

ASI Indigenous Peoples Advisory Forum (IPAF)

FACT SHEET 2

Indigenous Peoples' Free Prior and Informed Consent (FPIC)¹

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<http://aluminium-stewardship.org/wp-content/uploads/2017/04/Mining-the-Aluminium-Industry-and-Indigenous-Peoples-Nov2015.pdf>

Overview

The right of indigenous peoples to give or withhold free, prior, and informed consent (“FPIC”) to activities impacting on their lands, territories and resources is one of the core internationally recognized safeguards for ensuring respect for their collective territorial, self-governance and cultural rights. This Factsheet provides an overview of the requirement for FPIC addressing: i) its human rights bases; ii) the content of the requirement including what it is, how and when it is to be sought, and whose consent is required; iii) its interrelationship with other requirements aimed at safeguarding indigenous peoples’ rights; iv) its relevance to the corporate responsibility to respect indigenous peoples’ rights; and, v) its role in risk mitigation for corporations and as a platform for building long-term rights-based partnerships with indigenous peoples.

Over the course of its 100-year history the aluminium industry and the numerous large-scale dams and mines which supply bauxite and energy for aluminium smelters have adversely impacted on indigenous peoples’ enjoyment of their rights. The location of much of the world’s remaining bauxite resources in or near indigenous peoples’ territories points to the growing importance for the aluminium industry of ensuring that engagements with indigenous peoples are respectful of their rights. Meaningful implementation of the principle of FPIC, which indigenous peoples and human rights law have affirmed as a core rights-based safeguard for indigenous peoples’ continued survival and development, is therefore of particular importance to environmental, social and economic sustainability in the aluminium industry and to the integrity of the Aluminium Stewardship Initiative (ASI).

(i) What is the rights basis for the requirement to obtain indigenous peoples’ FPIC?

The international framework of indigenous peoples’ rights is the product of over 30 years of negotiation, analysis and reflection by indigenous peoples, States and human rights experts and

¹ Author Dr Cathal M Doyle, Research Fellow at Middlesex University. The factsheet draws extensively from the following publications: Doyle C (2015) *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (London: Routledge) & Doyle C & J Carino (2013) “Making Free Prior and Informed Consent a Reality: Indigenous Peoples and the Extractive Sector” (London: Middlesex University, PIPLinks, ECCR)

advocates. Its clearest articulation is found in the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The collective and individual rights which are recognized in the UNDRIP are consistent with the jurisprudence of the human rights treaty bodies overseeing the implementation of the major international and regional human rights treaties. These collective rights of indigenous peoples, recognized under international human rights law, can be broadly classified into three categories of rights: self-governance rights (to self-determination, to autonomy, to participation and to self-determined development, to maintain and develop their own institutions and to exist as distinct peoples), territorial rights (to lands, territories and resources, to property and to customary land tenure regimes, to a healthy environment) and cultural rights (to identity, to customary practices and traditions and spiritual beliefs / religions, and to maintain and protect sacred places).

The associated right of indigenous peoples to give or withhold FPIC is derived from, and is necessary for the realization of, these cultural, territorial and self-governance rights. The requirement to obtain indigenous peoples' FPIC is essentially a corollary of their right, as peoples, to self-determination, which includes the right to freely determine their social, economic and cultural development. In other words, FPIC aims to protect their self-determined social, cultural and economic development as well as their particular relationship with their lands, territories and natural resources. The requirement for FPIC is further reinforced by: a) the necessity of guaranteeing indigenous peoples' cultural and physical survival; b) ensuring the maintenance of their historical identities in the context of externally proposed extractive projects, and c) to cater to their particular historical contexts.²

The requirement to obtain FPIC, along with recognition of the right to self-determination (article 3 of the UNDRIP), forms the skeletal frame of the UNDRIP. The requirement for FPIC is explicitly linked with self-governance rights (article 19) development, territorial and land rights (articles 10, 28, 29, 32) and cultural rights (article 11). The UNDRIP affirms the State duty to "consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their FPIC" "before adopting and implementing legislative or administrative measures that may affect them" (article 19) and "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" (article 32) (emphasis added).

The requirement to seek and obtain indigenous peoples' FPIC is either explicitly affirmed, or clearly implied, in a range of other international instruments and standards.³ Human rights treaty and charter bodies have affirmed that the requirement for FPIC is implied in all major international human rights covenants and treaties, being a derivative of their provisions addressing self-determination, non-discrimination, cultural and property rights. The focus of these bodies on ensuring respect for FPIC has increased significantly following the adoption of the UNDRIP in 2007.

ILO Convention 169 (C169) recognizes indigenous peoples' collective land and participation rights and affirms that whenever these rights are impacted, consultations must be held which have "the objective of achieving ... consent".⁴ These consultations must be undertaken "in good faith and in a form appropriate to the circumstances".⁵ C169 also 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

² Experts Mechanism on the Rights of Indigenous Peoples (2011) A/HRC/18/42, para. 22; CERD General Recommendation XXIII

³ ILO Convention 169, CBD Article 8j, Nagoya Protocol, IFC Performance Standards

⁴ ILO Convention 169 Articles 6, 7 and 15

⁵ ILO Convention 169 Article 6

and informed consent.”⁶ Any deviations from this requirement must be under exceptional circumstances, and subject to formal inquiries involving indigenous representation.

A growing body of recognized good practice industry standards and policies has also afforded explicit recognition to the requirement for FPIC since 2007. Most notable among these for its influence on extractive, energy and financial sector actors was the 2012 incorporation of the FPIC requirement into the safeguards of the World Bank’s private sector arm, the International Finance Corporation (IFC). This was then incorporated by reference into the policies of the private sector Equator Principles for Financial Institutions in 2014. Under Performance Standard 7, IFC clients are required to obtain FPIC for design, implementation and expected outcomes stages for projects: impacting on land or natural resources subject to traditional ownership or under customary use; requiring relocation of communities; or significantly impacting on critical cultural heritage of indigenous peoples.⁷

At the national level, a number of States have incorporated the requirement for FPIC into legislation. In other States judicial rulings of national or regional courts have clarified that the requirement for FPIC should be assumed to apply in the context of large-scale extractive or energy projects. Similarly, multi-stakeholder initiatives focused on dams and mining have concluded that FPIC is necessary to ensure respect for indigenous peoples’ rights. The evolving perspectives of some mining companies and the International Council on Mining and Metals (ICMM) and the emergence of multi-stakeholder initiatives such as the Initiative for Responsible Mining Assurance (IRMA) suggest a growing understanding of this rights-basis of the requirement for FPIC among key industry actors. Likewise, in the agri-business sector there has been significant uptake of FPIC. The requirement is incorporated into the FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (FAO-VGGT), a United Nations led standard applicable to agricultural sector. It is also required under multi-stakeholder initiatives such as the Roundtable on Sustainable Palm Oil,⁸ the Forest Stewardship Council as well as in the policies all of the major food and beverage companies. A number of commentators suggest that a tipping point has been reached in terms of recognition of the requirement for FPIC as the standard to be adhered to by all parties in their engagement with indigenous peoples, and the focus now must shift towards its implementation. The following section will look at the content of FPIC, briefly addressing the related “what”, “when”, “how” and “who” questions that frequently arise when the requirement is being implemented.

(ii) Content of the FPIC requirement

a. What is FPIC?

Given the diversity of indigenous peoples’ histories and contemporary realities, as well as their broad range of institutions and decision-making practices, a one-size-fits-all formulation of FPIC is not possible. However, indigenous peoples throughout the world regard FPIC as a principle and manifestation of their control as to the future development of their territories.⁹ All indigenous peoples must therefore be in a position to define for themselves what FPIC processes should look like, based on their own particular circumstances, rights and needs. As has been elaborated on by UN bodies

⁶ ILO Convention 169 Article 16

⁷ IFC Performance Standard No 7 (2012) paras 13-7

⁸ M Colchester “Free Prior and Informed Consent and the Roundtable on Sustainable Palm Oil: A guide for companies”

(Moreton in Marsh: Forest Peoples Programme) available at

[http://www.rspo.org/sites/default/files/FPIC%20and%20Oil%20Palm%20Plantations%20-%20A%20Guide%20for%20Companies%20\(Oct%2008\).pdf](http://www.rspo.org/sites/default/files/FPIC%20and%20Oil%20Palm%20Plantations%20-%20A%20Guide%20for%20Companies%20(Oct%2008).pdf)

⁹ Doyle C & J Carino (2013) *supra*

addressing indigenous peoples' rights, there are nevertheless a number of overarching principles which are embodied in the four component parts of the requirement for FPIC.¹⁰

- “Free” implies consent is sought in the absence of any actual or perceived coercion, intimidation or manipulation and indigenous peoples can determine the format of the consultations. Free also reflects the fact that participating in consultations aimed at obtaining their FPIC is a self-determination right of indigenous peoples, rather than an obligation which they must meet.¹¹
- “Prior” implies consent is sought sufficiently in advance of any decisions or actions which may impact on indigenous peoples' enjoyment of their rights and that indigenous peoples have the time they need to make their decisions in accordance with their own processes and through their own freely chosen representatives and institutions;
- “Informed” implies that there is full disclosure of all the information indigenous peoples need in order to meaningfully assess the potential risks and benefits of the project (including its location, duration, scope, impacts, benefits and/or partnership models). This information has to be provided in a format understandable to, and through a process agreed by, the concerned indigenous peoples. This may involve participation in, or indigenous conduct of, impact assessments, access to funding for independent technical and legal advice, and negotiations in relation to benefits.
- “Consent” implies respect by all parties, irrespective of the outcome, for the freely taken informed autonomous decision of indigenous peoples. This decision should be the outcome of good faith rights-based consultations and cooperation with the concerned indigenous peoples. It should be taken by them in accordance with procedures and timeframes of their own choosing and be premised on indigenous rights based principles of self-determination, inclusivity, consensus, harmony and intergenerational well-being.

Where consent is provided, the associated conditions, agreed with the concerned indigenous peoples, should be formalized in a legally binding document, which, in addition to addressing potential impacts and mitigation measures, benefits sharing or partnership arrangements and rehabilitation plans, also addresses the monitoring and grievance mechanisms and sanctions applicable in the event of environmental or human rights harms. Where consent is withheld the decision of the indigenous peoples should be respected. Any conditions (for example in relation to timeframes, scope and process) stipulated by the concerned indigenous peoples in relation to the conduct (or non-conduct) of future consultations should also be respected. FPIC therefore mandates respect for indigenous peoples' rights to be informed and consulted in a timely and culturally appropriate manner and to determine under what conditions, if any, projects are allowed to proceed within their territories. This includes the right to accept, conditionally accept, or reject a particular proposal¹² as well as guarantees that these outcomes are respected and effectively implemented.

¹⁰ The implications of its four component parts Free, Prior, Informed and Consent have been addressed at a high level by UN bodies such as the UN Permanent Forum on Indigenous Issues and a former standard setting body, the UN Working Group on Indigenous Populations.

¹¹ 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

¹² Doyle C & J Carino (2013) supra

b. When is FPIC required? – trigger mechanisms and culturally appropriate timing

There are two dimensions to the question of when consent should be sought, both of which are embodied in the “prior” component of FPIC. One relates to the trigger mechanisms for FPIC, and the sequencing of when it is sought, and the other relates to the time necessary for consultation and decision-making practices. Human rights standards and jurisprudence provide clear guidance in relation to both questions. ILO Convention 169, the UNDRIP and the jurisprudence of international and regional human rights bodies, affirm that the requirement to seek and obtain consent is triggered prior to the issuance of concessions or entering into agreements which impact on indigenous peoples’ rights and throughout the lifecycle of projects at key decision-making phases.¹³ Engagement with indigenous peoples must occur early in the project planning phase, with FPIC sought prior to taking project related decisions which impact on their rights. It is subsequently required during key phases of project implementation, up to and including project closure. This is both to ensure that the “prior” component of FPIC is respected, and also to ensure that the good-faith relationship that should underpin an effective FPIC process is initiated as soon as possible, and trust and a working relationship can be established or begin to be built.

In the context of mining projects, triggers would include concession issuance, commencement of exploration, exploitation and project closure activities, or any other activities which affect indigenous peoples’ enjoyment of their rights.¹⁴ For dam projects, consultations in order to obtain consent are also required prior to concession issuance or contractual agreements and again prior to major decisions impacting on indigenous peoples’ rights such as project design and implementation, and dam closure and rehabilitation.¹⁵ The second dimension of the “When” question relates to respect for indigenous peoples’ decision-making timeframes and realities. It requires that sufficient time is provided for these traditional processes and that consultations are scheduled in accordance with the wishes of indigenous peoples and avoid infringing on their socio-economic activities.

There are rights based, as well as pragmatic, reasons for this requirement. From a rights-based perspective if indigenous peoples are to determine their social, cultural and economic development in accordance with their right to self-determination they must be involved in decision-making in relation to their territories from the outset, and not after plans or measures impacting on those territories have already been agreed by corporations and States. Similarly, as self-determination is an on-going right, they must be actively involved in the decision-making process throughout the project lifecycle.

From a technical point of view FPIC cannot be obtained for an activity for which there is insufficient information regarding potential impacts, benefits and risks available or where information is not provided in a language and form which is fully understood by the affected communities. In most project

¹³ Saramaka People v. Suriname, Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations, and Costs) Inter-Am. Ct. H.R., (Ser. C) No. 172 (2007) para 79; ILO Convention 169 Articles 6 and 15; UN Declaration Articles 19 and 32; CERD and CESCR affirming that FPIC must be sought and obtained in a manner consistent with ILO Convention 169. UN Special Rapporteur on the rights of indigenous peoples A/HRC/12/34 (2009) para 54

¹⁴ International Labour Organization Convention 169 (1989) article 6 and article 15; Directive C/DIR.3/05/09 Abuja 26-27 May 2009 Sixty Second Session of Council of Ministers Chapter V Human Rights Obligations and Mining Activities article 16; Saramaka People v. Suriname, Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations, and Costs) Inter-Am. Ct. H.R., (Ser. C) No. 172 (2007), para 137; CESCR Cambodia UN Doc. E/C.12/KHM/CO/1, (22 May 2009) para 16; and UN Doc. CERD/C/COL/CO/14, (28 August 2009) para 20

¹⁵ See report of the World Commission on Dams and Relator Especial sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas, S. James Anaya Observaciones sobre la situación de la Comunidad Charco la Pava y otras comunidades afectadas por el Proyecto Hidroeléctrico Chan 75 (Panamá) 12 de mayo de 2009

phases, information pertinent to a particular activity or stage generally flows from the activities which precede it. A phased approach to obtaining consent at each decision-making point is therefore inherent in the notion of informed consent. In other words FPIC has to be an on-going process if the consent that is provided is to be fully informed.

The implication is that FPIC processes are tailored to the information that is available at a particular point in time and the potential impacts associated with the decision. An initial consultation with indigenous peoples should ask if they would “in principle” be willing to consider a project in their territories.¹⁶ At this initial stage detailed information and prolonged consultations may not be available or necessary. A refusal to consider such a project avoids the need for further consultations, thereby saving expense and minimizing inconvenience for all, while acceptance would be an agreement to enter into consent seeking consultations about a project, rather than to the project itself. Subsequent consultations would relate to decisions which have legal or practical implications for communities and involve the provision of technical information pertaining to a particular activity.

In addition to these rights-based and technical arguments there are clear business drivers for obtaining informed consent at the earliest stage possible, and maintaining it throughout the project lifecycle. These drivers apply both in cases where consent may be forthcoming or withheld. In the former, by seeking consent at an early stage strong relationships can be built with the community and misunderstandings avoided. Likewise seeking consent at the planning stage avoids scenarios where potentially significant investment losses are incurred because projects are stalled or halted at later stages. Discussions need to take place between indigenous peoples, corporations and States with regard to the precise points at which consent is to be obtained, as well as the process through which it should be obtained. These discussions should also address the manner in which corporations should respect this obligation to obtain FPIC in contexts where States fail to respect the requirement.

Finally, given their exceptional vulnerability, no projects should proceed where the rights or territories of indigenous peoples who are in voluntary isolation or initial contact may potentially be impacted. In such contexts their voluntary isolation should be understood as an exercise of their right to self-determination and a manifestation that FPIC to projects in their territories has been withheld.

c. Who is to be consulted? – indigenous determination of who provides consent

The requirement for FPIC is triggered by any proposed activities in, or affecting, indigenous territories or their self-determination and cultural rights.¹⁷ This applies irrespective of the existence of State issued titles over those territories or State recognition of indigenous peoples or their rights.¹⁸ A single project or project activity may affect multiple indigenous peoples or indigenous communities. Given its rights-basis, in such contexts, the requirement for FPIC is triggered for all indigenous peoples, or communities, whose rights may be impacted, including, for example, downstream communities in cases of water pollution.¹⁹

¹⁶ This is the approach used by the Northern Territory Land Council in Australia in the implementation of the Aboriginal Land Rights (Northern Territories) Act (1976) see M Rumler “Free, prior and informed consent: a review of free, prior and informed consent in Australia” (Oxfam Australia, 2011) at 11

¹⁷ Report of the UN Special Rapporteur on the rights of indigenous peoples (2012) UN Doc. A/HRC/21/47

¹⁸ Report of the UN Special Rapporteur on the rights of indigenous peoples (2009) A/HRC/12/34 para 44. See Fact Sheet on Identification of Indigenous Peoples for further discussion.

¹⁹ Constitutional Court of Colombia Sentencia T-769/09 (Referencia: expediente T-2315944) 29 de Octubre (2009)

FPIC must be obtained through indigenous peoples' institutions or representatives chosen by indigenous peoples themselves in accordance with their own procedures.²⁰ They have the right to maintain and develop their institutions or to create new representative structures.²¹ The determination of who is consulted and provides FPIC is to be made by indigenous peoples themselves and not by State or corporate actors.²² The processes should respect the rights of indigenous women who should be empowered to participate in consultations and decision-making. Communities must be free to institute their own mechanisms to address any issues around the lack of women's participation through internal procedures in a culturally appropriate manner.

d. How to consult? - format of consultations and consent seeking processes

Indigenous peoples view FPIC as a self-determination-based principle which provides for their control over the future development of their territories. One important manifestation of this control is the definition and management of FPIC processes by indigenous authorities and communities whose territories and futures are impacted by proposed projects. Where indigenous peoples have produced their own external facing consultation and FPIC procedures, guidelines, or policies these should be respected by third party.²³ In cases where indigenous peoples chose to work with companies or other third parties to develop consultation procedures, companies should respect and defer to proposals made by indigenous peoples.²⁴ Whenever possible these consensus based consultation procedures should be agreed with indigenous peoples before companies enter into agreements with States in relation to proposed extractive projects.²⁵ Culturally appropriate consultation procedures aimed at obtaining FPIC must be in a format that is appropriate for the circumstances and ensure:²⁶

- a) sufficient time is available to indigenous peoples to conduct their decision-making and consensus building processes in conformity with their 'own social and cultural traditions';²⁷
- b) respect indigenous peoples' customary laws, practices and traditions;
- c) consistency with and respect for indigenous peoples collective rights;²⁸

²⁰ UN Declaration on the Rights of Indigenous Peoples Article 18, 19, 32

²¹ UN Doc. A/66/288 (2011) para 89

²² *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; This has been a consistent theme in the recommendations of the ILO Supervisory bodies, CERD and CESCR see also World Bank Operational Policy 4.10; IFC Performance Standard 7 (2012)

²³ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to The Convention On Biological Diversity. Nagoya, 29 October 2010 C.N.782.2010.TREATIES-1 (Depositary Notification).

²⁴ UN Doc. A/HRC/21/47 (2012) para 67. See also Representation (article 24) – GUATEMALA – C169 – 2007 – 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) Submitted:2005 Document:(GB.294/17/1) para. 53.

²⁵ UN Doc. A/66/288 (2011) para 88

²⁶ Operational Policy 4.10 Annex 1 para 2(c)

²⁷ Representation (article 24) – Colombia – C169 – 2001 – -- -- Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT) Description:(Article 24 Representation) Convention: C169 Country:(Colombia) Submitted:1999 Document:(GB.276/17/1) Document:(GB.282/14/3).

²⁸ CERD Concluding Observation to the Philippines UN Doc. CERD/C/PHL/CO/20 (23 September 2009)

- d) information is in a format and language that is accessible to, and understandable by, the peoples in question;
- e) that proposed activities do not result in the creation of divisions within communities by facilitating exhaustive internal discussions among community members.

If indigenous peoples decide not to proceed with an FPIC process, or to call a halt to an-going FPIC process, this should be recognized as the absence of consent to proceed with the proposed activities and respected as such. Where FPIC is withheld, indigenous communities are entitled to determine when any further consent seeking consultations may proceed.

Indigenous peoples have a right to technical and financial support in the operationalization of FPIC processes.²⁹ This assistance is often necessary in order for meaningful consent seeking consultations to be conducted in good faith and for the imbalance of power between indigenous peoples and entities seeking their consent to be addressed. However, such assistance, aimed at empowering indigenous peoples in informed consent processes and associated negotiations, cannot be used as leverage to influence their positions.³⁰

(iii) What is the relationship of FPIC with other safeguards?

In addition to the requirement for FPIC, international human rights law has identified three interrelated requirements which are necessary preconditions for the protection and respect of indigenous peoples' rights in the context of large scale development projects: i) participatory social, environmental, cultural, spiritual, economic and human rights impact assessments; ii) negotiated agreements ensuring equitable benefit sharing and risk prevention and mitigation; and iii) establishment of credible and effective oversight and grievance mechanisms which guarantee access to remedy.³¹

In order to provide their informed consent, indigenous peoples need to be aware of any potential impacts the proposed project plans or activities may have on their lands, territories and resources and their self-governance, cultural and individual rights. The nature of social, cultural, spiritual, and of certain economic and environmental, impacts is context specific and can only be assessed through a particular cultural lens or worldview. For this reason, international human rights and environmental standards requires effective and inclusive indigenous participation in the conduct of assessments spanning social, cultural, spiritual, environmental, gender, human rights and economic considerations. This also applies to the determination of the extent of the actual impact area, which may be dependent on cultural or spiritual significance of areas to groups that reside outside of the physical impact area. The form of participation should be determined by and agreed with the concerned indigenous peoples. It may range from determining what assessments are required and how and by whom they will be conducted and reviewed, to the conduct of aspects of the assessments by indigenous peoples themselves free from outside interference and with the provision of adequate financial resources. In the conduct of assessments, indigenous peoples should be free to engage experts of their own choosing.

²⁹ UN Declaration on the Rights of Indigenous Peoples articles 4 and 39.

³⁰ UN Doc. A/HRC/12/34 para 51.

³¹ *Saramaka People v. Suriname*, Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations, and Costs) Inter-Am. Ct. H.R., (Ser. C) No. 172 (2007) paras 129-140.

Indigenous peoples have a right to fair and equitable benefits from projects which use land and resources located in their territories. This applies over and above compensation which is necessary to address any infringement of their rights arising from foreseen or unforeseen harms caused by project activities.³² This right to fair and equitable benefits from the exploitation of their lands and resources applies irrespective of State claims to ownership over subsoil resources.³³ FPIC is the mechanism through which indigenous peoples can negotiate benefit-sharing arrangements and enter into agreements that best suit them. Where consent is forthcoming, the outcome of FPIC processes should be a binding mutually acceptable agreement detailing the benefit sharing arrangements and associated terms and conditions. These agreements should also include the measures to prevent or mitigate impacts and limit community exposure to human rights harms including through participatory monitoring, oversight and rights-based grievance mechanisms to detect and provide effective remedy for such harms when they occur. This agreement should include a time-bound and adequately resourced implementation plan, developed with the indigenous peoples concerned, spanning the entire project lifecycle from the design through to the post mine or dam closure and rehabilitation stage.

In order to safeguard indigenous peoples' rights, effective oversight mechanisms have to be in place which can address any failures to meet agreed commitments, problems with consultation or consent processes, or any human rights harms that arise as a result of project activities. The primary responsibility rests with the State to ensure that such mechanisms exist. According to the UN Guiding Principles on Business and Human Rights, where companies cause or contribute to an adverse human rights impact their "responsibility to respect human rights requires active engagement in remediation, by itself or in cooperation with other actors".³⁴ To this end companies are expected to "establish or participate in effective operational-level grievance mechanisms" to be administered either by the company, potentially in conjunction with others, or by a "mutually acceptable external expert or body". Such mechanisms should not "preclude access to judicial or other non-judicial grievance mechanisms" or "negatively impact opportunities for complainants to seek recourse through State-based mechanisms".³⁵ In order to ensure respect for indigenous peoples' rights and to guarantee culturally appropriate rights-based and gender-sensitive grievance handling procedures and structures, operational level grievance mechanisms must be developed in cooperation with indigenous peoples and be based on obtaining their FPIC. The role of customary law and the use of, or interface with, existing traditional dispute mechanisms must also be considered as part of this design process. Finally, remedies that are offered must be acceptable to indigenous peoples.

(iv) What is the corporate responsibility in relation to FPIC?

The UN Guiding Principles on Business and Human Rights affirm that corporations have a responsibility to respect human rights independently of the State compliance with its duty to protect those rights. A core component of this responsibility is to conduct human rights due diligence. This necessitates the identification of indigenous peoples and any potential impacts on their rights prior to decision-making

³² ILO Convention 169 article 15; World Bank Operational Policy 4.10 Annex A para 2(e)

³³ ILO C169 Article 15

³⁴ UN Guiding Principles on Business and Human Rights UN Doc A/HRC/17/31 principle 22

³⁵ UN Framework on Business and Human Rights UN Doc. A/HRC/8/5 para 95.

in relation to plans or activities potentially impacting on them.³⁶ The responsibility includes the requirement to consult with indigenous peoples in order to obtain their FPIC.³⁷

The incorporation of the requirement for FPIC into the IFC 2012 Performance Standards, and by extension the standards of the Equator Banks, is reflective of the reality that the requirement for FPIC applies irrespective of national legislation and should be triggered by any project which may impact on indigenous peoples' rights.³⁸ Just as companies need to understand the national legislative frameworks in the jurisdictions where they seek to do business, companies should similarly understand how to engage with indigenous communities in order to seek their consent in accordance with the communities' laws and procedures.

United Nations bodies, including those dedicated to indigenous peoples' rights, as well as United Nations bodies addressing the issue of business and human rights, have developed guidance targeted at corporate actors explaining their responsibilities in relation to the requirement for FPIC. The UN Special Rapporteur on the rights of indigenous peoples has explained that FPIC seeking consultations should be component of corporate due diligence, while the Norwegian OECD National Contact Point (NCP) has explained that corporations should respect for the outcome of consultations with indigenous peoples, which must be conducted in a form appropriate to the circumstances and involve all potentially impacted indigenous groups.³⁹ The NCP provided detailed guidance in relation to FPIC and noted the need for due diligence to address the 'entire project impact area, including associated infrastructure'.⁴⁰

Human rights guidance explicitly recommends that corporate adherence with the provisions of ILO Convention 169 and the UNDRIP should not be a function of State ratification or support for these instruments.⁴¹ The sovereign power of States is conditional on respect for human rights, including respect for indigenous peoples' rights, and therefore, where those rights are impacted the State does not have a right to override FPIC decisions.⁴² Companies should therefore not invoke State sovereignty or national development arguments as a justification for activities which do not respect indigenous peoples' rights. Instead there should be genuine corporate acknowledgment of, and respect for, the right of indigenous peoples to define their own development paths. This requires that companies "promote the full assumption by Governments" of their duties to protect indigenous peoples' rights and not "accept any award or commence any activity if the State has failed to hold prior and adequate consultations with the indigenous communities concerned."⁴³

Companies must therefore guarantee that FPIC has been obtained in contexts where it is required under international standards, and these same international standards "may require companies to abstain from operations in certain countries where the appropriate consultation framework is not in place".⁴⁴ This has implications for the negotiation and implementation of any investment agreements or contracts which could place limitations on indigenous peoples' rights over their territories. It would

³⁶ UN Doc. A/66/288 (2011) para 95

³⁷ UN Doc. A/66/288 (2011) para 99

³⁸ A/HRC/15/37 para 30

³⁹ Final Statement Complaint from the Future In Our Hands (FIOH) against Intex Resources ASA and the Mindoro Nickel Project The Norwegian National Contact Point for the OECD Guidelines for Multinational Enterprises (Oslo, OECD, 2011) at 10

⁴⁰ *ibid*

⁴¹ UN Doc A/HRC/15/37 para 47

⁴² UN Doc. A/66/288 para 95

⁴³ UN Doc. A/HRC/15/37 para 65, 66

⁴⁴ *ibid*

be contrary to the corporate responsibility to respect human rights if compensation were required for corporations under international investment arbitration in contexts where States sought to uphold indigenous peoples' rights, including their right to give or withhold FPIC to project activities.

(v) Role of FPIC in risk mitigation and a transition to a partnership based approach

The adoption of the UNDRIP followed over 20 years of indigenous peoples' negotiations with States and was indicative of the lobbying and advocacy power of the global indigenous peoples' movement. The central role for FPIC in the realization of self-determination, cultural and territorial rights, and the obligation it imposes on the private sector, was emphasized in the statement of Global Indigenous Caucus following the adoption of the UNDRIP which held that:

Indigenous Peoples' right to self-determination is about our right to freely determine our political status and freely pursue our economic, social and cultural development. It also includes our right to freely manage our natural wealth and resources for mutual benefit, and our right to maintain and protect our own means of subsistence. 'Free, prior and informed consent' is what we demand as part of self-determination and non-discrimination from governments, multinationals and private sector.⁴⁵

Indigenous peoples throughout the world are now proactively using the UNDRIP as the framework for engagement with all actors who seek to access resources located in their territories. A growing number of indigenous communities being empowered to assert their rights and the expectation that corporations will respect those rights and obtain their FPIC is becoming increasingly widespread. The corresponding risks associated with the failure to obtain FPIC, and the associated lack of social licence to operate, are evident. Numerous large-scale projects have been halted or delayed for extended periods due to indigenous protests, and indigenous advocacy is leading to challenges to the legality of concessions and their potential revocation. Financial risks are also associated with the failure to meet the FPIC criteria of a growing number of private and public financial institutions. Similarly, corporations which do not engage with FPIC may potentially be regarded as complicit in State violations of indigenous peoples' rights.

Engaging in good faith consultations in order to obtain FPIC provides a mechanism through which corporations can avoid the material, legal and reputational risks they will otherwise face in this era of global networks, rapid communications and increased rights-holder empowerment and mobilization.

Ultimately, FPIC provides the platform that is necessary for constructive engagements with indigenous peoples in a manner consistent with the corporate responsibility to respect their human rights.⁴⁶ In so doing, it also offers the only practical long-term approach to the pursuit of extractive and energy projects in or near indigenous peoples' territories for all actors in the Aluminium sector. As a framework within which indigenous peoples' effective participation in impact assessments is ensured, and the power imbalances inherent in negotiations can be addressed, FPIC processes are a foundation for conditions facilitative of rights-based partnerships models with indigenous peoples.

As noted by the UN Special Rapporteur on the rights of indigenous peoples this partnership approach should extend beyond direct financial benefits and include "the option of participating in the management of the extractive projects, in addition to whatever regulatory control they may exercise,

⁴⁵ Statement by the Chairman, Global Indigenous Caucus, Les Malezer, 13 September 2007 on the adoption of the UN Declaration on the Rights of Indigenous Peoples

⁴⁶ Doyle (2015) supra

in keeping with their right to self-determination". Furthermore, the Special Rapporteur noted, and encouraged, developments along the line of FPIC based agreements

in which indigenous peoples are guaranteed a percentage of profits from the extractive operation or other income stream and are provided means of participation in certain management decisions. In some cases the indigenous people concerned is provided a minority ownership interest in the extractive operation, and through that interest is able to participate in management decisions and profits from the project.⁴⁷

Indeed, given that FPIC is the minimum standard for partnership with indigenous peoples and that new models of indigenous peoples' participation in the extractive sector are also required in cases where indigenous peoples are willing to engage resource extraction, the Special Rapporteur has pointed out that:

In contrast to the prevailing model in which natural resource extraction within indigenous territories is under the control of and primarily for the benefit of others, indigenous peoples in some cases are establishing and implementing their own enterprises to extract and develop natural resources. This alternative of indigenous-controlled resource extraction, by its very nature, is more conducive to the exercise of indigenous peoples' rights to self-determination, lands and resources, culturally appropriate development and related rights, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples and other international sources of authority.⁴⁸

Therefore, while FPIC is a necessary condition for rights-respecting engagements with indigenous peoples, to be meaningful it needs to be understood and operationalized within the broader framework of indigenous peoples' self-determination rights. This implies that FPIC be respected as a safeguard to protect those rights where indigenous peoples wish to pursue alternative non resource extraction development paths, and as an enabler for new partnerships with extractive industry actors where indigenous peoples are interested in participating in natural resource extraction.

⁴⁷ Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya UN Doc A/HRC/24/41, 2013 para 76-7

⁴⁸ Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya UN Doc A/HRC/24/41, 2013 para 8

Further Reading on Free Prior Informed Consent (FPIC)

Doyle C & J Carino (2014) "Making Free Prior and Informed Consent a Reality: Indigenous Peoples and the Extractive Sector" (London: Middlesex University, ECCR, PIPLinks)

<http://www.socialimpactassessment.com/documents/Consortium+FPIC+report+-+May+2103+-+web+version.pdf>

GIZ & the National Commission on Indigenous Peoples (2013) "An assessment of the implementation of the Free and Prior Informed Consent (FPIC) in the Philippines" Volumes 1 & 2:

<http://www.ncip.gov.ph/images/pdf/Assessment%20of%20FPIC%20in%20the%20Philippines%20-%20Volume%20I.pdf> &

<http://www.ncip.gov.ph/images/pdf/Assessment%20of%20FPIC%20in%20the%20Philippines%20-%20Volume%20II.pdf>

AIPP (2014) "Training Manual for Indigenous Peoples on Free and Prior Informed Consent (FPIC)":

<http://www.aippnet.org/index.php/publication-sp-2697/environment/manuals/1495-training-manual-for-indigenous-peoples-on-free-prior-and-informed-consent-fpic>

AIPP (2012) "Hydropower Development and Right to Free, Prior and Informed Consent (FPIC) of Indigenous Peoples - Case Studies from Nepal and Northeast India":

<http://www.aippnet.org/index.php/publication-sp-2697/environment/case-studies/1062-hydropower-development-and-right-to-free-prior-and-informed-consent-fpic-of-indigenous-peoples-case-studies-from-nepal-and-northeast-india>

FAO (2014) "Respecting free, prior and informed consent, Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition":

<http://www.fao.org/3/a-i3496e.pdf>

Doyle C (2015) "Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent" (London: Routledge)

S.J. Rombouts (2014) "Having a Say: Indigenous Peoples, International Law and Free, Prior and Informed Consent" (Oosterwijk: Wolf Legal Publishers Law series)