Notes

The Extraction Industry in Latin America and the Protection of Indigenous Land and Natural Resource Rights: From Consultation Toward Free, Prior, and Informed Consent

KYLAH STALEY[†]

Resource extraction and exploitation threaten the survival of Indigenous and tribal peoples, who are amongst the most marginalized communities in the world. This is both a human rights issue and an environmental issue. There are around 300 million people that make up Indigenous communities worldwide, the majority of whom live in forests. Furthermore, Indigenous customary lands contain 80% of the world's biodiversity. Traditionally, Indigenous communities have been stewards of their lands, where they regard the land as means for their own physical, spiritual, and cultural survival rather than a commodity to be exploited. The only protection Indigenous Peoples have against resource extraction in international law, under the Indigenous and Tribal Peoples (ILO) Convention 169, is the right to consultation and participation. Effectively, Indigenous communities have limited decision-making power in this context. This narrow protection of Indigenous Peoples' lands and natural resources under ILO Convention 169 is inadequate and informed by a colonial past. For there to be adequate protections of Indigenous Peoples' land and resource rights, Indigenous Peoples must hold actual decision-making power, not just participatory power. Free, prior, and informed consent (FPIC) is the principle and right that is critical to safeguarding Indigenous lands and resources as it is grounded in the foundational right of self-determination. Thus, I argue operationalizing FPIC would provide a comprehensive protection of Indigenous rights by ensuring that affected Indigenous communities (1) design the procedures for obtaining their consent (2) retain negotiating power and (3) actually agree to proposed projects.

[†] Kylah Staley, J.D. 2022, University of California, Hastings College of the Law.

TABLE OF CONTENTS

INTRODUCTION

This paper will explore the scope of Indigenous and Tribal Peoples (ILO) Convention 169[1] regarding Indigenous Peoples' right to consultation and free, prior, and informed consent (FPIC). Currently, the Convention is the only binding legal instrument on Indigenous and tribal peoples' rights.[2] Thus, the Convention is of particular importance to Indigenous Peoples who reside in the twenty-three countries (thirteen in Latin-America) that have ratified the Convention and want to seek legal recourse to protect and vindicate their rights.[3] However, with regard to resource extraction, the Convention qualifies Indigenous land rights by prioritizing state sovereignty over natural resources and deliberately leaves Indigenous Peoples with the inferior right to consultation.[4] Because the right to consultation is the international legal ceiling for Indigenous Peoples' rights, Indigenous rights must be expanded so Indigenous communities have real decision-making power with regard to extraction projects that affect their lands.

The right to self-determination is central to realizing Indigenous Peoples' decision-making power because it grants Indigenous Peoples the power to "freely determine their political status and freely pursue their economic, social and cultural development,"[5] which necessarily includes the right to develop and "maintain their ancestral territory . . . within a specific state."[6] Self-determination is thus a "pillar right"—it is the foundation and origin of all other Indigenous rights.[7] The right to free, prior, and informed consent (FPIC), is one of the rights grounded in self-determination,[8] and is a substantive procedural mechanism through which self-determination can be advanced. The primary difference between the right to consultation and the right to FPIC is that consultation focuses on the unilateral act of communicating and informing Indigenous Peoples of an extraction project, and while the affected peoples may *participate* by raising concerns, they cannot *negotiate* how the project is carried out. The right to FPIC, on the other hand, "guarantees community driven consultations and decision-making processes and ensures that [I]ndigenous

1. Hereinafter referred to in this Article as "the Convention."

2. Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 U.N.T.S. 28383 [hereinafter Convention (No. 169)].

3. *Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169*), INT'L LAB. ORG., https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314 (last visited Apr. 20, 2022). (It is important to note that the United States is not a party to the Convention.).

4. Roger Merino, *Law and Politics of Indigenous Self-Determination: The Meaning of the Right to Prior Consultation, in* INDIGENOUS PEOPLES AS SUBJECTS OF INTERNATIONAL Law 120, 130 (Irene Watson ed., 2017).

5. G.A. Res. 61/295, art. 3, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP].

6. Merino, *supra* note 4, at 121; UNDRIP, *supra* note 5, at art. 25.

7. Hum. Rts. Council, Free, Prior and Informed Consent: A Human Rights-Based Approach: Study of the Expert Mechanism on the Rights of Indigenous Peoples, U.N. Doc. A/HRC/39/62, at 3 (2018) [hereinafter FPIC].

8. *Id.*

[P]eoples can effectively determine the outcome of decision-making that affects them."[9]

Despite the benefits the right to FPIC confers on Indigenous Peoples, FPIC has been characterized as a threat to national development[10] because states maintain their permanent sovereignty over natural resources,[11] thus granting them nearly unfettered access to Indigenous lands via subsurface land rights. However, Indigenous Peoples' relationship to their lands cannot be understood in western, capitalistic terms. Traditionally, "land does not represent simply a possession or means of production . . . [nor] is it a commodity that can be appropriated."[12] Indigenous Peoples' relationship with their lands is a "profoundly spiritual relationship" and one that is central to their cultural survival.[13] Due to this relationship, the environmental benefits Indigenous Peoples deliver to their lands should not be understated. When Indigenous Peoples have "clear user rights," they are "more likely to invest in the good management of forests, soil and water."[14]

Extraction projects are particularly fraught for Indigenous communities because they frustrate and disrespect this Indigenous-land relationship and come with "high environmental and social cost[s]."[15] These projects tend to be long term, and leave deep and lasting environmental impacts.[16] For example, oil and gas extraction, spills, and leaks can pollute waterways and degrade ecosystems.[17] Likewise, mining activities yield toxic wastes that contaminate soil and groundwater and contribute to soil erosion.[18] These threats to human health and the environment have been exacerbated in the mining industry as the global demand for minerals and metals used to manufacture smartphones, laptops, and electric storage batteries for electric cars and solar panels has

9. Angus MacInnes, Marcus Colchester & Andrew Whitmore, *Free, Prior, and Informed Consent: How to Rectify the Devastating Consequences of Harmful Mining for Indigenous Peoples'*, 15 PERSP. ECOLOGY & CONSERVATION 152, 155 (2017).

10. *See* Roger Merino, *Reimagining the Nation-State: Indigenous Peoples and the Making of Plurinationalism in Latin America*, 31 LEIDEN J. INT'L L. 773, 784 (2018).

11. *See* G.A. Res. 1803 (XVII), Permanent Sovereignty Over Natural Resources ¶ 1 (Dec. 14, 1962), https://www.ohchr.org/EN/ProfessionalInterest/Pages/NaturalResources.aspx#:~:text=Declares%20that%3A,people%20of%20the%20State%20concerned.

12. Jose R. Martínez Cobo (Special Rapporteur), Subcomm. on Prevention of Discrimination & Prot. of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (Vol. 5), at 39 (1987).

13. *Id.*

14. Hum. Rts. Council, Right to a Healthy Environment: Good Practices, U.N. Doc. A/HRC/43/53, at 17–18 (2020).

15. U.N. ENVIRON. PROG., SUSTAINABILITY REPORTING IN THE MINING SECTOR: CURRENT STATUS AND FUTURE TRENDS 19 (2020).

16. *See* Nathan Yaffe, *Indigenous Consent: A Self Determination Perspective*, 19 MELB. J. INT'L L. 703, 714–15 (2018).

17. *Id.*; *see also* Joseph Zarate, Opinion, *The Amazon was Sick, Now It's Sicker*, N.Y. TIMES (Oct. 2, 2020), https://www.nytimes.com/2020/10/02/opinion/amazon-pollution-oil.html.

18. SUSTAINABILITY REPORTING IN THE MINING SECTOR, *supra* note 15, at 19–20.

increased.[19] In addition, building access roads for both oil extraction and mining projects contributes to deforestation.[20]

Thus far, the primary legal approach Indigenous communities have used to thwart extraction projects has been to invoke the right to consultation.[21] However, this approach is insufficient if the objective is preventing environmental harm and resource exploitation, rather than obtaining damages and restitution.[22] In landmark cases where Indigenous Peoples have invoked the right to consultation and succeeded in gaining it, the environmental damage had already occurred.[23] Thus, there is a need for stronger procedural and substantive protections that Indigenous communities can invoke prior to the destruction of their lands.

In this Note, I will provide a textual analysis of the Convention and how its approach to Indigenous land and resource rights has produced the narrow right to consultation and how the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), by comparison, takes a more holistic conception of Indigenous rights by incorporating the right to consultation, FPIC, and self-determination. I will then discuss how the Convention's consultation requirement and the right to FPIC has been interpreted by the Inter-American Court of Human Rights and other international bodies. This section will also address how the consultation requirement has been implemented in the Latin-American states that have ratified the Convention. Specifically, I will be looking into how Bolivia and Peru have implemented the convention.

Furthermore, I will assess the status of FPIC in the private sector and how the FPIC process is conceived in the context of obtaining a social license to operate, despite its legal unenforceability. Lastly, I propose a FPIC process that is shaped by the principles inherent in the right to self-determination and discuss how it can be implemented to ultimately give Indigenous Peoples control over the development of their land and resources. In this Note, I argue that the interpretation and the implementation of the right to consultation in the extractive industry reinforces western, hegemonic power structures that subordinate Indigenous Peoples, ultimately leaving them with little to no control over the development of their lands and natural resources. For Indigenous

19. John Vidal, *How Developing Countries are Paying a High Price for the Global Mineral Boom*, THE GUARDIAN (Aug. 15, 2015, 6:44 PM), https://www.theguardian.com/global-development/2015/aug/15/developing-countries-high-price-global-mineral-boom; SUSTAINABILITY REPORTING IN THE MINING SECTOR, *supra* note 15, at 19–20.

20. John C. Cannon, *Mining Covers More Than 20% of Indigenous Territory in the Amazon*, MONGABAY (Oct. 9, 2020), https://news.mongabay.com/2020/10/mining-covers-more-than-20-of-indigenous-territory-in-the-amazon ("deforestation rates are as much as three times higher on Indigenous lands with mining compared to those without").

21. Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 ¶ 43–45 (June 27, 2012).

22. Hans Morten Haugen, *Participation and Decision-making in Non-dominant Communities. A Perspective from Civic Republicanism*, 23 INT'L J. ON MINORITY & GROUP RTS. 306, 313 (2016).

23. *Sarayaku*, Inter-Am. Ct. H.R. (ser. C) No. 245 ¶ 43–45; Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 54 ¶ 191 (Sept. 24, 1999).

Peoples to obtain the necessary control over the development of their lands and natural resources, I argue that the right to FPIC offers a procedural and substantive pathway towards the realization of the right to self-determination and that a proper FPIC process should be informed by self-determination. However, since the FPIC process is a natural extension of the consultation process, it is important that consultations are also informed by self-determination to produce meaningful consultations that can ground subsequent FPIC process.

I. ILO CONVENTION NO. 169 & UNDRIP

At the time the Convention was drafted and signed in 1989, it was considered the foremost international legal instrument addressing Indigenous rights;[24] however, a close reading of the text reveals how the Convention is internally contradictory because it recognizes land and resource rights consistent with the right to self-determination but later qualifies them, and ultimately grants Indigenous Peoples a narrow participatory right. The Convention recognizes the "collective character" of Indigenous land and resource rights by identifying how "possessory, use and management rights" are all central to Indigenous Peoples' physical, cultural, and spiritual survival.[25]

Article 7 of the Convention provides that Indigenous Peoples "shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development."[26] Self-determination is implicitly woven into this section.[27] The key phrases in this article—"decide their own priorities" and "exercise control"—recognize Indigenous Peoples' decision-making power. Part II of the Convention, which specifically governs land and resource rights, carries similar expressions of self-determination. Article 13 requires that governments "respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories . . . which they occupy or otherwise use, and in particular the collective aspects of this relationship."[28] Furthermore, Article 15, section 1 explicitly provides that Indigenous Peoples' right to "participate in the use, management and conservation of [natural] resources . . . pertaining to their lands shall be specially safeguarded."[29]

24. James Anaya, *Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, 22 ARIZ. J. INT'L & COMP. L. 7, 9 (2005).

25. *Id.*

26. Convention (No. 169), *supra* note 2, at art. 7.

27. Yaffe, *supra* note 16, at 721.

28. Convention (No. 169), *supra* note 2, at art. 13.

29. *Id.* at art. 15 § 1.

These Articles suggest that Indigenous Peoples have broad decision-making power over the possession, development, management, and use of their lands and the natural resources therein.

Article 15, section 2 is where the Convention undercuts its previous recognition of land and resource rights, as it shifts toward state "ownership of mineral, subsurface resources and other resources pertaining to lands."[30] The language in this section conflicts with the previously mentioned Articles in the Convention and contains the most severe consequences for Indigenous lands. What is left of Indigenous land and resource rights after this section is the right to be consulted through government-established procedures to determine the "degree [to which] their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands."[31]

Article 6 gives some guidance on what the consultation requirement entails by providing that consultations shall be conducted in manner that allows affected Indigenous Peoples to "freely participate . . . at all levels of decision making," and that state governments provide the "means for the full development of these peoples' own institutions and initiatives."[32] This Article only emphasizes participation, and providing means to ensure it, rather than actual decision-making. Furthermore, Article 6 maintains that consultations "shall be carried out in good faith and in a form appropriate to the circumstances with the objective of achieving agreement or consent."[33] Thus, consent makes its appearance as a goal, rather than a requirement.[34]

However, it remains that subsurface resources are categorically exempt from Indigenous Peoples' right to possess, manage, and use natural resources "pertaining to their lands."[35] Instead of safeguarding subsurface resources, Article 15, section 2 grants their exploitation as long as state governments undertake a consultation procedure—one which they get to choose for themselves. Indigenous decision-making power is entirely absent in both the formulation of the consultation procedure and within the procedure itself.

Article 15 is inconsistent with the right to self-determination, as it adopts a democratic, participatory rights approach.[36] Under this approach, the legal mechanisms available for Indigenous Peoples to protect their rights are based on "western standards," where Indigenous Peoples are "accommodated" and

30. *Id.* at art. 15 § 2.

31. *Id.*

32. *Id.* at art. 6 § 1.

33. *Id.* at art. 6 § 2.

34. *Id.*; Article 16 returns to FPIC but maintains that this is only required for instances of relocation. State governments are still able to go through with relocation without consent as long as they allow the affected community to later return, or if return is not possible, they should be provided lands of the same quality of which they were removed. State governments are also required to provide full compensation for any losses or injuries that result from relocation. *Id.* at art. 16.

35. *Id.* at art. 15 § 1.

36. Anaya, *supra* note 24, at 10.

"included" in development decisions by being able to "participate" as an "ethnic minority," rather than as distinct Indigenous nations.[37] This participatory right borders on being a hollow right when taking into account the asymmetric power dynamic between Indigenous communities and state governments that are at least somewhat influenced by the extractive industry. Under this approach, this power imbalance is fueled by principles of liberal democratic participation promising inclusion.[38] At best, state governments would consult Indigenous Peoples prior to undertaking an extraction project, allow for participation in the consultation, and share the benefits of such projects, "wherever possible."[39]

During the drafting of the Convention, Indigenous organizations pointed out that rights to consultation and participation were "inadequate" and emphasized the right "to 'determine' and 'control' their own affairs and that economic and social self-determination should be the basic orientation" of the Convention.[40] However, the ILO Committee of Experts, taking into account various state interests, did not agree that the right to self-determination should appear in its "operative part," and instead be referenced in the Preamble. [41] In the Convention's final version, the Preamble alluded to self-determination in the same way it does later in the aforementioned "General Policy" section Articles. While the aforementioned Articles are contained in the "operative part" of the Convention, their recognition of self-determination is swiftly undercut by Article 15, section 2, thus rendering self-determination inoperative, as was the intention in the Convention's drafting. Instead, consultation and participation are hailed as the "cornerstone" of the Convention.[42] The ILO Committee of Experts has overstated the capacity of participation and consultation to protect Indigenous rights, as Indigenous participation is characterized as an "essential element in ensuring equity and guaranteeing social peace through inclusion and dialogue," and consultation being the "instrument of [that] genuine dialogue."[43] With consultation and participation being the main focus of the Convention, self-determination and FPIC remain in the background as elusive objectives.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (hereinafter referred to as the "Declaration") embodies a more holistic approach to Indigenous rights and was adopted in 2007, with 144

37. Merino, *supra* note 4, at 121.

38. Riccarda Flemmer & Almut Schilling-Vacaflor, *Unfulfilled Promises of the Consultation Approach: The Limits to Effective Indigenous Participation in Bolivia's and Peru's Extractive Industries*, 37 THIRD WORLD Q. 172, 175 (2016); César Rodríguez-Garavito, *Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields*, 18 IND. J. GLOB. LEGAL STUD. 263, 289 (Winter 2010).

39. Convention (No. 169), *supra* note 2, at art. 15 sec. 2.

40. INT'L LAB. ORG. [ILO], *Report VI (2) Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, at 9 (1988), https://www.ilo.org/public/libdoc/ilo/1988/88B09_44_engl.pdf.

41. INT'L LAB. ORG. [ILO], *Report VI (1) Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, at 29 (1988), https://www.ilo.org/public/libdoc/ilo/1987/87B09_172_engl.pdf.

42. INT'L LAB. STANDARDS DEP'T, INDIGENOUS & TRIBAL PEOPLES' RIGHTS IN PRACTICE: A GUIDE TO ILO CONVENTION NO. 169, at 59 (2009).

43. *Id.* at 60.

member states in favor of the Declaration.[44] Self-determination and FPIC are as central to the Declaration as consultation and participation are to the Convention. Throughout the Declaration, there are explicit mentions of self-determination and FPIC.[45] Yet, the Convention continues to be the primary instrument governing international Indigenous rights because the Declaration is effectively non-binding. Practically, the entirety of the Declaration can be seen as a set of goals that states can endeavor to achieve. This non-binding instrument is nonetheless important because of its articulations of self-determination and FPIC regarding Indigenous land and resource rights.

Articles 3 and 4 recognize the broad rights inherent in the right to self-determination. Like the Convention, Article 3 holds that Indigenous Peoples have the right to "pursue their economic, social and cultural development."[46] However, the means by which this right should be exercised is through Indigenous Peoples' right to "self-government in matters relating to their internal and local affairs"—a right firmly grounded in self-determination.[47] While consultation and participation are referred to in the Declaration, they do not serve the same purpose in the Declaration as they do in the Convention. Consultation and participation are positioned as preliminary rights, thus serving as the starting point of the greater FPIC process.[48] FPIC encompasses "three interrelated and cumulative rights of Indigenous [P]eoples: the right to be consulted; the right to participate; and the right to their lands, territories and resources."[49] This is exemplified in Article 32, section 2:

> States shall consult and cooperate in good faith with the [I]ndigenous [P]eoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[50]

The obligation created in this article is clear: without any conditions or exceptions, state governments must first consult and then obtain the affected Indigenous community's consent prior to any extraction project. There is no qualifying language contained in the Declaration's Articles pertaining to land

44. UNDRIP, *supra* note 5; United Nations Declaration on the Rights of Indigenous Peoples, UN, https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html (last visited Apr. 20, 2022).

45. UNDRIP, *supra* note 5.

46. *Id.* at art. 3.

47. *Id.* at art. 4.

48. *See* UNDRIP, *supra* note 5, at art. 38; *see also* ANDY GARGETT, OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS. & ASIA PAC. F. OF NAT'L HUM. RTS. INST., THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A MANUAL FOR HUMAN RIGHTS INSTITUTIONS 34 (2013).

49. Free, Prior and Informed Consent: A Human Rights-Based Approach, *supra* note 7, at 5.

50. UNDRIP, *supra* note 5, at art. 32.

and natural resources.[51] In large part, the Declaration is able to "offer[] a more robust protection to [I]ndigenous [P]eoples from decisions affecting them" because of its soft law characteristics.[52] That is, Indigenous Peoples do not necessarily have the right to invoke the Declaration and the rights contained therein if the state in which their community resides has not codified the Declaration into its national law.

However, the Declaration can capture "the importance of lands and resources to the survival of Indigenous cultures" by upholding the collective nature of Indigenous Peoples' land and resource rights.[53] The Declaration does not seek to separate "land" from "resource" or "resource" from "subsurface resource." Despite its unenforceability, the Declaration remains important because it pushes self-determination and FPIC towards becoming customary principles of international law.

A recent regional environmental agreement, the Escazú Agreement ("Escazú"), has been signed by twenty-four countries in Latin America and the Caribbean, twelve of which have ratified it.[54] Escazú has implications for Indigenous rights, but it does not contain land or resource obligations beyond what the Convention requires.[55] Escazú went into effect on April 22, 2021.[56] Escazú is consistent with the Convention, in that it requires state governments to establish "appropriate spaces for consultation" and allow the public to participate in decision-making on projects that might have a significant effect on the environment.[57] However, Escazú is broadly concerned with "public participation" and makes no explicit mention of Indigenous Peoples. State parties to Escazú still retain full sovereignty over subsurface resources, however they must prepare an environmental impact assessment prior to undertaking an extraction or any project which may have a significant effect on the environment.[58] Like the Convention, Escazú employs a participatory rights approach and does not address the power asymmetries inherent in the relationship between Indigenous Peoples and state governments. Thus,

51. *Id.*

52. José Parra, *The Role of Domestic Courts in International Human Rights Law: The Constitutional Court of Colombia and Free, Prior and Informed Consent*, 23 INT'L J. ON MINORITY & GRP. RTS. 355, 364 (2016).

53. Anaya, *supra* note 24, at 8–9.

54. *Escazu Agreement Takes Effect, Enshrining Right to Sustainable Development*, IISD: SDG KNOWLEDGE HUB (Apr. 26, 2021), https://sdg.iisd.org/news/escazu-agreement-takes-effect-enshrining-right-to-sustainable-development.

55. Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters, Caribbean-Latin-Am., art. 7, Mar. 4, 2018, https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf [hereinafter Regional Agreement].

56. Press Release, Econ. Comm'n for Latin Am. & the Caribbean, Escazú Agreement Enters into Force in Latin America and the Caribbean on International Mother Earth Day (Apr. 22, 2021), https://www.cepal.org/en/pressreleases/escazu-agreement-enters-force-latin-america-and-caribbean-international-mother-earth.

57. Regional Agreement *supra* note 55, at art. 7.

58. *Id.*

consultation remains an "available liberal tool" for Indigenous Peoples to use to the extent they can to protect their lands and resources.[59]

II. INTERPRETATION AND IMPLEMENTATION OF THE RIGHT TO CONSULTATION AND FPIC

A. INTERPRETATIONS FROM THE ILO, UN, AND THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Various international bodies, like the ILO and UN have interpreted what the right to consultation entails and how it should be operationalized to protect Indigenous Peoples' rights to their lands and resources; however, these international entities have no authority to enforce their interpretations on states. The ILO Committee of Experts on the Application of Conventions (CEACR) serves to "guide" state governments to ensure compliance and their observations of state compliance is intended to have "considerable moral force."[60] The CEACR concluded in its general observations that the Convention does not create nor implicitly contain a veto power for affected Indigenous communities.[61] In its 2010 General Observation, the CEACR referred back to the negotiations of Article 15 and reviewed the substantial objections to mandating consent to support this conclusion.[62] Instead, the CEACR focused on the consultation requirement as containing a participatory right and advised that affected communities "participate as early as possible in the process."[63] In a more recent report, the ILO encouraged, but did not mandate the inclusion of Indigenous Peoples in designing consultation procedures.[64] Here, the ILO emphasized the procedural aspect of the right to participate in consultations. Naturally, these interpretations put forth by the ILO remain consistent with the Convention, where consultation, participation, and inclusion are championed as sufficient tools for Indigenous Peoples to use to protect their lands and resources.

---

59. Merino, *supra* note 4, at 134.

60. Int'l Lab. Org. [ILO], *Monitoring Compliance with International Labour Standards: The Key Role of the ILO Committee of Experts on the Application of Conventions and Recommendations*, at 10, 23 (2019), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_730866.pdf.

61. Parra, *supra* note 52, at 367.

62. Int'l Lab. Org. [ILO], *Indigenous and Tribal Peoples: General Observation*, Observation 2010/81, at 5 (2010) ("[O]riginal proposal that had been contained in the proposed Conclusions concerning this provision had included the phrase "seek the consent," which would have required that consent be obtained, it was clear from the first discussion that this phrase was not acceptable to a sufficiently large proportion of the membership and it could therefore not include it in the proposed text being submitted to the Conference for a second discussion.").

63. *Id.* at 8; *see also* James Anaya (Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/12/34, at 22 (July 15, 2009) (In 2009, Special Rapporteur on the rights of indigenous peoples James Anaya stated that "consultations should occur early in the stages of the development or planning of the proposed measure, so that indigenous peoples may genuinely participate in and influence the decision-making.").

64. Int'l Lab. Org. [ILO], *Implementing the ILO Indigenous and Tribal Peoples Convention No. 169: Toward and Inclusive, Sustainable and Just Future*, at 120 (2020).

However, these "liberal tool[s]" stop short of allowing Indigenous Peoples from occupying decision-maker position, and instead promise that they will be able to "influence" the decision-making process.[65]

In 2012, former UN Special Rapporteur on the Rights of Indigenous Peoples, and now Dean of University of Colorado Law School, James Anaya articulated the "[n]eed for an approach that comprehensively takes account of the rights that may be affected by extractive operations."[66] Thus, Anaya found the consultation requirement as more than a "stand alone right" and instead urged that the focus shift toward protecting Indigenous Peoples' substantive rights to land and resources rather than on procedures contained in the right to consultation.[67] Recently, former UN Special Rapporteur Victoria Lucia Tauli-Corpuz echoed this point by explaining that "the starting point for analysing consultation and consent is evaluation of the substantive rights of [I]ndigenous [P]eoples that would be at stake."[68] While the ILO and UN Special Rapportuer interpretations of the right to consultation are useful because these international bodies serve as norm entrepreneurs, their interpretations ultimately have no binding effect.

On the other hand, the Inter-American Court of Human Rights (the "IAC") has offered a binding interpretation of the right to consultation regarding extraction projects that it developed and reaffirmed over the course of deciding two prominent cases. However, the IAC missed an opportunity to develop its jurisprudence on the right to FPIC. In the first case, *Saramaka v. Suriname*, the state government granted mining and logging concessions without consulting the Saramaka community. Like the approach suggested by the UN Special Rapporteurs, the IAC began its analysis by focusing on the substantive right to property under Article 21 of the American Convention on Human Rights.[69] The IAC recognized the distinct relationship the Saramaka peoples share with their lands and the resources therein as part of their "social, ancestral, and spiritual essence."[70]

Because the IAC recognized that land and resources are inextricably linked to the cultural, spiritual, and physical survival of the Saramaka people, it was

65. Merino, *supra* note 4, at 134.

66. James Anaya (Special Rapporteur), Rep. on the Rights of Indigenous Peoples, U.N. Doc. A/HRC/21/47, at 12 (July 6, 2012).

67. *Id.* at 13.

68. Victoria Lucia Tauli-Corpuz (Special Rapporteur), Rep. on the Rights of Indigenous Peoples, U.N. Doc. A/HRC/45/34, at 13 (June 18, 2020).

69. Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 95 (Nov. 28, 2007) (The Saramaka Community could not bring this case under the ILO Convention 169 because Suriname had not ratified the Convention. With the advent of ILO Convention 169 the Court has found the right to consultation implicit in the right to property); *see also* Lillian Aponte Miranda, *Uploading the Local: Assessing the Contemporary Relationship Between Indigenous Peoples' Land Tenure Systems and International Human Rights Law Regarding the Allocation of Traditional Lands and Resources in Latin America*, 10 OR. REV. INT'L L. 419, 439–40 (2009); *see also* Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 ¶ 145 (June 27, 2012).

70. *Saramaka v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 172, at ¶ 82.

unable to fully agree with the government's claim that it had a right to grant mining and logging concessions without consultations.[71] However, the IAC did not go so far as to say that the Saramaka's right to property was absolute either.[72] The IAC fell in between these two positions to hold that the "[s]tate may restrict the Saramakas' right to use and enjoy their traditionally owned lands and natural resources only when it does not deny their survival as a tribal people."[73] The IAC developed a "safeguard test" to determine whether the state had restricted the Saramaka's right to land and resources to such an extent that it denied their survival as a tribal people.[74] Under this "safeguard test" the state must:

> [1] ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan . . . within Saramaka territory . . . [2] guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory . . . [3] ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment.[75]

By not conducting any consultations prior to granting mining and logging concessions, the IAC held that the state failed the safeguard test.[76] In its holding, the IAC also made an important distinction in its analysis of the Saramaka's right to the gold underneath their lands. The Saramaka people claimed that they had a general right to "own everything, from the very top of the trees to the very deepest place that you could go under the ground," even if they did not traditionally use those subsurface resources which laid beneath their lands.[77] In response to this claim, the IAC concluded that even if the Saramakas did not traditionally use the gold underneath their lands, they were still entitled to consultation because the indirect impacts of the mining would "affect other natural resources necessary for the[ir] survival."[78]

On top of the consultation process, which requires that all the safeguard test elements be met "when planning development or investment projects within traditional Saramaka territory," the IAC also held that "major development or investment plans that may have a profound impact on the property rights of the members of the Saramaka people to a large part of their territory . . . additionally

71. *Id.* at ¶ 124.
72. *Id.* at ¶ 127.
73. *Id.* at ¶ 128.
74. *Id.* at ¶ 129.
75. *Id.*
76. *Id.* at ¶ 154.
77. *See id.* at ¶ 155.
78. *Id.*

require the free, prior, and informed consent."[79] However, the IAC did not clarify what it meant by "profound impact." Additionally, the IAC did not distinguish between types of projects that would necessarily "deny" Indigenous Peoples their "survival as a tribal people" that would trigger the consultation requirement and projects that would have such "profound impacts" that would additionally require FPIC.

Following this case, the Inter-American Commission on Human Rights ("IACHR") clarified what the *Saramaka* court meant by a "major development project" that would have a "profound impact" on an Indigenous community's property rights. The IACHR is one of the institutions within the Inter-American System, and like the IAC, serves to protect human rights.[80] The IACHR categorized FPIC as a "heightened safeguard" and identified three situations where FPIC would be mandatory, which included instances that would (1) displace or require the relocation of the community, (2) deprive community members of their lands and natural resources "necessary for their subsistence," and (3) include the storage or disposal of hazardous materials on the community's land.[81] While the instances where FPIC may be triggered are narrow, this interpretation of FPIC goes beyond what is required by the Convention and thus suggests that FPIC is a right that Indigenous communities are entitled to, rather than being a distant promise.[82]

Three years later, the Court came down with *Sarayaku v. Ecuador*, in which the IAC carried forth the same approach and applied the safeguard test to evaluate the adequacy of Ecuador's consultation process, but surprisingly remained silent on FPIC.[83] The Sarayaku people claimed that the state had violated their right to property by not conducting consultations and obtaining their consent prior to authorizing oil exploration.[84] In this case, the "company opened seismic lines, established heliports, destroyed caves, and water sources and subterranean rivers that provided the community's drinking water; cut trees and plants of environmental, cultural and nutritional value to the Sarayaku, and placed powerful explosives on the surface and in the subsoil of the territory."[85] Despite the FPIC claim, the IAC's reliance on Article 6 of the Convention

79. *Id.* at ¶ 137.

80. *What is the IACHR?*, ORG. AM. STS: INTER-AM. COMM'N ON HUM. RTS., https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/what.asp (last visited Apr. 20, 2022).

81. Inter-Am. Comm'n H.R., *Indigenous and Tribal Peoples' Rights Over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc. 56/09 ¶ 334 (2009).

82. It is important to note that these three categories that the Commission outlined also run into other rights enshrined in other international treaties, like the right to life in the American Convention. The advancement of FPIC can be seen as a procedural right that can apply to other substantive human rights, and thus widen the scope of approaches courts can take to advance this procedural right. *See* American Convention on Human Rights: "Pact of San José, Costa Rica" arts. 4, 21, Nov. 11, 1969, 144 U.N.T.S. 17955; *see also Indigenous and Tribal Peoples' Rights Over their Ancestral Lands and Natural Resources*, *supra* note 81, at ¶ 334.

83. *See Sarayaku*, Inter-Am. Ct. H. R. (ser. C) No. 245, at ¶ 156.

84. *Id.* at ¶¶ 2, 172.

85. *Id.*

allowed it to effectively "sidestep"[86] a FPIC analysis and instead turn its focus to and affirm the right to consultation not only as mandated by the Convention, but also a customary principle in international law.[87] The IAC's approach here is crucial. If the IAC had drawn on the IACHR's three categories of when FPIC is mandated, the IAC would have had the opportunity to analyze whether the environmental harm rose to a level that triggered the need for FPIC. Additionally, the IAC's silence here impliedly narrows the application of FPIC and suggests that even when an Indigenous community's water sources and other natural resources are destroyed or threatened, these circumstances are not severe enough to warrant FPIC.

Instead, the IAC decided to clarify Ecuador's obligations under the consultation requirement. Here, the state delegated its consultation obligations to the oil company.[88] The oil company made attempts to consult the Saramaka peoples, which included offering the community money, gifts, or wages for working on the project.[89] Additionally, the company prepared its own environmental impact assessment, which the state approved. The IAC decided not to evaluate the adequacy of these procedures and instead held that Ecuador is not permitted to delegate away its consultation responsibilities.[90] Thus, Ecuador had failed the safeguard test because the consultation mandated by the IAC and in the Convention never occurred, thus rendering the consultation process in this case insufficient.[91]

While both decisions produced favorable outcomes for the Indigenous communities, they remained largely within the bounds of the Convention. Even with the IAC addressing FPIC in the *Saramaka* decision and the IACHR's subsequent clarification of the right, the *Sarayaku* decision completely bypassed any discussion of FPIC. Thus, the jurisprudence that the *Saramaka* decision and the IACHR began to develop on FPIC was halted by the *Sarayaku* decision, leaving the applicability of FPIC unclear, and possibly even narrower than what was intended in the *Saramaka* decision.

However, these cases did produce more tangible and detailed obligations that states must meet to fulfill the consultation requirement. *Sarayaku* made it clear that the consultation requirement cannot be delegated to a private entity and the safeguard test from *Saramaka* gives states a roadmap for properly conducting consultations. These decisions are helpful clarifications of states' consultation duties under the Convention. Yet, by staying within the bounds of

86. Aled Dilwyn Fisher & Maria Lundberg, *Human Rights' Legitimacy in the Face of the Global Ecological Crisis – Indigenous Peoples, Ecological Rights Claims and the Inter-American Human Rights System*, 6 J. HUM. RTS. & ENV'T 177, 193 (2015).

87. *See Sarayaku*, Inter-Am. Ct. H. R. (ser. C) No. 245, at ¶ 165.

88. *Id.* at ¶ 199.

89. *Id.* at ¶ 73.

90. *Id.* at ¶ 199.

91. Convention (No. 169), *supra* note 2, at art. 6 (the Convention explicitly states that "governments shall consult the peoples concerned").

the Convention, the IAC engaged more in gap-filling than expanding Indigenous Peoples' procedural rights. However, the importance of these decisions should not be understated. The IAC's acknowledgement of the spiritual, cultural, and social connections that Indigenous Peoples have to their lands affirms Indigenous methods of development.[92] However, the IAC's missed opportunity to develop a more comprehensive jurisprudence on FPIC weakens its applicability in international law.

B. IMPLEMENTING THE CONSULTATION REQUIREMENT: BOLIVIA AND PERU

Both Bolivia and Peru have ratified the Convention and enacted legislation codifying the consultation requirement in their domestic law. In the wake of the IAC's jurisprudence on this subject, these two states' implementation of the consultation requirement reveals its fundamental inability to function as an adequate safeguard for Indigenous Peoples' right to land and natural resources and to rightly address the oppressive relationship between the state and Indigenous Peoples. Problems with implementing the consultation requirement include the unilateral state framework and authority over consultation procedures and a reciprocal knowledge gap that stifles communication and participation. Within this reciprocal knowledge gap, there is lack of technical knowledge on the Indigenous community's side and a lack of cultural knowledge on the state's side.

In 2005, Bolivia enacted legislation that codified the consultation requirement with its last amendment thereof made in 2014.[93] Adopting the consultation requirement was an important step for Bolivia, which has a sizeable Indigenous population.[94] Implementation procedures, however, have not been carried out in the most meaningful fashion. Before consultations begin, the Ministry of Hydrocarbons and Energy (MHE), which is the state agency that is responsible for carrying out consultations, allows the affected community to submit a proposed consultation plan.

However, due to budget constraints, the agency limits these plans to a large extent.[95] In practice, the agency relies on consultation procedures that it has

92. *See* Miranda, *supra* note 69, at 444 (Inter-American Commission on Human Rights and Inter-American Court of Human Rights have interpreted the right to property, when applied to indigenous peoples' lands and resources, to embody norms of communal, collective occupancy and control as well as of religious and cultural value. Although an in-depth acknowledgement of the peculiarities and nuances of a particular indigenous community's land tenure system may not be reflected in these bodies' final decisions, the identification and recognition of such broadly conceived core, normative precepts nevertheless constitute a step in the right direction.).

93. José Aylwin & Pablo Policzer, *No Going Back: The Impact of ILO Convention on Latin America in Comparative Perspective*, 13 UNIV. OF CALGARY SCH. PUB. POL'Y PUBL'NS 1, 4 (2020).

94. *Indigenous World 2019: Bolivia*, INT'L WORK GRP. FOR INDIGENOUS AFFS. (Apr. 24, 2019), https://www.iwgia.org/en/bolivia/3389-iw2019-bolivia.html (according to Bolivia's 2012 National Census, 41% of the state's population aged 15 and over is of Indigenous origin).

95. Flemmer & Schilling-Vacaflor, *supra* note 38, at 178.

designed itself.[96] This gives the appearance of Indigenous inclusion and influence in the decision-making process, yet the reality is that these procedures are designed by bureaucrats who seek to expedite the consultation process. In addition, Bolivia has manipulated the consultation process by scheduling the consultations very late, where "contracts with the responsible companies had already been signed and the respective project's details had already been established," leaving no space to meaningfully consider the affected community's concerns.[97]

By imposing its own consultation procedures, the state agency is culturally ill-equipped to communicate with affected communities because it is unfamiliar with cultural practices and methods of communication. During one consultation in 2013, the Indigenous communities requested that their elderly community members serve as their official advisors, however the state agency rejected this request because, as a policy matter, it decided that community members with bachelor's degrees would be better suited for such a position.[98] From the state's point of view, this is a practical policy and facilitates better communication between the state and community members who might be able to better understand the complexities of a hydrocarbon project.[99] However, interviews with affected Indigenous communities "show that there is a general discontent with the results of the consultation process . . . because of the limited opportunities the consultation participants have had to co-design the planned projects."[100] Unilateral state control over the consultation procedures also dictates what issues get prioritized in the consultation itself and consequently affects the Indigenous community's ability to defend its interests.[101] While Indigenous communities may raise important concerns about the project's socioenvironmental impacts, the state has the authority to swiftly review and address these concerns and give more weight to the project's technical aspects.[102]

Given the state agency's reluctance to give up unilateral control over consultation procedures, affected communities turn to compensation negotiations to establish a compensation fund to mitigate the project's future impacts to obtain some "tangible results."[103] This reduction of the consultation process undermines the purpose of the consultation procedure. The consultation requirement, as interpreted by the UN Special Rapporteurs and the IAC, is a procedural tool to facilitate dialogue between the state and Indigenous community so that the state understands the community's interests and

96. *Id.* at 177.
97. *Id.* at 180.
98. *Id.* at 177.
99. *Id.* at 180.
100. *Id.* at 181.
101. *See id.* at 179.
102. *Id.*
103. *Id.* at 181.

ultimately protects their substantive land and resource rights.[104] Yet in this case, discussions concerning the community's rights and livelihood are suppressed, leaving little space for intercultural dialogue and diluting the right to consultation initially granted in the Convention.[105] However, Bolivia's methods of carrying out consultations have not gone unnoticed.

Bolivia's consultation process has also been assessed by the CEACR. In 2019, the CEACR conducted an observation of Bolivia and noted that the state was not in compliance with Article 15 of the Convention.[106] Along with Bolivia scheduling the consultations later in the project timeline,[107] the CEACR observed that Bolivia had adopted a policy of limiting consultations to a maximum of three meetings that could not take place over any longer than four months.[108] After its observation, the CEACR highlighted that Bolivia's consultations "must be adapted to the situation of the peoples concerned, ensuring that the communities affected participate as early as possible in the process," so that communities can ultimately influence the outcome of the process.[109] To encourage compliance, the CEACR requested that Bolivia "indicate the manner in which the consultation processes . . . have taken into account the decision-making institutions and procedures of the peoples concerned."[110] Thus, the CEAR has compelled the Bolivian government to consider the extent to which the state has permitted Indigenous decision-making in its consultations. This forces the Bolivian government to confront the fact that it has convoluted the purpose of the consultation requirement.

Peru has faced similar problems with implementing its consultation process. Peru also has a large Indigenous population that "includes more than 4 million [I]ndigenous persons, of whom 83.11% are Quechua, 10.92% Aymara, 1.67% Ashaninka, and 4.31% belong to other Amazonian [I]ndigenous peoples."[111] Additionally, with 75% of the Peruvian Amazon already subject to oil and gas concessions, Indigenous communities who reside in and rely on the Amazon rainforest are profoundly impacted by the extraction industry.[112] Like Bolivia, Peru has employed various methods for streamlining the consultation process in a way that advances its development and economic interests. These methods include imposing state-designed procedures, seemingly arbitrary

104. *See supra* notes 62–65 and accompanying text.

105. *See* Flemmer & Schilling-Vacaflor, *supra* note 38, at 182.

106. INT'L LAB. ORG. [ILO], *Observation (CEACR) - adopted 2019, published 109th ILC session (2021) Indigenous and Tribal Peoples Convention, 1989 (No. 169) - Bolivia (Plurinational State of) (Ratification: 1991)* (2019), http://ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:4023317 (last visited Apr. 20, 2022).

107. *See* Flemmer & Schilling-Vacaflor, *supra* note 38, at 180.

108. *See* ILO, *supra* note 106.

109. *Id.*

110. *Id.*

111. *Indigenous Peoples in Peru*, INT'L WORK GP. FOR INDIGENOUS AFFS., https://www.iwgia.org/en/peru.html (last visited Apr. 20, 2022).

112. *Id.*

consultation scheduling, and limiting contact and communication with the affected communities.

Perupetro, Peru's oil agency that is responsible for carrying out consultations, invites affected communities to partake in the planning of the consultation procedures; however, these plans are almost immediately limited by budget constraints.[113] Again, this tactic serves to provide the illusion of Indigenous participation and decision-making. Furthermore, like Bolivia, Peru has manipulated its consultation process, but has done so by holding the consultations "very early, before any concrete project has been designed."[114] With consultations being held so early in a project's timeline, the affected community might make demands or request measures that might not even apply to the final project or the project might impact the community in a way it could not foresee.[115] Additionally, Perupetro only allows discussions with "few designated [I]ndigenous representatives" and when the agency conducts presentations about the impacts of extractions to the larger community, it does so with faulty translations and technical language, making it difficult for other community participants to understand the impacts.[116]

The implementation of the consultation requirement in Bolivia and Peru demonstrates that the consultation requirement maintains Indigenous marginalization by making the consultation process an "invited space" that is dominated by the state.[117] Thus, in practice, the consultation process is primarily something that *happens to* the affected Indigenous community, where the Indigenous community occupies the position of an "invited participant."[118]

State-imposed procedures end up exacerbating the adversarial relationship between Indigenous communities and the state government because Indigenous communities are expected to conform to the state procedures, but the state does not impose any measures on itself to show the affected community that it respects their interests. Discretionary language in the Convention that merely encourages states to use Indigenous decision-making procedures results in state-dominated consultations. While the objectives contained in the Convention are intended to lessen the burdens of compliance, in lesser developed countries where national development is prioritized like Bolivia and Peru, the goals contained in the Convention end up falling to the wayside. The right to participation being the only enforceable requirement in the consultation process demonstrates how in practice the remaining nonobligatory components of the consultation requirement render it incapable of enforcing its intended purpose. Thus, the participatory right contained in the consultation requirement wantonly

113. *See* Flemmer & Schilling-Vacaflor, *supra* note 38, at 178.
114. *Id.* at 181.
115. *Id.* at 182.
116. *Id.* at 179–80.
117. *Id.* at 182.
118. *Id.* at 177.

holds Indigenous Peoples at arm's length and impairs their ability to be decision-makers, thus perpetuating their subordination and marginalization by the state.

III. FPIC AS A FORM OF CORPORATE SOCIAL RESPONSIBILITY?

While the parties to the Convention are only required to conduct consultations, non-state actors, such as the International Council on Mining and Metals (ICMM), have attempted to adopt FPIC.[119] For mining companies, FPIC is a measure they can take to obtain a "social license to operate" with a social license existing "when a mining project is seen as having the ongoing approval and broad acceptance of society to conduct its activities."[120] However, FPIC has taken on a more liberal meaning for these non-state actors and consequently bears no connection to self-determination.[121] Under this "corporate vision" of FPIC, obtaining FPIC is framed as a "good practice" and leaves discretion and decision-making power with the company.[122] However, under the standards set by the Initiative for Responsible Mining Assurance (IRMA), FPIC is a requirement rather than a "good practice," which indicates that other actors in the mining industry are attempting to strengthen the standards for obtaining a "social license to operate."

Founded in 2001, the ICMM was established to promote sustainability in the mining industry.[123] ICMM members are expected to follow ICMM's Mining Principles, in which the organization outlined good practices in a guide for environmentally conscious and socially responsible mining.[124] Principle 3 expects members to "[r]espect human rights and the interests, cultures, customs and values of employees and communities affected by [mining] activities."[125] Under this principle, members are expected to work to obtain FPIC of Indigenous Peoples where "significant adverse impacts" are "likely to occur."[126] The ICMM asserts that "every ICMM company member adheres to [its] Mining Principles, which incorporates comprehensive environmental, social and governance requirements, robust site-level validation of performance expectations and credible assurance of corporate sustainability."[127] The economic incentive for joining the ICMM is that membership gives companies

119. *See* INT'L FIN. CORP. [IFC], *Performance Standard 7: Indigenous Peoples*, at 3 (2012) (Under its Performance Standards, the IFC has also adopted its own version of FPIC).

120. Jason Prno and D. Scott Slocombe, *Exploring the Origins of 'Social License to Operate' in the Mining Sector: Perspectives from Governance and Sustainability Theories*, 37 RES. POL'Y 346 (2012).

121. Yaffe, *supra* note 16, at 715–17.

122. *Id.* at 725.

123. *About Us*, INT'L COUNCIL ON MINING & METALS, https://www.icmm.com/en-gb/about-us (last visited Apr. 20, 2022).

124. *Member Requirements*, INT'L COUNCIL ON MINING & METALS, https://www.icmm.com/en-gb/about-us/member-requirements (last visited Apr. 20, 2022).

125. *Mining Principles*, INT'L COUNCIL ON MINING & METALS, https://www.icmm.com/mining-principles (last visited Apr. 20, 2022).

126. INT'L COUNCIL ON MINING & METALS [ICMM], GOOD PRACTICE GUIDE: INDIGENOUS PEOPLES AND MINING 28 (2d ed. 2015).

127. *About Us*, *supra* note 123.

the status of operating responsibly, thus bolstering their international reputation. There is also an incentive to secure cooperation from an affected community as a means to ensure a timely and non-interrupted project. However, the ICMM does not require that its members submit reports, nor does it conduct its own monitoring to ensure compliance with the Mining Principles. Despite ICMM's claim that all its members follow the Mining Principles, a closer look at these principles—namely Principle 3—reveals that they are merely objectives that companies are encouraged to achieve, and not enforceable standards.

Principle 3, which sets out "good practices" for obtaining FPIC is an example of how corporate actors have modified the meaning and scope of FPIC to fit within liberal notions of participatory governance. ICMM's approach to FPIC "seeks to respect the rights and interests of Indigenous Peoples . . . while seeking to balance the legitimate interests of all stakeholders, including . . . governments and industry."[128] Under ICMM's meaning of FPIC, Indigenous communities are just one of the "many 'stakeholders'" involved in the development of a mining project.[129] By positioning Indigenous Peoples as fellow stakeholders, their rights and interests become de-centered in actions that will have impacts on their lands and natural resources. The classification of "stakeholder" connotes the right to participate and be included in the decision-making process, but the practice of "balancing" all the stakeholders' interests suggests that each party has the power to defend and negotiate on behalf of its own interests. Thus, this "stakeholder status"[130] obscures Indigenous Peoples' distinct position as a historically marginalized and subordinated group of people. This iteration of FPIC does not support the right to self-determination because Indigenous Peoples are unable to freely decide how to develop their ancestral lands if their interests are outweighed by industry or the state government's interests, which, given the realities of these kinds of cases, seems likely to almost always be the case.[131]

Like the IAC's interpretation, the Guide limits the application of FPIC to instances when a proposed project is likely to have significant adverse impacts.[132] This implies that Indigenous Peoples' right to decide what occurs on their land should only be invoked in severe circumstances, and even in those circumstances, Indigenous decision-making power is hamstrung by corporate and state actors. However, the Guide also encourages practices intended to reduce tension and hostility between mining companies and Indigenous communities, such as using a "trusted intermediary" to help facilitate

128. GOOD PRACTICE GUIDE: INDIGENOUS PEOPLES AND MINING, *supra* note 126, at 25.

129. Yaffe, *supra* note 16, at 726 (2018).

130. *Id.* at 727.

131. *See id.* at 726; GOOD PRACTICE GUIDE: INDIGENOUS PEOPLES AND MINING, *supra* note 126, at 25.

132. GOOD PRACTICE GUIDE: INDIGENOUS PEOPLES AND MINING, *supra* note 126, at 28, 85 ("An impact of significance is not any impact; "significant" means important, notable or of consequence, having regard to its context or intensity. Similarly, "adverse" means a harm or detriment that cannot be easily remedied; it is something more than a temporary inconvenience or disruption and cannot be fully mitigated.").

meetings.[133] While such measures are useful to creating a more cordial environment, none of the measures mentioned in the Guide include communicating or obtaining consent for actions that are just shy of "significantly adverse."[134] While this limitation on FPIC is consistent with the Convention[135] and the IAC's jurisprudence,[136] as a corporate actor, the ICMM is free to set more ambitious goals for its members but it has not done so.

The ICMM has further limited the scope of FPIC by retaining much of the control over the procedures for obtaining consent. The Guide encourages companies to use Indigenous communities' "traditional decision-making structures as much as possible."[137] Given that this Guide serves to provide "good practices" and to enforce requirements, it is not surprising to see the qualifying language "as much as possible," whereby the company can implement this measure at its discretion. The Guide does recognize the "power imbalances" between companies and Indigenous communities,[138] but does not provide adequate measures for addressing the power imbalances it identifies. Under the Guide's "practical steps" to facilitate effective negotiations, it suggests "agreeing on the negotiation process and procedures through a memorandum."[139] This is where positioning Indigenous Peoples as stakeholders is also unfitting. This "practical step" would be fitting for two stakeholders where there is presumably equal bargaining power, however, in this context, Indigenous communities likely do not have the means to negotiate for their own decision-making procedures. Additionally, the Guide maintains that "a party is not required to continue negotiations where it believes agreement will not be possible" and "in cases where agreement cannot be achieved . . . it will be up to the companies to decide whether they should remain involved in the project."[140] Thus, the onus of negotiation is implicitly shifted onto the Indigenous community because, realistically, the company does not stand to lose anything if consent is not obtained. If the Indigenous community were to want to design its own procedures for the FPIC process, the company would essentially have to sign off on the decision; the community cannot unilaterally make this decision. However, past communities have attempted to thwart projects through collective action and protests, which can stall projects.[141]

Throughout the Guide, ICMM explicitly acknowledges the asymmetric power dynamic between Indigenous communities and companies, as well as Indigenous Peoples' "special relationship to land, territories and resources on

133. *Id.* at 62.
134. *Id.* at 85.
135. *See supra* note 34 and accompanying text.
136. *See supra* note 76 and accompanying text.
137. GOOD PRACTICE GUIDE: INDIGENOUS PEOPLES AND MINING, *supra* note 126, at 61.
138. *Id.* at 82.
139. *Id.* at 83.
140. *Id.* at 83, 86.
141. *See Waorani People Win Landmark Legal Victory Against Ecuadorian Government*, AMAZON FRONTLINES (Apr. 26, 2019), https://www.amazonfrontlines.org/chronicles/waorani-victory.

which companies want to explore and mine."[142] Thus, the Guide is presented as a "toolkit" for companies to address power imbalances, resolve problems that arise between companies and Indigenous communities, and ultimately obtain FPIC.[143] Yet, these "tools" are not adapted to properly address the power asymmetries between Indigenous communities and companies. Instead, these "tools," with their "practical steps," are intended to produce outcomes that companies can memorialize on a page, thus demonstrating the performative aspect of this kind of FPIC approach. Under this "corporate vision" of FPIC, principles inherent in the right to self-determination are absent and the FPIC process is reduced to a socially responsible "formality."[144] Overall, this voluntary FPIC approach brings us back to the baseline of consultation because the ICMM has not actually set FPIC as a standard with which companies are required to comply.

The Initiative for Responsible Mining Assurance (IRMA), founded in 2006, offers a different corporate social responsibility scheme for mining—one that is informed by self-determination. This multi-stakeholder organization offers "independent third-party verification and certification against a comprehensive standard for all mined materials."[145] An independent auditor will score a mine site with the highest possible score being 100 points. If a mine site receives a score below 50 then it will not be certified.[146] IRMA only certifies the mine sites, but companies in the jewelry or electronics industry can become members by making a commitment to only source metals from IRMA-certified mines.[147] Under this mine-certification scheme, IRMA requires that new mine sites obtain FPIC to become certified.[148] In its "Policy Commitment," IRMA requires that operating companies publicly commit to the rights of Indigenous Peoples enshrined in UNDRIP.[149] Additionally, while ICMM's "good practices"

142. GOOD PRACTICE GUIDE: INDIGENOUS PEOPLES AND MINING, *supra* note 126, at 10.

143. *Id.* at 51.

144. Lisbet Christoffersen, *Contextualizing Consent: Spaces for Repression, Resistance, and Accommodation in Bolivia's TIPNIS Consultation*, LATIN AM. & CARIBBEAN ETHNIC STUD. 1, 4 (2020) ("Rather than an iterative process of dialogue, FPIC has turned into a formality . . . .").

145. *About Us*, INITIATIVE FOR RESPONSIBLE MINING ASSURANCE, https://responsiblemining.net/about/about-us (last visited Apr. 20, 2022); *see also Certification*, INITIATIVE FOR RESPONSIBLE MINING ASSURANCE, https://responsiblemining.net/what-we-do/certification (last visited Apr. 20, 2022); *About Us*, FOREST STEWARDSHIP COUNCIL, https://fsc.org/en/about-us (last visited Apr. 20, 2022) (the Forest Stewardship Council employs a similar certification scheme for forests).

146. Ryan Stuart, *In a World that Needs Metals, How Can We Mine More Responsibly?*, THE NARWHAL (Oct. 6, 2020), https://thenarwhal.ca/responsible-mining-deer-horn-irma.

147. *Business*, INITIATIVE FOR RESPONSIBLE MINING ASSURANCE, https://responsiblemining.net/what-you-can-do/businesses [https://web.archive.org/web/20210123005403/https://responsiblemining.net/what-you-can-do/businesses/] (last visited Apr. 20, 2022); *see also Members/Partners*, INITIATIVE FOR RESPONSIBLE MINING ASSURANCE, https://responsiblemining.net/about/members-partners [https://web.archive.org/web/20200513035716/https://responsiblemining.net/what-you-can-do/businesses/] (last visited Apr. 20, 2022).

148. INITIATIVE FOR RESPONSIBLE MINING ASSURANCE, IRMA STANDARD FOR RESPONSIBLE MINING IRMA-STD-001 20 (2018).

149. *Id.* at 26.

establish a discretionary approach to FPIC, IRMA instills enforceable requirements and is focused on accountability and transparency.

Unlike the ICMM Guide, IRMA's standard does not restrict FPIC to instances in which there are "significant adverse impacts, but instead maintains that FPIC is triggered in "situations where mining-related activities may affect [I]ndigenous [P]eoples' rights or interests."[150] By making FPIC applicable to a wider range of situations, IRMA's standard opens more opportunities for intercultural dialogue. As for the FPIC procedures, if an affected Indigenous community has an "FPIC protocol in place or under development, the operating company shall abide by it" and if no such protocol exists, the company must cooperate with the Indigenous community to establish a FPIC process.[151] IRMA's FPIC process is informed by self-determination because Indigenous communities are able to freely design and decide the procedures for obtaining their consent. Decision-making power is specifically granted to the affected Indigenous community and required if the company is seeking mine certification. Thus, IRMA has gone beyond consultation and set a higher standard for engaging with Indigenous Peoples.

While IRMA has set seemingly sufficient standards for companies to comply with, the shortcoming of this scheme is in its popularity. Currently, no mine sites have been certified under IRMA's standards.[152] However, with the popularity of other certification schemes like the Forest Stewardship Council and the Marine Stewardship Council, and as consumers push for more environmentally sustainable and ethical products, "sustainable certification could become increasingly important in securing financing."[153] Deer Horn, a mining company, is currently undergoing an audit for one of its proposed mine sites and has publicly announced its commitment to UNDRIP and obtaining the First Nations Peoples' FPIC.[154] Thus, while this IRMA may not be as popular as other organizations employing similar certification schemes, it is certainly a norm entrepreneur in this context and has potential to gain more traction as metals for electronic devices and renewable energy increase in demand.

IV. SOLUTIONS

The right to consultation and the dominant corporate interpretation of FPIC are structurally ill-equipped mechanisms for protecting Indigenous Peoples' right to their lands and natural resources. The common thread in both

150. *Id.* at 51.

151. *Id.* at 52.

152. *IRMA Engagement Map*, INITIATIVE FOR RESPONSIBLE MINING ASSURANCE, https://map.responsiblemining.net (last visited Apr. 20, 2022).

153. Nelson Bennett, *Does Mining Need Good Housekeeping Seal of Approval?*, BUS. IN VANCOUVER (Sept. 23, 2020), https://biv.com/article/2020/09/does-mining-need-good-housekeeping-seal-approval.

154. *Irma Engagement Map: Mining Site: Deer Horn Gold-Silver-Tellurium Mine (Proposed)*, INITIATIVE FOR RESPONSIBLE MINING ASSURANCE, https://map.responsiblemining.net/site/87 (last visited Apr. 20, 2022); Bennett, *supra* note 153.

mechanisms is that the right to self-determination is absent, yet it is "the recognition of . . . 'self-determination' that has been central to [Indigenous Peoples'] demands at the international level."[155] The right to consultation, as originally set out in the Convention, was not intended to bear any connection to the right to self-determination and notions of Indigenous decision-making, but instead to the right of participation and inclusion.[156] Unsurprisingly, in its implementation, the right to consultation compels affected Indigenous communities to participate in the consultation process in a manner that best suits the state and consequently the extraction industry. Even the IAC's ruling on FPIC has framed FPIC as a heightened safeguard that is only available when there are extreme impacts, essentially rendering FPIC an unworkable standard that can seldom be invoked. Additionally, corporate actors in the mining industry, like the ICMM, purport to engage in the FPIC process, yet deploy similar participatory measures seen in the consultation process in which the company retains all the decision-making authority and can grant some of that authority to the affected Indigenous community at its discretion. Given that the current interpretations of FPIC are removed from the right to self-determination, I propose a FPIC process that is informed by self-determination and that could be used by Indigenous Peoples to protect their lands and natural resources.

Such a FPIC process would first grant affected Indigenous communities the authority to decide and design the procedures for obtaining their consent, and second would contain the right to withhold consent. Due to FPIC being the natural extension of the consultation process, this FPIC approach would also require states to abide by consultation procedures set by the affected Indigenous community. This would mean that the state and operating company would be required to follow a consultation and FPIC protocol that has been specifically created for and by the affected Indigenous community.

Indigenous communities in Colombia have produced FPIC protocols that contain appropriate measures for engagement. The Resguardo communities occupy ancestral territory in Colombia that has a long history of gold mining, Indigenous repression, and violence.[157] Due to this fraught history between mining companies and the Resguardo communities, under their FPIC protocol they specified that "any external oversight of their decision-making processes is considered disrespectful of the communities' autonomy," thus excluding state and company representatives from influencing the consultation and consent procedures.[158] This FPIC protocol allows the communities to develop procedures and make decisions without the possibility of manipulation from the state or the company.[159] While this FPIC protocol was established in 2012, it has

155. Merino, *supra* note 4, at 126.

156. *See* discussion *supra* Part II.

157. CATHAL DOYLE & JILL CARIÑO, MAKING FREE PRIOR & INFORMED CONSENT A REALITY: INDIGENOUS PEOPLES AND THE EXTRACTIVE SECTOR 26 (2013).

158. *Id.* at 28.

159. *Id.*

not yet been applied to mining projects but nevertheless demonstrates that Indigenous communities can and have made demands for how they want the state and companies to engage with them.

The Indigenous communities in Peru have not developed their own FPIC protocols but have provided some alternatives for the state's consultation procedures. The Indigenous communities requested that the state agency responsible for carrying out consultations be one that specializes in Indigenous issues and employs indigenous persons, rather than the state's oil agency.[160] Additionally, the communities expressed their discontent toward the unilateral design of consultation procedures and the state's reluctance to identify any instances in which FPIC might be triggered.[161] While the Resguardo's FPIC protocol contains more uncompromising demands, both communities represented here have pushed for designing their own consultation and FPIC procedures, underscoring the importance of adopting such a measure in a FPIC process. Giving affected Indigenous communities the authority to design their own FPIC protocol could promote intercultural dialogue and respect between the state and the affected community. If a state were to adopt this measure, it would be compelled to engage with the affected community in a culturally appropriate manner. Consequently, the state would be addressing the cultural knowledge gap between itself and the community. Adopting this procedure would eliminate the discretionary authority that state governments have under the Convention, which merely encourages them to use the affected community's traditional decision-making procedures.

As for the second prong of my FPIC proposal, withholding consent would mean that the affected community could "withhold consent temporarily because of deficiencies in the process."[162] While there has been debate as to whether FPIC contains a veto right, these arguments "tend to detract from and undermine the legitimacy of the [FPIC] concept."[163] FPIC as containing a veto right is the most "progressive"[164] interpretation of FPIC; however, opposing arguments shift the focus away from FPIC as a valuable mechanism for protecting Indigenous Peoples' substantive rights to land and natural resources, and onto FPIC as a threat to state sovereignty over natural resources. Instead, withholding consent would practically mean that the affected Indigenous community could delay the proposed project until the state is willing to engage in meaningful negotiations. In these types of engagements in which affected Indigenous communities' objections to a certain course of action might not affect the

160. Almut Schilling-Vacaflor & Riccarda Flemmer, *Conflict Transformation Through Prior Consultation? Lessons from Peru*, 47 J. LATIN AM. STUD. 811, 828 (2015).

161. *Id.*

162. FPIC, *supra* note 7, at 8.

163. *Id.*

164. Parra, *supra* note 52, at 367.

ultimate decision, "withholding consent can . . . communicate legitimate distrust in the consultation process or national initiative."[165]

This FPIC process gets closer to operationalizing the right to self-determination by transforming state and Indigenous engagements from a space where Indigenous communities were "invited" into a space that Indigenous communities can "claim" and control themselves.[166] Within this "claimed space,"[167] Indigenous communities set the terms of engagement. Granting Indigenous communities the authority to design the FPIC procedures and withhold consent does not amount to the denial of state sovereignty,[168] but instead acknowledges the historically distinct position Indigenous Peoples hold with their settler states and their historic lands. FPIC recognizes Indigenous Peoples as nations themselves, rather than ethnic minorities that can be included and accommodated under the "dominant nation."[169] Thus, FPIC in this form pushes against states' own development interests and provides space for Indigenous Peoples to offer alternative development methods.

CONCLUSION

The consultation requirement, born out of ILO Convention 169, has led to procedural box checking and empty promises. This liberal participatory rights approach to Indigenous land and resource rights, even in its broadest interpretation, is unable to account for the longstanding marginalization and subordination of Indigenous Peoples. The fundamental problem with this approach is that it disregards how the western property regime, which separates land from its natural resources, is a colonial vestige that can be used by states to justify the exploitation of natural resources and simultaneously promote the "internal colonization" of Indigenous communities.[170]

FPIC, on the other hand, confronts this problem by giving Indigenous Peoples the decision-making power that is necessary for their interests to stand up against state interests. FPIC, which contains the right to withhold consent but not necessarily a veto right, properly distributes power to the state, extractive companies, and Indigenous communities. This formulation of FPIC would allow affected Indigenous communities to withhold consent as a means to come to a genuine agreement and effectively force state governments to communicate and negotiate with their Indigenous communities in a meaningful way. Since this type of FPIC process has yet to take hold in both domestic and international law, it raises the question of how it should enter the legal arena. It might be that corporate actors, like IRMA, will be pressured to shoulder the responsibility of

165. FPIC, *supra* note 7, at 8.
166. Flemmer & Schilling-Vacaflor, *supra* note 38, at 177.
167. *Id.*
168. Merino, *supra* note 4, at 127.
169. *Id.*
170. Merino, *supra* note 10, at 775.

implementing a meaningful FPIC procedure as developing countries tend to take the position that protecting Indigenous land and resource rights to a heightened degree places an undue burden on their national development.