Indigenous Peoples and the Extractive Sector

TOWARDS A RIGHTS-RESPECTING ENGAGEMENT

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Towards a Rights-Respecting Engagement

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Abbreviations

AIPNEE	Asian Indigenous Peoples' Network on Extractives and Energy
AMV	Africa Mining Vision
C169	ILO Convention No. 169
CAER	Corporate Analysis Enhanced Responsibility
CAT	Committee Against Torture
CBD	Convention on Biological Diversity
CCS	Carbon Capture and Storage
CEDAW	Committee on the Elimination of Discrimination Against Women
CERD	Committee for the Elimination of all Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CO2	Carbon Dioxide
CONNEX	Strengthening Assistance for Complex Contract Negotiations
COP	Communication on Progress
CRC	Committee on the Rights of the Child
CSR	Corporate Social Responsibility
ECOSOC	(United Nations) Economic and Social Council
ECOWAS	Economic Community Of West African States
EITI	Extractive Industries Transparency Initiative
EMRIP	(United Nations) Expert Mechanism on the Rights of Indigenous Peoples
EROI	Energy Return On Investment
EY	Ernst & Young LLP (renamed to EY)
FPIC	Free, Prior and Informed Consent
GDP	Gross Domestic Product
GtC	Gigatons of carbon

HLPR	High Level Panel Report
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMM	International Council on Mining and Metals
IEA	International Energy Agency
IFC	(World Bank's) International Finance Corporation
IFI	International Financial Institution
ILO	International Labor Organization
IMF	International Monetary Fund
IPCC	Intergovernmental Panel on Climate Change
IPEIN	Indigenous Peoples' Extractive Industry Network
IPIECA	International Petroleum Industry Environmental Conservation Association
IPRA	Indigenous Peoples Rights Act
IRMA	Initiative for Responsible Mining Assurance
ISA	International Seabed Authority
ISO	International Organization for Standardization
IUCN	International Union for the Conservation of Nature
MDGs	(United Nations) Millennium Development Goals
NCP	National Contact Point (of the OECD Guidelines for Multinational Enterprises)
NGO	Non-Governmental Organization
OECD	Organization for Economic Co-operation and Development
OHCHR	(United Nations) Office of the High Commissioner for Human Rights
OPEC	Organization of the Petroleum Exporting Countries
OWG	Open Working Group
PDAC	Prospectors and Developers Association of Canada
PS7	Performance Standard No. 7
PwC	PricewaterhouseCoopers
RJC	Responsible Jewellery Council

SDGs	(United Nations) Sustainable Development Goals
SDSN	Sustainable Development Solutions Network
TSX	Toronto Stock Exchange
UK	United Kingdom
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
UNPFII	United Nations Permanent Forum on Indigenous Issues
UPR	(United Nations) Universal Periodic Review
US/USA	United States of America

Glossary and Table of Boxes

Glossary

Acid mine drainage	The outflow of acidic water from mines (aka acid rock drainage).
Coalbed methane	A form of natural gas extracted from coalbeds (aka coalbed gas or coal seam gas).
Conventional oil	Crude oil that collects in reservoirs and is extracted from vertical, or near vertical, drilling.
Deep sea mining	See seabed mining.
Energy Return On Investment	The amount of energy you need to expend in order to extract from a particular energy source.
Fracking	Hydraulic fracturing is the propagation of fractures in a rock layer, as a result of the action of a pressurized fluid (aka hydraulic fracturing).
Gigaton	A unit of measurement where 1 Gigaton is equivalent to 1 billion tons.
Indigenous peoples	Given the diversity of indigenous peoples, and the dynamic nature of their cultures, there is no signal agreed definition capable of capturing the concept of indigenous peoples. A working definition has been developed by the UN identifying certain characteristics of indigenous peoples. However, not all of the other characteristics are regarded as mandatory. The principle of self-identification is, however, recognized as a fundamental criterion in the identification of indigenous peoples.[1]
Local community	A group of people living near a project who are potentially impacted by that project.
Seabed mining	An emerging technology, which involves extracting submerged minerals and resources from the sea floor (aka deep sea mining, which may also refer to a subset of the mining conducted in deep, as opposed to coastal waters).

Shale gas	A natural gas that is found trapped within shale formations.
Tar sands	A thick, dense type of oil, often referred to as bitumen, that is mixed with sand, clay and water, and extracted by mining (aka oil sands or bituminous sands).
Tight oil (shale oil)	Crude oil that is found in shale or other rocks where it is tightly held in place and does not flow easily (aka shale oil).
Unconventional fossil fuels	Oil or gas that cannot be produced or extracted using conventional drilling.

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Foreword

It is an incontestable fact that the extractive sector has had devastating impacts on indigenous peoples. These impacts commenced with the process of colonization and continue to the present day. Despite this, the sector's legacy has not yet been acknowledged or addressed by States and the industry. As a result, the contemporary extractive industry model continues to be premised on the rights-denying assumptions, which facilitated its historical encroachment into indigenous territories. This is reflected in the ongoing serious violations of indigenous peoples' rights, which are associated with the sector throughout the world. For an ever-growing number of indigenous peoples the sector conjures up images of displaced communities, despoiled lands, desecrated sacred sites, depleted resources and destruction of livelihoods. These historical and ongoing impacts underpin the widespread and sustained resistance of indigenous communities to extractive industry projects and their high degree of skepticism in relation to industry promises of responsible behavior.

The adoption of the UN Declaration on the Rights of Indigenous Peoples by the General Assembly in 2007 established the universal minimum standards to be respected by all parties in order to guarantee the cultural and physical survival of indigenous peoples. If implemented in good faith, this rights-based framework has the potential to deliver the much needed transformation of the existing extractive industry model. This central role of the Declaration in the context of extractive industries' engagement with indigenous peoples has therefore been the focus of considerable attention by the human rights regime. Illustrative of this is the fact that the former Special Rapporteur on the rights of indigenous peoples, James Anaya, adopted the issue of extractive industry

and indigenous peoples as the central thematic focus of his mandate. Among his important observations was that extractive projects are "one of the foremost concerns of indigenous peoples worldwide," being possibly "the most pervasive source of the challenges to the full exercise of their rights." Given this reality, it is not surprising that the issue of extractive industry impacts on indigenous peoples is also increasingly the focus of the major UN treaty bodies and other international, regional and national oversight mechanisms. However, as pointed out in the report, despite the provision by these bodies of clear policy and legal guidance to both States and corporate actors, the extractive sector continues to be an area where major obstacles remain to the realization of indigenous peoples' rights.

A range of factors, which are identified in the report, contribute to this unacceptable situation. Among these are the lack of understanding by States and extractive industry corporations of the content of international standards in relation to indigenous peoples' rights; the lack of implementation by States of the decisions of national and international bodies upholding indigenous peoples' rights in the context of the extractive sector; and the ongoing failure of extractive corporations to fully comply with their obligation to respect indigenous peoples' rights. I would like to briefly highlight two of the obstacles to rights realization which the report addresses, and which I regard as core issues meriting immediate attention by the international community, in particular those States within which indigenous peoples reside and the home States of extractive industry companies. The first is the absence of a broad-based good faith participatory process aimed at addressing the serious legacy and ongoing issues associated with the sector. The second is the failure to ensure indigenous peoples' full and effective participation during strategic resource-use planning and in the negotiation of trade and investment agreements or contracts pertaining to extractive industry activities in their territories.

Given this context, I commend the report's strong emphasis on the importance of operationalizing free, prior and informed consent (FPIC) in accordance with indigenous peoples' right to self-determination, as well as its attention to

the need for effective participatory oversight and regulation of the extractive sector. These are fundamental elements of any serious effort to tackle the obstacles which the sector poses to the realization of indigenous peoples' rights. They must be recognized, promoted and facilitated by States, extractive companies, and financial institutions as well by all initiatives aimed at addressing governance issues pertaining to the extractive sector.

Finally, the report sheds light on an extremely important topic which is of particular interest to me in my current role as Special Rapporteur, namely, the relevance of the realization of indigenous peoples' rights to the pursuit of sustainable development. Ensuring indigenous peoples' rights are recognized, and that they exercise effective control over their territories, has potentially profound implications for realizing a sustainable future of all members of the global society. This is particularly true in the context of limiting the environmental harms and climate change effects caused by ever expanding and pervasive extractive industry projects in indigenous territories. In this regard, it is important not to underestimate the role which indigenous rights realization can play in establishing an enabling environment that facilitates the emergence of alternative sustainable economic models.

For these and other reasons this report is particularly timely. Its recommendations merit serious and considered attention by States, the UN System and all actors involved in the implementation of the 2014 World Conference on Indigenous Peoples outcome document. They should also prompt a genuine reflection on, and acknowledgement of, the importance of ensuring respect for indigenous peoples' rights in the ongoing negotiations around the Post-2015 Sustainable Development Goals and Agenda. Lastly, but by no means least, the report is a valuable contribution towards promoting effective indigenous participation in, and rights-based outcomes of, all UN and extractive industry initiated or facilitated processes aimed at addressing corporate obligations to respect human rights.

Ultimately, it is rights-holders themselves who effect genuine change and indigenous peoples will have to continue to be creative and persistent in their assertion of their rights in the

context of extractive industry activities. Enormous sacrifices will no doubt unfortunately remain the norm in many contexts where indigenous communities are faced with unwanted rights-denying extractive projects. However, the momentum towards rights recognition is clearly in their favor, and it is my sincere hope that this report will go some way towards furthering the understanding of States, corporations, and of the broader society that it is in all of our long-term interests that indigenous rights become a reality on the ground. If the report's recommendations receive the attention they deserve by States and extractive corporations, then we will be one step closer to the prospect of genuine rights-based engagements with indigenous peoples finally becoming a tangible reality. This is essential not only for the cultural and physical survival of indigenous peoples, but is also necessary to ensure inter-generational justice for all those whose future well-being depends on our legacy.

Let me thank the Tamalpais Trust Fund and the Brot für die Welt/Protestant Development Service for providing the support for the research and publication of this book. I also thank Cathal Doyle and Andy Whitmore for their work in putting this together and my Tebtebba colleagues, Raymond De Chavez and Bong Corpuz, for helping in this publication. Finally, I thank the members of the Indigenous Peoples' Global Network on the Extractive Industries who provided their comments and stories.

Victoria Tauli-Corpuz
UN Special Rapporteur on the rights of indigenous peoples
Executive Director, Tebtebba

05 September 2014

Executive Summary and Summary of Recommendations

Indigenous peoples throughout the world have historically suffered from the most profound impacts of the extractive industry sector. In many instances the sector has been responsible for the destruction of their territories, lead to displacement, undermined governance structures and resulted in the loss of traditional livelihoods, with devastating effects on their self-determination, territorial and cultural rights. These impacts, which commenced in the colonial era, continue to the present day. This report provides an overview of the present state of play of the extractive industries in relation to indigenous peoples, taking as its point of departure the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007, together with the 2009 UN Permanent Forum on Indigenous Issues International (UNPFII) Expert Group Meeting on Extractive Industries, Indigenous Peoples' Rights and Corporate Social Responsibility, and the 2009 International Conference on Indigenous Peoples and the Extractive Industries.

The report is divided into four chapters and concludes with a set of recommendations. Chapter one sets the context for the remainder of the report. It examines the impact of extractive industries on indigenous peoples in the years following the adoption of the UNDRIP, and in particular since the 2009 UNPFII expert group meeting and conference. In considering the current and evolving global reach of, and

trends in, the extractive sector, including the role of China and the implications of technological developments, the chapter notes that forecasts for the coming 20 years suggest that investments in the sector will continue to grow, both in conventional and unconventional fossil fuels, as well as in the mineral sector. Despite the slowdown in the sector following the global financial crash in 2007, signs exist of recovery in a number of extractive industry sub-sectors, in particular, in unconventional energy and for resources such as nickel and copper. This is expected to occur irrespective of their substantial contribution to CO2 emissions and environmental harms, in particular, to water sources. Given the high correlation of indigenous territories and subsoil resources, many of these projects will impact on indigenous peoples' enjoyment of their rights.

Ample evidence also exists of the sector's unabated impact on indigenous rights as a result of a range of environmental, social and cultural impacts in the intervening years. Nevertheless, key actors in the extractive sector, including a few major companies and important financial actors, as well as the mining industry's International Council for Mines and Minerals (ICMM), appear to have learned some lessons, and evidence exists of a few emerging good practices in this regard. Having said that, many of these good practices have been the result of long-standing indigenous resistance, and the leverage which indigenous peoples have exerted through developments in national and international legal frameworks and norms. Significant developments have also taken place in national legislation addressing both indigenous peoples' rights and the regulation of the extractive industries. However, these are frequently not aligned, and in many instances run contrary to each other. This therefore limits the potential for indigenous rights, recognized under law, to be realized in practice. The responses of indigenous peoples to these ongoing impacts of the extractive sector have been varied. In a number of cases, indigenous peoples have managed to successfully assert their rights to control activities in their territories, resulting in the negotiation of more meaningful agreements on benefits and impacts, or in some cases leading to projects not proceeding due to the absence of consent.

Chapter two outlines the developments in the normative framework of indigenous peoples' rights, since the adoption of the UNDRIP. This includes a consolidated thematic analysis of UN treaty body jurisprudence in relation to indigenous peoples and the extractive sector. The major themes which emerge from this body of jurisprudence are: State obligations in relation to the requirement for free, prior and informed consent (FPIC); the duty to ensure the conduct of participatory social, spiritual, cultural, environmental and human rights impact assessments; the need for adequate and culturally appropriate redress, restitution, compensation and benefit-sharing; the duty to protect indigenous peoples in voluntary isolation from extractive industry impacts; the need to address the impacts of the sector on indigenous children and women; requirements in relation to protection of the environment, water and areas of spiritual and cultural significance; required measures to eliminate displacement and forced evictions; State obligations in the context of violence, repression and conflict associated with the sector; the need to guarantee implementation of Court decisions and legislation upholding indigenous peoples' rights; and the duty of States to promote the corporate responsibly to respect human rights and to provide extraterritorial remedies in cases where their corporations are implicated, or complicit, in indigenous rights violations.

Extensive indigenous rights-based advice has also been provided to State and corporate actors by UN charter bodies, including the UN Special Rapporteur on the rights of indigenous peoples, the UN Working Group on the issue of human rights and transnational corporations and other business enterprises, and the UN Experts Mechanism on the Rights of Indigenous Peoples. In their jurisprudence and reports in relation to the extractive sector and indigenous peoples' rights, UN treaty and charter bodies, in particular the UN Committee on the Elimination of Racial Discrimination (CERD) and the UN Special Rapporteur on the rights of indigenous peoples, have provided detailed guidance in relation to the measures which need to be taken by States in order to establish the conditions to facilitate a rights-compliant extractive industry model.

Chapter three focuses on other UN and non-UN organizations, bodies and initiatives, which have addressed indigenous peoples' rights, and their relationship with the extractive sector. This includes the recommendations of the UNPFII as well as guidance which has been developed by the UN Global Compact in relation to the implications of the UNDRIP for extractive industry behavior. The chapter also addresses emblematic cases pertaining to the extractive sector and indigenous peoples under the OECD Guidelines for Multinational Enterprises complaint mechanisms and regional human rights systems, as well as the evolving practice of the International Labor Organization (ILO) in relation to indigenous peoples and the extractive sector.

The persuasive value of OECD National Contact Point (NCP) statements in certain contexts is noted, as is the need for NCP follow-up, and some form of sanction, in cases where extractive companies chose to ignore their findings and recommendations. The chapter also welcomes the ILO's recommendations that projects should be suspended where inclusive good faith consultations have not been held in line with the provisions of ILO Convention 169. The report suggests the evolution in the normative framework of indigenous peoples' rights since 1989 is such that the ILO supervisory bodies can now legitimately call for full respect for the requirement for FPIC. Finally, the chapter notes the need for dialogue between revenue transparency initiatives, in particular, the Extractive Industries Transparency Initiative (EITI), and indigenous peoples in relation to the role which these initiatives should play in establishing the enabling conditions for the realization of indigenous peoples' rights.

Chapter four offers some expectations with regard to the state of play in the extractive sector in relation to indigenous peoples over the coming years. In examining this, it addresses the implications of the Post-2015 Development Agenda for the realization of indigenous peoples' rights, and the reasons why the rights recognized in the UNDRIP must feature in the associated Sustainable Development Goals (SDGs). In order to establish the legal framework supporting this requirement, it provides an overview of the relevant UN General Assembly

and Human Rights Council resolutions. Drawing from the lessons learned by indigenous peoples as a result of the failure of the Millennium Development Goals (MDGs) initiative to target their development needs—and at times the use of the MDGs as justification for the imposition of extractive industry projects in indigenous territories—the chapter highlights the importance of ensuring that the SDGs are premised on recognition of indigenous peoples' self-determination rights and guarantee respect for indicators of sustainable well-being which are formulated with, and agreed to by, indigenous peoples themselves. The chapter notes that indigenous peoples who are free to exercise control over their territories have a huge potential to contribute to sustainable development in terms of constraining the otherwise uninhibited expansion of carbon-emitting and environmentally-damaging extractive industries. In addition, they can make important contributions to sustainable development by offering valuable lessons and knowledge to broader society in terms of climate change adaptation. Realizing and capitalizing on this capacity is only possible if a relationship premised on respect for indigenous peoples is fostered, and indigenous peoples' inherent rights, including the requirement for their FPIC to extractive projects, are given due recognition in the SDGs.

Indigenous peoples themselves have articulated their perspectives on the major challenges that they face in relation to extractive industries. In keeping with their right to self-determination, they must be the ones who establish the conditions under which extractive operations proceed, or do not proceed, in their territories. The chapter therefore concludes by offering some suggestions in relation to what can be done at the institutional level to open up new opportunities for indigenous peoples to control activities in their territories. It argues that a self-determination and sustainable development-based re-conceptualization of the extractive sector will necessitate the emergence of effective and participatory local level oversight and accountability mechanisms. It also suggests that the establishment of some form of international rights-based governance regime for the sector may be appropriate and timely. A fundamental consideration in the design and functioning of any such local or international oversight or

regulatory regimes is that full and effective indigenous participation be guaranteed at levels and stages. In addition, it must be ensured that such mechanisms or regimes in no way serve to limit indigenous peoples' control over their territories.

With these basic principles in mind, the report concludes by offering a set of recommendations targeted primarily at States and the UN system—but also relevant to a range of actors, including international organizations, financial institutions, extractive corporations, civil society and indigenous peoples—aimed at the realization of an indigenous rights-compliant extractive sector, which is governed consistently with the principles of sustainable development. A summary of these recommendations is provided below.

Overarching Recommendations

1. Establish participatory mechanisms for oversight of the extractive sector at the local level, and consider, in conjunction with indigenous peoples, the establishment of an international rights-based governance regime for the sector.
2. Ensure recognition of indigenous peoples' rights in the post-2015 sustainable development agenda and guarantee full and effective participation of indigenous peoples in the formulation and implementation of the Sustainable Development Goals.
3. Increase self-determination-based participation of indigenous peoples in the UN on issues affecting them, including by granting their governments observer status at the General Assembly and ECOSOC consultative status to their representative bodies;
4. Consider the establishment, with full and effective participation of indigenous peoples, of an agreed and adequately-resourced mechanism within the UN human rights regime to monitor and promote implementation of indigenous peoples' rights.

5. Promote greater attention of existing UN human rights mechanisms and environmental and development bodies to the issue of extractive sector impacts on indigenous peoples' rights, including those recognized in the UNDRIP.
6. Establish participatory and adequately-resourced mechanisms at the national level aimed at realizing indigenous peoples' self-determination and territorial rights and implementing FPIC in relation to extractive industry operations.
7. Ensure full compliance with the recommendations of international human rights bodies and regional court and commission decisions pertaining to indigenous peoples' rights and the ratification of, and compliance with, ILO Convention 169.
8. Recognize that indigenous peoples' right to self-determination constitutes a right to determine the outcome of decision-making processes in relation to extractive projects in their territories, and imposes a duty on States and corporations to obtain their FPIC and to ensure participatory social, cultural, spiritual, environmental and human rights impact assessments.
9. Initiate comprehensive participatory reviews of the regulation of extractive industries in both home and host states with the aim of ensuring that regulatory frameworks are fully consistent with international human rights standards, including the UNDRIP.

Thematic Recommendations

10. Establish affordable, effective and accessible complaint and redress mechanisms, at the national, regional and international levels, through which indigenous peoples can raise, and seek redress for, allegations of corporate violations of their rights.
11. Enact or strengthen legislation to ensure that corporations can be held accountable and sanctioned for viola-

tions of indigenous peoples' rights overseas for which they are responsible, or in which they are complicit.

12. Ensure the adequate financing of regional human rights systems enabling them to address all the complaints they receive in a timely, participatory and effective manner.
13. Ensure National Action Plans on business and human rights include full recognition of indigenous peoples' rights and;
    i. Establish achievable and agreed targets for implementing the UNDRIP in relation to extractive industries;
    ii. Ensure policy coordination across all governmental actors, including Export Credit Agencies, in relation to respect for indigenous peoples' rights;
    iii. Guarantee the conduct of indigenous rights due diligence by extractive corporations, in accordance with international standards including the UNDRIP;
    iv. Ensure adequate monitoring and enforcement mechanisms are in place for State and corporate policies, and that indigenous legal systems are recognized.
14. Support international processes aimed at ensuring that corporations are regulated and held accountable for violations of human rights for which they are directly responsible or complicit in, including violations of indigenous peoples' rights.
15. Encourage the UN Global Compact to promote implementation of its UNDRIP Business Reference Guide through extractive industry project-specific reporting in "Communication on Progress" reports, and facilitating dialogue on the sector's legacy.
16. Ensure that all multilateral and bilateral investment and trade agreements regulating extractive activities comply with international human rights standards, including the UNDRIP, and are consistent with the principles of self-determination and FPIC.
17. Establish a transparent and participatory oversight system spanning the supply chains of extractive indus-

try products and commodities, which guarantees that raw materials are not sourced from conflict areas or areas where indigenous rights are violated.

18. Ensure that the policies and practices of International Financial Institutions, such as the World Bank, are fully compliant with the rights recognized in the UNDRIP, including the requirement for FPIC.
19. Apply the precautionary principle to the exploration and extraction of seabed resources, ensuring comprehensive social, spiritual, cultural, environmental and human rights impact assessments, and the FPIC of indigenous peoples whose rights are impacted.
20. Guarantee that no extractive activities should be undertaken in, or near, territories used or occupied by indigenous peoples in voluntary isolation.

Contextual Recommendations

21. Ensure resources are directed towards research by, and cooperation with, indigenous peoples in the development of alternative rights-based models for resource extraction in contexts where indigenous peoples are considering pursing extractive projects.
22. Support the empowerment of indigenous communities through the provision, in a non-influential manner, of financial and independent technical assistance in relation to:
    a. Community run impact assessments, negotiation skills; and
    b. The formulation and operationalization of self-determined development plans and FPIC processes.
23. Improve the understanding of all State and corporate actors of indigenous rights and perspectives and their implications for extractive activities through the provision of training and by engaging in rights-based dialogues with indigenous peoples.
24. Acknowledge the legacy of extractive activities in indigenous peoples' territories and initiate processes

of reconciliation in a manner agreed to by indigenous peoples with the aim of providing compensation and redress.

25. Monitor and report on violence against indigenous women and children related to extractive industries through adequate resourcing of and constructive engagement with international human rights mechanisms and National Human Rights Institutions.
26. Avoid extractive projects in conflict areas, or areas where they are likely to be accompanied by militarization, and launch discussions at the international level aimed at developing binding agreements regulating corporate activities in such areas.

Introduction

Indigenous peoples throughout the world have historically suffered from the most profound impacts of the extractive industry sector. In many instances the sector has been responsible for: the destruction of their territories; lead to their displacement; undermined their governance structures; resulted in the loss of their traditional livelihoods; and has had devastating effects on their self-determination, territorial and cultural rights. These impacts, which commenced in the colonial era, continue to the present day. Despite a relative slowdown in the extractive industry activity following the global financial crash in 2007, signs exist of recovery in a number of extractive industry sub-sectors. Forecasts for the coming 20 years suggest that investments in the sector will continue to grow—both in conventional and unconventional fossil fuels, as well as in the mineral sector—despite the substantial contribution to CO2 emissions and environmental harms, in particular, to water sources. Many of these projects will be located in indigenous territories, leading to serious concerns based on the extensive evidence of the sector's historical impact on indigenous rights.

In part as a result of indigenous peoples' opposition to these profound ongoing impacts, the international community has recognized, through the human rights regime, the need to guarantee respect for indigenous peoples' inherent rights. The clearest articulation of these rights is found the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP). This rights recognition emerged in a context where there is greater awareness of the impact of the extractive sector on indigenous peoples, and an acknowledgement of the dis-

cordance between the existing extractive industry model, as determined and pursued by both States and the corporate sector, and the realization of indigenous peoples' rights.

Three additional important developments at the international level have also served to direct greater attention towards indigenous peoples' rights in the context of the extractive sector. The first was the recognition by the international community in 2008 of the independent responsibility of extractive companies to respect indigenous peoples' rights in accordance with the UN Framework on Business and Human Rights, and the associated requirement to conduct human rights due diligence. The second development is the increased attention which is beginning to be placed on the responsibilities of financial institutions to ensure that they are not complicit in the violation of indigenous peoples' rights. This is reflected in the incorporation of the requirement to obtain indigenous peoples' free, prior and informed consent (FPIC) with regard to extractive projects into the policies of many of the major financial institutions, most notably in 2013 by the Equator Principle banks. These developments have prompted some extractive industry companies, and associated extractive industry-based trade associations, to make policy commitments to respect indigenous peoples' rights and to work to obtain indigenous peoples' FPIC. The third development relates to the gradual recognition of the interrelationship between the respect for indigenous peoples' rights and the realization of sustainable development, including tackling climate change and environmental harms. The implications of this for the Post-2015 Development Agenda remain to be seen. However, indigenous peoples and UN experts have insisted that their self-determination rights, including the requirement for FPIC for extractive projects, must be recognized and given effect in the ongoing formulation of the UN Sustainable Development Goals (SDGs).

These normative developments offer the promise of a new extractive industry landscape, which is premised on compliance with indigenous peoples' rights and the pursuit of long-term sustainable development. However, significant obstacles remain to translating these normative developments into

practice, not least of which is the profound ongoing impact of extractive industries on indigenous peoples and the trend toward increased extractive industry activity in or near their territories. A review of the developments and trends in the extractive sector and its relationship with indigenous peoples, as well as the evolving normative framework aimed at regulating that relationship and its potential evolution and synergies with the sustainable development agenda, is therefore timely. This is of particular relevance in the context of the implementation of the action-oriented outcome of the 2014 World Conference on Indigenous Peoples, the ongoing negotiations around the SDGs and their future implementation, and the international processes aimed at clarifying and implementing corporate obligations in relation to respect for human rights.

In examining these developments, the report takes as its point of departure the adoption of the UNDRIP in 2007, together with the 2009 UN Permanent Forum on Indigenous Issues International Expert Group Meeting on Extractive Industries, Indigenous Peoples' Rights and Corporate Social Responsibility, and the 2009 International Conference on Indigenous Peoples and the Extractive Industries. In doing so it seeks to provide an overview of the present state of play of the extractive industries in relation to indigenous peoples. The report is divided into four chapters and concludes with a set of recommendations. Chapter one addresses the evolving landscape of this relationship and examines whether, from a rights respecting perspective, there has been an improvement or a deterioration in how the extractive industries gain access to, and operate in, indigenous peoples' territories. In this regard it focuses on indigenous peoples' challenges to State and industry practice and the responses of these actors.

Chapters two and three elaborate on the roles and responsibilities of States, international organizations, financial institutions, and the extractive sector itself, in shaping a more indigenous rights-compliant landscape. They do so by drawing on the jurisprudence and guidance emerging from human rights mechanisms and other oversight and standard-setting bodies in the context of extractive industry projects impacting on indigenous peoples. Finally, chapter four high-

lights the challenges faced by indigenous peoples in shaping this evolving landscape, as well as the opportunities which it affords them. It focuses on the potential synergies between the realization of indigenous peoples' rights and the pursuit of a genuine, all inclusive sustainable development agenda, concluding that they are highly inter-dependent, with the realization of neither one being possible without the active pursuit of the other.

The report concludes with a series of recommendations in relation to indigenous peoples and the extractive industry. These are aimed at realizing the promise of a rights-compliant extractive industry sector, which is offered by the primarily normative developments that have taken place in the last decade. These recommendations are grouped into three categories. A set of overarching recommendations address the governance mechanisms and frameworks necessary to ensure compliance with indigenous rights and guarantee their self-determined, sustainable development. These include suggestions in relation to consideration of an international governance regime, and improved local participatory oversight of the extractive sector. A number of thematic recommendations address specific issues which profoundly impact on indigenous peoples' enjoyment of their rights, including the human rights responsibilities of extractive companies and financial institutions. Finally, a set of contextual recommendations address broader issues in relation to the extractive industry and indigenous peoples, all of which act as major constraints on the potential for indigenous rights realization, such the sector's legacy issues and operations in conflict areas.

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Chapter One

Overview of the Situation of Indigenous Peoples and Extractive Industries

This chapter provides a review of the current situation of the extractive sector and its relationship with indigenous peoples. It does so by addressing five interrelated topics. Firstly, it asks if there has been an increase in extractive industries-related impacts on indigenous peoples in the years since the 2009 International Conference on Extractive Industries and Indigenous Peoples and the UN Permanent Forum expert group meeting on the same subject. To assess this it first looks at general trends in the extractive sector. It then reviews the sector's specific impacts on indigenous peoples. Thirdly, it explores the lessons learned by the extractive industries and examples of good practice which have emerged over this period. The fourth issue it engages with is developments in national regulatory frameworks in relation to indigenous peoples' rights and the extractive sector. Finally, it examines the responses of indigenous peoples when asserting their rights in the context of extractive industry activities in or near their territories.

1.1 Has Extractive Industries-Related Impact on Indigenous Peoples Increased?

As noted in the introduction, a starting point for this report is the 2009 Manila International Conference on Extractive Industries and Indigenous Peoples, and its subsequent documentation *Pitfalls and Pipelines*.[2] A major objective of that documentation was to review the impact of the extractive industries upon indigenous peoples, in particular, to review how far the extractive industries had been expanding onto the lands and

territories of indigenous peoples. The mining researcher Roger Moody was quoted at the conference confirming his original estimate that over 50 percent of all mineral resources that were being targeted by mining companies would take place on indigenous-claimed territories, and shared concerns that given current trends, this could increase.[3]

The conference reviewed positive trends and best practice case studies, where negotiation and benefit agreements offered hope of a more respectful relationship. However, the documentation primarily noted how much of the narrative between indigenous peoples and the extractive industries was built on negative environmental, social and human rights experiences for indigenous peoples. These included ongoing conflict, particularly over the ability of tribal peoples to exercise their right to self-determination in the context of indigenous rights.

So have these pessimistic prognoses come to pass? Although in some ways it is too short a timeframe to really judge long-term trends, it is interesting to note that as, predicted in the conclusion of *Pitfalls*, commodity prices—and thus the industry as a whole—have indeed bounced back from post-financial crash lows.[4] Although not uniform across all commodities, and subject to extreme price volatility, it is clear that much of the industry has been prospering over the last six years.[5]

Despite the global economy slowing relative to pre-financial crisis levels, the main drivers for increased mineral and energy use are still in place, with a growing, increasingly affluent Chinese population. Some analysts argue that the expansion of non-conventional oil and gas, as well as the slowing—and maturing—of the Chinese economy means that commodity prices will lower, and so the long-term resource boom will end. However, as a recent report from Chatham House argues, "the hard truth is that many of the fundamental conditions that gave rise to the tight markets in the past ten years remain—and that lower prices in the meantime may simply trigger another bout of resource gluts in the large and growing developing countries."[6]

Leaving aside the inherent difficulties with prediction, projections suggest continued demand growth for fossil

fuels and minerals—until at least 2030. The Organization for Economic Co-operation and Development (OECD) estimates that metal demand will grow by 250 percent by 2030 compared to 2005 levels. Among the major metals, aluminum demand is expected to grow the fastest (4.1% per year until 2020), followed by steel.[7] According to the International Energy Agency (IEA), demand for energy is set to grow 35 percent by 2035 compared with 2010. Fossil fuels are estimated to provide about 75 percent of energy supply over this period, with the gas sector seeing the largest growth.[8] A total of over US$37 trillion of investments will be needed in the energy sector by 2035.[9] The worldwide trade in commodities will continue to grow, building on an increase of nearly 50 percent from a decade ago in terms of weight.[10]

So is this boom still affecting indigenous peoples? It would certainly seem so. Recent research from First Peoples Worldwide analyzed 52 oil, gas and mining companies, as well as a total of 370 projects where they are operating on or near indigenous land. They found that an alarming 92 percent of those oil, gas and mining projects posed a medium to high risk to the companies' shareholders. Nearly all of the companies reviewed faced a medium to high risk profile for at least one of their projects. Of the companies that have over 10 projects operating on or near indigenous land, 92 percent have at least one high risk site and 23 percent have over five.[11] Likewise, Oxfam Australia and CAER, in their research on Australian-registered extractive companies, noted that one quarter of them have been accused of negatively impacting indigenous peoples' rights.[12] A range of regional focused reviews of the sector has also pointed to its ongoing profound impact on indigenous peoples.[13]

i. Global Spread of the Extractive Sector

To quantify the impact on indigenous peoples, it is worth reviewing the worldwide spread of the extractive industries, while maintaining a particular focus on exploration spending with an eye to how these trends will develop.

In the case of the mining industry, the main feature is declining ore grades, which are forcing companies to either re-evaluate current mines or look further afield for new resources. Those particularly affected include precious metals, such as gold and platinum, copper and nickel, while iron and bauxite grades seem to be remaining relatively stable.[14] It is clear from recent data that lands claimed by indigenous peoples are likely to be part targeted by the industry. Canada and Australia are the top-rated countries for exploration spending, with 13 percent each of global spending (Canada is just ahead, having been the top country destination since taking over from Australia in 2002). However, in terms of a global share, Latin America leads (at 27%, with Chile and Mexico coming in fifth and sixth positions in the country rankings, respectively), with the Southeast Asia-Pacific region next (21%, including Australia), with North America coming in third (20%) and Africa fourth (16%). Russia is ranked sixth with a five percent share, and China has four percent of exploration spending.[15]

Much of this exploration is in countries and regions with a long history of mineral production. Some of those countries, such as Peru and Australia, have increased their dependence on it since the financial crisis. However, it is also true that there is a development into so-called "commodity frontiers." According to PwC, "new emerging markets" have become increasingly prominent over the last decade, with these regions accounting for 60-80 percent of new reserves globally in 2013. Companies exploring in these regions frequently face new risks, caused by the relatively uncharted nature of political, legal and business practices, as indeed do the communities who will be affected by them.[16] Recent examples of mining projects in such untested jurisdictions include the Oyu Tolgoi project, which is expected to account for around a third of Mongolia's Gross Domestic Product (GDP) and Kinross's Tasiast gold mine, which is estimated to provide approximately a quarter of Mauritania's GDP for this year.[17]

In terms of the companies, PwC notes that, whereas some of the largest traditional global miners are working on expanding their operations in "traditional" mining areas

(such as BHP Billiton and Rio Tinto in the Pilbara region of Australia), there is a new wave of miners who are geographically expanding. Such companies tend to be based in Russia, India and China and have had a primarily domestic focus, but are now aiming to follow the example of Brazil's Vale and expand beyond their national borders. An example is Coal India, which reportedly has an estimated $6.7 billion to invest in coal mines over the next five years, in order to satisfy a rising demand for coal in India. Coal India has discussed strategic alliances with companies such as Peabody Energy and Rio Tinto to mine coal in Australia, the USA, South Africa and Indonesia.[18]

With regard to the oil and gas industry, it is estimated that oil production from conventional oilfields is declining at an average annual rate of over four percent (equivalent to a reduction of 47 million barrels per day).[19] It is increasingly likely that supply will come from countries that are non-Organization of the Petroleum Exporting Countries (OPEC). This is partly because the Middle East is increasingly consuming more of its own supply, but primarily because of a boom in new unconventional oil, as well as gas, supplies. This unconventional oil and gas production is helping the United States to move steadily towards meeting almost all of its energy needs from domestic resources by 2035.[20]

While there is no strict definition of an "unconventional fossil fuel," the term is often used to describe fuels that cannot be extracted using conventional drilling or mining. Examples of unconventional fossil fuels include tar sands, tight oil (aka shale oil), shale gas, coalbed methane, and oil shale, as well as more esoteric processes such as creating synthetic liquid fuels from coal and gas, and extracting methane hydrate (or "fire ice"). CorporateWatch have produced a report exploring these and other related fuel types.[21] These production processes are becoming increasingly crucial as conventional supplies run low and energy prices rise. Such new technologies are making it economically viable to produce fossil fuels from other harder to extract sources. The move towards unconventional fossil fuels is also being driven by the desire of countries to develop their own energy sources, rather than being dependent on foreign oil and gas.

Whole new frontiers are being opened up in any country with potential reserves, and as unconventional fossil fuels deposits are usually larger and more dispersed than conventional ones, their exploitation has huge potential to affect lands claimed by indigenous peoples. Seventy percent of known tar sand deposits occur in Canada (the implications of which will be examined in section 3.5). Kazakhstan and Russia hold the next biggest reserves. Tight oil, shale gas and shale oil are all well distributed across many countries, with USA, China, Canada, Australia and Argentina well-represented.[22] It is predicted that China will be the next test case for unconventional gas development, with state companies directed to more than double China's 2008 natural gas production, primarily from coalbed methane and shale deposits by 2015.[23]

Aside from the specific concerns of affected indigenous communities, there are two global concerns with regard to unconventional fossil fuels. Both of these concerns will also have disproportionate impacts on indigenous peoples, given they are frequently the most vulnerable to climate change and environmental harms. The first is the decrease in Energy Return On Investment (EROI), which is the amount of energy you need to expend in order to extract from a particular energy source. Unconventional fossil fuels generally have lower EROI values (i.e., take more energy to produce) than conventional ones. Tar sands, tight oil and oil shale all have very low EROIs. Countries may consider there are strategic benefits in pursuing such small returns, but this could be disastrous for climate change. It is estimated that in order to avoid the most serious impacts to the climate, we should not burn more than 500 Gigatons of Carbon (GtC). As we have already emitted 370 GtC, staying within the 500 GtC limit implies that at most a further 130 GtC can be burnt. This argues for most fossil fuel reserves to be left in the ground. Although estimates vary significantly, remaining conventional coal reserves alone are well over 500 GtC, with conventional oil reserves of 162 GtC, and tar sands and shale gas adding another 264 and 211 GtC respectively.[24]

ii. The China factor

Resource demands remain premised on a growing Chinese economy, and, to a lesser extent, a growing Indian economy. Emerging markets continue to be the world's growth engine, with China representing the most important market for minerals. For example the copper boom in recent years has been inextricably linked to the growth of China. Although the International Monetary Fund (IMF) has revised growth estimates for China from 8.4 percent in 2014 to 6.6 percent in 2018, this is still an impressive rate of growth. That is especially the case in an economy, which has expanded around 10 percent year on year in recent decades. Despite its less rapidly growing economy, China remains the world's dominant metals consumer.[25] Of all the metals traded worldwide, 45 percent goes to China—more than the sum total of the 20 next largest importers. It is estimated its share of global metals consumption will increase to about 50 percent in 2020.[26] Energy demand growth in Asia continues to be led by China over the coming decade, but will shift towards India and, to a lesser extent, Southeast Asia after 2025.[27]

As such many resource-rich countries—including Australia, Peru, Brazil and Chile—have become increasingly dependent on exports to China. China's global economic influence has also increased greatly, especially in Southeast Asia, Africa and Latin America. Even during the 2008–09 global financial crisis, China's foreign direct investment continued to grow by nearly eight percent, while total world overseas foreign direct investment during the same period decreased by nearly 40 percent.[28]

Ecuador is a good example of this dependence when you consider that by 2013, China provided an estimated 61 percent of Ecuador's financing needs. Those loans, of nearly $9 billion, and promises of $7 billion more, add up to nearly one-fifth of Ecuador's GDP. They are fuelling new infrastructure and energy projects, including massive oil, mining, and hydropower projects on indigenous territories in the Amazon. In exchange, China stands to receive nearly 90 percent of Ecuador's oil. This is a near monopoly position,

and represents the first time Ecuador has committed oil sales directly to a lender. In 2010, China's state-owned Tongling Non-ferrous Metals Group and China Railway Construction Corp. paid $679 million to take over Canadian mining company Corriente. A deal has now been reached between the Ecuadorian government and the new Ecuacorriente mining company to initiate the $2.4 billion open pit Mirador mine on Shuar land.[29]

This is one of a number of signs of China's increased interest in sourcing "resource security overseas," At the time of writing, a Chinese consortium led by MMG are finalizing an agreement of close to $6 billion to buy Glencore's Las Bambas mine in Peru. The deal is likely to place MMG among the top 10 copper producers in the world, and make it Asia's number one producer. John Gravelle, PwC's global mining leader noted that "The size of the deal reflects Chinese belief in copper. And China's smaller and private mining operations take their guidance from the large state-owned enterprises."[30]

In May 2014, the National Development and Reform Commission, China's powerful economic planning agency, established a new regime—under the so-called Order 9—to govern overseas investment. The regime makes it much easier for domestic companies to make acquisitions and establish joint ventures abroad. As a sign of intent, the Chinese firm Zijin Mining has established a $500 million global offshore mining fund, which will target global mining investments in publicly listed equity and debt instruments of gold, other precious metals and copper mining companies. China's continued eye for outward investment opportunities seems sure to lead to an increased impact on indigenous peoples as a result of Beijing's thirst for resources. [31]

iii. Trends in the Extractive Industry Sector

The global mining industry is larger than the GDP of over 150 countries.[32] It is difficult to estimate the size of the global oil and gas industry, as the largest companies by production and reserves are nationally-owned companies, whose financial

data is difficult to access. Nevertheless the fact that the fourth largest oil company by production in 2013, the privately-owned Exxon Mobil, had a market capitalization of $417 billion shows that the oil industry dwarfs even the mining industry in absolute terms.[33] BP's ability to pay $90 billion in damages following the Deepwater Horizon disaster, and continue to operate, also illustrates their impressive financial reserves.

As the portfolios of many of the world's major mining companies include projects located in indigenous territories, it is worth conducting an overview of the general trends in the industry and the character of the companies with which indigenous peoples may come into contact. PwC conducts annual research into the top 40 global mining companies, and as such has tracked the changes from 2009 until the last reported figures in 2013. In that time, their total assets have grown to $1,256 billion from $801 billion, with their annual revenues rising to $512 billion, up from $325 billion (and from $184 billion in 2004).[34] The scale of global mining firms is also illustrated by the 2012 merger of mining and commodities trading giants Glencore and Xstrata, creating a firm with combined assets of over $169 billion. A report at the time noted that "the combination of commodities trader Glencore and producer Xstrata…creates a mining and trading powerhouse with over 100 mines around the world, some 130,000 employees, and an oil division with more ships than Britain's Royal Navy."[35]

Although mining companies have been growing, so too has the total amount of money the top 40 companies borrow (which stood at $330 billion in 2013, up 26% on the previous year). After many years of rising prices, and the pursuit of increased output irrespective of the cost, a more recent industry trend has been to reduce costs. This has led to the closing of unprofitable operations and reducing unnecessary expenditure in the face of uncertain and volatile commodity prices. In 2013, Rio Tinto reportedly exceeded its cost reduction target of $2 billion by 15 percent, while setting new production records in the year. Similarly BHP Billiton is expecting to deliver on efficiency savings totaling $5.5 billion by the end of its 2014 financial year.[36]

In order to focus on cost-cutting, almost half of the top 40 companies have hired a new Chief Executive Officer since 2011. This effectively amounts to a collective punishment of the industry by its shareholders, and has introduced a new set of industry leaders whose bottom line is cost-reduction. What the implications of this will be for resources allocated to corporate social responsibility programs, business and human and indigenous peoples' rights, community relations, or even health and safety, remains to be seen.[37]

In terms of industry financing, Canada, the USA, UK and Australia still dominate, with South Africa and China leading the challenge from the developing economies. As of May 2014, there were over 1,500 mining companies listed on the Toronto Stock Exchange and TSX Venture Exchange, while London stock exchanges still host (or at least co-host) three of the top four largest mining companies. However, the proportion of large companies which come from developing economies has increased over the last decade, and as of December 2013, these companies comprised over half of the top 40 companies.[38]

This trend is expected to continue. Many of the top 40 companies from emerging markets appear to be focused on expansion, at a time when those from the developed economies are focused on portfolio rationalization—in terms of reducing costs and minimizing their exposure to risk—be it from a geographical or commodity diversification perspective. For example, BHP Billiton, the world's largest mining company, recently confirmed it will simplify its portfolio, announcing or completing divestments in Australia, the USA, Canada, and South Africa, concentrating its focus on its major iron ore, copper, coal petroleum, and possibly phosphate, assets.[39]

Interestingly, one of the non-core assets BHP Billiton may sell is its oil business, which is perhaps indicative of tightening margins in the oil industry. One would expect that in a time of consistently high oil prices the oil companies would be doing well. Yet, despite the potential for growing demand, consistently high prices—along with climate change worries—may well lead to a decline in demand as alternatives are prioritized. Certainly as conventional reserves are becoming depleted, or national oil companies claim the best reserves for themselves,

costs are rising. Companies are also looking further afield for new reserves, as with Shell's much campaigned against search for oil in the Arctic. Although the "supermajor" oil companies have generally tried to move into the unconventional oil, and gas, business, many have had their fingers burned, for example, Exxon's overpayment for the American firm XTO in 2009. However, their increasing dependence on gas production is for now benefiting their bottom lines. Over half of Shell's and Exxon's production is now based on gas, although with prices expected to tumble as production increases, this too may be less lucrative. The "supermajors" are spending nearly $100 billion a year on oil exploration and production, and yet their output fell two percent between 2006 and 2011, in addition their share price is in general dropping and it may well be that they will likely shrink or be split up in years to come.[40]

iv. Technological Drivers

The expansion of the extractive industries is driven by improvements in technological capability. The rapid growth of shale gas production in the US is illustrative of how quickly innovation can bring significant changes to the industry's profile. Advances in technology are also a driver for the demand for certain materials. By the end of 2013, the number of mobile electronic devices exceeded the number of people on Earth, and is projected to continue to increase.[41] This in turn is driving the growth in demand for, and associated supply concerns around, a whole range of metals, primarily the so-called rare earth elements. It is also, perhaps most infamously, behind much of the demand for the "3 Ts"—tin, tantalum and tungsten—which are mainly sourced from the conflict zone of the Eastern Congo.

Technological development, together with political intent, will be key to how quickly renewable energy will be adopted. Projections suggest that solar and wind energy will meet around five percent of global energy demand in 2050,[42] but this could be stepped up dramatically if there are unexpected

breakthroughs in cost reductions, in for instance solar photovoltaic cells. A breakthrough in energy storage technology could transform the potential for electric vehicles and/or fuel cell vehicles. This would reduce oil consumption, but also increase demand for electricity as well as lithium for batteries; at least until another preferred material is found.[43]

The hope has been expressed that new technologies could improve the lives of those affected by the extractive industries, for instance, in the area of the safe disposal of mine waste, with technologies promised that will biologically or microbially neutralize toxic mine or tar sand wastes. However, such technologies have yet to be either developed or proven effective and shown to be commercially viable.[44] More rapid and tangible applied advances in technology are evident in the context of improving productivity or reducing costs, such as the increasing use of larger, robot-controlled vehicles for transporting ore. Technology is also been applied to highly controversial uses, such as the recently-advertised unmanned drones for use by mining companies for crowd control.[45] Another example of the controversial use of technology, in a manner which is at odds with the precautionary principle, is the facilitation of seabed mining, with much of the technology being transferred from the deep sea oil and gas industry. (See box on Seabed mining).

Carbon Capture and Storage (CCS) is a good example of where an apparently benign, or even beneficial, technology is not necessarily politically neutral. It is used by fossil fuel proponents to argue that increased carbon emissions can be dealt with by injecting the carbon dioxide into underground storage, primarily in geological formations. Although there have been smaller-scale tests of different CSS processes, including Saskatchewan's Boundary Dam coal-fired power plant, there is no large-scale cost-effective example. There appear to be significant challenges involved in scaling up, including in relation to safe storage and costs. However, governments and extractive industry companies continue to use the promise of CCS implementation in the future as a smokescreen to allow the expansion of fossil fuel production. This has stalled the development of alternatives to fossil fuels and served to

distract from the need to transition towards more sustainable forms of energy production.[46]

Box 1. Seabed mining

The concept of mining from the seabed is not so new, as there has been diamond mining off the coast of Namibia and the extensive extraction of sand and gravel, often from shallow marine areas. Sand mining, in particular, is now conducted on a grand scale, with 93.5 million cubic meters of sand removed from European waters alone in 2012.[47] There has also been a long history of deep sea oil and gas extraction, as well as oceanic dumping of mine wastes.[48] The expansion of such sea floor mining, which has been on a small-scale in the past, is looking increasingly viable due to technological advances, rising mineral prices and fears of shortages of specific minerals associated with declining ore grades. The difficulties of obtaining social license to operate for terrestrial projects, discussed in this report, may well play a part too.[49] Companies and States can see commercial opportunities, especially in the case of island nations, which have limited land area, but extensive access to ocean resources. For this reason, alongside geological conditions, deep sea mining has mainly emerged as a concern of the Pacific nations.[50]

Nation-states are responsible for the regulation of mining activity in their own sovereign territory, including in their coastal waters. If the resources are located within a 200 nautical mile zone of a State, it has the sole right to mine them or to award mining licenses to foreign companies. However, in the case of the deep sea, the central authority which grants licenses is the International Seabed Authority (ISA). The ISA has already assigned numerous licenses to several States, covering 1.5 million square kilometers divided up among 26 different permits, but as yet only for exploration purposes. To date no actual mining has been carried out anywhere because the final set of rules governing the activity is still being debated. The ISA plans to establish the legal conditions for such seabed mining by 2016.[51]

There are three main types of seabed resource deposit which are of interest. The first, cobalt crusts, are encrustations of minerals that form on the sides of submarine mountain ranges, and are found mostly in the western Pacific at depths of 1,000 to 3,000 meters. It is still not clear how the crusts can be commercially mined, or to what extent such mining

will damage deep sea habitats. The second type is so-called massive sulphides, which accumulate at the opening of hot vents on the ocean floor. They are found in many places on the sea floor which are, or used to be, volcanic. The commercially estimated amounts of massive sulphides total a few hundred million tons, of which not all will be commercially viable. However, the massive sulphides found in the territorial waters of Papua New Guinea contain substantial amounts of gold and silver, with the Canadian company, Nautilus Minerals Inc., gaining the first mining lease to explore these deposits at its Solwara 1 project.[52]

The third deposit type is known as manganese nodules. They are lumps of minerals, ranging in size from a potato to a head of lettuce, which cover enormous areas of the seabed of the Pacific and Indian Oceans, mostly at depths below 3,500 meters. Manganese nodule mining at an industrial scale is presently not possible because there are no market-ready mining machines, although Japan and South Korea have built prototypes and companies have developed similar machines for diamond mining. There is a strong consensus among environmental scientists that mining manganese nodules would represent a devastating encroachment on the marine habitat, as the machines will effectively plough the seabed harvesting the nodules over many square kilometers before pumping them to the surface.[53]

An uninformed perspective could regard deep sea mining as being of no concern to indigenous peoples, given its distance from land-based territories. However, that is to ignore both the holistic vision of indigenous peoples with regard to nature, and the serious environmental—which may also be economic—concerns, especially with so many island communities making their living from the sea. It also ignores the customary claims which certain coastal indigenous peoples and communities have over their traditional fishing grounds. Roche and Bice have reviewed the potential impacts of deep sea mining on communities in the Pacific. They recognize that communities' perceptions of risk can create real fears and stresses regardless of what the reality will ultimately bring. These are often informed by their prior experiences of terrestrial mining, which in many cases in the Pacific has not been hugely positive.[54] This reality helps to explain why potentially affected local populations are joining conservation groups in voicing their concerns, calling for the application of the precautionary principle, as well as FPIC, in relation to any resource decisions that may affect them. Communities in New Ireland Province in Papua New Guinea are already arguing that Nautilus' Solwara 1 license was granted without their FPIC.[55]

1.2 Review of Environmental and Social Impacts on Indigenous Peoples

In the 2009 Manila Conference, indigenous peoples raised their concerns in relation to the impact which the extractive industry was having on them. Various concerns were raised with regard to the types and scale of those impacts which were documented in the *Pitfalls and Pipelines* publication.[56] The following section aims to provide an update on the situation, noting relevant developments or new research, and identifying where there have been significant changes.

i. Indigenous Peoples' Experiences of Environmental Impacts

The impact of the extractive industries on water, and how that affects their communities, continues to be predominant among the issues which cause anxiety for indigenous peoples. This is not surprising when viewed in light of the fact that despite global water withdrawals having tripled in the last 50 years, the potential supply of water has stayed relatively constant during the same period.[57] According to the Water Resources Group's 2030 scenarios, global demand for water already exceeds sustainable supply. It is estimated that water demand could be as much as 40 percent higher than supply by 2030.[58]

A recent report by Oxfam America mapped the water constraints in Ghana and Peru, countries where water is a particularly scarce resource and yet local communities compete for it against substantial extractive industry needs. The report noted how these constraints were a growing problem, which undermined both farming potential and urban quality of life. The maps in the report reveal extensive overlaps between mining concessions and water resources, overlaps that are growing steadily larger, with little hope of well-designed and fair systems for the water allocation.[59] This reality is well illustrated by a review of environmental problems at Canadian

mines in Latin America which concentrated on the issue of water, and the extent to which concerns over water have driven recent indigenous protests in the Peruvian Andes, notably the opposition to Newmont's Conga project, that will be discussed in greater detail later.[60]

A growing share of energy and mineral demand is also met by lower-quality resources, such as low-grade metal ores or unconventional oil and gas, which tend to require much larger quantities of water in the extraction and processing stages. In 2001, the US Environmental Protection Agency estimated that fracking in the US used 70 to 140 billion gallons (265 - 531 billion liters) of water per year, which is equivalent to the total amount of water used each year by up to five million people. Meanwhile, the toxic lakes created by the tar sands industry in Alberta, Canada now cover an area of 176km^2.[61]

It is particularly worrying is that the hydropower sector is especially exposed to the effects of water stress. This will lead to energy vulnerabilities in hydro-dependent regions in Latin America, South Asia and sub-Saharan Africa. Many extractive industries, especially aluminum production, are dependent on such power, so unless precautions are taken, such reductions in hydropower could in turn lead to a greater reliance on fossil fuels. This is a concern when you consider how the production of these fossil fuels (especially coal and tar sands) is likely to need large quantities of water, and therefore vie for such resources in already water-stressed areas such as in India, China and South Africa.[62]

Another major concern is the cumulative impacts associated with mining. A report by Earthworks in the US focused on acid mine drainage (where water coming into contact with mined sulphide rocks becomes acidic), estimated that between 17 to 27 billion gallons of polluted water will be generated by just 40 mines in the USA each year, every year, in perpetuity. They estimated that the bill to taxpayers for water treatment will be $56-67 billion a year.[63] In South Africa there are concerns that, unless serious remedial work is done, acid water from over a century's worth of disused mines will flood Johannesburg. The companies involved are fighting legal actions against their historical liabilities to clean up this mess.[64]

Two issues, which merit particular attention, are impacts associated with heavy metals, including mercury, and impacts of uranium mining. Mercury continues to be a serious environmental concern, with the estimates of 1,960 tons of human-sourced mercury being released into the atmosphere in 2010. The two biggest sources for this are both mining related, namely small-scale gold mining and coal burning. The United Nations Environment Programme (UNEP) estimates that without improved pollution controls, or other actions to reduce mercury emissions, they are likely to increase substantially by 2050.[65] The urgency of the situation is reflected in the fact that 100 countries have signed the 2013 Minamata Convention (Mercury Treaty) agreeing to cut mercury pollution by setting enforceable international limits.[66]

However, no equivalent treaty exists regulating the exploitation of radioactive uranium, despite—or possibly even in part because of—its disproportionate impact on indigenous peoples. Of the estimated 10,000 or more abandoned uranium mines in the 15 Western states of the United States, 75 percent are on federal or tribal lands (with more than 1,200 abandoned uranium mines documented on the Navajo reservation alone).[67] Although the price of uranium has dropped, after Japan's Fukishima disaster stalled many nuclear power projects, there are constant promises of a price rally. Meanwhile, the depressed price has not stopped recent conflicts over uranium mining affecting indigenous peoples in countries throughout the world, including but not limited to Australia, Canada, USA, Niger, India and Greenland.[68]

The impacts of mercury and uranium are, aside from their human rights and cultural dimensions, good examples of how environmental concerns can merge with social issues, in particular, health impacts. In addition to the adverse environmental and cultural impacts associated with mining, impacts on health are a major concern. These health-based impacts, which can be associated with the release of dust or chemicals into the air, water or soil, are particularly prevalent in the contexts where heavy metals enter into water sources as a result of mining. While the much-needed studies on the potentially severe health impacts of uranium mining on communities

have yet to be conducted, ample evidence already exists of health impacts of other forms of mining. For example, the 2014 report on the impact of Canadian mining companies in Latin America points to cases of increased respiratory disease in Argentina and health issues arising from increased levels of metals such as lead, mercury, zinc, arsenic, and copper in the blood of community members in Honduras and Guatemala. [69]

ii. Indigenous Peoples' Experiences of Social and Cultural Impacts

One of the major rights-based issues, which has come to public attention in recent years and is having profound social impacts, is land grabbing, particularly where it affects food production. In the case of indigenous peoples this involves the large-scale taking of their customary lands, or lands they traditionally used as sources of food, absent their informed consent and without adequate compensation in the form of equivalent lands. The Oxfam America mapping exercise mentioned above clearly demonstrated the geographical overlap of agricultural production and extractive industries activities in Peru and Ghana. The report warns that unless this overlap and the process of land allocation are managed effectively by governments, it is a recipe for continued social conflict.[70]

Despite such warnings, there are numerous examples where the extent of these overlaps is increasing. In Alberta, Canada, the area of land required to produce a barrel of oil from tar sands increased by a factor of 12 between 1955 and 2006, and a recent scientific study has unsurprisingly highlighted how wild-caught foods in downstream regions have higher-than-normal levels of pollutants, which are being associated with oil sands production.[71] In the Philippines, the impact on food production of the government's widespread promotion of mining, primarily located in indigenous territories, was analyzed in the 2009 book *The Philippines: Mining or Food?*[72] The proposal for a massive coal mine in Bangladesh's region of Phulbari is projected to affect the food production and livelihoods of up to 220,000 people, mostly from 23 differ-

ent tribal groups, in Bangladesh's principle rice-growing area. In South Africa, it is calculated that 12 percent of the country's high potential arable land is threatened by coal mining, which would mean losing 284,844 tons of maize per annum.[73] Arguably of even greater concern is the finding of a recent study of the direct impact of gold mining in Ghana on agricultural production that crop losses of up to 40 percent, almost certainly result from air pollution from mining. The report found that these impacts, while most serious in areas nearest to the mines, extended as far as 20 km away.[74] Although, some would argue the economic benefits of a mine may outweigh these risks, many consider them too short-term a compensation against such a serious loss. Even so, a 2011 study on the impact of the Marlin Mine in Guatemala concluded that "over the entire life-cycle of the mine, environmental risks significantly outweigh economic benefits."[75]

As was highlighted in *Pitfalls and Pipelines*, the impacts of large-scale mining on women is leading to a breakdown of the social fabric of many indigenous communities, with the negative impacts of this being particularly profound for indigenous women. Two recent gender-focused publications from Asia have highlighted the continuing trends of loss of livelihood, increased prostitution and sexual predation, community division, loss of social status and increased domestic violence, as well as increased marginalization of indigenous women in the development process.[76] This issue around women's safety is particularly pronounced when mining is conducted in conflict areas. For example, ABColombia reported increased sexual violence in conflict areas in Colombia where mining was taking place. Between 2001 and 2009, in 407 municipalities where armed actors were present, almost 18 percent of women were reported to have been victims of sexual violence.[77] In cases where such violence has taken place, there is a failure on the part of both the government and the companies to ensure that the victims have access to effective remedies and receive adequate compensation. A good example of this is where Barrick Gold has implemented project-level non-judicial grievance mechanisms at both its Porgera joint Venture mine in Papua New Guinea and its African Barrick Gold at the North Mara mine in Tanzania. It is reported that in both cases, victims

of rape were required to sign a legal waiver in return for a benefits package.[78]

Tales of other social impacts continue to be reported. The issue of the violation of sacred sites is an important one to indigenous peoples, and the cases of the struggles of the Subanon over their sacred Mount Subanon in the Philippines, the Lakota over the sacred Black Hills and the Western Shoshone over Mount Tenabo in the United States are well documented (see also chapter two, boxes 5 and 6). A recent example in Mexico is the Wirikuta (La Luz) project, where divisions in the community have been caused by some representatives of the Wixárika people agreeing to prospecting activities by First Majestic Silver Corp. on indigenous communal lands, which are threatening Wixárika sacred sites.[79]

Mining projects continue to be associated with other serious rights violations, such as forced displacement. The Wayúu of La Guajira in Colombia continue to struggle against the further encroachment of the vast Cerrejon opencast coal mine.[80] Tribal communities in the province of Tete, Mozambique have been forcibly removed to make way for Vale and Rio Tinto coal mines, which have affected their livelihoods and access to croplands. Human Rights Watch has documented how serious shortcomings in government resettlement policy and mining companies' implementation uprooted largely self-sufficient farming communities and resettled them to arid land far from rivers and markets.[81] In all the above cases, the people have taken to blockading the railway lines by which the coal reaches coastal ports for export. In India. Korean company POSCO has been battling with residents, including local Adivasi, in the town of Kalinganagar, Jajpur, since 2004 in order to build a vast "steel hub" with local company Tata. Despite protests, which have resulted in the killing of community members, and a refusal by the State to provide "land for land" compensation, the foundation stone was laid for the plant in May 2010.[82]

One key concern is direct attacks against human rights advocates. Global Witness report that worldwide between 2002 and 2013, known killings of environmental and land defenders have dramatically increased. Three times as many people were killed in 2012 than 10 years before. The data

shows how indigenous peoples in particular are on the frontline of this upsurge in violence. The report documents 92 events related to indigenous peoples involving 115 victims, which as they note is likely to be a conservative figure because of under-reporting of indigenous identities and incidents in remote areas. Over two-thirds of the known killings took place in the context of conflicts over the ownership, control and use of land, frequently in the context of mining and extractive industries operations. [83] As Global Witness note:

> "the expansion of mining activities in and around areas of indigenous, community-held or contested land has given rise to many grave conflicts. The environmental effects of mining are well-documented and violence against these opposing projects is increasing, for example in Mexico and Central America. At least 150 killings have taken place in the context of struggles with mining and extractive projects. Many of these have taken place during protests. In Peru, for example, between 2002 and 2013 there were 46 extrajudicial killings of demonstrators at mining sites around the country. We have also documented the deliberate targeting of activists who lead or participate in organized opposition to the expansion of mining activities. In the Philippines, 41 defenders were killed opposing mining or extractive operations, many by unknown gunmen on motorcycles. In Colombia in 2012 and 2013, seven anti-mining activists were killed in connection with their resistance to mining and extractive companies operating on indigenous lands. Four of those killed belonged to the indigenous Awá group: On 11 February 2012, in Turmaca municipality, Nariño, Gilberto Paí Canticús and Giovanni Rosero were shot dead by unknown gunmen on motorbikes. They were members of a non-violent group of indigenous guards, established to defend ancestral lands. On 12 July 2012, Libio Guanga, indigenous Awá governor of Cartagena Alto reserve, was stabbed to death in Ricaurte village. Statements from the National Indigenous Organization of Colombia (ONIC) relate his murder to the arrival of mining in the area. On 29 November 2013, another indigenous Awá leader, Pai, died after being twice shot in the head by unknown

gunmen. Pai had led attempts to stop the contamination of his community's water supply by oil spills."[84]

This level of violence is all the more alarming due to the frequent collusion between State and company security. An example of this is the ongoing violent conflict at Minera Yanacocha in Cajamarca, Peru, which is the largest open pit gold mine in Latin America. The company has been attempting to expand its operations to a new site, as resources at the old mine are almost depleted. The plan for the new mine, known as the Conga project, involves the destruction of four mountain lakes, which supply water to the region. Following a number of mass mobilizations and a general strike, in July 2012, violent clashes broke out and five people were killed and several dozen more injured by the police. Arrests were made and many people were detained. The Inter-American Commission on Human Rights expressed its concern over the killings and the violence in Cajamarca, particularly over attacks on human rights defenders. In February 2014, a further protest by farmers and villagers was ruthlessly suppressed by hundreds of security agents from a specialized police unit using tear gas and pellets, who arrived in company buses.[85]

A contract between Yanacocha and the Peruvian National Police in force at the time of the violence, points to the company's direct complicity in the actions of the State forces. Many such agreements exist between the National Police force and mining companies aimed at securing their operations. These agreements allow companies to request permanent police presence or seek the rapid deployment of larger units to repress social protests. In some cases, the companies provide the police with extensive financial and logistical support.[86]

Compounding the lack of accountability associated with such repression of community protest, President Humala's government has modified the penal code to ensure that members of the Armed Forces and the National Police are "exempt from criminal responsibility" if they cause injury or death through the use of their guns while on duty.[87] The organization Front Line Defenders noted in February 2014 that there were 400 protesters and activists facing prosecution on the basis of charges lodged by the mining companies, their

staff or the public prosecutor, many of which are tantamount to judicial harassment. Even the Governor of Cajamarca, who is opposed to the Conga project, has been jailed, on alleged corruption charges, and refused bail.[88]

This increasingly violent combined State-company response to, and criminalization of, social protest is in no way unique to Peru and is instead illustrative of a widespread trend in countries throughout Latin America, Asia and Africa:

- In Guatemala, a government operation, called the "Inter-Agency Mining Affairs Group," is being piloted in the municipality San Rafael Las Flores, where local communities have been resisting Tahoe Resources. Community members and activists view this as a military intelligence operation;[89]
- In Burma/Myanmar, protests over land confiscations for the Letpadaung Copper Mine have led to a string of violent actions by State forces against peaceful protests; the most serious incident taking place on 29 November 2012, with police setting fire to, and destroying, six protest camps housing up to 500 monks and 50 farmers. Despite the government creating the Letpadaung Investigation Commission, led by Aung San Suu Kyi, protests continue, as do the arrests of protestors;[90]
- In their 2009 submission to UN Committee on the Elimination of Racial Discrimination (CERD), Philippine indigenous communities raised their concerns in relation to widespread militarization and violent repression of opposition to mining.[91] The systematic nature of this practice across Asia has been reported on by the UN Special Rapporteur on the rights of indigenous peoples in 2013;[92]
- In Uganda, employees of East Africa Mining arrived in local communities accompanied by soldiers before the company had conducted any meetings, thereby spreading fear and confusion, and with no attempt to secure the FPIC for access to local indigenous communal land. Although Uganda's mining law requires negotiating a surface rights agreement with landown-

> ers before mining begins, and payments of royalties once revenues flow, the law does not require any communication or consent during exploration work.[93]

1.3 Lessons Learned by the Industry and Emerging Good Practices

i. Company Policy and Practice

In general, extractive industry companies are taking the issue of community relations, particularly with regard to indigenous peoples, more seriously than in previous decades. As noted in section 1.1, research is proving a link between levels of risk for extractive industry companies and indigenous peoples. It seems the greater the impact of extractive industries on indigenous peoples the greater the perception by companies of the risks involved in ignoring community concerns.

The 2014-15 annual EY report reviewing mining company executives' perceptions of the primary risks which their operations face indicates that the issue of maintaining a social license to operate is now their third biggest concern, up from fourth place in 2008.[94] As EY note:

> "there is a significant upwelling of anti-mining sentiment in several regions, including Latin America and Africa. Social license issues in Latin America intensified in 2012, with mining and metals operations increasingly perceived as having a negative impact on human rights, communities and the natural environment."[95]

It has been estimated that a major world-class mining project—with capital expenditure between $3 billion and $5 billion—could incur costs of approximately $20 million per week in lost productivity as a result of production delays from social conflict, mostly from lost sales.[96] In addition to the significant challenges around obtaining social license to operate

many greenfield projects located outside traditional mining, countries face additional challenges around planning processes, environmental impacts and poor State infrastructure.[97] In a 2011 survey of 400 projects, Citigroup suggested that as a result only 35 percent are likely to be developed before 2020.[98]

With regard to the oil sector, increasing challenges around stakeholder engagement, including indigenous rights-holder engagement, are translating into rising costs for companies. In 2008, a Goldman Sachs study of 190 international oil projects found that it took almost twice as long to bring projects online as it had 10 years earlier. A 2010 report of the UN Special Representative of the Secretary-General on the issue of human rights cites an independent review of a subset of these companies, finding that "non-technical risks accounted for nearly half of all risk factors faced by these companies, with stakeholder-related risks constituting the largest single category."[99]

As a result, tentative company commitments to FPIC have begun to emerge. The inclusion of the requirement for FPIC into the 2012 Performance Standards of the World Bank's private sector arm, the International Finance Corporation (IFC), and by extension the Equator Banks, is adding significant momentum to the incorporation of FPIC into policies of a number of extractive industry companies, and their industry bodies. Oxfam America's 2012 Community Consent Index reviewed the public commitments made by 28 extractive industry companies on the issue of community consent. The report found that 13 of the companies reviewed have made some form of public commitments in relation to FPIC. Five companies (Inmet, Newmont, Rio Tinto, Talisman, and Xstrata) made explicit, albeit in some cases context-specific and limited, public commitments to FPIC. This was up from just two companies in 2009. An additional eight companies made indirect or qualified commitments to FPIC. Twenty of the 28 companies reviewed had publicly committed, directly or indirectly, to either general concepts of FPIC, community support, or social license to operate, in their positions regarding development activities.[100]

A 2013 consortium report on FPIC and mining companies, *Making Free Prior and Informed Consent a Reality*, pointed to the concrete FPIC commitments in the policies of both Rio Tinto and De Beers Canada (although noting that De Beers was in the process of revising its policy). It also offered qualified praise to other companies, including Anglo American and Newmont for steps taken towards the pursuit of FPIC in certain contexts. However, many of the industry representatives interviewed during the report production noted that they were effectively waiting to see what the collective response from the industry body, the International Council on Mining and Metals (ICMM), would be before formulating their own policy positions in relation to FPIC.[101]

The report identified both the pressing need for, and an apparent corresponding willingness by, the industry to ensure that FPIC is taken seriously. It also examined company perspectives in relation to certain "good practice" cases identified by the companies themselves, and cross-checked with the indigenous peoples involved. In some cases, it found constructive examples of where contractual agreements committing companies to obtaining FPIC had been entered into, in both Canada and Australia. However, in these cases the commitments had either arisen from sustained community opposition to projects, such as in the case of Rio Tinto's Jabiluka project in Australia, or were limited to obtaining FPIC at the exploitation rather than exploration stage, such as in the case of Silvercorp in Canada. In other contexts, such as in the cases of Inmet in Panama and Xstrata in the Philippines, highly diverging opinions of company practice in relation to obtaining FPIC emerged from interviews with community members and company representatives.[102]

There is obviously a long way to go before good practice cases around FPIC become more common. In order to reach this objective, increased understanding around indigenous peoples' rights and mining operations will be required by all parties involved. During the interviews conducted for the *Making FPIC a Reality* report, some company representatives expressed trepidation in relation to presenting cases as good practice or making public commitments to respect FPIC as

they regarded doing so was effectively "putting a target on their back." For this reason, some companies reportedly maintain "confidential implementation guidelines" containing a consent requirement.[103] Yet cases continue to be mentioned by companies of good practice in relation to community consent, although this often tends to be focused on benefit-sharing as opposed to obtaining FPIC. One such case, which was ongoing during the preparation of this report, is Martu Mining Services in Western Australia, where Cameco Corporation, Newcrest Mining and Reward Minerals have reserved Aus $5 million in contracts for the local indigenous group, the Martu, for services including labor hire, construction and maintenance. It aims to attract money into indigenous businesses while also increasing the capacity of local suppliers that can create supply chain efficiencies.[104]

A 2013 workshop at Chatham House, which brought together industry and civil society representatives, addressed this issue. The report of the meeting noted:

> "participants explained that many executives in the industry are still clinging to the idea that they can define the scope and set the agenda for their engagement with communities, and there is a strong preference for clear boundaries on timeframes and outcomes of such processes… Such 'fears of losing control' over the process are often unfounded. The group agreed that successful engagement with communities requires time and patience, but argued that evidence from the few projects where communities have been closely involved in planning and decision-making shows that this is rarely an obstacle to success, and indeed can yield tangible benefits for companies."[105]

ii. Private Sector Investment Policies

For some time, pressure has been mounting on banks to take greater responsibility for the human rights impacts of their lending practices. Initial steps have been taken by some banks in this regard in the context of complying with the UN Guiding Principles on Business and Human Rights, but it is

still very much a work in progress.[106] There are a number of socially responsible investors, such as Boston Common Asset Management and Calvert Asset Management, who have not only adopted FPIC for indigenous peoples, but campaigned for its adoption by other investors.[107] However, these groups remain in the minority.

Nevertheless, the incorporation of FPIC into the IFC Safeguards is to a considerable degree driving the extractive industry towards FPIC-based engagement with indigenous peoples. This is less to do with IFC's own lending, but more because of the Equator Principles, which its safeguards inform. Notably, those financial institutions who have signed up to the Equator Principles (currently numbering 80 in 34 countries) are, since the latest version of the Equator Principles came into effect on 1 January 2014, also bound to implement FPIC under the same conditions as the IFC Safeguards. Those financial institutions cover over 70 percent of international project finance debt in emerging markets.[108] That is a huge impetus to obtain FPIC for any company that needs to raise project financing. However, how the banks interpret that in their own policies, and indeed how they choose to implement it, is an ongoing issue as discussed in chapter three. A review of publically available bank policies, as of July 2014, indicates that only 39 percent have adopted a policy expressly referring to indigenous peoples.[109]

Another aspect of extractive industry project financing, which is worth highlighting, relates to Chinese investment in the sector. There is often a perception that the increasing Chinese investment is both monolithic and unresponsive to the demands of rights-holders. Yet there would appear to be some cause for hope, as increased international attention on Chinese overseas investment and the influence of rising global standards has led the Chinese government to issue two frameworks for overseas operations. These are the Green Credit Guidelines for social and environmental responsibility standards for Chinese bank loans, and the Guidelines for Environmental Protection in Foreign Investment and Cooperation.[110] The former is a Chinese green finance measure largely considered to be one of the most progressive poli-

cies in the world, while the latter sets environmental standards for Chinese companies operating internationally, as well as for partner companies. However, two years after issuing the Green Credit directive, the China Banking Regulatory Commission has yet to create a department charged with overseeing its compliance. Despite this disappointment it offers much on paper, and concerned parties have been encouraged to ensure its fuller, stronger adoption.[111]

Another potential lever in relation to influencing Chinese investors and companies is the focus which China places on compliance with ISO standards. The alignment of the guidance on social responsibility of ISO 26000 with the UN Guiding Principle on Business and Human Rights therefore offers opportunities to insist on respect for indigenous peoples' rights by Chinese corporations overseas.[112] Finally, the UN Committee overseeing the implementation of the International Covenant on Economic Social and Cultural Rights has reminded China of its obligations under the Covenant to guarantee that its corporations ensure that these rights are not negatively impacted by operations overseas.[113]

iii. Supply Chain Issues

Advances in relation to addressing supply chain concerns, in the context of a number of high profile campaigns that are focused on so-called conflict minerals, could have important implications for mining and indigenous peoples' rights. The first major campaign concerned "conflict diamonds," or "blood diamonds," and led to the Kimberley Process, a global certification scheme which was launched in South Africa in 2002. This process has been strongly criticized in recent years, with NGOs withdrawing from it and condemning it, primarily for approving Zimbabwe's sale of diamonds from the much-criticized Marange mine.[114]

The more recent campaign to gain international attention is that led primarily by Global Witness and the Enough Project for supply chain due diligence for processors and importers of the "3 Ts" (tin, tantalum and tungsten) and gold sourced

from the Eastern Congo. Revulsion at the gross rights violations arising from the conflict in the region, and the fact that purchasing of these products was fuelling this violence, led to a global campaign which culminated in the passing in the USA of Section 1502 of the Dodd Frank Act. This Act mandates companies listed on the US Securities and Exchange Commission to carry out due diligence to determine whether their products contain minerals the sales of which have funded armed groups in Democratic Republic of Congo or its eight bordering countries. So far implementation has been poor, because—as of the initial deadline given of 2 June 2014—only five percent of firms were able to confirm the source of their materials. However, it is a work in progress, and some of the major electronic firms have made substantial efforts to be compliant.

Perhaps of more importance, is that the campaign has also inspired other legislation and initiatives. For instance in March 2014, the European Commission published a legislative proposal on this issue, which although considered voluntary in nature has led to much discussion and calls for improvement. There are a number of voluntary initiatives, via the OECD, with even the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters committed to launching a "Guideline for Social Responsibility in Outbound Mining Investments" in summer 2014.[115]

Although such campaigning has certainly raised the profile of the issue of conflict around extractive industries, it is still very geographically constrained, and—while there are certainly ethnic dimensions to much of the conflict in Eastern Congo—it is generally not classified as a conflict involving groups that self-identify as indigenous peoples. However, it seems that the NGOs involved are increasingly looking to broaden the definition of conflict minerals in supply chain-related campaigns—something which could have a big impact on many of the extractive industry-related conflicts impacting on indigenous peoples.

One arena in which there are proactive moves towards realizing this is in the context of smelters' responsibility for human rights violations. A recent report by the Swiss-based

Society for Threatened Peoples outlines the role for due diligence of gold refineries in Switzerland with regard to "conflict gold" purchased from Peru. Another Swiss NGO, TRIAL, has filed a criminal complaint against gold refiner Argor-Heraeus SA, accusing the firm of the war crime of "pillage" because it had sourced the metal from rebels in the conflict region in the Democratic Republic of Congo. The Swiss prosecutor has deemed the case admissible. It represents a valiant attempt to push the boundaries of international human rights law as it applies to companies and address impunity for potential complicity in war crimes.[116]

iv. Multisectoral Developments

Supply chain concerns are also the driver for many multisectoral initiatives, which are mainly focused on establishing assurance or certification systems in response to highly publicized problems in the extractive industry sector. These initiatives have, however, had varying degrees of success. For instance, the Responsible Jewellery Council (RJC) launched a certification system in 2009 intended to address consumer confidence in diamond and precious metals jewelry. Nonetheless, it has been roundly criticized with regard to its content—for instance, it has weak certification and fails to require members to obtain the FPIC of indigenous peoples—but also because it is not really a true multistakeholder process, consisting of retailers, manufacturers and miners, with no genuine civil society input.[117]

Other single issue certification schemes, such as the coal-focused Bettercoal, have been similarly criticized for being producer-led (in the case of Bettercoal, being biased to the major power utilities and miners).[118] The Aluminium Stewardship Initiative, which was launched in 2012, is also an industry initiative, particularly manufacturers utilizing aluminum who fear growing consumer concern in relation to their products. At present, it seems to have been reasonably successful in including civil society participation, with a secretariat at the International Union for the Conservation of

Nature (IUCN), but it too is still a work in progress and has little direct indigenous participation.[119]

Perhaps the extractive industry initiative that has worked hardest at being a true multistakeholder process is the Initiative for Responsible Mining Assurance (IRMA). In theory it includes a place at the (round)table for direct representatives of "affected and indigenous communities" (rather than assuming they will be represented by NGOs). The fact that the draft of the Standard for Responsible Mining, which was released in July 2014, is the result of eight years of collaborative discussions is also indicative of the effort involved in its elaboration. The draft includes provisions requiring the FPIC of indigenous peoples, and although it is still under review, at the very least it appears to provide a framework for inclusive discussion on the issue.[120]

Finally, although not entirely similar in terms of being a full multistakeholder process, an interesting development is that, heeding the IUCN's advice, at its 2014 annual meeting the World Heritage Committee sent an emphatic message to the extractive industries not to operate in World Heritage sites. This was primarily in response to concessions granted to the oil companies Total and SOCO in the Virunga National Park in the Democratic Republic of the Congo. This complements a growing movement calling for "no-go zones" for mining, oil and gas. It offers some hope of support for indigenous peoples who wish to ensure environmental or cultural areas are preserved, on the condition that processes aimed at declaring indigenous territories as no-go zones are led by indigenous peoples, or at least take place with their full participation and FPIC.[121]

Box 2. Industry body policies: ICMM and IPIECA

In recent years, extractive industry "trade bodies" have taken a lead position on behalf of their members in dealing with indigenous peoples' issues—arguably to collectively deal with the advance of indigenous rights. The ICMM published its updated "Indigenous Peoples and Mining Position Statement" in May 2013. It sets out ICMM members' approach to engaging with indigenous peoples, and recognizes that UNDRIP "sets out rights that countries should aspire to recognize, guarantee and implement and establishes a framework for discussion and dialogue between Indigenous Peoples and States." It also lays out a position on members participating in FPIC processes in which "indigenous peoples can give or withhold their consent to a project, through a process that strives to be consistent with their traditional decision-making processes while respecting internationally recognized human rights and is based on good faith negotiation."[122]

As discussed in chapter three, the Position Statement has been subject to some criticism from indigenous peoples, not least because it appears to assert the primacy of the State under the "recognition statements" (while at the same time recognizing that indigenous peoples have their rights regardless of State recognition). However, it can be viewed as a potentially significant step forward, especially as its members will be expected to implement the commitments in this position statement by May 2015. The Guidance notes for implementation are currently being developed, and representatives of indigenous peoples have stressed the need for an inclusive process to consider such guidance.

The hydrocarbon industry is represented by the International Petroleum Industry Environmental Conservation Association (IPIECA), which released an updated version of their guidance on "Indigenous Peoples and the oil and gas industry to take into account the IFC's new safeguards."[123] The document does include an overview of the international standards and best practices related to FPIC, but it does not specifically recommend policies or practices. More importantly, any recommendations made by IPIECA are entirely voluntary for its members. IPIECA has more recently been working on community level grievance mechanisms, having released a toolkit aimed at enabling oil and gas companies to create, implement and raise awareness of Community Grievance Mechanisms.[124]

1.4 National Level Developments in Relation to Indigenous Peoples and Extractive Industries

When reviewing lessons learned by, and actions of, governments it is necessary to consider both the regulatory framework as it pertains to the recognition and protection of indigenous peoples' rights and the regulatory framework as it pertains to the extractive industry more generally. While these two aspects of the State regulatory regime are intimately related, they are generally dealt with by different parts of the State apparatus, frequently leading to a failure to ensure that the latter is harmonized with the former in a manner which guarantees indigenous rights are respected. The focus of the following section will be on these two aspects of the regulatory regime in countries in which indigenous people live. However, as addressed in chapter two, it should not be forgotten that the countries which are home to multinational extractive industry companies have responsibilities to enact legislation to ensure that their corporates respect indigenous peoples rights and to address violations for which they are responsible.[125]

i. Review of National Legislation and Indigenous Peoples

Although there have been major advances with regard to indigenous rights in international norms and international or regional court decisions—in particular, following the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)—it is the manner in which these advances are implemented—or not—at the national level, which tends to most directly impact upon indigenous peoples. There is frequently a great deal of disparity in that implementation between countries, or indeed across global regions. Even in States, which are known for having more progressive constitutions or legal frameworks with regard to indigenous peoples

(including Bolivia, the Philippines, Greenland, Venezuela and Colombia), the issue of implementation still arises with significant gaps existing between the regulatory framework and actual practice.[126]

In terms of more recent advances in national laws, there are a number of positive examples. At the time of writing El Salvador had become the latest country to amend their Constitution to recognize the country's indigenous peoples, as well as the State's obligation to them.[127] In Liberia, a 2009 law on community rights with regards to forest lands explicitly establishes FPIC as a guiding principle. The law recognizes local communities as the owners of all forest resources on community forest lands and states that "any decision, agreement, or activity affecting the status or use of community forest resources shall not proceed without prior, free, informed consent of the said community."[128] In nearby Benin, a ground-breaking law has been passed in 2012 for the sustainable management and legal protection of sacred forests, treating the communities as the custodians of sacred forests and sites where gods, spirits and ancestors reside.[129] Peru has passed legislation regulating the conduct of prior consultations.

However, as mentioned, the implementation is often poor. In India, there are legislation and policies framed to safeguard and enhance the rights of Adivasi communities, such as the 5th and 6th schedule of the Constitution and the 2006 Forest Rights Act. Yet a recent study demonstrated that five out of six large-scale projects had adversely impacted indigenous Adivasi communities, regardless of this legal protection. Customary and traditional rights, such as rights to religious grounds and burial sites had been violated by the projects, while forest lands were acquired without seeking the consent of *gram sabhas* as per the provisions of the Forest Rights Act.[130] Having said that, the India Supreme Courts have played a role in addressing this issue in one notable context as outlined below in section 1.4 and chapter three, section 3.4. In Colombia, a 2009 court ruling noted that 34 of 102 indigenous nations in Colombia were "threatened with physical and cultural extermination" amidst armed conflict, forced displacement and the imposition of resource extraction projects without concern for their

rights. The Court gave the Colombian government six months to develop comprehensive ethnic protection plans in coordination with threatened indigenous peoples.[131] Yet to date there is still no implementation, while the extractive industries are promoted regardless of their impact on indigenous peoples' rights. A landmark ruling by the Supreme Court in Indonesia recognizing the customary tenure rights of indigenous *Adat* communities is also awaiting implementation.[132]

ii. Review of National Legislation and Extractive Industries

The assumption that the extractive industries can act as a panacea for the economic woes of developing countries has become an increasing feature of governments' relations with the extractive industries. High—albeit fluctuating—resource prices have spurred government expectations as to the sectors potential. This is sometimes manifested in resource nationalism, an issue which has become one of the primary concerns of mining executives in recent years.[133]

Governments have sought to maximize returns from their national resources, through reviews of fiscal regimes and windfall taxes. The Philippine government issued a ban on all new mineral extraction contracts and is exploring an increase in excise tax on mining companies from two percent to between five percent and seven percent. Mexico has also introduced additional taxes on resource companies, which include a 7.5 percent mining royalty on earnings. States are also seeking to extract greater value from their resources by mandating that minerals are processed in-country prior to export. Indonesia has imposed steep new levies or banned the export of unprocessed mineral ore from January 2014, which has led to some very public dueling with the likes of Newmont and Freeport McMoRan. Ghana, South Africa and Zimbabwe are all proposing similar measures.[134]

Increased concerns on security of resource supply have led governments to use fiscal policy to stimulate or curb production, with, for instance, the Chinese State raising taxes

on iron ore and other metals in an attempt to reduce foreign dependence. There has also been an increase in the number of both partially or fully state-owned extractive enterprises, particularly by China and other governments with well-endowed sovereign wealth funds (which governments use to invest directly in companies in overseas resource sectors). This has generated renewed fears that these investments will be used as blunt instruments to serve the interests of foreign governments, a concern which is most pronounced in the case of countries such as China which are regarded as tying up deals overseas to feed their domestic economies with cheap resources. State expropriations are also being increasingly used to promote the national interest (recent examples being Repsol in Argentina, Rio Tinto in Guinea and First Quantum Minerals in the Democratic Republic of the Congo)[135]

Extractive companies are, however, attempting to fight this trend, with the head of Glencore leading the rallying cry against resource nationalism. Under pressure from the industry, the Australian government recently withdrew a carbon tax that would have imposed significant costs on mining companies.[136] This increased friction between governments and the industry is leading to more public disputes in the extractive industries sector, which is in turn resulting in more international arbitration. Between 2001 and 2010, international arbitration cases for oil and gas increased more than tenfold compared with the previous decade, while those for mining increased nearly fourfold. This is also being spurred on by the proliferation of international trade and investment agreements, which provide the legal frameworks for many of these disputes. In many cases, the rights of indigenous peoples are given little head in such frameworks.[137]

The fact that many countries are attempting to ride the commodities boom by promoting the extractive industries is leading to widespread violations of indigenous peoples' rights and direct clashes with indigenous peoples. In Colombia, the Mining and Energy Vision 2019 (*Minero Energético Visión* 2019) promotes Colombia as a "mining country." In 2012 the government passed Resolution 18, 0241 of 2012 and Resolution 0045 of June 2012, which declared millions of hectares as

"Strategic Mining Areas," with the implication that a concession owner would be charged with the process of consultation, which could be conducted after the contract had been awarded. The National Indigenous Organization of Colombia (ONIC) reports that 80 percent of concessions for economic projects in indigenous territories were granted without prior consultation.[138]

In a similar fashion, Peru has received international condemnation for forcing through a law aimed at increasing investment in the extractive industries. The law deprives Peru's environment ministry of jurisdiction over air, soil and water quality standards. It also eliminates the ministry's power to establish nature reserves exempt from mining and oil drilling. Ironically, some critics argue that the law violates Peru's free trade agreements with the USA and the European Union, which stipulate that environmental protections cannot be weakened to spur investment.[139] In March 2012, the New South Wales government in Australia passed legislation that excluded uranium from provisions of the Aboriginal Land Rights Act 1983, thus stripping Aboriginal Land Councils of any future say in uranium mining proposals.[140]

However, all is not negative. In Africa, two transnational initiatives have led to steps in promoting extractive industry policies that aim to encourage not only good governance and transparency, but also community participation. The Africa Mining Vision (AMV), adopted in February 2009 at an African Union summit, advocates for "transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development."[141] The document creates a framework for action with short, medium, and long-term targets for improving public participation in mining projects on the continent. In West Africa, the regional group of 15 countries known as ECOWAS created a Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector. This Directive calls for FPIC when communities will be affected by mineral or hydrocarbon projects. Specifically, the directive states: "Companies shall obtain free, prior, and informed consent of local communities before exploration begins and prior to each subsequent phase of

mining and post mining operations."[142]

In the USA, it is reported that federally-recognized American Indian tribes increasingly have the legal and institutional capacity to assert rights of local self-government in their own areas. This means they have the right to decide on extractive projects, both in terms of blocking development at least where it is proposed in their reservations, albeit with less control across the remainder of their traditional territories, and in developing their own mineral resources should they so choose.[143] In Canada, the recent court victory of the Tsilhqot'in Nation in the case of *William vs British Columbia,* recognizing aboriginal title to a large area of territory which lies outside its actual reserve, has wide-ranging implications for aboriginal peoples' rights throughout the country. The ruling, which recognizes the need for Tsilhqot'in Nation FPIC before any economic activity takes place on their territory, has led to the first nation releasing a draft mining policy to open "doors to more respectful relationships with industry."[144]

BOX 3. Philippine Experience with IPRA

As Doyle and Cariño point out in *Making FPIC a Reality,* "The Philippines is an important country for documenting the application of the UN Declaration and FPIC of indigenous peoples in relation to mining. This is because the Philippines has national legislation, the Indigenous Peoples Rights Act (IPRA) of 1997, which was modelled on the then draft UN Declaration and requires FPIC for mining projects in indigenous territories. Despite this robust legal framework for the protection of indigenous rights, the approach adopted by the government to the implementation of FPIC has been subject to strong criticism by indigenous peoples nationwide. They hold that the government's implementation guidelines fail to ensure respect for their customary laws and that their experience indicates that FPIC is implemented in a manner which is strongly biased towards supporting government aspirations to increase foreign investment rather than uphold and guarantee respect for indigenous peoples rights."[145]

Ahjung Lee, the UN Indigenous Peoples Partnership South-East Asia Regional Project Coordinator, echoes these views in her reflection of the IPRA implementation and lessons learned from the Philippine experience.

Based on consultations with indigenous leaders and experts, she notes that they have "emphasized the importance of not over-romanticizing the provision of FPIC within IPRA. Implementation of FPIC in the Philippines has been hindered by contradictory laws, conflicting boundaries and overlapping agency mandates, as well as corruption and manipulation in FPIC processes."[146] She also points out that "[t]hese experiences show that protection of indigenous rights requires more than enactment of a single law, however good it may be. There is a need for ongoing national consensus-building, legal and policy harmonization, as well as comprehensive reforms that address all relevant issues in a holistic framework and vision."[147]

Finally, as pointed out in *Making FPIC a Reality*, the "context is further complicated by the fact that the Philippines has a significant level of armed conflict, particularly in the remoter areas of the country."[148] Lee notes that this context of violence and intimidation within which mining is pursued has led to investigations by the Philippines Commission on Human Rights of mining-related harassments and killings, and points to the need for the need for strong support mechanisms "if rights on paper are to be realized in reality."[149] The Philippine experience highlights the fundamental importance of ensuring that indigenous communities are well-organized and empowered prior to any extractive industry activities being proposed in their territories. Such empowerment is the corner stone for indigenous' rights realization.

1.5 Indigenous Rights Asserting Responses in the Context of Extractive Industries

This idea of indigenous peoples taking the initiative to decide their own futures, as reflected in the Tsilhqot'in Nation mining policy, is an increasingly common theme with regard to indigenous peoples and the extractive industries. The myriad of responses of indigenous peoples to the extractive industries, from protest to engagement (as well as the subsequent responses of both industry and state to such indigenous assertion of their rights) is addressed in a number of publications. Much of *Pitfalls and Pipelines* is dedicated to these issues

while *Making FPIC a Reality* offers insights into a number of recent cases where indigenous peoples have taken proactive steps to assert their rights in the context of mining projects in their territories. The remainder of this chapter addresses some of the themes raised in these and other publications.[150]

It is worth noting that the Permanent Forum's 2013 consolidated report on the extractive industries refers to good practice in the extractive industry as allowing:

> "for the full participation of indigenous peoples in the design of decision-making processes; it allows for and enhances indigenous peoples' participation in decision-making; it allows indigenous peoples to influence the outcome of decisions that affect them; it realizes indigenous peoples' right to self-determination; and it includes, as appropriate, robust consultation procedures and/or processes to seek indigenous peoples' [FPIC]."[151]

Despite the improvements in rhetoric and tangible efforts from some of the major players in the extractive sector, there is still some way to go towards realizing this objective. This reality is evident in the fact that community-based protest and conflict over resources appears to be on the increase. Such conflicts tend to be highly concentrated, though not exclusively, in countries with: insecure land tenure for indigenous communities; poor recognition of and respect for indigenous peoples' rights; weak environmental protection, in particular, protection for water and food sources; and high economic and social inequality. Reliable statistics on community conflicts and their impact are hard to come by. However, Stacy D. Vaneveer notes that a "Google search produces over 24 million results for the words 'mining protest' and over 115 million for 'oil protest,' covering countries in global North and South, and on every continent."[152] One assessment identified 126 active local conflicts in Peru related to the extractive industries sector as of mid-2013, while there were over 50 protests in Colombia in 2011 alone.[153] A new organization, EJOLT, has taking on the mapping of environmental conflicts, and while they admit there are large gaps in their data, the maps are nevertheless startling in the global breadth of community-based resource conflicts.[154]

We have already covered the issue of costs to the companies of such protest, but it is worth reiterating here that in a survey of companies, over 36 percent agreed that public opposition to mining had affected the permitting and/or approval process. Asked to rank the grounds for opposition, "Indigenous or Aboriginal rights or title" (at 31.8%) came second only to "environmental or water usage" as the most frequent reason given for opposition.[155] A new mine—such as the one built by Rio Tinto in Mongolia, which has been the subject to protests from local herders—can require an investment of $12 billion before any saleable resources are extracted. In Peru, mining giant Newmont reported that it was losing approximately $2 million a day in the first few days alone after local protests paralyzed its Conga mining project.[156]

A notable trend in recent years is the increasing interlinking of indigenous rights protests and the environmental movement over the extractive industries and climate change issues. There has been a growing campaign arguing that fossil fuel reserves should not be exploited. Leaving aside the issues on unconventional oil and gas as outlined in section 1.1, it has been acknowledged that if we are to implement climate change targets, in the absence of carbon capture and storage technology, more than two-thirds of coal, oil and gas reserves cannot be commercialized before 2050.[157] This has seen the large-scale linking of indigenous movements and environmentalists over various issues and raises the prospect for greater synergies.

One of the contexts in which this synergy is evident is the protests around increases in fracking for shale oil and gas. In October 2013, over 40 members of the Elsipogtog and Mi'kmaq First Nations were violently arrested for peacefully blockading access to Southwestern Energy's seismic testing equipment in New Brunswick.[158] Another is the Albertan tar sands, as well as the pipelines—Keystone XL to the Gulf of Mexico, Enbridge's Northern Gateway to the British Columbia coast and TransCanada's Energy East to the St. Lawrence River—that are needed for bulk transport. The Canadian indigenous "Idle No More" movement has allied with many anti-fossil fuel groups in Canada—and in the case of Keystone XL, indigenous groups in the USA—to delay the construc-

tion of these planned pipelines. Although there are serious concerns about the implications of the project for indigenous sovereignty and rights, as well as localized destruction and pollution, many of the joint arguments have been articulated in terms of climate change. These rights-based actions by indigenous peoples reinforce their credentials as serious players and partners in combating climate change, particularly if they have the necessary control over their lands, territories and resources to determine whether or not extractive industry projects can proceed within them.[159]

There are also obvious crossovers in the movements such as in the Australia "Lock the Gate Alliance," which seeks to mobilize community landowners to keep out fracking companies, and draws on the experience of indigenous peoples asserting their collective, self-determination-based right to give or withhold FPIC.[160] However, it should not be assumed that there is a completely symbiotic relationship between the indigenous peoples' assertion of their self-determination rights and the environmental movement. There have often been marked differences between the two, particularly where environmental NGOs seek to claim leadership over decisions impacting on indigenous peoples or where the wishes of single issue campaign groups clash with indigenous leaders who have to consider long-term community needs and interests. It is interesting, and somewhat ironic, to note that EJOLT is quoted as coining the phrase "Yasunization" to capture local community resistance to the extractive industries, which has indigenous peoples very much at its heart. It is named after Ecuador's unsuccessful plan to "keep the oil in the soil" in Yasuní National Park, which—although an admirable effort in terms of the environment and climate change—was criticized by some local indigenous peoples for failing to adequately take into account their views.[161] In the particular case of the Yasuni National Park, the issue is even more complex as it covers the territories of indigenous peoples in voluntary isolation. Respect for their fundamental right to exist would demand that no extractive activities occur in their territories irrespective of the environmental or climate change implications.

An area where the relationship between indigenous peoples and environmentalists looks strong is in their opposition to the "commodification of nature." While the intent behind this notion of placing a monetary value on nature may be good, its implementation is controversial for a number of reasons. One of the key asks of critics of the extractive industries for some time has been to ensure that all the costs of mining, oil or gas extraction are paid for by a company—in keeping with the "polluter pays" principle—and not just passed on to impacted communities in terms of polluted land, air and water. However, there are a number of problems with putting this into practice. One issue is that putting a monetary value on nature suggests that everything is for sale. Aside from depriving humanity of what is considered nature's sacred and intangible dimensions, it facilitates the argument by companies that they can "swap" biodiverse land that has been set aside as nature reserves for areas they wish to mine. In the case of Resolution Copper, in Arizona, the company— jointly owned by Rio Tinto and BHP Billiton—has been trying unsuccessfully to get a land swap as the proposed mine site has been a protected area since 1955. It is also sacred to the local Apache tribe. A broad coalition of local activists, including the Apache Tribal Government, have so far blocked numerous attempts to pass a bill through Congress to give the federal government 4,500 acres of environmentally-sensitive land in Arizona in exchange for the 3,000-acre site. In doing so the company has failed to grasp the strength of feeling among local people, especially the Apache, that the land is not for sale.[162]

The Apache campaign is to date a successful case of indigenous protest and advocacy to have legitimate rights respected, but the fate of the area has yet to be determined. One of the best examples of a successful campaign is the Dongria Khond of Niyamgiri in India. After a hard-fought campaign, which was well supported in both India and internationally to stop the UK-registered company, Vedanta Resources, from mining bauxite on their sacred mountain, the Indian Supreme Court directed that there be court-witnessed, public village councils (gram sabhas) of the affected indigenous peoples. In doing so the court was supporting the implementation of the Forest Act, which had been generally abused through intimidation

and misinformation (as noted in section 1.4). There were 12 gram sabhas in total, assessing whether mining in Niyamgiri will tantamount to an infringement of the religious, community and individual rights of local forest-dwellers, and all of them rejected the project unanimously.[163] As outlined in chapter three, box 9, their decision was subsequently upheld by the Ministry of the Environment.

The Niyamgiri example shows how, under pressure, (at least the judicial branch of) States can support the legitimate rights of indigenous peoples with regard to consenting to projects. Likewise in Guatemala, a court ruled in favor of the Mayan people of the Municipality of Sipacapa, arguing that the Guatemalan government must respect their right to consultation over a mining exploration permit granted to a subsidiary of Goldcorp.[164] In Belize, the Supreme Court has repeated held that the FPIC of the Maya people must be obtained for extractive projects in their territories.[165]

Increasingly, indigenous peoples are asserting their rights, which are then occasionally recognized *ex post facto*. The Subanon people of the Southern Philippines, tired of the failure of the implementing regulations of the Indigenous Peoples Rights Act (IPRA) to comply with the spirit and intent of the Act to ensure respect for their indigenous decision-making process, formulated their own manifesto setting out how they are to be consulted.[166] The Kitchenuhmaykoosib Inninuwug (KI) of Canada have developed, as part of protracted struggles with resource companies, an enhanced consultation and consent protocol, which asserts their own law and ownership over their resources.[167] At the Cerrejon mine in Colombia, some indigenous Wayuu communities have withdrawn from official consultation procedures, which they see as manipulated by the company and the government, and have begun to conduct their own "autonomous consultation" processes, which they will control themselves in accordance with their own traditions and their own timetable.[168]

The Wayuu communities have been led by strong female leaders, as have, for example, the Mirrar in Australia and many indigenous communities in the Cordillera in the Philippines. As noted in section 1.1 and in chapter two, indig-

enous women are disproportionally impacted by large-scale extractive industry projects, and consequently are frequently on the frontlines of asserting their rights. According to recent materials synthesizing experiences in the Philippines they are campaigning and advocating locally, as well as nationally, undertaking livelihood projects, struggling to be heard within decision-making processes and networking together in order to collectively strengthen their positions.[169]

Having provided examples of indigenous peoples struggling for their right to affect decisions impacting on them, we move to those communities who are more willing to engage in extractive industry activities. There does, over time, appear to be a growing number of communities entering into negotiations and signing benefit-sharing agreements with extractive companies. How freely these are entered into is open to debate, especially where relevant legislation in many contexts effectively forces communities into a "use it or lose it style negotiation." For instance, in the Australian context, the Native Title Act provides six months for "good faith" negotiations between companies and native title holders, but if unresolved it is sent to arbitration, which tends not to favor the communities; and constitutes a time-bound right to negotiation as opposed to a right to give or withhold consent.[170]

However, there is a growing body of indigenous experience with such negotiations to draw upon, particularly from Australia and North America. The 2013 report *Making FPIC a Reality* explored the different experiences of the Kaska Dena, Lutsel K'e Dene and Tlicho First Nations in Canada, who have a history of dealing with the mining industry. At any point in time each may be engaged with up to 30 companies. As such they illustrate a transition from a more confrontational relationship with the industry, to one which is based on processes defined by, and agreed with, indigenous peoples.[171]

A 2014 report by the Harvard Project on American Indian Economic Development reviews the legal and regulatory background to agreements reached in North America, addressing both impediments to, and the elements of, successful agreements. It quotes a number of case studies, including fossil fuel production on the Southern Ute Indian Tribe territory and

experiences of coal and uranium mining with the Navajo. The report notes "the Navajo Nation has formed its own company and has taken over the Navajo Mine from BHP Billiton, and the Southern Ute Tribe of Colorado is a fully formed, vertically integrated 'player' in the San Juan Basin natural gas fields."[172] Likewise, examples of "good practice" are published by the industry bodies IPIECA and ICMM, and by the UN Global Compact.[173] However, how far such cases mentioned by industry have been opened up to in-depth analysis is not clear. Research for the *Making FPIC a Reality* report demonstrated that behind even often-quoted examples of good practice, such as Rio Tinto's decision to respect the wishes of the Mirrar people at the proposed Jabiluka mine, there are complex historical realities; as well as ongoing tensions and differences of opinion with regard to the ideal nature of agreements and the role which the State should play in protecting indigenous peoples' rights. From the community perspective, while the current arrangement affords a strong safeguard for their rights, an outright prohibition on mining in the area would be preferable to a contract which vests certain rights over their territory to a mining company. It is clearly a mark of both respect, and necessity, that both parties continue in long-term negotiations.[174] The search for, and dissemination of, good practice is clearly important. However, it is evident that any case study purporting to show good practice must understand and project the views of the impacted rights-holders. That should hopefully ensure that any lessons to be applied in other contexts will be based on a true understanding of the social and power dynamics behind the decisions which have been made and agreements reached.

Box 4. Rio Tinto and the Mirrar people

In 2005, following three years of negotiation, Rio Tinto publicly agreed to a binding consent requirement in relation to any mining operations (exploration and exploitation) within the Jabiluka concession it had acquired in 2000. The mining lease located in the Mirrar lands in Australia's Northern Territory had been granted to another company in

1982 pursuant to national pro-indigenous legislation in which consent was a condition of approval. However, from the perspective of the Mirrar, their original "consent" had not been obtained in a manner that was free and informed, forcing them to engage in two decades of local, national and international campaigning in order to assert their rights. The case is of particular importance as it illustrates: a) the potential for a mining company and an indigenous representative organization to enter into a contractual agreement ensuring future FPIC, irrespective of the legislative context; b) the limitations of legislation in the absence of political will to implement it; and c) the importance of a well-resourced representative organization which is accountable to the impacted indigenous peoples.[175]

Chapter Two

UN Human Rights Bodies, Indigenous Peoples and Extractive Industries

2.1 Overview of the Normative Framework of Indigenous Peoples Rights.

Chapter one outlined some of the trends in the extractive sector since 2009, which have had impacts on, or have implications for, indigenous peoples. This chapter and chapter three examine the development in the international normative framework of indigenous peoples' rights as it relates to the extractive industry in a similar timeframe. Chapter two does so by reviewing the relevant jurisprudence of UN treaty and charter bodies following the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007. This is complemented by chapter three, which addresses parallel developments in other international fora that have implications for the realization of indigenous peoples' rights in the context of extractive industry activities. Before addressing this body of jurisprudence, standards and guidance, a brief overview of the evolution of indigenous rights is provided in order to contextualize the subsequent analysis.

The UNDRIP represents the culmination of 50 years of developments in the international normative framework of indigenous peoples' rights and constitutes the clearest articulation of indigenous peoples' cultural, territorial and self-governance rights. Indigenous peoples' collective land rights flowing from native custom and long-time possession or usage were first given formal recognition by the international community in 1957 under Article 13 of International Labor Organization (ILO) Convention 107 (C107). While the

Convention was framed with the integration of indigenous peoples into mainstream society as its primary objective, its rights-denying provisions, such as those providing for non-consensual relocation of indigenous peoples on the grounds of national development, have been re-interpreted in light of subsequent developments in international law. For example, while C107 makes no explicit reference to resource rights, the requirement for indigenous consultation and participation in decision-making pertaining to exploitation of resources located in their territories is now understood to be implicit in the Convention's land rights and cooperation provisions.

One of the most significant developments in the evolving normative framework of indigenous peoples' rights was the 1989 revision of C107 into ILO Convention 169 (C169). This revision was reflective of the transition from an integration and assimilation approach, towards one based on respect for indigenous peoples' cultures and territorial integrity and their right to permanent existence. Participation and consultation aimed at achieving consent constitute the cornerstones of C169, with a particular emphasis placed on ensuring that the rights recognized under the Convention are not infringed upon in the context of extractive industry projects. C169 affirms many of the fundamental and inherent rights recognized as pertaining to indigenous peoples under the contemporary international normative framework. These include: rights to land, based on customary ownership or long-time possession; self-governance rights, pertaining to development and respect for indigenous institutions; and the right to participate in, and benefit from, resource exploitation. Participatory social, spiritual, cultural and environmental impact assessments aimed at determining the extent to which resource exploitation may infringe upon the enjoyment of rights recognized under C169 are required prior to authorizing or commencing any extractive industry activities. These impact assessments, along with the requirement for benefit-sharing, provide a basis for mandatory, culturally appropriate, good faith consultations, which must have the objective of obtaining consent to all potential resources exploration or exploitation impacting on their rights.

From the perspective of many indigenous peoples, C169 had three major shortcomings at the time of its adoption. Firstly, while it uses the concept "peoples," it also includes a qualification holding that the reference to "peoples" does not have any implications in terms of the rights which flow from the term under international law, thereby excluding the affirmation of the right to self-determination from the Convention's scope. Secondly, while consent is explicitly required in the context of relocation, with some potential exceptions, in all other contexts consent is framed as an objective, as opposed to a required outcome, of consultations. Thirdly, while the legitimacy of indigenous peoples' claims over subsoil resources located in their territories was recognized during the drafting discussions, the final text of C169 did little to challenge the claims of States to exclusive ownership over those resources.[176]

Subsequent developments in the normative framework of indigenous rights have built on the positive aspects of C169, while also going some way towards addressing its deficiencies. Among the most notable developments was the issuance in 1997 of General Recommendation 23 on indigenous peoples by the treaty body responsible for the oversight of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD). General Recommendation 23 interprets ICERD as requiring indigenous peoples' free, prior and informed consent (FPIC) for activities impacting on their rights and interests. In a similarly constructive vein, the treaty bodies—which oversee the implementation of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR)— subsequently affirmed that indigenous peoples are vested with the right to self-determination under Common Article 1 of the Covenants, with a particular emphasis placed on the resource dimension of that right. However, the issue of indigenous peoples' ownership claims over subsoil resources has to date not been adequately addressed by the human rights regime, despite the important 2004 study on the question conducted for the sub-commission on human rights by Erica-Irene Daes.[177]

This right to self-determination and the associated obligation to obtain FPIC were reaffirmed by States when the General Assembly adopted the UNDRIP in 2007. The Declaration frames the consent requirement in relation to resource exploitation in a more affirmative manner than C169, establishing indigenous peoples' FPIC as the self-determination-based standard to be met in the context of resource exploitation in their territories. Resource rights are also afforded greater recognition under the Declaration than C169, with no distinction made between surface and subsoil resources. Particular emphasis is also placed on indigenous peoples' cultural rights throughout the Declaration. Indigenous peoples have repeatedly articulated their perspectives with regard to respect for their rights in the context of extractive industry operations in a range of pronouncements, all of which call for respect for the rights affirmed in the UNDRIP.

The adoption of the Declaration triggered an increased focus of UN treaty and charter bodies on the rights of indigenous peoples. Notably, since 2007, treaty bodies have placed particular emphasis on the impact of extractive industries on the enjoyment of these rights. These bodies have repeatedly recommended that States obtain indigenous peoples' FPIC prior to authorizing any extractive industry projects in their territories and prior to the commencement of exploration or exploitation activities. Over the course of his mandate, the former Special Rapporteur on the rights of indigenous peoples, James Anaya, dedicated his thematic work to the issue of indigenous peoples and the extractive sector, further clarifying and strengthening the role of the UNDRIP as the standard with which all State and non-State actors must comply in the context of extractive projects impacting on indigenous peoples. As will be outlined in chapter three, similar affirmations of the requirement for FPIC are found in the post-Declaration jurisprudence of the Inter-American and African regional human rights systems.

This post-UNDRIP body of jurisprudence frames the requirement for FPIC as a derivative of the fundamental collective rights of indigenous peoples, in particular, their right to self-determination as well as their cultural and ter-

ritorial rights. The requirement to consult and obtain FPIC is coupled with the duty to conduct participatory environmental, cultural, social, spiritual and human rights impact assessments, and, where consent is forthcoming, to guarantee fair and reasonable benefits and ensure compensation for any rights infringements. Increasing emphasis is also being placed on the responsibility of corporate actors to respect indigenous peoples' rights in the context of extractive industry projects.

The following section will focus on these developments in relation to indigenous peoples' rights as they pertain to the extractive industries. Where dedicated reports exist addressing the issue of indigenous peoples and the extractive industries, such as the thematic reports of the UN Special Rapporteur on the rights of indigenous peoples, this chapter will provide a brief overview of their content and direct readers to the appropriate sections for further information. It complements these thematic sources by consolidating extractive industry-related recommendations emerging from the UN treaty bodies and other special procedures of the UN Human Rights Council. One of the important contributions of the chapter is that it provides a consolidated thematic overview of treaty body jurisprudence in the area of indigenous rights and extractive industries. This jurisprudence reinforces other developments in the normative framework of indigenous peoples' rights, such as the adoption of the UNDRIP. It is particularly important in light of the legal obligations following the human rights treaties, in particular, the peoples' right to self-determination and their right to non-discrimination, and the need to interpret these treaties in accordance with developments in the broader framework of international law.

2.2 Developments in UN Treaty Body Jurisprudence Post-UNDRIP Adoption

Two particularly notable features of international human rights jurisprudence from 2007 onwards are the extent to which the UNDRIP has served as an interpretative guide for

human rights treaties as they pertain to indigenous peoples' rights, and the increased focus of that jurisprudence on the impact of extractive industries on indigenous peoples' enjoyment of those rights. The universal significance of the UNDRIP for the interpretation of human rights affirmed under other international instruments was highlighted by the Committee on the Elimination of Racial Discrimination (CERD) in its 2008 recommendation to the United States. CERD recommended that the United States use the Declaration as a guide to interpret its obligations under ICERD as they relate to indigenous peoples, despite the fact that at the time the United States had not yet supported the Declaration. In the intervening years, both CERD and the Committee on Economic Social and Cultural Rights (CESCR) have made explicit reference to the UNDRIP as a basis for interpreting State obligations under their respective treaties, while the jurisprudence of other treaty bodies such as the Human Rights Committee (HRC) and the Committee on the Rights of the Child (CRC) has also clearly been influenced by the adoption of UNDRIP.[178]

A survey of the treaty bodies' recommendations under their concluding observations and complaint mechanism between 2007 and 2014 indicates a strong trend towards addressing indigenous peoples' rights in the context of subsoil extractive industry operations. Since the adoption of the Declaration, CERD has issued 20 communications to States under its urgent action procedure, 25 concluding observations, and four follow up letters, all in relation to the impact of subsoil extractive industries on indigenous peoples' rights. Both the CESCR and the CRC have issued similar recommendations to nine States in the same timeframe, while the HRC has addressed four States, and the Committee Against Torture (CAT) and Committee on the Elimination of Discrimination Against Women (CEDAW), one each. In total, in the seven years since the adoption of the UNDRIP, some 34 States have been addressed in relation to indigenous peoples' rights and the extractive industry, with some of these States receiving multiple communications from one or more treaty body. In contrast, in the 14 years prior to the adoption of the UNDRIP a total of 16 States had been directly addressed in relation to indigenous peoples and subsoil extractive industries.[179]

While this increase in treaty body engagement with the issue is a welcome and important development, it is noteworthy that the HRC, which historically had been proactive in the area of indigenous peoples' rights and the extractive sector, has tended to be less active in this area than CERD, CESCR and the CRC in recent years. In this regard, a revision of the HRC practice in relation to considering indigenous peoples' complaints in relation to their right to self-determination under its optional protocol would be timely, in light of the adoption of the UNDRIP, and would assist in redressing this imbalance. It is also to be expected that the entry into force of the optional protocol to the ICESCR will lead to greater engagement of the CESCR with indigenous peoples' rights in the context of the extractive sector and in specific cases. The Committee on the Elimination of Discrimination Against Women (CEDAW) has increased its focus on the rights of indigenous women. CEDAW addressed the profound impacts of mega-mining projects on women' rights in Colombia in its 2014 concluding observations, which is hopefully an indication of its intent to give greater attention to the particular impacts on indigenous women arising from extractive industry activities in the future.

This increase in treaty body engagement with indigenous peoples' rights in the context of the extractive sector, while it is clearly reflective of alarming level of rights violations in the sector, is not necessarily indicative of an increase in the extent or severity of such violations. The cases addressed by treaty bodies represent only a small percentage of actual violations due to the fact that only reporting States, and cases which have been brought to these Committees' attention, are addressed. The fact that violations of indigenous rights in the context of extractive industry operations have long been pervasive and profound was noted by the Special Representative to the Secretary General on the issue of human rights and transnational corporations and other business enterprises in 2006, when he stated:

> "[t]he extractive sector oil, gas and mining utterly dominates this sample of reported abuses with two-thirds of the total...The extractive industries also account for most allegations of the worst abuses, up to and including complicity

in crimes against humanity. These are typically for acts committed by public and private security forces protecting company assets and property; large-scale corruption; violations of labor rights; and a broad array of abuses in relation to local communities, especially indigenous people."[180]

This increase in treaty body focus on the impact of the extractive sector on indigenous peoples' enjoyment of their rights may be attributable to a combination factors, including:

i. A general increase in treaty body engagement with indigenous peoples' issues, both in terms of the number of States and the range of rights violations addressed;
ii. The consolidation of the normative framework in relation to indigenous peoples' land, territory and resource rights and an increased focus on addressing obstacles to the implementation of this framework;
iii. Improved treaty body appreciation with regard to how their Conventions should be interpreted and applied in the particular context of indigenous peoples, with the UNDRIP playing an important role in this regard; and
iv. Increased engagement by indigenous peoples with human rights mechanisms, both in the context of submitting shadow reports, attending treaty body sessions and presenting grievances and submitting information to complaint mechanisms.

The 10 main themes addressed by the UN treaty bodies in their post-UNDRIP jurisprudence addressing the extractive sector and indigenous peoples can be broadly grouped under the following categories:

A. *Mandatory participatory rights and safeguards*: i) Free, Prior and Informed Consent (FPIC), ii) impact assessments, and iii) redress, restitution and compensation;
B. *Specific contexts and impacts*: iv) Indigenous peoples in voluntary isolation, v) impacts on children, vi) impacts on water and sacred sites, vii) displacement and forced evictions, and viii) violence, repression and conflict;
C. *Implementation challenges*: ix) National court decisions

and legislation, x) business and human rights and home state responsibility.

The following section provides a consolidated overview of the jurisprudence, which has emerged since the adoption of the UNDRIP from the various treaty bodies, under each of these themes.

i. Free, Prior and Informed Consent (FPIC)

The influence of the UNDRIP is particularly noticeable in the context of the growing body of jurisprudence pertaining to the substantive and procedural dimensions of the State duty to obtain indigenous peoples' FPIC and their self-determination right to give or withhold consent to extractive projects impacting on their rights and interests.[181] As previously noted, in 1997, CERD was the first human rights body to affirm the requirement for FPIC in its General Recommendation 23. Following the UNDRIP's adoption, CERD has placed particular emphasis on this duty of States to obtain FPIC for extractive projects in a manner that is consistent with the rights affirmed under the UNDRIP. It has also repeatedly called for national legislation in relation to indigenous peoples' rights to be enforced in line with CERD's General Recommendation 23, necessitating that States "consult the indigenous population concerned at each stage of the process and obtain their consent in advance of the implementation of projects for the extraction of natural resources.[182] Indicative of CERD's focus on this issue is the fact that some 30 percent of its communications under its urgent action procedure address the requirement to obtain FPIC, predominantly in relation to the extractive sector.[183]

The CESCR, in its 2009 general comment on the right to take part in cultural life,[184] interpreted Article 15 of the ICESCR in light of the FPIC requirement in the UNDRIP. Its subsequent concluding observations to States have repeatedly affirmed this FPIC requirement as a component of the right to self-determination and indigenous peoples' cultural rights. In its 2010 concluding observations to Colombia, the CESCR expressed its concern that mining projects were proceeding

without the FPIC of indigenous peoples and afro-Colombian communities. It called on the State to "adopt legislation in consultation with and the participation of indigenous and afro-Colombian people that clearly establishes the right to free, prior and informed consent."[185] The CESCR noted the absence of FPIC for mining projects was associated with violations of "the right to livelihood, the right to food, the right to water, labor rights and cultural rights."[186]

In its concluding observations, the HRC has also framed the requirement for indigenous peoples' FPIC in light of the right to self-determination and cultural rights under Article 27 of the ICCPR.[187] In 2009, under its individual complaint procedure decision of *Poma Poma vs Peru*,[188] the HRC affirmed the requirement for FPIC for measures with a substantive negative impact on the enjoyment of the cultural life of the community. The case addressed the drilling of wells by the State, which deprived the community of water necessary for their traditional practice of llama-raising. The decision, while it did not make explicit reference to the right to self-determination, was clearly inspired by article 32 of the UNDRIP in relation to resource exploitation. In the context of the extractive sector, the HRC has focused on the issue of FPIC for projects which could have significant impacts on the rights of indigenous peoples. In this regard, it has expressed concern in relation to the enactment of legislation in Bolivia and Peru which "provides only for consultation with the peoples affected, but not their [FPIC]."[189] It has emphasized consent should be obtained through their representative institutions prior to the adoption of any measures which would substantially compromise, jeopardize or interfere with their culturally-significant economic activities.[190] Specifically addressing the case of the Mayan communities in Belize, the HRC recommended that Belize "desist from issuing new concessions for logging, parceling for private leasing, oil drilling, seismic surveys and road infrastructure projects in Mayan territories without the [FPIC] of the relevant Mayan community."[191]

In addressing procedural aspects of consent-seeking process and negotiations with indigenous peoples, CERD has raised questions as to the "standards of fairness and transpar-

ency in negotiation processes" and "allegations concerning financial inducements to conclude agreements."[192] It has also questioned the imposition of second voting processes in contexts where communities have voted against a final agreement.[193] Another important issue raised by CERD is the need to "ensure that communities have the capacity to effectively represent their interests in decision-making processes" related to extractive industries.[194] In cases where agreements have been entered into, such as in the context of uranium mining in the territory of the Tuareg peoples in Niger, CERD requested "information on the environmental and social impact assessments carried out" as well as on the measures taken to "conduct consultations with the affected communities in order to obtain their prior and informed consent to these mining activities."[195]

In their concluding observations to the Philippines and Gabon, CERD and the CESCR have also addressed issues pertaining to State creation of bodies "with no status in indigenous structure and not deemed representative"[196] and to the need to ensure that "the timeframe and process required to obtain the free and prior informed consent" are "in conformity with the customs, laws and traditional practices of these communities."[197] In its 2013 recommendation to Indonesia, the CESCR called for "strong mechanisms for ensuring the respect of [indigenous peoples' FPIC] on decisions affecting them and their resources"[198] and highlighted the need for "legal assistance" to realize FPIC.[199] In 2012, the CESCR expressed concern in relation to consultations constituting little more than information provision exercises, insufficient to allow for intercultural dialogue and expression of consent by indigenous peoples, and recommended that they should respect existing community consultation protocols and any decisions emerging from them.[200]

Finally, both CERD and the CESCR have affirmed that moratoria on mining are necessary in contexts where the enabling conditions for securing indigenous peoples' rights, and by extension their FPIC, are absent, in particular, in cases where such moratoria are proposed by indigenous peoples themselves.[201]

ii. Social, Spiritual, Cultural, Environmental, and Human Rights Impact Assessments

Treaty bodies have repeatedly clarified that obtaining indigenous peoples' FPIC necessitates the conduct of systematic impact assessments aimed at determining the extent to which their rights may be infringed upon by extractive projects, including by project-related activities such as deforestation or road construction. Noting the absence of such systematic impact assessments and consultations, CERD and the CESCR have called for States—such as Ecuador, India, Honduras, Chile, Cambodia and Peru—to establish independent mechanisms to ensure their conduct prior to authorizing any investment projects or activities that may impact on indigenous peoples' enjoyment of their rights.[202]

The jurisprudence of the treaty bodies clarifies that in order to ensure that consent is informed, impact assessments should address environmental, social, spiritual, cultural, and human rights impacts, including impacts pertaining to health, water, air or soil quality and livelihoods.[203] In order to fulfill their obligations, CERD has suggested that States, such as Niger, Bolivia and Colombia, should "use the services of an independent international institution" to assess impacts to the environment and health[204] and request technical assistance from the Office of the United Nations High Commissioner for Human Rights (OHCHR) and from the ILO.[205] Addressing the impacts on children's rights, the CRC recommended that Peru ensure "independent, rights-based environmental and social impact assessments prior to the setting up of all mining or other industrial projects."[206] It also noted that while the Philippines was actively seeking greater foreign direct investment in the extractive sector, it had yet to address the issue of social and environmental impacts.[207]

iii. Redress, Restitution, Compensation and Benefits

Ensuring adequate and culturally-appropriate redress, compensation and benefit-sharing has been raised as a priority issue by CERD and the CESCR in the context of addressing

legacy issues pertaining to extractive projects, the impacts of ongoing projects and in agreements in relation to new projects.[208] CERD has raised the urgency of addressing the legacy of the past decades of extractive projects in indigenous peoples' territories in Peru, which have led to "serious environmental pollution and irreparable damage to the health and well-being of indigenous communities,"[209] and its impact on the subsistence activities of indigenous peoples.[210] CERD has also called on States such as Chile to "provide redress for the damage sustained and place priority on resolving the environmental problems caused by such activities which… have harmful effects on the lives and livelihoods of indigenous peoples."[211]

The CESCR has reminded Argentina that a failure to ensure just and fair compensation for indigenous peoples in relation to extractive industry operations in their territories constitutes a violation of their rights.[212] It has also called on Indonesia to ensure, through legislation, that extractive projects guarantee "tangible benefits" for indigenous communities in accordance with their rights to self-determination and to an adequate standard of living.[213] CESCR and CERD have also called on Congo and Niger to do likewise.[214] The affirmation of the requirement for adequate compensation frequently goes hand in hand with an emphasis on the need to ensure access to justice, effective remedies, and redress in cases of rights violations, as was the case in the CESCR's 2014 recommendation to Indonesia.[215] In this regard, CERD stressed to Bolivia in 2011 that indigenous communities must "be guaranteed access to the courts or to any special independent body established for this purpose so that they may defend their traditional rights, their right to be consulted before concessions are awarded, and their right to receive fair compensation for any harm or damage suffered."[216]

CERD has also challenged the use of discriminatory colonial doctrines and interpretations of historic agreements with indigenous peoples to justify extractive industry operations, in the absence of full protection of their inherent rights. Examples include its recommendation to: the Philippines, that rights-denying doctrines, such as the *Regalian* doctrine

under which States claim ownership of subsoil resources, be re-interpreted in accordance with the notion of indigenous peoples' inherent rights;[217] to the United States, that it ensure culturally acceptable reparations for non-compliance with its 1863 treaty obligations to the Western Shoshone in the context of land taking and mining in their territories;[218] and to Chile, that it ensure respect for treaties entered into with indigenous peoples in order to guarantee that their rights are respected in the context of natural resource exploitation.[219]

Box 5. Western Shoshone Engagement with IACHR and CERD

One of the most blatant examples of the United States' refusal to cooperate with human rights bodies is the case of the Western Shoshone—a situation of which the State is aware, but continues to refuse to address in good faith. Specific well-documented reports include those to CERD,[220] the HRC, and in a 10-year legal proceeding before the Inter-American Commission on Human Rights (IACHR).[221] In a decision issued by the IACHR in 2002, the United States was found to have violated rights to property, due process and equality before the law.[222] The United States was directed to review its laws and policies to ensure compliance with recognized standards of human rights for indigenous peoples, in particular, the right to property. To date, the United States has failed to comply with either recommendation.

In its proceedings, CERD released a full decision under the urgent action/early warning procedure in March 2006. Under this decision, the United States is to "freeze," "desist" and "stop" any further actions on Western Shoshone Territory until the land dispute is resolved in good faith. The decision affirmed the findings of the IACHR by expressing concern over the United States' claim that Western Shoshone peoples' legal rights to ancestral lands (as recognized under the 1863 Treaty of Ruby Valley) had been extinguished through "gradual encroachment" and processes before the Indian Claims Commission. In March 2013, CERD issued a follow-up letter to the United States government inquiring as to its implementation of the 2006 urgent action decision.

Despite the findings of the IACHR and CERD, the United States continues to engage in activities that threaten irreparable harm to the Western Shoshone peoples, their ancestral homelands and spiritually significant

sites. These activities include cyanide heap-leach gold mining and military weapons testing, with concomitant hazards to health and well-being; privatizing of land; continued issuances of geothermal and gas leases; and proceeding with plans to store nuclear waste on, and appropriate ground water within, Western Shoshone lands. Most recently, a massive hydraulic fracturing, or "fracking," operation is slated to begin in the coming months. Not only would these operations disrupt and destroy portions of indigenous lands, but they would likely play a large role in contaminating enormous amounts of precious groundwater.

Western Shoshone situation update by the Western Shoshone Defense Project

iv. Indigenous Peoples in Voluntary Isolation

CERD has addressed the need to protect the rights of indigenous peoples in voluntary isolation and initial contact who are—or may be—impacted by extractive operations. It has recommended in its concluding observations and under its urgent action procedure that Venezuela and Peru take into account the guidelines on voluntary isolation adopted following consultations organized by the OHCHR in the region of the Plurinational State of Bolivia, Brazil, Colombia, Ecuador, Paraguay, Peru, and Venezuela.[223] In the specific case of the Yanomami people in Brazil, CERD called for thorough investigations into attacks by illegal miners, while in the context of Camisea's plans to expand its operations into areas occupied by communities in voluntary isolation in Peru, CERD pointed to the urgency of adhering to the guidelines.[224]

In light of Ecuador's decision to pursue extractive activities in the territories used by the Tagaeri and Taromenane people, CERD expressed its concern about the vulnerable situation of those peoples and urged the State to "comply with the precautionary measures of the Inter-American Commission of Human Rights (2006) granted with respect to indigenous peoples in voluntary isolation, and…to strengthen and adapt the strategies to protect the life and livelihoods of such peoples."[225] In order to realize this, CERD emphasized the need to consider cultural, as well as environmental, impacts prior to

authorizing any extractive activities, and suggested extending the Tagaeri and Taromenane Intangible Zone, within which extractive operations are not permitted.[226]

v. Extractive Industry Impacts on Indigenous Children and Women

The CRC has engaged with the issue of extractive industry impacts on indigenous children's health from as far back as 1988, when it recommended that Ecuador seek "international cooperation, to prevent and combat the damaging effects of environmental degradation [caused by oil exploitation], including pollution" on indigenous children in the Amazon.[227] Following the adoption of the UNDRIP, the CRC has placed increased attention on the range of impacts of extractive industries on the rights of indigenous children. In its 2007 recommendation to Suriname, the CRC expressed its concern "over reports of rape of girls belonging to indigenous and tribal groups in regions where mining and forestry operations have been developed."[228] The Committee also addressed the issue of potential sexual exploitation of children arising from increased foreign investment in the extractive sector in its 2011 recommendation to Costa Rica, and emphasized the need to regulate the sector's impact on "quality of the environment (e.g., quality of water and soil), property rights and family life."[229]

The issue of forced labor of indigenous children in the extractive sector was also addressed by the CRC in its 2009 recommendation to Bolivia, which called for greater monitoring of the sector and improved opportunities for human and economic development for indigenous families and children.[230] In recommendations to Bolivia, Namibia and Burma/Myanmar, the CRC has pointed to the absence of, and need for, adequate extractive industry regulatory frameworks to ensure respect for human rights standards relating to indigenous children, and to uphold the social and environmental responsibility of extractive companies,[231] emphasizing the need for reparations where rights violations occur.[232] The

Committee on Torture (CAT) expressed its concern to Peru at the "increasing number of children affected by the worst forms of child labor" in the mining sector and the trafficking of "women and young girls from impoverished rural regions in the Amazon who are recruited and coerced into prostitution in brothels located in mining shantytowns."[233] It has called for legislation, prompt investigations, and awareness raising and training of law enforcement personnel to eradicate such practices and compensate victims.[234]

In 2014, CEDAW expressed its deep concern to Colombia "that the disproportionate impact of the armed conflict in conjunction with the negative impact of…mining mega-projects on [indigenous] women are deepening the prevailing discrimination, inequalities and poverty which they have long been experiencing."[235] It called for protection of their rights "to access productive resources, such as seeds, water and credit and foster their capacity to earn a living and produce their own food; ensure that the protection of these rights prevails over the profit interests of third parties involved in agricultural and mining mega-projects."[236]

vi. Impact on Environment, Water and Areas of Spiritual and Cultural Significance

Since 2007, treaty body jurisprudence has placed increasing emphasis on the existing and potentially severe environmental impacts of mining, oil and gas projects in indigenous peoples' territories.[237] The right to water has garnered particular attention from CERD, CESCR, HRC and CRC in the context of assessing the impact of extractive operations on indigenous peoples' rights.[238] For example, the CESCR recommended that Ecuador take specific measures to protect the enjoyment of the right to water in the context of mining and agro-industrial projects.[239] CERD has also raised concerns in relation to the impact of licensed small- and medium-scale mining on water sources used by indigenous peoples in Guyana,[240] emphasizing that substantive impacts on rights are not limited to large-scale extractive industry projects.

The severe impact of mining on sacred sites and areas of spiritual or cultural significance has been addressed on a number of occasions by CERD and the HRC, including in relation to the bauxite mining plans on the religious lands of the Dongria Kondh people in Orissa, India,[240] the mining of the Subanon people's sacred Mt Canatuan in Zamboanga del Norte, the Philippines[242] and of sites of spiritual and cultural significance to the Western Shoshone.[243]

Box 6. Subanon Engagement with CERD Urgent Action Procedure

According to the Subanon traditional leader, Timuay (Chieftain) Jose Anoy, there have been a number of positive outcomes from the community's engagement with CERD under its urgent action procedure. Firstly, due to the profile of the CERD case at the international level, the Philippine government felt pressurized to address some of the issues they raised. This led to: i) the turn-over of the certification of ancestral domain title to the Subanon and its registration at the Register of Deeds; ii) a response to the allegations filed by the Subanon and a submission of an overdue State party report to CERD; iii) increased pressure on the mining company, TVIRD, to recognize the leadership and authority of the Subanon Timuay Jose Anoy and the decision-making powers of the Subanon traditional council which he leads; and iv) efforts by Canadian embassy to coordinate monitoring of TVIRD's operations together with the community.

The Subanon case is still ongoing at the CERD and the community hope that it will encourage the Philippine government to formally acknowledge, in writing: a) its mistakes or wrongdoings in relation to the mining of their sacred mountain which "caused division of the community, and chaos with the ancestral domain," and b) the rights of the Subanon and the leadership of Timuay Jose Anoy, informing all national and local government agencies of this, in order to avoid repetitions of past problems. They also hope it will encourage the government to ensure "redress in the form of reparation or compensation to damages" for violations of their rights, and those of other Philippines indigenous communities impacted by mining. Finally, they hope that the CERD urgent action procedure will trigger action on cases before judicial and quasi-judicial bodies, which remain in limbo years after they were filed by the Subanon.

Based on Input provided by Timuay Jose Anoy

vii. Displacement and Forced Evictions

Displacement and forced evictions associated with the extractive sector are a long standing concern which have been addressed by treaty bodies prior to the adoption of the UNDRIP, with the CESCR, for example, addressing these issues in its 2001 and 2003 concluding observations to Bolivia, Honduras, Panama and Brazil.[244] Following the adoption of the UNDRIP, the CESCR continued to express its deep concern to India about "displacement and forced evictions in the context of land acquisition by private and state actors for the purposes of development projects, including constructions of dams and mining."[245] In 2008, it welcomed Bolivia's incorporation of the UNDRIP into law, but repeated its 2001 recommendation that Bolivia take legislative measures to address displacement of indigenous peoples and ensure the return of their lands.[246] In 2012, the CESCR also addressed the issue of mining-related displacement of indigenous peoples in Tanzania, calling for investigations of past evictions and prosecutions for those responsible.[247] In this regard, it affirmed that any mining projects "threatening their livelihoods and their right to food," should be "preceded by free, prior and informed consent of the people affected."[248] The CESCR also addressed the issue of displacement in the Democratic Republic of Congo arising from mining projects, which it framed as a violation of the right to self-determination.[249] In its 2009 concluding observations, the CRC noted its concern in relation to indigenous children in the Philippines "being acutely affected as families are removed from mining areas" and that "indigenous people are being deprived of their ancestral lands and highly polluting technology is being utilized."[250]

viii. Violence, Repression and Conflict

The issue of violence and conflict, which arises as a result of non-consensual extractive industry activities in indigenous territories, has also been high on the agenda of treaty bodies. Among the cases with regard to which CERD has expressed "its deep concern at the growing tensions between outsiders

and indigenous peoples over the exploitation of natural resources, especially mines,"[251] are the killings in Bagua[252] and other "socio-environmental conflicts due to extractive activities in Peru";[253] violent clashes as a result of attempts to mine the sacred mountains of the Dongria Kondh in India;[254] the use of military in Ecuador to secure the interests of oil and mining companies in indigenous territories;[255] acts of hatred and violence against the Subanon in the Philippines in the context of paramilitary groups protecting mining interests in their territories;[256] and incidents at a cement plant in San Juan Sacatepéquez, Guatemala.[257]

In order to address conflicts which arise in such contexts, CERD has also called for "the effective application of alternative methods for the settlement of disputes, such as mediation, negotiation, conciliation and arbitration" in line with the provisions of the UNDRIP, and urged States, such as Ecuador, to "boost training for the Government armed forces in human rights."[258] In cases where serious conflicts have arisen, such as in Bagua in 2009, CERD has echoed recommendations of the Special Rapporteur on the rights of indigenous peoples, that urgent steps be taken "to set up an independent commission that includes indigenous representatives to carry out a thorough, objective and impartial investigation" and that the findings of such commissions should be addressed in legislation pertaining to extractive industry regulation.[259] In the Latin American context, CERD has also recommended that States such as Panama and Peru "pay particular attention to the precautionary measures ordered by the Inter-American human rights system" and increase funds assigned to Ombudsman's Office to facilitate their role in preventing such rights violations.[260]

Similar recommendations have been made by the HRC in light of its concern at "the ill-treatment, threats and harassment to which members of the communities have reportedly been subjected [in Panama] on the occasion of protests against hydroelectric infrastructure construction projects, mining operations or tourism facilities on their territory."[261] The CESCR has called on Argentina to "ensure the protection of indigenous communities during the implementation of mining

exploration and exploitation projects,"[262] and expressed its alarm in relation to the level of enforced disappearances and extrajudicial killings associated with indigenous peoples' opposition to mining operations in the Philippines.[263]

In such contexts, CERD has called on States to take prompt measures to prevent ill treatment and violence against indigenous peoples by members of the armed forces and to investigate all allegations and ensure that those responsible are punished. A related issue in the context of opposition to extractive projects is the "intimidation and persecution [including jailing] of indigenous leaders and communities for militancy in protecting indigenous rights" in States such as Panama.[264] The practice has drawn strong criticism from CERD and led to demands to ensure the safety of indigenous leaders and communities.[265]

ix. Implementation of Court Decisions and Legislation

The post-UNDRIP era has seen a notable shift in focus from standard setting to rights realization, with treaty bodies placing an increasing emphasis on encouraging—and following up on—the implementation of rulings issued in favor of indigenous peoples in national courts, including Supreme Courts and High Courts, and in other regional and international fora.[266] Among the rights-affirming rulings, which CERD, CESCR and the HRC have called on States to implement, are the Supreme Court decision of Belize in relation to land demarcation and FPIC for extractive projects;[267] the High Court injunction against evictions in Kenya;[268] the Constitutional Court decision in Indonesia recognizing ownership of customary forests; and the Constitutional Court decisions in Colombia affirming the requirement for FPIC in relation to mining projects.[269] Also illustrative of this increased focus on rights implementation is CERD's request to Guyana for examples of jurisprudence where "indigenous communities have challenged decisions on land entitlement in court, and information on the role of customary law within national jurisdiction in this regard."[270]

CERD has also directed its attention to national rulings and legislation that accord inadequate protection for indigenous peoples' rights, such as the ruling of Guyana's Supreme Court which interprets the Amerindian Act 2006 as according precedent to rights granted to corporations prior to 2006 over the pre-existing rights of indigenous peoples.[271] In 2013, the HRC expressed its concern in relation to the refusal by Belize "to comply with court orders following the decision of the Inter-American Human Rights Commission of 12 October 2004 and the decisions of the Supreme Court of Belize of 18 October 2007 and 28 June 2010."[272] Similarly, the CESCR has urged Ecuador to comply with the orders of the Inter-American Court of Human Rights in its judgment of 27 June 2012 (*Kichwa Indigenous People of Sarayaku vs. Ecuador*).[273] CERD also requested that States, which have been subject of decisions under its urgent action procedure in relation to extractive industry operations in indigenous peoples' territories, such as Suriname and the United States, report on the measures taken to implement those decisions.[274]

CERD and the CESCR have also emphasized the need for States to effectively implement existing legislation and international standards recognizing indigenous peoples' rights, in order to ensure that mining activities do not adversely affect the protection of the rights recognized in such legislation and standards.[275] These include the 1997 Philippines Indigenous Peoples Rights Act (IPRA), India's 2006 Forest Act, and the Consultation and Participation Act in Ecuador.[276] Addressing the failure to adequately implement the rights recognized under IPRA, the CESCR noted the negative impact of mining operations on the rights to self-determination, an adequate standard of living, the highest attainable standard of physical and mental health and cultural rights. Similarly, in the context of India's Constitutional protection for Scheduled Tribes, and its 2006 Forest Act, CERD has called on it to ensure that indigenous communities are not removed from their lands without FPIC and "that bans on leasing tribal lands to third persons or companies are effectively enforced."[277] In the context of States which have ratified ILO C169, CERD has reminded them that "absence of implementing regulations for the…(ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169), is

no obstacle to holding prior consultations" in order to obtain indigenous peoples' consent.[278]

x. Business and Human Rights and Extraterritorial Responsibility

The adoption by the UN Human Rights Council of the UN Framework and Guiding Principles on Business and Human Rights in 2008 and 2011, respectively, has acted as a trigger for increased treaty body engagement with the issue of extractive corporations' responsibility to respect indigenous peoples' rights. In 2009, the CESCR issued a *Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights*.[279] The statement addresses the UN Guiding Principles on Business and Human Rights and the State responsibility to "ensure corporations demonstrate due diligence to make certain that they do not impede the enjoyment of the Covenant rights by those who depend on or are negatively affected by their activities" and to ensure access to remedies to victims.[280] The Statement specifically mentions indigenous peoples as among those most impacted by corporate activities,[281] and was invoked by the CESCR in its 2011 Concluding Observations to Argentina in relation to indigenous peoples impacted by extractive industry operations.[282]

In 2013, the CRC issued its *General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights*,[283] which notes that indigenous children are particularly at risk from projects which impact on their community's access to natural resources. In 2014, the CRC stressed the relevance of this General Comment to indigenous children in Russia impacted by extractive industry projects.[284] It has also repeatedly called for compliance "with international and domestic standards on corporate social and environmental responsibility with a view to protecting local communities, particularly children, from any adverse effects resulting from business operations, in line with the Guiding Principles on Business and Human Rights."[285]

Both the CERD and the CRC have been proactive in recommending that home States comply with their responsibilities under international law to hold their extractive corporations to account for violations of indigenous peoples' rights in territories outside their borders. The CESCR has also issued similar recommendations in relation to home State responsibility, to States including China in 2014 and also in the context of impacts on the right to water.[286] CERD's first recommendation addressing this issue to Canada (2007)[287] was followed by similar recommendations to the United States (2008),[288] Australia (2010),[289] Norway (2011),[290] the United Kingdom (2011),[291] and again to Canada (2012). In these cases it has urged States "to take appropriate legislative measures to prevent transnational corporations registered in [their jurisdictions] from carrying out activities that negatively impact on the enjoyment of rights of indigenous peoples in territories outside [of their jurisdictions], and hold them accountable."[292] It has also called on home States to fulfill their commitments under the different international initiatives they support to advance responsible corporate citizenship[293] and to "explore ways to hold transnational corporations domiciled in the[ir] territory and/or under the[ir] jurisdiction…accountable for any adverse impacts on the rights of indigenous peoples…in conformity with the principles of social responsibility and the ethics code of corporations."[294]

Addressing the issue of extraterritorial responsibility, the CRC noted the inadequacy of the Australian Mining Council voluntary code of conduct "in preventing direct and/or indirect human rights violations by Australian mining enterprises"[295] and expressed its concern at "Australian mining companies' participation and complicity in serious violations of human rights in countries such as the Democratic Republic of Congo, the Philippines, Indonesia and Fiji, where children have been victims of evictions, land dispossession and killings."[296] It also noted Canada's lack of a regulatory framework to hold its corporations "accountable for human rights and environmental abuses committed abroad,"[297] and echoed CERD's call for "a clear regulatory framework" for extractive companies "operating in territories outside Canada [to] ensure that their activities do not impact on human rights or endanger envi-

ronment and other standards, especially those related to children's rights."[298] To this end it has consistently recommended guaranteeing the conduct of impact assessments with full disclosure of corporate plans, ensuring harm prevention and mitigation as well as mechanisms for monitoring, sanctioning, remedies and redress.[299]

2.3 UN Charter Body Focus on Indigenous Peoples and the Extractive Industries.

i. Special Rapporteur on the Rights of indigenous Peoples

The mandate of the Special Rapporteur on the rights of indigenous peoples was established in 2001 as part of the then UN Commission on Human Rights' system of thematic Special Procedures.[300] In 2008, Professor James Anaya was appointed by the Human Rights Council to the position. Over the course of his two-term mandate which concluded in 2014, he dealt extensively with the issue of extractive industries that operate within or near indigenous territories.[304] The Special Rapporteur's first annual report in 2008 provided an analysis of the UNDRIP, situating it within the broader international human rights framework,[302] and concluding that it "represents an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law."[303] The Rapporteur also highlighted that indigenous peoples are "crucial actors" in its operationalization and that this necessitates a financial commitment as well as political will on the part of States, with other actors, including the private sector, having a supporting role to play in its realization.[304]

The Rapporteur's second annual report in 2009 addressed the duty of States to consult with indigenous peoples in the

context of constitutional and legislative reforms and development of natural resource extraction initiatives impacting on indigenous peoples, framing this duty as a central component of the State duty to protect human rights.[305] The report clarified that the objective of such consultations has to be the achievement of FPIC,[306] which the Rapporteur subsequently framed as a safeguard for indigenous peoples' rights, whenever the State or a third party may affect indigenous peoples.[307] Where FPIC is not obtained, and there is potentially a significant negative impact on indigenous peoples' rights, the project should not move forward.[308] The State duty to protect indigenous peoples' rights also includes addressing imbalances in power between indigenous peoples and corporate actors.[309] The importance of fulfilling this duty in the context of the extractive industry was reflected in the numerous communications the Rapporteur forwarded to governments addressing "infringements of the right to free, prior and informed consent, especially in relation to natural resource extraction and displacement or removal of indigenous communities" and impacts on indigenous peoples in voluntary isolation.[310]

The Rapporteur's 2010 report was the first in a series of thematic reports dedicated to the issue of extractive industries and indigenous peoples. Building on the UN Framework on Business and Human Rights, the 2010 report elaborated on the corporate responsibility to respect human rights and highlighted the necessity for States and corporations to understand that this includes respect for the rights affirmed in the UNDRIP, ILO Convention 169, regional instruments and international and regional human rights jurisprudence related to indigenous peoples. The report addressed the need for due diligence in relation to indigenous peoples' rights, encompassing: i) the recognition of indigenous peoples and their rights, irrespective of State positions in this regard; ii) the responsibility to consult in order to obtain consent and the necessity of avoiding complicity in human rights violations as a result of a State's failure to hold consent seeking consultations;[311] iii) the need for independent assessments addressing social, spiritual, cultural, environmental and human rights impacts, in accordance with good practice guidance such as the *Akwé Kon* Guidelines;[312] and iv) the requirement

for compensation and mechanisms which ensure appropriate benefit-sharing.[313]

The Rapporteur's 2011 report provided a synthesis of experiences recounted by indigenous peoples in relation to the extractive sector, highlighting the environmental, social and cultural impacts of extractive projects,[314] the inadequacy of consultation and consent seeking mechanisms and practices on behalf of States and corporations,[315] the absence of regulatory frameworks and State institutional capacity,[316] and a failure to guarantee adequate and appropriate benefits.[317] The report noted the "great degree of skepticism" among indigenous peoples in relation to the possibility of indigenous communities benefiting from extractive industry operations[318] and pointed the need for a greater understanding of the content and scope of indigenous peoples' rights among States and corporate actors in order to minimize extractive project-generated social conflict and violence.[319] Based on these experiences of mining-impacted indigenous peoples, the Rapporteur concluded that:

> the implementation of natural resource extraction and other development projects on or near indigenous territories has become one of the foremost concerns of indigenous peoples worldwide, and possibly also the most pervasive source of the challenges to the full exercise of their rights.[320]

The Rapporteur's 2012 report focused on four specific issues aimed at addressing the primary problems faced by indigenous peoples in relation to extractive projects. The first relates to the development of a comprehensive understanding of the rights that may be affected by extractive operations.[321] In this regard the report emphasized the importance of maintaining a focus on the substantive rights to self-determination and land territories and resources in addition to focusing on the safeguards of consultation and FPIC.[322] These safeguards, together with impact assessments and benefit-sharing requirements, are derived from, and necessary for the realization of, the rights they protect. The second topic addressed is the duty of States to develop clear regulatory frameworks, including laws and regulations affecting extractive company behavior

that impacts on indigenous peoples, and the independent responsibility of corporations to respect the rights recognized in the UNDRIP.[323]

The third area addressed in the report is the requirement to obtain consent "where the rights implicated are essential to the survival of indigenous groups as distinct peoples and the foreseen impacts on the exercise of the rights are significant."[324] The report clarified that this requirement should be assumed to apply when there is a potential infringement on indigenous peoples' rights over their lands and resources, and that the principles of "necessity and proportionality with regard to a valid public purpose" must also be respected.[325] Addressing power imbalances necessitates funding of independent external advisers and requires extractive companies to "defer to indigenous decision-making processes without attempting to influence or manipulate the consultation process."[326] Where consent is forthcoming "compensation, mitigation measures and benefit-sharing in proportion to the impact on the affected indigenous party's rights' must be guaranteed."[327]

Finally, the report touched on emerging models for indigenous engagement in the extractive sector, in which "genuine partnership arrangements between indigenous peoples and corporations, in which the indigenous part has a significant or even controlling share in the ownership and management of the partnership, or models in which indigenous peoples develop their own extractive business enterprises."[328]

The 2013 report provides a synthesis of the Rapporteur's observations during his mandate and is aimed at building an understanding of what good practices could, or should, be in the context of the extractive industries.[329] The report expands on the notion of a preferred, self-determined, model for extractive operations, if indigenous peoples chose to engage in them. In doing so, it acknowledges that for the most part, indigenous peoples are not currently in a position to realize this and their views in relation to extractive projects should be respected.[330] The report concludes by identifying a series of pre-conditions for extractive activities which have to be met

if they are to take place on indigenous peoples' territories in a rights respecting manner. These preconditions are outlined in chapter four, section 4.4 of this report in the context of the discussion around the requirements for rights-based engagement with the extractive sector.

The Special Rapporteur has also affirmed that moratoria on mining are necessary in contexts where the enabling conditions for securing indigenous peoples rights are absent.[331] Of the Rapporteur's 18 country mission reports, 16 address the issue of extractive project impacts on indigenous peoples, offering context-specific recommendations aimed at ensuring protection for indigenous peoples' rights. These include reports on his missions to: Brazil (2009),[332] Chile (2009),[333] Colombia (2010),[334] Australia (2010),[335] Botswana (2010),[336] Russia (2010),[337] the Sápmi region of Norway, Sweden and Finland (2011),[338] New Caledonia, France (2011),[339] Argentina (2012),[340] El Salvador (2012),[341] Costa Rica (2012), the United States (2012),[342] Namibia (2012),[343] Panama (2014),[344] Canada (2014),[345] and Peru (2014).[346]

The current Special Rapporteur on the rights of indigenous peoples, Vicky Tauli-Corpuz, in her first report to the Human Rights Council, has signaled her intention to focus on the economic, social and cultural rights of indigenous peoples,[347] fulfillment of which is a necessary condition for development choices to be available and consent to be freely given. In her former role as Chairperson of the UN Permanent Forum on Indigenous Issues (UNPFIII), she noted that "[f]or many indigenous peoples throughout the world, oil, gas and coal industries conjure images of displaced peoples, despoiled lands, and depleted resources. This explains the unwavering resistance of most indigenous communities with any project related to extractive industries." Addressing this legacy is therefore one of the fundamental prerequisites for transitioning to a context in which rights-based engagement between the extractive sector and indigenous peoples is possible.

ii. Engagement of Other Special Rapporteurs

A number of other Special Rapporteurs of the Human Rights Council have addressed the issue of indigenous peoples impacted by extractive industry projects in the context of specific country missions. In 2011, the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living expressed concern in relation to "violent forced evictions related to oil, mining and agricultural projects, which are carried out [in Argentina] without prior consultation with the affected communities and without their participation."[348] The Special Rapporteur on contemporary forms of slavery, including its causes and consequences, addressed the issue of forced labor and trafficking in girls and young women in the context of the informal mining sector in the Madre de Dios and Ucayali departments of Peru.[349] The 2012 mission to Mexico of the Special Rapporteur on the right to food identified threats to that right arising from land expropriation and resettlement due to mining projects such as that in Cerro de San Pedro, San Luis Potosi.[350] The Independent Expert on the rights of minorities has affirmed the requirement to obtain FPIC of indigenous and afro-descendent communities in the Colombian context.[351]

These Special Rapporteurs have also addressed the issue of indigenous peoples' FPIC in relation to extractive projects in their thematic reports. The Special Rapporteur on the right to food has called for States to consult with indigenous peoples in order to obtain their FPIC for resource extraction projects[352] and emphasized the need for their participation in negotiations pertaining to investment agreements based on the principle of FPIC.[353] The Special Rapporteur on adequate housing as a component of the right to an adequate standard of living has stated that "[t]he right of affected persons, groups and communities to full and prior informed consent regarding relocation must be guaranteed," highlighting the necessity for greater protection of indigenous peoples' right to property and their access to natural resources.[354] A number of special rapporteurs have also issued joint communications to States with the Special Rapporteur on the rights of indig-

enous peoples in relation to the lack of adequate procedures to obtain FPIC.[355]

iii. UN Working Group on Business and Human Rights

In its 2011 resolution 17/4 endorsing the Guiding Principles on Business and Human Rights, the Human Rights Council established a five-member Working Group on the issue of human rights and transnational corporations and other business enterprises (known as the UN Working Group on Business and Human Rights). The resolution establishing the Working Group requires it to: a) "explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities, including those in conflict areas;" and b) "work in close cooperation and coordination with other relevant special procedures of the Human Rights Council, relevant United Nations and other international bodies, the treaty bodies and regional human rights organizations."[356] The resolution was renewed in 2014 for a further three years and tasks the Working Group with the promotion and "effective and comprehensive dissemination and implementation of the Guiding Principles." The 2014 resolution places greater attention on the third (Remedy) pillar of the Protect, Respect, Remedy Framework and invites the Working Group "to continue to collaborate closely with relevant [UN] bodies, including the treaty bodies and the special procedures."[357] The opportunity therefore exists for the Working Group to cooperate closely with the UN mechanisms dedicated to indigenous peoples' rights and to be guided by UN human rights bodies in the context of ensuring remedies for extractive industry-related indigenous rights violations.

The Working Group's first thematic annual report was presented to the 68th session of General Assembly in 2013.[358] It sought to explore "the challenges faced in addressing adverse impacts of business-related activities on the rights of

indigenous peoples through the lens of the United Nations Guiding Principles on Business and Human Rights,"[359] and addresses a number of core issues in the context of indigenous peoples' rights and the extractive sector. Three aspects of the Working Group's report are particularly noteworthy and represent important contributions to the realization of indigenous peoples' rights in the context of extractive corporate activities.[360] First is the report's affirmation of the fact that the duties and obligations outlined in the Guiding Principles have to be interpreted by States, businesses and other actors in a manner which is consistent with the UNDRIP and ILO C169. Second is the report's acknowledgement that indigenous peoples' customary judicial systems must be accorded due consideration by State and corporate actors, are on a par with other remedial mechanisms, and have been "successfully applied to remedy abuses of indigenous peoples' rights by business enterprises."[361] Third is the emphasis it places on indigenous peoples' FPIC as a "fundamental element of indigenous peoples' rights, on which the ability to exercise and enjoy a number of other rights rest." In relation to this latter point, the report recognizes that the requirement for FPIC is derived from indigenous peoples' collective rights and is a component of the State duty to protect, as well as the corporate obligation to respect human rights. It also recognizes that indigenous peoples' right to self-determination implies that, to the extent possible, FPIC processes must be determined and controlled by indigenous peoples themselves.[362]

The report also suffers from some limitations. Two of its more significant shortcomings are its relatively limited focus on the relationship between FPIC and the fundamental rights of indigenous peoples, and the rather cursory consideration given to the need for home States to ensure access to effective remedies for indigenous peoples impacted by corporations registered in their jurisdictions. The former shortcoming could result in "an overly restrictive interpretation of the circumstances under which FPIC is required, and could also lead to inadequate attention being directed to the necessary preconditions for the effective realization of FPIC processes."[363] The latter shortcoming tends to underplay the importance of extraterritoriality in ensuring access to remedies and

justice, and the increasing attention being placed on home State obligations by treaty and charter body human rights mechanisms.[364] In doing so, the report missed an opportunity to move beyond the "inadequacy of the status quo" in the context of international responsibility and extraterritorial obligations, in particular, in relation to protecting indigenous peoples rights.[365] Finally, the adoption by the Human Rights Council, in June 2014, of a parallel resolution establishing "an open-ended intergovernmental working group with the mandate to elaborate an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights" is a potentially significant development for extractive industry operations in indigenous territories.[366] The impact on indigenous peoples' enjoyment of their rights will not be immediate, due to the inevitably lengthy drafting process and the contentious nature of the issues involved. The legitimacy of that drafting process, and the text emerging from it, will however be contingent on ensuring their consistency with the UNDRIP. The elaboration of such an instrument therefore has potentially important longer-term implications for extractive sector impacts on indigenous peoples, which should be closely monitored and its rights-reinforcing aspects encouraged.

iv. Expert Mechanism on the Rights of Indigenous People

The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) was established in December 2007 with the mandate to provide the Human Rights Council with thematic expertise on the rights of indigenous peoples.[367] It has produced a number of studies of relevance to the extractive industry and indigenous peoples. These include its 2010 *Progress report on the study on indigenous peoples and the right to participate in decision-making*,[368] its 2011 *Final report on the right to participate* including its companion Advice No. 2,[369] its 2012 *Follow up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries* and its

companion Advice No. 4,[370] and its 2014 studies on access to justice and disaster risk reduction.[371]

In its 2010 report, the Expert Mechanism emphasized the self-determination basis for the right to FPIC in the context of large-scale natural resource extraction.[372] EMRIP's Advice no. 2 (2011) notes that "[t]he State's duty to obtain indigenous peoples free, prior and informed consent affirms the prerogative of indigenous peoples to withhold consent and to establish terms and conditions for their consent" and entitles indigenous peoples to "effectively determine the outcome of decision-making that affects them, not merely a right to be involved in such processes."[373] Advice No 4 (2012) describes FPIC as providing "protection analogous to that provided under common article 1, paragraphs 2 and 3 [addressing the resource dimension of the right to self-determination] of the Human rights covenants."[374] It further affirms that States have an obligation to provide corporations with clarity in relation to consent seeking requirements and that corporations must take the requirement for FPIC, as well as existing agreements with indigenous peoples, into account in their due diligence processes.[375] EMRIP has also clarified that the principles around indigenous participation outlined in Advice No. 4 should also apply to investment and trade agreements impacting on indigenous peoples' rights.[376] Finally, in its 2014 report to the Human Rights Council, EMRIP has pointed to the relevance of its work on indigenous peoples' access to justice for the implementation of the third pillar of the Guiding Principles on Business and Human Rights. The report proposes that the Council request EMRIP to convene a technical expert seminar on the subject, together with the UN Working Group on Business and Human Rights, with the output to be transmitted to all relevant processes, including the open-ended Intergovernmental Working Group on a binding international instrument on business and human rights.[377]

v. Universal Periodic Review (UPR)

The UPR process is a State peer review mechanism of the Human Rights Council. It was established in 2006, with the first reviews held in 2008. Each State is reviewed on a three-year cycle on the basis of all the human rights instruments to which it is a party, as well as the Universal Declaration of Human Rights, the UN Charter and any voluntary pledges made by the State.[378] Members of the Human Rights Council make recommendations which the State under review can accept or merely note. Indigenous peoples' issues have been gaining increased attention under the review process, with a total of almost 500 recommendations made in relation to them in the intervening years, of which 400 were accepted. Some 54 recommendations have included calls for implementation of the UNDRIP. There have been 37 recommendations in relation to consultation with indigenous peoples, while 31 recommendations have addressed indigenous peoples' participation in decision-making. Twelve recommendations have specifically addressed the extractive sector and indigenous peoples' rights, of which seven were accepted, while a further 12 recommendations explicitly reference respect for indigenous peoples' rights to natural resources.[379] Five recommendations address the requirement for indigenous peoples' FPIC in relation to activities impacting on their rights, two of which were accepted. A 2011 recommendation by the Holy See to Papua New Guinea notes the links between mining and climate change and violations of indigenous peoples' rights.[380] Overall, the trend towards increased engagement with indigenous peoples' issues under the UPR is encouraging. However, there is significant room for improvement in relation to addressing the impact of the extractive sector on indigenous peoples' rights, both in terms of the volume of recommendations and the degree of commitment by States to their implementation.

Chapter Three

Normative Developments Outside of Human Rights Bodies

This chapter addresses normative developments outside the UN human rights regime which are relevant to indigenous peoples' rights and their relationship with the extractive sector. It complements the overview of extractive industry-related jurisprudence and recommendations emerging from the UN human rights regime, addressed in chapter two, by drawing on recommendations and developments of the UN Permanent Forum on Indigenous Issues (UNPFII), the International Labor Organization (ILO) and the Inter-American and African regional human rights systems. It also engages with the relevant standards and guidance directed at private sector actors by the Organization for Economic Co-operation and Development (OECD) National Contact Points (NCPs) under the OECD Guidelines for Multinational Enterprises, and the 2013 guidance of the UN Global Compact in relation to the implementation of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). The chapter then addresses the policies of financial institutions, which have significant implications for the practices of extractive sector actors in relation to respecting indigenous peoples' rights. Finally, it considers the potentially constructive role that the Extractive Industry Transparency Initiative's (EITI) could play in furthering the realization of indigenous peoples' rights.

3.1 UN Permanent Forum on Indigenous Issues (UNPFII)

The UNPFII, which was established in 2000, is the third UN mechanism dedicated to indigenous peoples.[381] It was established by ECOSOC and its mandate extends beyond human rights to include indigenous issues related to economic and social development, culture, the environment, education, and health. In 2009, it facilitated an international expert group meeting on extractive industries, indigenous peoples' rights and corporate social responsibility, producing a report addressing the roles of State, corporate, financial and UN actors.[382] As noted in the introduction, that report, which was an input document to the 18th and 19th sessions of the Commission on Sustainable Development, constitutes one of the points of departure for this report.[383] In the intervening years, the UNPFII has addressed the issue of the extractive industries and indigenous peoples at all of its annual sessions, touching on the sectors impacts on food and water, as well as specific experiences in Australia, the Artic, Africa and Mexico.[384]

In 2013, the UNPFII produced a consolidated report addressing the impact of the extractive industries on the rights of indigenous peoples.[385] The report notes the historical role of mineral extraction in the extermination of native peoples during the colonial era. As mentioned in chapter one, the report noted a number of emerging good practices in the extractive sector's engagement with indigenous peoples, in particular, in relation to benefit-sharing arrangements and recognition of subsoil rights, such as in the case of Nama people in Richtersveld, South Africa.[386]

However, the report also emphasizes the ongoing impacts to groundwater, the environment, cultural sites, agricultural and forest areas, health, safety and well-being, as well as the continued displacement of indigenous peoples.[387] In this regard, it touches on such impacts felt by indigenous peoples in the United States (Western Shoshone), Russia (Nenets), Peru

(communities in Cerro de Pasco), Suriname (Maroons), India (Santhal Adivasi), and Kenya (Keiyo).[388] One of the objectives of the report is to provide a synthesis of the views expressed on the subject of the extractive industries by the three UN mechanisms dedicated to indigenous peoples. In this regard it concludes that "[t]he three mechanisms acknowledge that the negative and even catastrophic impact of extractive industries in or near to indigenous territories is one of the greatest concerns of indigenous peoples and one of the greatest challenges to the realization of their individual and collective rights."[389]

3.2 International Labor Organization

As noted in the introduction to chapter two, ILO Convention 169 (C169) contains a number of important provisions which have implications for extractive industry operations in or near indigenous peoples' territories. Articles 6, 7(3) and 15(2) address the requirement to consult in good faith with indigenous peoples "in a form appropriate to the circumstances" with the objective of obtaining their FPIC to subsoil projects impacting on their rights.[390] If relocation is necessary FPIC is required in all almost all circumstances. These provisions affirm that participatory social, spiritual, cultural and environmental impact assessments[391] are a "fundamental criteria for the implementation" of extractive projects,[392] and that indigenous peoples are to participate in benefits of resource exploitation and "receive fair compensation for any damages which they may sustain as a result of such activities."[393] This requirement for benefits is therefore over and above the requirement for compensation for damages or rights infringements.

The Convention also requires recognition of the unique collective relationship indigenous peoples have with their lands and territories, and its importance to their cultures and spiritual values.[394] Importantly, it recognizes ownership rights over land as flowing from traditional occupation and the right to decide their own priorities for the process of development as it affects these lands, as well as their lives, beliefs, institu-

tions and spiritual well-being.[395] Consequently, it goes some way towards recognizing indigenous peoples' self-government right to exercise control over their own economic, social and cultural development.[396]

C169 has only been ratified by 22 countries, with five of these ratifications (Chile, Nepal, Nicaragua, Spain and the Central African Republic) being from 2007 onwards.[397] However, its impact extends well beyond ratifying countries. The ILO supervisory bodies have developed a large body of jurisprudence around the Conventions provisions, in particular, those pertaining to indigenous consultation and participation in the context of extractive industry projects. The recommendations issued by the ILO in 2009 and 2010, which are representative of this broader body of jurisprudence, have been consolidated into a report entitled *Monitoring Indigenous and Tribal Peoples' Rights Through ILO Conventions A Compilation of ILO Supervisory Bodies' Comments 2009-2010*. At the national level, constitutional Courts have invoked these ILO recommendations in their jurisprudence.[398] A collation of this jurisprudence from across Latin American State parties to the Convention has been developed by the ILO in a report entitled *Application Of Convention No. 169 By Domestic And International Courts In Latin America - A Casebook*.[399]

As noted, the procedural aspects of good faith consultations aimed at obtaining consent have been the primary focus of the ILO supervisory bodies' recommendations. They have repeatedly clarified that the requirement for consultations to be "in a form appropriate to the circumstances" implies that the procedures must ensure that sufficient time is available to indigenous peoples to conduct their own decision-making processes in conformity with their "own social and cultural traditions." [400] Accordingly, "best practice" involves accepting the proposals put forward by indigenous peoples themselves with regard to consultation processes.[401]

In recent years the ILO supervisory bodies have taken a more affirmative stance in relation to the implications of inadequate consultation processes. In a number of cases where prior consultations were not held, or were deemed to be inadequate, they have called for the suspension of extractive

projects, despite the vocal opposition of States—and behind-the-scenes opposition of the extractive industry—which claim that in doing so, the ILO supervisory bodies are exceeding their mandate.[402] A recent alarming development is the ILO's responsiveness to a request of the employer's organization that it review the impact which C169 is having on investment in the extractive sector in Chile, Colombia, Costa Rica and Guatemala.[403] The review will examine the timeframe for prior consultation processes and aim to develop recommendations for more efficient processes.[404] Rather than examine how national frameworks regulating mining activities can be made consistent with C169, the reported thrust of the review suggests that it may be aimed at harmonizing the implementation of C169 with the interests of the extractive sector.

Given the legally-binding nature of C169, and the scope of the rights it affirms, such objections to the ILO's mandate to uphold indigenous rights lack substance. Indeed, in light of developments in the broader normative framework of indigenous peoples' rights since 1989, the ILO supervisory bodies could legitimately interpret C169 as supporting a substantive requirement for FPIC in relation to all extractive industry projects, which infringe on those rights affirmed in the Convention that are central to indigenous peoples' cultural and physical existence.[405]

C169 is also of direct relevance for extractive industry companies operating in, or seeking to operate in, indigenous territories.[406] The International Financial Corporation (IFC) has produced guidance explaining that "[i]f an IFC client is implementing a project where government's actions mean that the project does not meet the requirements of [C169], it can find itself accused of 'breaching' the principles of the Convention or of violating rights protected under the Convention," something which may have potential legal implications depending on how national courts determine responsibilities of non-State actors.[407] Finally, other ILO Conventions and Declarations are also applicable to the situation of indigenous peoples. Particularly relevant are *ILO Convention 111 concerning Discrimination in Respect of Employment and Occupation* in the context of extractive industry impacts

on traditional livelihoods, and the *ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, which has international coverage.[408]

3.3 Regional Systems

The Inter-American system has been the most proactive of the regional systems in terms of affirming indigenous peoples' rights in relation to extractive industry operations. The 2009 report *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System* provides a useful compilation of decisions of the Inter-American Commission and Court in this area.[409]

The 2002 Western Shoshone decision of the Inter-American Commission on Human Rights (IACHR) is of particular note as it raises as yet unresolved issues around the absence of FPIC and the need for reparations for mining activities in Shoshone lands (see box 5 in chapter two). Two of the most notable decisions of the Inter-American Court on Human Rights following the adoption of the UNDRIP have been the 2008 *Saramaka vs Suriname* and the 2012 *Sarayaku vs Ecuador* decisions.[410] The Saramaka case, which addresses mining concessions granted in the territory of the Saramaka people without adequate consultation, was ground-breaking in so far as it represented the first time that the Inter-American Court affirmed the requirement for FPIC in relation to the issuance of concessions for large-scale mining operations in indigenous peoples' territories.[411] The case also elaborated on the essential nature of impact assessments and benefit-sharing.

The Sarayaku case, which addressed oil exploration in the territories of the Kichwa indigenous people of Sarayaku, placed greater attention on the procedural aspects of the requirement to consult with the objective of obtaining consent. It is particularly informative with regard to the role of impact assessments involving the participation of the impacted indigenous peoples, and the need to capture and respect

their unique perspectives on the potential impacts, which such projects may have on their cultural, spiritual, and social well-being.[412]

Both cases build on the earlier jurisprudence of the Court, in particular, the 2001 *Awas Tingi* case and the 2006 *Sawhoyamaxa Indigenous Community vs Paraguay,*[413] which affirm that the right to property under the Inter-American Convention extends to lands held under customary tenure regimes. The Sawhoyamaxa case is of particular relevance in the context of the ongoing debate over extraterritorial obligations as the Court addressed the need to ensure that a Bilateral Investment Treaty, which addressed land restitution to indigenous people, be applied in accordance with human rights obligations under the Convention.[414]

The decisions of the Inter-American Commission and Court have also served to inform the ruling of the African Commission on Human and Peoples Rights (ACHPR) in the 2010 case of the *Endorois vs Kenya*. The Endorois case addressed the eviction of the Endorois from their traditional land because of tourism and prospecting for rubies. The African Commission on Human and Peoples Rights invoked the reasoning of the Inter-American Court in Saramaka, but expanded on its logic by concluding that the requirement for FPIC was a derivative of a peoples' right to development, as well as their collective right to property.[415] The broader range of rights affirmed under the African Convention, and the interpretation of the African Commission that the collective rights of peoples, "such as the rights to development and natural resources, are vested in indigenous peoples, provides a stronger normative underpinning for the consent requirement than that affirmed by the Inter-American Court."[416] The Government of Kenya has yet to implement the 2010 decision, and in 2013, the African Commission reiterated its call for the government to do so.[417]

The European Court of Human Rights, for its part, has yet to address the issue of extractive industry impacts on indigenous peoples.[418] However, it is likely to have to do so in the future in the context of potential legal actions in relation to extractive industry operations in Sami territories.[419]

Ideally, in advance of engaging with such issues the judges of the European Court could learn from the experiences of the American and African regional Courts and Commissions. The mandate of the ASEAN Intergovernmental Commission on Human Rights, to date the only regional human rights mechanism in Asia, is limited to the promotion of human rights. Its members are appointed by governments and it lacks a complaint mechanism with commission decisions based on consensus, rendering it generally ineffective in tackling the highly politicized issues which inevitably arise in the oversight of indigenous peoples' rights, in the context of extractive industry operations in their territories.

Box 7. Perspectives on the Implications of the Achpr Endorois Decision

"The implication of the ACHPR ruling [in the Endorois case] is that it will set precedence for all indigenous communities in Kenya, Africa and the world who have lost lands to government…This will also set a standard for respect of indigenous peoples' property and decisions on how they would like to use their territorial lands."

Wilson Kipsang Kipkazi, Programme Coordinator of the Endorois Welfare Council[420]

"The [ACHPR] working group also sends urgent calls on specific situations and serious violations of human rights in some States parties, urging them to refrain from taking any initiative or implementing any program or policy that could cause harm to indigenous peoples without their free, prior and informed consent. In its decision on the 276/03 Communication… the African Commission recognized the rights of the Endorois of Kenya to the land and to control and manage their traditional resources. Although the implementation of this decision has been delayed since 2010, the scope and the precedential value of the decision, in terms of protection of indigenous peoples' rights in Africa and elsewhere in the world are now indisputable."

ACHPR Commissioner Soyata Maiga, Chairperson of the Working Group on Indigenous Populations/Communities in Africa[421]

"A lot of work remains to be done in order to translate the positive decision of the African Commission into actual benefits for the Endorois community, and that the work will involve a delicate balance of political mobilization and legal activism."

Michael Ochieng Odhiambo, Resource Conflict Institute (RECONCILE)[422]

3.4 OECD Guidelines for Multinational Enterprises

The OECD Guidelines on Multinational Enterprises is the only State-backed corporate social responsibility (CSR) initiative which has a dedicated problem solving mechanism. The Guidelines are voluntary for corporations but compliance with their requirements, which includes establishing a complaint mechanism in the form of a National Contact Point (NCP), is mandatory for the 34 OECD, and 11 other non-OECD, signatory States.[423] These 46 States, which span five continents, account for 85 percent of all foreign investment and, consequently, have an important role to play in ensuring respect for indigenous peoples' rights in the context of extractive industry activities.

The revision of the Guidelines in 2011 saw the addition of a dedicated human rights chapter aligning them with the UN "Protect, Respect and Remedy Business and Human Rights Framework and Guiding Principles." Almost all of the cases filed in the subsequent year invoked this human rights chapter.[424] Due diligence is required in relation to all areas covered in the guidelines, including human rights. Supply chain responsibility is also addressed and greater emphasis is placed on NCP transparency. The OECD's commentary on the implementation of the 2011 Guidelines closely mirrors the UN Guiding Principles, including similar references to the rights of indigenous peoples. Nevertheless, the connection between the UN Guiding Principles, the OECD guidelines and indigenous peoples' rights remains widely misunderstood

at the operational level by extractive industry, financial sector and State actors.[425]

At the institutional level, the OECD NCPs are autonomous, operating independently from one another. This leads to challenges in ensuring some degree of consistency across NCP practice, given the significant variations in terms of their structures, procedures, and outcomes. Unfortunately some NCPs remain reluctant to issue determinations (final statements) in cases that cannot be resolved through mediation. As a result, the notion of jurisprudence technically does not apply to NCP mediation and statements; however, in practice, there is an increasing degree of cross-pollination between the NCPs, and it is accepted that certain mediation processes and determinations made in final statements constitute examples of good or best NCP practice.

Approximately half of all existing complaints to NCPs relate to the extractive sector,[426] with a significant percentage of those involving indigenous peoples.[427] Two of the final statements are recognized among NCPs as leading examples of good practice in the context of indigenous peoples' rights and the extractive sector.[428] These are the Norwegian OECD NCP's final statement in relation to Intex Resources Inc.'s Mindoro Nickel Project in the territories of the Mangyan people in Mindoro, the Philippines; and the UK NCP's final statement in relation to Vedanta Resources, a UK registered company-proposed bauxite mining in the Dongria Kondh's sacred Niyamgiri hills in Odisha (Orissa), India—both of which are addressed in boxes 8 and 9, below.

Box 8: Mindoro Nickel Project in the Territories of the Mangyan People

The Intex Resources case involved a three-year Norwegian NCP-facilitated process with which both the company and community engaged, that included a fact finding trip commissioned by the NCP. An NCP final statement was issued in 2011 finding breaches of the OECD Guidelines in relation to indigenous peoples' rights and environmental standards, with concerns also raised in relation to transparency of financial transactions. The statement affirmed that the FPIC process had failed to include **all** impacted Mangyan communities and that the environmental and social impact assessment was inadequate. The final statement provides extensive analysis of the substantive and procedural aspects of the requirement for FPIC[429] and has been pointed to by regional indigenous networks, such as Asian Indigenous Peoples Pact (AIPP), as a valuable source of guidance for other NCPs, as well as for members of the International Council on Mining and Metals (ICMM), in relation to engagement with indigenous peoples.[450]

A subsequent national investigation conducted under the auspices of the Philippine Department of the Environment and Natural Resources confirmed the NCP findings and revealed additional irregularities in Intex's operations, and recommended cancellation of Intex's Environmental Clearance Certification. Intex dismissed the NCP findings, claiming that independent consultants, which it employed but whose report it did not release for public critique, had exonerated it. Despite the NCP statement and national investigation, the company continues to attempt to pursue the project in the face of sustained local opposition.

The Intex case is illustrative of the fact that where a home State government, through its NCP, finds that its corporations are in breach of their human rights and environmental responsibilities, it is essential that effective mechanisms are in place to ensure that NCP findings and recommendations are respected and acted upon. Otherwise, the credibility of the NCP as a mechanism to provide access to remedies for human rights abuses is undermined. Interestingly from the perspective of the extraterritorial implications of ratifying ILO C169, the Norwegian NCP final statement in relation to Intex held that CERD's 2011 recommendation to Norway that it hold its corporations to account had "placed a duty on Norway to ensure that the standards affirmed in ILO Convention no. 169 are applied not just in indigenous territories in Norway, but also by Norwegian companies operating overseas."[431]

Complying with such a duty should render it incumbent on the State to ensure some form of follow-up and sanctions in cases such as that of Intex Resources, where companies simply reject the NCP findings and fail to implement their recommendations.

"While Intex Resources is vocal on being compliant with the highly-corruptible Philippine mining laws and policies, they are getting their way around the Indigenous Peoples Rights Act (IPRA) and traditional laws of Mangyan indigenous peoples in Mindoro, able to manipulate a small group to get their free, prior and informed consent. To make matters worse, the mining company is continuously ignoring the resistance of the local governments affected. It is frustrating to learn that after the findings of the OECD regarding the violation of certain guidelines, Intex Resources deliberately disregarded the recommendations of the OECD without being sanctioned. Unfortunately, this only leads us, indigenous peoples, to think that the OECD Guidelines and the OECD itself has no power over its members. We believe the OECD should not primarily focus on the development of its companies but more on securing that these companies behave accordingly, particularly in developing countries, protecting the welfare of stakeholder communities."

Ponyong Kadlos, Mangyan Federation Kapulungan Para sa Lupaing Ninuno (KPLN)

Box 9: Vedanta Resource Bauxite Mining in Dongria Kondh Sacred Mountains

The Vedanta Resources complaint was filed with the UK NCP in 2008. It alleged that consultation had not been held with the Dongria Kondh in relation to mining of Niyam Dongar, their sacred mountain, and that there had been a failure to adequately consider the potential impact on rights recognized under the UNDRIP and UN Conventions. Vedanta Resources refused to engage in the NCP mediation process and rejected the allegations without providing any evidence to the contrary.

The 2009 NCP final statement upheld the allegations and found that Vedanta had "failed to engage the Dongria Kondh in adequate and timely consultations about the construction of the mine, or to use other mechanisms to assess the implications of its activities on the community, such as an indigenous or human rights impact assessment."[432] Following the NCP statement, Vedanta continued to insist that its practices were

in line with the OECD Guidelines and India's laws. In 2010, the UK NCP issued a follow-up statement recommending that a human rights impact assessment be conducted and that the company engage with the Dongria Kondh. The inaction of Vedanta and its distain for the OECD guidelines resulted in a number of institutional investors disinvesting from the company.[433] In 2010, the India Ministry for the Environment blocked the clearance necessary for the mine to proceed and a case was taken to the Supreme Court by Vedanta challenging this decision.

In 2013, the Indian Supreme Court held that if Vedanta's proposed bauxite mine in the Dongria Kondh's sacred Niyamgiri hills in Odisha "…in any way, affects their religious rights, especially their right to worship their deity…in the hills top…that right has to be preserved and protected."[434]

The Court required that decisions be made by the *gram sabhas* (village councils) in relation to the communities' cultural or religious claims over the impacted areas prior to a final decision of the Ministry of the Environment and Forest in relation to the necessary forest clearance.[435] In a series of community referenda, all 12 gram sabhas rejected the project and in January 2014, the Ministry confirmed it would respect those decisions.[436] In May 2014 Vedanta announced that it would not mine the Niyamgiri hills unless it obtained community consent.[437] However, as of August 2014 Vedanta was again claiming to have community support despite the previous clearly expressed and ongoing community opposition.[438] While the NCP Final Statement was not explicitly referenced in the 2013 Supreme Court ruling, or in the 2014 decision of the Minister, it is highly probable—given the attention it received at the national and international level among shareholders, civil society and State actors—that it played some role in influencing these decisions.

Both the UK NCP final statement in relation to Vedanta in India and the Norwegian NCP statement in relation to Intex Resources in the Philippines affirmed that extractive companies seeking to operate in indigenous peoples' territories must respect the rights affirmed under the UNDRIP, conduct participatory impact assessments in accordance with the *Akwe: Kon Guidelines*, and comply with the outcome of inclusive, broad-based, good faith, consent-seeking consultations, which respect indigenous peoples' representative structures and decision-making processes.[439] The OECD is currently working

on developing further guidance in relation to the extractive sector. As a matter of international policy coherence, this guidance should be consistent with that developed by the UN human rights mechanisms, the UN Guiding Principles and the UN Global Compact, as well as the recommendations of the UK and Norwegian NCP in relation to indigenous peoples and the extractive sector—in particular, in relation to the requirement for FPIC.

3.5 United Nations Global Compact

The UN Global Compact was established in 2000 and is the world's largest CSR initiative. Its global network includes over 10,000 participants, of which some 7,500 are business participants, all of whom acknowledge the corporate responsibility to respect human rights and the need to avoid complicity in rights violations. The Compact consists of 10 principles, in the areas of human rights, labor, the environment, and anti-corruption, to which businesses commit to align their operations and strategies.[440] It is envisaged as a mechanism to facilitate sharing of good practice, with the principles envisaged as providing companies with a moral compass enabling them to contextualize their implementation in practice. It has however been criticized for its voluntary nature, the lack of specificity and vague nature of the commitments member organizations are required to make, and the absence of an effective complaint mechanism. In addition, the general critique levied at voluntarism—that there is a lack of understanding among corporate actors of what their responsibility to respect human rights actually implies in practice—has also been levied at the Global Compact.

In 2013, in a departure from these more generic principles, the UN Global Compact produced a Business Reference Guide to the UNDRIP.[441] The document, which was launched at the second annual UN Forum on Business and Human Rights in 2013, represents an important development due to the specificity of the guidance which it offers, and its potential

reach within the business community. Its production followed an 18-month, primarily online, consultation process in which civil society, indigenous peoples and industry participated.

The guide takes a rights-based, rather than a "legalistic, approach towards the importance of the UNDRIP and the associated responsibilities of business actors."[442] It emphasizes the document's normative value by contextualizing it within the broader framework of indigenous peoples' rights. While the guide is relevant for all businesses impacting on indigenous peoples, much of its content is of particular relevance for extractive companies. Given the widespread lack of understanding of indigenous peoples' collective rights within that sector, it represents an important contribution to the evolving area of business and indigenous peoples' rights.[443] Part one offers an indigenous rights lens on the UN Guiding Principles addressing the core corporate obligations around indigenous peoples' rights, due diligence, consultation and free, prior and informed consent, remediation and grievance mechanisms. Part two reaffirms the UNDRIP as an authoritative standard in the context of corporate and State human rights responsibilities and duties. The guide is complemented by a practical supplement, which includes examples of business respect for indigenous peoples' rights.

Consistent with the jurisprudence of the UN treaty and charter bodies, the document identifies respect for indigenous peoples' perspectives and rights to self-determination and to their lands, territories and resources as the foundation of any engagement with them. In doing so it frames FPIC as a core element of the indigenous rights framework. The guide echoes the UN Working Group on Business and Human Rights position, and that of the 2013 *Making FPIC a Reality* report, that as an expression of the rights to self-determination and lands and resources, FPIC processes "should be as far as possible determined and controlled by the particular indigenous community."[444]

Given the diversity of indigenous peoples, it seeks to avoid an overly prescriptive approach towards the realization of their rights and explains that the requirements for consultation and obtaining consent are a function of indigenous peoples'

cultures, practices, customary laws and institutions. The guide also serves a useful function in making explicit the relationship between consultation and consent. It highlights that the former has to serve to obtain the latter, and that consultation is not an end in and of itself. Particularly important is the guide's acknowledgement that indigenous peoples have "a right" to give or withhold consent, and its unambiguous rights-based position that where consent has not been obtained, businesses should not proceed with the proposed projects.

Another important issue, which the business reference guide addresses, is the corporate responsibility to respect indigenous peoples' rights in contexts where States fail in their duty to do so. In this regard it notes the potential legal risks, which include those arising from the possibility of complicity in rights abuses, if projects are pursued against the wishes of the impacted indigenous peoples. Finally, its inclusion of concrete cases in which the requirement for FPIC has been recognized by companies is welcome, as it demonstrates the challenges that both communities and companies face, given the frequently disastrous legacy of mining in indigenous territories and the potential role which respect for FPIC can play in overcoming these challenges. A companion "Good Practice Note" on FPIC was endorsed by the UN Global Compact in 2014 addressing the business case for FPIC, challenges associated with its operationalization, and existing good practice in the area.[445]

The guide therefore offers constructive advice to extractive companies that are considering engaging in indigenous territories. In terms of optimizing its impact and utility, the guide would perhaps be most effective if it were used as the basis for extractive corporations reporting in their public annual UN Global Compact Communication on Progress (COP) reports.[446] By encouraging this, the UN Global Compact could transform the guide into a living document, facilitating its objective of helping business understand, respect, and support the rights of indigenous peoples. Such reporting would help to convert policy commitments into practice, open them to the critique of indigenous peoples, and lead to the emergence of a publicly available body of practice around the implementation

of an indigenous rights compliant version of the UN Global Compact.

The Global Compact has also produced guides in relation to non-judicial grievance mechanisms and is currently involved in developing cases studies in relation to extractive projects involving indigenous peoples. It is hoped that the process and outcome of this guidance will be consistent with the principles affirmed in its business reference guide to the UNDRIP and promote rights-based engagement with indigenous peoples in relation to access to remedies.

3.6 Financial Institutions, Extractive Industries and Indigenous Peoples

Financial institutions are key enablers of extractive projects in indigenous peoples' territories. As a result of the role they have played in facilitating problematic projects in their territories, indigenous peoples have long held that these institutions need to take greater responsibility for their contribution to the human rights violations arising from these projects.[447] Until the adoption of the UN Guiding Principles on Business and Human Rights, and the revision of the OECD Guidelines, a certain degree of ambiguity existed around the human rights responsibility of these actors in relation to such investments.[448] Guidance from the OHCHR and the OECD have since clarified that, when investing in such projects, financial institutions have to avoid causing or contributing to human rights violations and to seek to prevent violations which are "directly linked to their operations products or services by their business relationships."[449] In order to meet their responsibility to respect human rights, these institutions are, as a result, obliged to conduct indigenous rights due diligence in relation to investments in extractive projects, and to ensure that remedies are available where rights violations occur. In addition, where such projects impact on indigenous peoples' rights, the requirement for FPIC applies in order to ensure that those rights are safeguarded.

The Policy and Performance Standards on Social and Environmental Sustainability of the International Financial Corporation (IFC), the private sector arm of the World Bank, cover a range of issues pertaining to project financing, including environmental and social assessments, relocation, community health and safety, biodiversity conservation and cultural heritage. They also include a specific Performance Standard no 7 (PS7) which is dedicated to indigenous peoples. They are widely regarded as constituting the benchmark standard for financial institutions and have been recognized as illustrative of elements of good practice in relation to business and human rights by the Special Representative to the Secretary General on human rights and transnational corporations and other business enterprises, OECD NCP's, the Special Rapporteur on the rights of indigenous peoples, and EMRIP.

The current version of the IFC Performance Standards came into effect in 2012 following a three-year revision process. From the perspective of extractive industry operations in indigenous peoples' territories, the most significant development in the 2012 revision was the incorporation into PS7 of the requirement to obtain indigenous peoples' FPIC in the context of projects, which have adverse impacts "on lands and natural resources subject to traditional ownership or under customary use" or projects which involve relocation of indigenous peoples.[450] The policy applies to all new investments. Under it, "clients are required to obtain FPIC for project design, implementation and expected outcomes."[451] The IFC produced a set of Guidance Notes to assist corporations in the implementation of the Performance Standards. These notes are helpful in providing direction to corporations unfamiliar with the concept of FPIC, but they also introduce some ambiguity in relation to when the requirement should be triggered, what level of due diligence is required, and the relationship of FPIC processes with indigenous peoples' customary law and practices and self-governance processes.[452] However, in practice, these Guidance Notes cannot be used to justify limitations on the role which indigenous peoples play in defining and implementing FPIC processes, as to do so would be to undermine the very rights which the FPIC safeguard aims to protect.[453]

This incorporation of the FPIC requirement into PS7 was reflective of the growing momentum behind its recognition[454] and followed significant lobbying by indigenous peoples and civil society, as well as input from the UN Special Rapporteur on the rights of indigenous peoples and other experts on indigenous peoples' rights. In the two years following its incorporation into PS7, the FPIC standard has had a major ripple effect across the financial sector, and, by extension, the extractive sector. This influence is notable in the 2013 commitment of ICMM members to "work towards obtaining consent" and the policies of a number of ICMM members which reference PS7. In addition to influencing IFC lending, the IFC's performance standards form the basis of the Equator Principles, which underpin the policies of the 80 financial institutions, who combined cover in excess of 70 percent of international project finance debt in emerging markets.[455]

The Equator Principles were revised in 2014 to bring them into line with the IFC's 2012 policy. The two significant changes introduced in the current version of the Equator Principles, known as EP-III, were the requirements to obtain indigenous peoples' FPIC and to conduct human rights due diligence. These requirements are mutually reinforcing and constitute core components of ensuring financial institution respect for human rights in decisions pertaining to funding extractive industry projects in indigenous peoples' territories. Initial research by a small sub-group of Equator Banks, known as the Thun Banks, has considered some of the implications of the human rights due diligence requirement for their operations.[456] However, similar research has yet to be initiated in relation to the implications of the FPIC requirement for bank practice and the conditions necessary for its effective implementation.[457] Given the diversity of indigenous peoples, guaranteeing compliance with the requirement for FPIC will necessitate context-specific understanding of the extent to which the particular governance and decision-making processes of impacted indigenous peoples have been respected by extractive industry clients.[458] Implementing a rights consistent concept of FPIC consequently gives rise to a range of operational challenges in areas such as monitoring and oversight of clients, staff incentives, remedial mechanisms and sanctions.

Financial institutions and their extractive industry clients have yet to fully comprehend these challenges and what will be required to develop appropriate and effective operational responses.[459] Developing such an understanding will necessitate extensive engagement with indigenous peoples, which should occur within the framework of the UNDRIP. Other challenges, which arise in the context of operationalizing FPIC within the financial sector, include ensuring that the requirement applies to financial intermediaries, as well as any other indirect mechanisms through which extractive projects in indigenous territories are financed.

Systematic implementation of FPIC in the extractive sector is increasingly necessary. This is not only to meet the responsibility to respect indigenous peoples' rights, but also to avoid unsustainable investments as a result of reputational and legal risks to which project implementers and funders may be exposed as a result of complicity in, or direct violations of, indigenous peoples' rights. It is therefore in the interests of all actors—including the financial sector actors—whose decisions impact on indigenous peoples, to ensure compliance with indigenous peoples' rights by obtaining their FPIC in accordance with international human rights standards. The commitment to obtain FPIC also implies an obligation to address power imbalances by facilitating indigenous peoples' access to technical expertise and financial assistance so that they are in a position to effectively engage in FPIC processes and negotiations arising from them.

While the IFC is the most significant actor among international financial institutions in the context of the implications of its standards for private sector financing of extractive projects, it was not the first financial institution to affirm the requirement for FPIC. The 2008 and 2014 Environmental and Social Policy of the European Bank for Reconstruction and Development[460] recognize that "the prior informed consent of affected Indigenous Peoples is required for [natural resources-related] project-related activities…given the specific vulnerability of Indigenous Peoples to the adverse impacts

of such projects."[461] Similarly, the 2009 safeguard policy of the Asian Development Bank's affirms the requirement for FPIC, albeit in a somewhat ambiguous manner, which, if interpreted narrowly, is potentially inconsistent with the indigenous rights-based notion of FPIC as affirmed under the human rights regime.[462] The, pre-UNDRIP, 2006 policy of the Inter-American Development Bank does not explicitly require FPIC. However, the consent requirement for large-scale mining project is implicit in it, as the policy is to be interpreted in a manner that is consistent with international and regional human rights jurisprudence.[463] In addition, a number of private investment institutions, in particular those targeting responsible investors, have also started to engage with the requirement for FPIC.[464] The African Development Bank remains the only multilateral development bank without a specific indigenous peoples' policy.

The public sector arm of the World Bank is currently undergoing a review of its environmental and social safeguard policies, including its Operational Policy 4.10 on indigenous peoples. The review process has identified FPIC as one of the major themes to be addressed, and the initial draft policy includes the requirement for FPIC in relation to resource extraction projects. However, the Environmental and Social Standard 7 on Indigenous Peoples includes a draconian clause providing an opt-out for States who claim that recognizing indigenous peoples is either contrary to their Constitutions or may heighten ethnic tensions. If such a policy is endorsed, the Bank would not only be failing to comply with its obligation as a UN specialized agency to promote the realization of the UNDRIP's provisions, but would be acting in direct contravention to this objective and could find itself complicit in the violations of indigenous peoples' rights.

3.7 The Extractive Industry Transparency Initiative (EITI)

The EITI is a multistakeholder initiative designed to address corruption and promote transparency within the oil, gas and mineral resources industries. It is premised on the principles that "public understanding of government revenues and expenditure over time could help public debate and inform choice of appropriate and realistic options for sustainable development" and that "prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction."[465]

An EITI board, consisting of representatives of governments, companies and civil society, determines if a country meets the EITI compliance requirements. As of May 2014, 27 countries were EITI compliant, three suspended, and a further 16 countries accepted as EITI candidate countries. A country can remain an EITI candidate for a maximum of five years, while EITI compliant countries are validated every three years. According to the EITI, compliance "does not necessarily mean a country's extractive sector is fully transparent, but it means there are satisfactory levels of disclosure and openness in the management of the natural resources, as well as a functioning process to oversee and improve disclosure."[466] Failure to meet this standard leads to suspension and a country may be de-listed if it remains non-compliant with EITI standards following a two-year warning.

Participation in the EITI is voluntary. However, once a government signs up to implement the EITI it is required to work together with industry and civil society to publish and verify tax and other payments it receives from extractive industry companies. By October 2013, over $1 trillion of such revenues had been disclosed.[467] All companies operating in an EITI candidate or compliant country are required to disclose how much they pay to governments, while governments are required to report on what they receive, with an independent

administrator assigned to reconcile the figures and disclose them for public debate in the compiled EITI report.[468] Some countries, such as Norway and Nigeria, have enacted legislation mandating EITI implementation.

Implementing countries are required to facilitate a national level multistakeholder platform, involving "full, independent, active and effective participation"[469] of civil society to oversee EITI implementation. The EITI differentiates itself from other initiatives aimed at ensuring transparency by pointing to its "multi-stakeholder platform for dialogue about all aspects of the use of their country's natural resources" and the fact that the "national multi-stakeholder group determines how to adapt the EITI implementation process to reflect local circumstances, needs or preferences."[470] Some civil society and indigenous peoples have been rather cautious in encouraging government and corporate participation in the EITI process. They have insisted that this must be accompanied by the meaningful involvement of genuine representatives of indigenous peoples and civil society, and emphasized that unless the EITI is coupled with effective measures to protect and respect indigenous peoples' rights and to address broader issues pertaining to the extractive sector's impact, engagement with the EITI will be ineffectual and could even risk legitimizing extractive operations associated with violations of indigenous peoples' rights.[471] In this regard, it is interesting to note that six accepted recommendations at the UN Human Rights Council Universal Periodic Review called for implementation of the EITI in a manner which ensures respect for human rights.[472]

In a critique of the level of engagement of the extractive industries with impacted communities, the Peruvian mediator Luis Ore, highlights the concerns of many of those working on the ground:

> "EITI foresees the company to disclose information regarding payments…to the government but there's no piece that I can see addressing the issue of what money the companies are paying to other stakeholders and to the local communities…Sometimes what companies do is contact the leaders of the communities and offer money to him and his family, so that he keeps the community under

> control. That's an issue I think that's not addressed and if it is addressed, it is not that clear."[473]

On the other hand, the US organization First Peoples Worldwide have urged tribal governments in the US to engage with the EITI, to ensure they reap any benefits arising from the initiative:

> "Tribal governments have yet to join the Multi Stakeholder Group that is overseeing implementation of the US Extractive Industries Transparency Initiative (USEITI), despite the vast quantities of natural resources extracted from tribal lands. This indicates that tribal governments do not realize the benefits that transparency offers their communities, and that more outreach is needed to mobilize tribal support for USEITI."[474]

As these perspectives and the aforementioned concerns illustrate, building trust and understanding between all stakeholders, including indigenous rights-holders, is essential to the realization of the EITI goals of eliminating corruption and avoiding conflict in the extractive sector. Participation of business and civil society is encouraged by the EITI secretariat and is regarded as being essential to the success of the initiative. To date "80 of the world's largest oil, gas and mining companies support and actively participate in the EITI process."[475] Civil society organizations participate through the Publish What You Pay campaign, which is supported by more than 800 organizations worldwide.[476] However, to date, there is no mechanism for ensuring full and effective indigenous participation in the process.

Debate still exists as the extent to which the EITI should contribute to realizing the broader "enabling environment" for civil society participation and ensuring that the fundamental rights of civil society representatives are respected, with different interpretations existing as to the implications of this commitment under the EITI standard.[477] In the context of indigenous peoples, this raises the issue as to the role of the EITI with regard to respect for indigenous peoples' rights and compliance with the principle of FPIC. To date, the inclusion of such issues have been rejected by the EITI board,

which maintains a narrower interpretation than civil society representatives of what the enabling environment implies.

The current EITI standard has, nevertheless, evolved significantly from the original initiative in which reporting requirements were focused on aggregating information and reports lacked in granularity and context. The 2013 standard requires that reports "be accompanied by publicly available contextual information about the extractive industries' including: an overview of the legal framework, fiscal regime and the extractive industries contribution to the economy."[478] Financial transparency is encouraged from the licensing and contract stages, through to revenue management and expenditure distribution on social and infrastructure development. The lifecycle of the EITI initiative is therefore closely correlated with project stages during which indigenous participation and FPIC are necessary for a rights-compliant extractive industry model.

Much of the revenues which are reported under the EITI are currently, or will in the future be, generated from resources extracted from indigenous territories. Turning a blind eye to the issue of indigenous peoples' rights violations by the sector is clearly not acceptable given the profound impact which the sector has on those peoples' cultural and physical survival and well-being. At the same time, the EITI cannot be the solution to all of the serious challenges which indigenous peoples face in relation to the extractive industry. At a very minimum, it would appear reasonable to expect that the EITI ensure that it does not serve to exacerbate existing problems and contributes to a process aimed at realizing a rights-compliant model of extractive industry operations in indigenous territories, in accordance with the minimum standards which are articulated in the UNDRIP and are increasingly acknowledged in a broad range of international standards.

In the Philippines, where FPIC is mandated under the Indigenous Peoples Rights Act, civil society has advocated for the EITI to act as a platform for strengthening these peoples' rights to participation in decision-making process in relation to the utilization of the country's natural resources, much of which resides in indigenous territories. The aspiration is that

the EITI can provide a platform which serves to strengthen and reinforce the requirement to obtain indigenous peoples' FPIC and to ensure that there is transparency as to how this is realized in practice.[479] The Philippine experience, if it proves successful, may therefore offer valuable insights and lessons for other national contexts, and assist in answering unresolved questions regarding the role which the EITI could, or should, play in promoting respect for the rights of indigenous peoples to participate in decision making.

The EITI is not the only transparency initiative in the context of the extractive sector. The most notable to date is the global civil society Publish What you Pay initiative, which advocates for transparency to extend beyond financial issues to encompass broader governance issues, addressing both what extractive companies pay and how they operate. The initiative recently welcomed the UK announcement that it was implementing EU extractive industry reporting requirements by requiring that, as of January 2015, oil, gas and mining companies publicly report their payments to governments in all countries where they operate.[480] Another initiative is Strengthening Assistance for Complex Contract Negotiations (Connex), which was launched in June 2014 by G7 Governments.[481] Its stated objective is to "provide developing countries with extended and concrete expertise for negotiating complex commercial contracts."[482] The initial focus of Connex is on the extractive industries sector and it includes a commitment to "working toward common global standards that raise extractive industry transparency in relation to company payments to governments." [483] As with the EITI, it is unclear to what extent Connex will address the underlying indigenous rights issues which are inherent in extractive industry contracts, and the role of FPIC as the common global standard for safeguarding indigenous peoples' rights prior to entering into such contracts and throughout the duration of the projects which they facilitate.

Chapter Four

Looking to the Future: A Self-Determination and Sustainable Development Compliant Extractive Sector?

4.1 Introduction

The post-UN Declaration on the Rights of Indigenous Peoples (UNDRIP) era has seen an important shift from the clarification of the content of the normative framework of indigenous rights towards the emergence of a body of jurisprudence and a series of initiatives aimed at furthering the implementation of this framework. This jurisprudence is grounded in a conception of indigenous peoples' rights, which is underpinned by the recognition of their right to self-determination. As a result, guidance in relation to implementation of the rights framework is directed towards ensuring that indigenous perspectives in relation to rights realization are given center stage. This self-determination-grounded rights framework should open up significant new opportunities for indigenous peoples to exercise control over their territories. However, significant challenges remain for this self-determination framework to become a reality in the context of the extractive industries. The prerequisites for its realization range from the empowerment of indigenous peoples to the education of corporate and state actors seeking to engage with them. Resistance to this indigenous rights framework nevertheless continues to be prevalent among many State and corporate actors, given the profound transformative effect it will have on the extractive industry sector. As a result, concerted indigenous action will be necessary to translate these normative developments into tangible changes within their territories.

Realizing this change will necessitate invoking socially shared values around our common future and educating broader society on the important role which indigenous

peoples have to play as key partners in sustainable development. Indigenous peoples and small-island States are among the most impacted by climatic and environmental change, much of which is attributable to economies built on the extractive industries. As a result, they face threats to their food sources, to their territories and their way of life—in short, to their fundamental rights and cultural and physical survival. At the same time, they offer broader society important lessons in relation to maintaining a sustainable relationship with the earth, while simultaneously making substantial contributions to reducing carbon emissions though the protection of their forest areas, and by acting as a break on the otherwise unconstrained expansion of the extractive sector. Maximizing synergies between the post-2015 sustainable development agenda and the implementation of the indigenous peoples' rights framework is therefore of vital importance, both for the future of indigenous peoples and that of the societies within which they reside.

With this in mind, this chapter will address three questions related to indigenous peoples' future relationship with the extractive industry. The first relates to the implications of the Post-2015 Development Agenda for indigenous peoples' rights; the second asks what can be done at the institutional level to open up new opportunities for indigenous peoples to control activities in their territories; and the third asks what role indigenous peoples can have in shaping the future extractive industry landscape.

4.2 Implications of the Post-2015 Development Agenda for Indigenous Peoples' Rights

i. Legal Basis for Indigenous Rights-Based Sustainable Development Agenda

Just as it is now generally accepted that healthy and safe workplace practices are positively correlated with sustainable and high productivity,[484] the global community is gradually coming to the realization that long-term sustainable development is only feasible in a context where it is underpinned by respect for human rights, including indigenous peoples' rights. This realization of the linkage between the environment and human rights is not entirely new. It was first reflected in the 1972 Stockholm Declaration on the human environment, paragraph 1 of which proclaimed: "[b]oth aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself" and Principle 1 of which affirmed the right to live "in an environment of a quality that permits a life of dignity and well-being" along with the "responsibility to protect and improve the environment for present and future generations."[485] Meanwhile the issue of climate change was first raised at the level of the UN General Assembly by the Maldives in 1987,[486] and in the intervening decades addressing climate change and ensuring sustainable development has emerged on the international agenda as one of the critical issues facing humanity.

As a result of their engagement in the 1992 United Nations Conference on Environment and Development (UNCED) (the Earth Summit),[487] and given their traditional environmental knowledge, indigenous peoples came to be seen as important partners in this new pursuit of sustainable development.[488] Probably the clearest articulation of this recognition of the

role of indigenous peoples is found in its Agenda 21 plan of action,[489] which in Chapter 26 states:

> "[i]n view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous people, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous people and their communities."[490]

A key component of the indigenous submission to that process was that the requirement for their FPIC be respected.[491] This was, to a certain degree, reflected in the final wording in Chapter 26 which establishes the objective of: "[r]ecognition that the lands of indigenous people and their communities should be protected from activities that are environmentally unsound or that the indigenous people concerned consider to be socially and culturally inappropriate."[492] The 2002 World Summit on Sustainable Development (WSSD) Johannesburg Political Declaration reaffirmed "the vital role of the indigenous peoples in sustainable development" and the need to strengthen partnerships with them.[493] In so doing it was acknowledging their distinct identities, cultures and rights, including their right to self-determination.

While this recognition of indigenous peoples' central role in relation to sustainable development was significant, very little tangible action followed in relation to the integration of the human and indigenous peoples' rights and the climate change and sustainable development agendas. Indigenous peoples themselves have attempted to progress this integration by proactively seeking to make use of the human rights mechanisms to address climate change impacts.

Box 10: Inuit Petition on Climate Change Harms Caused by the United States

In 2005, the Inuit from Canada and Alaska filed a complaint at the Inter-American Commission on Human Rights seeking relief from violations of their rights resulting from global warming caused by the greenhouse gas emissions of the United States (U.S.).[494] The case was deemed inadmissible due to the challenges in proving causality between the harm and the United States' emissions. However, the Commission invited the lead Inuit petitioner and her legal team to testify at a hearing on climate change and human rights, which it held in March 2007. Subsequent developments in international law, as reflected in the Human Rights Council resolutions, may help to address such issues around admissibility, should impacted indigenous peoples file similar petitions in the future.

As the issue of climate change continued to rise on the international agenda, so too did the recognition of its implications for human rights, and the central role of human and indigenous peoples' rights in addressing the challenges which climate changes poses. This was reflected in the 2007/2008 UNDP Human Development Report, which found that a failure to address climate change would constitute "a systematic violation of the human rights of the world's poor and future generations, and a step back from universal values."[495] The report noted the disproportionate impacts of climate change and environmental harms on indigenous peoples throughout the world,[496] and concluded that:

> "Institutional mechanisms and governance structures for overseeing shared goals have to extend beyond conservation and emission targets to a far wider set of environmental and human development concerns, including respect for the human rights of indigenous people."[497]

In March 2008, the Human Rights Council in its resolution no. 7/23 recognized the impact of climate change on human rights, noting its concern "that climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights."[498] The resolution promoted a 2009 OHCHR

report, which found that climate change undermines a wide range of internationally-protected human rights and that those already in vulnerable situations, such as indigenous peoples, would be those most affected.[499] The report also affirmed that human rights principles, such as those related to non-discrimination and participation in decision-making, play an important role in the formulation of climate change policy. The following year, Human Rights Council resolution 10/4 noted the direct and indirect impacts of climate change on human rights, including "the right to life, the right to adequate food,…health,… housing, the right to self-determination and…access to safe drinking water and sanitation."[500] It also noted that these impacts will be most acutely felt by vulnerable groups such as indigenous peoples, while affirming that State adherence to human rights obligations has the "potential to inform and strengthen international and national policy-making in the area of climate change, promoting policy coherence, legitimacy and sustainable outcomes."[501]

The 2011 Cancun Agreements on climate change reaffirmed the contents of Human Rights Council resolution 10/4 and noted the disproportionate impacts on indigenous peoples' rights. It emphasized that State parties should "in all climate change related actions, fully respect human rights."[502] This was followed in 2011 by Human Rights Council resolutions 16/11 on "human rights and the environment" and 18/22 on "human rights and climate change." Resolution 16/11 recognized that "sustainable development and the protection of the environment can contribute to human well-being and the enjoyment of human rights" and that, conversely, "environmental damage can have negative implications… for the effective enjoyment of human rights," in particular, for vulnerable groups.[503] The resolution acknowledged the transnational nature of environmental damage and the role of international cooperation in addressing this. It also reaffirmed the potential which human rights can play in ensuring sustainable outcomes. Resolution 18/22 also reaffirmed the potential of human rights obligations, standards, and principles "to inform and strengthen international and national policy making in the area of climate change, promoting policy coherence, legitimacy, and sustainable outcomes."[504] A 2014

resolution of the Human Rights Council on human rights and climate change again noted the disproportionate impact of climate change on indigenous peoples and called for the need to guarantee respect for human rights in the context of addressing it.[505] In order to realize this, it encouraged "relevant special procedures mandate holders to give consideration to the issue of climate change and human rights within their respective mandates."[506] The 2014 report of Working Group II of the Intergovernmental Panel on Climate Change (IPCC) likewise notes that '[r]ights-based approaches to development can inform adaptation efforts' and noted the role that indigenous knowledge can play in climate change adaptation.[507]

ii. Post-2015 Sustainable Development Goals and Lessons Learned from the Millennium Development Goals (MDGs) Initiative

The zero draft of the Post-2015 Sustainable Development Goals (SDGs) contains 17 goals and 169 targets[508] and was finalized by the General Assembly Open Working Group (OWG) on SDGs on 19 July 2014. Despite the aforementioned developments in international human rights and environmental law affirming the direct causal link between respect for human rights and the realization of sustainable development, serious concerns remain around the manner in which the zero draft addresses, or rather fails to address, human and indigenous peoples' rights.

Firstly, as noted by the Mining Working Group at the UN, a coalition with the support of some 300 NGOs, "[b]y excluding the human right to water and sanitation and other human rights from its targets, the SDGs…undermine the agency of those that most directly suffer the negative consequences of growth-driven development."[509] In order to address this situation, the coalition has called for a rights-based approach to natural resource development and sustainable development.

Secondly, from the perspective of indigenous peoples' rights, the zero draft is fundamentally flawed as it includes no reference to indigenous "peoples," and instead refers to "in-

digenous and local communities," thereby failing to recognize the relevance of indigenous peoples' right to self-determination. UN indigenous experts have expressed their alarm that this "undermines the gains achieved by indigenous peoples regarding their assertion of their distinct identity as peoples and the rights accorded to them under the [UNDRIP]."[510] These UN experts also point to the lack of coherence with the Johannesburg Declaration of 2002 and the Rio +20 outcome document (2012), "The Future We Want," which recognizes "the importance of the [UNDRIP] in the context of global, regional, national, and sub-National implementation of sustainable development strategies."[511]

If mistakes of the past are to be avoided in the formulation and realization of the Post-2015 Development Agenda, key lessons have to be learned from the experience of the MDG initiative, which, while it benefited significant proportions of the world's poor, failed to accord adequate attention to indigenous peoples. Indicators developed to track progress towards the MDGs hid inequalities between groups, with indigenous peoples frequently failing to benefit from programs in countries which met their MDG targets. In some cases, national programs aimed at meeting MDG targets were used to justify the pursuit of extractive industry projects in indigenous peoples' territories in a manner inconsistent with their rights.[512] In this regard, development programs aimed at achieving aggregate generic goals or targets can serve to obscure negative impacts on indigenous peoples, and ultimately have the perverse effect of denying the rights of those who should be among the primary beneficiaries. In a worse-case scenario, failure to ensure that a rights-based approach underpins the pursuit of Sustainable Development Goals could lead to the Post-2015 Development Agenda acting as a Trojan horse for "development aggression" in indigenous peoples' territories. Past experience with extractive industry co-option of the very notion of "sustainable development" points to this potential.[513]

In addition to the absence of indigenous participation in the formulation, implementation and oversight of the MDGs, three of the key deficiencies in the initiative were the:

- Absence of a rights-based approach and a commitment to the principle of FPIC;
- Lack of disaggregated data on particular groups, including indigenous peoples;
- Failure to develop and apply culturally-appropriate indicators to assess well-being.[514]

To avoid these shortcomings in the Post-2015 Development Agenda, UN experts have called for the issue of FPIC to be properly addressed and for "disaggregation of data across all indicators in order to enable a better assessment of the situation of indigenous peoples with regard to the [sustainable development] goals."[515] Fundamentally, this comes down to guaranteeing a rights-based approach to both the definition and pursuit of development goals and indicators. Doing this avoids the potential for over-simplification of complex realities and obscuring of rights abuses which can arise from the use of a purely outcome based approach that relies on aggregated, and potentially *de facto* discriminatory, indicators of success.

These issues are of critical importance to the development of a meaningful set of rights-compliant Sustainable Development Goals in the context of indigenous peoples and the extractive industries. Ironically, in the lead up to the Rio +20 meeting, efforts were made by certain States—most notably Canada, the United States, New Zealand and Australia—to ensure that the requirement for indigenous peoples' FPIC for resource exploitation was not included in the outcome document.[516] Given the central role of FPIC as a safeguard for, and indicator of, respect for indigenous peoples' rights, such a proposal goes completely contrary to a rights-based approach to sustainable development. The Rio +20 outcome document nevertheless acknowledges the centrality of such a rights-based approach through its recognition of the role of the UNDRIP, and by extension FPIC, in the pursuit of sustainable development. This sends an unambiguous signal to those developing the SDGs that the post-2015 sustainable development agenda must be developed with the full and effective participation of indigenous peoples, and that its goals and indicators should include tangible and measurable commitments around FPIC and respect for indigenous peoples' rights, in particular, in the context of resource exploitation.

Ensuring this would go some way towards building relationships with indigenous peoples as key partners in achieving sustainable development for all. This should constitute one of the primary objectives in the formulation and implementation of the global development agenda beyond 2015. To this end, the sustainable development agenda should be explicitly premised on respect for indigenous peoples' rights to self-determination and self-governance; to determine their own priorities for their development; and to participate in policy decision-making processes with regard to the extractive industries at the local, national, regional and international levels, in accordance with the principle of FPIC. This implies that indigenous peoples' ecological practices be supported, and their customary tenure and resource management systems, including in relation to sub-soil and ocean resources, be respected. It also necessitates addressing their perspectives on sustainability in the development of indices related to their well-being. A focus on "locally-controlled, clean, renewable energy systems and infrastructure" and capacity building in relation to sustainable development practices based on indigenous knowledge should be a core feature of the agenda.[34] Particular attention is necessary to the contribution of extractive industry operations to ecosystem vulnerability and the associated increased risk of environmental disasters impacting on indigenous peoples' enjoyment of their rights.[518]

iii. Indigenous Contribution to a Rights-Based Sustainable Development Agenda

Indigenous peoples have already demonstrated their unique, innovative and central role in pursing the potential of human rights to address climate change and environmental harms and in advocating for genuine rights-based sustainable development. This is evident in their participation in the 1992 Earth Summit, their subsequent engagement in the UN Conference on Sustainable Development, their active participation in the Convention on Biological Diversity (CBD) negotiations—particularly in relation to access and benefit-sharing—and in their attempts to engage the human rights

system in relation to specific cases, such as the Inuit petition to the Inter-American Commission.

In keeping with this proactive approach to realizing their rights and self-determined development objectives, indigenous peoples have formulated their major themes, goals, targets, and associated indicators for the SDG process.[519] These are outlined in the March 2014 Indigenous Peoples Major Group position paper, which draws from the international normative framework of indigenous rights, including: the UNDRIP; environmental law (the CBD; the Rio +20 *The Future We Want* outcome document), and SDG reports, such as the 2013 High Level Panel Report (HLPR) and Sustainable Development Solutions Network (SDSN) reports.[520]

Central to the indigenous perspective on sustainable development is the notion that cultural diversity underpins "the adaptive capacities and resilience of societies and the natural world as complex interrelated systems" and consequently must imbue all dimensions of the Post-2015 Development Agenda.[521] This is reflected in the UN Permanent Forum on Indigenous Issues' (UNPFII) recommendation that culture should be recognized as the fourth pillar of sustainable development, along with economic viability, social inclusion and environmental balance.[39] The eight major goals identified by indigenous peoples, each of which has specific rights-based targets and indicators, are:

- Eradicate poverty for indigenous peoples;
- Ensure human rights and end all forms of discrimination and exclusion of indigenous peoples;
- Ensure participatory governance and full participation of indigenous peoples in decision-making;
- Promote peace and prevent conflicts on indigenous peoples' territories, or that have an impact on indigenous peoples' communities;
- Achieve sustainable development that ensures protection of the environment and biodiversity of indigenous communities' lands and territories [and resources];
- Address the impacts of climate change and halt unsustainable energy development on indigenous communities' lands and territories;

- Recognize the crucial role of indigenous peoples in global partnerships for sustainable development; and,
- Protect and respect indigenous peoples' cultural heritage, traditional knowledge systems and practices.[523]

Each of these eight goals are relevant to the pursuit of extractive industry operations in or near indigenous peoples' territories, with goals three to six being particularly pertinent to ensuring that extractive industry operations are pursued in a manner which is consistent with sustainable development for indigenous peoples and society as a whole. One of the explicit targets for goal five is to "[e]nd and prevent uncontrolled, unmanaged and unsustainable industrial practices, including extractive industries' in indigenous peoples" territories.[524]

The Indigenous Peoples Major Group's position paper also emphasizes the need to respect indigenous peoples' own forms of monitoring and evaluation, which are based on their traditional knowledge and a holistic view of their sustainable, self-determined development. Indigenous participation in the definition and promotion of the Post-2105 Development Agenda will arguably be one of the key determinants of its success or failure. This is true for a range of reasons, many of which appear to have gone unnoticed in the context of formulating the sustainable development agenda to date.

Firstly, indigenous peoples can play an active role in pressuring governments and the international community to take tangible steps towards establishing agreements and mechanisms, which provide necessary assistance to those most immediately impacted by climate change and environmental harm. Through the UN resolutions outlined above, the international community has already acknowledged the links between human rights and sustainable development, climate change and environmental harm. It has also recognized that indigenous peoples are among those most impacted by the latter. By drawing on these resolutions in their engagement with international and regional human rights mechanisms, indigenous peoples can become important actors in clarifying the legal obligations which human rights give rise to in contexts where rights are denied due to climate change and

environmental harms. In this manner, they can contribute to the justiciability of human rights in relation to climate change and environmental impacts.

The establishment of the UN Special Procedure mandate on human rights and the environment, and the appointment of Professor John Knox to the role, should also contribute to the provision of greater clarity as to the legal obligations of States with regard to human rights violations arising from climate change and environmental harm. A clear synergy exists with the work of the current Special Rapporteur on the rights of indigenous peoples—a globally-recognized expert on climate change issues—who has identified indigenous peoples' economic, social and cultural rights as her major focus area, and highlighted her intention to also focus on the related issue of sustainable development, climate change and environmental harms, given their impact on indigenous peoples economic empowerment.[525]

The increased emphasis of UN treaty and charter bodies on extraterritorial obligations in relation to corporate impacts on indigenous peoples may also provide indigenous peoples with new avenues for pressuring home States of corporations to accept their responsibly for harms caused. In this regard, the recognition that climate change and environmental harms are trans-border issues necessitating international cooperation is also relevant.

Secondly, through the recognition and assertion of their rights to control development in their territories and their pursuit of self-determined development, indigenous peoples, through the operation of the principle of FPIC, are in a position to contribute towards the much needed slow-down in extractive industry-generated carbon emissions, and also to reduce the extent of environmental harms associated with the sector. This applies in particular to fossil fuel exploitation. It also applies to the high energy and water consumption, water pollution and forest destruction that are associated with mineral extraction and processing. In challenging this form of development in their territories, indigenous peoples become key actors not only in protecting their own territories, cultures

and futures, but also in encouraging alternative models of development and economies, which are genuinely sustainable from both an environmental and human rights perspective.

As noted in the 2014 report *Securing Rights Combatting Climate Change*, indigenous peoples and forest communities currently "have legal or official rights to at least 513 million hectares of forests… comprising 37.7 billion tons of carbon."[526] Those indigenous peoples whose rights are recognized, and who are in a position to ensure they are respected, have demonstrated their significant potential to make quantifiable contributions to sustainable development targets through the maintenance of these forest areas and meeting of CO2 targets of the States in which they reside.[527] A similar potential exists in the context of extractive industries, where respect for indigenous land rights and the principle of FPIC could potentially translate into comparable contributions to targets through the avoidance of CO2 emissions. By acting as the gate keepers over these subsoil resources, indigenous peoples are in a position to react in a more immediate and effective manner than national governments, which to date have shown themselves as largely incapable of taking effective measures to slow down carbon emissions. This is true even in cases such as Ecuador where, as noted in chapter one, innovative approaches to avoiding oil exploitation have been attempted.[528]

Finally, indigenous peoples find themselves in the unfortunate position of being the "canary in the coal mine" (no pun intended) in terms of assessing the global community's response to climate change and environmental harms. If solutions to these problems cannot be guaranteed for them, then it is almost inevitable that other segments of the population will suffer similar fates in the future. As noted above, the UNDP has recognized that to be effective '[i]nstitutional mechanisms and governance structures for overseeing shared goals have to extend…to including respect for the human rights of indigenous people."[529] It is therefore incumbent on society as a whole to ensure that indigenous peoples' rights are respected and that their perspectives on sustainable development inform the Post-2015 Development Agenda, in order for wider society to then reap the benefits. For such solutions to be realized, in-

digenous peoples themselves will have to be active participants in the design, implementation and oversight of these goals. Realizing their full potential in this regard will necessitate a broad array of changes across a range of economic, social and cultural, environmental, political and institutional levels.

4.3 Institutional Level Changes to Open Up New Opportunities for Indigenous Peoples

Indigenous peoples have called for the establishment of agreed and adequately-resourced mechanisms at the national and international levels aimed at furthering their control over their territories. Their primary calls in relation to addressing the encroachment of extractive industry actors into their territories have been for mechanisms aimed at: a) ensuring implementation of the rights to self-determination, lands, territories and resources, and the protection of sacred or culturally significant landscapes; b) resolving land, territory and resource disputes and ensuring effective redress for past territorial encroachments; c) obtaining free and informed consent prior to entering their territories for resource exploration or exploitation; and d) ensuring clean-up and restoration of damaged ecosystems and guaranteeing remediation for such harm.

At the international level, these indigenous proposals range from calls for the establishment, with the full and effective indigenous participation, of "a new UN body with a mandate to promote, protect, monitor, review and report on the implementation of the rights of Indigenous Peoples" to calls for greater engagement of existing UN mechanisms with indigenous peoples' rights in the context of extractive activities.[530] In addition, proposals have been made for the appointment of a UN Under-Secretary General for Indigenous Peoples and for "permanent observer status within the UN system," enabling direct participation through indigenous governments (including traditional councils and authorities) and parliaments.[531] In a similar vein, a "permanent mechanism

or system for consultations with indigenous peoples' governance bodies, including indigenous parliaments, assemblies, councils or other bodies representing the indigenous peoples concerned…enabling [such bodies] to participate effectively at all levels of the United Nations" has also been suggested. As a component of this, indigenous peoples have pointed to the need for "consultative status" within the UN to be granted to their representative bodies.[532]

At the national level, indigenous peoples have called for the establishment of "national committees, or other constructive mechanisms, consisting of State and Indigenous Peoples' representatives, with the aim of reaching substantive agreements on the content and scope of indigenous peoples' right to self-determination, as well as on how this right can be effectively implemented."[533] Similarly, it was proposed that the UN General Assembly "should recommend States to commit to engaging in formal dialogue with Indigenous Peoples, and their National Human Rights Institutions, to design and develop a National Strategy to give full effect to the [UNDRIP]."[534] All of these proposals are of direct relevance to the issues faced by indigenous peoples in the context of the extractive industry sector. To a certain degree, they are reflective of the concern noted in the 2013 *Making FPIC a Reality* report that:

> "…despite its indisputably high impact on human rights, in particular, indigenous peoples' rights, sustainable development and the environment, the extractive industry, does not have a forum or framework which engages all concerned parties and is dedicated to regulation of the industry in the international sphere."[535]

The report suggested that "[b]road-based dialogue is necessary in relation to the establishment of such an inclusive forum" and that this dialogue "should be guided by the UN human rights mechanisms and proceed on the basis of the principles and rights recognized in the [UNDRIP]."[536]

While such dialogue is necessary, a number of significant challenges would arise in attempting to provide an institutional home at the international level for addressing issues pertaining to indigenous peoples' rights and the extractive

sector. One of these is the structural chasm within the UN itself, between its developmental and its human rights arms. A strong argument can be made that bridging this gap should be a core component of realizing a rights-based sustainable development agenda.[537] Doing so is particularly relevant in the context of aligning the extractive sector with the realization of indigenous peoples' rights and the pursuit of sustainable development.

Addressing issues pertaining to indigenous peoples' rights clearly falls within the oversight role of the UN human rights machinery, while the focus on ensuring sustainable development options for indigenous peoples falls under the development arm of the UN. Indigenous rights-based self-determined development, and the associated requirement for FPIC in relation to extractive industry activities, spans these domains of human rights and development, and the effective operationalization of indigenous self-determination consequently necessitates coordination across all of the implicated institutional structures. Similar institutional fragmentation exists at the national level, with developmental organs of the State, in particular, those departments and agencies tasked with administration of the extractive sector, generally lacking the necessary understanding of, or appreciation for, indigenous peoples' rights. As a result, they pay little heed to national human rights institutions or ombudsman offices tasked with upholding them.

A second challenge, when it comes to developing the culturally-appropriate and effective institutional mechanisms necessary to ensure rights-based regulation and oversight of extractive industry operations in or near indigenous peoples' territories, relates to ensuring their cultural appropriateness. To guarantee this, such mechanisms must be developed with the full and effective participation of indigenous peoples and operate in a manner consistent with their right to self-determination. This implies that not only must there be indigenous participation in the design, implementation and operation of these institutions, but also that they should in no way serve to undermine indigenous peoples' governance structures, or their control over their traditional territories. Indigenous

peoples' right to self-determination, along with their territorial and cultural rights, must serve as fundamental constraints on the power of any international or national mechanisms aimed at regulating extractive industry activities in their territories.

On the assumption that this basic premise of respect for indigenous peoples' self-governance and territorial rights is adhered to, the potential exists for the international community to initiate processes aimed at establishing a governance regime for the purposes of monitoring and regulating extractive industry operations, including those in indigenous peoples' territories. The regime could have regional and national nodes, with oversight involving UN human rights mechanisms and national human rights institutions, which guarantee indigenous peoples' participation at all levels. To be effective, as part of its oversight role, such a regime would require a grievance mechanism with powers to adjudicate disputes involving those State or corporate actors which allegedly failed to respect indigenous rights. Among the core issues, which the regime would also have to address, are:

i. Legacy issues pertaining to extractive operations in indigenous territories and the associated compensation which should be provided by the industry and States;
ii. The harmonization of existing international trade and investment agreements related to the extractive sector with indigenous rights and ensuring effective indigenous participation in future negotiations of such agreements in accordance with the principles of self-determination and FPIC;
iii. The establishment and resourcing of a dedicated, independently-managed indigenous peoples' fund to provide them with the necessary financial and technical support;
iv. Interfaces with existing and emerging multilateral and multistakeholder initiatives addressing the extractive sector.

As outlined above, further broad-based dialogue with indigenous peoples in relation to the desirability of such a regime, and its potential *modus operandi*, should be a basic precondition to ensure that it is rights-compliant and capable of

addressing these pressing issues.

When considering opportunities at the institutional level to further indigenous peoples' control over extractive industry operations in their territories, the potential of multistakeholder and industry initiatives to deliver on their promise of responsible corporate behavior merits some consideration. These initiatives, which are aimed guaranteeing responsible behavior within the extractive sector, are increasingly numerous and give rise to a series of opportunities and the challenges. The general critique of voluntarism—that extractive corporations are free to decide if they will participate in them or not and, hence, they lack any binding effect on their behavior—applies to them. In addition, while they generally aim to address environmental and human rights concerns, the language used frequently falls short of minimum international standards, such as the UNDRIP.

A further caveat is that these are relatively recent initiatives in the extractive sector, and as such have yet to demonstrate their potential when implemented. Similar initiatives in other sectors have had mixed results, particularly in contexts where the State has not recognized indigenous peoples' rights and where verification mechanisms are overly lenient when assessing compliance.[55] Having said that, as noted in chapter one, the draft Initiative for Responsible Mining Assurance (IRMA) standard represents an improvement on previous multistakeholder practice in terms of its drafting process, with direct input from indigenous peoples, which has meant that the draft standard is, in a number of regards, closely aligned to the UNDRIP. It may therefore afford indigenous peoples with another potentially important institutional mechanism through which they can seek to pressurize the extractive sector to respect their territorial rights.

Finally, indigenous peoples are actively working to strengthen their own governance institutions at the community, peoples, national, regional and international levels. A good example of this is the global Indigenous Peoples' Extractive Industry Network (IPEIN) and its regional components, such as the Asian Indigenous Peoples' Network on Extractives and Energy (AIPNEE), which were formed following the 2009

Manila Conference on indigenous peoples and the extractive industries. By collaborating with civil society organizations, academics and UN agencies, programs and funds, indigenous networks and organizations may ultimately provide the most effective platforms for monitoring and reporting on the impact which extractive industry operations have on indigenous peoples' rights. This would not only facilitate greater access to this information by UN human rights, OECD and financial institution complaint mechanisms, but it could also assist in pressuring States and corporations to engage in genuine dialogue with indigenous peoples in relation to transitioning towards enforceable corporate commitments in relation to respecting their rights. To realize this much needed monitoring of, and reporting on, extractive sector impacts on their rights, indigenous peoples must be provided with the necessary technical, political and financial resources, and be fully empowered to engage with all available mechanisms.[539]

4.4 Future Extractive Industries Landscape and Opportunities to Shape It

Indigenous peoples are at a unique juncture in terms of their potential role in shaping the future of the extractive sector. The adoption of the UNDRIP and the emergence of a body of human rights jurisprudence in relation to extractive industry activities and indigenous rights has removed any ambiguity under international law in relation to their rights to control access to natural resources in their territories. At the same time, the international community has clarified that corporate actors have a responsibility to respect indigenous peoples' rights. Financial institutions are increasingly concerned about potential complicity in violations of those rights through investments in the extractive sector. The mining industry itself is taking tentative steps towards recognizing, at least on paper, the rights of indigenous peoples and the associated requirement to obtain their FPIC. In addition, as discussed above, the international community is in the process of developing goals

which will guide the sustainable development agenda for the foreseeable future. Implicit in the realization of these goals is a transition away from a fossil fuel economy and the scaling down of energy intensive and environmentally destructive extractive industry operations.

These primarily normative developments—almost all of which have occurred within the space of a decade—suggest that we may be on the cusp of a transformation in the modus operandi of the extractive industries. However, as with most normative developments that challenge the status quo, there will be major obstacles to overcome in their implementation. While industry, State, civil society, and indigenous actors for once all appear to be talking the language of rights and sustainability, it is clear that there remains a significant degree of divergence of opinion and understanding around what this means in practice. The extent of the role which indigenous peoples will play in shaping the future extractive industry landscape therefore remains to be determined. This raises the question as to what is necessary for genuine rights-based engagement with extractive industry companies and what the most effective way of engaging with the industry and other institutional actors is in order to achieve indigenous objectives.

Indigenous peoples themselves have identified a series of challenges which they face in ensuring rights-compliant extractive industry operations in their territories, as well as a range of topics around which greater dialogue is required between extractive sector actors and indigenous peoples. Among the key challenges identified are access to adequate information about proposed mining projects, and their impacts throughout the project lifecycle, extending from the strategic planning through to post-project stages. In this regard, a recent study found that, in practice, the provision of such information by mining companies in the context of efforts to obtain FPIC lacked adequate disclosure when compared with international standards, in particular, in the provision of information regarding impacts on water and mine closure.[540] Challenges in communicating with extractive industry companies arising from cultural differences are also regarded by indigenous peoples as an important obstacle to

rights-based engagements. The financial and logistical implications of multiple project engagements with the sector are a major consideration for most indigenous peoples. Another major challenge centers on the opportunity for indigenous peoples to strengthen their governance structures, many of which have been weakened due to historical and ongoing marginalization. Doing so in the context of imminent extractive industry projects in their territories is simply not feasible, given the timeframes involved and the tendency for external actors to exert undue influence on indigenous representatives and community members.

Another challenge, which indigenous peoples encounter on a frequent basis, is the lack of respect for their customary laws governing land use and resource access, which must have precedence over other legal regimes within their territories if their rights are to be guaranteed. The absence of transparency around, and lack of adequate independent monitoring of, State and extractive company actions, is one of the major obstacles to rights realization. For indigenous peoples the general lack of State recognition of their subsoil rights is an obstacle to meaningful engagements. The repeated pattern of State agencies according precedence to the interests of mining companies over the prior rights of indigenous peoples, and the lack of State action to address power imbalances in negotiations with extractive companies, creates a context within which the very notion of entering into "good faith consultations to obtain FPIC" becomes an oxymoron.

Addressing these challenges necessitates actions on the part of both State and corporate actors. Direct industry engagement with indigenous peoples on specific issues can lead to significant improvements in the context of the actions of particular actors within the extractive sector. It may also serve to encourage certain States to respect indigenous rights, as will be discussed below. However, ensuring that this behavior is systematic across the entire sector, and is not limited to a subset of more responsible companies, necessitates State compliance with the duty to respect, protect and fulfill indigenous peoples' rights. As noted in chapter two, a series of preconditions for indigenous rights-compliant extractive industry

operations have been identified by the previous UN Special Rapporteur on the rights of indigenous peoples, James Anaya, in his thematic reports on the extractive industries. These preconditions include:

i. Establishment, by home and host States, of regulatory regimes affording adequate protection to indigenous peoples' rights, including measures "aimed at preventing and, in appropriate circumstances, sanctioning and remedying violations of [these] rights…abroad for which [their] companies are responsible or in which they are complicit";[541]
ii. Guaranteeing indigenous participation in strategic planning pertaining to resource development and extraction;
iii. Ensuring indigenous rights-consistent due diligence by extractive companies;[542]
iv. Respecting the general rule that consent is required for extractive projects within indigenous territories,[543] with any limitations to indigenous rights meeting the strict criteria of necessity and proportionality "in relation to a valid State objective motivated by concern for the human rights of others";[544]
v. Ensuring that indigenous peoples can object to extractive operations, free from undue pressure, reprisals, violence or any compulsion to enter into consultations "about proposed extractive projects to which they have clearly expressed opposition";[545]
vi. Facilitating consultations to obtain consent prior to concession issuance and each stage of a project in a manner that mitigates power imbalances, respects indigenous representative structures, processes and timeframes, and ensures participatory, and independently-conducted or reviewed, rigorous environmental and human rights impact assessments;[546] and,
vii. Where consent is forthcoming, ensure it is rights-based, grounded on just and equitable agreements and arrangements for genuine partnership and benefit-sharing, with mitigation measures and adequate grievance mechanisms which respect indigenous peoples' customary dispute resolution systems.[547]

In the absence of these preconditions, for many indigenous peoples the only realistic means of ensuring that their rights are safeguarded is to continue to resist extractive industry operations through whatever channels are available to them. Many communities have argued that in such contexts, the most reasonable and rights respecting action on the part of the State would be to declare moratoria on mining activities in indigenous territories until the necessary preconditions have been met—a view echoed by a number of human rights mechanisms.[65] By drawing on this international human rights jurisprudence when articulating their perspectives on the preconditions to be realized in advance of any attempts to commence extractive industry projects in their territories, indigenous peoples in some jurisdictions may be in a position to encourage States to enter into dialogue with them in relation to realizing these conditions.

Given that many States have yet to live up to their obligations to respect indigenous peoples' rights, the question arises as to if and how indigenous peoples can play a constructive role in shaping the extractive sector by engaging with extractive industry companies, as well as financial actors. This issue was addressed in the research conducted in conjunction with indigenous peoples for the *Making FPIC a Reality* report. A range of contextual and operational issues were identified around which constructive dialogue is necessary in order to move towards a rights-based and sustainable extractive industry model. Contextual issues identified included:

i. Extractive company recognition and promotion of the State duty to respect indigenous rights, including the requirement to consult and obtain FPIC, in particular, at the investment agreement negotiation and contract discussion stages;
ii. The implications of political and legal realities for indigenous peoples' capacity to engage in consultations and negotiations, in particular, where there is a history of social conflict or repression of indigenous dissent associated with the extractive sector;
iii. The responsibility of extractive companies to avoid operations in conflict zones, or areas at risk of conflict,

and the heightened indigenous rights due diligence requirements and potential for complicity in rights violations which arise from conflict;

iv. The corporate responsibility to respect indigenous peoples' customary laws and practices, and the implications of this for consultations, negotiations and grievance and dispute resolution mechanisms;

v. Corporate understanding of indigenous perspectives and rights, and indigenous peoples' understanding of extractive companies' operational realities and constraints.

Key among the operational issues which arose were: indigenous assessment and determination of impacts on their rights; the urgent need for extractive companies to move towards a rights-based understanding of FPIC; and the potential for improved benefit-sharing and partnership arrangements.

The question of how impacts of extractive projects on indigenous rights are assessed, and indigenous peoples' unique capacity to determine the nature and extent of these impacts was identified as an issue of critical importance. The issue is closely related to indigenous determination of culturally-appropriate indicators for sustainable development, and work done by indigenous peoples in this area could inform indigenous rights impact assessments in relation to extractive industry projects. In this regard, it is necessary that indigenous peoples be in a position to conduct their own indigenous rights and sustainability impact assessments in relation to proposed extractive industry projects. This necessitates a radical change in the current approaches to impact assessments whereby outside actors, frequently with little understanding of the indigenous culture in question, are contracted to determine how that culture will be affected by an extractive industry project. By conducting their own indigenous rights impact assessments, indigenous peoples are better positioned to decide if such projects are consistent with their development objectives, and to effectively monitor and control any activities within their territories by ensuring that they proceed at a pace, scale and in a manner deemed beneficial and sustainable by the community.

One of the central demands of indigenous peoples in relation to any potential extractive industry operations in their territories is that their FPIC be sought and decisions taken in accordance with their own processes be respected. The current understanding of the concept of FPIC within the extractive industry is generally inconsistent with the rights framework which underpins the requirement for FPIC. The right to give or withhold consent is derivative of indigenous peoples' self-determination, territorial and cultural rights, and therefore cannot be detached from these rights. Proceeding with an extractive project without FPIC is a clear indicator that the fundamental self-determination right of indigenous peoples to determine their own social, cultural and economic development has not been respected. A systematic industry-wide transition to engagements based on obtaining FPIC provides the only means through which the sector can be transformed from one associated with widespread violations of indigenous peoples' rights into one which is compliant with its responsibility to respect indigenous peoples' rights.

The implications of this rights-based conception of FPIC are far reaching.[549] Among them is the need for indigenous involvement in decision-making commences prior to extractive corporations seeking permits from States and prior to the granting of any rights over indigenous territories. This necessitates reforming the international investment agreement architecture, which grants such rights to corporations absent prior and informed indigenous consent. The self-determination basis of FPIC also implies that the process of granting or withholding FPIC must be defined and managed by indigenous peoples themselves, and that any State or corporate guidelines in relation to its implementation be developed with the full and effective participation of indigenous peoples. A related requirement is that there must be adequate resourcing and time for indigenous peoples to strengthen their governance structures and to determine if, or how, they wish to be consulted sufficiently prior to any proposed engagement with extractive industry actors.

Finally, for those indigenous peoples who, in the exercise of their right to self-determination, decide to pursue extrac-

tive industry projects in their territories, developments in the normative framework of indigenous rights point to the need for new arrangements which guarantee them greater benefits from, and control over, such projects. The former UN Special Rapporteur on the rights of indigenous peoples dedicated significant attention to the need for a change in the extractive industry model from one in which indigenous peoples are passive recipients of frequently inadequate benefits and compensation, towards a model where extractive companies enter into genuine partnerships with indigenous peoples, potentially based on ownership stakes in projects and control over their operations. The Special Rapporteur also pointed to the possibility of indigenous peoples initiating and conducting their own extractive projects in contexts where the economic, legal and political environments are facilitative of this.[550]

Greater resources should be directed towards research by, and cooperation with, indigenous peoples in the development of alternative models for natural resource extraction in contexts where indigenous peoples are considering the pursuit of extractive projects in their territories and seek to exercise greater control over those projects than is possible under the existing corporate-controlled natural resource extraction model. These alternative models should enable indigenous peoples to pursue their own development priorities, forming where they so choose their own enterprises or entering into partnership on an equitable basis with States and corporate actors, while insisting on adequate environmental, cultural and social protections and adherence with the principles of sustainable development.

Realizing the various dimensions of indigenous empowerment, which underpin participation in impact assessments, the formulation and conduct of FPIC processes, and negotiating reasonable benefit-sharing agreements, necessitates the provision of adequate financial and technical resources to indigenous peoples. Corporations and States have an obligation to ensure that this funding is available, given that indigenous empowerment is required in order to facilitate rights-based engagements. Discussions are necessary with indigenous peoples around how this can be achieved in a manner that is

sufficiently in advance of any project proposal, is transparent and guarantees the independence and autonomy of indigenous decision-making. It is also to be expected that extractive corporations will establish capacity building programs for their staff in relation to indigenous peoples' rights and should seek indigenous guidance in relation to their implementation.

The increased role of extractive industry bodies, such as the International Council of Mining and Metals (ICMM), which represents 22 of the world's largest mining companies, in formulating position statements on indigenous peoples' rights also affords opportunities for indigenous engagement with the industry. The commitment of the ICMM member companies to "work to obtain the consent of indigenous communities," and its recognition of the rights affirmed in the UNDRIP in its 2013 Indigenous Peoples and Mining Position Statement, represents progress on its previous position that FPIC was not something its members could "endorse" or "grant."[551] However, the ICMM position statement includes a caveat, which holds that

> "where consent is not forthcoming despite the best efforts of all parties, in balancing the rights and interests of Indigenous Peoples with the wider population, government might determine that a project should proceed and specify the conditions that should apply…ICMM members will determine whether they ought to remain involved with a project."[552]

What the ICMM position statement basically says is that its members will seek FPIC, but will not necessarily be bound to the outcome of those FPIC seeking processes. It relies on the assumption that the State is adequately protecting the rights of indigenous peoples, which, as outlined in chapter two, is unfortunately generally not the case. As such the 2013 Position Statement falls short of the independent responsibility of extractive companies to respect indigenous peoples' rights.

In their engagement with the ICMM, indigenous peoples can seek to highlight the inherent contradiction in this Position Statement, which suggests that ICMM member companies can reconcile the claim to respect indigenous peoples' rights and

perspectives with the maintenance of the option to pursue projects for which FPIC is not forthcoming. By drawing attention to the reality that many governments fail to uphold their rights in the context of extractive industry projects, indigenous peoples can increase pressure on ICMM members to uphold their independent responsibility to respect the rights affirmed in the UNDRIP.

A large number of junior companies, many of which are Canadian in origin, have a tendency to be involved in speculative activities during the initial acquisition of exploration contracts. In general their limited financial resources for, and experience with, community engagement, when compared with the major mining companies, gives rise to a different set of challenges and opportunities than engaging with ICMM members, or other major companies. There are a number of additional difficulties in engaging with junior companies, including their sheer numbers, their tendency to be less risk adverse and an associated lack of transparency frequently related to a lack of resources. It is, however, in the interests of the industry as a whole that potential rogue actors are eliminated, and in this regard, indigenous peoples may find some common cause with national industry associations seeking to improve the sector's reputation.

On the positive side, junior companies are frequently more susceptible to community resistance than larger companies. While a company with a large portfolio can sustain delays to a specific project's commencement arising from community opposition, smaller companies generally do not have this luxury. A second driver for change in the comportment of juniors is the expectations and reputations of major companies to whom they frequently sell their concessions. As these major companies increasingly move towards the recognition of indigenous peoples' rights and the requirement for FPIC, their due diligence in relation to potential purchases from juniors will inevitably involve consideration of indigenous rights related issues. Perhaps the most significant lever for indigenous peoples in their engagements with junior companies is the fact that those companies generally require external financing in order to pursue their projects. As a result, safeguard policies

such as those of the Equator Banks, if adequately implemented and overseen, have the potential to play an important role in changing the operational practices of junior companies, while also serving to influence the policy of major players in the industry. Indeed, it has been speculated that some junior companies, many of whom are experiencing liquidly issues, may be squeezed out of the market if they are unable to comply with these expectations of lenders.[553] The implementation of indigenous rights policies in the financial sector, as outlined in chapter three, therefore offers a potentially fertile arena for indigenous advocacy and engagement in terms of shaping the future landscape of the extractive sector.

The oil and gas sector lags behind the mining sector in terms of its engagement with indigenous peoples. The industry body IPIECA has conducted studies in relation to FPIC and grievance mechanisms; however, it lacks any policies which have binding effects on member companies and consequently affords indigenous peoples with little leverage in terms of promoting respect for their rights. Individual companies in the sector have initiated studies with regard to their obligations in relation to indigenous peoples which have proven to be influential,[554] suggesting that further indigenous advocacy on a company by company basis may offer the most productive avenue at present. The uptake of non-conventional sources of oil and gas, through tar sands and fracking, also bring these companies into largely similar terrain to that of traditional mining companies in terms of community engagement issues, and should push the sector to improve its policies and practices in relation to respect for indigenous peoples' rights. It may consequently afford greater leverage to indigenous peoples advocating for change in oil and gas company policy and practice.

If the issues outlined earlier in the chapter pertaining to the current draft of the SDGs are addressed, new synergies should emerge between indigenous peoples and institutional actors responsible for SDGs oversight. This is particularly the case for those goals pertaining to reducing CO2 emissions, maintaining key land and marine biodiversity areas, and protecting the integrity of water sources. It is currently too

early to assess how indigenous peoples may most effectively engage with these mechanisms, as at present there is little clarity as to what the means for implementation of the goals will be, with considerable emphasis being placed on the role of private sector financing.[555] Investments in studies assessing the potential contribution, which the respect for indigenous peoples' self-governance and territorial rights can have on the realization of the sustainable development agenda, would undoubtedly open up new opportunities for indigenous peoples to shape the future extractive industry landscape. Such studies would also demonstrate the importance of guaranteeing the full and effective indigenous participation in the overall governance of the sustainable development agenda.

Conclusion

The adoption of the UN Declaration on the Rights of Indigenous Peoples was the first in a series of normative developments which opened up the prospect of a new era in indigenous and extractive industry relationships. It afforded a glimpse of an extractive industry landscape premised on compliance with indigenous peoples' rights and the pursuit of long-term sustainable development. However, the obstacles to translating these normative developments into practice, together with the trend toward increased extractive industry activity in or near indigenous peoples' territories, means that for many indigenous peoples, such a transformed landscape remains but a mirage on a distant horizon. Instead surveys of current extractive industry activity in indigenous territories, and reports of a growing number of specific cases addressed by international oversight mechanisms, confirm that the sector continues to pose serious risks to indigenous peoples' enjoyment of their rights.

In light of this reality it is clear that, despite improvements in corporate commitments to respect indigenous peoples' rights, the understanding of extractive corporations and the financial sector of the steps, which are necessary to achieve a rights-compliant extractive sector, remains deficient. This deficit in understanding of indigenous peoples' rights points to a pressing need for broad-based consultations with indigenous peoples aimed at reaching a common understanding of the key rights-based issues associated with the extractive sector.

Central to this discussion is the exploration of the implications of indigenous peoples' self-determination and territorial rights for the existing extractive industry model. These rights

have important consequences in the context of project-specific considerations, such as the operationalization of the requirement for free, prior and informed consent (FPIC) and the associated conduct of participatory indigenous rights impact assessments, as well as negotiations pertaining to benefit agreements and project oversight and grievance arrangements. They also have implications at the strategic level, and serve to shape the context within which extractive projects proceed.

Examples of overarching issues, which have to be reconceptualized in light of indigenous peoples' rights to self-determination and to control over their lands, territories and resources, include: indigenous participation in strategic resource-use planning and negotiations around investment agreements potentially impacting on their territories; the provision of financial resources for the empowerment of indigenous peoples and the strengthening of their governance structures; and the establishment or reinforcement of mechanisms aimed at guaranteeing effective remedies.

Finally, the issue of ensuring sustainable development for all, based on shared social values, has important implications for indigenous peoples and the extractive sector. Those indigenous peoples who are free to exercise control over their territories have a huge potential to contribute to sustainable development by constraining the—otherwise generally unrestrained—expansion of carbon emitting and environmentally damaging extractive industries. In addition they offer broader society valuable lessons and knowledge in terms of climate change adaptation. Realizing and capitalizing on this capacity is only possible if a relationship premised on respect for indigenous peoples is fostered, and indigenous peoples' inherent rights, including the requirement for their FPIC to extractive projects, are given due recognition in the Sustainable Development Goals (SDGs).

A self-determination and sustainable development-based reconceptualization of the extractive sector will necessitate the emergence of effective and participatory local level oversight and accountability mechanisms. It may also necessitate the establishment of some form of international rights-based governance regime for the sector. A fundamental consideration in

the design and functioning of any such local or international oversight or regulatory regimes is that full and effective indigenous participation be guaranteed at levels and stages. In addition, it must be ensured that such mechanisms or regimes in no way serve to limit indigenous peoples' control over their territories. With these basic principles in mind, the report closes by offering a set of recommendations targeted at a range of actors and aimed at the realization of an indigenous rights-compliant extractive sector, which is governed consistently with the principles of inclusive sustainable development.

Recommendations

Overarching Recommendations

International Extractive Industry Governance Regime

(States, international organizations, UN human rights mechanisms, and corporations)

1. Establish participatory mechanisms for oversight of the extractive sector at the local level, and consider, in consultation and cooperation with indigenous peoples and other actors, the establishment of an international governance regime, aimed at monitoring and regulating extractive industry operations, including those in indigenous peoples' territories. Such a regime should be founded on human rights and sustainable development principles, including the requirement for free, prior and informed consent (FPIC), guarantee respect for indigenous peoples' self-governance and territorial rights as recognized in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and accord due consideration to indigenous peoples' customary laws and legal systems. The regime should have regional and national nodes, and operate under the auspices of the United Nations (UN) human rights system and national human rights institutions, and would guarantee indigenous peoples' effective participation in oversight of the extractive sector. Part of its oversight role would involve a grievance mechanism with powers to adjudicate on disputes involving State or corporate actors which fail to adhere with indigenous rights. The regime would also give due consideration to:

a. Legacy issues pertaining to extractive operations in indigenous territories and the extent and nature of compensation to be provided by the industry;
b. Harmonizing existing international trade and investment agreements related to the extractive sector with indigenous rights and effective indigenous participation, in order to guarantee that future negotiations of such agreements are based on the principles of self-determination and FPIC;
c. Existing multilateral and multistakeholder initiatives and standards such as the EITI, the Global Compact, the OECD Guidelines on MNEs, and the UN Guiding Principles on Business and Human Rights;
d. Establishment and resourcing of a dedicated, independently-managed fund providing financial and technical support to indigenous peoples.

Sustainable Development

(States and international organizations)

2. Establish relationships with indigenous peoples as key partners in achieving sustainable development for all, recognizing their role as guardians of vulnerable and critical ecosystems. This should constitute one of the primary objectives in the formulation and implementation of the global development agenda beyond 2015. To this end the sustainable development agenda should be premised on respect for indigenous peoples' rights to self-determination and self-governance; to determine their own priorities for their development; and to participate in policy decision-making processes with regard to the extractive industry at the local, national, regional and international levels, in accordance with the principle of FPIC. This implies that indigenous peoples' ecological practices be supported and their customary tenure and resource management systems, including in relation to sub-soil and ocean resources, be respected. It also necessitates addressing their perspectives on sustainability in the development of indices related to their well-being. A focus on "locally-controlled,

clean, renewable energy systems and infrastructure" and capacity building in relation to sustainable development practices based on indigenous knowledge should be a core feature of the agenda. Particular attention is necessary to the contribution of extractive industry operations to climate change and ecosystem vulnerability and the associated increased risk of environmental disasters impacting on the fundamental human rights of indigenous peoples and other downstream communities, in particular, their rights to health.

Mechanisms for implementation of Rights

(States, international organizations, UN and regional human rights mechanisms)

3. Promote indigenous peoples' participation in the United Nations on issues affecting them. In accordance with the participatory and self-determination rights recognized under the UNDRIP. This necessitates granting indigenous peoples' parliaments and governments (including traditional councils and authorities) permanent observer status at the General Assembly, and also granting ECOSOC consultative status to indigenous representative bodies.
4. Consider the establishment, with the full and effective participation of indigenous peoples, of an agreed and adequately-resourced mechanism and body at the international level within the UN human rights regime to monitor and promote the implementation of indigenous peoples' rights, including those rights recognized in the UNDRIP.
5. Encourage existing UN treaty and charter body human rights mechanisms and UN development agencies, bodies and funds to increase their focus on the impacts of the extractive industry on indigenous peoples' rights as affirmed under the UNDRIP and other international standards. Particular focus should be directed to impacts on rights to water, children's and women's rights, collective self-governance and territorial rights, and impacts on sacred sites. In light of the relevant Human Rights Council and

General Assembly resolutions, human rights mechanisms should also give due consideration to the justiciability of claims related to climate change impacts on indigenous peoples' rights.

6. Adequately-resourced participatory mechanisms should be established at the national and regional levels to:
   i. Recognize and operationalize the rights of indigenous peoples to self-determination, lands, territories and resources, and to ensure the protection of sacred or culturally significant landscapes;
   ii. Assist in the resolution of land, territory and resource disputes and ensure effective redress;
   iii. Oversee the implementation of national and regional Court decisions and international recommendations upholding indigenous peoples' rights;
   iv. Implement FPIC prior to any corporate actor being authorized or to the commencement of any extractive activities in indigenous territories;
   v. Ensure clean-up and restoration of damaged ecosystems;
   vi. Guarantee that ecosystem-based sustainable development is equitable, non-discriminatory, participatory, accountable, and transparent, with remediation provided where this has not previously been the case.

Normative Framework

(States and indigenous peoples)

7. Fully comply with international human rights standards and jurisprudence in order to promote, respect, and protect the rights of indigenous peoples over their lands, territories and resources, guaranteeing that these rights are not violated in the context of extractive industry projects. This includes providing the necessary resources to ensure indigenous peoples can freely pursue their right to self-determined development in accordance with their cultures, needs, worldviews and aspirations. It should also involve: ratification of ILO Convention 169; a commitment to proactive participatory implementation of the

UNDRIP; and full compliance with the recommendations of international human rights bodies and regional court decisions pertaining to indigenous peoples' rights.

8. Recognize that indigenous peoples' right to self-determination constitutes a right to determine the outcome of decision-making processes in relation to extractive projects in their territories. It consequently imposes a duty on States and corporations to obtain their FPIC at all phases of extractive projects in a manner consistent with their rights as recognized in the UNDRIP. This necessitates that States ensure the conduct of participatory social, spiritual, cultural, environmental and human rights impact assessments and rights-based consultation processes consistent with the customary laws and decision-making practices of the indigenous peoples concerned, and that bureaucratization of these processes is avoided. It also implies that access to judicial review, independent oversight and dispute resolution mechanisms must be guaranteed.
9. Initiate comprehensive reviews of existing national regulation of extractive industries in both home and host states of extractive corporations, including constitutional provisions and legislative and administrative frameworks, with the aim of ensuring that they are fully consistent with, or exceed, international minimum standards concerning the recognition of indigenous peoples and their rights. This should be done in close consultation and cooperation with indigenous peoples, in a manner consistent with their right to self-determination, and may necessitate establishing national committees or other participatory mechanisms acceptable to indigenous peoples. This will also necessitate indigenous participation in strategic planning related to natural resource usage, and may require moratoria on extractive operations in indigenous territories until the necessary reforms have taken place.

Thematic Recommendations

Access to Justice and Right to Remedy

(States, international organizations, indigenous peoples and corporations)

10. Establish affordable, effective and accessible complaint and redress mechanisms at the national, regional and international levels, through which indigenous peoples can raise and seek redress for allegations of corporate violations of their rights. Such mechanisms should be developed with the full and effective participation of indigenous peoples, and guarantee recognition of indigenous conceptions of access to justice and respect for their judicial systems.

Extraterritorial Obligations

(States and UN human rights mechanisms)

11. In line with the recommendations of the UN Treaty and Charter bodies, States which have extractive industry corporations registered, or otherwise domiciled, in their jurisdictions should enact or strengthen legislation to ensure that these corporations can be held accountable and sanctioned for violations of indigenous peoples' rights overseas for which they are responsible, or in which they are complicit. Existing grievance mechanisms, such as the OECD guidelines on Multinational Enterprises' National Contact Points (NCPs), should be strengthened in terms of their accessibility, their mediation processes and their determinations in relation to allegations, with follow-up procedures established to oversee recommendation implementation.

Regional Human Rights Systems

(States and regional human rights systems)

12. Respect and implement the decisions of regional human rights bodies in relation to indigenous peoples' rights and the extractive industries, ensuring that legislation is enacted—and where necessary, constitutional reforms are realized—to that effect. An effective and independent regional human rights system should be established in Asia. Existing regional systems should be encouraged to be more proactive in addressing indigenous peoples' rights and to learn from those regional systems, such as the Inter-American system, which have developed a substantial corpus of jurisprudence in the context of indigenous peoples and the extractive industries. Particular attention should be directed to the rights of indigenous peoples who span national borders. Ensure the adequate financing of these systems enabling them to address all the complaints they receive in a timely and effective manner, which facilitates the participation of the indigenous petitioners.

Business and Human Rights

(States, UN human rights mechanisms and corporations)

13. Ensure that National Action Plans on business and human rights, as recommended by the UN Working Group on the issue of human rights and transnational corporations and other business enterprises, include full recognition of indigenous peoples' rights. This should involve commitments to:
    i. Work, in cooperation with indigenous peoples, towards agreed and achievable principles for implementing the UNDRIP in relation to extractive industries, including the enactment of legislation to hold corporations to account for violation of indigenous peoples' rights;
    ii. Ensure policy coordination across all governmental actors, including Export Credit Agencies, in relation to respect for indigenous peoples' rights;

iii. Ensure similar policy coordination among corporate actors, guaranteeing their conduct of human rights due diligence in accordance with international standards in relation to extractive activities impacting on indigenous peoples' rights,
iv. Ensure adequate monitoring and enforcement mechanisms are in place for all State and corporate policies, and that indigenous legal systems are recognized in this context.

14. Support international processes aimed at ensuring that transnational corporations and other business enterprises are regulated and held accountable for violations of human rights for which they are directly responsible or in which they are complicit, including violations of indigenous peoples' rights, as envisaged in the 2014 Human Rights Council Resolution 26/9 establishing an open-ended intergovernmental working group on the subject.
15. Encourage the UN Global Compact to:
    i. Promote the implementation of its Business Reference Guide on the UNDRIP through establishing project-specific reporting by extractive industry companies with regard to their respect for indigenous peoples rights, including in relation to consultation and seeking FPIC, as a core component of corporation's annual Communication on Progress (CoP) reports;
    ii. Facilitate an open and transparent dialogue between extractive industry companies and indigenous peoples' representatives in relation to developing an understanding of the extent of the sector's legacy issues and avenues towards addressing this legacy.

Trade and Investment Agreements

(States, international organizations, arbitration mechanisms and UN human rights mechanisms)

16. Ensure that all multilateral and bilateral investment and trade agreements entered into by States comply with international human rights standards, including the UNDRIP. This necessitates reviewing existing agreements impact-

ing on indigenous peoples' rights, to determine how to render them consistent with those rights. It also requires that all future agreements involve the conduct of human rights due diligence and impact assessments, with the full and effective participation and FPIC of those indigenous peoples whose rights are potentially impacted. Judicial or arbitration mechanisms responsible for monitoring their implementation should interpret the obligations flowing from these agreements in light of indigenous peoples' rights as reflected in the UNDRIP.

Supply Chain

(States, international organizations, UN human rights mechanisms and corporations)

17. Establish, with the involvement of UN human rights mechanisms, a transparent and participatory oversight system spanning the supply chains of extractive industry products and commodities, which guarantees that raw materials are not sourced from areas in which customary land tenure regimes are not recognized in law or respected in practice, or where conflicts or indigenous rights abuses are associated with natural resource extraction.

International Financial Institutions

(States and international financial institutions)

18. Ensure that the policies and practices of International Financial Institutions, such as the World Bank, are fully compliant with the rights recognized in the UNDRIP, including the requirement for FPIC. These institutions should publicly commit to only fund extractive projects impacting on indigenous peoples' rights in contexts where international human rights standards, including the UNDRIP, are respected, and adequate oversight and sanctioning mechanisms are in place.

Seabed and Deep Sea Mining

(States and international organizations)

19. The Precautionary Principle should be applied to the exploration and extraction of natural resources on the seabed, ensuring that all such activities require comprehensive social, spiritual, cultural, environmental and human rights impact assessments, and only progress with the FPIC of those indigenous peoples whose territory and resources rights may be affected. States, and where relevant bodies established under the United Nations Convention on the Law of the Sea, should ensure respect for indigenous peoples' customary resource rights as recognized under articles 25 and 32 of the UNDRIP.

Indigenous Peoples in Voluntary Isolation

20. In keeping with indigenous peoples' right to self-determination and the Precautionary Principle, no extractive activities should be undertaken in or near territories used or occupied by indigenous peoples in voluntary isolation. Corporate actors should be required, as part of their due diligence, to identify if such groups exist and ensure that their activities do not infringe on their rights.

Contextual Recommendations

New Model for Extractive Industries

(States, international organizations, indigenous peoples, and corporations)

21. Greater resources should be directed towards research by, and cooperation with, indigenous peoples in the development of alternative models for natural resource extraction in contexts where indigenous peoples are considering the pursuit of extractive projects in their territories and

seek to exercise greater control over those projects than is possible under the existing corporate-controlled natural resource extraction model. These alternative models should enable indigenous peoples to pursue their own development priorities, forming, where they so choose, their own enterprises or entering into partnership on an equitable basis with States and corporate actors, while insisting on adequate environmental, cultural and social protections and adherence with the principles of sustainable development.

Capacity Building/Empowerment

(States, international organizations, indigenous peoples and corporations)

22. In order to address imbalances in power in the context of extractive industry projects, States and other actors should support the empowerment of indigenous communities through human rights training and the provision of technical and financial assistance, in particular, in relation to:
    i. Indigenous community-run social, spiritual, cultural, environmental and human rights impact assessments and community negotiation skills in the context of the extractive industries, and;
    ii. Indigenous community formulation and operationalization of sustainable, self-determined development plans and FPIC processes.

This support must be provided in a manner which ensures independence from corporate and State actors and which does not influence, and is not perceived as influencing, indigenous positions in consultations.

23. State and corporate actors should also improve their own understanding of indigenous rights and perspectives and the implications of these for extractive activities through engaging in rights-based dialogues with indigenous peoples. Corporations should build their internal competence in relation to indigenous peoples' rights and ensure capacity building of employees and contractors.

Addressing Legacy Issues

(States, international organizations, indigenous peoples and corporations)

24. States, together with extractive industry actors, should recognize that their collective acknowledgement of the legacy of extractive activities in indigenous peoples' territories is fundamental to realigning relationships with indigenous peoples. This legacy consists of abandoned sites and disastrous human rights and environmental records. In accordance with the responsibilities of States, corporations and the international community, processes of reconciliation and avenues of compensation and redress should be established and implemented in a manner agreed to by all parties, including indigenous peoples.

Indigenous Women and Children and the Extractive Industries

(States, international organizations, civil society, indigenous peoples and corporations)

25. Monitor, through the Committee on the Elimination of Discrimination Against Women, the Committee on the Rights of the Child and National Human Rights Institutions, and comprehensively report on violence against indigenous women and children related to extractive industries, particularly sexual violence, guaranteeing adequate and culturally-appropriate redress for victims. This should be realized with the full and effective participation of indigenous women and children. Likewise, decision-making and consent processes with regard to extractive industries should respect the collective and individual rights of indigenous women. Indigenous women should be empowered to participate in these processes through indigenous peoples' internal procedures, which are acceptable to indigenous women themselves. State and corporate actors should not impose decision-making processes on indigenous peoples or generalize and assume that women are excluded in all indigenous peoples' decision-making processes.

Militarization, Repression and the Extractive Industries

(States, international organizations, civil society and UN human rights mechanisms)

26. Extractive industry projects should be avoided in conflict areas where indigenous peoples' territories are militarized, or where extractive projects are likely to be accompanied by militarization. International discussions should be launched towards developing binding agreements regulating corporate activities in conflict areas. In the meantime, heightened corporate due diligence should be mandatory in all such contexts, including areas at risk of conflict. Indigenous peoples should always be free to object to extractive operations, without fear of reprisals, violence or criminalization. UN bodies and independent experts should also be encouraged to conduct impartial investigations and make recommendations on the human rights situation of indigenous peoples affected by extractive industry related conflict.

Extractive Industry Transparency Initiative

27. The Extractive Industry Transparency Initiative (EITI) should initiate dialogue with indigenous peoples' representatives in relation to the role the initiative can play in promoting respect for the rights of indigenous peoples to participate in decision-making regarding the extraction of natural resources located in their territories. At a very minimum, the EITI should ensure that it does not exacerbate existing problems, but instead contributes to an indigenous rights-compliant extractive industry model. A similar logic should apply to other transparency initiatives, such as the Strengthening Assistance for Complex Contract Negotiations (Connex) initiative.

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The adoption of the UN Declaration on the Rights of Indigenous Peoples was the first in a series of normative developments, which opened up the prospect of a new era in indigenous and extractive industry relationships… However, the obstacles to translating these normative developments into practice, together with the trend toward increased extractive industry activity in or near indigenous peoples' territories, means that for indigenous peoples, such a transformed landscape remains but a mirage on a distant horizon.

PIPLINKS

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