

# INDIGENOUS CONSENT: A SELF-DETERMINATION PERSPECTIVE

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*With the rise of ‘Free, Prior and Informed Consent’ (‘FPIC’), obtaining consent from Indigenous peoples has become central to many struggles involving Indigenous communities. Yet even as consent-seeking practices become more universal, developments in the implementation of FPIC threaten to sever FPIC from its normative foundations. FPIC is a manifestation of, and pathway towards promoting, self-determined governance by Indigenous communities. Self-determination, however, is all but absent from the conception of FPIC articulated by those who often bear de facto responsibility for its implementation: companies who wish to pursue projects on Indigenous peoples’ land. Companies have taken the lead in (i) generating normative guidance regarding FPIC, (ii) implementing FPIC processes and (iii) evaluating FPIC processes’ implementation. Yet FPIC as interpreted and implemented by actors on the ground has heretofore received insufficient attention.*

*This article critically evaluates emerging FPIC practices in light of FPIC’s normative foundations. It suggests that we are witnessing ‘FPIC’s normative drift’: a process whereby FPIC is adopted by companies, but denuded of its normative import. Corporate articulations of FPIC suggest companies employ a thin, liberal notion of consent, inconsistent with understanding FPIC as part of a self-determined governance process. I argue that corporate delegation of FPIC obligations has gone too far, such that independent oversight from settler state or independent authorities is needed. I explore options for the institutional and procedural form for settler state re-engagement.*

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## I INTRODUCTION: SEEKING INDIGENOUS PEOPLES' CONSENT

We came to the determination, as a group, that [the project] was going to go ahead anyway. So [our signing of an agreement is] not really support. If we opposed it, we would have no way of addressing spills, because we would be disqualified from funding from Trans Mountain.<sup>1</sup>

[C]onsultation can be conscripted into a process of remaking the public sphere in ways that have a justificatory veneer of democratic engagement.<sup>2</sup>

Getting 'consent' from Indigenous peoples has come to occupy a central place in the legal landscape of Indigenous peoples' issues. The centrality of consent largely reflects a growing consensus in support of free, prior and informed consent ('FPIC') norms. When an FPIC norm is operative, it means that before a settler state can implement a policy or project (or grant permission to a company to do the same) on Indigenous peoples' land, the peoples in question have the right to be consulted with the goal of obtaining their consent to the activity. In its strong form, FPIC approaches a veto right. Various institutions such as international and domestic courts, national legislatures, international financial

<sup>1</sup> Amy Smart, 'Why Nine Island First Nations Signed Trans Mountain Deals', *Times Colonist* (Victoria, British Columbia), 4 December 2016, quoting Robert Joseph, Ditidaht First Nation Chief Councillor.

<sup>2</sup> John Morison, 'Citizen Participation: A Critical Look at the Democratic Adequacy of Government Consultations' (2017) 37 *Oxford Journal of Legal Studies* 636, 658.

institutions, business consortiums and even individual companies have embraced stronger FPIC rights for Indigenous peoples in recent years.<sup>3</sup>

Yet even as support for FPIC has spread, I argue that its normative foundations have been undermined. I refer to this process as FPIC's 'normative drift'. FPIC does not stand alone as a procedural decision-making or participation right. Rather, it is inextricably bound up with a broader normative agenda that revolves around Indigenous peoples' self-determination rights.<sup>4</sup> However, in implementation, it can come to resemble a procedural, box-checking requirement. To some extent, settler states have abdicated responsibility for ensuring FPIC processes are fit for purpose, leaving it to the proponents of the particular project that requires the consent of Indigenous peoples — often a corporation — to design and implement FPIC.<sup>5</sup> Even among corporate actors, no one openly disputes that there is a link between FPIC and self-determination. However, the implications of that link for *how FPIC should be implemented* have been under-emphasised. As a result, some of the leading actors implementing FPIC do so in a manner detrimental to the project of Indigenous peoples' self-determined governance. Herein lies the heart of what I call FPIC's 'normative drift': the conduct of key actors involved in FPIC does not reflect — and sometimes undermines — the broader agenda FPIC is meant to advance.

In this paper, I take up the subject of FPIC's normative drift. If, as I argue, FPIC is in fact undergoing normative drift, remedying that problem is essential for safeguarding Indigenous peoples' rights in the face of extractive industry, energy sector, fortress conservation and other projects on their land.<sup>6</sup> Beyond this intrinsic significance, FPIC's normative drift raises broader questions. Because it has been fuelled in part by corporate capture, analysing it provides a lens on broader dynamics whereby corporations take on human rights norms, but in so

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<sup>3</sup> See, eg, Coca-Cola Company, *The Coca-Cola Company Commitment — Land Rights and Sugar* (2013) <<https://www.coca-colacompany.com/content/dam/journey/us/en/private/fileassets/pdf/2013/11/proposal-to-oxfam-on-land-tenure-and-sugar.pdf>> archived at <<https://perma.cc/U326-88R6>>: 'The Coca-Cola Company will adhere to the principle of [Free, Prior and Informed Consent ('FPIC')] across our operations (including bottling partners) and will require our suppliers to adhere to this principle'.

<sup>4</sup> Cf S James Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Transaction Publishers, 2009) 184, 184: 'self-determination is a foundational principle that anchors the constellation of [I]ndigenous peoples' rights'.

<sup>5</sup> Jo-Anne Everingham et al, 'Why Agreements Matter' (Resource Guide, Rio Tinto, March 2016) <[https://www.riotinto.com/documents/Rio\\_Tinto\\_Why\\_Agreements\\_Matter.pdf](https://www.riotinto.com/documents/Rio_Tinto_Why_Agreements_Matter.pdf)> archived at <<https://perma.cc/4TF2-V5TQ>> ('*Why Agreements Matter*'). '[I]t may be possible for government to delegate procedural aspects of consultation to corporations. *This happens a lot in practice*': at 156 (emphasis added).

<sup>6</sup> Lindsay Bigda, '*Pristine Parks are Hurting Indigenous Peoples and Local Communities. These Examples from 5 Countries Call for a New Approach to Conservation*' (2018) *Cornered by Protected Areas* <<https://www.corneredbypas.com/blog-key-findings>> archived at <<https://perma.cc/XYV9-4NRH>>:

'fortress' conservation approaches — those grounded in a historical concept of protected areas as pristine, untouched lands — are perpetuating a system of abuse and human rights violations against the Indigenous Peoples and local communities who have traditionally inhabited and protected these lands.

doing, modify or distort those norms. Further, the dynamics that have empowered corporations in FPIC implementation shed light on how the private sector comes to be on the front lines of human rights norm development. Finally, exploring responses to FPIC's normative drift raises issues of institutional design and normative stewardship common to many areas where a human rights norm is effectuated (or not) in a decentralised context involving public and private actors.

I argue that FPIC's normative drift should raise a general alarm about the experiment of corporate-controlled FPIC.<sup>7</sup> Corporations — as common project proponents in situations triggering FPIC duties — will inevitably remain key actors in FPIC processes. However, the delegation of FPIC duties to private actors has gone too far.<sup>8</sup> They should no longer take a leading role, as they commonly do at present, during all three stages of (i) FPIC process design, (ii) implementation and (iii) ex post facto evaluation. Settler states, which are the primary FPIC duty-bearers in most circumstances, must re-engage more broadly. And settler states as well as corporations must do more to ensure that FPIC furthers its normative goals.

This paper proceeds as follows. In Part II, I discuss some conceptual and contextual challenges that inhere in implementing FPIC. In Part III, I document the rise and diffusion of FPIC standards. In Part IV, I elaborate on self-determination as the foundation of FPIC with reference to Indigenous peoples' struggles to secure rights on the international plane. This Part establishes general normative benchmarks for evaluating FPIC practices. In Part V, I turn to company interpretations of FPIC. I critically evaluate leading corporate guidance documents on FPIC implementation in light of the normative framework established in Part IV. In Part VI, I turn to a case study in which FPIC seems, from the limited public record, to have gone awry. In Part VII, I offer several tentative proposals for remedying FPIC's normative drift.

In reconnecting FPIC with its normative roots, I seek to move past the debate over whether FPIC is a true consent requirement (ie a veto right) or something less.<sup>9</sup> Whatever the outcome of that debate, current practices could presage a future in which putative consent is obtained with respect to nearly all projects (whether or not as a matter of legal obligation), wherein FPIC functions primarily as a legitimising tool that insulates from critique the process of dispossessing Indigenous peoples and undermining their autonomy. Or, less sinisterly, it may be implemented clumsily, in a manner that belies its origins as part of a broader self-determination project.

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<sup>7</sup> Of course, there are FPIC processes *not* controlled by corporations. This paper draws from certain industries, such as natural resources and energy, in which corporations are prominent.

<sup>8</sup> Cf O'Faircheallaigh, 'Community Development Agreements', below n 36, and accompanying text. See below Parts V–VI.

<sup>9</sup> S James Anaya and Sergio Puig, 'Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples' (2017) 67 *University of Toronto Law Journal* 435. Anaya and Puig outline the debate and take a sliding scale position. See generally Stefania Errico, 'The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights' in Steve Allen and Alexandra Xanthaki (eds), *Reflections on The UN Declaration on the Rights of Indigenous Peoples* (Hart, 2011) 329.

Speculation aside, what is clear is that corporations are embracing FPIC as a matter of risk management even when not legally required to do so.<sup>10</sup> As they do so, many have taken FPIC in a direction that should alarm those committed to the normative project FPIC represents. Thus, it is incumbent to engage at the level of critically evaluating FPIC practices in light of its normative roots.

## II CONCEPTUAL AND CONTEXTUAL CHALLENGES INHERENT IN FPIC

### A *Consent of a Collectivity*

Some background is necessary to understand how FPIC's normative drift has occurred. First, there are inherent complexities related to a settler state obtaining consent from Indigenous peoples. Primarily, these reflect the difficulty of defining with precision what it means for the collectivity that is a community of Indigenous peoples to *consent*. Unlike with states, no body of law sets forth criteria for what constitutes consent.<sup>11</sup> Nor is it appropriate to apply principles developed in the context of corporations law or the law of agency, both of which reflect individualistic liberal underpinnings.<sup>12</sup> Finally, in many cases, formal bodies recognised by the settler state as holding the legal personality for particular Indigenous peoples have either been imposed, or unduly influenced, by the settler state.<sup>13</sup> As a result, an act held out by project proponents as the consent of the community may lack legitimacy within the community because community members do not perceive it as the product of a valid process or legitimate representatives.

Second, FPIC implicates difficult trade-offs for communities of Indigenous peoples. Because of these difficult trade-offs, differences of opinion are inevitable.<sup>14</sup> Yet given that 'consent' in this context is the consent *of a collectivity*, it is obviously necessary to ensure that appropriate processes are in place for reckoning with competing priorities. Assuming a common community position or interest, or simply failing to adequately provide for internal reckoning

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<sup>10</sup> International Council on Mining And Metals, 'Good Practice Guide: Indigenous Peoples and Mining' (Good Practice Guide, 2<sup>nd</sup> ed, 2015) 40 <<https://www.icmm.com/website/publications/pdfs/social-and-economic-development/9520.pdf>> archived at <<https://perma.cc/6NHD-ZW4Z>> ('*ICMM Guide*').

<sup>11</sup> See *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 7 (defining who has 'full powers' to enter treaty), 11–17, defining acts that constitute consent.

<sup>12</sup> See generally American Law Institute, 'Restatement (Third) of Agency' (Report, 2006) § 2.01.

<sup>13</sup> Anaya and Puig, above n 9, 443: 'the institutions holding the legal personality of the Indigenous peoples [in El Diquis] ... are perceived as state agencies which are unrepresentative of [I]ndigenous peoples' interests'. See also Carey Newman, 'There Are Two Kinds of Indigenous Governance Structures, but Canada Has Been Listening to Just One', *CBC* (online), 11 January 2019 <<https://www.cbc.ca/news/opinion/gaslink-pipeline-1.4973825>> archived at <https://perma.cc/B8UX-5XLR>, describing how the governance system required by the *Indian Act*, RSC 1985, c I-5 ('*Indian Act*'), which 'is not universally recognized by Indigenous people', is nonetheless the only governance system the Canadian government will negotiate with in pursuing FPIC.

<sup>14</sup> Cf Katherine Trebeck, 'Corporate Social Responsibility and Democratisation' in Ciaran O'Faircheallaigh and Saleem Ali (eds), *Earth Matters: Indigenous Peoples, the Extractive Industries and Corporate Social Responsibility* (Greenleaf, 2008) 8, 13: '[Indigenous] communities themselves ... seldom engage as one voice, nor advocate uncontested positions'.

with different priorities, has consequences for the quality and legitimacy of the process leading to consent or rejection.<sup>15</sup>

A third challenge, flowing from the first two, is that consent in this context is not about an outcome, narrowly construed. Rather, FPIC is a key manifestation of, and means to safeguard, Indigenous peoples' right to self-determination.<sup>16</sup> Self-determination as it relates to Indigenous peoples' rights is never solely about the path a society ultimately chooses; rather, it is about autonomy and the terms of participation both within the group and in the polity of the settler state.

Consider by way of (very) loose analogy the burgeoning field of study among democracy theorists critically evaluating non-electoral public participation in, and local ownership of, policymaking.<sup>17</sup> Without suggesting the stakes or contexts are similar, such studies have generated two insights useful for evaluating FPIC's implementation. First, there is growing recognition that there needs to be a relationship between 'wider theories of democracy' on the one hand, and 'understandings of participatory decision making' on the other for such decision-making structures to advance particular normative ends.<sup>18</sup> If process designers are more explicit about the democratic values a participatory process seeks to advance, then participants and observers are better positioned to evaluate the 'democratic adequacy' of a given process.<sup>19</sup> Second, democracy theorists increasingly recognise that consultation is not an unalloyed good: citizen participation can be structured to 'ensure that the consulters are protected from challenge'<sup>20</sup> or

silence views through a sort of participatory disempowerment whereby the existence of an official consultation exercise closes off further, alternative or subaltern voices that are silenced by the existence of an official depiction of 'the public'.<sup>21</sup>

So too with FPIC. The purpose of this article is not to — nor would it be this author's place to — elaborate a detailed normative framework for evaluating FPIC processes. However, some basic criteria flow ineluctably from the fact that FPIC emerges from, and is meant to further, an agenda of Indigenous self-determination.

Among these are the fact that control over internal governance is a *sine qua non* of a self-determination-respecting process. For an act to be validly considered the consent or rejection of the Indigenous peoples' community, it

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<sup>15</sup> Cf Iris Marion Young, *Inclusion and Democracy* (Oxford University Press, 2000) 43: the author observes that assumed commonality of community interests is 'liable to narrow the possible agenda for deliberation'.

<sup>16</sup> See below Part IV.

<sup>17</sup> See, eg, Morison, above n 2; Kateřina Vrábliková, *What Kind of Democracy? Participation, Inclusiveness and Contestation* (Routledge, 2017); Gene Rowe and Lynn J Frewer, 'A Typology of Public Engagement Mechanisms' (2005) 30 *Science, Technology, & Human Values* 251.

<sup>18</sup> See Morison, above n 2, 652. See also at 653:

[C]onsulters and consultees should have fairly well worked out ideas about what they hope to achieve in any consultation, how this fits within any wider structures of decision making and what the relationship is to wider concepts of democracy.

<sup>19</sup> *Ibid* 649–54.

<sup>20</sup> *Ibid* 652.

<sup>21</sup> *Ibid* 657–8.

must emerge from a process that is itself accepted by the community as fit for purpose. Given that FPIC processes should be understood as a path for respecting self-determined governance of Indigenous peoples, the ‘C’ in FPIC cannot be reduced to a thin, liberal notion of consent. Consent here is not akin to a person signing a contract. Rather, embedded in any act of consent associated with FPIC is a complex process of political expression — a process over which Indigenous peoples must have substantial control over if self-determination norms are to be effectuated.

### B *Context of FPIC Implementation: Important Challenges*

With these conceptual challenges in mind, several causes for concern are apparent in light of the context in which FPIC plays out. First, commercial actors who seek to obtain consent from Indigenous peoples have taken a leading role in structuring FPIC processes.<sup>22</sup> They not only produce normative guidance that shapes FPIC methodologies,<sup>23</sup> but in the ordinary course, they often also implement the consent-seeking process — sometimes without meaningful state oversight.<sup>24</sup> The same commercial actors who are now FPIC standard-setters in some cases recently lobbied against Indigenous peoples obtaining the very land rights on which their bargaining position is based.<sup>25</sup> This corporate opposition is consistent with the view that companies see FPIC practices in a narrow, commercial manner.<sup>26</sup>

Secondly, FPIC processes often take place in circumstances that are coercive in the short term, marked by enormous pressure from both project proponents (usually companies) and often settler states as well.<sup>27</sup> This gives rise to the possibility that projects are presented to Indigenous communities as *fait accompli*.<sup>28</sup> The perception of inevitability may induce Indigenous peoples to sign agreements to ensure a bad situation at least produces some benefits<sup>29</sup> — an act which is not only taken to represent consent, but also often precludes them from future public opposition.<sup>30</sup> Moreover, organising political opposition to

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<sup>22</sup> See, eg, *Why Agreements Matter*, above n 5.

<sup>23</sup> See, eg, *ICMM Guide*, above n 10.

<sup>24</sup> Martin Papillon and Thierry Rodon, ‘Proponent–Indigenous Agreements and the Implementation of the Right to Free, Prior, and Informed Consent in Canada’ (2017) 62 *Environmental Impact Assessment Review* 216, 219: ‘Most provincial consultation guidelines ... recognize the central role of proponents in consultation processes and some go as far as making proponent-led consultations the default model’.

<sup>25</sup> See, eg, P G McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, 2011) 53: noting the role of mining interests in weakening the statutory land rights Bill considered in Australia.

<sup>26</sup> But see Marina Welker, *Enacting the Corporation: An American Mining Firm in Post-Authoritarian Indonesia* (University of California Press, 2014) 18: conceptualising Newmont Mining as a ‘collective’ subject responsive to multiple agenda and confronting demands associated with corporate social responsibility and sustainable development.

<sup>27</sup> See Ciaran O’Faircheallaigh, *Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada* (Routledge, 2016) 153: describing government determination not to let FPIC processes delay the Ekati diamond mine project.

<sup>28</sup> See Smart, above n 1, and text accompanying.

<sup>29</sup> *Ibid.*

<sup>30</sup> See below Part VI.

such projects often triggers violent repression or criminalisation from private or state actors.<sup>31</sup>

Thirdly, where Indigenous peoples are said to consent, it has become standard practice to memorialise the fact and terms of the consent in an impact benefit agreement ('IBA').<sup>32</sup> IBAs are private agreements between project proponents (private corporations or state-owned enterprises) and Indigenous organisations. They define some aspects of what the company may or must do on Indigenous lands and set forth certain benefits the Indigenous communities will receive in return.<sup>33</sup> Although they often lack settler state participation, they are frequently understood to discharge FPIC duties borne by settler states.<sup>34</sup>

IBAs, while not intrinsically problematic, offer perhaps the clearest manifestation of how emerging practices threaten the normative foundations of FPIC as a path towards respecting self-determined governance. Consider the breadth of IBAs: IBAs have expanded in scope to touch on all aspects of Indigenous communities' socio-political, economic and cultural affairs.<sup>35</sup> Taken together with the fact that IBAs (purport to) constitute a concrete expression of the will of the collective, it becomes clear that signing or refusing an IBA is a significant decision that must be understood as an act of governance.

That IBAs offer a clear manifestation of the issues implicated by FPIC's normative drift can be understood by distinguishing *FPIC resulting in an IBA* from *FPIC as consultation*. One prominent articulation of Indigenous peoples' self-determination includes 'dual aspects' that reflect the juridical location of Indigenous peoples as 'distinct from, yet joined to, larger units' in society.<sup>36</sup> These dual aspects are 'on the one hand, autonomous governance and, on the other, participatory engagement'.<sup>37</sup> Where FPIC entails consultation only, there is participatory engagement: Indigenous peoples can give input. However, autonomous governance is ambiguously implicated because there is not a concrete decision being taken on behalf of the collective. By contrast, where

<sup>31</sup> See, eg, Andrew Crosby and Jeffrey Monaghan, 'RCMP Files Say "Violent Aboriginal Extremists" are Undermining Pipeline Plans', *Vice News* (online), 5 May 2018 <[https://news.vice.com/en\\_ca/article/mbxyw8/rcmp-files-say-violent-aboriginal-extremists-are-undermining-pipeline-plans](https://news.vice.com/en_ca/article/mbxyw8/rcmp-files-say-violent-aboriginal-extremists-are-undermining-pipeline-plans)> archived at <<https://perma.cc/2Z4W-TT3X>>: 'it's possible that Idle No More [an Indigenous movement opposing natural resource projects] was the most thoroughly surveilled social movement in Canadian history'. See also Jonathan Watts, 'Almost Four Environmental Defenders Killed a Week in 2017', *The Guardian* (online), 2 February 2018 <<https://www.theguardian.com/environment/2018/feb/02/almost-four-environmental-defenders-a-week-killed-in-2017>> archived at <<https://perma.cc/8DDP-4VKX>>.

<sup>32</sup> Also referred to as a community development agreement or a community benefit agreement.

<sup>33</sup> Dwight Newman, 'Political Rhetoric Meets Legal Reality: How to Move Forward on Free, Prior and Informed Consent in Canada' (2017) 13 *Aboriginal Canada and the National Resource Economy Series* 1, 15.

<sup>34</sup> *Why Agreements Matter*, above n 5, 14 (emphasis added): 'Canadian courts have acknowledged that it may be possible for government to delegate procedural aspects of consultation to corporations. *This happens a lot in practice*'. See also *Haïda Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511, [53]: the Court rejected that corporations are FPIC duty-bearers but embraced that the state may delegate the procedural aspects of FPIC to corporations.

<sup>35</sup> Ciaran O'Faircheallaigh, 'Community Development Agreements in the Mining Industry: An Emerging Global Phenomenon' (2013) 44 *Community Development Journal* 222, 228: discussing the incredibly wide range of issues covered in these agreements.

<sup>36</sup> Anaya, 'Post-Declaration Era', above n 4, 193.

<sup>37</sup> *Ibid.*

FPIC results in signing a contract between the Indigenous peoples and a company, it necessarily suggests some governance process has taken place sufficient to justify attributing the act of consent to the collective. These traits only heighten the need for practices that recognise IBAs as technologies of governance, the making of which implicates sensitive internal governance questions.

Yet despite the expansion of IBAs' scope and the demands placed on the process of implementing FPIC by the form of the IBA, emerging practices and policy guidance from key actors appear far from fit for purpose. The limited evidence suggests that key actors involved in implementing FPIC see consent through a thin, liberal, individualistic lens.<sup>38</sup> Under this approach, deficiencies in the FPIC process can be cured by signing on the dotted line.<sup>39</sup> And while the recognised need for consultation means that FPIC is always understood to entail some degree of dialogue, it appears that the structure of dialogic procedures does not adequately account for the logic of self-determination.

### III RISE AND DIFFUSION OF FPIC

FPIC is on the rise. International actors including human rights monitoring bodies, multilateral and national lawmakers, international financial institutions, industry groups and civil society have all migrated towards the position that either law or best practices require obtaining the consent of Indigenous peoples before the onset of projects on or near Indigenous land.

UN treaty monitoring bodies consistently recognise that states bear FPIC obligations. On this score, the UN Committee on the Elimination of All Forms of Racial Discrimination ('CERD') was the first mover. In 1997, building on emerging practices around participation norms,<sup>40</sup> it issued a General Recommendation that states are to ensure 'no decisions directly relating to their [Indigenous] rights and interests are taken without their informed consent'.<sup>41</sup> The Committee on Economic, Social and Cultural Rights ('CESCR') followed suit in 2009 with General Comment 21, in which it affirmed that states party were to obtain free, prior and informed consent wherever 'cultural resources, especially those associated with their way of life and cultural expression, are at risk' as well

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<sup>38</sup> Limited by virtue of non-disclosure agreements covering the substance and process of negotiations.

<sup>39</sup> For a rare case in which a court looked beyond the memorialisation of a community's putative consent in a recent landmark ruling of the South African Constitutional Court against a Barrick affiliate, see *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Pilanesberg Platinum Mines (Pty) Limited* [2018] ZACC 41. A central question in *Maledu* was 'whether [the community members who brought suit] had consented' to give up certain rights. The lower court had concluded that they had because of a resolution adopted at an open community meeting: at [22]. The Constitutional Court, however, found the 'resolution does no more than merely indicate that it was adopted and signed by [a leader of the community] and a representative of Barrick': at [107]. Indeed, amici submitted an affidavit that spoke to the 'entrenchment of the autocratic powers of traditional leaders under the system of colonialism and apartheid': at [35]. Thus, signing the resolution did not show that the company had satisfied requirements related to community participation and support.

<sup>40</sup> See below Part III.

<sup>41</sup> United Nations Committee on the Elimination of All Forms of Racial Discrimination, *General Recommendation XXIII*, 51<sup>st</sup> sess, UN Doc A/52/18 (22 August 1997) annex V [4](d).

as more generally ‘in all matters covered by their specific rights’.<sup>42</sup> In a case concerning access to water for Indigenous peoples, the Human Rights Committee (‘HRC’) stated in its individual communication, ‘participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community’.<sup>43</sup> Both CERD and the CESCR, as well as the HRC, have issued specific guidance targeting individual states regarding failure to fulfill FPIC norms.<sup>44</sup>

The Inter-American human rights system features the most well-developed jurisprudence on Indigenous consent. In *Mary and Carrie Dann v United States* (‘*Mary and Carrie Dann*’), the Inter-American Commission on Human Rights (‘IACHR’) held that the informed consent of the community was required prior to any land settlement process that would extinguish or alter title over land and resources.<sup>45</sup> Importantly, the IACHR elaborated that the community’s consent required that all members be informed, and stated that the ‘community as a whole’ must consent.<sup>46</sup> In the *Maya Indigenous Community* dispute, the IACHR found the consent requirement from *Mary and Carrie Dann* was ‘equally applicable’ in the context of FPIC vis-à-vis extractive industry projects.<sup>47</sup> The Inter-American Court of Human Rights (IACtHR) offered the most robust articulation of an FPIC norm in the *Saramaka People v Suriname* case. In a formulation that adverted to the centrality of self-determined governance, the IACtHR held ‘the safeguard of effective participation ... must be understood to additionally require the free, prior, and informed consent of the Saramakas, in accordance with their traditions and customs’.<sup>48</sup>

International financial institutions have recently followed suit by embracing or strengthening consent-seeking standards. For example, the World Bank’s

<sup>42</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 21: Right of Everyone to Take Part in Cultural Life*, 43<sup>rd</sup> sess, UN Doc E/C.12/GC/21 (21 December 2009) [37], [55](e).

<sup>43</sup> Human Rights Committee, *Views: Communication No 1457/2006*, 95<sup>th</sup> sess, UN Doc CCPR/C/95/D/1457/2006 (24 April 2009) 11 [7.6].

<sup>44</sup> See United Nations Committee on the Elimination of All Forms of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding Observations on Ecuador*, 62<sup>nd</sup> sess, UN Doc CERD/C/62/CO/2 (2 June 2003) [16]:

merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee’s *general recommendation XXIII* ... The Committee therefore recommends that the prior informed consent of these communities be sought ...

See also *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, Concluding Observations on Colombia*, 44<sup>th</sup> sess, UN Doc E/C.12/COL/CO/5 (7 June 2010) [9]; Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations on Togo*, 101<sup>st</sup> sess, UN Doc CCPR/C/TGO/CO/4 (18 April 2011) [21]; Letter from Anwar Kemal (President of the Committee on the Elimination of Racial Discrimination) to Fernando Rojas Samanez (Ambassador for Peru) 2 September 2011.

<sup>45</sup> *Mary and Carrie Dann v United States* (Inter-American Commission on Human Rights, Report No 75/02, Case No 11.140, 27 December 2002) 45 [165].

<sup>46</sup> *Ibid* 37 [140].

<sup>47</sup> *Maya Indigenous Community of the Toledo District v Belize (Merits)* (Inter-American Commission on Human Rights, Report No 40/04, Case No 12.053, 12 October 2004) [142].

<sup>48</sup> *Saramaka People v Suriname (Preliminary Objections, Merits, Reparations, and Costs)* (2007) 172 Inter-Am Ct HR (ser C) 41 [137] (emphasis added) (‘*Saramaka People v Suriname*’).

2005 Operational Policy 4.10 only required that borrowers of Bank funds engage in ‘free prior, and informed *consultation*’ with affected communities.<sup>49</sup> Articulating a mere consultation requirement sparked intense criticism.<sup>50</sup> After a long and controversial revision process, the Bank’s board of executive directors approved a new Environmental and Social Framework in 2016.<sup>51</sup> In addition to good faith consultations, which had been required under the prior standard, the new Standard (‘ESS 7’) requires borrowers to obtain FPIC in certain circumstances.<sup>52</sup> ESS 7 defines consent as ‘collective support of affected [peoples] for the project activities that affect them, reached through a culturally appropriate process’.<sup>53</sup> The draft text presented to the Directors, which was ultimately approved, explained that revisions were undertaken ‘[i]n response to Indigenous Peoples’ interest in FPIC and the concerns of some shareholders regarding the potential inconsistency between FPIC and national law’.<sup>54</sup>

The World Bank’s private arm, the International Finance Corporation (‘IFC’), has requirements to the same effect. In Performance Standard 7, the IFC requires the client to document ‘(i) the mutually accepted process between the client and Affected Communities of Indigenous Peoples, and (ii) evidence of agreement between the parties as the outcome of the negotiations’.<sup>55</sup> In a guidance note, the IFC noted that FPIC was meant to ‘[comprise] a process and an outcome’, with the outcome being ‘an agreement’.<sup>56</sup> Again, adoption of this position in 2012 came after years of criticism from non-governmental organisations and other civil society actors.<sup>57</sup> Its Progress Report on the review process acknowledged as much, noting that one motivation for the change was that ‘IFC’s position [on FPIC] is ... perceived by some to be out of step with the international

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<sup>49</sup> World Bank, ‘The World Bank Operational Manual: Indigenous Peoples’ (Operational Manual No OP 4.10, World Bank, July 2005) [1] (emphasis added) <<http://indianlaw.org/sites/default/files/2000-03-09%20WB%20Draft%20OP%204.10%20Indigenous%20Peoples%20Policy.pdf>> archived at <<https://perma.cc/Y9NV-LMCX>>.

<sup>50</sup> See generally Cathal M Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (Routledge, 2015) 204–6.

<sup>51</sup> See World Bank, ‘Environmental and Social Framework’ (Framework, World Bank, 2017) 75 <<http://documents.worldbank.org/curated/en/383011492423734099/pdf/114278-WP-REVISED-PUBLIC-Environmental-and-Social-Framework.pdf>> archived at <<https://perma.cc/47Y2-PKSB>>.

<sup>52</sup> *Ibid* 10.

<sup>53</sup> *Ibid* 80. Of course, the ‘culturally appropriate process’ signals the importance of processes associated with FPIC.

<sup>54</sup> World Bank, ‘Review and Update of the World Bank’s Safeguard Policies: Environmental and Social Framework (Proposed Third Draft)’ (Board Paper, 4 August 2016) 19 [53].

<sup>55</sup> International Finance Corporation, ‘Indigenous Peoples’ (Performance Standard No 7, 1 January 2012) [12] (‘*Performance Standard No 7*’).

<sup>56</sup> International Finance Corporation, ‘Indigenous Peoples’ (Guidance Note No 7, 1 January 2012) [25] (‘*Guidance Note No 7*’).

<sup>57</sup> See Steve Herz et al, ‘The International Finance Corporation’s Performance Standards and the Equator Principles: Respecting Human Rights and Remediating Violations?’, Submission to the UN Special Representative to the Secretary General, August 2008 <[https://www.ciel.org/wp-content/uploads/2015/06/Ruggie\\_Submission.pdf](https://www.ciel.org/wp-content/uploads/2015/06/Ruggie_Submission.pdf)> archived at <<https://perma.cc/3J4K-H4RU>>: collecting commentary from NGOs such as the Center for International Environmental Law, the Bank Information Center, Oxfam, and the World Resources Institute.

community'.<sup>58</sup> Finally, many international financial institutions have signed on to the Equator Principles — a set of lender accountability guidelines that include FPIC — such that over 70 per cent of project finance in emerging markets could face an obligation to seek Indigenous peoples' consent.<sup>59</sup>

In practice, this normative activity has led to rapid expansion in both the number and scope of agreement-making exercises with Indigenous peoples. Starting with the IFC's embrace of FPIC in 2012, the number of companies making commitments to FPIC has roughly tripled; typically, these commitments indicate agreement-making as a preferred form of FPIC implementation.<sup>60</sup> Now, databases record hundreds of instances (most without full text agreements) in which project proponents and Indigenous communities have entered agreements related to land concessions or natural resource extraction.<sup>61</sup> The World Bank has recognised that FPIC's spread has far outpaced its codification in formal sources of law, such that it is now a 'necessary feature of successful decision making' related to commercial projects on or near Indigenous lands.<sup>62</sup> In a survey of legal sources and practices around the world, the International Law Association concluded:

with respect to some specific measures among the totality of those which may affect [I]ndigenous peoples ... the position taken by international institutions ... seems to be more oriented toward recognizing the existence of a duty to actually obtain the consent of the [I]ndigenous communities ...<sup>63</sup>

The report goes on to detail numerous specific circumstances in which law and practice have consolidated around a true consent requirement.<sup>64</sup>

Companies can read the tea leaves regarding FPIC's rise. Further, they understand that consultations that lead to a written agreement offer powerful

<sup>58</sup> International Finance Corporation, 'Progress Report on IFC's Policy and Performance Standards on Social and Environmental Sustainability, and Policy on Disclosure of Information: Review and Update Process' (Progress Report, 14 April 2010) [34].

<sup>59</sup> See Sergio Puig, 'International Indigenous Economic Law' (2018) *UC Davis Law Review* (forthcoming), 24. Puig states that '[a]dopted by 89 private financial institutions, the Equator Principles are voluntary but may affect over 70 percent of project financing in emerging markets'. See generally The Equator Principles Association, *The Equator Principles* (2018) <<http://www.equator-principles.com/about>> archived at <<https://perma.cc/42RL-SJN2>>.

<sup>60</sup> Oxfam, 'Community Consent Index 2015: Oil, Gas, and Mining Company Public Positions on Free, Prior, and Informed Consent' (Oxfam Briefing Paper No 207, Oxfam, 23 July 2015) 11, 19, 30.

<sup>61</sup> See, eg, Agreements, Treaties, and Negotiated Settlements Project, *ATNS Database* (2011) <<http://www.atns.net.au/>> archived at <<https://perma.cc/VM7J-68CN>>; Government of Canada, *Interactive Map of Indigenous Mining Agreements* (15 December 2017) Natural Resources Canada <<http://atlas.gc.ca/imaema/en/index.html>> archived at <<https://perma.cc/B3TH-JCJ8>>.

<sup>62</sup> World Bank Group, 'Indigenous in Latin America in the Twenty-First Century: The First Decade' (Report No 98544, World Bank, 2015) 95 <<http://documents.worldbank.org/curated/en/145891467991974540/pdf/98544-REVISED-WP-P148348-Box394854B-PUBLIC-Indigenous-Latin-America.pdf>> archived at <<https://perma.cc/5Y73-4T2R>> ('*First Decade*').

<sup>63</sup> Rights of Indigenous Peoples Committee, 'Final Report: Rights of Indigenous Peoples' (Report, International Law Association, 2012) 6 ('*Rights of Indigenous Peoples Committee Final Report*').

<sup>64</sup> *Ibid* 7: listing projects requiring relocation; taking of cultural, intellectual, religious, and spiritual property or lands, territories and resources; and disposal of hazardous materials on Indigenous land.

evidence of FPIC's successful implementation.<sup>65</sup> Indeed, implementing FPIC by negotiating and signing an agreement is now justified as a risk mitigation technique.<sup>66</sup> Decisions such as the recent *Bear Creek Mining v Perú*, in which an investor with a winning expropriation claim saw its damages reduced because it lacked a 'social license to operate' in light of opposition from local Indigenous communities, will only further incentivise companies to use agreements as a risk mitigation tool.<sup>67</sup> In addition to their evidentiary value as a sign of community buy-in, IBAs now often contain clauses in which the Indigenous peoples are precluded from voicing opposition to the project or process of agreement-making in any future proceeding.<sup>68</sup>

As this partial survey has shown, FPIC has spread throughout international law and practice — and appears poised to continue doing so.<sup>69</sup> But before discussing how its spread has been coupled with an erosion of the normative agenda it was meant to advance, it is necessary to first explore that agenda in greater detail.

#### IV THE EMERGENCE OF FPIC: TWO VERSIONS OF SELF-DETERMINATION

Self-determination gained prominence in international law after WWII in the context of debates over decolonisation. One of the 'dual aspects' of self-determination reflected in the modern concept of self-determination of Indigenous peoples — that of 'participatory engagement' — crystallised during this period.<sup>70</sup>

##### A *Self-Determination as Participation Right: The Liberal Notion*

Post-WWII, an international consensus emerged that inhabitants of colonised territories could effectuate self-government through what amounted to a choice of remedies: '(a) Emergence as a sovereign independent State; (b) [f]ree association with an independent State; or (c) [i]ntegration with an independent State'.<sup>71</sup> For obvious reasons, the norms being articulated in the context of decolonisation struck many Indigenous activists as wholly applicable to their relationship with settler states.<sup>72</sup> Unsurprisingly, however, the secessionist

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<sup>65</sup> Papillon and Rodon, above n 24, 220.

<sup>66</sup> See *ibid* 217–20.

<sup>67</sup> *Bear Creek Mining Corporation v Perú (Award)* (ICSID Arbitral Tribunal, Case No ARB/14/21, 30 November 2017) 65–6 [246]–[247], 105 [335], 211–65 (*'Bear Creek Mining'*).

<sup>68</sup> See below Part IV.

<sup>69</sup> Other sources reflecting FPIC include the national legal systems that have incorporated FPIC domestically (especially in Latin America), and the policies of non-commercial INGOs, such as the United Nations Programme on Reducing Emissions from Deforestation and Forest Degradation ('UN-REDD').

<sup>70</sup> See Anaya, 'Post-Declaration Era', above n 4, and accompanying text.

<sup>71</sup> *Principles Which Should Guide Members in Determining whether or Not an Obligation Exists to Transmit the Information Called for in Article 73(e) of the Charter of the United Nations*, GA Res 1541, UN GAOR, 15<sup>th</sup> sess, Un Doc A/RES/1541 (15 December 1960) annex [VI].

<sup>72</sup> Benedict Kingsbury, 'Self-Determination and "Indigenous Peoples"' [1992] 86 *Proceedings of the Annual Meeting (American Society of International Law)* 383, 387: 'a great many [I]ndigenous peoples see themselves as victims of colonialism, and regard themselves as eminently proper beneficiaries of the body of law dealing with decolonization'.

connotations led settler states to respond with fierce resistance to any attempts to make use of the emerging body of law on decolonisation and self-determination by groups other than entire territorial states under colonial rule.<sup>73</sup>

The first international instrument on Indigenous rights was drafted during this period, as debates about decolonisation — and concomitant fears about threats to territorial integrity from self-determination norms — dominated multilateral fora. That instrument was the International Labour Organization ('ILO') *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* ('ILO Convention No 107').<sup>74</sup> Unsurprisingly, the *Convention* reflected state anxieties about the threat of Indigenous peoples availing themselves of emergent self-determination norms. One premise of *ILO Convention No 107* was that the principles of self-government and self-determination could be fulfilled vis-à-vis Indigenous peoples by offering 'assimilation and rights of full citizenship as means of bringing enclave Indigenous peoples within the fold'.<sup>75</sup> Thus, the consummation of the *ILO Convention No 107* approach was simply making the 'culturally homogenous ... nation-state' more inclusive.<sup>76</sup> Obviously, this ideal represented an existential threat to the cultural, economic, and political survival of Indigenous peoples.<sup>77</sup>

Nonetheless, the outcome of *full incorporation into a homogenous polity* was entirely consistent with the North-Atlantic, liberal tradition of conceiving populations as individuated rights-holders on a level playing field. The *ILO Convention No 107* approach thus resonated with another major international instrument from the era: the twin 1966 human rights covenants.<sup>78</sup> Each covenant began with a Common Article 1, which stated: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.<sup>79</sup> Doubts as to the norm's foundation in liberal theory (with its individualistic emphasis) could be resolved by looking at the Preamble, which 'recogniz[ed] that these rights derive from the inherent dignity of the human person'.<sup>80</sup> Even more explicit was material from the *travaux préparatoires*, stating that self-

<sup>73</sup> See, eg, *The Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1654, UN GAOR, 16<sup>th</sup> sess, UN Doc A/RES/1654(XVI) (27 November 1961) 65: describing the General Assembly as '[d]eeply concerned that ... acts aimed at the partial or total disruption of national unity and territorial integrity are still being carried out in certain countries in the process of decolonization'.

<sup>74</sup> International Labour Organization, *Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, signed 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959) ('*ILO Convention 107*').

<sup>75</sup> S James Anaya, 'Indigenous Rights Norms in Contemporary International Law' (1991) 8 *Arizona Journal of International and Comparative Law* 1, 31–2.

<sup>76</sup> *Ibid* 32.

<sup>77</sup> Anaya, 'Post-Declaration Era', above n 4, 188: "'peoples" are transgenerational communities with significant attributes of political or cultural cohesion that they seek to maintain and develop'.

<sup>78</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').

<sup>79</sup> *ICCPR* art 1(1); *ICESCR* art 1(1).

<sup>80</sup> *ICCPR* Preamble; *ICESCR* Preamble.

determination was ‘a corollary of the democratic principle of consent of the governed’.<sup>81</sup> As such, it was intrinsically linked to art 25, which established the human right of all citizens to vote and more generally ‘[t]o take part in the conduct of public affairs, directly or through freely chosen representatives’.<sup>82</sup> In this articulation, the duty corresponding with the right of self-determination, owed ‘by all governments to their peoples’, was simply to safeguard participation rights formembers of the polity.<sup>83</sup>

So phrased, self-determination offered limited protections for Indigenous peoples. Indeed, it was not even entirely clear that self-determination of *peoples* included groups *other than* the aggregate populations of states and classical colonial territories.<sup>84</sup> It certainly did not provide for the continuation of distinctive cultural, social or political institutions of Indigenous peoples. Yet the norm of self-determination continued to evolve, driven in large part by Indigenous peoples’ (and their co-strugglers’) advocacy on the international stage.

### B *Indigenous Peoples’ Self-Determination: Beyond Liberal Assimilationism*

Calls to revise *ILO Convention 107* began barely a decade after its promulgation.<sup>85</sup> In particular, the 1970s witnessed increasing natural resource exploitation on Indigenous peoples’ land, which became a rallying point for the international Indigenous movement.<sup>86</sup> Beginning in 1971 and running for over a decade thereafter, the landmark *Study of the Problem of Discrimination against Indigenous Populations*, mandated by the United Nations Economic and Social Council (‘ECOSOC’), brought a high-profile spotlight to questions about Indigenous peoples’ rights.<sup>87</sup> Martínez Cobo provided an early articulation of FPIC. Specifically, he urged that (i) control over land and natural resources customarily under the possession of Indigenous groups was not to be taken without consent; (ii) the means and magnitude of natural resource development were to be determined by Indigenous peoples; and (iii) such decisions were to be

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<sup>81</sup> *Draft International Covenants on Human Rights*, UN GAOR, 3<sup>rd</sup> Comm, 10<sup>th</sup> sess, 647<sup>th</sup> mtg, UN Doc A/C.3/SR.647 (28 October 1955).

<sup>82</sup> ICCPR arts 25(a)–(b). See also Jordan J Paust, ‘Self-Determination: A Definitional Focus’ in Yonah Alexander and Robert A Friedlander (eds), *Self-Determination: National, Regional, and Global Dimensions* (Westview Press, 1980) 13: ‘There is no question that self-determination and human dignity are intricately interconnected with human rights as well as the only legitimate measure of authority — the “will of the people”’.

<sup>83</sup> Thomas M Franck, ‘The Emerging Right to Democratic Governance’ (1992) 86 *American Journal of International Law* 46, 54: Franck argues that in the post-WWII era, self-determination ‘was ... both universalized and internationalized, for it could now be said to portend a duty owed by all governments to their peoples and by each government to all members of the international community’.

<sup>84</sup> S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 1996) 77–80. Anaya discusses debate over which collectives or groups are ‘peoples’ entitled to self-determination.

<sup>85</sup> Luis Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime* (Oxford University Press, 2005) 265.

<sup>86</sup> Doyle, above n 50, 78–9.

<sup>87</sup> José R Martínez Cobo, *Study of the Problem of Discrimination against Indigenous Populations*, UN Docs E/CN.4/Sub.2/476 and Add.1–6 (30 July 1981); UN Docs E/CN.4/Sub.2/1982/2 and Add.1–7 (10 August 1982); UN Doc E/CN.4/Sub.2/1983/21 and Add.1–7 (5 August 1983).

taken ‘in accordance with their own values, social structures and rules and at their own pace’.<sup>88</sup>

Against this backdrop, after much deliberation, the ILO Governing Body approved a revision process in 1986.<sup>89</sup> The ILO-convened group of experts offered a clear rationale for undertaking a wholesale revision: namely, that the drive for integration ‘no longer reflects current thinking’, which instead prioritises giving Indigenous peoples ‘as much control as possible over their own economic, social, and cultural development’.<sup>90</sup>

The ILO’s reform agenda reflected the recent efforts of the Working Group on Indigenous Populations (‘WGIP’), a sub-commission of ECOSOC where Indigenous peoples played a prominent agenda-setting role in what would eventually become the *United Nations Declaration on the Rights of Indigenous Peoples* (‘UNDRIP’).<sup>91</sup> The WGIP released a 17-point Declaration of Principles.<sup>92</sup> In addition to two principles requiring ‘free and informed consent’ before the state takes, or acts in a way that may destroy, Indigenous land and resources,<sup>93</sup> among the principles were several that spoke to Indigenous control over internal social, economic, and governance institutions:

Principle 1. All [I]ndigenous peoples have the right of self-determination. By virtue of this right they may ... freely pursue their economic, social, religious and cultural development.

...

Principle 4. The traditions and customs of [I]ndigenous people must be respected by the States

...

Principle 6. Each [I]ndigenous people has the right to determine the form, structure and authority of its institutions.<sup>94</sup>

The coexistence of norms about control over internal affairs and institutions in the first international statement that includes a modern FPIC concept suggests

<sup>88</sup> José R Martínez Cobo, *Study of the Problem of Discrimination against Indigenous Populations (Final Report)*, UN ESCOR, 36<sup>th</sup> sess, Provisional Agenda Item 11, UN Doc E/CN.4/Sub.2/1983/21/Add.8 (30 September 1983) [234], [541]–[544].

<sup>89</sup> Russell Lawrence Barsh, ‘Revision of *ILO Convention No 107*’ [1987] 81 *American Journal of International Law* 756.

<sup>90</sup> International Labour Office, ‘Extracts from the Report of the Meeting of Experts on the Revision of the *Indigenous and Tribal Populations Convention, 1957 (No 107)*’ (ILO Doc APPL/MER/107/1986/D.7, 1–10 September 1986) [159] in International Labour Office, ‘Report VI(1): Partial revision of the *Indigenous and Tribal Populations Convention, 1957 (No 107)*’ (Paper presented at the International Labour Conference, 75<sup>th</sup> sess, Geneva, 1988) app I.

<sup>91</sup> *Report of the Working Group on Indigenous Populations on its Fourth Session*, 38<sup>th</sup> sess, Agenda Item 11, UN Doc E/CN.4/Sub.2/1985/22 (27 August 1985) 14 [61].

<sup>92</sup> *Ibid* annex III 1–2.

<sup>93</sup> *Ibid* (Principles 9 and 12).

<sup>94</sup> *Ibid* annex III 1.

the link between the concepts of self-determined governance and FPIC was present from the very beginning.<sup>95</sup>

Future WGIP statements were even more explicit.<sup>96</sup> In its fifth session, the WGIP prepared a statement on self-determination that considered at length the implications that ‘flow’ directly from ‘the right to self-determination’, which include ‘the right to permanent sovereignty over land ... and other natural resources’.<sup>97</sup> These substantive rights were linked not only to consent, but to *control of internal decision-making and governance mechanisms*:

- (4) Self-determination encompasses *the freedom of Indigenous peoples to determine the extent of and the institutions of their self-governance*

...

- (7) Any state action that terminates, undermines or replaces Indigenous societies, *or their governments or organizations*, without their consent, is a violation of the right to self-determination ...

- (8) *State imposition of governmental or organizational systems and forms without consent by the Indigenous people concerned violates the right to self-determination*, even where the ostensible purpose is to provide a measure of self-rule or autonomy.<sup>98</sup>

This statement forges an unambiguous link between self-determination and control of internal governance. Further, it insists on control over internal governance even in the face of settler state efforts to ‘impos[e] governmental or organizational systems and forms’.<sup>99</sup> Importantly, the statement presages the need to resist such imposition, even when the ‘ostensible purpose’ is to advance goals of Indigenous peoples.<sup>100</sup> To use the former UN Special Rapporteur on the Rights of Indigenous Peoples James Anaya’s language of ‘dual aspects of self-determination’, the WGIP emphasised that self-determination — including if not especially in the context of state efforts to engage with Indigenous peoples regarding their land — required that the ‘autonomous governance’ aspect of self-determination be front and centre.<sup>101</sup> If ‘determin[ing] the extent of and the institutions of self-governance’ inheres in the concept of self-determination, then

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<sup>95</sup> Cf Carla F Fredericks, ‘Operationalizing Free, Prior, and Informed Consent’ (2017) 80 *Albany Law Review* 429, 430: ‘A formal concept of FPIC for [I]ndigenous peoples began to emerge in the mid-1980s as a critical means to link to, and articulate the need for, self-determination for [I]ndigenous peoples’.

<sup>96</sup> In dwelling on Working Group on Indigenous Populations (‘WGIP’), I do not mean to discount the significance of other entities’ contributions. I merely wish to highlight the consistent and longstanding emphasis on the link between self-determination and control over internal governance — and in particular natural resource governance. WGIP is useful for making that point because it started decades before the Expert Mechanism or Permanent Forum.

<sup>97</sup> Working Group on Indigenous Populations, *Statement on Self-Determination by the Participants at the Indigenous Peoples Preparatory Meeting* (1985) Center for World Indigenous Studies [1] <<https://cwis.org/wp-content/uploads/documents/slf-dtrm.txt>> archived at <<https://perma.cc/2Y5Q-F9LL>>.

<sup>98</sup> *Ibid* arts 4, 7, 8 (emphasis added).

<sup>99</sup> *Ibid* 8.

<sup>100</sup> *Ibid*.

<sup>101</sup> Cf Anaya, ‘Post-Declaration Era’, above n 4, 193.

much more is at stake in the design of FPIC processes than simply how well they facilitate civic participation or work to produce consent.<sup>102</sup>

The final text of *Convention concerning Indigenous and Tribal Peoples in Independent Countries* ('ILO Convention No 169') reflected the WGIP's reorientation of the international community dialogue toward a concept of self-determination that foregrounded internal autonomy. In terms of framing, in the Preamble, it announced its intention to 'remov[e] the assimilationist orientation of the earlier standards', and instead affirmed Indigenous peoples' 'aspirations ... to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions'.<sup>103</sup> Further, it repeatedly — beginning in the title — distanced itself from liberal theory's individual rights framework by describing its scope of application as covering 'Indigenous and tribal peoples'.<sup>104</sup> In so doing, it 'affirm[ed] a set of collective rights on an equal footing with the individual rights of Indigenous persons'.<sup>105</sup> The embrace of the term 'peoples' over competing formulations such as 'populations' or 'members' itself 'implies a certain affirmation of Indigenous groups' identity and attributes of community'.<sup>106</sup> Recognising collective rights marked a significant departure from standard liberal theory's individualistic approach.

More concretely, *ILO Convention No 169* expanded the participation rights of Indigenous peoples and put them on what can be conceptualised as a spectrum. On one end of the spectrum, when it came to national affairs and policies, Indigenous peoples had basic rights to participate. This corresponds to one of former Rapporteur Anaya's dual aspects: that of 'participatory engagement'. Falling under this category were rights to participate in: 'developing ... coordinated and systematic action to protect [Indigenous] rights' and 'to guarantee respect for their integrity';<sup>107</sup> 'formulati[ng] ... plans ... for national and regional development which may affect them directly';<sup>108</sup> adopting 'policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work';<sup>109</sup> and developing vocational training programs where desired<sup>110</sup> or in designing programs for 'strengthen[ing] and promot[ing]' traditional industries.<sup>111</sup>

Occupying a middle ground on the spectrum were certain areas where participation rights became stronger and were accompanied by explicit procedural protections. Falling into this category were the provisions on relocation and natural resource use. Most importantly for present purposes, art 15

<sup>102</sup> See generally Part V for how FPIC processes have been conceptualised and designed.

<sup>103</sup> International Labour Organization, *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991) para 6 ('ILO Convention 169').

<sup>104</sup> See, eg, *ibid* art 3.

<sup>105</sup> Rodríguez-Piñero, above n 85, 322. Cf *ILO Convention 169* art 1 (emphasis added): 'Tribal peoples'; *ILO Convention 107* art 1 (emphasis added): 'tribal populations'.

<sup>106</sup> Anaya, above n 84, 49.

<sup>107</sup> *ILO Convention 169* art 2(1).

<sup>108</sup> *Ibid* art 7(1).

<sup>109</sup> *Ibid* art 5(c).

<sup>110</sup> *Ibid* art 22.

<sup>111</sup> *Ibid* arts 23(1)–(2).

established that Indigenous peoples had the right ‘to participate in the use, management and conservation of [natural] resources’.<sup>112</sup> It further elaborated:

2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities ...<sup>113</sup>

The consultation requirement in art 15 was given additional content by two components of art 6. The text of art 6, which applies trans-substantively to all aspects of the *Convention*,<sup>114</sup> provided that consultations must be carried out ‘through appropriate procedures and in particular through their representative institutions’.<sup>115</sup> It further established that they had to be ‘undertaken, in good faith and in a form appropriate to the circumstances’.<sup>116</sup> The additional procedural safeguards accompanying rights in this category reflected at least in part the fact that they had to do with land.<sup>117</sup>

Finally, on the other end of the spectrum were matters wholly internal to Indigenous communities, where the groups in question exercised almost complete control.<sup>118</sup> The most important provision in this category is art 7, which establishes Indigenous peoples’ ‘right to decide their own priorities for the process of development as it affects their lives ... institutions ... and the lands they occupy or otherwise use’.<sup>119</sup> Article 7 also establishes a right ‘to exercise control, to the extent possible, over their own economic, social and cultural development’.<sup>120</sup> Finally, art 8 established Indigenous peoples’ ‘right to retain their own customs and institutions’.<sup>121</sup>

Stepping back to make sense of the overall framework of *ILO Convention No 169*, one can make several observations. First, it articulates a consultation right, which includes the right to be consulted through ‘representative institutions’ using ‘appropriate procedures’. The institutions involved in consultation would necessarily overlap with Indigenous communities’ governance institutions, which they have a right to ‘retain’. Moreover, they have the right to decide and control ‘priorities for ... development’ as it affects

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<sup>112</sup> Ibid art 15(1).

<sup>113</sup> Ibid art 15(2).

<sup>114</sup> Ibid art 6(1).

<sup>115</sup> Ibid art 6(1)(a).

<sup>116</sup> Ibid art 6(2).

<sup>117</sup> See, eg, *ibid* art 13(1):

governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories ... and in particular the collective aspects of this relationship.

All the provisions with specific additional procedural safeguards fall under the heading ‘Part II. Land’: at 11.

<sup>118</sup> Subject only to minimal caveats related to, *inter alia*, human rights protections. See *ibid* art 8(2).

<sup>119</sup> *Ibid* art 7(1).

<sup>120</sup> *Ibid*.

<sup>121</sup> *Ibid* art 8(2).

internal institutions. Thus, the right to be consulted regarding land use projects occurring on their land is firmly linked to a network of other rights regarding the maintenance, development and control of internal institutions.

Secondly, an implication of the first point is that Indigenous peoples' right to maintain, develop, and control their internal institutions — including governance institutions — may be violated by the imposition of consultation procedures that lack acceptance, undermine existing institutions, or are otherwise not 'appropriate'. Thirdly, especially when considered in light of statements from the WGIP,<sup>122</sup> maintaining internal governance institutions is inextricably bound up with Indigenous peoples' self-determination rights — including as exercised in the context of negotiations over natural resource projects. In fact, the drafting history makes clear that art 7 is inspired by self-determination norms.<sup>123</sup>

### C Self-Determination and FPIC

Although *ILO Convention No 169* broke ground for Indigenous peoples' right to self-determined governance, FPIC itself barely made an appearance.<sup>124</sup> It was not until the adoption of *UNDRIP* that FPIC was fully realised in an international instrument.<sup>125</sup> *UNDRIP* 'operationalize[d] self-determination' by, inter alia, enshrining Indigenous peoples' 'rights to participation, consultation, and consent' including through explicit recognition of FPIC.<sup>126</sup>

In parallel to the Common Article 1 of the twin 1966 covenants, art 3 of *UNDRIP* affirms, 'Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.<sup>127</sup> Early drafts included additional guidance on what the right to self-determination meant in practice, stating that self-determination gave Indigenous peoples control over 'culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and

<sup>122</sup> See above Part IV(B) and accompanying text.

<sup>123</sup> International Labour Organization, *Partial Revision of the Indigenous and Tribal Populations Convention 1957 (No 107) Report VI(2)*, 75<sup>th</sup> sess (1988) [8], [17], [19].

<sup>124</sup> But see César Rodríguez Garavito and Carlos Andrés Baquero Díaz, *The Right to Free, Prior, and Informed Consultation in Colombia: Advances and Setbacks* (2018) Office of the United Nations High Commissioner for Human Rights, 2 <<https://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/FPIC/GaravitoAndDiaz.pdf>> archived at <<https://perma.cc/YU26-Q6L7>>: 'Convention 169 is the centerpiece of the international history of FPIC in Latin America generally'.

<sup>125</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) ('*UNDRIP*'). For an account of legal and discursive junctures in this history, see Karen Engle, 'On Fragile Architecture: The *UN Declaration on the Rights of Indigenous Peoples* in the Context of Human Rights' (2011) 22 *European Journal of International Law* 141. See also Erica-Irene Daes, 'The *UN Declaration on the Rights of Indigenous Peoples*: Background and Appraisal' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart, 2011) 11–40. See generally S J Rombouts, *Having a Say: Indigenous Peoples, International Law and Free, Prior and Informed Consent* (Wolf Legal Publishers, 2014).

<sup>126</sup> S J Rombouts, 'Consultation and Consent Norms under *ILO Convention 169* and the *UN Declaration on the Rights of Indigenous Peoples* Compared', Written Submission to the Expert Mechanism on the Rights of Indigenous Peoples, 2018, <<https://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/FPIC/RomboutsSJ.pdf>>.

<sup>127</sup> *UNDRIP*, UN Doc A/RES/61/295, art 3.

entry by non-members'.<sup>128</sup> In response to Human Rights Council input, the specification of what self-determination encompasses was modified to its current version, which states, 'Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs'.<sup>129</sup> Article 5 goes on to elaborate the related right to 'maintain and strengthen ... distinct political, legal, economic, social and cultural institutions'.<sup>130</sup>

Self-determination is embodied in *UNDRIP*'s recognition of FPIC rights in key areas. *UNDRIP* recognises FPIC as either a prospective right, or as the basis for providing redress for past wrongs, in provisions on: (i) relocation;<sup>131</sup> (ii) redress for cultural, intellectual, religious, or spiritual property taken;<sup>132</sup> (iii) legislation affecting Indigenous peoples;<sup>133</sup> (iv) redress for land taken;<sup>134</sup> (v) storage of hazardous waste on their lands;<sup>135</sup> and, most importantly for present purposes, (vi) projects affecting their lands.<sup>136</sup> The last of these reads as follows:

States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.<sup>137</sup>

It also linked internal autonomy or self-government as an expression of self-determination on the one hand, to engagement with the outside world on important policy matters on the other. Articles 18 through 20 make this link evident. Article 18 establishes the

right to participate in decision-making in matters which would affect their rights, through *representatives chosen by themselves in accordance with their own procedures*, as well as to maintain and develop their own *[I]ndigenous decision-making institutions*.<sup>138</sup>

Thus, in addition to 'self-government' (art 4) through 'distinct political, legal, economic and cultural institutions' (art 5), *UNDRIP* also enshrines a right to participate in decision-making through either (i) pre-existing procedures that can be 'maintain[ed]', or (ii) new institutions that can be 'develop[ed]' by the peoples involved.<sup>139</sup> Article 19 expands on this right, obliging states to

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<sup>128</sup> United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Draft Declaration on the Rights of Indigenous Peoples*, 45<sup>th</sup> sess, UN Doc E/CN.4/Sub.2/1994 (26 August 1994) art 31; United Nations Sub-Commission on the Promotion and Protection of Human Rights, *Report of the Working Group on Indigenous Populations on its Eleventh Session*, 45<sup>th</sup> sess, Agenda Item 14, UN Doc E/CN.4/Sub.2/1993/29/ (23 August 1993) [49]–[75].

<sup>129</sup> *UNDRIP*, UN Doc A/RES/61/295, art 4.

<sup>130</sup> *Ibid* art 5.

<sup>131</sup> *Ibid* art 10.

<sup>132</sup> *Ibid* art 11(2).

<sup>133</sup> *Ibid* art 19.

<sup>134</sup> *Ibid* art 28(1).

<sup>135</sup> *Ibid* art 29(2).

<sup>136</sup> *Ibid* art 32(2).

<sup>137</sup> *Ibid*.

<sup>138</sup> *Ibid* art 18 (emphasis added).

<sup>139</sup> *Ibid*.

consult and cooperate in good faith with the [I]ndigenous peoples concerned *through their own representative institutions* in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.<sup>140</sup>

Finally, the *ILO Convention 169* right to ‘retain ... customs and institutions’ is expanded in *UNDRIP* art 20 into a right ‘to maintain and develop their political, economic, and social systems or institutions’.<sup>141</sup>

#### D *The Implications of Self-Determination for FPIC*

Considering *UNDRIP* and *ILO Convention No 169*, we can see that autonomy and self-government for Indigenous peoples (i) entails more than a limited, liberal right to participate in the polity; (ii) is strongly linked to control over land and natural resources; and (iii) has significant and unavoidable implications when a project proponent seeks to engage Indigenous peoples about the governance of their land — with associated implications for their socio-economic, cultural, religious and political life — in a consent-seeking process.

Given that maintaining and developing internal institutions, including internal governance and decision-making structures, is central to the right to self-determination, it is necessarily the case that Indigenous peoples engaged through FPIC processes enjoy a right to be engaged through institutions of their choosing and design. Indeed, this has been universally recognised in case law and guidance from multilateral fora.<sup>142</sup> Identifying that FPIC is an outgrowth of self-determination necessarily foregrounds the need for Indigenous control of or buy-in to representative institutions, including those that represent them during negotiations with project proponents. Unsurprisingly, Indigenous peoples have demanded greater control of self-government as a key component of self-determination.<sup>143</sup>

Yet most discussions of FPIC, even when they link FPIC to self-determination, fail to draw out this point. Typically, they revolve around whether the link to self-determination supports a reading that — alone or in conjunction with other normative resources — FPIC amounts to a true consent requirement.<sup>144</sup> I take no view on that question here. Whatever the answer, at a minimum it can safely be asserted that FPIC’s normative foundations reflect a vision of self-determination that encompasses the right to exercise control over

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<sup>140</sup> Ibid art 19 (emphasis added).

<sup>141</sup> Ibid art 20(1).

<sup>142</sup> Cf Human Rights Council, *Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-Making*, 15<sup>th</sup> sess, Agenda Item 5, UN Doc A/HRC/15/35 (23 August 2010) [34]: ‘Indigenous peoples identify the right of free, prior and informed consent as a requirement, prerequisite and manifestation of the exercise of their right to self-determination’; *Samaraka People v Suriname* (2007) 172 Inter-Am Ct HR (ser C) 41: ‘effective participation ... must be understood to additionally require the free, prior, and informed consent of the Saramakas, in accordance with their traditions and custom’.

<sup>143</sup> Gerald R Alfred, *Heeding The Voices Of Our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism* (Oxford University Press, 1995) 14: discussing that most Indigenous movements seek to achieve self-determination not ‘through the creation of a new state, but through the achievement of a cultural sovereignty and a political relationship based on group autonomy reflected in formal self-government arrangements’.

<sup>144</sup> *Rights of Indigenous Peoples Committee Final Report*, above n 63, 3–7. See also Doyle, above n 50, 73–125. But see Fredericks, above n 95, 430.

the process of, and particularly the internal mechanisms associated with, representation wherever the FPIC process is being carried out.<sup>145</sup> With that in mind, I turn to the FPIC policies and practices of those who have recently taken a lead in FPIC implementation and norm development: corporations.

## V CONSENT WITHOUT SELF-DETERMINATION? THE CORPORATE VISION OF FPIC

Given the central role played by commercial actors in implementing FPIC, the vision of FPIC articulated by these actors merits serious scrutiny. However, given confidentiality terms that commercial actors insist upon,<sup>146</sup> I draw heavily on policy and practice documents to supplement the sparse material available to construct case studies.

The words (and where ascertainable, practices) of these commercial actors exhibit, at best, indifference or ignorance that FPIC is part of a broader normative project related to self-determination. While they take FPIC seriously, their version of FPIC is all about an outcome. Theirs is a thin version of FPIC in which FPIC is a commercial, rather than a governance, process. As such, the corporate approach to FPIC appears to write the ‘autonomous governance’ aspect out of the FPIC agenda, thereby fuelling FPIC’s normative drift. Consent, in this version of FPIC, becomes a simple up-or-down vote with procedural prerequisites; there is no attempt to interrogate whether the process could be said to give rise to valid consent. Finally, a lack of consent is not so much a ‘no’, as an invitation to come back with another offer. Seeing the ‘C’ in FPIC through this type of ‘getting to yes’ lens betrays disregard for Indigenous peoples as collectivities engaged in the act of defining the future they choose to pursue.

### A *FPIC as Articulated by Private Actors*

Two years after the International Council on Mining and Minerals (‘ICMM’) reversed course by embracing FPIC,<sup>147</sup> it released an updated Good Practice Guide (‘Guide’) for engaging Indigenous peoples that reflected its new

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<sup>145</sup> I do not argue that *UNDRIP* generally, or its FPIC/self-determination provisions specifically, constitute customary international law; nor am I treating it as a treaty. I argue that we should consider FPIC’s normative roots in thinking about how FPIC should be implemented. For the impact of *UNDRIP* on this area, see Doyle, above n 50, 104–5: where he discusses the incorporation of *UNDRIP* into guidance, general comments, and policy advice on the part of the United Nations Economic and Social Council, Human Rights Committee, Committee on the Elimination of All Forms of Racial Discrimination, the Permanent Forum on Indigenous Issues, and the Expert Mechanism on the Rights of Indigenous Peoples, the African Commission on Human and Peoples Rights, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

<sup>146</sup> Ginger Gibson and Ciaran O’Faircheallaigh, ‘IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements’ (Report, Walter & Duncan Gordon Foundation, March 2010) 48–9 (emphasis added) <[http://www.ibacommunitytoolkit.ca/pdf/IBA\\_toolkit\\_March\\_2010\\_low\\_resolution.pdf](http://www.ibacommunitytoolkit.ca/pdf/IBA_toolkit_March_2010_low_resolution.pdf)> archived at <<https://perma.cc/CJ2Q-658E>> (‘*Community Toolkit*’): ‘agreements very commonly (*indeed almost universally*) include confidentiality provisions that prevent Aboriginal groups from making public information about negotiations and agreements’.

<sup>147</sup> See International Council on Mining and Metals, *Position Statement on Indigenous Peoples and Mining* (May 2013) <<https://www.icmm.com/en-gb/members/member-commitments/position-statements/indigenous-peoples-and-mining-position-statement>> archived at <<https://perma.cc/3WJC-2CQ6>>.

position.<sup>148</sup> Given that ICMM's membership includes 23 mining companies with over 800 project sites worldwide, the announcement garnered considerable attention.<sup>149</sup> The Guide notes that ICMM reflected international law developments, including *UNDRIP*, IFC's Performance Standard,<sup>150</sup> and emerging Business and Human Rights Principles.<sup>151</sup> Nonetheless, the Guide contributes to, and crystallises trends associated with, FPIC's normative drift in important ways.

### 1 *Who Structures Consent Processes?*

Despite emerging from a broader normative agenda, important elements of that agenda were shorn from the content of the FPIC principle as articulated by ICMM.<sup>152</sup> For example, in the section listing what 'ICMM company members commit to', Commitment 3 indicates that a plan should be agreed in advance that outlines 'what would constitute consent' and 'processes and protocols' for negotiation.<sup>153</sup> However, making a plan is no guarantee that its formulation is participatory or inclusive, much less culturally appropriate. As shown below, this gap can permit actors with a *prima facie* plausible claim that they represent the group — such as elected leaders who do not traditionally exercise authority relevant to matters FPIC-related agreements cover — to unilaterally act in a manner that contravenes the wishes of the community by agreeing to a consent process that is perceived as unrepresentative and exclusionary by the community.<sup>154</sup> Commitment 4 indicates '[c]onsent processes should focus on reaching agreement on the basis for which a project (or changes to existing projects) should proceed'.<sup>155</sup> But structuring a process to focus on achieving the outcome desired by B is not obviously consistent with advancing the self-determination of A — especially where A and B's interests are likely to be adverse. Commitments 4 and 6 both provide for continuing a project, at the discretion of the company and subject to the permission of the government, even where a community rejects the project.

### 2 *Indigenous Peoples as Stakeholders*

In its conception of the relationship Indigenous peoples have vis-à-vis projects and project proponents, the Guide creates notable tensions with the self-determination norms central to FPIC. First, the Guide reframes Indigenous communities as but one of many 'stakeholders' with whom companies must

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<sup>148</sup> *ICMM Guide*, above n 10.

<sup>149</sup> Emily Greenspan, *Getting to 'No' in Mining and Community Consent* (24 November 2015) Oxfam <<https://politicsofpoverty.oxfamamerica.org/2015/11/getting-to-no-in-mining-and-community-consent/>> archived at <<https://perma.cc/JUH5-M2AS>>.

<sup>150</sup> See *Performance Standard No 7*, above n 55 and accompanying text; *Guidance Note No 7*, above n 56 and accompanying text.

<sup>151</sup> *ICMM Guide*, above n 10, 9–10. See also John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc A/HRC/8/5 (7 April 2008).

<sup>152</sup> To be clear, there are many strong and positive elements of the Guide, which is in some ways a progressive document.

<sup>153</sup> *ICMM Guide*, above n 10, 11.

<sup>154</sup> See below Part VI.

<sup>155</sup> *ICMM Guide*, above n 10, 11.

‘engag[e] with ... throughout the life cycle of a project’.<sup>156</sup> Stakeholder status connotes a right to give input in a deliberative decision-making process; it reflects neither decisional autonomy nor control over the terms of and procedures accompanying participation. Thus, to frame engagement with Indigenous communities as a form of stakeholder consultation is to deny that their rights and interests are unique, and to assimilate them to an existing stakeholder process. Indeed, the Guide later implicitly recognises the diminished status of stakeholders when it states, ‘the agreement-making process ... can allow [Indigenous peoples] to become partners to the project rather than *merely* stakeholders’.<sup>157</sup> Thus, even by its own terms, the Guide recognises that stakeholders (the role to which Indigenous communities are relegated *until they consent*) constitutes a secondary status of sorts.

### 3 *Framing Development*

Another area in which hierarchy and disempowerment is written into the guide is related to ‘development’. The Guide suggests taking ‘Indigenous aspirations and concerns ... into account’ in project design by using the World Bank-promoted concept of ‘ethnodevelopment’.<sup>158</sup> Of course, ethnodevelopment as defined by the World Bank is a tool for top-down planners that presumes an outcome: namely, that development — ie project approval and commencement — will occur in a way that accounts for socio-cultural differences.<sup>159</sup> It is a way to ‘includ[e] the excluded’ in the benefits of a predefined trajectory.<sup>160</sup> Ethnodevelopment thus emphasises project design features such as beneficiary targeting and mobilising social capital within ethnic groups.<sup>161</sup> Even if ethnodevelopment foregrounds the welfare of Indigenous groups, it does not comport with *self-determination* by those groups. Accordingly, Indigenous groups have never, to my knowledge, framed demands on the international stage in terms of ethnodevelopment.<sup>162</sup>

### 4 *Impact Assessment*

Elements of the ‘planning on behalf of’ mindset also manifest in the Commitments undertaken by ICMM members. For example, Commitment 3

<sup>156</sup> Ibid 21. It continues to refer to Indigenous communities as stakeholders intermittently throughout the remainder of the Guide. See, eg, at 22, 24, 25, 28.

<sup>157</sup> Ibid 39 (emphasis added).

<sup>158</sup> *ICMM Guide*, above n 10, 23.

<sup>159</sup> The concept was popularised in the 1980s around the time FPIC emerged. See Radolpho Stavenhagen, ‘Ethnodevelopment: A Neglected Dimension in Development Thinking’ in Raymond Apthorpe and Andrés Kráhl (eds), *Development Studies: Critique and Renewal* (Leiden EJ Brill, 1986) 71–94.

<sup>160</sup> See, eg, William L Partridge, Jorge E Uquillas and Kathryn Johns, ‘Including the Excluded: Ethnodevelopment in Latin America’ (Working Paper No 27202, World Bank, 1996) <<http://documents.worldbank.org/curated/en/981431468770397760/Including-the-excluded-ethnodevelopment-in-Latin-America>> archived at <<https://perma.cc/V9UE-USJV>>.

<sup>161</sup> Martien Van Nieuwkoop and Jorge E Uquillas, ‘Defining Ethnodevelopment in Operational Terms: Lessons from the Ecuador Indigenous and Afro-Ecuadoran Peoples Development Project’ (Working Paper No 6, World Bank, January 2000) 16–22 <<http://documents.worldbank.org/curated/en/990421468771860403/Defining-ethnodevelopment-in-operational-terms-lessons-from-the-Ecuador-Indigenous-and-Afro-Ecuadoran-peoples-development-project>> <<https://perma.cc/HM96-R5Y6>>.

<sup>162</sup> For example, the word is absent from the resolutions adopted by the WGIP.

suggests that ‘engagement and consultation processes ... should ... be commensurate with the scale of the potential impacts and vulnerability of impacted communities’.<sup>163</sup> Unlike with other contestable issues, the Guide makes no provision for what to do if the impacted Indigenous peoples see more at stake than the company does.<sup>164</sup> The Guide does not instruct companies on how to ensure Indigenous viewpoints are fully articulated in the impact evaluation process.<sup>165</sup> Yet Indigenous peoples are acutely aware of the risk posed when companies have latitude to unilaterally answer questions about the potential impact of a project.<sup>166</sup> Moreover, impact assessment has been recognised as an area where political questions can be rendered technical, obscuring first-order questions about what is valued.<sup>167</sup>

As a procedural matter, Tool 8 (‘Baseline Studies and Impact Assessments’) directs companies to ‘use ... a variety of sources ... to make predictions about how communities, individuals, and the receiving environment will, or may, be affected by a project’.<sup>168</sup> Tool 8 thus squarely places the authority to decide what is at stake in the hands of the company. Even more troubling from the standpoint of self-determination, Tool 8 suggests that although sharing ‘the results of such assessments’ with the affected communities is a ‘good practice’, companies must ‘recogniz[e] and [protect] against any potential risks to communities as a result of disclosure’.<sup>169</sup> Thus, the Guide contemplates a company-controlled impact evaluation process, the results of which are not necessarily (or not fully) shared with affected communities.

##### 5 *Obtaining Consent and Traditional Decision-Making Institutions*

When it comes to the core processes associated with obtaining consent, the Guide falls far short. In ‘Tool 11’ on ‘Working to Obtain Consent’, the Guide contains an insert on ‘traditional decision-making structures’.<sup>170</sup> Yet it actually only speaks to a narrow type of situation, in which the Indigenous community refuses to even engage in negotiation.<sup>171</sup> After suggesting the use of a more palatable intermediary when faced with refusal to deal, the Guide advises companies to ‘consider carefully’ whether to proceed with a project despite refusal to even negotiate.<sup>172</sup> Obtaining consent is termed a ‘good practice’ where ‘significant adverse impacts’ (such as displacement, massive environmental

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<sup>163</sup> *ICMM Guide*, above n 10, 11.

<sup>164</sup> See *ibid.*

<sup>165</sup> See generally *ibid.*

<sup>166</sup> In light of the recognised insufficiency of assessments conducted by outside actors, practice guides developed for Indigenous communities in FPIC-related processes describe how to ‘undertake independent, community-controlled’ impact evaluations. See *Community Toolkit*, above n 146, 84–91.

<sup>167</sup> Cf Ben Boer et al, *The Mekong: A Socio-Legal Approach to River Basin Development* (Routledge, 2016) 89 (emphasis in original): describing how social and environmental impact assessments ‘render that politicized field *technical* through the deployment of science’ to obscure ‘first-order considerations’ in the field of river basin governance.

<sup>168</sup> *ICMM Guide*, above n 10, 74.

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.* 84.

<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid.* See also at 86, where the conclusion of the ‘Tool 11’ section returns to the subject of proceeding absent consent.

damage, etc) will occur from a project.<sup>173</sup> Such an equivocal commitment to consent is regrettable.<sup>174</sup>

As to what constitutes consent, the ‘process to obtain consent’ entails identifying the groups from which consent is to be obtained, determining their rights, and setting up ‘consent processes’.<sup>175</sup> Interestingly, in a passage on ‘defin[ing] and record[ing] what constitutes consent’, the Guide advises companies to ‘consult with Indigenous communities ... to define what they consider consent to be’.<sup>176</sup> Recognising that definitions of consent vary and counselling companies to consult represents an important first step. However, the idea of ‘consulting’ to promulgate a definition is slippery and does not rule out taking a decision adverse to Indigenous articulations after consultation.

This section is also notable for what it does *not* say. After blessing companies that choose to proceed absent consent and giving companies limited guidance on defining consent, it leaves out many of the hard questions about consent. For example, the Guide contains no discussion of how to engage with traditional decision-making structures, what to do where the settler state has imposed representative structures that differ from internal Indigenous structures, or how to handle conflicts of authority. These questions are central and common to the FPIC enterprise; their omission suggests superficiality (or more ominously, an intention *not* to engage with complex questions related to consent-seeking).<sup>177</sup>

## 6 *Absence of Self-Determination*

The section on ‘Agreements’ — the term preferred by companies for referring to documents memorialising and laying out the terms of Indigenous consent to extractive industry projects — never mentions FPIC, self-determination, or consent norms generally. The omission reframes agreements between companies and Indigenous peoples so that they are no longer connected to broader normative agenda, but are instead simply complex, multi-year commercial contracts. The closest the Guide comes to naming self-determination in the section on agreements is when it briefly acknowledges that it is undesirable if Indigenous peoples ‘feel that an agreement has been imposed on them’.<sup>178</sup> Yet even this is framed in instrumental terms: such an outcome is undesirable because the resulting lack of buy-in means the community will be ‘much less likely to commit to making it work’.<sup>179</sup> In any event, these ‘process’ concerns are

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<sup>173</sup> Ibid 85. Consistent with the interpretation that the significance and adversity of the impacts are to be ultimately determined by the company, the *ICCM Guide* devotes roughly one-quarter of this section to ‘understand[ing] what a significant adverse impact is’.

<sup>174</sup> Admittedly, however, the equivocal commitment to consent reflects the question — which is not the subject of this piece — of whether FPIC is a true consent requirement.

<sup>175</sup> *ICMM Guide*, above n 10, 85–6.

<sup>176</sup> Ibid 86. The *ICMM Guide* also states:

To avoid later disputes over whether consent was granted or not, companies should engage with communities at a very early stage to understand their preferred approach to decision making, with the aim of reaching agreement on how consent will be demonstrated, and the sequence to be followed.

<sup>177</sup> See generally *ibid*.

<sup>178</sup> Ibid 40.

<sup>179</sup> Ibid.

quickly bypassed to focus on the substantive provisions necessary for ‘managing impacts and sharing the benefits’ and components necessary thereto.<sup>180</sup>

### 7 *Grievance Mechanisms*

Another red flag occurs in the section on grievance mechanisms. As one of the causes of grievances that necessitate grievance mechanisms, the Guide lists ‘establishing a mine in the absence of broad community support or, where required, their FPIC’.<sup>181</sup> First, establishing a mine absent ‘required’ FPIC is a violation of the applicable norm that establishes an FPIC requirement. More generally, it is notable that the Guide presumes the propriety of company-designed and -run grievance mechanisms for resolving community disputes. Further, the Guide only provides for employing an independent body ‘where community distrust reaches an elevated level’.<sup>182</sup> In each case the Guide’s approach runs afoul of best practices as distilled in the ‘Guiding Principles on Business and Human Rights’ (‘Guiding Principles’). The Guiding Principles state ‘operational-level mechanisms should ... be ... [b]ased on engagement and dialogue’, meaning affected communities should be ‘consult[ed] ... on their design and performance’.<sup>183</sup> Further, the Guiding Principles state that grievance mechanisms should be available for representatives to ‘raise concerns’ even before a formal dispute arises.<sup>184</sup>

### 8 *Case Studies*

The ICMM Guide’s limited foray into case studies only lends more credence to these concerns. In discussing how a Suriname-based Newmont subsidiary (Surgold) engaged with the Pamaka people, the Guide heralds the fact that Surgold tapped the ‘paramount chief of the Pamaka’ to ‘[select] the group of community leaders ... to represent the overall community’.<sup>185</sup> Rather than explaining its actions as reflecting traditional practice (such as, for example, if the paramount chief of the Pamaka typically assembled an ad hoc team of advisers to make major land-related decisions), or even in terms of ensuring representativeness (in keeping with earlier Guide statements to the effect that FPIC processes may deviate from traditional decision-making in so far as necessary to ensure inclusivity), the Guide instead explains that this approach was undertaken ‘[i]n order to institute efficient and transparent communication between the Pamaka community and Surgold’.<sup>186</sup> The described process may have been efficient, but in light of the fact that the negotiations and outcome were covered by a non-disclosure agreement, it is far from clear that it was transparent. In so far as representativeness is adverted to, the Guide promotes the

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<sup>180</sup> Ibid 41–3.

<sup>181</sup> Ibid 49.

<sup>182</sup> Ibid 47.

<sup>183</sup> John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises — Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, 17<sup>th</sup> Sess, Agenda Item 3, UN Doc A/HRC/17/31 (21 March 2011) annex (‘Guiding Principles on Business and Human Rights’) 26.

<sup>184</sup> Ibid.

<sup>185</sup> *ICMM Guide*, above n 10, 115.

<sup>186</sup> Ibid.

fact that the chief-convened committee ‘has representation from small-scale mining, local business, traditional authority, journalism and legal’.<sup>187</sup> Thus, the case study makes clear that representatives from the community were assimilated to a stakeholder-model structure, raising serious doubts as to whether any representative institutions engaged were traditional or accepted.

Moreover, the Guide implies that FPIC was not a known concept to the Pamaka prior to this engagement, and as such the company undertook ‘capacity-building ... regarding their awareness as to FPIC process/outcomes and rights’.<sup>188</sup> Although no details of the capacity-building program are disclosed, one wonders in light of the preceding discussion how FPIC would be represented in a company-led training.

## 9 *Positive Notes*

To be sure, it is noteworthy that the ICMM has embraced FPIC. It could represent a turning point if it helps companies pivot from past practices in which these companies were often at the forefront of displacement and abuse, allowing them to become active partners in safeguarding Indigenous rights when Indigenous peoples choose to embrace them as such. Moreover, there are numerous strong and positive passages in the Guide. One passage that stands out as reflecting FPIC’s normative goals envisions collaboration on (i) developing a way to ensure understanding of the material necessary to evaluate risks (and benefits) associated with mining, and (ii) subsidising capacity-building towards that end if necessary.<sup>189</sup> The point of this section is not merely to critique the ICMM’s depiction, but to raise a broader question: should any industry consortium comprising those who will always be in the posture of project proponents be empowered to design, implement and evaluate processes associated with FPIC?

## 10 *Conclusion*

If we are concerned about FPIC’s normative drift, the answer is that companies cannot do all three. Indeed, the Guide does not purport to put companies in the position of stewarding a broader normative agenda. Although it mentions in passing Indigenous perspectives on FPIC,<sup>190</sup> and the fact that FPIC is enshrined in international law,<sup>191</sup> the Guide does not instruct the companies to take these into account in any robust way. The section on ‘ICMM members’ approach to FPIC’ never mentions self-determination or accounting for the goals outlined by Indigenous or intergovernmental actors.<sup>192</sup> Instead, ICMM members ‘[seek] to respect the individual and collective rights and interests of Indigenous Peoples’ — never defined in operative sections of the Guide to include self-

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<sup>187</sup> Ibid.

<sup>188</sup> Ibid.

<sup>189</sup> Ibid 24–5. Of course, even here the discussion revolves around how companies can ‘*demonstrat[e]* ... good faith’ rather than, say, articulating the above as a *requirement of engaging in good faith*: at 25 (emphasis added).

<sup>190</sup> Ibid 26.

<sup>191</sup> Ibid 17, 27.

<sup>192</sup> Ibid 28–9. Rhetorically, it is interesting that ICMM members are implicitly presented as not having a ‘perspective’ on FPIC.

determination rights — as they ‘[work] to obtain the consent of Indigenous Peoples’.<sup>193</sup> Consistent with its transactional view of consent, in this section the Guide repeats the formulation: ‘[c]onsent processes should *focus on reaching agreement* on the basis for which a project (or changes to existing projects) should proceed’.<sup>194</sup> In essence, it is not a question of whether, but for what price.<sup>195</sup>

### B *Individual Corporations Internalise the Guide*

In the hands of individual company members of the consortium, the evidence suggests that the transactional approach is even more deeply entrenched. In 2016, Rio Tinto released a resource guide entitled *Why Agreements Matter*.<sup>196</sup> The guide included input from a range of industry actors, professors, consultancies and government representatives. Three salient features of *Why Agreements Matter* merit brief comment.

First, not only is there a complete absence of discussion of self-determination, but even FPIC itself disappears almost entirely from view. Although a brief section on Rio Tinto’s policies notes that it will ‘strive to achieve [FPIC]’ as part of its commitment to ‘work in a spirit of reciprocity, transparency, and recognition of rights and cultures’ and its ‘recogni[tion] that every Indigenous community is unique’,<sup>197</sup> FPIC is not substantively discussed at any point in the more than 100 pages of the ‘how to’ guide.<sup>198</sup> Instead, it is relegated to the ‘background reader’ appended to the body of the report, wherein it is discussed as a ‘key driver’ behind the rise of agreement-making.<sup>199</sup>

Removing FPIC and self-determination entirely from the conceptual landscape of consent-seeking practice indicates an approach to agreement-making that sees agreements with Indigenous communities as no different in principle from any other commercial contract. *Why Agreements Matter* thus takes worrying signs in the Guide to their logical endpoint: it explicitly assimilates FPIC into an individualistic, liberal framework by obscuring its origins and even the basic content of FPIC norms themselves.<sup>200</sup> The implication is that consent in the Indigenous peoples’ context is signing on the proverbial dotted line, full stop.<sup>201</sup> Confirmation that a sterile reading of ‘consent’ pervades the document can be found in its repeated lumping of ‘consents’ (in the noun

<sup>193</sup> Ibid 28.

<sup>194</sup> Ibid (emphasis added).

<sup>195</sup> Cf Smart, above n 1 and accompanying text. See also Aidan Davy, *ICMM Responds to Oxfam’s Blog on Indigenous Peoples and Mining* (3 December 2015) International Council on Mining and Metals <<https://www.icmm.com/en-gb/news/2015/icmm-responds-to-oxfam-blog-on-indigenous-peoples-and-mining>> archived at <<https://perma.cc/H9U3-JDRU>>. Davy, the Deputy President, suggestively states that ‘[o]ver two years since the adoption of the ICMM policy [incorporating FPIC] ... none [of our members] have faced the difficult choice of how to proceed where consent has not been given’.

<sup>196</sup> *Why Agreements Matter*, above n 5.

<sup>197</sup> Ibid 31.

<sup>198</sup> See generally *ibid*.

<sup>199</sup> Ibid 158–60.

<sup>200</sup> Ibid 30: ‘Community agreements are commercial arrangements’.

<sup>201</sup> A related reframing move is replacing references to ‘consent processes’ with the term ‘agreement processes’. See, eg, *ibid* 32: ‘All actions related to an agreement and its implementation are termed “agreement processes”’.

form, as something Rio Tinto comes into possession of) with other types of bureaucratic permitting and licensing procedures.<sup>202</sup>

Second, consistent with the conceptual shift away from FPIC and self-determination, agreement-making is framed in pure business terms: ‘Agreements facilitate Rio Tinto’s access to land, approvals and permits, paving the way for our continued presence in host communities’.<sup>203</sup> As a tool of business strategy rather than a reflection of broader normative commitments, agreements are simply one of the tools to select from to guarantee access to land.<sup>204</sup> Its utility is thus not tied to the presence of FPIC requirements: it is profitable to use agreements to secure preferable terms of access and insure against risk even where FPIC is not required.<sup>205</sup> Framing it as a business tool necessarily leads to further FPIC’s normative drift. For example, it is universally recognised by human rights bodies and international organisations that implementing FPIC necessarily includes a temporal dimension to allow the time necessary for Indigenous decision-making processes.<sup>206</sup> Yet *Why Agreements Matter* repeatedly discusses how to discharge agreement processes in a ‘timely’ fashion — which it consistently lists ahead of doing so in a ‘culturally appropriate’ manner.<sup>207</sup>

Third, the sense that agreement is a foregone conclusion is even more firmly established in *Why Agreements Matter* than in the ICMM Guide. *Why Agreements Matter* frames ‘inclusive engagement’ as the centrepiece of agreement processes.<sup>208</sup> Yet inclusive engagement is defined as being ‘directed to understanding, implementing and monitoring the agreement, and communicating agreement-related activities, concerns and achievements’.<sup>209</sup> Notably absent from that list of engagement’s various aspects is any indication

<sup>202</sup> See, eg, *ibid* 56: referring to ‘the full suite of approvals and consents required for a project to proceed’.

<sup>203</sup> *Ibid* 15.

<sup>204</sup> *Ibid* 16 (emphasis added): ‘In 1996 ... Rio Tinto published its first Australian Aboriginal and Torres Strait Islander Policy. All parts of the business in Australia were instructed that *agreement-making would be the preferred approach to access land, rather than litigation*’.

<sup>205</sup> *Ibid* 30: ‘Where there is no such legal obligation to reach an agreement, securing access to land on or adjacent to Indigenous lands can be made easier by forming an agreement’. See also *Bear Creek Mining*, ARB/14/21.

<sup>206</sup> See, eg, James Anaya, *UN Report of the Former Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples*, 12<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/12/34/Add.6 (5 October 2009) annex A 28 [33] [author’s trans]:

the necessary time has to be provided for Indigenous peoples to conduct their decision-making processes and to effectively participate in the decision-making in a manner that adapts to their cultural and social models ... if these are not taken into consideration, it will be impossible to comply with the fundamental requirements of a prior consultation and participation.

See also *Kichwa Indigenous People of Sarayaku v Ecuador (Merits and Reparations)* (2012) 245 Inter-Am Ct HR (ser C) 51 [180]; International Labour Organization, ‘Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Colombia of the *Indigenous and Tribal Peoples Convention, 1989 (No 169)*, Made under Article 24 of the *ILO Constitution* by the Central Unitary Workers’ Union (CUT)’ (Report, 14 November 2001) [79]. There is one passing reference in *Why Agreements Matter* to allowing ‘sufficient time’ for Indigenous peoples’ communities to form consensus: *ICMM Guide*, above n 10, 46.

<sup>207</sup> See, eg, *Why Agreements Matter*, above n 5, 36, 124.

<sup>208</sup> *Ibid* 35.

<sup>209</sup> *Ibid* 36.

that a decision juncture exists at which the Indigenous community may express its will — that is, its consent or rejection. Indeed, *Why Agreements Matter* indicates that the company is not bound to *act* on the community's expressed will at all; instead, its engagement 'should involve active listening, consideration, responses and *possibly* actions'.<sup>210</sup> Acting on the community's expressed will, in turn, is a question of what makes *business* sense.

## VI PERILS OF THE CORPORATE VISION OF FPIC: A CASE STUDY

Although many agreements are never made public and companies insist that the terms of FPIC-related negotiations are not disclosed, the limited insight offered by publicly available information does nothing to dispel the above concerns. One controversial example relates to the Pinehouse Collaboration Agreement between the Canadian Aboriginal village of Pinehouse, the Kineepik Métis, and two uranium mining companies — Cameco Corporation and AREVA Resources Canada Inc ('Pinehouse Agreement').<sup>211</sup> Pinehouse, located in northern Saskatchewan, has long been a site of uranium mining; however, the Pinehouse Agreement represents a marked expansion of the use of IBAs to regulate relations between the area's Aboriginal communities and mining companies. As such, it fits within the broader trends of which the ICMM's Guide and *Why Agreements Matter* are a part (and indeed, AREVA is an ICMM member).<sup>212</sup>

After its conclusion, the Pinehouse Agreement drew fierce criticism both for its substance, as well as for procedural aspects related to its conclusion. On the substance side, the main issue related to art 5 ('Pinehouse Support for Operations').<sup>213</sup> Article 5 not only memorialised Pinehouse's support for existing operations,<sup>214</sup> but also stated that Pinehouse 'intends to fully support the Millennium project' subject to limited caveats.<sup>215</sup> The Millennium project outlined a vision for the expansion of uranium mining within the region, and was alternately referred to in the agreement as the 'Proposed Project'.<sup>216</sup> Thus, art 5 went on to specify:

Pinehouse intends to fully support the Proposed Projects and acknowledges it will be a breach of this Agreement to oppose the issuance of any Proposed

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<sup>210</sup> *Ibid* (emphasis added).

<sup>211</sup> See AREVA Resources Canada Inc, 'Industry and Northern Community Agree to Strengthen Relationship' (Press Release, 13 December 2012) <<http://us.aveva.com/EN/home-2096/new-agreement-with-northern-communities.html>> archived at <<https://perma.cc/C2DN-PXZS>>.

<sup>212</sup> International Council of Mining & Metals, *See Our Members* (2017) <<https://www.icmm.com/en-gb/members/member-companies>> archived at <<https://perma.cc/AQL5-TCSU>>.

<sup>213</sup> Collaboration Agreement between the Northern Village of Pinehouse and Kineepik Metis Local Inc and Cameco Corporation and AREVA Resources Canada Inc (signed 12 December 2012) art 5 ('Pinehouse Agreement'). Generally, the agreement set out terms related to impacts (eg environmental effects, cultural preservation, etc) and benefits (jobs, infrastructure investment, etc) typical of impact-benefit agreements ('IBAs').

<sup>214</sup> *Ibid* art 5.1(a).

<sup>215</sup> *Ibid* art 5.1(b)(ii).

<sup>216</sup> *Ibid* art 1.1: under 'Definitions', "'Millennium" means the Proposed Project described in Schedule A'.

Authorizations or the construction, development or operation of any of the Proposed Projects.<sup>217</sup>

Although other provisions indicated a commitment to negotiate regarding ‘Future Operations’,<sup>218</sup> such future operations were defined to exclude the Millennium Project.<sup>219</sup> This definition limited the Future Operations clause’s negotiation requirement to projects not yet contemplated.

Thus, the Pinehouse Agreement effectively contained a precommitment device vis-à-vis future expansions of uranium mining. Even ICMC’s Guide, for all its deficiencies, included a commitment to obtain consent for ‘changes to existing projects’.<sup>220</sup> By way of counterbalance, the Agreement merely provides for ‘meaningfully addressing relevant Pinehouse concerns raised in accordance with [agreed negotiation procedures]’.<sup>221</sup> However, as subsequent events came to show, this created a one-way ratchet. Community planning may have counted on the purported \$200 million in aggregate benefits to be disbursed over the life cycle of the project.<sup>222</sup> Yet Cameco and AREVA were under no obligation to continue with the project — and as it happened, in 2014 Cameco rescinded its application for licenses associated with the Millennium Mine due to ‘current economic conditions’.<sup>223</sup> The circumstances of company-initiated withdrawal, nowhere contemplated in the Agreement, seemingly left Pinehouse without recourse.

On the procedural and representational side, criticisms abounded. First, members of the community have raised concerns that the actors with whom Cameco and AREVA engaged were not at all representative. The counterparties to the agreement on the First Nations side were Kineepik Métis Local, Inc and the Village of Pinehouse.<sup>224</sup> Absent were band councils, which are typically involved in such decisions.<sup>225</sup> Kineepik is not a traditional authority structure in the Métis community, but is reportedly ‘a private corporation whose shareholders are not known’.<sup>226</sup> Its President, Mike Natomagan, is also the

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<sup>217</sup> Ibid art 5.1(b)(iii).

<sup>218</sup> Ibid art 5.2.

<sup>219</sup> Ibid art 1.1.

<sup>220</sup> *ICMC Guide*, above n 10, 11.

<sup>221</sup> Pinehouse Agreement, above n 213, arts 5.1(b)(iii), (c)(ii).

<sup>222</sup> AREVA Resources Canada Inc, above n 211.

<sup>223</sup> Canadian Nuclear Safety Commission, *Notice of Adjournment of Public Hearing* (16 May 2014) <<http://www.nuclearsafety.gc.ca/eng/the-commission/pdf/2014-06-18-NoticeRevised2-2014-H-05-Cameco-Millennium-e-edoc4437737.pdf>> archived at <<https://perma.cc/RE6T-DVNK>>.

<sup>224</sup> Pinehouse Agreement, above n 213.

<sup>225</sup> Sandra Cuffe, ‘Uranium’s Chilling Effects: Community Participation Stifled as Industry Expands in Northern Saskatchewan’, *The Media Co-op* (online), 21 November 2013 <<http://www.mediacoop.ca/story/uraniums-chilling-effects/19083>> archived at <<https://perma.cc/FMR8-C3QG>>. Cuffe quotes a local First Nations resident whose local government signed on to a sister agreement: ‘Big decisions like this would generally go to a general band meeting and be ratified at a general band meeting. It would be put to the public and there would be a vote’.

<sup>226</sup> D’Arcy Hande, ‘Courting Collaboration: How the Uranium Industry Bought the Village of Pinehouse, and What Residents Are Doing to Take It Back’ *Briarpatch Magazine* (online), 1 November 2013 <<https://briarpatchmagazine.com/articles/view/courting-collaboration>> archived at <<https://perma.cc/7XTQ-68UT>>.

mayor of Pinehouse Village.<sup>227</sup> The 2012 municipal elections in Pinehouse were marked by allegations of irregularities,<sup>228</sup> giving rise to a complaint with Saskatchewan's Ministry of Government Relations that never led to action.<sup>229</sup>

The existence of a closed loop of bargaining representatives (Natomagan as head of both the Métis negotiating group and the Village government), each of which faces legitimacy challenges, would seemingly create a greater impetus to ensure a procedurally sound agreement-making process. However, the process associated with the conclusion of the Pinehouse Agreement only generated additional concerns. Although village and company officials had been negotiating for years, Pinehouse residents purportedly did not learn about the draft agreement until a community meeting in November 2012 — one month before signing.<sup>230</sup> The draft agreement summary released at that time included a predecessor to art 5 that was even more expansive. It obligated Pinehouse to help obtain government approvals necessary to establish future mining operations without distinction.<sup>231</sup> Most troublingly, it contained two provisions that were labelled the 'gag order':

Pinehouse promises to: ... (e) Not make statements or say things in public or to any government, business or agency that opposes Cameco/Areva's mining operations. (f) Make reasonable efforts to ensure Pinehouse members do not say or do anything that is not consistent with Pinehouse's promises under the Collaboration Agreement.<sup>232</sup>

Outcry arose immediately.<sup>233</sup> The response was unsurprising, given that the combination of the gag order with a broad, indefinite support commitment deprived Pinehouse residents of any leverage or say over what happened in their community moving forward. Less than one month later, the Agreement was concluded without ever having another community meeting — despite a 'wave of public protest' in the community.<sup>234</sup> The final agreement removed the gag order provision and specified — seemingly in response to the outcry — that 'nothing in ... this Agreement ... precludes Pinehouse or its Residents from raising concerns in any forum or to any entity whatsoever'.<sup>235</sup> However, the fact that the 'village administration refused to share the text' until after signing (among other procedural and representational defects) has continued to catalyse

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<sup>227</sup> Ibid.

<sup>228</sup> Sandra Cuffe, 'Intimidation, Irregularities Cloud Pinehouse Election', *The Media Co-op* (online), 18 September 2012 <<http://www.mediacoop.ca/story/intimidation-and-irregularities-cloud-pinehouse-election/12812>> archived at <<https://perma.cc/V6G3-C9XM>>.

<sup>229</sup> Hande, above n 226.

<sup>230</sup> Cuffe, 'Uranium's Chilling Effects', above n 225, 5.

<sup>231</sup> Cameco Corporation, AREVA Resources Canada Inc and Pinehouse, *Summary of the Collaboration Agreement Term Sheet Made among Cameco Corporation, AREVA Resources Canada Inc and Pinehouse* (12 October 2012) cl D(15)(c)(ii) <<https://committeeforfuturegenerations.files.wordpress.com/2012/11/collaborationagreement.pdf>> archived at <<https://perma.cc/B3ZT-TPAS>>.

<sup>232</sup> Ibid cl G(e)–(f).

<sup>233</sup> Garth Materie, 'Cameco and Pinehouse', *Blue Sky*, 28 November 2012 (Gary Merasty, John Smerek and Fred Pederson): discussing the then-draft agreement following the community meeting where the term sheet was shared.

<sup>234</sup> Hande, above n 226.

<sup>235</sup> Pinehouse Agreement, above n 213, arts 5.1(b)(iv), 5.1(c)(iii).

local and broader opposition to the Agreement's legitimacy in years since — including in the form of a lawsuit seeking to invalidate the Agreement.<sup>236</sup>

Years after the fact, residents learned that their exclusion from negotiations was not simply a product of the Village of Pinehouse being secretive; rather, it was a required feature of the negotiations process pursuant to a signed Letter of Understanding ('LOU') between Pinehouse, Kineepik and Cameco.<sup>237</sup> Although the LOU permitted some communications with community members, these were limited to disclosures associated with an *ex post facto* 'Community Endorsement'<sup>238</sup> process and encompassed only 'general information' about the negotiations and outcomes.<sup>239</sup> Under a heading entitled 'Community Decision-Making Processes', the LOU included stipulations by both Pinehouse and Kineepik that they 'have full authority ... to negotiate the terms of the [Agreement]'.<sup>240</sup> Thus, the LOU suggests that Cameco and AREVA viewed the process involved in the making of the Pinehouse Agreement as comporting with the Aboriginal community's own decision-making processes. In reality, however, the extremely cursory discussion of community decision-making and the emphasis on the binary question of whether the negotiators had 'full authority' to negotiate reduces complex issues of community decision-making into something that resembles an agency question: namely, whether X could act on behalf of Y.<sup>241</sup>

Procedural and representational defects of this order of magnitude call into question whether what transpired in Pinehouse can even rightly be considered 'consent' on the part of the First Nations communities.<sup>242</sup> They also highlight the

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<sup>236</sup> Hande, above n 226. See also *Smerek v Areva Resources Canada Inc* [2014] SKQB 282. The class action lawsuit sought to rely on *UNDRIP* and the *ICESCR*, among other international instruments. However, it was dismissed on the view that these instruments did not create private rights of action: at [16]–[23]. Constitutional and statutory claims were also dismissed without reaching the merits: at [24]–[54].

<sup>237</sup> Letter from Cameco to the Kineepik Metis Local Inc and the Northern Village of Pinehouse, 23 August 2011, 2.

<sup>238</sup> *Ibid* 3. Apparently the Letter of Understanding envisioned that a separate 'Community Endorsement' process would take place after the signing. However, it is not clear such a process occurred:

When asked, 'When and in what forum did that Community Endorsement happen?' the Village's lawyer responded by saying, 'Our client is not required to answer questions related to the records.' In fact, she indicated that 'there are no additional records which are responsive to this request'.

See also D'Arcy Hande, 'The Pinehouse Collaboration Agreement with Uranium Firms: A Deal Lacking Transparency and Accountability', *Briarpatch Magazine* (online), 3 June 2015 <<https://briarpatchmagazine.com/articles/view/pinehouse-collaboration-agreement>> archived at <<https://perma.cc/TA2R-BPMQ>>.

<sup>239</sup> Letter from Cameco to the Kineepik Metis Local Inc and the Northern Village of Pinehouse, 23 August 2011, 2.

<sup>240</sup> *Ibid* 3.

<sup>241</sup> The structure and operation of the negotiating team is a crucial and contested topic. See generally *Community Toolkit*, above n 146, 59–67: describing the role and structure of negotiating teams, its composition, how to select its members, internal roles, etc. Self-appointed representatives handling secret negotiations is a red flag. 'The importance of communication between the negotiating team and the community cannot be overstated': at 92.

<sup>242</sup> Evaluating more fully would require additional information about interactions between the negotiation teams for Pinehouse, Kineepik Métis Local, Inc, and Cameco/AREVA, about the composition of those teams, and about procedures for internal deliberations.

significance of the ICMM Guide's omission of guidance on how to deal with overlapping representation structures<sup>243</sup> — here, the municipal government and private non-profit corporation on the one hand, versus band councils, community plebiscites, and possibly other competing representation structures on the other.

Even in the doubtful event that the episode described above passes a meaningful threshold for what should be understood as Indigenous community consent, the terms of the agreement themselves are problematic from a self-determination perspective. Precommitments to support and obligations not to challenge future licensing or other processes are difficult to square with a version of the FPIC norm that has even a minimal element of self-determination embedded within it.<sup>244</sup> To take an easy illustration, assuming the Village government itself constituted a legitimate representative structure, the community could vote the incumbent government out of office in subsequent elections. It could even do so because of its handling of the Pinehouse Agreement. Yet under the terms of the Agreement, the community would still be bound to support future expansions of the Millennium mining project — including those that occurred after the ouster of the government for mishandling the Pinehouse Agreement.<sup>245</sup>

One might respond that national governments often enter treaties or contracts that pre-commit them to long-term arrangements. No one can seriously contend that doing so constitutes erosion of national sovereignty. It is worth asking, then if we should look at Indigenous communities pledging support for future projects as a similar type of valid precommitment. At least in a case like Pinehouse, the reverse is true. The parallel provides an argument *against* collapsing community decision-making structures into elected local leadership (at least absent some secondary determination that elected leadership was intended by the community to serve that role), not an argument *for* accepting that elected leaders can presumptively be empowered to spearhead FPIC processes. Indigenous peoples' self-determination and FPIC rights are not contingent on their organisation in a certain political structure: to the contrary, organisation into a settler state political structure (eg mayorship) often reflects a strategic decision about how to interface with the state, or else an imposition by the state. As such, it is not often an organic decision-making structure. Indeed, the tension between levels and forms of authority within Indigenous communities is a well-known challenge to

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<sup>243</sup> See *ICMM Guide*, above n 10.

<sup>244</sup> To be clear, Canada does not fully embrace FPIC. Section 35 of the *Constitution Act 1982* demands consultation and accommodation of aboriginal peoples in natural resource project development. See *Canada Act 1982* (UK), cl 11, sch B ('*Constitution Act 1982*') s 35. For present purposes, the issue is that a consent-seeking process was carried out, and ostensibly resulted in consent. The question is how that process should be evaluated in light of self-determination norms that underlie FPIC.

<sup>245</sup> To be clear, this did not come to pass: Mike Natomagan was re-elected Mayor in 2016. My purpose here is not to take a view on the merits or advisability of the Pinehouse Agreement nor on the legitimacy of the actors involved in its negotiation. Mike Natomagan says the controversy is cooked up. See Nigel Maxwell, 'Northern Mayor Responds to Lawsuit', *Prince Albert Now* (Prince Albert, Canada), 30 January 2014. The procedural and representational concerns persist regardless of the merits of the agreement or actors involved.

implementing FPIC.<sup>246</sup> Here, the companies did not engage with that challenge, and instead accepted unquestioningly the validity of certain representatives.

#### A *Concluding Observations on Private Actors' Views of Indigenous Consent*

This Part has shown that FPIC is being internalised by companies, and applied even outside the context where it constitutes a strict legal requirement. But in the process, it risks being radically altered. To the extent self-determination is a part of the conception of FPIC that mining companies operate under, the evidence presented in this Part suggests that in practice, they have written the 'autonomous governance' aspect out, leaving only a 'participatory engagement' aspect remaining.<sup>247</sup> That is, Indigenous peoples can give input, but primarily on terms defined by the project proponents. Moreover, the view of Indigenous peoples' consent they have developed is a highly transactional one. FPIC is a business tool; acquiring consent serves a useful function for the company in stabilising favorable arrangements and insulating them from future threats (be they from Indigenous communities' resistance, governments or human rights bodies on review). And most crucially for purposes of the present argument, these actors have stripped the 'C' in FPIC of much of its complex, expressive, internal representative dimensions. It does not seem that the examples discussed in this section are exceptional.<sup>248</sup>

Just as FPIC is not monolithic across legal regimes, its articulation differs across private actors. The actors discussed herein are not the only players in the field, and other industry-driven FPIC guidance runs the gamut from much worse to much better in terms of recognising the broader self-determination framework. On the one hand, some industry associations — especially in countries like Canada that have not fully embraced consent requirements — have enacted guidance that either fails to recognise consent requirements or FPIC, or deflects

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<sup>246</sup> *Community Toolkit*, above n 146, 52: 'a common source of tension in [British Columbia] emerges between traditional forms of governance and [regional governance] organizations that are funded and created through the *Indian Act*'.

<sup>247</sup> Anaya, 'Post-Declaration Era', above n 4, 193.

<sup>248</sup> See, eg, Ishita Petkar, *Conceptualizing Free, Prior and Informed Consent: Interpreting Interpretations of FPIC* (Master's Thesis, Columbia University, 2017) 6 <<https://academiccommons.columbia.edu/catalog/ac:v15dv41ntr>>. Petkar notes that as she 'quickly discovered, [best practices] examples were virtually nonexistent, with the exceptions based on extraordinary circumstances, or pre-existing external relationships between company and community'. See Papillon and Rodon, above n 24, 221–2: describing two instances in which FPIC processes resulted in a 'truncated version of consent that does not truly allow for the realisation of FPIC'. See also at 221: describing how, in an environmental impact assessment process in Quebec, the most affected Cree community was given the least input and the process was used to insulate the project from criticism while disempowering those most apt to object.

responsibility onto governments in defiance of the lessons of past experience.<sup>249</sup> On the other, some private actors have produced FPIC guidance that explicitly recognises how processes associated with Indigenous community's consent must be informed by the self-determination framework more generally. For example, Foley Hoag's FPIC implementation guide engages thoughtfully with how outside actors might strive to 'understand how a community makes decisions regarding land use' such as by 'ask[ing] how decisions traditionally were made regarding giving permission to another group to use community land seasonally for fishing or other activities'.<sup>250</sup> It goes on to consider different circumstances, such as instances in which traditional structures have eroded or in which parallel internal structures exist — and potential implications for outside actors, such as subsidising the revival of old structures or allowing time for Indigenous groups to devise new ones.<sup>251</sup> Further, it counsels against company-imposed consent processes as being 'inherently' opposed to the broader goals of the Indigenous rights movement, which includes 'continuation of [I]ndigenous culture' as an 'essential' component.<sup>252</sup> Finally, it notes that even where potential leader-representatives are identified, companies must stand ready to reevaluate if additional information calls into question community support for those leaders or the representativeness of the process through which they are engaged.<sup>253</sup> Yet in the private sector, recognition of the broader normative underpinnings of FPIC — and the specific implications that the normative backdrop has for how FPIC operates in practice — is generally lacking.

## VII REVERSING FPIC'S NORMATIVE DRIFT

In Part I, I suggested that company project proponents cannot occupy all three roles of (i) primary process designers, (ii) implementers and (iii) ex post facto evaluators. But open questions remain about which of the roles they should be displaced from, and what should replace them. There will be no one-size-fits-all solution given the diversity of circumstances, community structures, and

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<sup>249</sup> See, eg, Natural Resources Canada, 'Trainer's Manual: Exploration and Mining Guide for Aboriginal Communities' (Guide, Minerals and Metals Sector of NRCan, Aboriginal Affairs and Northern Development Canada, The Mining Association of Canada, the Prospectors and Developers Association of Canada, and the Canadian Aboriginal Minerals Association, 2014): discussing agreement-making and other aspects of Aboriginal engagement with no mention of FPIC or even of the role of consent; Canadian Association of Petroleum Producers, *Developing Effective Working Relationships with Aboriginal Communities* (Industry Practices Guide, 2006): the Canadian Association of Petroleum Producers argues that the duty to consult is a non-delegable Crown duty, and encouraging companies to take a risk management strategy to reducing the odds of challenges on the basis of failure to consult.

<sup>250</sup> Amy K Lehr and Gare A Smith, *Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges* (Foley Hoag, 2010) 39.

<sup>251</sup> *Ibid* 39–41.

<sup>252</sup> *Ibid* 40. Although cabining the significance of Indigenous communities expressing their collective will through FPIC-related processes as a mere 'cultural' matter is unnecessarily limiting, linking the process of giving consent to the broader platform at all is an important and rare step.

<sup>253</sup> *Ibid* 42: discussing a case in which Shell had to do this after it found out that the community did not feel included in the procedures initially devised.

histories of different Indigenous peoples.<sup>254</sup> Moreover, there is a need for academic humility regarding prescriptive interventions. Thus, these proposals are tentatively offered with an eye towards stimulating further dialogue about remedying FPIC's normative drift.

The most obvious entity to step in alongside or instead of corporate actors is the settler state. And where FPIC is required by treaty or by national constitution, the settler state is the duty-bearer.<sup>255</sup> Yet this approach brings its own complications. If the goal is to safeguard self-determination norms, a turn to states will not comfort many Indigenous peoples: for decades, Indigenous peoples have faced opposition, erasure or worse from states in the face of their calls for self-determination.<sup>256</sup> Further, settler states have already shown a willingness to manipulate FPIC in domestic articulations so as to facilitate a development agenda.<sup>257</sup> Thus, simply calling for a return of the state is no sufficient answer.

#### A *Support the Development of Community Protocols for Outside Actor Engagement*

One useful avenue for settler state engagement would be to support the development of community protocols within Indigenous peoples' communities.<sup>258</sup> A community protocol is a 'tool that can help communities to mobilise and reach their own decisions about how development should take place and how to ensure the protection of their fundamental rights'.<sup>259</sup> They typically include (i) clarifying and memorialising development priorities; (ii) articulating processes for giving or withholding consent; and (iii) providing other information to outside actors about ways of life, institutions, or other matters that

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<sup>254</sup> One reflection of this diversity is the fact that it has not been possible to develop a suitable definition of Indigenous that is appropriate in all 'regional application[s] and local implications': Erica-Irene A Daes 'An Overview of the History of Indigenous Peoples: Self-Determination and the United Nations' (2008) 21 *Cambridge Review of International Affairs* 7, 11.

<sup>255</sup> See, eg, *Constitution Act 1982* s 35 (Crown duty to consult); *ILO Convention 169* art 15(2).

<sup>256</sup> Rodolfo Stavenhagen, *The Ethnic Question: Conflicts, Development and Human Rights* (United Nations University Press, 1991) 118: describing state treatment of Indigenous peoples as genocide.

<sup>257</sup> See, eg, Gonzalo Bustamante, 'The Right to Consultation and Free, Prior and Informed Consent in Latin America: The Governmentality of the Extraction of Natural Resources' [2015] (Special issue) *Revue Québécoise de Droit International* 179; Dwight Newman, 'Ottawa's Sly Change on Consent May Damage Indigenous Relationships', *Globe and Mail* (online), 3 August 2017 <<https://www.theglobeandmail.com/opinion/ottawas-sly-change-on-consent-may-damage-Indigenous-relationships/article35863756/>> archived at <<https://perma.cc/F6FF-M42E>>.

<sup>258</sup> There are tools aside from community protocols that outside actors have similarly sought to develop with or offer to Indigenous communities to assist them in engaging mining companies. For example, there are several toolkits for negotiating IBAs. See, eg, *Community Toolkit*, above n 146. See also Rachel Knight et al, 'Preparing in Advance for Potential Investors: Guide 1' (Report, Columbia Center on Sustainable Development and Namati, 2018) <[http://ccsi.columbia.edu/files/2018/09/50-namati\\_ccsi-guide-1-full-online-lr-compressed.pdf](http://ccsi.columbia.edu/files/2018/09/50-namati_ccsi-guide-1-full-online-lr-compressed.pdf)>. These are typically narrower in scope, focused only on the negotiation, and for that reason community protocols may be preferable.

<sup>259</sup> Jael Makagon et al, 'Balancing the Scales: Community Protocols and the Extractive Industries — Lessons from Argentina, India, Kenya and Zimbabwe' (Report, Heinrich Böll Stiftung, 2016) 2 <[https://za.boell.org/sites/default/files/balancing\\_the\\_scales.pdf](https://za.boell.org/sites/default/files/balancing_the_scales.pdf)> archived at <<https://perma.cc/6UDG-HEGU>> ('*Balancing the Scales*').

are relevant for a project proponent to know about the community, according to the community.<sup>260</sup>

One option for settler states would be to support the development of community protocols by providing funding for organisations to work with Indigenous communities to develop such protocols *ex ante*. Support for this proposal can be found in the best practices guidance from the UN's Permanent Forum on Indigenous Issues on implementing FPIC. The Permanent Forum has urged states to find ways to address power imbalances between Indigenous peoples' communities and outside actors, as a necessity for ensuring that consent is 'free' from coercion.<sup>261</sup> One way to implement this best practice guidance, which has been ignored in practice in many cases, is to support development of community protocols.

Some communities have already sought to take steps to democratise the process of selecting representatives and determining priorities for negotiation, independent of the community protocols framework.<sup>262</sup> For example, the Lutsel K'e Dene First Nation established a committee responsible for reviewing applications from mining companies.<sup>263</sup> However, broadening the institutional development process within Indigenous communities remains beneficial, given that the Lutsel K'e Dene — and many others — have felt that actual negotiation processes excluded important community views, resulting in skewed deals, despite attempts to prepare in advance.<sup>264</sup> As such, providing support for the development of community protocols builds on goals that have emerged organically from some Indigenous communities, and offers a way to partially mitigate power imbalances in negotiating IBAs.

#### B *Provide Additional Normative Guidance on 'Consent' in the Context of FPIC*

Another approach to counteracting FPIC's normative drift would be to provide additional normative guidance from independent sources that are less apt to reflect a narrowly commercial agenda. For such guidance to be useful, it would have to address the practical problems associated with implementing FPIC.

Guidance offered from the UN's Expert Mechanism on the Rights of Indigenous Peoples ('EMRIP') to date has not sufficed. EMRIP has addressed Indigenous peoples' right to participate in decision-making in two separate

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<sup>260</sup> See generally *ibid*.

<sup>261</sup> Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples*, 4<sup>th</sup> sess, Provisional Agenda Item 4, UN Doc E/C.19/2005/3 (17 February 2005) [23]–[24], [46].

<sup>262</sup> Community protocols have an associated methodology for developing the final guidance. See generally *Balancing the Scales*, above n 259.

<sup>263</sup> Viviane Weitzner, "'Dealing Full Force': Lutsel K'e Dene First Nation's Experience Negotiating with Mining Companies' (Report, The North South Institute and Lutsel K'e Dene First Nation, 2006) 7.

<sup>264</sup> *Ibid* 12–13.

reports, one of which focuses on extractive industries.<sup>265</sup> The reports endeavor to outline good practices vis-à-vis Indigenous peoples' participation in decisions, including through FPIC. Both reports operate at the level of principle, rather than concrete implementation guidance. The first report deems it 'likely' that the 'most significant indicator of good practice is ... the extent to which Indigenous peoples were involved in the design of the practice and their agreement to it'.<sup>266</sup> Other indicia that a practice is good include that the practice:

allows and enhances [I]ndigenous peoples' participation ... allows [them] to influence the outcome ... realis[e] [their] right to self-determination ... [and] includes ... robust consultation procedures and/or processes to seek [their] free, prior and informed consent.<sup>267</sup>

When the report turns to practical problems, it continues to operate only at the level of principle. For example, on the subject of historical or traditional institutions no longer existing, the report clarifies, 'internal decision-making processes' need not be 'traditional in a historical sense' but may 'have evolved over time ... sometimes in response to external influences', possibly including '[agreement] with the State'.<sup>268</sup> The report makes clear that Indigenous peoples' conception of the institutions that represent them should prevail over externally imposed conceptions when it asserts that in so far as 'institutions continue to receive support from communities', Indigenous peoples have a right to maintain those institutions despite non-recognition by the state.<sup>269</sup>

This report was justifiably seen as insufficient, especially regarding consent and the material rights it was meant to safeguard.<sup>270</sup> In the follow-up report issued a year later, EMRIP sought to address these concerns. However, it continued to operate at too high a level of generality. For example, it asserted that states have 'an obligation to provide businesses and [I]ndigenous peoples with clarity on how the right of [I]ndigenous peoples to participate in decision-making can be realized'.<sup>271</sup> The report further urged both states and companies to 'bear in mind' the right of Indigenous people to 'determine their own representatives ... in accordance with their own procedures' and further to 'maintain ... their own decision-making institutions'.<sup>272</sup> Seemingly after having set itself up to establish more robust guidelines, the report hedges by allocating equivalent responsibilities to Indigenous peoples and governments: on the one hand, outside actors are told, 'account should be taken of potential changes in the

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<sup>265</sup> Human Rights Council, *Final Study on Indigenous Peoples and the Right to Participate in Decision-Making*, 4<sup>th</sup> sess, UN Doc A/HRC/EMRIP/2011/2 (26 May 2011) ('*Right to Participate*'); Human Rights Council, *Follow-Up Report on Indigenous Peoples and the Right to Participate in Decision-Making, with a Focus on Extractive Industries*, 21<sup>st</sup> sess, Agenda Item 5, UN Doc A/HRC/21/55 (16 August 2012).

<sup>266</sup> *Right to Participate*, UN Doc A/HRC/EMRIP/2011/2, [13].

<sup>267</sup> *Ibid.*

<sup>268</sup> *Ibid* [16].

<sup>269</sup> *Ibid* [17].

<sup>270</sup> See, eg, Human Rights Council, *Report of the Expert Mechanism on the Rights of Indigenous Peoples on its Fourth Session*, 18<sup>th</sup> sess, Agenda Item 5, UN Doc A/HRC/18/43 (19 August 2011) 10 [31].

<sup>271</sup> Human Rights Council, *Follow-Up Report on Indigenous Peoples and the Right to Participate in Decision-Making, with a Focus on Extractive Industries*, 21<sup>st</sup> sess, Agenda Item 5, UN Doc A/HRC/21/55 (16 August 2012) annex 15–16 [5].

<sup>272</sup> *Ibid* annex 18 [15].

traditional authority structures of Indigenous people as a result of outside influences'.<sup>273</sup> On the other, Indigenous people are told they 'should make clear to governments and extractive enterprises who should be consulted and from whom to seek consent'.<sup>274</sup> As a whole, the report fails to place specific duties on certain parties or outline concrete steps that would enable fulfilling FPIC's normative agenda. In this respect, EMRIP's past reports displays defects similar to those of other sources of guidance.<sup>275</sup>

Notably, however, EMRIP has prepared a new study on FPIC for presentation to the Human Rights Council in September 2018.<sup>276</sup> The draft study emphasises that as 'a manifestation of [I]ndigenous peoples' right to self-determine their political, social, economic, or cultural priorities ... FPIC is wider in scope than, and differentiated from ... "participation" and "consultation"'.<sup>277</sup> It thus explicitly recognises that a goal of Indigenous peoples' participation in decision-making is not just to influence outcomes, but also to 'revitalise and restore Indigenous peoples' own decisions-making [sic] and representative institutions that were also either disregarded or abolished'.<sup>278</sup>

Turning to concrete implications, the draft study comports with certain of my recommendations in identifying things that 'should occur'. These include that Indigenous peoples should (i) have the 'freedom to be represented as traditionally required'; (ii) 'determine how much and which of their institutions represent them'; (iii) be allowed to 'guide and direct the process of consultation' whether that means 'being consulted when devising the process' or 'us[ing] their own protocols on consultation where available'; and (iv) 'contribute to defining methods, timelines, locations, assessment and evaluation intervals'.<sup>279</sup> Notably, the draft study makes two moves that arguably transform these principles from exhortations into purported requirements for consent to be valid. First, it defines (i)–(iv) as requirements for satisfying the 'free' prong of FPIC, on the theory that failure to meet these requirements 'can hinder [I]ndigenous peoples' free will'.<sup>280</sup> Secondly, it states that 'consent can only be received for proposals when it fulfills the three threshold criteria of having been *free, prior* and *informed*'.<sup>281</sup> In this respect, the draft study is consistent with one of my principal arguments: that where a putative 'consent' results from a process that violates certain basic prescriptions of self-determined governance, it cannot rightly be called the consent of a community of Indigenous peoples.

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<sup>273</sup> Ibid.

<sup>274</sup> Ibid annex 18 [16].

<sup>275</sup> There are other examples, too, but generally they suffer the same deficiencies. See, eg, UN-REDD, 'Guidelines on Free, Prior and Informed Consent' (Guidelines, 2013).

<sup>276</sup> *Study on Free, Prior and Informed Consent* (2018) United Nations Human Rights Office of the High Commissioner <<https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/StudyFPIC.aspx>> archived at <<https://perma.cc/M4EJ-68WB>>.

<sup>277</sup> Human Rights Council, *Draft Study on Free, Prior and Informed Consent: A Human Rights Based Approach*, 11<sup>th</sup> sess, Agenda Item 4, UN Doc A/HRC/EMRIP/2018/CRP.1 (5 July 2018) 6 [14].

<sup>278</sup> Ibid 7 [17].

<sup>279</sup> Ibid 7–8 [19].

<sup>280</sup> Ibid 7 [19].

<sup>281</sup> Ibid 9 [23] (emphasis in original).

Other statements in the draft study also evince concern for problems highlighted in this article. For example, the draft study says agreements should not foreclose the possibility of future judicial or administrative challenges,<sup>282</sup> and that where possible the agreement should identify recourse mechanisms that were themselves designed or selected with the input of the Indigenous peoples in question.<sup>283</sup> It also suggests the FPIC processes should be documented in any resulting agreement, which would further facilitate ex post facto review.<sup>284</sup> Finally, it calls on states to ‘establish pre-conditions for an effective free, prior and informed consent’ — as well as ‘procedures ... to regulate, verify and monitor’ individual FPIC processes — in national legislation developed in consultation with Indigenous peoples.<sup>285</sup>

The draft study therefore represents a step in the right direction. If adopted, it could bring both greater clarity and more protection of Indigenous rights. However, there would remain the hurdle of encouraging uptake at the national or regional level. EMRIP’s new mandate — pursuant to which the FPIC study itself was undertaken — expands its powers and responsibilities with respect to disseminating and promoting best practices, assisting member states with implementation and engaging with national human rights institutions.<sup>286</sup> It remains to be seen how effectively implementation will be promoted.

### C *Direct Institutional Engagement in Implementation to Ensure a Level Playing Field*

There are a few reasons why introducing the mechanism of a neutral third-party merits consideration. First, even with additional normative guidance, it is likely that company actors under pressure to move forward with a project would truncate FPIC such that it fails to serve as a pathway to promoting self-determined governance. FPIC is a hurdle to projects breaking ground; often, it is among the last hurdles.

One way to counteract the tendency of companies to truncate FPIC would be to implement a system of third-party review that would be triggered whenever a project proponent holds out that a community of Indigenous peoples have consented. This third-party review likely would have to be carried out by an agency of the state, or a (national or supra-national) institution designated by the state but granted a measure of independence. Three such approaches are briefly explored here.

First, some settler states, especially in Central and South America, have already implemented permanent institutional mechanisms for engaging with FPIC processes. For example, since 1997, Colombia has had a government-facilitated Permanent Negotiation Roundtable with Indigenous Peoples (*Mesa*

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<sup>282</sup> Ibid 14 [39].

<sup>283</sup> Ibid 15 [43].

<sup>284</sup> Ibid.

<sup>285</sup> Ibid annex 21, 23.

<sup>286</sup> Human Rights Council, *Expert Mechanism on the Rights of Indigenous Peoples*, HRC Res 33/25, UN GAOR, 33rd sess, 41<sup>st</sup> mtg, Agenda Item 5, UN Doc A/HRC/RES/33/25 (5 October 2016, adopted 30 September 2016) [2](b), [2](d), [11].

*Permanente de Concertación con los Pueblos Indígenas*).<sup>287</sup> The Permanent Roundtable, established at the prompting of the Colombian government, reflects in part the mature Colombian constitutional law landscape on FPIC.<sup>288</sup> By contrast, Peru has a Human Rights Ombudsman whose portfolio includes Indigenous peoples and FPIC.

In both cases, the institutional mechanism plays a primarily policy-oriented function at present. The Permanent Roundtable is meant to be a forum for soliciting the views of Indigenous peoples in furtherance of their participation in national politics, and in this way advances participation norms generally.<sup>289</sup> By contrast, the Peruvian Ombudsman offers views on policy issues relevant to Indigenous peoples, such as the Peruvian *Law No 29785* which establishes rights to prior consultation under national law.<sup>290</sup>

Where such a forum exists, its mandate could be expanded to include ex post facto review of FPIC processes with an eye towards validating the legitimacy and representativeness of consent. Documentation provided to the forum could be sealed. Moreover, such an arrangement would allow for leveraging existing institutional knowledge and offering the prospect of accumulating additional institutional knowledge. Further, it may mitigate settler state concerns over sovereignty implicated by the other proposals discussed below. Housing ex-post review within an institution whose mandate includes policy stewardship appropriately locates the FPIC process in the domain of political, rather than technical or empty bureaucratic, functions.

On the other hand, experience with the Permanent Roundtable also provides reason for caution. At present, the Government wants to design — in partnership with the Permanent Roundtable — a law to regulate FPIC processes.<sup>291</sup> In an international forum in 2017, Indigenous peoples decried the draft law for diluting legal protections.<sup>292</sup> Progress on the law subsequently stalled.<sup>293</sup> This experience raises the question — even if it does not conclusively answer it — of how well federal government bodies can respond to, and safeguard, Indigenous communities' needs.

Secondly, there could be an appointed ombudsperson who was not a representative of the state, agreed in advance of a project. Such an approach has the benefit of ameliorating concerns over the settler state being aligned with the

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<sup>287</sup> See generally *Decreto 1397 de 1996* [Decree 1397 of 1996], establishing requirement of prior consultation of Indigenous communities. See also *Decreto 1320 de 1998* [Decree 1320 of 1998], establishing the Permanent Roundtable.

<sup>288</sup> See, eg, Corte Constitucional [Colombian Constitutional Court], Ruling T-129/11, 3 March 2011.

<sup>289</sup> See Guillaume Fontaine et al, 'The Politics of Accountability: Indigenous Participation in Colombian and Ecuadorian Oil and Gas Policies' (2015) 86 *Colombia Internacional* 17, 38.

<sup>290</sup> See Human Rights Ombudsman of Peru, 'El Derecho a la Consulta de los Pueblos Indígenas: Opinión de la Defensoría del Pueblo sobre Dictamen recaído en los proyectos de *Ley No 413/2006-CR, 427/2006-CR Y 2016/2007-CR*' [The Right to Consultation of Indigenous Peoples: Opinion of the Ombudsman's Office on the Report on the Bills of *Law No 413/2006-CR, 427/2006-CR and 2016/2007-CR*] (Report No 011-2009-DP/AMASPP-PP, May 2009).

<sup>291</sup> Garavito and Díaz, above n 124, 6.

<sup>292</sup> *Ibid.*

<sup>293</sup> *Ibid.*

project proponent against the Indigenous peoples in question.<sup>294</sup> For example, Canada loudly committed to ‘fully implement[ing]’ *UNDRIP*,<sup>295</sup> yet doubts persist as to the seriousness of the Canadian government’s commitment to anything other than the public relations benefits of being seen as embracing *UNDRIP*.<sup>296</sup>

Such an ombudsperson could be, but need not be, a national figure. In the international arena, there is significant expertise in FPIC methodologies. Perhaps the resources of EMRIP could be better deployed by providing a roster of individual, mutually-agreed upon reviewers who could come in to evaluate FPIC processes after the fact of (purported) consent, but before a project broke ground. In terms of the substance of this third-party reviewer’s work, I envision a process somewhat akin to a fairness hearing when the court evaluates a proposed class action settlement.<sup>297</sup> Without pushing the analogy too far, such an ‘FPIC fairness hearing’ might include written submissions from objectors, review of documents generated in the course of negotiations (including documentation of the consultation process), and so on. Such a reviewer would either need to be agreed in advance by the Indigenous communities and the project proponent on an ad hoc basis, or perhaps more realistically be drawn from a standing roster of FPIC methodology experts.

Thirdly, settler states could create unilaterally or by treaty a limited-purpose institution for the review of (either all, or only international, projects requiring FPIC). A useful model for such an undertaking could be found in the Mekong River Commission (‘MRC’). The MRC was created by treaty in 1995 for the purpose of transboundary river basin governance between countries in the Mekong River Delta, including Cambodia, Laos, Thailand and Vietnam.<sup>298</sup> The MRC liaises with relevant national ministries in member states, and has some policy-making, knowledge-production, and project-specific oversight functions vis-à-vis projects such as dams that occur in or impact the Mekong River or its tributaries.<sup>299</sup> Most relevantly, the MRC employs Procedures for Notification, Prior Consultation and Agreement (‘PNPCA’) with respect to individual projects.

The PNPCA was originally conceived as a purely state-to-state consultative process.<sup>300</sup> However, it includes various impact assessments, including an environmental impact assessment and a social impact assessment component,

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<sup>294</sup> Cf O’Faircheallaigh, *Negotiations in the Indigenous World*, above n 28, 152–3: describing the Canadian federal and local governments as ‘determined that development of [the] Ekati [diamond mine] should not be prevented or substantially delayed’ by negotiations with aboriginal groups, because it was expected to contribute \$2.5 billion to GDP and generate \$39 million worth of jobs.

<sup>295</sup> ‘Fully Adopting *UNDRIP*: Minister Bennett’s Speech at the United Nations’, *Northern Public Affairs* (online), 11 May 2016 <<http://www.northernpublicaffairs.ca/index/fully-adopting-undrip-minister-bennetts-speech/>> archived at <<https://perma.cc/M8NP-L5WF>>.

<sup>296</sup> Newman, above n 257.

<sup>297</sup> See *Federal Rules of Civil Procedure*, 4 USC § 23(e)(2).

<sup>298</sup> *Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin*, 2069 UNTS 3 (entered into force 5 April 1995). China has observer status.

<sup>299</sup> For an excellent book-length treatment of the Mekong River Commission, see Boer et al, above n 167.

<sup>300</sup> *Ibid* 112: ‘In its strictest interpretation, the letter of the [Procedures for Notification, Prior Consultation and Agreement (‘PNPCA’)] only requires interstate consultation’.

which has offered a doorway to broader participation.<sup>301</sup> Thus, the PNPCA (and the MRC more broadly) has become a site of contestation for civil society, local communities, and others to advance their agenda and secure their livelihoods as they relate to the river basin.<sup>302</sup> Moreover, and responsive to state concerns in the FPIC context, the MRC does not hold final say pursuant to the PNPCA.<sup>303</sup> Final decisions are left to ordinary politics, as they ultimately are with respect to FPIC.<sup>304</sup> Yet, it is clear that the MRC's operation has served to crystallise community and civil society efforts by creating a public record and an institutional home for assessments of the effects of proposed projects.

These suggestions are meant to be evocative only. Other ideas should be put forth that reflect different local contexts. Perhaps there is a role for EMRIP, the Permanent Forum, or the Special Rapporteur (although capacity issues spring to mind as an important concern). As noted earlier, I seek not to solve, but rather to raise the profile of, a problem (purported instances of consent resulting from FPIC processes that disserve FPIC's goals) and frame it in a particular way (as a problem of undermining self-determination).

### VIII CONCLUSION

Even as FPIC universalises as a matter of both law and (even more so) one of practice, it threatens to become unmoored from its normative underpinnings. In this paper, I have sought to foreground those normative underpinnings. Doing so requires two things: taking the 'C' in FPIC seriously, and recognising that to speak of Indigenous peoples consenting is to implicate core issues of self-determined governance that confront Indigenous communities, and around which they have rallied for decades. The perverse possibility that this paper hopes to help forestall is that FPIC, which emerged from self-determination norms, will in its implementation undermine those very norms by truncating processes of internal governance.

The problem lies in part, but not entirely, with corporate project proponents; however, solutions cannot come from them alone. I propose in this paper that we demand more of states and international initiatives by way of providing normative guidance regarding, and review of, FPIC processes. There will not, and cannot, be one-size-fits-all solutions to this problem at the state, company group, or international level. However, the tentative proposals offered here are meant to serve as the beginning of a conversation about what tailored solutions, appropriate for individual contexts, may look like.

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<sup>301</sup> Ibid: '[The PNPCA] has progressively evolved into a practice of consultation involving the public, civil society, local government and other stakeholders, even though such broader consultation is not mandated by the PNPCA'.

<sup>302</sup> See generally *ibid* 120–50.

<sup>303</sup> *Ibid* 108: 'the prior consultation is clearly not regulatory in a hard, enforceable sense of authorizing a veto, requiring a specific decision, or providing for the imposition of sanctions'.

<sup>304</sup> Efforts to organise with Indigenous communities to prepare for confronting project proponents are crucial: the more politically mobilised a community is, the better they will fare in any negotiation. For one recent analysis that considers some of these political issues, see Sam Szoke-Burke and Kaitlin Y Cordes, 'Mechanisms for Consultation and Free, Prior and Informed Consent in the Context of Investment Contracts' (Working Paper, Columbia Center on Sustainable Investment, March 2017) (draft paper, on file with author).

This case study of FPIC as interpreted by corporations also holds broader lessons about the corporate internalisation of human rights and environmental norms. The primary innovations — at least of those gaining the most traction — in the business and human rights agenda are being put forward by the business community.<sup>305</sup> Thus, it is crucial to engage with the substance of the norms ostensibly accepted or even championed by companies. In the case of FPIC, it appears that companies are modifying the substantive content of the norm. Companies' engagement has thus led to what I call 'normative drift'. In addition to corrective action in the FPIC arena, then, it is necessary to take seriously the content of the norms being articulated by companies in a range of areas as they internalise additional elements of the human and environmental rights agenda.

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<sup>305</sup> See, eg, Business & Human Rights Resource Centre, *5 Years on from Rana Plaza Building Collapse — Labour Rights Organizations Urge Brands to Sign Renewed Bangladesh Accord on Fire & Building Safety* (18 April 2018), 7 <<https://www.business-humanrights.org/en/5-years-on-from-rana-plaza-building-collapse-labour-rights-organizations-urge-brands-to-sign-renewed-bangladesh-accord-on-fire-building-safety>> archived at <<https://perma.cc/R44Y-VC5P>>.