Making Free Prior & Informed Consent a Reality

Indigenous Peoples and the Extractive Sector

Cathal Doyle and Jill Cariño

Indigenous Peoples Links (PIPLinks)

Middlesex University School of Law

The Ecumenical Council for Corporate Responsibility

May 2013

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Introduction

Context

The right to self-determination is an inherent right of indigenous peoples which includes the right to freely determine their social, economic and cultural development. Indigenous peoples also enjoy the right to maintain and develop their cultures, as well as rights over their lands, territories and resources. The requirement for their free and informed consent prior to the authorization or commencement of any resource extraction project which encroaches, or impacts, on their territories, is derived directly from these self-determination rights. This free prior and informed consent (FPIC) must be obtained in a manner that is in accordance with the indigenous peoples' customary laws and practices of decision-making. The right of indigenous peoples to give or withhold FPIC is therefore indivisible from, and necessary for the realization of, their cultural, territorial and self-governance rights. The requirement to seek and obtain indigenous peoples' FPIC is affirmed in a number of international instruments and has been recognized by the human rights regime as flowing from all of the major International Human Rights Covenants. It is most clearly articulated in the UN Declaration on the Rights of Indigenous Peoples, which was primarily the result of indigenous advocacy in the international arena.

There is now a growing acceptance of the requirement for indigenous peoples' FPIC by the extractive industries, as reflected by its incorporation into policies of an increasing number of mining companies. The inclusion of the requirement for FPIC into the 2012 performance standards of the World Bank's International Finance Corporation, and by extension the Equator Banks, is indicative of the fact that we have reached a tipping point in terms of the acceptance of FPIC as the standard to which all corporate actors must comply in order to meet their responsibility to respect indigenous peoples' human rights.

The mining industry is also taking some initial steps towards seriously tackling the requirement for FPIC. However it has serious legacy issues, has been slow to incorporate the requirement into policy, and has struggled with how to comply with it in practice. Multinational mining corporations continue to engage with indigenous communities in an inconsistent manner and rarely comply with the standards necessary to respect indigenous peoples' rights, interests and well-being. This has resulted in a range of negative social, environmental, cultural, spiritual and economic consequences for indigenous peoples, including threats to the physical and cultural survival of indigenous communities around the world.

There is a corporate recognition that failing to achieve genuine community consent has put companies at risk of short, medium, and long-term financial losses, including stalled project commencement or disruption of production due to local community opposition. At the same time, mining corporations wishing to operate in indigenous peoples' territories point to the practical challenges they face in operationalizing FPIC.

Indigenous peoples on the other hand remain highly sceptical about the sincerity of the industry to actually respect their rights in practice. They are also concerned that the concept of FPIC will be undermined and divorced from the right to self-determination if actors other than indigenous peoples themselves attempt to define it and control its operationalization.

The Special Rapporteur on the rights of indigenous peoples has expressed the view that "the lack of a minimum common ground for understanding the key issues by all actors concerned entails a major barrier for the effective protection and realization of indigenous peoples' rights in the context of extractive development projects."[2] This paper seeks to provide a basis for discussion and debate

between indigenous peoples and mining companies as a step towards constructing that common ground with regard to the requirement for indigenous peoples' FPIC.

It advocates for multinational mining companies, the investor community, and state actors to understand the importance of the FPIC principle from ethical, sustainability and economic perspectives. Fundamentally it argues that it is essential to understand FPIC from an indigenous peoples' rights-based perspective in order to effectively support its operationalization in a manner which is in accordance with indigenous peoples' exercising their right to self-determination.

Making FPIC a Reality project

In this context, three UK-based civil society organisations – Ecumenical Council for Corporate Responsibility (ECCR), Indigenous Peoples Links (PIPLinks), and the Missionary Society of St Columban – and one UK academic institution – Middlesex University School of Law – established a consortium to develop an advocacy project, jointly with indigenous representatives, aimed at making FPIC a reality in the mining industry.

The project aims to promote the human rights of indigenous peoples by persuading leading multinational mining companies to abide by their obligations under international human rights standards. Specifically, the project aims to achieve sector-wide adoption of FPIC as the global mining industry standard, in order to safeguard the rights, including the collective rights to self-determination, lands, territories and resources and culture, of indigenous peoples currently or potentially faced with mining operations in their territories.

Report contents

This research paper is the first major initiative of the project. It seeks to contribute towards a discussion between indigenous peoples and mining companies on the issue of indigenous peoples' FPIC. The foundation for this discussion is three fold. The first element seeks to develop a shared understanding of the international normative framework of indigenous peoples' rights, which includes the requirement for FPIC. The second element is an overview of indigenous perspectives on the requirement, while the third element is the perspectives of mining companies. These theoretical perspectives are complemented by a series of brief case studies addressing how indigenous peoples and companies have approached the issue of FPIC.

The first part of the paper summarises the current status of the requirement for indigenous peoples FPIC under international human rights law.[3] It provides an overview of the requirement under international human and indigenous peoples' rights treaties, instruments and jurisprudence, as well as regional human rights systems and specific standards pertaining to corporate engagement with indigenous peoples. An overview of the content of the requirement for FPIC and the guidance emerging from the human rights regime, in relation to its operationalization, is also provided.

The second section presents the key concepts of FPIC and issues related to its implementation from an indigenous perspective. These are drawn from interviews with indigenous leaders and representatives of indigenous communities across the global regions. It presents indigenous peoples' definition of FPIC, concepts of culturally appropriate FPIC processes and indigenous guidelines for operationalizing FPIC, and the experiences and issues that indigenous peoples have with its implementation.

The third part looks into prevailing mining industry policies on FPIC and corporate perspectives on its operationalization. It draws insights from interviews conducted with major UK-based mining multinationals, Rio Tinto, BHP Billiton, Xstrata, and Anglo-American/De Beers, as well as the industry body the International Council on Mining and Metals (ICMM). Investor policies, particularly of the International Finance Corporation and World Bank are also considered.

The paper draws on a range of case studies to illustrate positive and negative experiences from which lessons can be derived. Company-specific case studies examine the challenges faced, and progress made, by corporations in engaging with FPIC in certain contexts. A second set of case

studies focuses on the experiences of indigenous peoples with self-developed FPIC protocols, policies and guidelines. It points to the central role that these indigenous peoples' defined instruments can play in the operationalization of the FPIC principle.

Finally, the advocacy paper makes recommendations which are addressed to a number of actors based on the findings emerging from the research. A concluding section identifies key issues around which further dialogue and continuing engagement between mining companies, State actors, Non-Governmental Organisations (NGOs) and indigenous peoples is encouraged.

The debate on FPIC in the mining industry has reached a critical juncture. There is both a greater need for, and corresponding willingness by, the industry to ensure that FPIC is taken seriously. It is hoped that this research will contribute to furthering the debate so that mining companies and indigenous peoples can establish the parameters for a common rights-based understanding upon which the requirement for FPIC can be operationalized.

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The authors have attempted to honestly represent views of all those interviewed in the report in a spirit of moving the debate forward in a constructive manner. Efforts were also made to incorporate the views of all parties interviewed in the case studies. Ultimately, however, the interpretations and views expressed are those of the authors.

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Table of acronyms

ALRA	Aboriginal Land Rights (NT) Act (ALRA)
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
ERA	Energy Resources Australia
FPIC	Free Prior and Informed Consent
GEMCO	Groote Eylandt Mining Company Pty Ltd
FTAA	Financial and Technical Assistance Agreement
GPS	Global Positioning System
HRC	Human Rights Committee
ICMM	International Council on Mining and Metals
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all forms of Racial Discrimination
IFC	International Finance Corporation
ILO	International Labour Organization
IPRA	Indigenous Peoples Rights Act
KI	Kitchenuhmaykoosib Inninuwug
LKDFN	Lutsel K'e Dene First Nation
MRM	McArther River Mine
NCIP	National Commission on Indigenous Peoples
NCP	National Contact Point
NGO	Non-Governmental Organisation
OECD	Organization for Economic Cooperation and Development
OTML	Ok Tedi Mining Ltd Capacity
SMI	Sagittarius Mines, Inc
TRTFN	Taku River Tlingit First Nation
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
TVIRD	TVI Resources Development Inc.
WMC	Western Mining Corporation

1: Status of the requirement for FPIC under international law

International standards and the requirement for FPIC

The contemporary requirement for indigenous peoples' Free Prior and Informed Consent (FPIC) is derived from the rights of indigenous peoples which are recognized under international and regional human rights treaties and declarations. The bodies responsible for oversight and interpretation of these instruments have clarified that this rights framework give rise to a duty on States to obtain indigenous peoples' FPIC to the issuance of concessions, and before the commencement of related activities in or near their territories or impacting on the enjoyment of their rights.

In addition, the requirement for FPIC has been expressly recognized in a number of international instruments and standard setting activities in recent decades, reflecting its emergence as the standard to be adhered to by all parties in their engagements with indigenous peoples. This section provides a brief overview of the relevant key instruments and jurisprudence.

International human and indigenous peoples' rights treaties, instruments and jurisprudence

The requirement for indigenous peoples' FPIC under international human rights law is primarily derived from the applicability to indigenous peoples of the right to self-determination affirmed in the International Human Rights Covenants. When affirming that the requirement flows from other rights, including the right to develop and maintain their cultures, under article 27 of the *International Covenant on Civil and Political Rights* (ICCPR) and article 15 of the *International Covenant on Economic Social and Cultural Rights* (ICECSR), the treaty bodies responsible for these covenants have increasingly framed the requirement in light of the right to self-determination. The requirement is also derived from the application of the principle of non-discrimination to indigenous peoples' rights. In its 1997 *General Recommendation No XXIII on indigenous peoples*, the Committee on the Elimination of Racial Discrimination (CERD) clarified that securing indigenous peoples' rights, including their right to property, in a non-discriminatory manner necessitated that:

> ...no decisions directly relating to [indigenous peoples] rights and interests are taken without their informed consent.

In its 2009 *General Comment No 21 on the right of everyone to take part in cultural life*, the Committee on Economic Social and Cultural Rights (CESCR) affirmed the duty of States to:

> …respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights.[4]

Following the adoption of the *UN Declaration on the Rights of Indigenous Peoples* (*the UN Declaration*) in 2007 all three treaty bodies have placed increased emphasis on the requirement to obtain FPIC in relation to extractive and other projects impacting on indigenous peoples. An example of this is the fact that over thirty per cent of the cases addressed by CERD in the context of its Early Warning and Urgent Action procedure have involved issues related to the failure to obtain indigenous peoples' FPIC in relation to extractive projects.[5] Most of these cases have been addressed since 2007.

In addition to affirming a requirement to obtain FPIC in its concluding observations to States the Human Rights Committee (the body responsible for oversight of the ICCPR), adopted a decision in April 2009 affirming the requirement for FPIC. The case of *Ángela Poma Poma v Peru* addressed impacts on water beneath indigenous peoples' lands and affirmed 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.*'

Since 2007, the CESCR has repeatedly affirmed that indigenous peoples have 'a right to free, prior and informed consent' which should be respected prior to the implementation 'of any project affecting their lives', and that legislation must be enacted to ensure it is respected.[6] In affirming the right to FPIC, both CERD and CESCR have affirmed that it should be realized in conformity with *ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169)*.[7]

ILO Convention 169 recognizes indigenous peoples' collective land and participation rights and affirms a strong procedural requirement for consultations which must have 'the objective of achieving … consent'.[8] In addition these consultations must be undertaken 'in good faith and in a form appropriate to the circumstances'. In the context of relocation, the Convention requires that '[w]here the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent.' Any deviations from this requirement must be under exceptional circumstances, and subject to formal inquiries involving indigenous representation.[9]

The *UN Declaration* represents the clearest elaboration of the requirement for FPIC in an existing international instrument. Through it States have clarified that the right to self-determination applies to indigenous peoples. It has been invoked by the international human rights treaty and charter bodies as well as regional human rights bodies as an interpretative guide for determining the content and scope of indigenous peoples' rights. The requirement for consent is affirmed in seven of its articles. Article 19 affirms it in the context of administrative measures, including the issuance of concessions, while article 32 specifically addresses the requirement to obtain consent prior to the approval of extractive activities.[10]

Engagement of UN charter bodies with consent requirement

In 2003, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples*,* described FPIC as embodying 'the right to say no', and being of 'crucial concern' and 'essential for the human rights of indigenous peoples in relation to major development projects'.[11] The current Special Rapporteur on the rights of indigenous peoples has argued that we are witnessing the development of an international norm requiring the consent of indigenous peoples when their property rights are impacted by natural resource extraction.[12] The Special Rapporteur has explained that measures which have a potentially substantial impact on basic physical or cultural well-being of a community should not proceed without its consent, and has clarified that this applies to large scale mining activities in, or near, indigenous territories.[13]

The Special Rapporteur on the right to food has affirmed that under international law indigenous peoples' land rights impose obligations on States to consult and cooperate in good faith 'in order to obtain their free and informed consent prior to the approval' of any resource extraction projects.[14] Likewise the Independent Expert on the Rights of Minorities has stated that their right to withhold consent is implied in the ILO Convention 169.[15] The Special Rapporteur on adequate housing as a component of the right to an adequate standard of living has affirmed that displacement as a result of mining was 'unacceptable without the indigenous peoples' free, prior and informed consent'.[16]

Regional human rights systems

The Inter American Commission on Human Rights interprets the requirement for consent in the context of development or investment plans affecting indigenous peoples' rights as directly connected to the rights to life, cultural identity as well as other fundamental rights.[17] It has since 2001 consistently emphasised the requirement for indigenous peoples' consent in the context of natural resources extraction.[18]

The Inter-American Court of Human Rights issued a landmark ruling in November 2007 affirming the requirement for FPIC of indigenous and tribal peoples. In its decision in the *Saramaka v. Suriname* case, which related to mining on tribal lands, the Court stated 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.[19]

The ruling, which interpreted indigenous peoples' right to property in light of their right to self-determination, clarified that consent was necessary prior to the issuance of concessions for large scale mining exploration and exploitation within Saramaka territory.[20]

The draft *American Declaration on the Rights of Indigenous Peoples* addresses the requirement

for FPIC for 'any plan, program or proposal affecting the rights or living conditions of indigenous peoples.'[21] The UN Declaration has been established as 'a point of reference' for reaching agreement on the outstanding articles.[22]

The African Commission on Human and Peoples Rights affirmed that the requirement for FPIC flows from both the rights to property and development under the African Charter on Human and Peoples Rights.[23] In its 2009 ruling in the case of the *Endorois v Kenya* in the context of the right to development the African Commission held that for any development or investment projects which could:

> ...have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.[24]

The African Commission unambiguously affirmed the requirement for consent in the context of the right to property affirming that: 'In terms of consultation, the threshold is especially stringent in favour of indigenous peoples, as it also requires that consent be accorded.'[25]

In 2012 the African Commission issued a resolution on a *Human Rights-Based Approach to Natural Resources Governance* confirming:

> …that all necessary measures must be taken by the State to ensure participation, including the free, prior and informed consent of communities, in decision making related to natural resources governance.[26]

International environmental law

Article 8j of the *Convention on Biological Diversity*, addressing benefit sharing arrangements with indigenous peoples, has been interpreted by the Convention's Conference of Parties as requiring indigenous peoples' consent for access to their traditional knowledge.[27] The 2004, the *Akwé: Kon guidelines* for the implementation of Article 8j of the Convention,[28] recognized prior informed consent as being of fundamental importance in the context of protection of indigenous peoples' cultures.[29] The guidelines have been cited by human rights bodies as illustrative of best practice for impact assessments involving indigenous peoples in the context of extractive projects.[30] The requirement for indigenous peoples' prior and informed consent was also included in the Convention's 2011 *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization*.[31] The *Nagoya protocol* refers to the need to promote indigenous peoples' FPIC protocols as a mechanism to ensure that consultation and consent seeking are consistent with indigenous peoples own practices and institutions.

The *UN Framework Convention on Climate Change Conference* was also opened for ratification at the 1992 Earth Summit. To date its most tangible outcome is the *Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries*, under the secretariat of the UN Development Programme.[32] The programme is currently developing guidelines for FPIC processes for its activities, with discussion arising in relation to the extension of the requirement to include local communities.[33]

The 2012 *Conference on Sustainable Development* (Rio +20) report, *The future we want*, extends this recognition of the requirement for indigenous peoples FPIC by recognizing:

> ...the importance of the United Nations Declaration on the Rights of Indigenous Peoples in the context of global, regional, national and subnational implementation of sustainable development strategies.[34]

Specific standards pertaining to corporate engagement with indigenous peoples

Over the course of the last decade multinational mining companies have placed increasing emphasis on engagement with indigenous peoples as part of their policies. This has gone hand in hand with efforts within the UN to formulate and develop internationally applicable standards and guidance

in the area of business and human rights, with a particular focus on the nexus of extractive sector operations and indigenous peoples' enjoyment of their rights.

Illustrative of this trend was the 1994 report of the United Nations Centre for Transnational Corporations which addressed the positive correlation between the performance of companies and their respect for indigenous peoples' 'right to withhold consent to development'.[35] The 2003 *Commentary on the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* of the Sub-commission on human rights,[36] specifically addressed the need for companies to 'respect the principle of free, prior and informed consent of the indigenous peoples and communities to be affected by their development projects.'[37]

The decade long *Study of the Problem of Discrimination against Indigenous Populations* by then Special Rapporteur Martinez Cobo; the 2001 and 2004 reports of the UN Sub-Commission on Human Rights on *Indigenous people and their relationship to land* and *Indigenous Peoples' Permanent Sovereignty over Natural Resources;* the 2003 report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people on large scale development projects; and the 2004 World Bank Extractive Industry Review all emphasised the frequently 'devastating' impact on indigenous peoples of large scale mining in, or near, their territories, and the fundamental role of FPIC in addressing and resolving this phenomenon.[38]

In 2006, the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, echoed some of these findings, observing that:

> The extractive sector – oil, gas and mining – utterly dominates this sample of reported abuses with two thirds of the total.... [and] accounts for most allegations of the worst abuses, up to and including complicity in crimes against humanity. These are typically for acts committed by public and private security forces protecting company assets and property; large-scale corruption; violations of labour rights; and a broad array of abuses in relation to local communities, especially indigenous people.'[39]

As outlined above, the 2007 *UN Declaration* affirmed the requirement for States to obtain indigenous peoples' free prior and informed consent in order to safeguard indigenous peoples' rights. The corporate responsibility to respect component of the 2011, *Guiding Principles on Business and Human Rights for the implementation of the United Nations "Protect, Respect and Remedy" Framework* is premised on the fact that 'corporate responsibility to respect human rights exists independently of States' abilities and/or willingness to fulfil their own human rights obligations.' In this regard it states that where indigenous peoples' rights are impacted, business enterprises should be guided by the United Nations standards which elaborate further on the rights of indigenous peoples.[40]

The incorporation of the consent requirement into the IFC 2012 performance standards, and by extension the standards of the Equator Banks, was reflective of the approach, and is acknowledged by mining companies and commentators to be of major significance to the industry and consultants working on its behalf (see section 7 below).[41] The IFC had previously noted that '[i]f an IFC client is implementing a project where government's actions mean that the project does not meet the requirements of [ILO Convention 169], it can find itself accused of "breaching" the principles of the Convention or of violating rights protected under the Convention,' something which may have potential legal implications depending on how the courts determine responsibilities of non-State actors.[42] The non-recognition by States of the existence of indigenous peoples or of their land rights, or the absence of legislation to give them effect, does not constitute a legitimate basis for corporate failure to respect their rights.[43] Consequently, corporate adherence with the provisions of *ILO Convention 169* and the *UN Declaration* should not be a function of State ratification or support for these instruments.[44]

National Contact Points of the Organization for Economic Cooperation and Development have interpreted the *OECD Guidelines on Multinational Enterprises* as requiring respect for the outcome of consultations aimed at achieving consent, which must be conducted in a form appropriate to the circumstances and involve all potentially impacted indigenous groups.[45] They have also pointed to the need for due diligence to address the 'entire project impact area, including associated infrastructure'.[46]

Content of FPIC under human rights law and standards

Within the human rights framework the requirement for indigenous peoples' FPIC is framed as both a principle and a right which is intimately linked with, and flows from, the principle and right of self-determination. It is also framed as a safeguard for securing indigenous peoples' rights in the context of dealings with third parties. The duty to obtain indigenous peoples' FPIC is seen as corollary of these rights, in particular the rights to self-determination, development, culture and land, territories and resources.

In addition to affirming the obligation to obtain indigenous peoples' FPIC, and the fact that this obligation cannot be divorced from the rights framework underpinning it, the human rights regime has also elaborated on the content of the requirement for FPIC.

Basis for the requirement for FPIC

Under international human rights law the requirement for indigenous peoples' FPIC is primarily premised on their recognition as peoples who are vested with the right to self-determination and who have their own perspectives on self-determined social, cultural and economic development and maintain a particular relationship with their lands, territories and natural resources. Within this human rights framework the requirement is also derived from the collective dimensions of their rights, including rights to property, to develop and maintain their cultures, to autonomy and the associated practice of customary law and maintenance and development of their own institutions.

The requirement is further buttressed by a) the necessity of guaranteeing indigenous peoples' cultural and physical survival; b) ensuring the maintenance of their historical identity in the context of externally proposed extractive projects, c) their particular historical contexts.[47] The requirement has also been recognized by the Inter-American Court on Human Rights as applying to groups which:

> …share similar characteristics with indigenous peoples, such as social, cultural and economic traditions different from other sections of the national community, identifying themselves with their ancestral territories, and regulating themselves, at least partially, by their own norms, customs, and traditions.[48]

Within the sphere of environmental law the requirement is framed as extending to include the category of local communities. However, the collective rights framework underpinning this extension has yet to be elaborated on.

Consent prior to concession issuance and subsequent activities

The normative framework of indigenous peoples' rights, which includes *ILO Convention 169*, the *UN Declaration* and the jurisprudence of international and regional human rights bodies, explicitly affirms that the requirement to seek and obtain consent exists prior to the issuance of concessions impacting on indigenous peoples' enjoyment of their rights.[49] Where States fail in this duty corporate human rights due diligence necessitates the advance identification of indigenous peoples and any potential impacts on their rights.[50] This includes the requirement to consult and obtain FPIC.[51]

The human rights framework also clarifies that consent must be obtained throughout the project life-cycle. This specifically applies prior to exploration and exploitation activities or any other activities which affect indigenous peoples' enjoyment of their rights.[52] In addition to the moral imperative underpinning this iterative consent requirement, there is also an important business case driver, as investment in exploration activities can be avoided where a community will be unwilling to consent to exploitation.

National sovereignty and respect for indigenous peoples' rights

The Human Rights Committee has rejected the notion of a 'margin of appreciation', in cases where development projects deny indigenous peoples' rights associated with the traditional uses of land. The Special Rapporteur on indigenous peoples' rights has clarified that companies must respect the rights of indigenous peoples even 'in cases where States are opposed to the application of

such standards'.[53] Instead companies are require to 'promote the full assumption by Governments of such responsibility' and 'must not accept any award or commence any activity if the State has failed to hold prior and adequate consultations with the indigenous communities concerned.' This requires that companies guarantee that FPIC has been obtained in context where it is required under international standards, and 'may require companies to abstain from operations in certain countries where the appropriate consultation framework is not in place'.[54]

Format of consultations and consent seeking processes

International human rights treaty bodies have clarified that consent seeking processes should be consistent with the requirements of *ILO Convention 169* and the *UN Declaration*. *ILO Convention 169* requires that consultations with the objective of achieving consent must be in a format that is appropriate to the circumstances. The ILO supervisory body has clarified that this implies that the procedures must ensure that sufficient time is available to indigenous peoples to conduct their own decision-making processes in conformity with their 'own social and cultural traditions'.[55] The Special Rapporteur on the right of indigenous peoples has explained that consultation procedures must be agreed before companies and State enter into agreements in relation to proposed extractive projects.[56] The Special Rapporteur also notes that:

> …'in order to achieve a climate of confidence and mutual respect for the consultations, the consultation procedure itself should be the product of consensus',[57] and that mining 'companies should … defer to indigenous decision-making processes without attempting to influence or manipulate the consultation process.'[58]

According to the ILO Supervisory body 'best practice' involves accepting the proposals put forward by indigenous peoples themselves with regard to a consultation process.[59] The World Bank's Operational Policy requires that consultations be conducted through 'culturally appropriate processes'.[60] CERD has instructed states to consult with indigenous peoples in a manner that respects their customary laws and practices, and to ensure that FPIC implementation guidelines are consistent with respect for their inherent rights.[61] The emerging practice among indigenous peoples of formalizing their own unique consultation and consent protocols or policies is one mechanism through which this can be achieved, and is recognized as something which States should support indigenous communities to develop.[62]

The role of indigenous institutions in FPIC processes

The *UN Declaration* clarifies that all third parties must obtain consent through representatives and institutions, chosen by indigenous peoples in accordance with their own procedures.[63] The Inter-American Court on Human Rights in the case of *Saramaka v Suriname* has clarified that indigenous peoples should determine, in accordance with their custom and traditions, who should be consulted and provide consent in relation to activities impacting on them.[64] This fact that indigenous peoples must be represented by structures of their own choosing has been repeatedly emphasised by human rights bodies and acknowledged by international financial institutions.[65] Indigenous peoples are entitled to strengthen or modify their institutions, or create new representative structures to facilitate their engagement in contemporary decision-making processes pertaining to extractive projects.[66]

Participating in FPIC processes, an obligation or a right

A self-determination based right to give or withhold FPIC implies that where a community does not wish to enter into consultations with a third party, or the State, such an obligation should not be imposed on them.[67] In practice this could be operationalized in various ways depending on the particular circumstances and wishes of the indigenous peoples. In cases of communities in voluntary isolation any attempt to obtain consent would be inappropriate. In other contexts, communities may impose moratoria on mining activities, during which time they have expressed their refusal to be consulted in relation to them. Another approach is through a phased consent requirement, whereby indigenous peoples can reject a proposal at the outset in principle, without having to engage in a lengthy and

resource intensive consultation and information provision process. Precursory 'consultations about consultations' may be necessary in order to determine if indigenous peoples wish to engage in a full blown consultation process or would rather express their rejection of a proposed project from the outset. Given that refusal to engage in a consultation constitutes an exercise of their right to self-determination, participation in such consultations should not be assumed to be a mandatory requirement. Mandatory participation in consent seeking processes would be inconsistent with the notion of seeking voluntary consent in a manner that is free of coercion.[68]

The role of moratoria in establishing the enabling conditions for FPIC

Human rights bodies have affirmed that moratoria on mining are necessary in contexts where the enabling conditions for securing indigenous peoples rights, and by extension their FPIC, are absent.[69]

Consent of all impacted communities

The requirement for consent is triggered by proposed mining activities in, or affecting, indigenous territories.[70] This applies to all indigenous peoples' traditional territories independent of whether formal title is held over them.[71] The FPIC of all communities whose rights are impacted must be sought and obtained.[72] Impact areas, as a result, have to be based on the social, cultural and spiritual links to territories as well as the direct physical impact area.[73]

Indigenous capacity building and power inequalities

The *UN Declaration* requires that indigenous peoples have a right to technical and financial assistance and must have the means to finance their autonomous functions, one of which includes the operationalization of FPIC processes.[74] The UN Special Rapporteur has placed considerable emphasis on the need to address the imbalance of power between indigenous peoples and entities seeking their consent through technical and financial assistance 'without using such assistance to leverage or influence indigenous positions in the consultations.'[75] The Special Rapporteur also emphasised the need to 'build the negotiating capacity of indigenous peoples in order for them to be able to overcome power disparities and effectively engage in consultation procedures'.[76]

Corporate due diligence and FPIC

This requirement for human rights due diligence is most relevant where the 'nature of business operations or operating contexts pose significant risk to human rights'.[77] The Guiding Principles on Business and Human Rights indicate that State guidance to business:

> should advise on appropriate methods, including human rights due diligence, and how to consider effectively issues on… vulnerability and/or marginalization, recognizing the specific challenges that may be faced by indigenous peoples'.[788]

In its guidance to States and corporations the UN Experts Mechanism on the Rights of Indigenous Peoples has recommended that corporations take the requirement for indigenous FPIC into account in their due diligence processes.[79]

The Special Rapporteur on the rights of indigenous peoples has clarified that part of this required due diligence is ensuring that a corporation 'does not ratify or contribute to any act or omission on the part of the State that could infringe the human rights of the affected communities', such as a failure to seek the informed consent of an indigenous community prior proceeding with a project.[80] The Special Rapporteur also noted that '[t]he duty of companies to respect human rights and the concept of due diligence … are reflected in the United Nations Global Compact'.[81] The 2012 Compact's draft *Business Reference Guide on the UN Declaration on the Rights of Indigenous Peoples* notes that in contexts where States have not 'respected indigenous peoples' right to FPIC … businesses can and should still ensure that they do not start a project unless and until the relevant indigenous peoples have provided FPIC'.[82] Indigenous peoples' rights to land, territories and resources arising from their customary land tenure should be identified as part of corporate due diligence. Lack of formal title or

protection of these rights and does not constitute a legitimate basis for the failure to seek and obtain indigenous peoples' FPIC.[83]

In accordance with the recommendations of the UN Special Rapporteur due diligence implies that '[c]ompanies must therefore grant, in all respects, full recognition of the indigenous territorial rights arising from customary land tenure, independent of official State recognition', and 'must ensure that the consultations they hold are based on the criteria laid down in international rules'.[84]

Extraterritorial responsibility of home states for corporate compliance with FPIC

CERD has repeatedly emphasized the responsibility of home states of extractive industry companies to explore ways to hold companies registered in their territories, or under their jurisdiction, to account for violation of indigenous peoples' rights.[85]

Social, spiritual, cultural, environmental and human rights impact assessments

The requirement for FPIC serves to protect indigenous peoples from the potential impacts of extractive projects on their enjoyment of their rights. *ILO Convention 169* affirms that 'studies ...carried out in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact' are a 'fundamental criteria for the implementation' of extractive projects.[86] The *Akwé: Kon guidelines* require 'full and effective participation and involvement of affected indigenous and local communities' through the use of 'participatory models of community engagement during the conduct of the impact assessment'.[87] This requirement has also been addressed by the Inter American Commission on Human Rights which has clarified that participatory impact assessments are necessary in order to identify indigenous peoples' rights to communal property and the potential impact on their enjoyment of these rights.[88] The *UN Guiding Principles* complement this requirement by requiring Human Rights Impact Assessments, the realization of which by definition necessitates a rights based participatory approach.[89] Addressing the impact trigger for the requirement for FPIC, the UN Experts Mechanism on the Rights of Indigenous Peoples has stated that in 'assessing whether a matter is of importance to the indigenous peoples concerned, relevant factors include the perspective and priorities of the indigenous peoples concerned'.[90] CERD has clarified that in the context of obtaining consent for extractive projects impact assessments must be carried out prior to the issuance of licences.[91] The Inter-American Court of Human Rights has also clarified that impact assessments must address the cumulative 'effects of existing or future activities'[92] and that the purpose of these assessments is to ensure a 'proposed development or investment plan is accepted knowingly and voluntarily'.[93] This body of human rights law and guidance addresses the right of indigenous peoples to participate in the conduct of impact assessments. It supports their right to select and access independent experts, and to carry out those aspects of assessments which are contingent on their own perspectives and developmental priorities.

Consensual benefit agreements

The *UN Declaration* recognizes indigenous peoples' rights over resources and envisages FPIC as the mechanism to ensure that they obtain adequate benefits from their exploitation. *ILO Convention 169* affirms that 'wherever possible' indigenous peoples must participate in the benefits, irrespective of State claims to ownership over subsoil resources. This requirement for culturally appropriate benefit sharing exists in addition to compensation for any damages caused as a result of extractive activities.[94] The Inter-American Court on Human Rights held that a reasonable share in benefits, together with FPIC and participatory impact assessments were necessary to safeguard indigenous peoples rights.[95] The UN Expert Mechanism on the Rights of Indigenous Peoples has proposed that States establish permanent mechanisms together with indigenous peoples to ensure that their 'perspectives on the extractive activity are taken into account including their ideal benefit-sharing arrangements if they so choose'.[96]

While effective indigenous participation is necessary in determining appropriate benefit sharing mechanisms, the requirement to enter into benefit sharing agreements should not be confused

with the notion of a self-determination based requirement for FPIC. The former entails reaching agreement on the terms and conditions pertaining to benefit and impact mitigation measures. The latter implies a right to decide if the project should proceed, and arises in the early planning stages prior to the issuance of the concession or the commencement of activities. Where consent is granted it is generally manifested in a contractually binding agreement which includes benefit sharing arrangements.

The requirement for FPIC also has implications for the nature of the benefit sharing arrangements. The Norwegian OECD National Contact Point (NCP) found, in the case of a mining company seeking to operate in Mindoro Island in the Philippines, 'reason to question the procedures by which the FPIC was obtained from the local communities' as a result of payments which influenced the outcome and nature of those processes.[97] It recommended that the company ensure transparency and 'establish clear criteria and systems for allocating community funding'. Similar concerns have been raised by UN bodies in relation to the potential for a lack of transparency around benefits, or payments to individuals, as well as bribery and corruption of indigenous leaders to distort the outcome of consent seeking processes.[98] This issue is also associated with confidentiality in benefit and impact agreements. Conflicts between confidentiality and FPIC arise when members of a community or future generations are denied access to the terms of agreements. Confidentiality also limits access to information across indigenous communities and as such may, in certain contexts, be at odds with the informed aspect of FPIC operationalization.

FPIC and the right to development

Indigenous peoples have the right to determine their own development priorities.[99] At the core of the requirement for FPIC is the securing of indigenous peoples' right to self-determination, by virtue of which they are entitled to 'freely pursue their economic, social and cultural development'.[100] This is most clearly manifested in the *UN Declaration,* article 3 of which affirms that the right to self-determination under the ICCPR and ICESCR applies to indigenous peoples. Article 32(1) of the *UN Declaration* addresses the right to determine development policies and strategies in relation to land, territories and resources. When read in light of article 3, it affirms a right to self-determined development.[101] Article 32(2) establishes that obtaining 'free and informed consent prior to the approval of any [extractive] project affecting their lands or territories and other resources' is necessary to safeguard that right. This effectively recognises that indigenous peoples are entitled to freely choose between extractive or non-extractive based models of economic, as well as social and cultural, development. Indigenous peoples' right to development extends to the pursuit of extractive projects on their own terms as well as the pursuit of alternative traditional or non-traditional economic models. Discourses which frame choices that are not aligned with the pursuit of extractive projects in indigenous territories as 'anti-development' are consequently inconsistent with the human rights framework, and counterproductive to establishing constructive relationships with indigenous peoples.

FPIC oversight and grievance mechanisms

Respect for indigenous peoples' customary law is an essential component of the operationalization of their right to give or withhold FPIC.[102] Indigenous peoples participating in international fora have asserted that FPIC, in the context of impacts of development projects, mandates direct accountability of government agencies, corporate entities, and development agencies, to their local indigenous governance structures.[103] This accountability commences at the outset of the FPIC process, prior to entry into indigenous territories or the granting of any rights or privileges to third parties in relation to those territories, and continues throughout the project life-cycle. Consideration of, and respect for, indigenous customary law is a fundamental component of any grievance mechanism in relation to FPIC processes.

The *UN Guiding Principles on Business and Human Rights* clarify that 'a grievance is understood to be a perceived injustice evoking … a group's sense of entitlement, which may be based on … customary practice, or general notions of fairness of aggrieved communities.'[104] A failure to respect customary laws and practices consequently constitutes a legitimate grievance. This applies both in

the process of seeking consent and in the mechanisms to address grievances associated with those processes. At the local level grievance mechanisms must, as a result, be consistent with indigenous peoples customary laws and practices and be established with their consent.

In addition to such local customary law based monitoring mechanisms, the recommendation that States should allow international monitoring to address community complaints in relation to FPIC implementation emerged from the international expert group meeting on extractive industries, indigenous peoples' rights and corporate social responsibility.[105] The meeting also suggested that the United Nations Permanent Forum should facilitate the establishment of an FPIC monitoring body, which would be comprised of 'independent figures, including Indigenous Peoples, who enjoy the respect and confidence of indigenous communities'.[106] The precise composition of such an independent structure would need to be case specific and acceptable to the parties involved.

FPIC and conflict zones

The 2004 report of the World Bank's Extractive Industry Review cautioned against the pursuit of extractive operations in contexts of 'armed conflict or of a high risk of such conflict'.[107] In his survey of extractive projects in indigenous territories the Special Rapporteur received submissions indicating that some of these projects were resulting in violence against indigenous leaders, 'political instability, violent upheavals and the rise of extremist groups in indigenous areas'.[108] The *UN Declaration* requires that:

> Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.[109]

The deployment of military and para-military forces in indigenous territories is consequently not justifiable on the basis of protecting the private interests of an extractive cooperation. Corporate due-diligence should assess the need for such forces as part of their operations and if these are deemed necessary, obtain the FPIC prior to their deployment, or cancel or suspend any activity in that area until the situation if fully stabilized. The deployment of military or para-military forces in indigenous peoples' territories without the free agreement of indigenous peoples renders it extremely challenging, if not impossible, to subsequently obtain 'free' consent to proposed development projects in those territories.

2: Indigenous peoples' perspectives on FPIC in the context of mining projects

Interviews were conducted with indigenous peoples' representatives from different geographical regions including the Asia-Pacific, Latin America, Africa and North America, to gather their perspectives on free, prior and informed consent (FPIC) in the context of mining projects in or near indigenous peoples' territories. The respondents include indigenous leaders who have had experience in FPIC and mining at the community level, as well as in advocacy of indigenous peoples' rights at the local, national and international levels. The views they expressed in the interviews (presented below) comprehensively cover the key themes around FPIC that mining companies need to understand, as well as the issues that indigenous peoples directly face when dealing with mining corporations. Given that at its core FPIC is a means for operationalizing the right to self-determination it is absolutely essential that mining corporations approach FPIC from the perspective of indigenous peoples.

Definition of FPIC as a right, a process and a principle

Indigenous peoples define FPIC as a right, based on their collective right of self-determination. FPIC means respect for the right of self-determination, part of which is the right to collective decision-making. It embodies, and is fundamental to, recognition of the sovereignty and rights of indigenous peoples over their land, territories and resources and the need to be consulted in a manner that is in keeping with the people's own indigenous culture. FPIC is the means for guaranteeing respect for the rights of all communities and groups of which an indigenous people is comprised.

Indigenous peoples also view FPIC as part of a process of operationalizing the right of self-determination by guaranteeing respect for their decision-making processes and their associated right to accept or reject a project that will affect them. A common theme highlighted by many of those interviewed was that unwritten community protocols and laws have always been practiced as part of the cultures of indigenous peoples. These include customary practices of paying respect and asking permission for entering, or having an impact on, an indigenous peoples' territory. Anybody seeking to do so would need to go through this process. As a result, if an indigenous people or community refuses on principle grounds not to consent to a concession being issued over their territory, or a project commencing in it, that decision is binding on all parties, and should not be contested. Indigenous peoples view FPIC as embodying this right to say no without having to engage in a prolonged consultation or negotiation process.

FPIC was also seen by those interviewed as a principle of negotiating in good faith on the basis of mutual respect and equality. Meaningful negotiations require consultations free from intimidation, coercion, bribery or undue influence, and an acceptance of the outcome of those negotiations. These are essential for indigenous peoples to have confidence in external processes and systems in the context of FPIC. Such good faith and equality based negotiations have to be central to the concept of FPIC if it is to lead to partnership between an indigenous community and a mining company. Such partnership must guarantee that indigenous peoples are able to realize their economic, social and cultural rights and obtain culturally appropriate and equitable benefits, while appreciating and mitigating the possible impacts that a mining project could have on their communities.

> "FPIC means realizing one's economic, social and cultural rights in the context of fully appreciating that a project is being accepted by a community with negligible negative impacts, and that communities will benefit from it. Meaningful consultations that are [in] good faith must [be] central to this concept and not psychological coercion. FPIC has to be grounded in the principle that a community or a people have the right to accept or turn down a project."
>
> Quote from Reinford Mwangonde of Malawi, Africa

Culturally appropriate FPIC processes

Consensus-building

For indigenous peoples, FPIC is more than just consultation, consent or non-consent. Rather it entails an internal process of consensus-building among the people. Consensus is not simply a majority vote or a decision made by the leaders in the community. Rather it is a process whereby the different parts of a community can be included in decision-making in accordance with their customary laws and practices or procedures which they have internally agreed. Decisions are frequently taken in community general assemblies, where everyone participates.

Arriving at a consensus is an activity which is internal to the communities. It requires ensuring that all the necessary information is available, in a language the people understand, and that all appropriate means have been used to ensure that the people understand what is being planned or proposed for their territories so that they can assess the impact on their rights. According to those interviewed, customary practices of debate and deliberation – taking into consideration different points of view – lead to a united and collective decision and ensure that the decision reached is the correct one for the community, and is firm and binding on all parties. Dissenting opinions are dealt with in the process of arriving at a consensus such that individuals cannot veto the decision of the whole community. The internal consensus making component of FPIC processes therefore has to be exhaustive, taking the time necessary to reach consensus in a culturally appropriate manner, and all-inclusive to avoid the potential for the proposed activity to create divisions in the community.

Community-defined process

> "Formal law should recognize customary law to be operative in its own jurisdiction. But what is happening is that formal law wants to regulate customary law. This is not correct and formal law should recognize, respect and empower customary law."
>
> Quote from Joji Cariño, Ibaloi, Philippines

Indigenous representatives insisted that the FPIC process should be community-defined, and not prescribed by guidelines issued by the State or company. FPIC implementation must be sought in a manner that respects customary laws and norms. There is no template or one-size-fits-all model for FPIC that applies to all communities. Community defined FPIC processes will generally involve adherence with customary laws and traditional modes of decision-making. It is the community's choice if they wish to invoke traditional decision-making processes, hybrid models of decision-making which merge customary laws and practices with new modes of decision-making, or to devise entirely new processes to cater to contemporary realities which they face. They should not be forced by external actors either to use traditional decision-making processes or to abandon these processes. Where communities document their own FPIC protocols or policies these should be respected by all third parties.

Recognizing centres of authority

The interviews revealed that it is common for different governing structures to exist in indigenous communities, each with differing domains of authority. In some instances there exist governance structures that are formally recognized by the State with which it engages and which are involved in negotiating with external entities. There are also customary structures and traditional authorities. These are often concerned with internal issues, social protection, cultural and environmental safeguards. They may also have authority over decisions pertaining to lands and resources or those with implications for community development, but are often inappropriately ignored by States in the context of decisions pertaining to these issues. In some communities, men may be responsible for certain laws and customs and women responsible for other laws and customs. Each would have their own authority and responsibility, so each in turn would need to discuss and engage in decision making through their own processes.

In cases where multiple centres of authority exist, indigenous representatives interviewed explained

that FPIC processes must go through all of the relevant governance structures. The traditional authorities need to be fully involved in FPIC discussions as decisions taken through formal authorities often do not have the full participation of the community. The company must deal with the elders, the traditional authorities and various leadership structures at different levels in the community. The manner in which this engagement is to proceed should be determined by the community itself. As a result the community must have the space and time to develop these means of engagement and communicate them to third parties.

In communities where traditional processes are no longer practiced, have weakened or are inadequate to tackle the matter at hand, indigenous communities may adopt new forms of consultation and participation. These may entail developing or strengthening traditional processes or devising new processes. What is important is that the community decides the way they choose to engage, and that all concerned sectors of the community are able to contribute their opinions.

> "The FPIC process should be community-defined. The community should be the one to determine the process to follow in arriving at FPIC, e.g. from the household to the community level. It is not necessarily always the traditional process of decision-making of the IPs, e.g. by the elders, but it should involve all concerned sectors of the community in order to arrive at a consensus of all groups and so that everybody is consulted. You need to ensure the participation of the women, youth and elders."
>
> Quote from Santos Mero, Ibaloi, Philippines

Participation of women and youth

The interviews indicated that indigenous peoples view the participation of women, in particular, as essential in the FPIC process. This is because women possess valuable traditional knowledge in relation to land, resources, spirituality and local history. They are also among the most vulnerable to the effects of mining due to their traditional roles in providing for their families. Youth participation is likewise seen as important, as any impacts will affect their future, and could continue for generations. Indigenous peoples need to be able to consider these impacts for current and future generations as part of FPIC processes.

> "[Women] absolutely have every right to participate as they are a part of the community and whatever transpires will impact their families and future generations. In KI, women were at the forefront in the protection of the lands and waters. They also carried the instructions of the past generations of the elders into the corporate memory of the community."
>
> Quote from John Cutfeet, KI, Canada

The participation of women and youth in FPIC processes should be ensured using indigenous peoples' own mechanisms. The manner of their participation is a decision for the community to take and can be realized through a process of dialogue with indigenous communities. Indigenous representatives noted that in cases where men dominate the traditional structures, flexibility is often practiced at the community level in order to involve the whole community in decision-making on whether to grant or withhold FPIC.

Engaging with genuine representatives of indigenous peoples

Indigenous interviewees were of the view that mining companies should exert due diligence to understand how to engage with indigenous communities in order to seek their consent in accordance with the communities' laws and procedures. They described this as equivalent to the process which companies have to go through to understand national laws and who has to provide consent under those laws. It is the obligation of the company to ask the community who their representatives are, how they are to be engaged with, and to respect these rules and structures in the context of seeking FPIC. They should not use national laws as an excuse not to do this.

The people have the right to choose their own leaders and to designate their representatives in the

FPIC negotiations, without interference from companies, the State or other actors. These may be traditional elders or they may be representatives selected and authorized by the community for the specific purpose of negotiating with the company on the terms, conditions and conduct of FPIC.

Indigenous guidelines for FPIC implementation

Points in the development process when should FPIC be obtained

> "Companies, working in our country act in compliance with national legislation. If those laws don't protect indigenous peoples' rights, the companies will ignore them but still look like they are not doing anything against the law. If they are bound by criteria of international donors or certifications, they attempt to reach consent with local communities, otherwise, they don't."
>
> Quote from Valentina Semyashkina, Izvatas from Komi Republic, Russia

It was pointed out that the *UN Declaration on the Rights of Indigenous Peoples* (*UN Declaration*) recognizes FPIC at the level of policies or laws, programs and projects. Thus, before the government initiates an FPIC process at a project level, there should be FPIC at the policy and program levels. Indigenous peoples' would have to give consent for their territories to be designated as mining areas, before the government can even consider entering into investment agreements with, or issuing mining concessions, exploration permits or licenses to, mining companies. Both the State authorities and mining companies would need to exert due diligence to ensure that there is FPIC before the issuance of a mining concession in indigenous peoples' areas.

Many representatives argued that it makes a good case in the moral and cultural sense, as well as in the business sense, to seek FPIC at the earliest time possible. Consultations need to be done at the very early inception and planning stages of a mining project as an investment or insurance against future risk. Even before entering indigenous territory, the company would have to talk to the people to explain what it is they plan to do. The earlier they do it, the easier it is for them to develop good faith in any subsequent negotiations.

FPIC should be an on-going and iterative process, and should be obtained at every major step of the mining development process, for instance from exploration, to feasibility, operation and post-operation. A major step would be defined as one which has a potential impact on an indigenous communities' enjoyment of their rights. The community and the company would have to negotiate different conditions and requirements for each stage.

The indigenous representatives expressed the view that FPIC is non-transferrable, and is not for sale at any point in the mining process. If a company pulls out of a project, this would signify abandonment. If another company takes over or buys the project or company, this should require another FPIC process to be negotiated between the community and the new entity. They regarded this as necessary to protect indigenous peoples from concessions being acquired by companies with a poor track record in relation to respect for indigenous peoples' rights, and to negotiate the terms of agreements with the new entity.

Extent of FPIC consultations

Indigenous interviewees emphasized that FPIC processes must include all the indigenous communities to the extent in which impacts occur in their territories. Indigenous representatives pointed out that the communities are the only ones who can assess the extent of most social, cultural, spiritual and, certain types of, economic impacts. All indigenous communities directly and indirectly affected would need to be included in the FPIC process. Particular emphasis was placed on this in contexts where projects may impact on water resources or culturally significant areas. FPIC is also an indispensable requirement for all projects involving relocation of indigenous peoples.

Time frames

Time frames for the conduct of FPIC processes should take into account the cultural protocols of the people. Interviewees held that timetables are a non-indigenous concept, and FPIC may be quick or may take a long time. What is important is arriving at a consensus after a full understanding of the information and issues, and not following a rigid time frame. It is the community's responsibility to make sure that they have sufficient time to arrive at a consensus.

However, it was also suggested that the timeframe for FPIC should not be open-ended, but should give a reasonable amount of time to ensure consensus building and good faith in the negotiations. The period for the FPIC process should be agreed upon with the community, and not set by the law or FPIC guidelines. That period should take into consideration the customary decision-making process, agricultural or seasonal cycles, economic activities, necessary rituals, free time of the community to hold meetings, or issues that could prevent the community from gathering.

If the decision arrived at by the community is a no, the FPIC process should end. The result should be reported and the State should not persist in getting FPIC after the people have decided. If the community says no, this decision should hold for a set number of years during which time, no new FPIC process can take place.

Information Provision and Capacity Building

The government and the company should be transparent and provide the full details about the mining company at the very start of the application process. Information about company ownership, registration, ongoing operations and track record were considered important by the interviewees. Companies should also provide ample information about the proposed project from its inception. This information should be in a language that is simple and properly understood by communities and any technical terms should be explained at the company's expense. Full and summary information should also be provided in writing. The community should be informed of its right to give or withhold FPIC and that it has the option to engage independent technical and legal advisors of its own choosing.

There is a need to ensure that there has been sufficient independently provided capacity building for indigenous peoples so that they are able to engage in meaningful negotiations in the exercise their right to self-determination. Otherwise the granting of FPIC is not possible. This means that indigenous peoples must be fully equipped with the technical capacity to set the terms of an arrangement that is sustainable and conducive to their well-being, and the conditions exist for them to make choices that include, but go beyond, choosing between saying yes or no to a predefined project proposal, and extend to choices between various possible negotiated options. One way of achieving this would be to ensure that there is access to, and financing for, independent technical and legal advice to assist communities which wish to develop their own FPIC protocols and internal expertise.

Impact Assessments

The representatives interviewed insisted that indigenous communities must be empowered to effectively participate in the conduct of environmental, social and human rights impact assessments of a mining project. The community is in the best position to assess the real value of the area and identify the natural resources, as well as historical, cultural and sacred sites, which could be affected. Indigenous peoples should also be given an opportunity to review, understand and submit comments on impact assessments, to ascertain that the final assessments reflect the actual conditions in the affected communities. Some indigenous representatives held that their communities had the capacity to perform social, cultural, spiritual, and human rights impact assessments themselves. They therefore did not want companies to employ external consultants to conduct this activity, as the result were often flawed and constituted a totally inadequate basis for an informed consent process.

It was also noted that the widespread government practice of requiring corporations to conduct Environmental and Social Impact Assessments has side-lined the role of the State in ensuring that communities are given ample opportunity to be consulted and fully informed of potential impacts.

Benefit sharing

Many jurisdictions view natural resources and subsurface minerals as belonging to the State. However, the indigenous representatives interviewed held that for indigenous peoples, these resources belong to them. Government and companies should understand the true value of the investment being put in by the communities in terms of the land and minerals that they contribute to the mining project.

If the community gives its consent, the people should receive a fair and reasonable share of the benefits from the mining operation commensurate to their contribution. The basis for computing the indigenous community's share should be a valuation of what they stand to lose from the mining operation, e.g. land, soil fertility, water resources, forests, animals, plants, food, culture, etc. It should also factor in community claims over subsoil resources in their territories, as well as the potential risks they and future generations face as a result of these activities. The terms of benefit sharing should be negotiated and specified in the memorandum of agreement resulting from the FPIC process. Some indigenous representatives emphasized that negotiations must be conducted in their own language.

> "Sharing of benefits from mining projects has to be fair and just. The basis for computing the share of the community should be a valuation of everything lost, e.g. loss of culture, loss of fertility of the land, animals, plants, food, etc. The impact of the project is already the cost, which is the basis for computation of the investment of the indigenous peoples. "
>
> Quote from Rukka Sombolinggi, Toraja, Indonesia

There are various models of benefit sharing, and it is the right of the people to choose what form this will take. Benefit sharing as a component of a partnership with indigenous peoples must go beyond compensation for damages. Elements of it could include employment, education or infrastructure provision. Guaranteeing royalties to the community is a step in the right direction, but equity shares in the company or the mining project were regarded as constituting more constructive relationships.

Mining companies as a matter of course implement community projects as part of their corporate social responsibility. The community should decide what kind of social projects will be implemented and prioritized. These projects should be separate from the community's share in the benefits of mining operation. Indigenous representatives expressed concern that the implementation of these projects prior to obtaining consent serves to distort FPIC processes.

Agreements and grievance mechanisms

Indigenous representatives interviewed saw the need to ensure that respect for their customary rituals are made part of the legal requirements of the FPIC process. Rituals need to be performed and respected because they serve a deeper purpose in the people's culture and spirituality. Performing a ritual is a sign of good faith on the part of the community. Violating these rituals could be a basis for voiding or nullifying the agreement.

> "FPIC has to be made mandatory and this can only be done if guidelines … are developed to regulate its operationalization. This will mean that the industry enters into binding agreements with local communities and any breach of that agreement will be tantamount to a punitive action."
>
> Quote from Reinford Mwangonde of Malawi, Africa

The signing of an agreement, be it in the form of a Memorandum of Agreement or an Impact Benefit Agreement, between the company and the community signifies the commitment of both parties to abide by the obligations they negotiated and agreed upon in the process of FPIC. Agreements should be formal legal contracts with the force of law. This means that any breach of the agreement would require punitive action.

All agreements should specify the grievance procedures and mechanisms of redress for any violation committed. It is the choice of the community what grievance mechanisms they want to put in place, and to identify the recognized authority that will monitor and enforce the agreement. What is important is that the people have confidence in the system. It should be run by independent persons whom the

people can talk to about their grievances. A multipartite monitoring team, including representatives of the community, alliances or federations, government and other independent bodies could be set up to ensure the implementation of the agreement. The State should then deal with any violations by law or in accordance with the provisions of the agreement. Respect for indigenous peoples judicial institutions and customary law is an integral part of ensuring adequate grievance mechanisms.

Role of stakeholders in operationalizing FPIC

Role of the State

Indigenous peoples interviewed agreed on the fact that as the primary duty-bearer, the State's role is to respect, protect and promote indigenous peoples' rights and that this includes respect for their customary law. In the context of extractive projects this implies that government agencies and state companies should do no harm. It also implies that measures must be taken in conjunction with indigenous peoples to prevent third parties, such as mining companies from negatively impacting on indigenous peoples' rights. It also implies that pro-active measures must be taken to strengthen indigenous peoples' representative structures and their capacity to engage in FPIC processes and to practice their customary law.

It is the role of the State to ensure that the enabling conditions for FPIC to be realized are in place. The State needs to incorporate the requirement for FPIC into its national legal framework and policies. In the context of mining projects it is the role of the State to ensure that FPIC is obtained prior to the issuance of concessions. Indigenous peoples interviewed regarded it as incumbent on corporations to request that States fulfil this role prior to acquiring concessions or entering into agreements with them.

When an external entity seeks to enter into indigenous territories, the role of the State is to act as a facilitator in the FPIC process, not by creating new bodies from which to obtain FPIC, but by respecting the indigenous authorities that already exist.

The State's role is to consult with the people, ensure that resources are available for consultations in a manner that does not influence the outcome of the process, ensure that the information provided is correct and that all the affected indigenous peoples are involved in the process. The State should have no part in the decision-making of the indigenous community. The role of the State is merely to explain the project in the clearest way possible and then leave the community to dialogue among themselves and to take their own decision within the framework of their own decision-making processes. Local government officials should not be assumed to represent the community in FPIC negotiations. While elected by the people, their mandate as part of the state apparatus is to implement government programs, which are often contradictory to the wishes of the community. They are therefore not the correct body to represent self-determination of indigenous peoples, unless the community expressly says they are.

> "The responsibility of fulfilling the process of FPIC is of the State. … It has to be implemented in a way that respects the norms and laws under customary law. If there are existing decision-making processes of indigenous peoples, the State should not create other spaces."
>
> Quote from Elisa Canqui, Bolivia

Role of companies

The role of the mining company is to seek the indigenous peoples' consent for the mining project. Before starting any kind of FPIC process, the company should do a context study to understand who are the indigenous peoples, where are their communities, how do they make decisions, who are the representatives, and everything they need to know about the indigenous people or community in order to respect their rights.

> "Companies should be encouraged to develop their own FPIC policies and principles. We need to engage with companies and say to them that they need to participate in defining FPIC principles so that they can follow them and own them as well."
>
> Quote from Brian Wyatt, Australia

It is the role of the company to provide adequate information about the project to the community. The company has the responsibility to inform communities that they are entitled to independent technical and legal advisors of their choosing and where the State does not provide funding for this the company should do so. Once information provision has met the demands of the community, companies should avoid any interference in the FPIC process as to do so would render the process void.

Role of third parties

The indigenous representatives interviewed believe that indigenous peoples have the right and prerogative to choose their advisers and supporters as part of their right to self-determination. Communities are often not familiar with mining or may not have the necessary capabilities to engage fully in FPIC processes. They may require legal or technical advice or negotiating skills in order to ensure that their rights are fully protected. Regional or national organizations and federations to which the communities are affiliated could play the role of advisers or observers to minimize the power imbalance between indigenous communities and other actors in the process. In their capacity as observers they can provide a degree of oversight and monitoring to ensure that both State and corporate actors act consistently with their human rights obligations. The role of third parties such as civil society organizations is crucial in helping indigenous peoples appreciate the impacts of mining projects.

States and companies should not attempt to prevent third parties from providing support and advice to indigenous communities, as the decision to accept or reject this support and information is up to the impacted communities. However, such third parties should not impose their views on the community, but should leave decision-making to the community in the context of FPIC and self-determination.

Challenges faced by indigenous peoples

Among the challenges for operationalizing FPIC identified by the indigenous representatives interviewed are:

1. Lack of access to adequate and correct information about the mining project and its impacts. In most cases, only biased and misleading information or details of positive impacts of mining are provided. Indigenous peoples also experience communication problems when dealing with companies or government because of cultural barriers such as language and different ways of thinking and perspectives.
2. Indigenous peoples have difficulties mustering the financial and logistical requirements necessary for the community to gather and hold their consultations, especially if the communities are far apart or the affected area involves different indigenous peoples and communities.
3. The current strength of indigenous peoples and their traditional authorities to be able to assert their right to FPIC is a challenge. Having experienced colonization and marginalization, often for many centuries, indigenous authorities and institutions in some communities have been rendered very weak. When mining encroaches on their territories there is a push for the indigenous community to strengthen their traditional authorities. If they are do not have the space in which to do this and access to the resources which it requires, the context becomes one which is conducive to undue influence on leaders or the establishment of unrepresentative structures. This renders good faith consultation and consent seeking impossible.
4. Indigenous peoples argue that customary law should have predominance within their territories. However, asserting which law should prevail – whether formal law or customary law – is a challenge. In a system of legal plurality formal laws should be on a par with and empower, and not re-engineer or undermine, customary law. This is the proper relationship between these two bodies of law.
5. It is a challenge for indigenous peoples to determine what strategies to use in pressuring the State to implement FPIC. They need to monitor and hold the concerned government agencies

to account, to ensure that they act in an independent manner, in accordance with their human rights obligations. Full transparency around all State and corporate engagement in relation to proposed projects is fundamental to achieving this.

6. A major obstacle in FPIC is the lack of recognition by the State of indigenous peoples' sovereign rights over their lands and resources. Even if subsoil minerals are considered public domain, mining these mineral resources leads to dispossession of the lands and territories of the indigenous peoples. Thus the recognition of the people's sovereignty is important.
7. A challenge in operationalizing FPIC is that the laws of the government favour developers. Rights of mining companies often supersede, or are given precedence over, the rights of indigenous peoples. There is also inequality in negotiations, in which the company always has the advantage and enjoys the support of the State. When indigenous peoples want their rights to be respected, they always have to bargain for it, and inevitably have to do so from a position of disempowerment.

3: Case Studies addressing indigenous peoples' FPIC protocols

A number of the indigenous representatives interviewed addressed the practical role which indigenous peoples' protocols can play in the operationalization of a rights compliant model of FPIC. Such views resonate with the experience of a growing number of indigenous peoples throughout the world that formalizing their own engagement rules and procedures, in the form of FPIC protocols, policies, templates or guidelines,[110] may be one of the more effective avenues available to assert self-determined and indigenous controlled models of FPIC. In addition these protocols frequently address those 'practical concerns' raised by corporations with regard to FPIC operationalization, including issues such as: procedural clarity; representation; and pan community or peoples governance structures. As a result, while not a panacea for the complex issues which arise in the context of mining engagements, these indigenous protocol approaches can go some ways towards reducing long term investment risk exposure by providing both the clarity and certainty which corporations seek. This protocol approach is addressed in four case studies covering three jurisdictions: Canada, the Philippines and Colombia. Two cases studies address the Canadian experience, as First Nations there have been leading the way in the formulation of these FPIC tools. The Philippines and Colombian protocols cover numerous communities and were developed in contexts where legally recognized rights, including the requirement for FPIC, are not upheld by the State. They consequently provide important insights for companies considering operating in such contexts.

Resguardo Indígena de Cañamono Lomaprieta, Riosucio y Supía Caldas, Colombia

Resguardo and Colombian Context

The *Resguardo*[111] of Cañamono Lomapretia covers 4,800 hectares and consists of 22,000 Embera Chamí people living in 32 communities. It was registered as ancestral territory by the Spanish Crown in 1540 and has a long history of gold mining during both the colonial and post-colonial era. The indigenous population of the region have historical gold mining practices, and have continued these practices of ancestral artisanal mining to this day. They now form an important part of their traditional livelihoods and incomes. These practices have been considered illegal and criminalized by the State, and those engaged in it have been jailed as a result.

The 1991 Constitution recognized the existence and inherent rights of indigenous peoples. Together with the ratification of ILO Convention 169, it recognized the autonomous character of these peoples. Official title has been given for ancestral lands covering more than 25% of Colombia's land base, with ongoing negotiations which will increase this amount.

However, over the last two decades there has been a new wave of repression of indigenous communities associated with the State taking possession of their lands for extractive and infrastructure projects. The current government has identified mining as a strategic focus, referring to the "mining locomotive" which will drive the economy forward. It has adopted a strategy of restructuring traditional *Resguardos* in order to attempt to facilitate third party access to them. This is reflected in the enactment of legislation, including the Mining Code, which weakens the territorial rights and special jurisdiction of indigenous peoples. Mining concessions have been issued to over 30% of the country, covering vast proportions of indigenous peoples' territories. The 89 Colombian indigenous peoples with officially titled lands are overlooked in the process, and mining companies are informed by the responsible government agencies that there are no indigenous peoples in these territories occupied by indigenous peoples for 400 years.

Precautionary measures have been issued by the Inter-American Commission on Human Rights as a result of displacement threats to communities, while the Colombia Constitutional Court issued an order recognizing 34 indigenous peoples as being in grave threat of extinction as a result of military and paramilitary activities and encroachment of development projects into their territories. The reform of the Mining Code was declared unconstitutional by the Constitutional Court due to

a lack of prior consultation with indigenous peoples in relation to its drafting. The mandatory prior consultation requirement under ILO Convention 169 has not been complied with in the issuance of mining concessions covering indigenous territories. The legal step of requesting their annulment on these grounds is still outstanding due to the potential risk to the lives of those pursuing such an action. In communities where indigenous peoples are strong, companies have been unable to enter without their consent. The lack of prior consultations with the impacted peoples and denial of their decision-making rights is however resulting in escalating levels of conflict. It has been accompanied by the widespread deployment of paramilitary groups, killings of and threats to the lives of indigenous leaders. In this regard Colombia is a clear example the impacts which the pursuit of a non-consensual based model of mining can have in the context of fragile States affected by armed conflict.

The *Resguardo* communities became aware that mining concessions had been granted in their territories following helicopter exploration flyovers conducted by Canadian junior Colombian Gold Field, without the consultation or consent of *Resguardo* authorities. Two years ago, alleged representatives of Canadian company Medoro Resources (now merged with Gran Colombia Gold) entered the *Resguardo* territory and attempted to take some samples, but were detained by the *Resguardo*'s indigenous guard and did not return. On further investigation of the status of mining concessions in their territories the *Resguardo* communities discovered that all of their territory was effectively covered by mining applications, with 48 concessions already issued, one of which belonged to Anglo Gold Ashanti. Anglo Gold Ashanti have subsequent committed to obtaining the communities' consent prior to commencing any operations and suggested that they should ensure their territories are registered on the government official geological maps.

The Resguardo's Indigenous guard – here seen learning about the Resguardo's mining processes -- holds the special responsibility of patrolling the territory and ensuring that the Resguardo's consent protocol is enforced. Photo: Viviane Weitzner.

Response of the Resguardo communities to imposed mining concessions

The *Resguardo* communities realized that they did not have equality of terms with the companies to engage in a meaningful good faith consultation process. In this context they started to develop a strategy to assert their rights based on the international rights framework and the jurisprudence of the Colombian Constitutional Court. The asymmetry of information between companies and the communities was reflected in the companies' detailed resource maps and their studies of the communities. The strategy adopted by the *Resguardo* was therefore to focus on documenting their own situation. Community based baseline studies were undertaken using their own methodologies and consisted of cultural, sociological, political, administrative and economic elements. The impacts and risks of ancestral artisanal mining were compared with those of large scale mining; and the *Resguardo* boundaries and features were also mapped, using GPS. Further, the ancestral mining history of the *Resguardo* was gathered through collecting the stories and knowledge of elders. To address intergenerational impacts children were involved in the education process, and the older generations were involved to provide ancestral perspectives, and a historical perspective covering 500 years was elaborated.

In order to secure their way of life in the face of external threats the community developed its own normative framework, including the development of an FPIC protocol, governing mining in the *Resguardo* territory. Over a two year time-frame a process of collective construction involving leaders and all sectors of the community led to the development of a normative framework consisting of series of resolutions. These address: the nature of permissible mining operations; the role of ancestral artisanal mining; specific zones to be excluded from mining; and the consultation and consent seeking protocols which must be followed by all parties seeking to enter the territory. This consultation and consent seeking framework is in harmony with ILO Convention 169, the UN Declaration on the Rights of Indigenous Peoples and the jurisprudence of the Inter-American Court on Human Rights. It seeks to ground the right to consultation on their customary laws and the principle that they constitute self-governing territories. The framework serves to reduce the power asymmetries by establishing that consultations must be conducted on the terms established by the communities, with companies seeking to enter the area required to accept this normative framework prior to engaging in consultations.

Resguardo FPIC Protocol

Under the consultation and consent protocol, all administrative acts, including the issuance of concessions and environmental certificates, require prior consultation through traditional authorities. As a result, prior to actually commencing mining operations up to six consultations may be required. In order to exercise their right to consultation the communities are willing to be consulted in relation to large scale mining. However, they inform companies that it is a waste of their time and money to attempt to pursue mining in their territory, as they have made a predetermined decision to withhold consent to large-scale mining or mining involving the use of cyanide or mercury.

Any external oversight of their decision-making processes is considered disrespectful of the communities' autonomy. Consequently as part of the communities' consultation and consent protocols decisions are taken without government or company representatives present in the community. The normative framework also provides that if the community members are not happy with the decision of their leaders a general assembly of the community is held to make a final decision. If there is any evidence of manipulation of the process or of leaders, through financial or other means, the consultation process is considered void, and consent deemed to be withheld.

The FPIC protocol was finalized in May 2012, and has yet to be applied in the context of a mining project, as no prior consultations have been initiated by the responsible government agency. Engagement with external actors on the basis of it is ongoing in the context of a proposed Water Plan.

The case is illustrative of the fact that in the context of fragile States such as Colombia, where corruption and conflict are rife, companies have a heightened due diligence responsibility to verify the existence communities and the impact of their proposals on their internationally recognized rights. Otherwise they perpetuate State practices, and the corrupt model which facilitates them. If companies wish to establish a new scenario of good faith engagements with indigenous peoples,

they need to move beyond a mind-set which frames all choices in monetary terms. The case indicates the underlying demand of communities in the assertion of FPIC is to have a genuine choice of development models, which should include but cannot be limited to those premised on western conceptions of economic progress. The expectation in Colombia is that other communities will increasingly adopt similar strategies to assert their self-determination right to set the terms of consultations, and, if they so choose, to withhold consent. Unless companies rectify their relationship with indigenous peoples the reality is that it will become increasingly difficult and ultimately impossible for them to work in indigenous territories.

Observations

The *Resguardo* has declared its entire territory as a 'no go' zone for large-scale mining. This decision was taken because the communities felt that given the state of armed conflict, and the threats to leaders who speak up for their rights, the enabling conditions are not in place for 'free' prior and informed consent to be sought and granted. A second factor is that the *Resguardo* territory is very limited relative to its population size. As a result any large-scale mining within it would affect the capacity of the people to guarantee their food security and practice their livelihoods.

The case highlights the issue of whether or not the 'free' dimension of FPIC processes can ever by realized in a context of armed conflict. It also begs the question as to whether companies can comply with their human rights obligations while operating in such conditions, and if they should even consider attempting to conduct mining operations in these contexts given the potential for grave human rights violations.

The case of the Subanen of Zamboanga Peninsula, Philippines

The experience of the Subanen people[112] of Zamboanga Peninsula in Mindanao, Philippines, is a case of indigenous peoples who have had negative experiences in engaging in flawed FPIC processes and have asserted their own conceptions of FPIC to ensure future processes comply with, and protect, their rights, including their right to self-determination. To do this they have asserted their customary laws and formulated their own guidelines for culturally appropriate FPIC processes. This has been done in a context where the existing government FPIC guidelines and implementation have been found defective and in violation of customary law. The case study provides an overview of the specific experience of the Subanon of Mt Canatuan and then addresses the response of the wider Subanen people whose communities are spread across the Zamboanga Peninsula.

Context

The Zamboanga peninsula is a priority mining area in the Philippines under the government's policy to revitalize the mining industry. The peninsula, which was traditionally Subanen territory, is home to some 300,000 Subanen who now represent a minority of the population and whose ancestral domains are scattered throughout the peninsula. The area has been host to several mining applications over time by international and national companies including Rio Tinto, TVI Resources Development Inc. (TVIRD), Ferrum 168, Geotechniques and Mines Inc (GAMI) and Frank Real Inc.

In spite of the fact that FPIC is legislated for in the 1997 Indigenous Peoples Rights Act (IPRA), numerous violations of customary laws and FPIC have been documented in relation to the selection of community representatives and decision-making processes to obtain consent for mining activities in Zamboanga. Some of the violations are by the government's National Commission on Indigenous Peoples (NCIP). In addition, FPIC processes have been conducted only in certain selected areas within the Subanen ancestral domains, without the participation of other affected Subanen communities, and without due respect for traditional territorial boundaries and governance structures. The NCIP has also initiated new FPIC processes each time new mining applications are submitted resulting in the Subanen facing numerous simultaneous and separate FPIC processes.

The demands associated with these processes render it impossible for the communities to assert their rights. There have also been reports of imposing predefined geographic boundaries, ignoring prior decisions made by communities, coercion, undue influence, bribery and inappropriately timed community development projects attributed to the NCIP and a number of mining companies.[113]

Indigenous leaders have also experienced what they consider mine-related harassment by the military and security forces through the filing of civil and criminal charges against them and a recent incident of armed ambush, which resulted in the killing of the son of one of the leaders. Mining operations are continuing in Zamboanga despite the lack of genuine FPIC.

These violations were the subject of numerous complaints submitted by the Subanen – in particular the communities of Midsalip, Bayog and Mt Canatuan – to the government with no satisfactory response.

Experience of the Subanon of Mt Cantuan

At Mt. Canatuan, the NCIP created a Siocon Council of Elders to give consent to TVIRD, circumventing the longstanding opposition of the local Subanon leaders and community to the project. The Gukom of the Seven Rivers, which is the highest Subanon judicial authority in the area, ruled that the Siocon Council of Elders was "illegitimate, illegal and an affront to the customs, traditions and practices of the Subanon."[114]

The Subanon of Mt Canatuan, where TVIRD started operating without legitimate consent, filed a complaint to the UN CERD Early Warning Urgent Action Procedure in July 2007 against the Philippine government for violating their human rights. The case resulted in strong recommendations issued by the CERD for the Philippine government to address these concerns.

In response to the Subanon complaint to the UNCERD, the Philippine government acknowledged that consent was not obtained prior to the mining operation in Mt. Canatuan. However, to date, the government has still to satisfactorily act on the CERD recommendations and has failed to initiate the process to provide culturally appropriate remedies.

Implications for companies

In September 2007, the Subanon judicial authority, the *Gukom,* consisting of the traditional leaders of the surrounding Subanon communities, convened in Mt. Canatuan and performed a traditional ritual called *Glongosan sog Dongos nog Konotuan* to condemn the destruction of the sacred Mt. Canatuan. This was followed in December 2007 by a Gukom trial convened to decide on the complaint filed by their traditional leader, Timuoy Anoy, against TVIRD. The complaint covered all the issues which had arisen from the company's non-consensual presence in the area. During the trial, the *Gukom* fined the mining company for disrespecting existing community protocols. The traditional authorities also required TVIRDI to conduct a cleansing ritual in atonement for desecrating Mt. Canatuan. After four years on May 17, 2011, the company finally and publicly admitted its responsibility, performed the mandatory cleansing ritual called *Bintungan nog gasip bu doladjat* and agreed to negotiations regarding penalties. Despite this seeming conciliatory move of the company, the community is still pursuing its complaint against the Philippine government filed at the UN CERD.[115]

Subanen Peoples' Protocol: The Subanen Manifesto

The negative experiences of the Subanon of Mt Canatuan and other Subanen communities with NCIP regulated and controlled FPIC processes promoted the Subanen to assert their own conception of FPIC and their right to control its implementation. The Subanen "Manifesto" on FPIC came about after a group of Subanen traditional leaders from different parts of Zamboanga Peninsula gathered in 2007 to protest against the NCIP 2006 FPIC Guidelines for facilitating the entry of extractive projects into their ancestral domains. This was followed in 2009 by a series of community consultations and a conference of Subanen traditional leaders to consolidate the views of the different communities

Traditional Subanon Timuoy (chieftan) Jose Boy Anoy receives the Certificate for his Ancestral Domain. Photo: Cathal Doyle.

and to formulate FPIC guidelines that they considered to be culturally appropriate, consistent with their customary law and sensitive to their indigenous worldview and beliefs. The Subanen leaders, including Subanen women leaders, involved in the consultation process represented different communities and provinces from all over the Zamboanga peninsula. The result of this broad-based community consultation process was a manifesto expressing the aspirations of the Subanen people for an acceptable consent process before the introduction of development projects in the ancestral domains.[116]

The Manifesto declared their views on the importance of their land and natural resources. It called for respect for indigenous values through asking permission, and acquiring consent, before doing anything involving the people, their property and the unseen spirits. The document called for the adoption of guidelines to regulate the entry of large-scale development programs in the Zamboanga peninsula. Among the conditions for the conduct of FPIC were: the submission of a list of names of indigenous leaders duly recognized by their respective communities; participation of all affected communities in the FPIC process; respect for traditional territories and boundaries; respect for traditional leadership and decision-making processes; performance of traditional sacred rituals; written agreements with terms and conditions; respect for decisions to reject projects and the absence of military and police forces in the community.[117]

Philippine government response

Instead of recognizing the Subanen Manifesto as a Subanen defined FPIC process, the NCIP Chairman instructed its Regional Office to uphold and adhere to the FPIC Guidelines of 2006.[118] While the NCIP acknowledged that customary law had primacy in the ancestral domain, it held

that its FPIC Guidelines provided for this. This was despite the fact that the Subanen protocol was devised explicitly to address areas where the Guidelines contradicted, or were in violation of, their customary law.

Pressured by demands of indigenous peoples throughout the country, the NCIP suspended all FPIC processes in late 2011, pending the review of the 2006 FPIC guidelines and the determination of appropriate guidelines for implementation. The review process led to the issuance by the NCIP of the Revised Guidelines on FPIC and Related Processes of 2012.

Observations

The experience of the Subanon of Mt Canatuan underlines the importance for companies of ensuring that they are talking to the right people and abiding by existing customary laws and traditional processes of decision-making. It also provides a rare example of where a company has been found guilty under an indigenous peoples' own judicial authority of violating their customary laws, including the failure to obtain their consent, and where that company eventually recognized the ruling and agreed to negotiate the penalties which it imposed. It therefore provides an interesting case for indigenous peoples and companies to consider in the context of appropriate grievance mechanism to address violations of indigenous peoples rights.

Based on their experiences of flawed FPIC processes which failed to respect their rights and customary laws, the Subanen people as a whole decided to formulate their own rules around FPIC. This unified coming together of Subanen communities from across the Zamboanga peninsula to develop their FPIC Manifesto was empowering for all of the Subanen communities involved. It counters the potential for the imposition of unrepresentative structures as the legitimate authorities of the Subanen communities are recognized by both their community members and by other Subanen communities. Furthermore, it addresses the deficiencies in the national FPIC guidelines, which due to their bureaucratic nature are unable to respect the diversity of indigenous peoples.

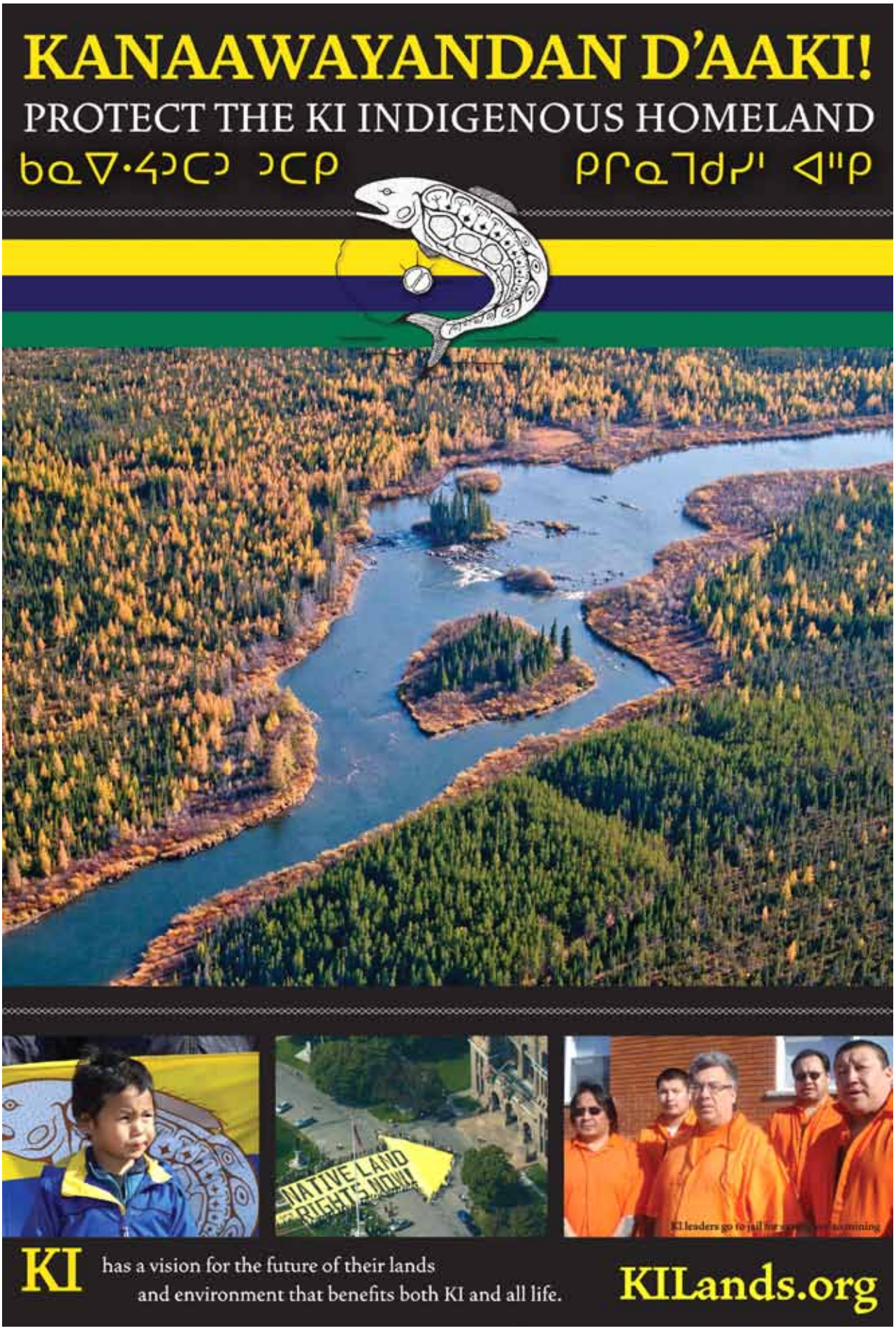
For companies, following community protocols provides an opportunity to avoid risks and conflicts with the community and is more advantageous than merely following the government process, which has been proven defective and in violation of indigenous peoples' rights.

Based on their experience the Subanen are of the firm opinion that once a community has decided against mining within their domain, then no further mining applications should be entertained until the community decides otherwise. In addition, once a mining application is rejected, the community decision is seen as final and is not subject to appeal. They see these requirements as essential to the meaningful operationalization of FPIC. Otherwise repeated processes are imposed on them with which they lack the capacity to engage. If this happens FPIC processes are transformed into a mechanism for justifying the imposition of a project as opposed to a tool for the operationalization of the right to self-determination.

Kitchenuhmaykoosib Inninuwug (KI) First Nation – FPIC protocols as a means of resistance.

The Kitchenuhmaykoosib Inninuwug (KI) territories are located in Northwestern Ontario, Canada. In 1998, Platinex acquired claims for exploration rights in their territories 20 kilometres south of Big Trout Lake.[119] In 2000, the KI First Nation, declared a moratorium on mining.[120] Platinex's initial attempts to enter KI territory in 2006 were met by community opposition, which included the presentation of eviction notices to the company and culminated in a stand-off between community members and corporate security. Platinex proceed to file an injunction against the community and sought 10 Billion dollars in damages.

In July 2006, the Superior Court of Ontario found in favour of the KI community granting them an "interim interim" injunction against Platinex. A draft KI consultation protocol, produced in 2006 in the context of Platinex's attempted entry, was addressed by the Judge when ordering a five month suspension of drilling to allow for consultations. The KI protocol contained a form of consent


KANAAWAYANDAN D'AAKI!
PROTECT THE KI INDIGENOUS HOMELAND
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NATIVE LAND RIGHTS NOW!
KI leaders go to jail for
mining
KI has a vision for the future of their lands
and environment that benefits both KI and all life.
KILands.org

requirement, in so far as it held that the community should reach a consensus on a decision before it could become binding on them.[121] The KI consequently viewed this initial Court ruling as an implicit recognition of their consent requirement.[122]

In the subsequent reversal of its decision six months later, the Court effectively imposed a Company and State defined protocol on the KI. The company's right to proceed with its mining activities was recognized by the Court. In the fall of 2007, the community prevented the company from entering their community and continued to maintain that Platinex was not welcome in their territory. Platinex then brought a contempt of court motion in March 2008, following a court hearing, six of the KI community members and leaders, who refused to recognize the Court's decision and the externally imposed memorandum of understanding and drilling timetable, were sentenced to jail for six months. Following an appeal based on the severity of the sentences against the KI members, and two members of the Ardoch Algonquin First Nation who were similarly sentenced to six months imprisonment for ignoring an injunction, and a motion by Platinex that the KI members had spent enough time in jail, they were released in May 2008. In May 2008 Platinex also filed a suit against Ontario for 70 million dollars claiming that Ontario failed to discharge its obligation to consult KI and that it breached its duty to warn Platinex that it would not enforce the rule of law around the Platinex mining claims.

In 2009, Platinex again attempted to enter KI territory, but their plane was physically prevented from landing by KI Chief Danny Morris who by chance or design was exercising his fishing rights on the lake adjacent to the Platinex claims. That same year, Ontario and Platinex reached a settlement, which entailed the province paying the company five million dollars and a potential future royalty interest in order to surrender its mining claims and leases in KI territory and drop the outstanding cases.[123]

A second gold mining company, God's Lake Resources, obtained claims over areas within the KI territory in 2009. In October 2011, KI learned that God's Lake Resources had commenced early exploration activities in their territories at Sherman Lake, in an area containing sacred burial grounds,[124] and issued an eviction notice to the mining company. They also made the halting of the project a condition for participation in discussions with the government.[125] The government's response was that it was not legally empowered under the Mining Act to stop the company.[126] However, on the 5th of March, immediately prior to an international Prospectors and Developers Association conference, the province announced the withdrawal of over 23,000 square kilometres of KI traditional lands from areas open to mining claims. On the 29th of March it paid Gods Lake Resources 3.5 Million dollars to abandon its claims.[127]

During the God's Lake dispute the KI embarked on a Right to say No campaign. They developed an enhanced consultation and consent protocol, which served as a means of resistance against any repetition of the Platinex experience. The protocol asserts KI law – *Kanawayandan D'aaki* – and their ownership over resources. The protocol was, as a result, developed in the context of an immediate threat to the KI territorial and governance rights, and has been described as constituting a key tactical decision in the resistance of mining projects and the assertion of KI jurisdiction on the land.[128] It was distributed to all households in the KI *Oji-Cree* dialect and served as a means for mobilizing and educating the community in relation to asserting their self-governance rights.

While the KI's protocol and decision-making rights were never formally recognized by the company or the State, ultimately, the KI illustrated that they held a de-facto power to withhold consent by preventing two companies from entering their territory and achieving an effective moratorium on all mining activities. This de-facto consent power was exercised at considerable expense to the community, particularly in a context where they were forced to repeatedly resist projects. The FPIC protocol effectively constituted an effective tool for resistance in a context where the State consultation requirements could be regarded as a mechanism for regulating that resistance.[129]

The KI case, together with the companion case of their ally the Ardoch Algonquin First Nation, triggered a review of the 1868 Ontario Mining Act, and the substantial reform of the antiquated 'free entry' system in the State of Ontario. However, the failure to incorporate a requirement for FPIC means that the revision has not addressed the underlying issues which gave rise to and continue

to underpin the KI opposition to Ontario approach to mining in their territory. The Far North Act, providing for community land use planning, was also enacted following the legal action of the KI. However, the KI regard this Act as a means through which Ontario is attempting to assert jurisdiction over their territories. Their demands for recognition of the requirement for FPIC are framed with the broader question of claims to jurisdiction and sovereignty over their territories.

The KI position is that they refuse any engagement with companies until the underlying issues of jurisdiction and Treaty 9 rights are addressed in nation to nation negotiations.[130] They continue to affirm that their inherent jurisdiction implies that their consent is required for any development of lands, water and resources within their territory.[131] They also passed a declaration through a community referendum nationalizing the resources in their territories. In keeping with their moratorium all mining operations have withdrawn from their territories.

General observations arising from the overall KI Experience

The Kitchenuhmaykoosib Inninuwug are perhaps the clearest example of a First Nation which has been successful in using its consultation and FPIC protocol as a means to: a) resist unwanted projects and inadequate consultation processes; b) challenge the constraints imposed by the national legal framework which requires consultation and accommodation but which to date, in most cases, has not been interpreted as embodying a right to withhold consent; and c) ensure corporate commitment to engagement and consent seeking based on community defined terms.

The KI have demonstrated that where indigenous communities resist non-consensual encroachments, and are prepared to pay the potentially high personal and social costs that doing so may entail, they have a de-facto consent power over State and corporate actions. However, the potential for this form of assertion of rights and resistance in the context of violent State repression of indigenous peoples' rights and corporate engagement of para-military groups is significantly reduced. In addition the KI are extremely remote, accessible only by air, and have minimal state presence in their territories. As a result, in a context such as Canada where the use of violent force against indigenous peoples is increasingly unacceptable, the territory is effectively ungovernable and projects impossible to impose absent community consent.[132]

An important issue which emerges from the KI case is how the requirement for FPIC addresses the issue of consultation fatigue, whereby communities are expected to engage in multiple FPIC process with a series of mining companies seeking to access and exploit resources in their territories? The capacity of most indigenous communities to sustain multiple FPIC processes, especially if they are attempting to withhold their consent, is severely limited. As a result if communities are not in a position to enforce mining moratoria after they have withheld their consent, the requirement for FPIC cannot be operationalized in a manner which is consistent with the realization of their rights.

The KI case also challenges the legitimacy of State imposition of consultation and land use rules and procedures through legal frameworks and policies, without first engaging in good faith with the First Nations to address the unresolved issue of inadequate State recognition of their territorial jurisdiction. In the absence of this type of State engagement the KI have unilaterally declared full ownership over the resources in their territories. By effectively nationalizing these resources they have rejected the power of the provincial government to regulate or administer their usage.

The KI consultation and FPIC protocol was developed in the context of resistance to an imminent threat. While clearly elaborating on the principles of engagement, it remains more ambiguous than the Taku River Tlingit First Nation's (TRTFN) mining policy with regard to certain aspects of how a FPIC process might play out in the context of a full blown engagement with mining companies, should the communities decide to proceed with a project. This may not be a limitation of the protocol as it provides a greater degree of flexibility to the First Nation to address the different types of engagements and negotiations which may arise when dealing with a spectrum of mining companies. It also illustrates that protocols do not have to be drafted from Eurocentric legal perspectives, as implied by the principle of legal plurality and the primacy of customary law within the territories of indigenous peoples. The consultation protocol is in effect superseded by a moratorium which the KI have imposed on all mining activities in their territories.

The KI case resonates with the view of many indigenous peoples that prior to expecting them to engagement with corporate actors the State must first enter into good faith dialogues with them in order to recognize their territorial and self-governance rights. Another issue which the KI case highlights is the State's exposure to corporate lawsuits as a result of its failure to require indigenous peoples' consent prior to issuing leases over their lands. Platinex filed a law suit against the State for 70 million dollars to cover its investment loss as a result of the State's failure to consult with the KI. The State ultimately ended up having to compensate two mining companies a total of 8.5 million Canadian dollars, in order for them to abandon their claims in KI territory.

Canadian negotiation approaches – building leverage for consent requirements

The Kaska Dena, Lutsel K'e Dene or Tłįcho First Nations have a long experience of dealing with the mining industry, and are at any point in time each engaged with up to 30 mining companies. This has provided them with useful experience in negotiations and engagements with companies, from which useful lessons can be drawn.

Kaska Dena

The case of the Kaska Dena First Nation, whose territories are in Yukon, Northwest Territories and British Columbia, Canada, offers an interesting insight into a situation where a Chinese company, Silvercorp, has voluntarily signed a legally binding contract requiring consent at the exploitation stage, should the mine proceed from exploration to production. The agreement followed an accelerated negotiating process conducted from December 2009 to May 2010 and included a resource funding agreement to finance the negotiation process. In effect consent was provided for exploration as a sort of trade-off for the subsequent consent requirement at exploitation. If during the exploration phase, legitimate concerns 'arise in environmental studies and traditional knowledge study, [the Kaska Dena] retain their right to oppose the Project'.[133] Under the agreement the consent requirement can be triggered by a technical environmental impacts study, or by a traditional knowledge study. The latter is conducted under a stand-alone traditional knowledge protocol. This protocol elaborates a community-owned traditional knowledge governance process and provides for investment in a traditional knowledge database.[134]

This agreement was reached in a context where the company felt relatively confident that it would be able to obtain consent. The Kaska Dena case is also interesting because, in addition to negotiating with companies, they have (like many indigenous communities) engaged in adversarial approaches with them. In one notable case, the December 2012 decision of the Yukon Court of Appeals challenging the "free entry system",[135] has had the potential effect of triggering legislative reforms, which address deficiencies in corporate engagement with First Nations. The Kaska Dena First Nation use a series of legal templates, which define a step-by-step engagement process, rather than a single policy or FPIC protocol in their engagements. They have up to 30 companies engaging with them simultaneously.

Lutsel K'e Dene First Nation (LKDFN)

The Lutsel K'e Dene First Nation (LKDFN) are part of the Akaitcho Treaty 8 Nations located in Canada's Northwest Territories. They are in a somewhat similar situation to the Kaska Dena, as neither First Nation has a land claim agreement to act as leverage in their engagements with companies. As a result companies are technically not obliged to enter into impact benefit agreements with them. The LKDFN also use engagement templates which seek to use exploration agreements as the leverage for pushing companies towards recognizing the requirement for consent for any subsequent exploitation. They include a clause stating that companies agree not to begin commercial mining within their properties without their prior consent, which is to be solicited through the negotiation of an access/impacts-benefits agreement. To date they have been successful in getting companies to commit to entering into impact benefit agreements, despite the absence of the legal requirement to

do so. Like the Kaska and Tłı̨cho, the LKDFN have extensive experience in engaging with mining companies, and have perfected their approach primarily through practice rather than policy. In 2011, the LKDFN entered into a MOU with the Northwest Territories and Nunavut Chamber of Mines.[136] Under the MOU an engagement approach based on LKDFN guidelines is to be promoted to member companies. The LKDFN are also in the process of establishing a joint office with the Chamber of Mines.

As with the Kaska Dena the LKDFN also continue to engage the courts in context where their rights are under threat from mining projects. Together with the Yellowknife Dene First Nation, they took the landmark 2011 Supreme Court *North Arrow* case which established that First Nations exploration protocols and guidelines were a reasonable and robust approach for their engagement with corporations, and that corporate refusal to engage on the basis of these guidelines could lead to denial of permits. The LKDFN, along with the Tłı̨cho and other First Nations in the region, have agreements with De Beers, BHP and Rio Tinto in the context of the Snap Lake, Ekati and Diavik projects. However, they point out that these were not negotiated from the more progressive position which First Nations have developed in recent years, in particular following the *North Arrow* case. The LKDFN are also seeking recognition of an area within their territories, which is known as Thaidene Nene, as a permanently protected area, prior to the 2014 expiry of a moratorium which currently covers it.[137]

Tłı̨cho ***Nation***

The Tłı̨cho Nation, are neighbours of the Lutsel K'e Dene. They hold a Land Claim and Self Government Agreement, which was negotiated over a 12 year period and covers an area of 39,000 sq kms which is held in fee simple.[138] It is the first combined land, resource, and self-government agreement in the North West Territories,[139] and requires that companies negotiate Impact Benefit Agreements

Tłı̨cho elders and youth, drumming and singing, during a university visit to present Tłı̨cho research interests. Photo: Ginger Gibson.

prior to commencing mining operations. Under the Tłįcho Land Claim and legislation and under the Mackenzie Valley Resource Management Act, the Tłįcho Nation has the right to accept, modify or reject the decisions made by the regulatory agency or environmental assessments. This is the only case in Canada where this authority has been spelt out in legislation. These powers are not held by other First Nations in the same region due to the fact that they have not yet completed land claim negotiations. Any development in the lands of the Tłįcho which is reviewed following the Mackenzie Valley environmental assessment regulatory process, comes to the Tłįcho government. The Tłįcho hold the decision-making authority to accept or reject the recommendation of the regulatory body.

They are currently exercising this decision–making power in the context of a January 2013 recommendation by the Mackenzie Valley Environmental Impact Review Board that, subject to compliance with certain measures, a mining project should be authorized in their territories. One of the measures is the establishment of a cultural camp, funded by the company, for indigenous 'hands-on' monitoring of the mine operation, should the project proceed. The Tłįcho are consequently in the position of having to decide to accept, reject, or accept with further conditionality, this recommendation. The case represents a tangible example of a consent process in operation. It is the first time that the Tłįcho First Nation will exercise these decision-making powers over a mining project in accordance with its own government, assembly and constitution, all of which are premised on indigenous perspectives. During the environmental assessment process the Tłįcho had two agreements negotiated with the company – one to fund their own technical studies, and the other to fund traditional knowledge research.

The Tłįcho have extensive experience of engaging with mining companies. This includes agreements which pre-date their land claim agreement, and were excluded from its scope, as well as engagement with other companies which have subsequently sought entry into their territories. Similar to the Kaska Dena and the LKDFN, they have followed the approach of refining their engagement with mining companies based on practice, as opposed to the creation of an all-encompassing mining policy or protocol. In place of a policy they send customized letters with guidance to prospective companies, and provide them with advice in the form of meetings and presentations, attempting to engage them as soon as they enter their territory. One of their reasons for not choosing the policy route is their view that mining majors and juniors cannot be treated in the same manner. The Tłįcho have realized that dealing with mining companies is a full time job, and to this end established the Kwe Beh Working Group in 2010. The Group reports to the Tłįcho Chief Executive Council, and seeks to give advice and direct mining companies from the outset of projects. It has adopted a particular focus on ensuring that the First Nation themselves, and not external consultants, conduct impact assessments.

Observations

The experience of both Kaska Dena and the LKDFN is illustrative of a trend towards a transition from a confrontational relationship with the industry, to one which is more cooperative and based on processes defined by, and agreed with, indigenous peoples. In at least one incident this model of engagement has led to a contractually binding consent requirement for exploitation. It consequently addresses arguments which are made against consent on procedural and practical grounds by illustrating that seeking and potentially gaining consent through processes based on indigenous peoples' guidelines and template agreements is possible. The current template agreements which these First Nations have developed seek to leverage exploration for subsequent consent based engagement. The First Nations' success in realizing a commitment to obtain consent at this exploitation stage provides a solid basis for arguing that consent can, and should, also be sought at the concession seeking and exploration stages.

However, most companies have yet to transition to a model of engagement premised on respect for First Nations right to withhold consent. The lesser standard of negotiating and entering into Impact Benefit Agreements is instead more widely adhered to. This model can potentially bring some benefits to communities. However, it also constitutes a significant limitation on the exercise of indigenous rights. The experiences of these First Nations in negotiating such agreements, and

in using FPIC protocols and templates, have been shared with indigenous communities in other jurisdictions. One notable example was the LKDFN sharing with the Lokono in Suriname in the context of their development of an FPIC protocol when faced with a project in their territories.

The current decision-making process in which the Tłįcho are engaged also provides concrete evidence of the capacity of indigenous peoples to operationalize FPIC processes. One of the primary lessons which emerge from the Tłįcho case is the need for indigenous peoples to take greater control over the conduct of socio-economic and traditional knowledge impact studies. The Tłįcho inform companies that they should hire the First Nation's own research staff to conduct these assessments, as opposed to engaging external consultants who generally have no understanding of the specific cultural context of their communities. This is reflective of an emerging trend among indigenous peoples globally to develop their own indicators, based on their particular perceptions of well-being and development. These indicators will serve as important tools in empowering indigenous peoples to conduct their own impact assessments and monitoring into the future.

4: Company perceptions of FPIC

This project focuses on FPIC and corporations by considering the policy and practice of four London-listed (FTSE 100) companies: BHP Billiton, Rio Tinto, Anglo American and Xstrata. They are among the world's seven largest (by market capitalization) mining companies,[140] and each has either a significant or growing number of projects directly affecting indigenous peoples. As industry leaders, their policies and practices are influential outside of their own portfolios. The four are also all members of the ICMM. Business units, subsidiaries and companies belonging to these four majors which are included in the scope of the project include De Beers Canada, which is 80% owned by Anglo American; Groote Eylandt Mining Company Pty Ltd (GEMCO), which is 60% owned by BHP Billiton plc, and under its management control, and 40% owned by Anglo American;[141] and Energy Resources Australia (ERA), which is 68.4 per cent owned by Rio Tinto.

In addition to these four major mining companies and their three subsidiaries, a Canadian junior mining company, Inmet, which is attempting to establish a copper mine in the lands occupied by the Ngobe people in Panama, was included in the research, on the grounds that it was cited in company interviews and ICMM documentation as a possible example of good practice in relation to consent seeking in the context of relocation.

Interview Scope

Interviews were held with the above mentioned companies with the objective of clarifying concerns and perspectives in relation to the principle of FPIC and its operationalization. The issues raised in the interviews can be divided into two broad categories. The first relates to FPIC in corporate policy and the drivers for its future inclusion. The second relates to the operationalization of FPIC in practice and addresses corporate perspectives on definitional ambiguities as well as challenges to and potential mechanisms towards its operationalization. The interviews sought to focus on tangible examples where these challenges were encountered as well as practices which the companies regarded as facilitative of FPIC operationalization.

Ngöbé community at the headwaters of the Caimito River, Donoso Province, Panama.

FPIC in corporate policy

Official positions on FPIC – policy and public statements

The UN Special Rapporteur on the rights of indigenous peoples has clarified that extractive companies should 'as a matter of company policy, endeavour to conform their behaviour at all times to relevant international norms concerning the rights of indigenous peoples'. Recent years have seen important developments in terms of their public commitments of some mining companies to seek or obtain indigenous peoples' consent. From a policy perspective within the mining sector, Rio Tinto and De Beers are notable examples with stated commitments to seeking indigenous peoples' free prior and informed consent.

Rio Tinto's 2012 Community agreement guidance states that it seeks to:

> operate in a manner that is consistent with the [UN Declaration]. In particular, we strive to achieve the Free, Prior, and Informed Consent (FPIC) of affected Indigenous communities as defined in the 2012 International Finance Corporation (IFC) Performance Standard 7 and supporting guidance.[142]

De Beers 2012 Group Community Policy states that it is committed to:

> [r]especting community governance and always seeking a community's free and informed consent prior to initiating any significant operations that will have a substantial impact on their interests.[143]

In its 2008 policy, De Beers Canada Inc requires consent at the exploitation phase, and defines it as:

> mean[ing] that a community is to be consulted, and is free to make its own decision and give its consent without outside influence, in a sufficiently timely manner ahead of a final decision in time to influence that decision, that it has sufficient information upon which to base its decision, and that its consent is required before a significant development or activity such as mining may go ahead. This means a community has the right of veto before mining development can take place.[144]

Disclaimer: De Beers Canada Inc. revised its policy early in 2013. It now makes reference to 'Free Prior and Informed Consultation'. The document was not public at the time of printing this report. The quotes from the De Beers representative included in the section below are from an interview conducted prior to the adoption of this revised policy. As a result all the references to De Beers in the report are historical and do not necessarily reflect current policy or positions.

In July 2012, Anglo American acquired 80% ownership of De Beers, which now represents one of the four business units within Anglo American. Anglo American Socio-Economic Assessment Tool Box offers a qualified support for recognition of the consent requirement, stating:

> Anglo American does not have a policy that grants indigenous peoples Free, Prior Informed Consent, but it supports the notion where the relevant government authority has granted or recognized the rights of indigenous peoples.[145]

Xstrata states that it seeks:

> to maintain broad based ongoing community support … including, where relevant, free prior informed consent.

The 'relevant' circumstances are not specified. Xstrata points out that it publicly reports on its adherence to ICMM's principles and was an active participant in the development of ICMM's new standard on indigenous people. Xstrata's public commitment to obtaining FPIC for relocation at its Tampakan project has to be viewed within the context of the Philippine legislative requirement for FPIC.

BHP Billiton commits to obtaining 'broad community support', but holds that this is distinct from FPIC,[146] which it currently regards as 'only required where it is mandated by law.'[147]

Inmet was mentioned by the ICMM as a possible case to consider. Inmet does not have a policy requiring consent but has committed to obtaining it for resettlements of indigenous and campesino people at its Cobre Panama project.[148] Efforts were made to include the case, however divergent

positions between the company perspective and that of the community leader who was interviewed rendered it impossible to reach a mutually agreed set of observations (see section 5 below).

Newmont was referred to in interviews as another mining company with policy commitments in relation to indigenous peoples' FPIC. Its policy states that its resettlement plans 'honor the principles of free prior informed consent' and that the necessary permits, permissions and land titles are acquired before any exploration, mining and other related activity commences and that such permissions are obtained honoring the principle of free prior informed consent

AngloGold Ashanti, which consolidated the gold mining interests of Anglo American, notes that

> An exception [from its compliance with IFC Performance Standards] could be the issue of Free, Prior Informed Consent (FPIC) in the Indigenous Peoples management standard. We await the outcome of the International Council on Mining and Metals (ICMM)'s engagement with the IFC on this issue.[149]

AngloGold Ashanti is however reported to have stated, in the context of seeking to mine in Colombia, that it would 'comply with the communities' right to say no to a project, although no law says we have to do it'.[150] In the Oil and Gas sector Talisman has lead the way from a policy perspective, though its implementation in practices has been questioned.[151]

The International Council for Mining and Metals (ICMM) is a mining industry body representing 22 of the world's major extractive companies. While acknowledging that FPIC is 'of particular concern to Indigenous Peoples involved with mining',[152] its official position continues to be that 'FPIC is not something companies can unilaterally grant',[153] and that 'a blanket endorsement of the right to FPIC is not currently possible, particularly given the difficulties entailed in applying the concept in practice.'[154] ICMM members therefore only commit to consulting Indigenous Peoples in order to seek 'broad community support for new projects or activities'.[155] The ICMM's Council of CEOs has however committed ICMM members to participating in fora dealing with the concept of free, prior and informed consent,[156] and has initiated a process of drafting a new position statement on Indigenous Peoples and Mining setting out its members approach to FPIC.

Drivers for FPIC in Company policy

The De Beers representative interviewed described the incorporation of the consent requirement into policy and practice as not only 'the right thing to do', and meeting 'the gut test, where you get a warm fuzzy feeling about your policy instead of feeling that it was not quite right', but also as important for their reputation by setting them aside from the pack. The focus on establishing relationship with the communities and seeing them as potential employees and partners in the supply chain was also a consideration.

The Anglo American representative expressed the view that "We have, historically, had relatively limited interactions with Indigenous Peoples, so it isn't an issue that Anglo American would naturally seek to take a leadership stance on. However, FPIC is increasingly important for the industry, and it is quite likely that it will become a more prominent issue for Anglo American in years to come."

The Rio Tinto representative explained that 'the company of choice argument' had been quite powerful with their board. In terms of moving the debate forward, they suggested that 'assisting in the business case for free prior and informed consent' was important as 'in the end the business case is there, because it costs less to build projects when you have harmonious relationship with the communities, and then further on into operations you draw on those communities as employees'. In addition to the business case they also suggested that 'the notion of working in conjunction with government and communities for this' was important, and that ultimately 'building in community agreements into the larger investment agreements...will work better...at least the government recognizing your right, if not requiring you, to develop agreements with local communities'. In this regard, they noted that 'there is still a role for both industry and civil society and media and government to make the case for consent based process because there are still plenty of companies out there who don't believe that'.

The Xstrata representative noted that addressing community agreements in investment agreements 'is an emerging area that could be very beneficial' and expressed the view that having 'these things

agreed by, or inherent in, the project right from the start … is important'. They also observed that 'when we talk about the challenges of FPIC we are talking about the things that can prevent a successful process happening, but a successful process itself is a huge strategic benefit ... as long as it is seen as an on-going process by both the company and the government and the communities'.

The BHP Billiton representative noted that they had 'gone through an exercise of mapping [our Group Level Documents (internal standards)] to the elements of free prior and informed consent, and … are probably in a similar position to most companies, [in] that we are very comfortable with the free prior and informed elements, but we have always struggled with consent'. The issues they identified as 'associated with the struggle with consent' 'link back with the sovereign rights of States' and 'concerns about manipulation or exploitation or…corruption of process'.

The Inmet representative explained that the current differences of opinion of what consent meant in practice was the primary concern they have about creating and implementing a formal policy. There is concern that having a formal FPIC policy, particularly incorporating an explicit definition of consent, could expose the company to criticism, rather than being seen as a positive step forward in the FPIC conversation. In Inmet's case their commitment to obtain FPIC for resettlement in the Cobre Panama project was a result of their corporate responsibility vision, their corporate values and the perspective that they will not develop a project if they do not have privilege to operate from the local communities.

The ICMM representatives suggested that, should they move towards a free prior and informed consent standard, they would 'want communities to recognize that ICMM members have set out the expectation of responsible behaviour in this space' which other companies should also be adhering to. They also expressed the view that 'the debate needs to shift from "FPIC or not FPIC", to addressing the practical implementation challenges'. In this context they would 'like to think that the ICMM can be part of moving the debate in that direction'. They also raised the question as to what a good process for arriving at their policy in relation to FPIC should look like.

A general perspective which emerged from the discussions on policy was that companies felt that even if their policies did not publicly commit to obtaining FPIC, there was nothing in their policies which acted as an obstacle to obtaining consent. The view was that in practice companies were in fact already attempting to operationalize the principle, and that further dialogue and discussion on how this could be achieved was welcome. At the same time this was coupled with the perspective on actual practice, which emerged from a number of interviews, that accepting the outcome of consent seeking process in circumstances where consent was withheld was something that they struggled with in contexts where the resource could potentially be exploited by another company. The obstacles which the companies interviewed saw to the operationalization of FPIC in practice and the potential solutions or opportunities they envisaged in relation to these are addressed in the following section.

Corporate perspectives on FPIC operationalization

Definitional ambiguities

A number of questions arose around the definition of consent and to whom and when it applies.

a) Concept of consent

The view was expressed by the ICMM representative that defining consent, and arriving at what it looked like from the community's perspective, should be part of a broader discussion whereby companies engage with Indigenous communities early on to agree appropriate engagement and consultation processes (including what would constitute consent). However, they raised a concern that the concept of consent could be defined in a manner that is disadvantageous to members of the community, such as in cases where consent was defined as 'when an unrepresentative number of elders, for example, who may personally benefit but whose people may be disadvantaged, approve.'

The Xstrata representative held that there was a need to 'get past … the fears around what consent does and doesn't mean. Communities that define FPIC protocols, define consent in

different ways, i.e. there is no one standard definition'. The company also held that consent 'is not always defined in the same way by external groups, and so community expectations can be set at completely unrealistic levels and that causes conflict'. More specifically, the Xstrata representative suggested 'that some anti-mining groups deliberately use consent to try to introduce conflict, increase conflict, or change peoples' expectations, and that has been very unhelpful over the last few years, [and] made it much more difficult for companies to embrace free prior and informed consent as it is more broadly understood by indigenous groups and by most other third parties'.

b) Consent of whom?

The issue of whether the consent of all impacted communities was required in a context where the majority of communities and peoples support a proposed project was raised by the De Beers representative.

The Anglo American representative asked if there was 'some sort of threshold' for consent in such contexts, 'is it a majority of indigenous groups, is it all indigenous communities?' In raising this definitional question, as a 'practical dilemma' about which the industry was concerned, the Anglo American representative also acknowledged that there are practical issues which are 'probably quite hard to answer in the abstract because ... the answers can only be context specific'.

The Xstrata representative expressed the view that consent 'should be the desired outcome but it should not be defined as requiring unanimous support from all of the potentially impacted indigenous peoples, and it does also not constitute a right to veto' of individuals or small groups within a community.

c) FPIC of non-indigenous communities

The Anglo American representative noted that 'clearly, the special rights and interests of Indigenous Peoples underpin the FPIC debate. Therefore, we don't see a strong case for extending FPIC to non-indigenous communities, although if such a decision was made through normal democratic processes within countries then we would of course respect that.'

The Rio Tinto representative noted that there was always the 'optionality for companies, if they so choose, to deal in the same way with non-indigenous communities'. Addressing the issue of 'dealing with communities where the central government is not necessarily on board' the Rio Tinto representative observed that 'we are kind of put in the position of not necessarily being antagonistic to government but of almost kind of working in parallel and trying to avoid the other trap which is becoming pseudo government yourself'.

d) Who is indigenous and how is membership determined?

The Anglo American representative pointed out that one of the impacts of the IFC's engagement with the requirement for FPIC was 'a trend towards increasing self-identification', particularly in parts of South America. In this regard it was suggested that 'there is a risk that you are going to have a lot more communities who suddenly want to be treated as such, and there really isn't clear guidance around … how you do that'. An associated concern was expressed about how difficult political situations could arise 'if you have got a group who self-identify as Indigenous and a government who doesn't want to acknowledge them and afford them those rights and you're the company caught in the middle what are you to do?'

The Rio Tinto representative pointed out that they have to 'work out what is the community', given the 'tremendous variability among indigenous peoples' and the fact that communities may not be the 'physical entities that bring people together', but might be defined on something quite different such as 'ethnicity, or land affiliation, or other issues'. It also asked 'what do you do in areas where there are disparate communities?'

A related issue around group membership was raised by the Anglo American representative. They noted that being recognized 'as a member of the community can have implications for access to social funds'. The company held that in these contexts the issue of membership is related to the issue of representation with 'disputes over who represents the community very linked with disputes over who is a member of the community.'

e) When and how often is consent required?

The BHP Billiton representative expressed an interest in thoughts around the issue of exploration and FPIC, and 'at what point would FPIC be expected to apply'? This was in light of the fact that 'exploration ranges … from desk top surveys …to satellite data, to aerial magnetic flyovers of the region, potentially to satellite related stuff, to taking stream bed samples … or … some basic drilling, to full scale drilling programmes, to putting in declines for bulk samples etc'.

The BHP Billiton representative also raised the notion of finding the "sweet spot" at which consent could be sought. This would be where they 'are confident that there is something there but … not so heavily invested that you can't back out'. They suggest that finding that point is the challenge. Consent in this scenario would consist of two points. One would be 'before you go on any land and do exploration', something which they described as 'FPIC light', as 'we don't necessarily want to have to go over a significant FPIC hurdle when we don't know if there is potential for a material discovery'. The second point is when the community has to take a 'full scale decision' as to whether they are going to allow the company 'proceed with a significant development'. The issue the BHP Billiton representative saw with the latter case is 'at what point does a company say I am not going to proceed with large scale exploration and trial mining unless I know I can proceed with full scale development.

The Xstrata representative noted that they 'prefer broad based support, because consent implies a kind of once off flip the light switch and you have consent, where as we see it as an on-going process that leads to an agreement which is then monitored and reviewed over time'. It was also suggested that 'the word consent can be taken as a one off, [where] you have got consent that's it, but it is very much an iterative process'. Ensuring that their people on the ground and communities understood it as 'an on-going process of consultation and … gaining the support of the community throughout the operation's life' was described as one of the challenges that they faced.

The Anglo American representative explained that they understand the argument 'that there should be consent even before there is land licenced, before you should even apply for a licence to do exploration', but expressed the view that it 'is possibly going a little too far, because the first physical or social impact would be once you start to do exploration, so that seems to be an appropriate point to me to ask for consent'. Consent at this initial stage would be for access, and not for the final development plan as that could not be determined until later in the project life-cycle.

Perceived challenges to operationalization

a) National Sovereignty – antithetical to FPIC or merely another consideration to be managed?

The ICMM representative noted that 'part of the challenge in this space is that governments have a responsibility to balance the rights of indigenous groups, or other minority groups with the rights of the wider population'. As a result of this 'one of the political realities [is that] you may find yourself in a situation where governments say OK we'll subscribe to the notion of consent, but ultimately the sovereign government, it is within our gift to determine whether or not a project should move forward.' Given this context the ICMM representative felt that 'depending upon how things go in the next few years companies may get ahead of legal provisions, which is a good thing, but we almost need a body of practice which demonstrates the art of the possible, before companies can consistently do that from solid ground'.

According to BHP Billiton, the principle of FPIC is complicated by the 'overlay of the sovereign state and that in most jurisdictions, the state is the legal owner of the resources 'and that 'the challenge for us ... is the right of governments to decide whether they want a project to proceed or not'.

Addressing the issue of national sovereignty the Rio Tinto representative explained that 'an early sticking point in all of the discussions about sovereignty … [was] that governments have a right to say how they are going to develop the resources that they control, and … we're trying to say that communities need to be the primary basis of consent and hopefully governments will see that as sensible and therefore the project can proceed harmoniously'.

The BHP Billiton representative suggested that in a context where a government regards the exploitation of an ore body as potentially 'transformative for the economy in that region…you could perhaps envisage [it] saying well actually we don't want a tier one company delaying development while they achieve FPIC; we are happy with a third tier company that will just push these people out of the way and get the project up and running'. In light of this it suggested that 'the way it [is] probably is going to wind up working in practice in the future is you go through a process where you will either get consent or not; the government will then ultimately make the judgement where they have a legal right to do so; ... and then the company is going to have to say … here's our values, here's our public positioning on this issue, do we want to go ahead or are we going to say no there's not enough community support? Either we come back again in five years' time or drop it and go somewhere else'.

The Xstrata representative commented on the fact that 'some of the difficulties around ... consent, is that there is not enough ... emphasis on the role and the rights of sovereign states to make decisions on the development of natural resources and the key role that they must play as well to establish common understandings and expectations about the outcomes'. They suggested that 'where the State is not very present, or clear, on its own intensions and its own rights, the company then often ends up being in the middle of a process that is ... enshrined in national legislation but the community has a completely different set of expectations about its own rights, and what we object to is the company being seen as the sole arbitrator ... to resolve those issues'. In such contexts the Xstrata representative held that it is forgotten 'that companies sit in the middle of the State and the community, and often community groups just look at the relationship with the community in isolation'. They argued that this was 'the wrong way to look at things because we have to manage the relationships on both sides, both with the community and with the state'. In this regard they held that 'the biggest challenge is maybe in the absence of good State governance or a clear process from the State, and unclear land rights, or who is leading communities to steer the course and have a good FPIC process'.

The Anglo American representative held that 'the grey area for us is when [FPIC] is not in national law, and there is no legal need to formally demonstrate it'. They regarded this scenario as potentially leading to a perverse incentive not to respect indigenous rights as 'what you don't want, and what nobody would want really, is a situation where those companies which do their best to try and secure consent then walk away from a project if they can't secure FPIC, but then because there is no permitting or legal barrier to that project subsequently being developed by somebody else, you get somebody with less regard for indigenous rights coming in and developing the project anyway.'

The De Beers representative held that in the Canadian context where indigenous communities 'do not have the right of veto [the company has] to be aware of that and get shouted at every now and then by the government for saying that we will effectively give the communities the right of veto by effectively asking for their consent for development. And [the company] just responds, well tough, you will have to live with it.'

b) Tensions with Human Rights

This potential issue, which was raised by the Anglo American and the BHP Billiton representatives, is closely related to a concern expressed by the ICMM representative 'that traditional processes

may exclude certain groups that are profoundly important in terms of getting to the concept' of consent.

While they acknowledged that 'good practice on FPIC generally says that you should seek consent using traditional decision making techniques' the Anglo American representative suggested that doing so 'could lead to a potential tension' between human rights 'as outlined in the Ruggie principles / democratic norms and traditional decision making'. However, the company also acknowledged that where they arise, the solution to these tensions 'would have to be case specific'.

c) Maintaining consent

An aspect of the definitional issue which arose in a number of the interviews was once consent has been obtained how is it maintained? The De Beers representative raised a Canadian case where the community had held a referendum 'in which 85% of the people had voted in favour of the project and the leaders had supported it', which from the company's perspective indicated that 'the margin of the vote had been substantial'. According to the company, following changes in community leadership and demographic changes within the community, due to people moving back to the area from elsewhere, they 'decided that they wanted the contact changed and the agreement torn up'. In addition 'some in the community were saying that the company needed to come back once a year in order to re-obtain consent.'

The concern that FPIC, as defined by some NGOs, needs to be re-obtained on an annual basis, was also raised by the BHP Billiton representative as grounds for its reluctance to commit to it. According to the BHP Billiton representative, 'companies need a reasonable level of certainty about the long term support for a project before they can commit capital to major resource developments.'

d) Legacy Issues

One of the areas where a particular obstacle to FPIC was highlighted was in the context of addressing legacy issues. The ICMM noted that 'if you enter into a situation where some prior action on the part of government has put indigenous peoples at odds with whoever come into that situation, this can be very difficult to recover from. In such contexts they regarded it as being 'extraordinarily difficult for companies to navigate and reach a point of even getting to a conversation with indigenous peoples about the prospects of developing a project in a way that they would feel comfortable with'.

Commenting on how to address these legacy issues the Rio Tinto representative's view was that in many of the settings in which we all work are ones in which there is a high degree of mistrust and have a bad history or a legacy of bad relationships so very often third parties are needed as oversight, as moderators'. For this reason the Rio Tinto representative held that 'the implementation of FPIC was a mutual project for all of us, communities, civil society, government and industry, and each situation is different but very often there are roles for civil society to playing moderating or oversight influence'.

The Xstrata representative noted that in cases which have a very conflicted history 'you come in bearing the scars of the previous owners really, and having to rectify some of the errors of the previous owners'.

e) Junior mining companies and FPIC

Closely related to this issue of legacy issues was the question of how juniors engaged with communities and the implication of the FPIC requirement for them, given their potential lack of capacity to deal with FPIC. Two perspectives were expressed by the Anglo American representatives on the potential implications of the IFC 2012 Performance Standard for juniors. One saw the IFC FPIC requirement as 'going to influence project finance significantly, and that the big companies who are used to being leaders on social responsibility type issues are not

going to be particularly comfortable with the juniors having to adhere to standard that maybe some of the majors don't'. Another view was that the extent to which the IFC has raised the bar with this change 'could actually serve to squeeze the junior sector out from some geographies, because of investor perceptions of increases in project development risk'.

The Xstrata representative expressed the view that 'the more that companies like us and Rio Tinto and Anglo American start to say to companies, we are concerned about these issues and if you want to be acquired by us you have got to get this right, there is sort of an incentive for the juniors to address these issues more seriously.'

The Rio Tinto representative observed that 'a lot of the juniors … think [community engagement] is just a kind of luxury or add on [because] it costs money … and they just want to get on with digging ore out of the ground. They regarded this as a distorted and outdated perception as 'the digging the hole bit's easy, its what's outside the mine fence and engaging successfully there that's the key to business going forward'. Faced with this situation they suggested that 'the things that we are talking about are not necessarily about … spending a lot of money, they are really about fundamentally starting from the point of view that … if you don't have [communities] on board then you don't have a project, so you better figure out a way to engage and discuss and set up vehicles for this sort of thing and that doesn't cost money'. Addressing how pressure can be put on these companies to obtain community consent they answered that 'it is a role for the industry to lift the standards and to publicise what is good practice'

Paths towards operationalization

a) Capacity Building

The centrality of capacity building, at both the community and company level, and the importance of addressing community expectations around benefits was a theme raised in several interviews. The Rio Tinto representative noted that 'there's capacity building and new skills learning on both sides of the relationship and trust building'. On the community side this was 'critical, because they are not used to dealing with … major global corporations and don't necessarily have the financial or legal skills to make sure they are covered'. They also noted that 'part of the capacity building is … an understanding of business and how it works' as 'a lot of communities get disappointed' in relation to the benefits that are realistically available to them. On the corporate side capacity building involved 'learning about communities ... building a knowledge base about them and figuring out effective ways to communicate and consult and engage, and those are skills which mining companies still [lack].' It also involved a shift of mind-set, which necessitated that company leaders recognize 'the moral and business imperatives of [indigenous participation in decision-making], and not swallowing the notion that aboriginal people are necessarily anti-development, [but realizing that] they just want to be involved in it and have a real decision about how it's to proceed, if it's to proceed.'

The Xstrata representative pointed out a challenge existed because of project durations as the exploration phase may last for several years so 'there is a lot of confusion and misconception about the different phases of the project' with community members losing 'track of where they are' which in turn 'creates a lot of misconception and can lead to tension'.

The BHP Billiton representative expressed the view that capacity development 'is really important and the mining company will always be somewhat compromised in that space, so the role of an independent body [selected by the community] is probably pretty fundamental' to its realization.

This need for capacity building was also recognized as applying to investors. The Anglo American representative noted that there was a risk 'that as a result of the IFC / Equator bank approach it becomes a case of finance people saying "show us your consent" and divorcing consent from the engagement processes and on-going relationships', thereby transforming it into a bureaucratic tick-box legalistic exercise.

A positive example of capacity building was raised by the Anglo American representative in the

context of a First Nation in British Columbia where councils were 'established within the Aboriginal communities who are ... participating actively in the environmental assessment process'. The suggestion was made that in the context of obtaining consent 'you could see the industry start to try to look more towards those kind of models overtime in communities where there is the capacity to do that'.

b) Indigenous Peoples FPIC Protocols

The issue of community FPIC protocols was addressed in a number of the discussions. While all of the companies, with the exception of De Beers, claimed not to have experience of engaging with communities that had defined their own FPIC protocols, the Rio Tinto representative suggested that a 'protocol presumably includes who represents whom about what and reflects their social structure'. The representative suggested that 'a lot of companies shy away from FPIC because they say how do we know who we are dealing with…and getting around that so that you can see what the real structures are in the community…is often not very easy?'. As a result they held that 'the more that can be done up front the better otherwise companies have to go in and develop the mechanism for engagement not necessarily knowing much about the community' which raises the issue of 'imposing a foreign model that is inappropriate for that community'. In light of this the Rio Tinto representative regarded 'whatever can be set up prior' as being very welcome, 'whether that's structures for engagement or processes and protocols'.

The Xstrata representative raised a concern regarding 'conflict over who are the community leaders or what are the appropriate protocols'. The Xstrata representative explained that 'historically, Xstrata engaged with tribal leaders, now its approach has evolved to allow engagement with each affected household, as this allows the inclusion of the whole community, including minority groups such as women and the elderly, in the process and has been well-received.'. As a result they suggested that 'this idea that there is a sort of a coherent view that itself has broad based support of a protocol for FPIC.. is just problematic in a lot of communities, particular where you have fragmented leadership structures or conflict over the leadership structure'.

The Anglo American representative expressed the view that 'mining companies are clearly going to need support in implementing FPIC. Similarly, I'm sure it would be useful for communities engaging with the mining sector for the first time to understand how mutually beneficial agreements can be reached. It would be helpful to know of successful cases – from both a company and community perspective – that can be used to inform approaches.'

The BHP Billiton representative noted the need for FPIC not to be a tick-box exercise, and that it is 'complicated by how the local community believes corporates should engage with them' which is 'certainly not a generic process that is common in all jurisdictions'. The company regarded community protocols as 'an area where there does need to be more development, more case studies, examples, development of best practice and identification of what works in practice and what doesn't work' and held that 'anything that helps you put it into effect would be helpful'.

The De Beers representative noted the company's constructive engagement with the Kitchenuhmaykoosib Inninuwug First Nation in Canada on the basis of their FPIC protocol, and the suggestions it made to them with regard to the potential financial implications of certain aspects of the protocol pertaining to community sovereignty over resources and production sharing agreements.

Commenting on the potential of indigenous defined FPIC protocols, the ICMM representative noted that they had not had any practical experience with them, but saw 'value in that kind of an approach' and thought that 'in principle' it was 'very interesting'. It suggested that 'having a repository signalling how this has been done in different contexts could be incredibly helpful' and particularly 'interesting if it is a process that has actually been applied with a good outcome', as 'then you could say it's a sort of a template for how the world should be'.

c) Oversight and Grievance

The importance of oversight of consultation and consent seeking processes was raised by the Rio Tinto representative. The company representative noted the potential role that civil society could play in this regard and also suggested that the IFC Compliance / Advisor Ombudsman (CAO) 'has given a lot of credibility to some of these situations'. The Rio Tinto representative also noted the important oversight role of Land Councils in Australia which 'keep a firm grip on negotiations between aboriginal clans and companies and are very much a part of the process'. In the United States context it discussed the novel approach being adopted at its Eagle project.

The Xstrata representative expressed the view that 'reasonable avenues of recourse' are necessary when engaging in a consent seeking processes. Consequently, 'the grievance mechanism part of an FPIC process is going to be very important' as 'one of the huge challenges' from their perspective 'is how do you ensure that all of the participants are acting in good faith, and how ...do you ensure that the process isn't disrupted by minority groups with a particular view point, or political agenda, or whatever it might be'.

Positive practices raised by companies

Almost 40 cases were raised in the context of the interviews. Some were experiences from which the companies claimed to have learned important lessons. Others were examples of elements of good practice, but not full FPIC, while others were cases involving a commitment to obtaining FPIC.

Addressing the first set of cases the Rio Tinto representative noted that 'every company has its Bougainville, but you have to work even harder to get over it to prove that you are a different beast now and worthwhile talking to at least, if not engaging fully with'.

The Anglo American representatives made reference to lessons learned from the Cerrejon project, and their on-going efforts to address these legacy issues. BHP Billiton referred to the lessons it had learned from relying on a local partner to conduct an FPIC process in the Philippines, stating that they reached 'the point where we lost confidence' in some aspects of the FPIC process that was conducted, despite it being documented by the National Commission on Indigenous Peoples. Their conclusion from that experience was they 'will always want to be in control and have our people doing the work and not rely on a third party'.

A number of cases were pointed to where companies identified aspects of positive practice in their engagement with indigenous peoples. Unlike the cases discussed in the 'company FPIC case study' section below, these cases are not examples of where a public commitment was made to obtain indigenous peoples' FPIC. The project research did not extend to validating the information with the impacted communities, so the following perspectives are solely based on information provided by the companies.

The Rio Tinto representative pointed to the Community Environment Monitoring Program at its Eagle Project in Michigan, which is due to commence production in 2014. Under this program, 'the Tribe can appoint a representative to the Monitoring Board, the Tribe has a say in what monitoring will be undertaken and the Tribe can be involved in actual monitoring activities'. The Rio Tinto representative describes 'this model of comprehensive independent community environmental monitoring' as establishing a new benchmark within the company, and as serving 'as a model for the resource development industry'.

The Rio Tinto representative discussed the constructive manner in which the agreements had evolved at Argyle and at Gove. The negotiation of an agreement with the traditional owners at Gove in 2010 was described as 'truly reflecting FPIC' with respect to the new and extended leases. According to the Rio Tinto representative the traditional owners stated that subject to appropriate negotiated terms, their aim was to support the project renewal, despite the fact that they had objected to original imposition in 1969. The Rio Tinto representative explained that regardless of what may or may not have been required at law, the company started with the mind-set that traditional owner consent was indeed required along with public acknowledgement of and respect for their land rights and their entitlement to negotiate benefits. Privately employed lawyers and financial advisors were funded by

the company and an agreement was reached which focuses particularly on business development.

At Argyle, in 2004 and 2005, a Participation Agreement and an Indigenous Land Use Agreement were entered into with all of the relevant traditional owners, represented by the Kimberly Land Council. The Rio Tinto representative described this as reflecting an on-going relationship with the traditional owners, which had matured since the initial agreement in the 1980s with a smaller group of Aboriginal elders. The agreement recognizes indigenous peoples' land rights and addresses employment, education and income generation.

The 2013 agreement entered into with the Gundjeihmi Aboriginal Corporation at the Ranger project, after 13 years of negotiations, replaced the earlier contested agreement. The negotiations led to a mining agreement with the Land Council and a separate support agreement between the company and Traditional Owners. As a result of the negotiations the company feels that there is now a much more positive relationship with the Traditional Owners.

The Anglo American representative identified the company's Quellaveco project in Southern Peru as an example of good practice in terms of community engagement. Indigenous Amayra communities in high lands were among the impacted groups with which the company engaged. The engagement approach was not distinct for the indigenous groups who formed a small minority of the impacted communities. The company described itself as 'looking for understanding and consent', with the approach they adopted representing an 'example of, how, if you do things with transparency and patience, they can work'. They described it as 'a cautious success story' in which 'you have consent day by day' with the question always being 'what do you need to keep it tomorrow'. The dialogue table was described as forcing a lot of listening on their behalf and allowing them to develop 'a great understanding of socio–political dynamics and the peoples' aspirations'. Another case that was regarded with cautious optimism by the Anglo American representative was the Michiquillay project in Peru, where a secret ballot was conducted prior to exploration with the two communities, neither of which self-identifies as indigenous. Both of the communities supported the project and continued to do so, despite the fact that the surrounding area was one of the most conflict prone areas in terms of mining projects in Latin America.

At its Ok Tedi project BHP Billiton required Ok Tedi Mining Ltd (OTML) to 'demonstrate continued support for the operation of local communities down the river system'. To do this 'OTML enlisted an NGO to run an informed consent process called the Community Mine Continuation Agreement'. According to the BHP Billiton representative, a decision was later taken to withdraw from the project following international opposition and issues with downstream communities. This did not, however, stop the mine from operating.

The BHP Billiton representative cited the company's Olympic Dam expansion project in South Australia as an example of where broad community support has been revisited in the context of material changes to a pre-existing project. The Browse project, in which BHP Billiton subsequently sold its minority share, was cited as an example of agreement making in the context of State intervention if an agreement was not reached. The fact that this case is illustrative of the absence of the 'Free' dimension of FPIC has been noted.[157]

The Xstrata representative described a number of projects which they regarded as representing good practice in terms of engagement with traditional leadership structures. These included the consultation programme conducted for the social impact assessment for McArther River (Zinc) Mine (MRM) Phase 3 (2011) Development Project, in Australia's Northern Territory, where there have been some tensions with the Northern Land Council. The process involved the prioritization of meetings with the Traditional Owners of all four language groups across an extensive geographic region. Site visits were organized, consultations on culturally inappropriate days were avoided, and the MRM General Manager and an indigenous woman were appointed to undertake the consultation. Among the challenges encountered were reaching everyone, low levels of literacy, consultation fatigue and competition for access and time.

Another example provided was the Frieda River project's land access programme and resolution of land ownership dispute (2012), which formed part of the permitting process in Papua New Guinea. Two tribal communities were in conflict over customary land ownership and usage, with no written

historical records and minimal regulatory oversight due to remoteness. Xstrata commissioned an ethnographic study of the region and facilitated discussions between traditional groups and government authorities. A benefit sharing agreement, 'the Jais Aben Accord' was reached. Among the challenges the Xstrata representative identified was the fact that '"community", or "customary group", is not a cohesive, democratic entity; customary rights are based on oral tradition and dispute is common; the prospect of benefits … can … detract attention away from traditional organising principles, and agreements are not binding and liable to change'.

The Xstrata representative also raised the Las Bambas project in Peru as a case of good practice. They explained that in 2004 the company sought consent prior to putting any drill rigs or having 'anyone from an operational perspective there'. Subsequently, a five year process was conducted to obtain community consent to resettlement. Culturally appropriate communication was something they aimed at, through community radio, theatre type techniques, and site visits to the Tintaya mine. The Xstrata representative also claimed that the company had done 'a lot of work on helping [the community] with legal ownership of the land because they didn't really have legal title to the land'. Despite the challenges of operating in Peru they felt they had 'managed to maintain good relations with the community, [which] from a position of extreme ignorance about what a mining project looks like, is now much better informed'. The project was described as being 'at a stage where consultation and the consent process for mining is well underway, and resettlement has been agreed'.

5: Company case studies

The BHP Billiton representative noted the importance of 'case studies examples where companies have implemented an FPIC compliant process that has worked effectively'. This didn't necessarily mean addressing cases in which consent was forthcoming but those in which both parties agree 'that it was the full and fair process and the community made the decision that was right for them based on all the information and it wasn't corrupted or it wasn't compromised, it just worked well'. According to the BHP Billiton representative 'that sort of case study exploration would be very useful as this evolves, because one of the nervousness issues for companies is the lack of track record of effectively doing this in a way that works well'.

However, the relatively nascent nature of the industry's engagement with the principle, and the lack of an informed understanding of what this means from the perspective of the impacted indigenous peoples, means that such cases are few and far between. As pointed out by the Rio Tinto representative 'you don't build something like this overnight, it's a very complex process both on the company side and on the community side, and no wonder there's not very many examples around because we really just started trying to do it in the fashion that its laid out under the FPIC framework'.

The following four cases address examples where companies have committed to obtaining FPIC. In all of the cases the perspectives of the indigenous representatives was sought. In one case this perspective was not obtained for timing reasons, so the perspective offered is that of the Land Council which acts on acts on behalf of the Traditional Owners in the conduct of FPIC processes.

A fifth case study, addressing Inmet's Cobre Panama project and the Ngobe people, was also researched. The perspectives afforded by the company and the consultants working for it on the one hand and an indigenous leader and a Canadian professor on the other,[158] on the nature of the consultations and consent seeking processes diverged substantially. Company responses to issues raised by the indigenous leader were received as this report was going to print. Despite our best efforts there was insufficient time to reconcile these diverging perspectives and reach an adequately informed and agreed set of observations. As a result it was decided to remove the case study. The authors hope to revisit the case outside the context of the report as it touched on interesting questions which are relevant in other contexts. These include examining through the lens of indigenous peoples' rights: a) the process for the operationalization of FPIC for relocation of two communities which occurred some years subsequent to the issuance of the concession; b) the potential implications of obtaining consent for relocation from these communities, in a context where the consent of other impacted indigenous communities who will not be relocated is not sought; and c) the rights basis for the requirement for FPIC of indigenous communities who have either a tradition of moving between locations, with which they may have some historical relationship, or have had to do so for practical reasons such as economic necessity, population expansion, conflict, or the unavailability of a suitable land base.

Jabiluka – Rio Tinto / ERA and the Mirarr People

***Name of Project*:** Jabiluka

***Company*:** Rio Tinto (majority shareholder in local operator Energy Resources of Australia (ERA))

***Location*:** Northern Territory, Australia

I*ndigenous Peoples*: Mirarr

***Minerals*:** Uranium

***Current Status*:** ERA maintains Jabiluka lease. No mining operations being conducted there and a contractual agreement in place requiring Mirarr consent for their conduct.

The Jabiluka case, involving the Mirarr people, is one of the most frequently cited by Rio Tinto in international fora as evidence of its willingness to respect decisions of indigenous peoples who are

Protest to stop the Jabiluka Mine. Photo: Clive Hyde.

opposed to projects in their territories. The case is of particular importance given the company's commitment to seeking FPIC in its 2012 policy. Rio Tinto is the majority shareholder in Energy Resources of Australia (ERA) which has an operating uranium mine, the Ranger mine, also located in Mirarr territory. Therefore, it is also relevant to consider the Ranger mine in the broader context of the company's engagement with the Mirarr people.

Jabiluka Project:

Rio Tinto did not acquire an interest in ERA and thus the Jabiluka lease until 2000. However it is important to understand the history of the Jabiluka project from the outset in order to fully appreciate the perspective of the Mirarr and the context of their subsequent engagement with Rio Tinto in relation to Jabiluka. The role of Rio Tinto is also better understood when contrasted to events prior to 2000.

The 1976 Aboriginal Land Rights Act requires the consent of traditional land owners prior to the authorization of mining in their territories. That legislation provides for obtaining consent with a centralised bureaucracy, a land council, having the exclusive roles of identifying, consulting and representing the Traditional Owners.

In 1982, Mirarr approval was formally given through the Northern Land Council, and an agreement entered into between Pancontinental Mining Ltd, Getty Oil Development Ltd and the Traditional Owners in relation to the Jabiluka mine. This 'consent' was subsequently rejected by Traditional Owners as flawed and invalid, having been granted, in the midst of what the Mirarr have described as 'confusion and unconscionable pressure'.[159] The Northern Land Council later in turn informed Energy Resources of Australia (ERA), which purchased the project in 1991, that the traditional land owners objected to the project. By this time, the mining lease had been granted on the basis of the agreement with the Northern Land Council.

In 1997/98 ERA, under the control of North Ltd, commenced digging an underground portal with Northern Territory government approval. This led to an escalation in the Mirarr Traditional Owners' opposition to mining operations in the area. Their opposition involved an eight month blockade of Jabiluka established in March 1998 involving over 5000 people, over 500 of whom were arrested including Senior Traditional Owner Yvonne Margarula; a Federal Court case; challenges to the environmental impact assessment; a site visit from a high level UNESCO scientific mission, resolutions in the European Parliament and US congress; and an Australian Senate inquiry. The Traditional Owners were supported by the wider public, including environmentalists, supporters of heritage and aboriginal rights and anti-nuclear groups. The Northern Land Council received payments under the agreement during this period which the Traditional Owners objected to.

According to the Mirarr a combination of economic, legal and timing factors, combined with public pressure, contributed to their eventual success in stalling the project. The project was rendered less attractive as a result of a fall in uranium prices, the absence of a viable option for a uranium milling facility at Jabiluka due to a 'remote milling veto' which eliminated the option of processing ore mined at Jabiluka at the Ranger site. Blockades of their offices in Melbourne, investor focused campaigns and shareholder activism against North Ltd, the company which acquired ERA, raised the profile of the case significantly, until Rio Tinto purchased North Ltd in 2000. By this time the controversy in relation to Jabiluka had become a prominent issue, drawing significant international public attention and pressure. This international public pressure, combined with strategic media and political interventions of the Mirarr, led the then Chair of Rio Tinto, Robert Wilson, to make public statements in 2001 that although it was a matter for the ERA Board, Rio Tinto as majority shareholder would not support development of the project without Mirarr consent. This in turn led to discussion on an agreement with Traditional Owners. The Northern Land Council took no part in these discussions but was required to execute the agreement reached.

The Traditional Owners advocated for ERA to rehabilitate the mine. In 2003, ERA commenced back-filling of the work done. Discussions with the Traditional Owners in relation to 'long term care and maintenance' of the site remained on-going. In February 2005, following three years of negotiations, ERA formally recognized the Traditional Owners' objections and agreed not to proceed with mining developments at Jabiluka without their approval. The confidential agreement was signed by ERA, the Mirarr Traditional Owners, Gundjeihmi Aboriginal Corporation and the Northern Land Council. Under the agreement ERA continue to hold the lease to the area. This commitment to prior and informed consent has been reaffirmed by the former Rio Tinto CEO Tom Albanese.

The agreement is unusual because it cannot relate to consent to the grant of the mining lease by the government, that having been already granted. The agreement relates to development of the project by the company holding the lease.

ERA / Rio Tinto perspective:

From the perspective of Rio Tinto the agreement with the Mirarr in relation to Jabiluka had both a principled and practical dimension to it. On the principle side it reflects their position that where possible Rio Tinto seeks the approval of indigenous peoples. From the pragmatic side it reflects the reality that the project had got bogged down in protest. The lease nevertheless remains a valuable asset at ERA, should the Mirarr ever decide to support a project, and it effectively stops other companies gaining access to it. ERA is now in the process of decommissioning the remaining water pond at Jabiluka, having completed the back filling of the tunnel constructed when under North ownership. ERA and Rio Tinto regard the Long Term Care and Maintenance Agreement as having removed the threat of development of Jabiluka without Mirarr consent.

Mirarr perspective:

From the perspective of the Mirarr, both the government and the Northern Land Council failed to implement the consent provisions of the legislation in 1982 in a manner that ensured true FPIC. The complaint of the Mirarr in relation to the government is that despite having a strong commitment to

Ranger Mine surrounded by Kakadu Nationl Park World Heritage Area. Photo: Dominic O'Brien.

the rule of law in a first world economy, a pro-mining government can nonetheless defeat the intent of beneficial legislation by bringing unconscionable pressure on both industry and on the statutory agencies such as the Northern Land Council to deliver an economic outcome. This was an example of consent that was neither free nor informed at the local level. The complaint in relation to the Northern Land Council is that the bureaucracy usurped the resources, capacity and representation of the Traditional Owners. The Mirarr were excluded from being a party in their own right to the 1982 agreement. The 2005 agreement with ERA was entered into by the Mirarr directly. Neither the government nor the Northern Land Council was closely involved although both were required to tacitly approve of the agreement.

Ranger case:

At the time the 1976 Aboriginal Land Rights Act was passed, the Ranger Project Area was excluded from the consent/veto provisions that otherwise applied under the Act in relation to mining. The Ranger project proceeded without due regard to the wishes of the Mirarr Traditional Owners. Both the Ranger and Jabiluka leases are surrounded by, but excluded from, the Kakadu National Park.

Under the original arrangements dictated by the legislation, more than half of the financial benefits from the project were directed to the Northern Land Council and to other Aboriginal community programs. In 2013, the Mirarr and ERA finalised negotiations on an agreement in relation to the existing operation at the Ranger mine to review and update the financial arrangements. Due to the nature of the 1976 Aboriginal Land Rights Act, both the Mirarr and their representative organisation GAC were excluded from being included as parties to the revised agreements and all benefits continue to flow to the Northern Land Council. An additional Memorandum of Understanding was required to supplement these agreements to allow for an expression of consent by the Mirarr to the continuation of the current operations for the balance of the current Authority to 2021. The MOU does not have the force of an agreement under the legislation but demonstrates the commitment that both the Traditional Owners and the company have to achieving real FPIC in circumstances

where the legislative processes do not provide a sustainable or real FPIC.

Any further mining beyond 2021 on the Ranger Project Area will require new legislation as the current provisions do not extend beyond that date. Whilst both the Mirarr and ERA have committed to FPIC before further mining is approved, it remains to be seen if the government will incorporate this into any new legislation.

Commentary and observations:

The Jabiluka story is of interest to many indigenous communities as it represents a case where a company has formally and publically agreed to a binding consent requirement in a context where the company already holds a mining lease that was granted pursuant to national pro-indigenous legislation in which consent was a condition of approval. Furthermore, this has occurred in a first world (albeit pro-mining) economy with a strong commitment to the rule of law. The lessons from the Jabiluka case are several fold. Firstly, legislation alone, no matter how clear it is, does not ensure real FPIC if government is able to exert pro-mining pressure on the agencies involved in the process of obtaining consent. Secondly, the role of a well-resourced representative organisation that is accountable to the Traditional Owners at the level at which decisions are made is critical to the integrity of the process. The 2005 agreement that ensured FPIC in relation to future developments at Jabiluka and the 2013 agreement to update the Ranger arrangements were both negotiated by GAC which has no statutory role under the legislation, but which is accountable solely to the Mirarr Traditional Owners. Finally, a well-resourced representative organisation and a mining company, with a declared commitment to seeking Traditional Owner consent, are able to forge an agreement ensuring future FPIC despite the legislative context.

In relation to Jabiluka, the conundrum for both the Mirarr and for ERA is that the lease was granted pursuant to a process which does not reflect Traditional Owner support. That process ironically ostensibly did formally provide for a form of consent. ERA has now acknowledged both a commitment to honouring FPIC - despite holding the lease-and that there is no consent to development of the project. The Mirarr perspective is that the existence of the lease represents the failure of the government and the legislation.

The case does illustrate the potential for a contractually binding consent requirement to be achieved outside of the legislation. It highlights the role of sustained indigenous resistance in achieving this and also reflects a corporate acknowledgement that the consent requirement is a means to resolve such protracted disputes. It also demonstrates that any consent obtained, even through official processes, has to be sustainable. For this to be the case it must be genuine and freely given, and reflect the position of the impacted communities and land owners.

Other interesting aspects of the case are that it challenges corporate conceptions of traditional authorities and custom as being exclusively male dominated arenas within which women are excluded from major decision-making processes. It also demonstrates the potential role that common cause between aboriginal peoples and the wider general public can play in realizing the consent requirement.

SMI – Xstrata – Tampakan Copper-Gold Project

Company: Xstrata Copper (with local Partner: Sagittarius Mines, Inc. (SMI))

Name of Project: Tampakan Copper-Gold Project

Location: 4 provinces of South Cotabato, Sultan Kudarat, Sarangani and Davao del Sur in Mindanao, Philippines (covering 9,605 hectares)

Indigenous Peoples: B'laan

Minerals: 2.94 billion metric ton deposit of 0.51% copper and 0.19 grams/tonne gold

Current Status: Exploration and feasibility studies completed

Observations arising from the Tampakan case study and the Philippines Context

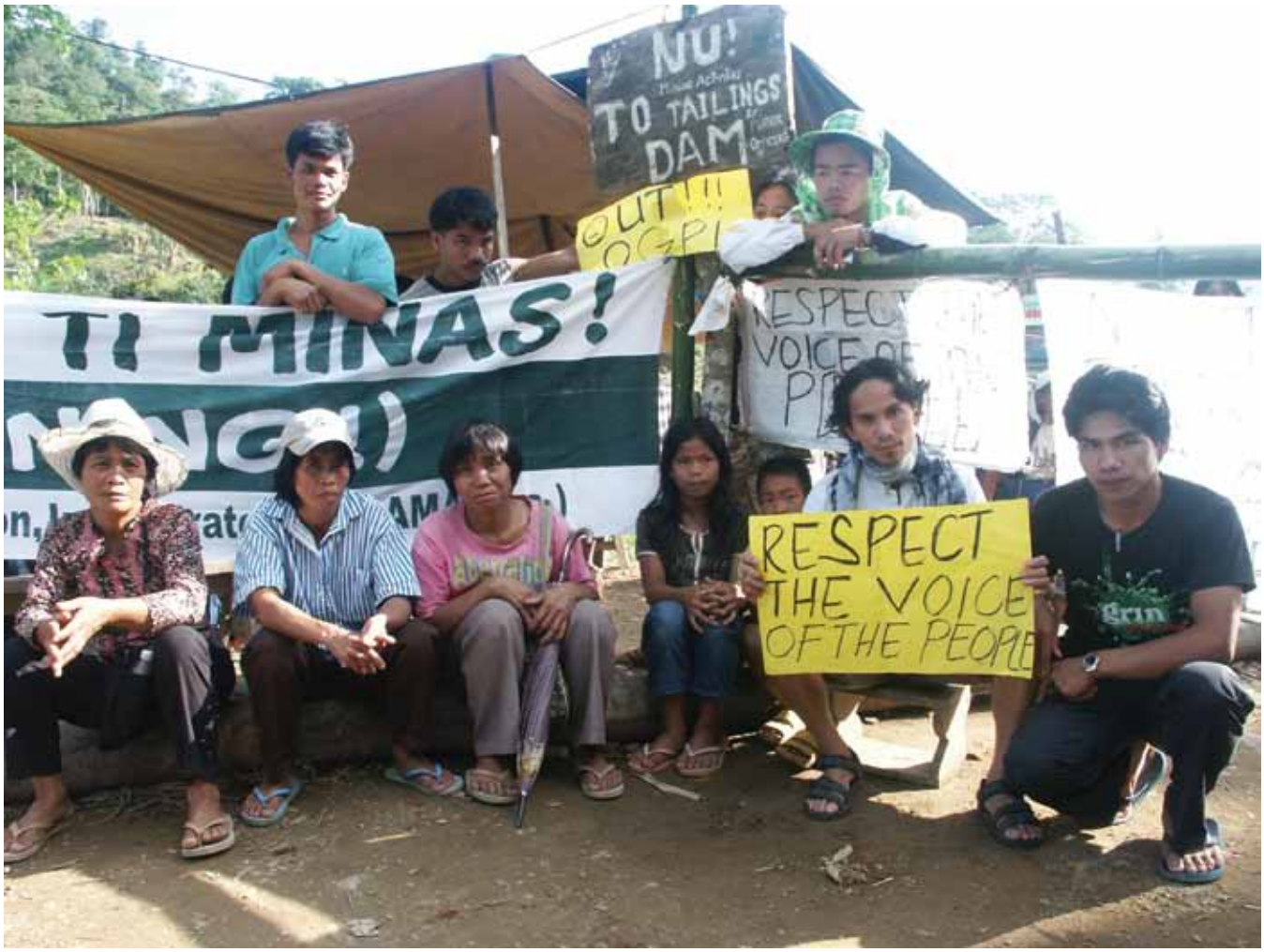
The researchers prepared a case study on the operationalization of FPIC at the prospective copper-gold mining project of Xstrata-Sagittarius Mining Inc. (SMI) in the Philippines. However, due to the limited time available and disagreement over some of the findings it was not possible to agree the full text. In light of the decision not to include the full case study it was agreed to limit the section to some general Philippine contextual observations which have implications for all mining companies seeking to obtain FPIC.

The Philippines is an important country for documenting the application of the UN Declaration and FPIC of indigenous peoples in relation to mining. This is because the Philippines has national legislation, the Indigenous Peoples Rights Act (IPRA) of 1997, which was modelled on the then draft UN Declaration and requires FPIC for mining projects in indigenous territories. Despite this robust legal framework for the protection of indigenous rights, the approach adopted by the government to the implementation of FPIC has been subject to strong criticism by indigenous peoples nationwide. They hold that the government's implementation guidelines fail to ensure respect for their customary laws and that their experience indicates that FPIC is implemented in a manner which is strongly biased towards supporting government aspirations to increase foreign investment rather than uphold and guarantee respect for indigenous peoples rights.[160]

Some indigenous peoples have also been frustrated by the national courts' failure to uphold their rights in the context of legal challenges taken against mining companies.[161] As a result they have engaged international mechanisms to raise their grievances. Their allegations that the responsible government agency and companies seeking to operate in their territories have failed to protect their rights by implementing FPIC in an appropriate manner has been recognized by the UN Special Rapporteur on the Rights of Indigenous Peoples, the UN Committee on the Elimination of Racial Discrimination, the Norwegian OECD National Contact Point and the International Finance Corporation Compliance Advisor Ombudsman.[162]

This context presents a major challenge to any mining company seeking to operate in such a jurisdiction, as simply following the government's implementing rules for FPIC is unlikely to lead to a genuine FPIC process. It underlines the need to go beyond statutory guidelines and processes prescribed by government and to comply with internationally recognized human rights standards for meaningful operationalization of FPIC in the recognition of indigenous peoples' rights.

The context is further complicated by the fact that the Philippines has a significant level of armed conflict, particularly in the remoter areas of the country. There are concerns that large-scale mining projects may divide communities between those who readily want access to promised economic benefits of investment and those who have concerns over its impacts to their rights and indigenous way of life. There is a perception among indigenous peoples that divisions are reinforced by violence associated with the intervention of government agencies, military and paramilitary groups and the presence of illegal and rebel armed groups. The implementation of FPIC becomes a major challenge in contexts where community members and company personnel have been killed. In regions of the country with a history of human rights abuses in the context of extractive operations there are unique challenges to assess whether consent is genuinely freely given.



Indigenous protest to stop construction at OceanaGold's Dipidio Mine, Philippines. Photo: Andy Whitmore.

In the Filipino context, environmental, social and human rights impacts resulting from poor mining practices, both historical and contemporary, have undermined the industry's reputation. This presents challenges for companies committed to responsible minerals development when seeking to gain FPIC in the country. Where a mining project has been in development over a long period and the companies involved have changed, the current implementers may face legacy issues arising prior to their involvement. This is particularly true in cases where there is a history of opposition by parts of the community. Communities may also be concerned about the status of past agreements, or may wish to reconsider or renegotiate with the current proponents.

Companies which need to explore prior to final decisions on mining often invest in community development projects prior to, or during, extended FPIC decision-making processes. This can be seen by some in the community as potentially influencing the outcome of indigenous FPIC decision-making processes.[163]

For corporations involved in seeking FPIC for exploitation in contexts where there is a history of strong opposition by some in the community, the substantial expenditure prior to reaching any agreement to proceed is an additional risk. This community level risk is heightened where there is opposition by other impacted groups, and is equivalent to political risk at the national level.

Groote Eylandt – BHP / GEMCO and the Warnindilyakwa / Anindilyakwa people

***Name of Project*:** Groote Eylandt

***Company*:** BHP (majority shareholder in local operator GEMCO, Anglo American hold a 40% share)

***Location*:** Northern Territory, Australia

***Indigenous Peoples*:** Warnindilyakwa people, referred to by their language name Anindilyakwa

***Minerals*:** Manganese

***Current Status*:** Open pit mining operations under way since the 1960s. Some areas of the island are under moratorium following withhold of consent.

Groote Eylandt, an island of approximately 2,300 square km, is located about 600km from Darwin in Australia's Northern Territory of the coast of Arnhem Land. It is home to the Warnindilyakwa/ Anindilyakwa people who consist of 14 clans. The archipelago was declared an Indigenous Protected Area in 2006. During the 1960s, the Church Missionary Society who were under the belief that mining would be beneficial to aboriginal peoples of the island, negotiated mining leases on their behalf. GEMCO, now a subsidiary of BHP, commenced mining on the island during this period. Following the passage of the Aboriginal Land Rights (NT) Act (ALRA) of 1976 land was converted to Aboriginal freehold title land. Since this time Aboriginal lands in Groote Eylandt not already under lease, as well as some that were under lease,[164] are subject to the veto right under section 42 of the ALRA. Under the ALRA, Land Councils are established which are responsible for identifying traditional owners, consulting with and informing them in relation to any proposals on their lands and communicating their permission or rejection of those proposals to the proponents. This veto right has been exercised by the traditional owners on occasion. Once consent is withheld a five year moratorium period is initiated. As a result there are areas on the island that are currently under moratorium. The law was amended in 2006 such that the traditional owners can bring an area out of moratorium before the five year window expires. Mining companies are not permitted to approach the traditional owners on this matter.

The procedure for engagement with the traditional owners is regulated under the ALRA, which limits the company to two opportunities to meet with the traditional owners to discuss project proposals. The remainder of the engagement is through the Anindilylakwa Land Council which negotiates on behalf of the traditional owners, if they give their in principle consent to enter into those negotiations. The Land Council ensures that the appropriate representatives of the traditional owners are consulted and that they are provided with sufficient information upon which to make an informed decision. The negotiations are to be completed within a 22 month window, but this window can be extended by mutual agreement between the Land Councils and the applicant.[165] The Northern Territory and Federal governments' role in the consent seeking and negotiation process is minimal and limited to ensuring that agreements entered into are valid.

Following an amendment in 1987 the veto requirement under the ALRA was limited to the exploration stage. Previously a second veto right existed at the exploitation stage. As a result conjunctive agreements are entered into at the exploration stage with traditional owners who provide their consent.[166] The Land Council emphasises to traditional owners that providing consent to exploration implies that they are providing their consent to mining.

GEMCO perspective:

The GEMCO representative explained that, in areas where they have secured mineral rights (i.e. where consent has been obtained) the company has adopted the practice of 'walking the land' with the traditional owners some months prior to conducting any activities. The purpose of this is to identify any areas of particular cultural or spiritual significance. These areas are then removed from the area to be exploited. This practice is above and beyond the requirement of the ALRA. In

some instances it has resulted in significant costs to the company but was described by the GEMCO representative as clearing up a lot of potential issues with the traditional owners.

From the GEMCO representative's perspective the ALRA places limitations on the potential to establish relationships with the communities and tends to turn engagements into legalistic and long negotiations with the Land Council. This leaves very little opportunity to sit down with the traditional owners. The GEMCO representative regarded the issue as a structural one, as there were limited opportunities to sit down together even though there were genuine efforts to cooperate on the part of all parties. A related observation was that recent negotiations under the Native Title Act, particularly in Western Australia, have tended to be more effective in delivering benefits to traditional owners, than those under the Land Rights Act. This conclusion is based on the fact that engagements are free flowing under the Native Title Act versus the more transactional type of engagements under the ALRA. While holding that the Land Rights Act was an impressive piece of legislation, the GEMCO representative noted that its content reflected the adversarial nature of its birth. Specifically by setting up the Land Council as a collective bargaining entity, which acts on behalf of traditional owners, it operates under the assumption that aboriginal people 'still retain a disability in their culture and language skills in engaging with the mainstream'. The GEMCO representative questioned if this assumption was still valid and suggested that it was time for a roundtable to look at the intent of the ALRA as it relates to the need for a single collective bargaining agent.

Land Council Perspective

The Land Council representative noted that the fact that mining was already operational on the island had a number of effects. Firstly, it implied that people were more aware of the potential impacts of mining and consequently the task of ensuring that they were informed of these and understood them was significantly less than in contexts where this was not the case. Secondly because of the royalty streams coming from existing mining projects the traditional owners were in a position where they are not depending on new mining projects for income and are able to weigh up the potential impacts to culture, the environment and their control over their lands, against the financial benefits which additional mining would offer. Thirdly, the fact that the initial mining leases had been issued without their informed consent, and the perception that when people gave consent in the initial years of the ALRA that they did not really understand what they consented to, has led to a situation where there is a growing tendency to withhold consent to mining proposals. This was particularly evident in the context of an attempt by Northern Manganese Limited to conduct exploration and mining on one of the islands which was rejected by the traditional owners in 2011.

The Land Council representative expressed the view that the ALRA was good at securing rights, but did not necessarily guarantee reasonable benefits, as these were subject to the effectiveness of the negotiators involved. Nevertheless, the negotiating power of, and outcomes achieved by, traditional owners under the ALRA were much better than under the national Native Title regime for a number of reasons. These included the fact that a) land was held in fee simple by the traditional owners under the Act b) the Land Council can buffer communities from practices whereby mining companies can enter and play different groups within the communities off against one another; c) the veto power is a major lever in negotiations with companies, and the Land Councils have lawyers and negotiators who act on the traditional owners behalf and are trained to deal with their counterparts in companies. In other contexts where such legal support is not available deals which are negotiated with mining companies can appear to promise a lot but ultimately they tend to deliver much less than expected in terms of financial reward. Other perceived advantages of the Land Councils were that they minimized the role of government in the process. The Land Councils are accountable to the Clans, as their board is composed of Clan representatives and it must also report to the government.

The five year moratorium provision was regarded as an effective way for Traditional Owners to minimize excessive consultations and consent seeking processes. Where companies sense that traditional owners will withhold consent, there is a general tendency to wait and not to seek their consent, as to do so would trigger the five year moratorium. As a result, the practice referred to as 'pick and shovel exploration' had developed, whereby companies are allowed by Traditional Owners to walk their land to do assessments of its mineral potential, but are provided no legal rights to

explore or exploit the resources.

One of the approaches proposed to the Traditional Owners by the Land Council to secure areas of cultural significance from mining in the future, is to involve elders in pre-identification of these areas, and enter into agreements with the mining companies that they will forever be off-limits to mining. In exchange Traditional Owners would consent to allow companies to access to conduct 'pick and shovel exploration'. In the initial leases issued on the island no account was taken of culturally significant areas. As a result it is in mining companies' interest to 'walk the land' prior to mining areas within its lease, as to do otherwise would damage its relationship with the traditional owners and jeopardize any future attempts to explore and mine areas outside of the lease.

Observations

The operation of the veto provision under the Aboriginal Land Rights Act in Groote Eylandt provides an example of a functioning model of FPIC which protects the rights of the traditional land owners, while also providing sufficient certainty to the mining company to enable it to plan for the future. The fact that the veto power only applies prior to the approval of a lease, but not before exploitation, is not regarded as a major obstacle to the provision of informed consent, because the communities have a history of exposure to mining, and already have an understanding of what the new projects will entail. However, the Land Council representative considered that it would be an enormous undertaking to operationalize this consent provision in a context where the communities do not have a prior exposure to mining. This would necessitate a mobile team which could provide expert independent advice to communities, in addition to facilitating field trips to comparable mine sites.

The role of the Land Council as a buffer between communities and companies, while it has its limitations, nevertheless serves to address some major issues in the operationalization of consent. From the community's perspective it prevents unscrupulous companies from attempting to divide them or promote non-representative leaders. It also ensures that the moratoriums are respected. From a company perspective it addresses the potential problems in identifying who the legitimate community representatives are, as the Land Council relays who the traditional owners are and communicates their decisions to the companies.

The critique that the Land Council represents a paternal model and is outdated has been raised. Mining companies have stated a preference to be able to establish direct relations with traditional owners and negotiate directly with them, leading to improved outcomes for all parties. It was noted by the Land Council representative that this critique of the Land Councils is generally one that is put forward by mining companies and not traditional owners themselves. How transferable this type of ALRA model would be to other jurisdictions is an open question. Among the challenges would be the need to cater to the particular customary tenure arrangements of each indigenous people. In addition the model relies on a certain degree of mining proceeding in order to fund the role of the Land Councils, and is contingent on the Land Council representatives providing adequate information to the communities and not attempting to distort the process. In a relatively small territory such as Groote Eylandt, which has its own dedicated Land Council, any failure to act in accordance with the communities' wishes would quickly be exposed. However, in other jurisdictions such accountability may prove to be a greater challenge.

The ALRA includes an option for the national governments to overwrite an aboriginal veto in the national interest. This has never been exercised. The widespread availability of manganese, and the difficulty in justifying a single mine as necessary to realize the national interest, suggests that an aboriginal people's decision to veto a mine here is unlikely ever to be overridden. This conservative interpretation of the national interest contrasts with the relative frequency with which mining project in indigenous peoples territories in other jurisdictions tend to be justified by government agencies, or national courts, on the basis of a vague and undefined public interest. As a result the enabling conditions which facilitate the meaningful implementation of the consent provision under the ALRA may be difficult to replicate in contexts where rights are readily subordinated to economic interests, and accountability of bodies with control and decision-making powers over extractive projects is a major challenges due to widespread corruption.

Interviews were conducted with a GEMCO company representative and an Anindilylakwa Land Council representative who works closely with Traditional Owners on issues related to mining. The Traditional Owners themselves were not interviewed as part of the case study due to initial difficulties in establishing contact with them and time constraints once that contact was made possible.

De Beers Canada – Victor, Gahcho Kue & Snap Lake projects and a commitment to engage with a First nation on the basis of its FPIC Protocol

***Name of Projects*:** Victor, Gahcho Kue and Snap Lake

***Company*:** De Beers (80% owned by Anglo American) (Gahcho Kue project is a joint-venture with Mountain Province Diamonds).

***Location*:** Ontario and Northwest Territories, Canada

***Indigenous Peoples*:** Attawapiskat, Moose, Fort Albany and Kashechewan Cree First Nations and Yellowknives Dene, the Tłı̨cho, the Lutsel K'e and Kache Dene First Nations

***Minerals*:** Diamonds

***Current Status*:** Victor and Snap Lake ongoing projects, Gahcho Kue currently in regulatory process to proceed to mining stage.

This case study is to be read in the context of the disclaimer on page 41 with regard to De Beers' current policies and practices.

De Beers' 2012 Community Policy commits it to seek FPIC of communities for projects with potentially substantial impacts on their rights. The company currently has operations in Botswana, Canada, Namibia and South Africa. Since 2008, De Beers Canada has had a policy in place which requires consent at the exploitation phase of projects and recognized First Nations right to veto mining projects. This case study briefly addresses De Beers Canada's experience in three of its projects. Two are operational mines, the Victor and Snap Lake mines, and the third is the currently proposed Gahcho Kue project. Finally, the positive experience of a Canadian First Nation in obtaining a commitment from De Beers to respect their FPIC protocols is also addressed.

Victor project:

In the case of the Victor project, three impact benefit agreements were entered into with the Attawapiskat (2005), Moose Cree (2007) and Fort Albany and Kashechewan (2009) First Nation communities in the James Bay area of Ontario. The communities are remote, with no permanent road access, and rely on a subsistence economy. None had experience with mining operations in or near their territories. They continue to be particularly socio-economically disadvantaged, with unemployment up to 90% in some communities. Educational attainment is low and health and drug abuse problems common.

The De Beers representative explained that they had followed the guidance of the Canadian courts in *Corbiere v. Canada*[167] that for consultations to be meaningful they had to involve a majority of people both on and off reserves. A referendum was held in 2005 in the Attawapiskat community in which up to 85% of the people who turned out to vote, with the support of their leaders, had voted in favour of the agreement. The percentage of the actual population who voted is estimated to be between 22 and 48 per cent of the population, which the company holds is in line with the turnout for leadership elections.[168] Over the last three years there have been blockades by Attawapiskat community members of the seasonal ice road, which De Beers uses to deliver fuel and other supplies to the mine. The 2009 protests arose in part as a result of frustration around inadequate information the community felt it had received from their Chief and Council members on specific Impact and Benefit

Agreement (IBA) funding provisions.[169] In 2013, blockades by some community members managed to close down the ice-road for a significant period and led to De Beers securing a court injunction to have the blockade removed. The blockades were in relation to a range of issues including: IBA transparency and accountability and trust fund terms and conditions; contracting administration; forms of community engagement, secrecy, requirement for public community meetings; additional exploration agreements and the environmental assessment of a second open pit mine; employment issues and compensation for impacts on trap-lines.

De Beers' perception is that "the majority of the issues raised were unrelated to the IBA, representing a mix of individual issues and issues between the individuals and the First Nation" and that the Trust Fund administration and management is under Attawapiskat First Nation control.It notes that compensation for predicted loss of harvest caused by the current mining activities is included in the annual payments to the First Nation with distribution of this being up to the First Nation. It also points out that community members were aware of the agreement content as the "Attawapiskat First Nation and its negotiating team undertook a 12-month internal consultation" prior to the ratification vote in 2005. De Beers also note that its request to the regulators, in the context of a possible second pit, is for a broad comprehensive environmental assessment, rather than a narrowly scoped one.

According to a De Beers' representative, changes in community leadership, and demographic changes within the community, due to people moving back to the area from elsewhere, had led to these demands for a modified contract and a new agreement. The case therefore touches one of the practical issues around the operationalization of consent, namely how consent is maintained, when does it need to be re-sought and under what conditions it can be revoked?

At the time the mine was being considered it was suggested that the impoverished socio-economic situation of the communities, and the need to strengthen its institutional capacity, were potentially incompatible with the pursuit of mining operations in their territories.[170] De Beers on the other hand hold that Attawapiskat First Nation had its own experienced legal team and an independent experienced negotiation consultant advising it, and consequently had access to both expertise and knowledge before making any decisions. In 2011, Attawapiskat chief Theresa Spence drew national and international attention to the First Nation's economic plight, in particular their housing situation. Former Ardoch Algonquin First Nation Chief Bob Lovelace has attributed blame for the communities' socio-economic situation to the lack of First Nation control over their own natural resources, which prevent them from exploiting them with government interference and denies them the exercise of their right to self-determination.[171] This raises the issue as to what the particular requirements may be in relation to informed consent processes in contexts such as these, in particular where it is indigenous peoples' first exposure to mining operations.

Gahcho Kue and Snap Lake projects:

Between 2005 and 2007 De Beers signed agreements with the Tłįcho Nation, the Yellowknives Dene, the Lutsel K'e and Kache Dene First Nations (LKDFN) and the North Slave Métis Alliance in relation to its underground Snap Lake project in Canadian Northwest Territories. These First Nations have a long history of engaging with mining companies and the company has not faced similar obstacles to its operation as those at the Victor mine. However, some of the First Nations have pointed out that the historical agreements would be considered inadequate by the communities' current negotiating standards.

De Beers is currently attempting to pursue another mining project, known as the Gahcho Kue project, in the territories of these First Nations. In their submission to the environmental impact assessment, the LKDFN have stated that they are withholding their consent to De Beer's proposal until the "Snap Lake mine comes into compliance with all regulations and commitments".[172] Included in the LKDFN recommendation is that the project be postponed until "the Bathurst caribou herd population restores sustainable numbers" and until De Beers sit down with them and ask "how they can contribute to the long term viability of [their] community."[173] De Beers maintain that the Gahcho Kue project should be recommended for approval to the Minister by the Mackenzie Valley Environmental Impact Review Board because it "will result in significant and positive socio-economic benefits to the NWT and

its people, including Aboriginal persons" and the "development of the Project will not result in any significant adverse environmental effects."[174] The LKDFN view De Beers as not approaching the engagement with them on the basis of obtaining their consent.

The other impacted First Nations have not to-date expressed an intent to withhold their consent to the project. The case therefore raises the issue of who determines if impacts are considered substantial, and how FPIC should be operationalized in contexts where there are multiple communities or indigenous peoples impacted by a project proposal. A related issue is how divergent opinions between communities on whether to provide consent or not are dealt with as part of FPIC processes.

The case also begs the question as to the implications of a company developing or improving its policy on FPIC in a context where it already has operations in place, and whether this poses challenges in light past practices or arrangements which have ongoing implications for communities.

All of the cases raise issues in relation to benefit sharing and optimum negotiation positions for indigenous communities when engaging with companies in the context of FPIC processes. The Victor experience suggests that industry-wide greater transparency and access to information on existing benefit sharing arrangements between mining companies and indigenous peoples is necessary so that indigenous peoples who are considering engaging in benefit sharing negotiations have an insight into what they can reasonably expect to negotiate with mining companies operating in their territories. The cases also raise the question as to what the potential implications are for past agreements which were entered into in contexts where indigenous peoples' negotiating power with mining companies was weak, relative to their current negotiating power under an FPIC framework.

De Beers' engagement with the First Nation X

De Beers had conducted regional exploration work covering the territory of a Canadian First Nation [referred to here as First Nation X in the interests of the company and the community]. The company decided to halt this exploration activity when it became clear that the First Nation was opposed to exploration and mining in its territories. The First Nation requested that any future engagement with them be based on their own protocols. In 2012, De Beers replied to the First Nation's request stating:

Bruce Shisheesh removes sheriff's injunction notice at a Victor mine demonstration on 17th February 2013. Photo: APTN

> "We also have agreed that any mining would be subject to free, prior informed consent by [First Nation X]. We are prepared to work within your protocols. We will be retaining our mining claims that are currently in existence. However, we will not work on these without the consent of [First Nation X] (or other First Nations). We agree completely that where there is an overlap of traditional lands, or sharing, then this should be resolved by the First Nations involved."[175]

De Beers' commitment not to work on claims in First Nation X's territory and to comply with their protocols is praiseworthy, and offers an important example for other mining companies to follow. It also touches on two important issues around FPIC from the perspective of indigenous peoples.

One is the question of the stage at which consent should be obtained. First Nation X, in common with the position of most Canadian First Nations, is of the view that respect for the jurisdictional and territorial rights of indigenous peoples implies that consent must be obtained prior to the issuance of any lease or concession over their territories, as well as for access to those territories in order to conduct exploration or exploitation activities. This consent must be obtained on the basis of the terms defined by the indigenous peoples themselves. Such an interpretation is consistent with the obligations which flow from international human rights standards. The fact that De Beers commitment is framed within the context of its existing mining claims, obtained without First Nation X consent, means that while it is a ground-breaking commitment for the industry, it nevertheless still falls short of international human rights standards.

A second issue that the case raises is how consent is to be operationalized where there are multiple communities or people sharing the area impacted by a project proposal, in particular where there are diverging opinions or existing land disputes among these communities. De Beers' communication with First Nation X suggests that in such cases it will operate on the principle that First Nations themselves should be the ones to resolve any disputes in relation to overlapping traditional lands. It commits De Beers to working 'within shared areas where there is consensus between the affected First Nations'. However, De Beers also state that 'in areas of dispute they would only work in such areas where there is support from two or more First Nations involved in the disputed area'.[176] This appears more conservative than the position adopted by Canadian First Nations themselves, which holds that operations should not be located in areas in which a) there are disputed land claims, b) unresolved community overlaps exists, or c) over which there is conflict. It is also at odds with the notion that the FPIC of each First Nation has to be respected in order for their particular rights to be safeguarded.

In addition to drawing out these issues the case also demonstrates that, where indigenous peoples have sufficient leverage to assert their territorial jurisdiction and decision-making rights, corporations may engage with them on an '*as-if*' basis, where they operate as if the indigenous peoples' inherent rights over their territories and resources were fully recognized under the national legislative framework.

6: International financial institutions and FPIC

In 2011, the board of the International Finance Corporation ("IFC") voted to incorporate the principle of FPIC into its safeguard policy addressing indigenous peoples.[177] The safeguard policy, which forms part of the IFC's Policy and Performance Standards on Social and Environmental Sustainability, came into effect in January 2012, and has had a major ripple effect across the financial sector, and by extension the mining sector. The IFC's performance standards form the basis of policies of the 75 Equator Principle financial institutions, which between them finance a major portion of projects in emerging markets. It also has implication for a host of other actors, institutions and processes which invoke the IFC standards in the context of their activities. Particularly relevant for the extractive industry is the fact that the standards were one of the key documents invoked by the UN Special Representative to the Secretary General during the process of formulating the UN Guiding Principles on Business and Human Rights.

The significance of this development has led to it being described as a 'watershed moment in international development history'.[178] It is recognized across the investment community as 'a confirmation of the growing momentum behind the recognition of the requirement for FPIC'.[179] The policy applies to all new investments. Under it 'clients are required to obtain FPIC for project design, implementation and expected outcomes stages for the following categories of projects, those:

- impacting on land or natural resources subject to traditional ownership or under customary use
- requiring relocation of communities
- significantly impacting on critical cultural heritage of indigenous peoples[180]

The IFC produced a set of Guidance Notes to provide advice to corporations in their implementation of the Performance Standard. While the Notes are helpful in providing direction to corporations unfamiliar with the concept of FPIC, they introduce some ambiguity in relation to when the requirement should be triggered, what level of due diligence is required, and the relationship of FPIC processes with indigenous peoples customary law and practices and self-governance processes.[181] However, it has been pointed out that in practice guiding principles cannot be used to justify limitations on the role which indigenous peoples must play in defining and implementing FPIC processes.[182]

While the IFC is arguably the most significant actor among international financial institutions in the context of the implications of its standards for financing of extractive sector projects, it is only one of a number of these institutions which has affirmed the requirement for FPIC.

The 2008 Environmental and Social Policy of the European Bank for Reconstruction and Development addresses the requirement for FPIC in a number of contexts, including in relation to the development of natural resources.[183] The policy recognizes that "the prior informed consent of affected Indigenous Peoples is required for the project-related activities ... given the specific vulnerability of Indigenous Peoples to the adverse impacts of such projects."[184] Similarly, the 2009 safeguard policy of the Asian Development Bank's affirms the requirement for FPIC. However, the definition of FPIC is somewhat ambiguous and if interpreted narrowly is potentially inconsistent with the rights underpinning it.[185] The Inter-American Development Bank does not explicitly require FPIC in its 2006 policy, which was issued prior to the adoption of the UN Declaration. However, an interpretation of the policy in a manner consistent with the regional and international framework of indigenous peoples' rights suggests that the consent requirement for large scale mining project is implicit in the policy.[186] A number of private investment institutions, in particular those targeting responsible investors have also started to engage with the requirement for FPIC.[187]

The public sector arm of the World Bank is currently undergoing a review of its environmental and social safeguard policies, including its Operational Policy 4.10 on indigenous peoples. The review process has identified FPIC as one of the major themes to be addressed. In light of developments within the international human rights framework following its last policy update, in particular the adoption of the UN Declaration, and the response of the IFC and other international financial institutions to these developments, it is difficult to see how the World Bank could justify delaying its incorporation of FPIC into its policy in relation to indigenous peoples. In the context of discussions on

FPIC, the Special Rapporteur on the Rights of Indigenous Peoples highlights that 'the revised policy should be consistent with rights of indigenous peoples affirmed in the UN Declaration' which should 'apply to all the Bank's financial and technical assistance, and not just its investment lending'.[188]

This recognition by investment institutions of the FPIC standard as necessary for project impacting on indigenous peoples' culture and lands and resources gives rise to a range of operational challenges which these institutions have yet to fully comprehend and subsequently respond to. At a fundamental level it entails an understanding that FPIC is a mechanism through which indigenous peoples' operationalize their self-governance rights vis-à-vis external actors. It is therefore not a process which financial institutions can define or set the parameters for, as this is something which the impacted peoples themselves must do. Operationalization of FPIC therefore requires moving beyond the standard audit tick-box type approach towards addressing client compliance with safeguards, and instead requires context specific understanding of the extent to which the particular governance and decision-making processes of each impacted indigenous peoples have been respected.

In order to develop an effective mechanism for oversight of corporate engagement with indigenous peoples in the context of FPIC, the investment community will require guidance from indigenous peoples and their authorities in relation both to the content of FPIC and the culturally appropriate and context specific means through which respect for it can be guaranteed. Such dialogues should occur within the framework established by the UN Declaration. This is necessary not only to ensure that the operationalization of FPIC is grounded on respect for the rights it aims to safeguard but also to overcome distrust which many indigenous peoples have of international financial institutions as a result of their role in past encroachments into their territories. These dialogues may lead to a range of possible outcomes, including requests by indigenous peoples for financial and technical assistance for their capacity building activities in relation to strengthening and developing their representative structures, formulating their own guidance and procedures in relation to FPIC processes, and ensuring effective and independent oversight and grievance mechanism.

The incorporation of FPIC into the safeguard policies of financial institutions implies a commitment to ensuring that all projects that are funded proceed in a manner consistent with the respect of indigenous peoples' rights. This would represent a major, but necessary, undertaking by the financial sector to remedy practices which condone and facilitate the imposition of rights denying projects on indigenous peoples. Implemented correctly FPIC has the potential to play a transformative role in client engagement with indigenous peoples, and by extension the relationship which these peoples have with the financial industry funding those engagements.

7: Conclusion and areas for further discussion

This research is intended to foster and encourage wider recognition and respect for indigenous rights by drawing lessons from past and current relations between multinational corporations and indigenous peoples impacted by their development projects. The goal is to encourage constructive dialogue based on the UN Declaration on the Rights of Indigenous Peoples and especially its provisions mandating Free, Prior and Informed Consent (FPIC) for all projects on indigenous lands. It is hoped that a wider acceptance of the FPIC framework will lead to more effective resolution of human rights and environmental challenges and a more detailed examination and discussion of common and serious unresolved issues.

The passage of the UN Declaration, and the increased attention being paid by international institutions to the frequently problematic relationship which the industry has with indigenous peoples, points to the need for change. It offers the prospect of a more respectful rights based interaction, and provides a unique opportunity for the industry to overcome its legacy.

Various corporations in the mining sector, and in associated financial institutions, have improved their mode of expression in relation to their engagements with indigenous peoples. In some cases this is also manifest in the adoption of better corporate policies. Nevertheless, the seriousness of past impacts, the ongoing unremedied grievances, and the scale of future planned extraction in indigenous areas, in our view, leave no room for complacency. Instead, these factors demonstrate the need for involved corporations to readily commit to ensure that the internationally recognized rights of indigenous peoples are respected. The adoption of FPIC principles by corporations and financial institutions as the guiding framework for improved rights-based interaction will lead to reduced conflict, the avoidance of abuses, and ultimately a more sustainable and peaceful environment for both corporations and communities.

The report aims to establish a basis for dialogue between the industry and indigenous peoples in relation to the operationalization of FPIC. The basic premise is that corporations have a legal obligation to closely adhere to international standards that command respect for indigenous peoples' rights. With this guiding principle in mind, it elaborates on the existing guidance which the human rights regime has provided to States and corporations in relation to the operationalization of FPIC as an essential safeguard for securing these rights. FPIC must be understood as a crucial derivative of the rights of indigenous peoples to self-determination, control of their lands and resources, and the protection of their culture, traditions, and chosen means of livelihood. The implication of this is that indigenous peoples themselves must be the ones to define what FPIC means and how it will be operationalized in their particular contexts.

The second section of the report aims to provide some insight into indigenous perspectives of FPIC. It draws from interviews with indigenous peoples in regions throughout the world and provides a synthesis of their perspectives and views categorized according to the major thematic issues raised by them. The actual experience of indigenous peoples in Canada, Colombia and the Philippines in attempting to assert their own rights-based conceptions of FPIC are evidence of the practical approach which indigenous peoples throughout the world are taking to addressing the challenges they face in protecting their rights.

The third section of the report offers an insight into the perspectives on FPIC of four of the world's major mining companies and incorporates some of the major themes that arose in interviews with company representatives. The primary purpose of this section is to provide a snapshot of mining company perspectives on FPIC and their concerns and observations in relation to its operationalization in practice. A number of case studies of corporate engagement with FPIC are provided to contextualize these concerns and perspectives. The research consequently provides the basis for a rich dialogue around FPIC operationalization in which common ground can be sought to assist in the development of a common understanding of the concept of indigenous peoples' FPIC.

Areas for further discussion:

A number of themes emerge from the research as areas where further discussion between the industry and indigenous peoples is necessary. The research indicates that further dialogue could assist in providing clarity on the corporate human rights obligations following from the normative framework of indigenous peoples' rights. This is necessary in order to facilitate an industry-wide shift towards a rights-based conception of FPIC. This section of the paper identifies a subset of the topics where there is a divergence of opinion and perspectives between indigenous peoples and corporations or where confusion, perceived ambiguities, and lack of clarity impede consensus.

What are the bases for the requirement for FPIC?

Indigenous peoples regard FPIC as a derivative of their fundamental right as self-determining people to control their own social, cultural and economic development. They also see it as an integral part of their territorial, cultural and self-governance rights. Human rights bodies' affirmations of the requirement for FPIC, and the international instruments which explicitly or implicitly require indigenous peoples' FPIC, are consistent with this perspective of indigenous peoples. FPIC is framed as a safeguard and a right which cannot be abstracted from the broader rights framework from which it is derived. The evolving perspectives of some mining companies indicate a growing understanding of this basis for the requirement for FPIC. However, the concept that FPIC is something which mining companies can decide to 'grant' or not to indigenous peoples, and is consequently detached from the recognition and respect for their fundamental rights, is still prevalent in the sector.

When consent is required?

The question of when consent is required is closely related to the understanding of the rights which underpin it. Indigenous peoples regard the fact that the consent requirement is derived from their self-governance and territorial rights as meaning that it must be obtained prior to the authorization – and also prior to the commencement – of any extractive project. The prior and ongoing dimension of consent therefore extends to any decisions, including entering into investment agreements in relation to potential extractive activities, which could impact on indigenous peoples' capacity to govern their territories. This perspective is grounded in their own customary legal systems and practices, as well as the international human rights standards which frame the consultation and consent seeking requirements.

Discussions with mining companies offer a spectrum of thinking in relation to when consent is required. Some recognize the potential value of addressing the consent requirement upfront in investment agreements with States. The more general perspective was that consent could be required prior to accessing land, and again prior to exploitation of resources. – as at these stages indigenous peoples rights' could be impacted on by project activities. Some suggested that seeking consent prior to concession issuance was pushing the requirement too far back in the project life-cycle, and presented problems due to the role of the State in the concession issuance process. The issue of potential investment loss where consent is withheld is also a consideration for corporations in the context of operationalizing consent at later stages of a project life-cycle.

Discussions with indigenous peoples around the appropriate points to initiate consent-seeking processes would be helpful. The notion of a 'sweet spot' prior to exploitation was floated by one company representative. This would be a point in time where adequate information is available for indigenous peoples to develop an informed understanding of the project's impacts and benefits, and the corporate investment curve has not yet reached a point where it becomes a significant obstacle to withdrawal. For a meaningful conversation to be had in relation to this issue corporations need to share insights into their operational realities with indigenous peoples and seek to understand indigenous perspectives on how they wish to operationalize FPIC at different phase of a project life-cycle.

The implementation of FPIC cannot be divorced from the political and legal realities in particular states. Corporations have often presented concession agreements from the State as *fait accompli* that excuses them from any recognition of FPIC. Therefore an optimum FPIC process would

necessarily begin well before any corporation seeks permits and other authorizations from the State.

What should corporations do when the State does not require indigenous consent?

In addressing the requirement for FPIC there is still a tendency for some corporations to invoke national legislation and State sovereignty as arguments to defend its non-recognition. Transnational corporations clearly have obligations to respect the laws and requirements of the host States in which they operate. However this is not the only source of corporate obligations. Indigenous peoples' customary laws and human rights law affirms corporate obligations which are above and beyond national legislation. Where States fail to enact legislation or take measures to protect the rights of indigenous peoples this threatens the credibility and viability of corporate projects within, and potentially beyond, those States.

Human rights bodies, such as the Special Rapporteur on the Rights of Indigenous Peoples, have addressed the need for corporations to go beyond such inadequate national requirements. They have recommended that, as part of their due diligence, mining companies should recognize and promote the State's duty to consult and obtain consent in the context of projects which have potential impacts on indigenous peoples. They should then avoid the pursuit of projects where the State has not complied with this duty. This last point is particularly relevant in States where military and para-military groups are deployed in indigenous peoples' territories against their wishes. Constructive dialogue with indigenous peoples with regard to how to encourage States to comply with this duty, and the appropriate corporate action in cases where this is not the case, would be a welcome development.

Who defines free prior and informed consent?

In a growing number of national jurisdictions the requirement for consent has been affirmed in legislation or by the courts. In some of these States implementing rules and regulations have been developed elaborating on how consent is to be obtained. In other contexts bodies, such as international financial institutions, have developed guidelines for corporations to follow when attempting to obtain FPIC. From a rights based perspective these approaches can be extremely problematic as such guidelines should be developed with the full and effective participation and agreement of indigenous peoples. Indigenous peoples themselves regard FPIC as a principle and manifestation of their control as to the future development of their territories. It is therefore a process to be defined and managed by those indigenous authorities and communities whose lands and futures are impacted, rather than imposed by corporations, corporate consultants or national governments. A dialogue with indigenous peoples on the emerging role of their FPIC protocols, policies and guidelines, and how these can be facilitated and respected in practice, could assist in avoiding what would otherwise be a form of colonial style social engineering.

How are differences of opinion between impacted communities or conflicts addressed?

In many instances a single mining project may impact two or more indigenous communities or peoples. Questions were posed during the research as to how FPIC is to be operationalized in these cases and how divergent positions are to be dealt with. The response of indigenous peoples has generally been that, in such contexts, prior to seeking their consent, they should first be in a position to determine collectively among themselves how FPIC will be granted or withheld and how any inter-community disputes are to be resolved. They have also expressed the view that in cases where there is conflict among communities or peoples over ownership or control of land then extractive projects should not proceed until the communities in question have resolved their differences. Some of the corporate perspectives emerging from the research pointed to a scenario whereby the consent of the majority of communities could potentially be considered as an adequate basis to proceed. Human rights standards imply that the FPIC of all indigenous communities whose rights are potentially impacted—including for example downstream communities impacted by water pollution—must be obtained.

How to determine who represents the community

Human rights bodies have recommended that mining companies should be guided by international criteria in the identification of indigenous peoples and the recognition of their rights, including rights flowing from customary tenure.

Various corporations have expressed their concern that, in developing dialogue with affected communities and rights holders, corporations are ill-equipped to judge between contesting claims by different bodies to be representative of communities. Indigenous peoples and international human rights standards direct corporations to engage in broad-based consultations with indigenous authorities in the areas in which they seek to operate and to be guided by them in relation to the bodies with which they should dialogue. Where national and regional federations of indigenous peoples exist, they should be consulted. In practice open and inclusive dialogue will generally result in the identification by indigenous peoples themselves of their own representatives and representative bodies. In cases where indigenous peoples have not had the opportunity to develop and strengthen their representative structures to the point where they are equipped to enter into FPIC-based dialogue and negotiations, then the granting of consent will not be possible and projects should not proceed. Dialogue with indigenous representatives in contexts outside of specific consent seeking processes can help provide corporations with guidance in addressing these concerns. However, the corruption of so-called community leaders through outright bribery or the provision of other favoured treatment is an unfortunate part of the history of corporate relations with indigenous peoples. Such short-sighted conduct rarely escapes local notice and usually poisons future relations to the detriment of all parties.

What is the role of corporations in capacity building?

Corporate social responsibility projects conducted with communities prior to obtaining consent are regarded by many indigenous peoples as having an undue influence on the outcome of FPIC processes. In the conduct of FPIC processes corporations need to be mindful of not influencing, or being perceived as trying to influence, the outcome of the FPIC process. Corporations do however need to ensure that communities are informed of their rights and that mechanisms are established to ensure adequate funding is available for capacity building and access to independent legal and technical advisors of the communities choosing. A mutually beneficial starting point would include discussions with indigenous representatives around where this has been realized, and possible routes towards ensuring resources are available for improved capacity building for indigenous peoples, in a manner which is transparent and guarantees the autonomy of indigenous decision-making.

What are adequate benefit sharing models?

The issue of benefit sharing, and indigenous expectations around this, arose in a number of the mining company interviews. One perception was that some indigenous peoples, in particular those with little experience of the mining sector, had unreasonable expectations as to possible benefits sharing arrangements. Another perspective, raised by both companies and indigenous peoples, or those working on their behalf, was that introducing the issue of benefits early in the process tended to detract from other fundamental issues which needed to be addressed. Yet another issue raised was what constituted an appropriate financial model for benefit sharing and control over the benefit stream, as well the potential role of companies, indigenous peoples and third parties in the transparent and effective administration of benefits. The importance of independent legal counsel and negotiators for indigenous peoples prior to signing any agreements was also emphasized. Another issue raised was the effect of confidentiality of benefit agreements on the operationalization of FPIC. Indigenous peoples raised the issue of cultural appropriateness of benefits and expressed a concern that there was often an assumption by companies that everything could be quantified in financial terms. Finally, the notion of going beyond benefit sharing to entering into production sharing agreements with indigenous peoples was also raised, on the grounds that indigenous peoples have inherent claims over the resources in their territories. There is consequently a broad range of issues pertaining to benefit sharing in the context of FPIC processes that could be the subject of further dialogue.

How are rights-based impact assessments to be realized in the context of FPIC processes?

International human rights and environmental standards and guidance point to the need for adequate indigenous participation in the conduct of impact assessments. These should span social, cultural, spiritual, environmental, gender, human rights and economic considerations and identify all rights which are potentially impacted by a proposed project. They also hold that the determination of the project impact area has to be based on both the technical information and indigenous peoples' perspectives of the impact area. The right to full and effective participation, of all groups including youth, women and the elderly, in the conduct of these processes can be realized in a number of ways, depending on the wishes and capacity of the people in question. Indigenous interviewees emphasised the importance of ensuring the participation of older indigenous women in recognition of their traditional knowledge regarding the value of resources, local history and the significance of certain sites. Indigenous peoples may be satisfied with a determining say in who will conduct impact assessments and provisions for participation in such assessments which would establish baseline information against which projects could be continually monitored—preferably through independent expert investigation and review. In other contexts indigenous peoples may decide to conduct aspects of these assessments themselves, free from outside interference, and request the financial resources necessary to this.

Is it time for a transition from voluntary standards to binding commitments with effective oversight?

An overarching issue concerning indigenous peoples faced with corporate violations of their rights is the fact that current commitments, which are made as part of voluntary standards, are non-enforceable in practice. The current wording of some mining company policies and public commitments in relation to FPIC are frequently framed towards maximizing the ambiguity as to the circumstance in which they apply while minimizing any potentially binding implications which might flow from them. The move towards the recognition of a rights-based requirement for FPIC suggests that we may be approaching a juncture at which a dialogue with corporations in relation to transitioning toward binding commitments and standards around respect for indigenous peoples rights is necessary. Until that time, it is crucial that the dialogue address transparent monitoring and grievance mechanisms to guarantee ongoing respect for agreements and standards. Finally, these processes must also recognize the role of indigenous judicial institutions and customary law.

8: General guiding principles and recommendations to mining companies, indigenous peoples, states, the financial sector, civil society organizations and the international community

General principles to guide corporate and other actors

1. Contemporary international human rights law and other standards constitute a framework of obligations which establishes the minimum acceptable standards of conduct for all actors, including States and corporations in the context of projects within indigenous territories. The *UN Declaration on the Rights of Indigenous Peoples (*henceforth *UN Declaration)* is the clearest expression of indigenous peoples' rights and encapsulates the international obligations of all actors which impact on indigenous peoples' enjoyment of those rights. Recognition of the rights affirmed in the *UN Declaration*, and the responsibilities and duties flowing from them, provides the basis for an emerging framework for corporate action in indigenous territories. However, implementation of this framework is in its infancy. The rapid acceptance and implementation of the provisions of the *UN Declaration* is necessary for the protection of indigenous peoples' rights and the realization of a stable environment in which negotiations, potentially leading to secure investments, can occur. Such an environment will benefit all parties.
2. Collective acknowledgement by the mining industry and States of the legacy of mining in indigenous peoples' territories is fundamental to realigning its relationship with indigenous peoples. This legacy consists of abandoned sites and disastrous human rights and environmental records. In accordance with the responsibilities of States and corporations and the international community processes of reconciliation and avenues of compensation and redress should be established and implemented.
3. Improvements in corporate and State practice are absolutely essential. For these to be realized adequate education and training on indigenous rights is necessary for all actors, including indigenous communities, employees and contractors of mining companies, central and local government officials, legal practitioners, and members of the police, army and security forces.
4. Effective independent and credible monitoring, as well as readily accessible grievance and redress mechanisms, are necessary for the realization of a climate in which good faith engagements are possible.
5. Operationalization of FPIC is dependent on a genuine acknowledgment of the right of all indigenous peoples to define their own development paths. This necessitates respect for their rights to be informed and consulted, and to determine under what conditions, investment and development projects are allowed to proceed within their territories. This includes the right to accept or reject a particular proposal.
6. As part of their right to give or withhold consent to project it is an essential right of indigenous communities to be able to consider project proposals and negotiate the contractual conditions to which they do or do not consent. Corporations that seek to develop a mining project will likely invest large amounts of resources in its development. It is therefore a reasonable expectation by companies that, if they abide by their contractual obligations, their mounting investment is protected from arbitrary expropriation or unilaterally imposed supplementary provisions. Entering into formal contractual agreements as part of the provision of FPIC, which include a functioning grievance mechanism, provides a way to protect both the indigenous and corporate party.
7. The requirement for "informed consent" implies that for consent to be given, an informed understanding of the potential impacts is required. The requirement therefore must apply at each stage in a project life-cycle, from concession application through to project closure. The human rights framework stipulates that consent is required prior to concession issuance and subsequently for major activities such as exploration and exploitation and any substantial changes to project plans which have material impacts on indigenous peoples' rights. Clarity and agreement is required in relation to the precise points at which consent is to be obtained, and

the manner in which corporations should respect this obligation in contexts where States fail to do so.

8. The use and application of FPIC within the framework of indigenous law has significant implications for national legal systems. These implications need to be explored in greater detail and a compilation of existing and evolving experience produced in a systematic manner.
9. Most States currently do not have sufficient institutional capacity, political will or know-how to establish and maintain legal and administrative systems which accord adequate respect to indigenous decision making and judicial processes. This is particularly the case in the context of investment and contractual arrangements with corporate entities. The provisions of the *UN Declaration* therefore pose a major challenge to States, particularly those that are relatively under-resourced, and are institutionally fragile. In this context the requirement for FPIC must be addressed in investment agreements with corporations such that these States are not placed in the untenable position of being expected to compensate corporations in order to uphold indigenous peoples' rights.
10. FPIC processes should be comprehensive and respect the collective and individual rights of indigenous peoples, including the rights of indigenous women. Corporations and other actors should not, however, generalize and assume that women are excluded in all indigenous peoples' decision-making processes. There are many indigenous peoples where women have leading roles in decision making. It is also possible for communities to institute their own mechanisms to address issues around the lack of women's participation where such issues exist. Women should be empowered to participate, but this must happen through internal procedures in a culturally appropriate manner and not be as a result of imposed procedures. Indigenous cultures are not static, and capacity-building with communities through culturally appropriate mechanisms can help them in addressing such issues.

Recommendations to mining companies

1. Corporations should commit to respect international standards on indigenous peoples, especially the *UN Declaration, ILO Convention 169* and the *General Recommendation number 23 on indigenous peoples* of the UN Committee on the Elimination of Racial Discrimination. These international standards should be mainstreamed within corporate policy and practice, integrated into their conduct of human rights due diligence, and promoted through the training and career development of their staff. Corporations should operate 'as if' these international standards were recognized under national law while also actively promoting their application within States which operate to lower standards.
2. Corporations need to adopt policies which clarify their human rights obligations under international standards, irrespective of national legislation. They also need to commit to those obligations flowing from the legislation and policies of home and host States.

   They should consider, in dialogue with affected indigenous rights holders and other relevant actors, the most effective ways to manifest their binding commitment as distinct corporations to operate up to, if not beyond, international standards on indigenous peoples' rights.
3. Corporations should welcome and support the establishment of credible independent monitoring of their activities which enjoys the confidence of all the affected parties.
4 Corporations should acknowledge and respect the fact that FPIC is viewed by indigenous peoples as a principle which provides for their control over the future development of their territories, and as a manifestation of that control. They should accept that FPIC is a process which is to be defined and managed by the indigenous authorities and communities whose territories and futures are impacted by proposed mining projects. Consequently they should not be party to corporate, State or third party defined processes imposed on indigenous peoples. Where indigenous peoples have defined their own FPIC protocols or policies these should be respected.

5. The appropriate bodies for companies to dialogue, and or negotiate, with should primarily be defined by local indigenous authorities. To address company concerns in relation to competing claims of different indigenous representative bodies, corporations should be guided by the UN rights framework for the identification of indigenous communities, which includes self-identification and identification by others. In practice inclusive and extensive cooperation with all indigenous authorities and the participation of corporate representatives in initial open inclusive and public dialogue with the community is one effective tool towards addressing this perceived problem. Affected peoples and communities need to be identified in a manner that respects local processes, customs and perspectives.
6. Corporations must adapt their existing internal decision-making processes to take account of the need to engage with indigenous peoples' processes of local dialogue and decision making. Indigenous decision-making processes may often be of a more protracted nature than certain aspects of corporate procedures. In addition indigenous modes of engagement may rely more on oral communication and face to face discussions. As a result, successful and lasting outcomes may frequently require a significant allocation of time and resources.
7. Corporations need to make provisions to address how the relative poverty, marginalization and frequently oppressed status of many indigenous communities act as barriers to credible FPIC processes. They should support efforts to partially redress this balance in a manner consistent with the aspirations of the indigenous peoples, primarily where such requests emanate from indigenous authorities. Funding should be made available for capacity building and access to independent legal and technical advisers of a community's own choosing. Companies will have to be mindful of not influencing, or being perceived as influencing, the outcome of the FPIC processes, so independent structures and oversight will be essential. To establish FPIC processes it is essential that communications which serve to inform discussions are in locally appropriate languages, and avoid overly technical language. Full access must also be accorded for technical documentation and independent review mechanisms.
8. FPIC should be viewed as an indigenous governance process. Corporations, and all third parties involved, need to guard against engagements that might be viewed as seeking to exert pressure on community members or key office holders, or which unduly influence or corrupt outcomes though offering incentives and rewards prior to local decision-making.
9. FPIC process must be broad based and include all indigenous peoples and communities whose rights and environment are impacted. Impact areas have to be based on the social, cultural and spiritual links to territories as well as the direct physical impact area.
10. Companies should operate under the presumption that there are rights holders over the land into which they wish to enter and that prior engagement is required with them.

Recommendations to indigenous peoples

1. Indigenous peoples and communities need to take steps to prepare and strengthen their structures in order to be better equipped to deal with external agents, such as corporations.
2. Indigenous peoples are advised to be proactive in asserting their rights in relation to extractive and other projects. This should ensure, where possible, defining, agreeing and codifying the decision-making processes of the community with regard to any FPIC process. They should consider their position with regard to community development alternatives. This may involve demanding the time and resources which communities deem necessary in order to establish enabling conditions for FPIC such as: adequate capacity building, institution strengthening, elaboration of indigenous defined FPIC processes, formal recognition of land and autonomy rights, and the formulation of self-determined development plans.
3. Indigenous peoples collectively have a range of experiences in resisting, cooperating or negotiating with, mining companies. They also had the empowering experiences of defining their own protocols, conducting their own impact assessments and developing their own social, cultural, environmental and economic baseline data. Indigenous groups who have had less

exposure to mining projects should learn from these and other experiences. The establishment of a database to share such experiences could be of value to indigenous peoples globally.

4. In order to strengthen community capacity to consider and evaluate project proposals, to conduct effective negotiations, and to assert their decision-making rights, indigenous peoples should insist on improved education on their rights. This should include education on relevant national processes and structures and possible avenues of complaint and redress at local, national and international levels. Indigenous peoples should also seek to better understand corporations, addressing issues such as their processes of decision-making, relationships with other companies, financial resources and investment sources, policies, and track record, particularly in relation to FPIC and benefit-sharing agreements.
5. Communities need to develop their own analytical skills, or have guaranteed access to independent experts with such skills, so that they are in a position to understand the legal and technical documentation provided by companies. In the spirit of FPIC the absence of the capacity to engage with the information provided could be viewed by communities as sufficient grounds to reject any proposal until these conditions are in place.
6. Indigenous communities should insist that they decide where and under what conditions negotiations will be held. If this choice of location is denied, or access is denied to some concerned parties, or consultations and negotiations are tainted by military or police threat or duress this would constitute sufficient grounds to reject any proposal until the appropriate conditions are in place.
7. Learning from communities who have direct experience including similar projects to those proposed can serve to inform local decision-making. Communities should ensure information excursions organised by corporations are directly comparable to the proposed project, and are not seen as a form of personal inducement which could isolate those attending from their community.
8. Participation in or the building of alliances between indigenous peoples or with broader networks may provide communities with better access to support in the context of ensuring that FPIC processes are conducted under the appropriate conditions.
9. In all consent-seeking consultations the indigenous organisers should ensure that all appropriate bodies and groups are invited, including representatives of the directly or indirectly affected peoples and any advisers or observers chosen by them.
10. When defining their position, strategies and demands in the course of negotiating and engaging in FPIC processes, indigenous organizations should familiarise themselves with their internationally recognised rights and align their demands with recognised international standards and instruments. These include *ILO Convention 169*, the UN *Declaration*, and other international human rights standards and jurisprudence. Good examples of laws, policies and court ruling in other States could also be drawn on.

Recommendations to States

1. Ratify *International Labour Organization Convention 169* and ensure the genuine implementation of the *UN Declaration* and other relevant human rights obligations as members of the international community. Securing indigenous peoples' right to self-determination and their inherent rights to ancestral territories is an essential prerequisite for any negotiation on corporate access to indigenous lands.
2. Where applicable the home States of mining corporations should enact extraterritorial legislation to hold their companies better to account for violations of indigenous peoples' rights overseas and establish affordable, accessible and responsive fora where indigenous peoples can bring allegations of abuses and complaints.
3. In order to ensure that the enabling conditions necessary to secure respect for indigenous peoples' rights are in place States must enact legislation and take appropriate administrative measures to:

a) recognize the existence of indigenous peoples in accordance with international criteria;

b) recognize their territorial, property, cultural, religious and self-determination and governance rights, including their right to practice their customary laws and maintain and develop their traditional authorities;

c) require indigenous peoples' FPIC when developments, such as mining projects in or near their territories, potentially impact on their enjoyment of these rights.

4. Review the broader national regulatory framework, in consultation with indigenous peoples, including that pertaining to mining and environmental impact assessments, in order to render it consistent with indigenous peoples' rights, the principles of non-discrimination and access to information, and any other safeguards necessary to secure these rights.
5. Ensure that adequate and culturally appropriate grievance mechanisms are available to indigenous peoples, through which they can address allegations of State and corporate violations of their rights, including their decision-making rights over developmental activities in their territories.
6. Guarantee that where indigenous peoples wish to do so they are accorded the necessary time and space to formulate their own FPIC protocols or policies. Where these exist commit to respecting, and requiring corporate respect of, their contents.

Recommendations to the financial sector

1. Engage in a comprehensive dialogue with indigenous peoples to better understand the issues they face and in order to understand how indigenous peoples seek to operationalize FPIC.
2. Ensure that their clients have policies in place which adhere to the principles of the UN Declaration, including the requirement for FPIC
3. Require rigorous due diligence regarding the potential impact of projects on the rights of indigenous peoples and support efforts to provide credible independent monitoring.
4. Ensure that clients indicate whether Indigenous Peoples will be impacted by proposed mining projects and, if this is the case, have obtained or commit to obtaining their FPIC prior to concession issuance and project commencement. Failure to obtain an impacted indigenous community's FPIC should constitute grounds for disinvestment.

Recommendations to civil society organisations

1. NGOs, academics and other civil society organisations can play an important supporting role, under the guidance and direction of indigenous peoples:
    a) in addressing the resource constraints faced by indigenous peoples in the context of information sharing and capacity building;
    b) in the oversight of FPIC processes and assisting in ensuring that independent and effective grievance systems exist, and that adequate remedies are available, to address violations of indigenous rights;
    c) by acting as a repository of FPIC experiences, in cases where they have involvement in oversight and monitoring, which can serve to inform international organizations concerned with the further elaboration of the human rights framework as it pertains to corporate and State actors.
2. Meaningful indigenous participation is essential where civil society bodies initiate processes to dialogue with the industry in relation to FPIC.

Suggestions to the international community

1. Given the limited confidence which many indigenous peoples may have in State institutions and the mining industry, the international community has a constructive role to play in supporting

the capacity-building of indigenous peoples through education on issues such as indigenous rights and the extractive industries. It can also aid the establishment of independent monitoring procedures. These initiatives might be facilitated through existing offices and procedures, or might be considered within the framework of establishing a new dedicated structure.

2. It is a matter of concern, that despite its indisputably high impact on human rights, in particular indigenous peoples rights, sustainable development and the environment, the extractive industry, does not have a forum or framework which engages all concerned parties and is dedicated to regulation of the industry in the international sphere. Broad-based dialogue is necessary in relation to the establishment of such an inclusive forum. This dialogue should be guided by the UN human rights mechanisms and proceed on the basis of the principles and rights recognized in the *UN Declaration*.

Endnotes

1 Special Rapporteur on the rights of indigenous peoples UN Doc. A/HRC/18/35 (2011) para 66.
2 Special Rapporteur on the rights of indigenous peoples UN Doc. A/HRC/18/35 (2011) para 66.
3 Section 2 of the paper draws heavily on C Doyle Indigenous Peoples, Title to Territory, Rights & Resources: The Transformative Role of Free Prior & Informed Consent (PhD Thesis, Middlesex University, 2012).
4 General Comment 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the ICESCR) E/C.12/GC/21 (21 December 2009) (GE.09-46922) paras 36-37.
5 C Doyle Indigenous Peoples, Title to Territory, Rights & Resources: The Transformative Role of Free Prior & Informed Consent (PhD Thesis, Middlesex University, 2012) at 175.
6 C Doyle Indigenous Peoples, Title to Territory, Rights & Resources: The Transformative Role of Free Prior & Informed Consent (PhD Thesis, Middlesex University, 2012) at 179-81 citing Colombia, UN Doc. E/C.12/COL/CO/5, (21 May 2010); Sri Lanka UN Doc.E/C.12/LKA/CO/2-4, (9 December 2010); Argentina UN Doc. E/C.12/ARG/CO/3, (14 December 2011);; see for example New Zealand UN Doc.E/C.12/NZL/CO/3 3 (31 May 2012) (arts. 1(2), 15) para 11.
7 Colombia UN Doc. E/C.12/COL/CO/5 (7 June 2010) para 9.
8 *ILO Convention 169* Articles 2, 6, 15, 16.
9 *ILO Convention 169* Article 16.
10 Articles 10, 11(2), 19, 28(1), 29(2) and 32(2). The free, prior and informed consent requirement is implicit in article 37 which addresses treaty rights.
11 *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc. E/CN.4/2003/90, (2003)para 66.*
12 SJ Anaya *Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The more Fundamental Issues of what right Indigenous Peoples have in Lands and Resources* 22 Ariz. JI&CL (2005) 17; see also F MacKay *Indigenous Peoples rights and Resource Exploitation* 12(1) Philippines Natural Resources Law Journal (2004) 58.
13 *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, SJ Anaya Addendum UN Doc. A/HRC/9/9/Add.1 15 August 2008 Annex 1 Observaciones del Relator Especial sobre la situación de derechos humanos y las libertades fundamentales de los indígenas acerca del proceso de revisión constitucional en el Ecuador; see also 'Declaración pública del Relator Especial sobre los derechos humanos y libertades fundamentales de los indígenas, James Anaya, sobre la "Ley del derecho a la consulta previa a los pueblos indígenas u originarios reconocido en el Convenio No. 169 de la Organización Internacional de Trabajo" aprobada por el Congreso de la República del Perú' 7 de julio de 2010.
14 Report of the Special Rapporteur on the right to food, Olivier De Schutter *Crisis into opportunity: reinforcing multilateralism* UN Doc. A/HRC/12/31 (21 July 2009) para 21(j). This corresponds to the text of article 32 of the UN Declaration on the Rights of Indigenous Peoples.
15 Statement by the UN Independent Expert on Minority Issues, Ms Gay McDougall, on the conclusion of her official visit to Colombia, 1 to 12 February 2010.
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63 UN Declaration on the Rights of Indigenous Peoples Article 18, 19, 32.
64 Saramaka People v. Suriname Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185 paras 18 and 22.
65 This has been a consistent theme in the recommendations of the ILO Supervisior bodies, CERD and CESCR see also World Bank Operational Policy 4.10; IFC Performance Standard 7 (2012) This has been a consistent theme in the recommendations of the ILO Supervisior bodies, CERD and CESCR see also World Bank Operational Policy 4.10; IFC Performance Standard 7 (2012)
66 UN Doc. A/66/288 (2011) para 89.
67 This position that 'FPIC is a right and not an obligation and it is therefore for Indigenous Peoples to determine whether they will engage in discussions or not' was also affirmed in the Report of the international expert group meeting on extractive industries, Indigenous Peoples' rights and corporate social responsibility E/C.19/2009/CRP. 8 4 May 2009 para 13.
68 The UN Special Rapporteur on the rights of indigenous peoples has suggested that the requirement for good faith consultations imposes an obligation indigenous peoples as well as states to engage in consultations. UN Doc. A/66/288 para 85. However the extent to which this obligation can be met by indigenous peoples will be a function of a range of circumstances which may make it impossible for the community to engage in a good faith consultation. These include power differentials, lack of capacity, consultation fatigue or the fact that decisions may be taken on grounds that there are impacts for which cannot be mitigated against.
69 Examples include recommendations by CERD in the case of Achuar lands in Peru, by the CESCR in the Congo, and by the Special Rapporteur on the rights of indigenous peoples in light of communities' opposition to extractive projects and the absence of legislation to regulate consultations with them.
70 Report of the UN Special Rapporteur on the rights of indigenous peoples (2012) UN Doc. A/HRC/21/47.
71 Report of the UN Special Rapporteur on the rights of indigenous peoples (2009) A/HRC/12/34 para 44; see also Report of the Committee set up to examine the representation alleging non-observance by Guatemala of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Federation of Country and City Workers (FTCC), para. 48.
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Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities, para 15 available at www.cbd.int/doc/publications/akwe-brochure-pdf.

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89 UN Guiding Principles on Business and Human Rights, principle 18.

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93 ibid para 40.

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104 Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework A/HRC/17/31 21 March 2011 para 25.

105 UN Doc. E/C.19/2009/CRP. 8 4 May 2009 para 88, 102.

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107 Striking a Better Balance Volume I The World Bank Group and Extractive Industries The Final Report of the Extractive Industries Review (December 2003) at 46.

108 UN Doc. A/HRC/18/35 para 38.

109 UN Declaration on the Rights of Indigenous Peoples article 30.

110 Different terms are used to capture the notion of community formulated rules around FPIC processes. The terms, policy, protocol and guidelines are among those frequently used. The term protocols has been generally used in this report, however indigenous peoples may decide to call these by more culturally appropriate names.

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118 NCIP Memorandum No. 184, April 27, 2010.

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120 New Alliance Declares Moratorium on Mining Exploration and Resource Development in the Far North: No Means No, text of resolution available at http://kifirstnation.blogspot.fr/2008/04/chief-donny-morris-on-meaning-of-no-ca.html.

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125 See http://kilands.org/2011/11/16/province-will-raise-k-i-s-concerns-with-mining-company/.

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128 Conversation with David Peerla.

129 No Means No: The Kitchenuhmaykoosib Inninuwug and the Fight for Indigenous Resource Sovereignty.

130 Conversation with David Preeta; KI letter to De Beers 2010; Statement of the Peoples of Kitchenuhmaykoosib Inninuwug

131 Statement of the Peoples of Kitchenuhmaykoosib Inninuwug.

132 Other first nations such as the Neskantaga First Nation have also asserted that 'The practical reality is that no project in the Ring of Fire can proceed without First Nation consent' see http://neskantaga.com/.....

133 ABORIGINAL LAW FORUM Merle C. Alexander Partner, First Nations Practice Group January 26, 2010.

134 LANDMARK IBAS & THE PRECEDENTS THEY SET BC Aboriginal Business Association Merle C. Alexander Co-Leader & Partner, Aboriginal Law Group November 16, 2012.

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146 BHP Billiton Sustainability Report (2011) at 20.

147 BHP Billiton SustainabilityFramework, at. 9.

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153 IMining and Indigenous Peoples Issues Roundtable: Continuing a Dialogue between Indigenous Peoples and Mining Companies IUCN-ICMM Dialogue on Mining and Biodiversity Sydney, Australia (Sydney: IUCN-ICMM, 2008)

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157 Business Reference Guide on the UN Declaration on the Rights of Indigenous Peoples (Global Compact, 2013) at 25

158 Martin Rodriguez is the president of the Asociación Rey Quibian – a civic association formed to represent the Ngobe of the area to outsiders, and the leader of his community – Nueva Lucha. He also has the authority and respect in the two other communities of Nueva Sinai and Petaquilla. According to Professor Daviken Studnicki-Gizbert, he and others who visited the area, perceived Martin Rodriguez to be a representative of the people's own choosing based on their conversations with community members. The company on the other hand holds that Martin Rodriguez only represents a minority of families within his community.

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To find out more about the Project Consortium partners go to the following websites:

Indigenous Peoples Links (PIPLinks) – http://www.piplinks.org/

The Ecumenical Council for Corporate Responsibility (ECCR) – http://eccr.org.uk/

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