (South Fork Band

v. US Department of Interior, 2009b) only for them to be lifted in 2012. Although many of these events happened prior to the ICMM's policy creation, Barrick continues to operate in the area causing irreparable damage to Western Shoshone lands, threatening both the health of its people and the survival of their culture (Cavanaugh-Bill and Howard, 2012).

In Guyana, colonial domination and institutionalized racism prevail and are firmly entrenched in Guyanese law and policy – something that mining companies such as ICMM member Newmont have profited from (Colchester and La Rose, 2010). Mining concessions and exploration permits have been superimposed on ancestral lands to the extent that they now cover two-thirds of the country (Colchester and La Rose, 2010) while the local Amerindians hold title to less than half of their traditional territories (Weitzner, 2011). All this has occurred without the FPIC of Guyana's indigenous peoples. The often ignored social and economic consequences include denial of access to traditional farming grounds; damage to hunting and fishing grounds; and the sexual exploitation of indigenous women (Atkinson et al., 2016).

Similar threats exist in Colombia, a country with a history of armed conflict fuelled by extractive activities (Weitzner, 2011), where AngloGold Ashanti (AGA), an ICMM member, has mining rights to 7.5% of the State's territory. In 2008 AGA started exploration activities in the Cañamomo Lomaprieta Indigenous Reserve without the consent on the peoples who occupy the land (RICL, 2008). This violation happened despite the ICMM's position (Weitzner, 2012) illustrating that voluntary corporate social responsibility initiatives on their own are far from sufficient to uphold human rights on the ground, particularly in the context of armed conflict. More insidiously, they can mask human rights abuses, given their reliance on self-reporting and lack of third-party verification (NSI, 2012).

This does raise the question of the prospect for the effectiveness of other voluntary extractive industry initiatives such as the Initiative for Responsible Mining Assurance (IRMA) and the Aluminium Stewardship Initiative (ASI) given that both will rely on self-reporting and a certain degree of third party verification through audits. The shortcomings of similar initiatives in other sectors such as the Roundtable on Sustainable Palm Oil (RSPO) and the Forest Stewardship Council have illustrated that a system predicated entirely on the ability of its auditors to monitor company operations is critically flawed (EIA, 2015). In both initiatives auditing firms have fundamentally failed to identify and mitigate unsustainable practices, conducting substandard assessments. Oversight of illegal practices is instead provided by the rigorous policing of communities and activists who must go through tedious complaints procedures to achieve redress for company abuses. For these initiatives to be effective and uphold indigenous rights, companies must be legally bound to their human rights obligations as at present there are no clear obligations on corporations in relation to respecting human rights under international human rights law, apart from the weak formulation of the “responsibility to respect human rights” in the UN Guiding Principles on Business and Human Rights (UNGPR).

When indigenous peoples' have attempted to assert their human rights they have been met by threats and repression. In Guatemala, the arrival of ICMM member Goldcorp incited protests among the Mayan indigenous peoples which led to criminalization and intimidation of members of the community (Collectif Guatemala et al., 2009). During the exploration phase of the Marlin project Goldcorp, through its subsidiary Montana Exploradora de Guatemala, met with the indigenous communities of San Miguel Ixtahuacán and Sipakapa in 2003 (Montana Exploradora de Guatemala, 2004). However, it did not carry out consultations on the proposed mining project as it falsely claimed (Van de Sandt, 2009), but used these meetings to pave the way for

smoothing land acquisitions, creating social division, and imposing a private land tenure system on communal territories (Imai et al., 2007). This immediately triggered organized resistance in Sipakapa communities (Castagnino, 2006), where they organized their own referendum, or *consulta*, on the issue. 11 of the 13 communities involved opposed the presence of mining activity in their region, however the *consulta* was denied its legitimacy by the State and the judiciary, a position Guatemala's Human Rights Ombudsman condemns given the State neither adequately informed nor initiated a dialogue with indigenous communities on the implementation of mega-projects on their territories (Van de Sandt, 2009).

In the Philippines, ICMM member Xstrata (later merged with current ICMM member Glencore, who took over control of the project) bought a controlling interest in the Tampakan copper-gold project on the traditional lands of the indigenous B'laan people. The directly affected B'laan have consistently denied that they have given their FPIC to the project (Dinteg and Kaluhhamin, 2015). The region of the project is already an area associated with internal armed conflict, but the B'laan's resistance rapidly led to further conflict, and the deployment of various army units, armed security and paramilitaries (notably an 'Investment Defence Force', which had the stated aim of protecting the company). Support groups quote a figure of ten project related extra-judicial killings associated with the mine since 2001, including the murder of indigenous leader Juvy Capion, with her two sons in 2012 (Kalikasan PNE, 2015) Militarization of indigenous territories, and the consequent serious human rights violations (Franciscans International, 2014) have resulted in a systematic narrowing of the space available for indigenous peoples' political participation and have eliminated any possibility for justice and accountability.

ICMM's inclusion of guidance on FPIC in their 2015 Good Practice Guide provided a crucial step towards safeguarding indigenous peoples' rights from the abuses already described. Nevertheless, the industry's articulation of what happens if consent is not forthcoming – where ICMM members may rely on the “good faith” of the State to judge whether a project may proceed – risks allowing members to pursue projects in the absence of FPIC, putting them in a position where they are potentially complicit in State violations of indigenous peoples' rights. This shortcoming must be addressed if ICMM is to champion rights based engagement with indigenous peoples and ensure that gross violations of these rights do not occur. The challenge facing the industry therefore, is to go beyond State based initiatives aimed at consultation which fail to live up to international standards, and to ensure that consultations and respect for indigenous peoples' land, territory and resource, cultural and self-governance rights are consistent with international standards.

Larger companies tend to believe exploration activities are underneath the radar screen of reporting, and that they do not need to report on their joint venture activities where they are not the operator. It is paramount therefore that ICMM members when considering a joint venture with a smaller company (junior) or acquiring concessions from juniors undertake the necessary due diligence to ascertain whether interactions with indigenous peoples have been managed appropriately in accordance with good practice (ICMM, 2010) and if they are found to have violated this to report them. In such contexts, due diligence is necessary to ensure that there have been no prior human rights violations and to put in place whatever remedial processes are necessary to ensure that human rights are respected. In cases where the wrong cannot be remedied, or where consent has been withheld, respect for indigenous peoples' rights would require that ICMM members do not proceed to acquire such concessions.

In most situations where juniors are involved, there is little or no effort to obtain FPIC with indigenous peoples' rights being frequently violated in the process of obtaining access to their lands. It is in the interests of the industry to eliminate these rogue actors,

improving the sector's reputation and reducing legacy issues from this phase of the project due to poorly implemented FPIC processes (Collins, 2016). In the words of the UN Global Compact, “obtaining FPIC in a ‘check-in-the-box manner is not sufficient to ensure that the company respects the rights of indigenous peoples” (Lehr, 2014). Furthermore, it is the opinion of the authors that stronger state regulation of juniors – who are numerous, tend to be less risk averse and have an associated lack of transparency – is essential. It is juniors who commonly undertake the exploration stage of the mining cycle and who are the first to engage with indigenous peoples.

### Free, Prior and Informed Consent

FPIC is one of the most important principles that indigenous peoples have used to protect their rights. It is derived from indigenous peoples rights to lands, territories and resources, and from cultural rights and self-governance rights, including the right to self-determination. The duty of State and companies to obtain indigenous peoples' FPIC guarantees community driven consultations and decision-making processes and ensures that indigenous peoples' can effectively determine the outcome of decision-making that affects them, not merely be involved in the process. The conversation around FPIC therefore must go hand in hand with the conversation around recognizing and respecting these rights, as otherwise it occurs in a vacuum with no benefit to indigenous peoples'.

FPIC has its origins in the principle of native title from common law, i.e. that native people have rights to their lands based on their customary law and sustained connections with the land. As such they do not require any act of the State in order to assert those rights. The principle of inherent rights over lands which native peoples held prior to the arrival of colonizers was affirmed by the Spanish conquistadores. Denying the application of *terra nullius*<sup>2</sup> to the Americas, de Vitoria, concluded “the aborigines in question were true owners, before the Spaniards came among them, both from the public and private point of view” (Vitoria, 1964). In practice this right has been denied since the days of Vitoria to the present day in nation states. This form of discrimination is now challenged by the more recent recognition of customary land tenure under human rights law, which has offered to revive indigenous peoples' sovereignty over their land. International human rights law and jurisprudence affirms that indigenous peoples' customary land rights are not dependent on any ‘grant’ by the nation state, but are pre-existing and inherent rights grounded in traditional occupation and use of the land.

The landmark judgement of the Inter American Court of Human Rights (IACHR) in *Saramaka People v Suriname* highlighted that it would be ‘meaningless’ to recognize land rights for indigenous peoples without recognizing their rights over natural resources (*Saramaka People v. Suriname*, 2007). This mirrors the rationale adopted in the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP), the clearest articulation of indigenous peoples' rights which affirms the State duty to consult with indigenous peoples before adopting measures that may affect them and prior to the approval of any project affecting their lands and other resources (UN General Assembly, 2007).

<sup>2</sup> The expression “terra nullius” was a legal term of art employed in connection with “occupation” as one of the accepted legal methods of acquiring sovereignty over territory. “Occupation” being legally an original means of peacefully acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of a valid “occupation” that the territory be *terra nullius* – Latin, a territory belonging to no-one – at the time of the act alleged to constitute the “occupation” (Encyclopaedic Dictionary of International Law (3rd ed.) 2009).

The requirement to seek and obtain indigenous peoples' FPIC is either explicitly affirmed, or clearly implied, in a range of other international instruments and standards,<sup>3</sup> being a derivative of their rights to self-determination, non-discrimination, culture and property. Notable examples being The Convention on Biological Diversity, an instrument that promotes the application of FPIC that has been signed and ratified by 157 countries ([Convention on Biological Diversity, 2017](#)), and International Labour Organization Convention 169 (ILO 169) which instructs the relevant state entity to identify the indigenous peoples to be consulted on the basis of the content of the proposed measure, the degree of the relationship between the measure and the indigenous peoples and the measure's territorial scope. Although ILO 169<sup>4</sup> has not been ratified by every country, the principles of consultation and participation that underpin the Convention are fundamental to the implementation of FPIC.

The presence of FPIC within national legislation is a crucial indicator of the extent to which the State recognizes indigenous peoples rights within its jurisdiction. UN CERD's General Recommendation XXIII calls upon States to ensure that indigenous peoples' informed consent is attained before making decisions that directly affect indigenous peoples' rights and interests ([UN Committee Elimination Racial Discrimination, 1997](#)). Since the incorporation of ILO169 and UNDRIP into the international human rights discourse several countries have allowed for stronger State recognition of indigenous peoples' land, territory and resource rights these include Liberia ([The Community Rights Law, Liberia, 2009](#)), Tanzania ([The Land Act, Tanzania, 1999](#)), Bolivia ([The Bolivian Constitution, Bolivia, 2009](#)), Kenya ([The Constitution of Kenya, Kenya, 2010](#)), Cambodia ([The Cambodian National Land Law, 2001](#)), Ecuador ([The Constitution of Ecuador, Republic of Ecuador, 2008](#)), Mozambique ([Mozambique Land Law, Mozambique, 1997](#)), Central African Republic (ILO, 2010), Benin ([Benin Sacred Forest Law, Benin, 2012](#)), and India ([Forest Rights Act, India, 2006](#)).

The trend is most pronounced in Latin America, where indigenous peoples are attaining significant recognition of customary access and formal rights to natural resources through the national courts. Several countries have passed laws or have jurisprudence that reference indigenous peoples right to FPIC. For example, the Constitution of Venezuela contains a provision requiring that native communities be consulted and provided with information prior to State exploitation of natural habitats ([Constitution of the Bolivarian Republic of Venezuela, Venezuela, 1999](#)). Judicial rulings have clarified the requirement for FPIC should be assumed to apply in the context of large-scale extractive projects. The Constitutional Court of Colombia, for example, has issued numerous rulings ordering the suspension of development projects, or declaring legislation unconstitutional because of a lack of prior consultation with indigenous peoples ([DPLF, 2011](#)). In one instance, it held that "the information or notification that is given to the indigenous community in connection with a project of exploration or exploitation of natural resources does not have the same value as consultation. It is necessary... that community declares, through their authorized representatives their consent" ([Constitutional Court of Colombia, 1997](#)).

The Canadian Supreme Court in *Delgamuukw v British Columbia* ([Delgamuukw v British Columbia, 1997](#)) held that the duty of the State to consult with indigenous peoples is proportionate to the expected impacts on traditional lands and resources. In the case of minor impact, a duty to discuss important decisions pertains

<sup>3</sup> Experts Mechanism on the Rights of Indigenous Peoples (2011), A/HRC/18/42 (2011), UN CERD General Recommendation XXIII (1997).

<sup>4</sup> ILO169 does not explicitly recognize the right to self-determination, nevertheless it can act as a tool for its realization.

while full consent pertains for serious issues and impacts. *Haida Nation v British Columbia* upheld the Government's duty of consultation and accommodation prior to title being proven ([Haida Nation v. British Columbia, 2004](#)), echoing *Taku River Tlingit First Nation v British Columbia* where it was judged the States duty to consult prior to approving the re-opening of a mine and the construction of an access road through the territory over which the First Nation claimed ([Taku River Tlingit First Nation v. British Columbia, 2004](#)). Sadly, these decisions, despite challenging the notion that the State had a monopoly on the exercise of law, have not caused the practice of government agencies and corporate interests to change in response to their duty to consult indigenous peoples on projects that impact them.

Even in States which have taken legislative measures to fulfil promises of constitutional recognition of indigenous peoples' ancestral land rights, such as the Philippines in its 1997 Indigenous Peoples Rights Act (IPRA), problems with the extractive industries have arisen. IPRA explicitly requires FPIC for significant development projects, like mining, in indigenous territories. However, in 2006, the National Commission on Indigenous Peoples (NCIP), the government agency responsible for protecting and promoting indigenous peoples' rights, revised its FPIC guidelines making it increasingly difficult for indigenous communities to implement their own visions of FPIC. Since then there have been significant problems in IPRA's implementation due in part to its inherent lack of representation of and accountability to indigenous peoples. Numerous violations have resulted in its poor application – subverting the process for acquiring FPIC ([Magno and Gatmaytan, 2013](#)), recognizing false indigenous leaders to further the claims of mining companies ([Castillo Llaneta, 2012a](#)) and implementing a defective, cumbersome and expensive process for securing certificates of ancestral domain title and land title ([Castillo Llaneta, 2012b](#)). This has all been undermined by the poorly funded NCIP which was transformed by more powerful actors into a facilitator of corporate access to indigenous peoples' lands, rather than an institution which facilitated indigenous people to exercise their right to self-determination ([Doyle, 2015b](#)). The NCIP has since promulgated revised guidelines on FPIC ([Republic of the Philippines, 2012](#)) as a way to address implementation challenges. The 2012 guidelines stipulate that indigenous peoples have the right to develop a resolution of consent or crucially a resolution of non-consent. They also provide for multiple application of FPIC throughout the life of a project, denote excluded areas (including sacred grounds and burial sites) and require the participation of indigenous leaders on the field research team ([Magno and Gatmaytan, 2013](#)). Effective implementation of the new progressive rules will be critical if the Philippine government is to achieve real community participation in the natural resources decision-making and genuine protection of indigenous peoples' rights.

While the obligations incumbent on States have traditionally been the focus of international human rights law, there is strong arguments in contemporary law that obligations to respect human rights can apply to non-state actors including multinational corporations.<sup>5</sup> The unanimous endorsement of the UNGP

<sup>5</sup> Among others see, Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. 1) (1992); Copenhagen Declaration and Programme of Action, UN Doc. UN Doc. A/CONF.166/9 (1995); G.A. Res. 42/115, 11 February 1988, The Impact of Property on the Enjoyment of Human Rights and Fundamental Freedoms; Commission on Human Rights Resolutions 1987/18 and 1988/19; principles relating to the human rights conduct of companies. Working paper prepared by Mr. David Weissbrodt. E/CN.4/Sub.2/2000/WG.2/WP.1, 25 May 2000; M. Addo (ed.), Human Rights Standards and the Responsibility of Transnational Corporations. The Hague: Kluwer Law International (1999); J.R. Paul, Holding Multinational Corporations Responsible Under International Law 24 Hastings Int'l. and Comp. Law Rev. 285 (2001); Patrick Macklem, Indigenous Rights and Multinational Corporations at

in 2011 called on corporations to respect human rights, independently of the State compliance with its duty to protect those rights, and to operate to internationally recognized human rights standards (Voss and Greenspan, 2012). This requires the identification of indigenous peoples and any potential impacts on their rights prior to decision-making in relation to plans or activities potentially impacting them (UN General Assembly, 2011). The responsibility includes the requirement to consult with indigenous peoples in order to obtain their FPIC (UN General Assembly, 2011). These processes must be implemented at the earliest possible stage of a project, prior to the issuance of licences or concessions and certainly before the commencement of any mining activity.

Ultimately, FPIC provides the platform that is necessary for constructive engagements with indigenous peoples in a manner consistent with the corporate responsibility to respect human rights (United Nations, 2007). In doing so, it also offers the only practical long-term approach to the pursuit of extractive projects in or near indigenous peoples' territories. Therefore, to guarantee the extractive sector lives up to its human rights responsibilities, in particular respect for indigenous peoples' rights, recognition of the standard is absolutely critical.

One of the major outstanding challenges with the FPIC standard, remains its enforcement and compliance. Evaluations of FPIC processes indicate the difficulties involved in actual implementation, especially in the absence of consensus among indigenous peoples' (where some may favour cooperation with a company while others oppose). Similarly, challenges due to complex layers of legislation, unsettled land-tenure, low government capacity, lack of existing institution infrastructures and transparency regarding compensation make verification of compliance with the FPIC principles tough to determine (Christoffersen, 2015). A concern is that companies and States alike are turning FPIC into a formality no longer based on customary laws, by manipulating processes and certifications without due verification of procedure in the community. This could lead to FPIC being reduced "from constructive collaborative decision-making to a reaction to externally defined projects or to a single event with no longer-term engagement" (Feiring, 2013).

### Initiative for Responsible Mining Assurance

The most promising of extractive industry multi-stakeholder initiatives involving indigenous peoples is IRMA (IRMA, 2016). The aim of IRMA is to establish a multi-stakeholder and independently verified Responsible Mining Assurance system that improves social and environmental performance. IRMA is not the most recent of initiatives, having been founded in 2006. Unlike the MMSD and ICMM, the development of the IRMA standard is much more of a multi-stakeholder process, involving players such as mineral buyers – particularly jewellers – who were seeking ways to certify their supply chains. Learning from previous failures, there was an attempt to build up trust among a small number of key players, allowing time to truly address even the more problematic issues, such as FPIC. Crucially, IRMA early on recognized the importance for indigenous peoples (and local communities) to be directly represented as a key stakeholder in negotiations, and not just be added as a subgroup of non-governmental organizations (NGOs).

Both these positive steps – the inclusion of indigenous peoples and the time taken to fully consult resulted in the second draft of the Standard for Responsible Mining, which was released in April 2016. This draft includes provisions requiring the FPIC of indigenous peoples and may afford indigenous peoples with another

potentially important institutional mechanism through which they can seek to pressure the extractive sector to respect their territorial rights. IRMA plans to beta test its certification system in 2017, with independent auditing. There have been concerns raised that IRMA is such a relatively high standard that it may not be applicable widely across the industry, but creating shared high standards and then independently verifying if companies can achieve these seems to be the way forward.

### Aluminium Stewardship Initiative

The flaws of MMSD and ICMM have allowed initiatives such as IRMA and ASI to rise to prominence in response to growing pressure from stakeholders in the mining supply chain to assure the protection of indigenous peoples' rights. Historically, the production of aluminium in particular – involving bauxite mining and large-scale dams supplying cheap power for smelting and refining – has had significant direct adverse effects on indigenous communities. A case in point is the experience of Adivasi indigenous peoples in India, where Vedanta Resources' attempts to exploit the world's fourth largest bauxite deposit in the sacred Niyamgiri mountain – located in the heart of the Kond tribal area – was the subject of international condemnation (Doyle et al., 2015). Investigations in 2009 by the UK Government's National Contact Point found the company had made no significant attempts 'to put in place an adequate and timely consultation mechanism' (London Mining Network, 2012) or seek Dongria Kond community consent (Amnesty International, 2012) despite falsely claiming otherwise (London Mining Network, 2012).

Just as local stakeholder resistance culminated in a successful Indian Supreme Court ruling in favour of the Kond community, pressure from the international community led to a fair and constructive discussion between the aluminium industry and civil society. The results of both have been extremely positive; the Dongria Kond when given the opportunity to decide whether they wanted bauxite mining on their ancestral land unsurprisingly voted unanimously against the project (Doyle et al., 2015). To date, despite continued intimidation and ongoing plans for mining, that vote has been respected. ASI, grew out of years of collaboration and input from a global group of stakeholders in the aluminium supply chain, civil society, research and policy organizations (Aluminium Stewardship Council, 2017a). The international multi-stakeholder approach resulted in the launch of the ASI Performance Standard in 2014 which crucially recognized indigenous peoples' right to give or withhold their FPIC (Aluminium Stewardship Council, 2014).

The development of the ASI standard is clearly a step in the right direction, it has set an exciting new precedent for other sectors of the extractive industry to follow. Multi-stakeholder dialogues, a system of checks and balances, and transparent decision-making help both the private and public sectors to overcome their reservations and foster a stronger relationship between the mining sector and indigenous peoples. This is not to say they are without their challenges, evidence from the RSPO and FSC demonstrate that systematic weaknesses exist over the efficacy of the monitoring regime where responsibility is delegated to auditing firms that are fundamentally failing to identify and mitigate illegal practices. For these initiatives to be effective and uphold indigenous rights, companies must be legally bound to their human rights obligations as at present there are no clear obligations on corporations in relation to respecting human rights under international human rights law, apart from the weak formulation of the "responsibility to respect human rights" in the UNGP. Furthermore, the tensions between these voluntary standards adopted by industry and company obligations to comply with national laws may create contradictory pressures in the future.

International Law, 24 *Hastings Int'l. and Comp. Law Rev.* 475 (2001); and B. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protections of International Human Rights*, 6 *Minn. J. Global Trade* 153 (1996).

This said, one of the core strengths of ASI is in the way it has involved indigenous peoples. Since 2015 it has established an Indigenous Peoples Advisory Forum whose principle aim is to support indigenous engagement with the ASI (Aluminium Stewardship Council, 2017b), guiding their input through their chosen organizations. ASI represents a new type of involvement for affected communities – one of collaboration rather than subjugation. Thus, the ASI standard is taking an important stand towards fulfilling its role as a safeguard for indigenous peoples' rights across the entire aluminium value chain. By requiring companies to commit to respect and implement, FPIC. ASI has built solid foundations for a comprehensive third-party certification system, one which respects fundamental freedoms. These foundations will face their true test when the certification comes into effect later this year.

## Conclusions

International human rights law and business good practice recognize that extractive projects should not be established on indigenous peoples' lands without recognition and respect of their prior rights to the land, and of their right to control what happens on that land – especially in States where weak national frameworks provide little protections for customary tenure rights. FPIC is the core international standard that allows these rights to be realized if the safeguard is properly applied in good faith and fully in line with its core principles.

In light of this it is deeply concerning that some States continue to oppose and undermine the FPIC human rights standard. At the time of its endorsement of the UN Declaration in 2010, the United States indicated that FPIC calls for “a process of meaningful consultation with tribal leaders, but not necessarily... agreement” (US Department of State, 2010). The following year, at the Commission on Sustainable Development's Working Group on Mining, Canada, Australia, New Zealand and the United States asked for the deletion of FPIC from text regarding indigenous and local communities. Similar concerns have been raised regarding the interpretation of FPIC, where a number of financial institutions – including the World Bank – have pushed for the concept of consultation over consent. Replacing the established standard with the lesser standard of consultation would mean at the conclusion of such a process governments and corporations could act in their own interests, while unilaterally and arbitrarily ignoring the will of indigenous peoples.

Moreover, recognition and enjoyment of the right are two quite different things. The gap between what is clearly established in good practice to be a requirement of international law and actual practice is still very wide. The common thread from the examples presented has been the inadequacy of corporate respect for indigenous peoples' rights under international law. In contrast when companies implement due FPIC processes in good faith and in an effective and credible manner, they can benefit from improved understanding of communities, which should translate into better partnerships in the long term should the FPIC process result in some form of agreement. In the same way, if no such agreement is reached the company is duty bound to respect the community decision and refrain from further engagement seeking consent or pressing sections of the community to reverse or revisit the decision.

An increasing number of indigenous communities are becoming empowered to assert their rights and there is widespread expectation that companies will respect those rights and obtain their FPIC. The corresponding risks associated with the failure to obtain FPIC, and the associated lack of social licence to operate, are evident. Numerous large-scale extractive projects have been halted or delayed for extended periods due to indigenous protests (Lehr and Smith, 2010), and indigenous advocacy is leading to challenges

to the legality of concessions and their potential revocation (Voss and Greenspan, 2012). The World Resources Institute published a report in 2007 that makes a business case for FPIC, arguing that extractive companies incur greater long-term costs if they operate without the consent of affected communities (Herz et al., 2007). Newmont's experience in Cajamarca is a notable example, where indigenous protests to the development of the massive Mina Conga project bought operations to a halt. The mining giant claims that it lost approximately \$2 million per day in the first few days of local protests (International Business Times, 2012). The project remains paralyzed to date. The message is clear. The extractive industry must toe the line on human rights and pursue due FPIC processes or face increasing difficulties in dealing with both the local and the international community.

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