Making Free Prior & Informed Consent a Reality
Indigenous Peoples and the Extractive Sector

EXTRACT

Cathal Doyle and Jill Cariño

Indigenous Peoples Links (PIPLinks)

Middlesex University School of Law

The Ecumenical Council for Corporate Responsibility

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7: Conclusion and areas for further discussion

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

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

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

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

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

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

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

What are the bases for the requirement for FPIC?

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

When consent is required?

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

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

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

The implementation of FPIC cannot be divorced from the political and legal realities in particular states. Corporations have often presented concession agreements from the State as fait accompli that excuses them from any recognition of FPIC. Therefore an optimum FPIC process would
necessarily begin well before any corporation seeks permits and other authorizations from the State.

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

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

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

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

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

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

What is the role of corporations in capacity building?

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

What are adequate benefit sharing models?

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

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

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

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

General principles to guide corporate and other actors

1. Contemporary international human rights law and other standards constitute a framework of obligations which establishes the minimum acceptable standards of conduct for all actors, including States and corporations in the context of projects within indigenous territories. The UN Declaration on the Rights of Indigenous Peoples (henceforth UN Declaration) is the clearest expression of indigenous peoples’ rights and encapsulates the international obligations of all actors which impact on indigenous peoples’ enjoyment of those rights. Recognition of the rights affirmed in the UN Declaration, and the responsibilities and duties flowing from them, provides the basis for an emerging framework for corporate action in indigenous territories. However, implementation of this framework is in its infancy. The rapid acceptance and implementation of the provisions of the UN Declaration is necessary for the protection of indigenous peoples’ rights and the realization of a stable environment in which negotiations, potentially leading to secure investments, can occur. Such an environment will benefit all parties.

2. Collective acknowledgement by the mining industry and States of the legacy of mining in indigenous peoples’ territories is fundamental to realigning its relationship with indigenous peoples. This legacy consists of abandoned sites and disastrous human rights and environmental records. In accordance with the responsibilities of States and corporations and the international community processes of reconciliation and avenues of compensation and redress should be established and implemented.

3. Improvements in corporate and State practice are absolutely essential. For these to be realized adequate education and training on indigenous rights is necessary for all actors, including indigenous communities, employees and contractors of mining companies, central and local government officials, legal practitioners, and members of the police, army and security forces.

4. Effective independent and credible monitoring, as well as readily accessible grievance and redress mechanisms, are necessary for the realization of a climate in which good faith engagements are possible.

5. Operationalization of FPIC is dependent on a genuine acknowledgment of the right of all indigenous peoples to define their own development paths. This necessitates respect for their rights to be informed and consulted, and to determine under what conditions, investment and development projects are allowed to proceed within their territories. This includes the right to accept or reject a particular proposal.

6. As part of their right to give or withhold consent to project it is an essential right of indigenous communities to be able to consider project proposals and negotiate the contractual conditions to which they do or do not consent. Corporations that seek to develop a mining project will likely invest large amounts of resources in its development. It is therefore a reasonable expectation by companies that, if they abide by their contractual obligations, their mounting investment is protected from arbitrary expropriation or unilaterally imposed supplementary provisions. Entering into formal contractual agreements as part of the provision of FPIC, which include a functioning grievance mechanism, provides a way to protect both the indigenous and corporate party.

7. The requirement for “informed consent” implies that for consent to be given, an informed understanding of the potential impacts is required. The requirement therefore must apply at each stage in a project life-cycle, from concession application through to project closure. The human rights framework stipulates that consent is required prior to concession issuance and subsequently for major activities such as exploration and exploitation and any substantial changes to project plans which have material impacts on indigenous peoples’ rights. Clarity and agreement is required in relation to the precise points at which consent is to be obtained, and
the manner in which corporations should respect this obligation in contexts where States fail to do so.

8. The use and application of FPIC within the framework of indigenous law has significant implications for national legal systems. These implications need to be explored in greater detail and a compilation of existing and evolving experience produced in a systematic manner.

9. Most States currently do not have sufficient institutional capacity, political will or know-how to establish and maintain legal and administrative systems which accord adequate respect to indigenous decision making and judicial processes. This is particularly the case in the context of investment and contractual arrangements with corporate entities. The provisions of the UN Declaration therefore pose a major challenge to States, particularly those that are relatively under-resourced, and are institutionally fragile. In this context the requirement for FPIC must be addressed in investment agreements with corporations such that these States are not placed in the untenable position of being expected to compensate corporations in order to uphold indigenous peoples’ rights.

10. FPIC processes should be comprehensive and respect the collective and individual rights of indigenous peoples, including the rights of indigenous women. Corporations and other actors should not, however, generalize and assume that women are excluded in all indigenous peoples’ decision-making processes. There are many indigenous peoples where women have leading roles in decision making. It is also possible for communities to institute their own mechanisms to address issues around the lack of women’s participation where such issues exist. Women should be empowered to participate, but this must happen through internal procedures in a culturally appropriate manner and not be as a result of imposed procedures. Indigenous cultures are not static, and capacity-building with communities through culturally appropriate mechanisms can help them in addressing such issues.

**Recommendations to mining companies**

1. Corporations should commit to respect international standards on indigenous peoples, especially the UN Declaration, ILO Convention 169 and the General Recommendation number 23 on indigenous peoples of the UN Committee on the Elimination of Racial Discrimination. These international standards should be mainstreamed within corporate policy and practice, integrated into their conduct of human rights due diligence, and promoted through the training and career development of their staff. Corporations should operate ‘as if’ these international standards were recognized under national law while also actively promoting their application within States which operate to lower standards.

2. Corporations need to adopt policies which clarify their human rights obligations under international standards, irrespective of national legislation. They also need to commit to those obligations flowing from the legislation and policies of home and host States.

   They should consider, in dialogue with affected indigenous rights holders and other relevant actors, the most effective ways to manifest their binding commitment as distinct corporations to operate up to, if not beyond, international standards on indigenous peoples’ rights.

3. Corporations should welcome and support the establishment of credible independent monitoring of their activities which enjoys the confidence of all the affected parties.

4 Corporations should acknowledge and respect the fact that FPIC is viewed by indigenous peoples as a principle which provides for their control over the future development of their territories, and as a manifestation of that control. They should accept that FPIC is a process which is to be defined and managed by the indigenous authorities and communities whose territories and futures are impacted by proposed mining projects. Consequently they should not be party to corporate, State or third party defined processes imposed on indigenous peoples. Where indigenous peoples have defined their own FPIC protocols or policies these should be respected.
5. The appropriate bodies for companies to dialogue, and or negotiate, with should primarily be defined by local indigenous authorities. To address company concerns in relation to competing claims of different indigenous representative bodies, corporations should be guided by the UN rights framework for the identification of indigenous communities, which includes self-identification and identification by others. In practice inclusive and extensive cooperation with all indigenous authorities and the participation of corporate representatives in initial open inclusive and public dialogue with the community is one effective tool towards addressing this perceived problem. Affected peoples and communities need to be identified in a manner that respects local processes, customs and perspectives.

6. Corporations must adapt their existing internal decision-making processes to take account of the need to engage with indigenous peoples’ processes of local dialogue and decision making. Indigenous decision-making processes may often be of a more protracted nature than certain aspects of corporate procedures. In addition indigenous modes of engagement may rely more on oral communication and face to face discussions. As a result, successful and lasting outcomes may frequently require a significant allocation of time and resources.

7. Corporations need to make provisions to address how the relative poverty, marginalization and frequently oppressed status of many indigenous communities act as barriers to credible FPIC processes. They should support efforts to partially redress this balance in a manner consistent with the aspirations of the indigenous peoples, primarily where such requests emanate from indigenous authorities. Funding should be made available for capacity building and access to independent legal and technical advisers of a community’s own choosing. Companies will have to be mindful of not influencing, or being perceived as influencing, the outcome of the FPIC processes, so independent structures and oversight will be essential. To establish FPIC processes it is essential that communications which serve to inform discussions are in locally appropriate languages, and avoid overly technical language. Full access must also be accorded for technical documentation and independent review mechanisms.

8. FPIC should be viewed as an indigenous governance process. Corporations, and all third parties involved, need to guard against engagements that might be viewed as seeking to exert pressure on community members or key office holders, or which unduly influence or corrupt outcomes though offering incentives and rewards prior to local decision-making.

9. FPIC process must be broad based and include all indigenous peoples and communities whose rights and environment are impacted. Impact areas have to be based on the social, cultural and spiritual links to territories as well as the direct physical impact area.

10. Companies should operate under the presumption that there are rights holders over the land into which they wish to enter and that prior engagement is required with them.

Recommendations to indigenous peoples

1. Indigenous peoples and communities need to take steps to prepare and strengthen their structures in order to be better equipped to deal with external agents, such as corporations.

2. Indigenous peoples are advised to be proactive in asserting their rights in relation to extractive and other projects. This should ensure, where possible, defining, agreeing and codifying the decision-making processes of the community with regard to any FPIC process. They should consider their position with regard to community development alternatives. This may involve demanding the time and resources which communities deem necessary in order to establish enabling conditions for FPIC such as: adequate capacity building, institution strengthening, elaboration of indigenous defined FPIC processes, formal recognition of land and autonomy rights, and the formulation of self-determined development plans.

3. Indigenous peoples collectively have a range of experiences in resisting, cooperating or negotiating with, mining companies. They also had the empowering experiences of defining their own protocols, conducting their own impact assessments and developing their own social, cultural, environmental and economic baseline data. Indigenous groups who have had less
exposure to mining projects should learn from these and other experiences. The establishment of a database to share such experiences could be of value to indigenous peoples globally.

4. In order to strengthen community capacity to consider and evaluate project proposals, to conduct effective negotiations, and to assert their decision-making rights, indigenous peoples should insist on improved education on their rights. This should include education on relevant national processes and structures and possible avenues of complaint and redress at local, national and international levels. Indigenous peoples should also seek to better understand corporations, addressing issues such as their processes of decision-making, relationships with other companies, financial resources and investment sources, policies, and track record, particularly in relation to FPIC and benefit-sharing agreements.

5. Communities need to develop their own analytical skills, or have guaranteed access to independent experts with such skills, so that they are in a position to understand the legal and technical documentation provided by companies. In the spirit of FPIC the absence of the capacity to engage with the information provided could be viewed by communities as sufficient grounds to reject any proposal until these conditions are in place.

6. Indigenous communities should insist that they decide where and under what conditions negotiations will be held. If this choice of location is denied, or access is denied to some concerned parties, or consultations and negotiations are tainted by military or police threat or duress this would constitute sufficient grounds to reject any proposal until the appropriate conditions are in place.

7. Learning from communities who have direct experience including similar projects to those proposed can serve to inform local decision-making. Communities should ensure information excursions organised by corporations are directly comparable to the proposed project, and are not seen as a form of personal inducement which could isolate those attending from their community.

8. Participation in or the building of alliances between indigenous peoples or with broader networks may provide communities with better access to support in the context of ensuring that FPIC processes are conducted under the appropriate conditions.

9. In all consent-seeking consultations the indigenous organisers should ensure that all appropriate bodies and groups are invited, including representatives of the directly or indirectly affected peoples and any advisers or observers chosen by them.

10. When defining their position, strategies and demands in the course of negotiating and engaging in FPIC processes, indigenous organizations should familiarise themselves with their internationally recognised rights and align their demands with recognised international standards and instruments. These include ILO Convention 169, the UN Declaration, and other international human rights standards and jurisprudence. Good examples of laws, policies and court ruling in other States could also be drawn on.

**Recommendations to States**

1. Ratify International Labour Organization Convention 169 and ensure the genuine implementation of the UN Declaration and other relevant human rights obligations as members of the international community. Securing indigenous peoples’ right to self-determination and their inherent rights to ancestral territories is an essential prerequisite for any negotiation on corporate access to indigenous lands.

2. Where applicable the home States of mining corporations should enact extraterritorial legislation to hold their companies better to account for violations of indigenous peoples’ rights overseas and establish affordable, accessible and responsive fora where indigenous peoples can bring allegations of abuses and complaints.

3. In order to ensure that the enabling conditions necessary to secure respect for indigenous peoples’ rights are in place States must enact legislation and take appropriate administrative measures to:
a) recognize the existence of indigenous peoples in accordance with international criteria;
b) recognize their territorial, property, cultural, religious and self-determination and governance rights, including their right to practice their customary laws and maintain and develop their traditional authorities;
c) require indigenous peoples’ FPIC when developments, such as mining projects in or near their territories, potentially impact on their enjoyment of these rights.

4. Review the broader national regulatory framework, in consultation with indigenous peoples, including that pertaining to mining and environmental impact assessments, in order to render it consistent with indigenous peoples’ rights, the principles of non-discrimination and access to information, and any other safeguards necessary to secure these rights.

5. Ensure that adequate and culturally appropriate grievance mechanisms are available to indigenous peoples, through which they can address allegations of State and corporate violations of their rights, including their decision-making rights over developmental activities in their territories.

6. Guarantee that where indigenous peoples wish to do so they are accorded the necessary time and space to formulate their own FPIC protocols or policies. Where these exist commit to respecting, and requiring corporate respect of, their contents.

Recommendations to the financial sector

1. Engage in a comprehensive dialogue with indigenous peoples to better understand the issues they face and in order to understand how indigenous peoples seek to operationalize FPIC.

2. Ensure that their clients have policies in place which adhere to the principles of the UN Declaration, including the requirement for FPIC

3. Require rigorous due diligence regarding the potential impact of projects on the rights of indigenous peoples and support efforts to provide credible independent monitoring.

4. Ensure that clients indicate whether Indigenous Peoples will be impacted by proposed mining projects and, if this is the case, have obtained or commit to obtaining their FPIC prior to concession issuance and project commencement. Failure to obtain an impacted indigenous community’s FPIC should constitute grounds for disinvestment.

Recommendations to civil society organisations

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

2. Meaningful indigenous participation is essential where civil society bodies initiate processes to dialogue with the industry in relation to FPIC.

Suggestions to the international community

1. Given the limited confidence which many indigenous peoples may have in State institutions and the mining industry, the international community has a constructive role to play in supporting
the capacity-building of indigenous peoples through education on issues such as indigenous rights and the extractive industries. It can also aid the establishment of independent monitoring procedures. These initiatives might be facilitated through existing offices and procedures, or might be considered within the framework of establishing a new dedicated structure.

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