FPIC RIGHT OF INDIGENOUS PEOPLE AND LOCAL COMMUNITIES IN RESOURCE DEVELOPMENT: LESSONS FROM THE INTER-AMERICAN JURISPRUDENCE

by

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1. Introduction

The need for development in the community of nations was one of the many reasons for the formation of the United Nations after World War II and the organisation has pursued that objective using various strategies and institutions believing that peace and security can be achieved through development. Trade and investment is one major means of achieving development especially within the context of nations. States, therefore, make efforts to influence foreign direct investments into their countries on the understanding that translate into development. Development and investment projects especially in the areas of natural resource development involve projects in oil, gas, mining, forestry, fisheries, and so on. Interestingly, these projects are usually take place in remote areas inhabited by indigenous peoples and communities.

The State has a right to explore and exploit it resources within its territorial boundaries and this includes areas inhabited by Indigenous Peoples (IPs) and communities. In other words, the State has the sovereign right to development of its natural resources and can exercise this right by granting concessions and licences to private investors to develop these resources. On the other hand, IPs and communities on whose land the development or investment project is to take place have the right to participate in the decision-making processes, and should thus be consulted by the State.[1]

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[1] Expert Mechanism on the Rights of Indigenous Peoples, Human Rights Council**,** Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-making, A/HRC/15/35 (Aug. 23, 2010); Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, Extractive Industries Operating Within or Near Indigenous Territories, A/HRC/18/35 (July 11, 2011).

This paper, accordingly, seeks to examine the extent to which the State's right to the development of its natural resources can be balanced against the right of indigenous peoples to be consulted by the State in the process. The paper will in achieving this objective employ an analytical approach in looking mainly at the international law norms and standards on the right to development and on the duty to consult. The essay will rely more on the jurisprudence emanating from the Inter-American System because of its leading pronouncements in the area, and on international and domestic law instruments on the discourse.

This paper is important because determining the boundaries of the State's right to development of its natural resources and balancing it against the right of indigenous peoples to be consulted can help in providing the enabling framework on which all stakeholders – governments, companies, indigenous peoples, lenders, and civil society organisations can proceed with investment projects. It will also provide lawyers, commercial analysts, and negotiators with the requisite knowledge when engaging in development or investment projects involving the State and indigenous peoples.

The paper is structured in the following manner – section two that follows the introduction is the conceptual framework that provides an understanding of the concepts such as the 'development', 'right to development' (RTD) and the human rights (HRs) links. Section three examines the States obligations in development projects in relation to the rights of IPs to highlight that the State's duty to consult IPs in development projects is an obligation arising from international law. Section four then explores, on the basis of statute law, case law and other international instruments, free, prior and informed consent (FPIC) and whom to consult in development projects with a view to showing that there are minimum content requirements with the duty to consult and obtain consent of indigenous peoples. Section five then concludes by looking at some of the broader implications for investment and development projects on lands belonging to indigenous peoples.

The essay will argue that in balancing the right to development and the duty to consult, a State has to obtain the FPIC of IPs and this requires complying with the minimum consultation requirements established under international laws, norms and standards as expounded by the Inter-American System with its evolutionary approach. Thus in obtaining FPIC, a State must comply with the requirements of the minimum duty to consult by consulting with IPs in good faith; at an early stage; on an on-going basis; from representatives of IPs' traditional institutions; in a culturally appropriate way; and with an agreement-reaching mind-set.

2. Resource Development Rights and Sustainable Development

The United Nations Declaration on the Right to Development (RTD)[2] conceptualises the right to development as "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."[3] The right to development also talks of right to self-determination of peoples to the 'full sovereignty over all their natural wealth and resources'.[4] The State has the obligation of creating conditions to realise this right either by acting alone or in partnership with others.[5] The State under international law has the right to explore and exploit its natural resources in furtherance of the RTD and this right includes the right to grant licences and concessions to companies to undertake the task.[6] The RTD interestingly includes all rights – civil and political rights, and economic, social and cultural rights. It thus includes the right to participation recognised under various international and domestic laws[7] that is relevant to this paper. Within the context of the paper the right to development is conceptualised as the self-determination rights of the State to explore and exploit its resources, and not that of indigenous peoples to exercise the same right as recognised under international law principles, norms and standards.

However, grasping development's meaning is difficult as it is seems a normative concept that is subject to value judgements.[8] It is defined as 'multi-dimensional and multi-sectoral process, involving social, economic and political change aimed at improving people's lives'.[9] The UN that was mandated to seek global development had emphasised 'human development' that includes to lead long and healthy lives, to be knowledgeable, to have access to the resources needed for a decent standard of living and to be able to participate in the life of the community.[10] Another perspective referred to as the capability approach conceives human development as people's freedom to develop and live their own lives.[11]

[2] UN Declaration on the Right to Development, adopted in 1986 by the UN General Assembly (GA) in its resolution 41/128
[3] Article 1.2 Declaration on the Right to Development
[4] *Ibid.*
[5] *Ibid.,* Article 3
[6] See articles 56 and 76 of the United Nations Convention on the Law of the Sea, (adopted 10 December 1982, entered into force 16 November 1994) 21 ILM 1245 (1982)
[7] Article 21, United Nations Declaration on Human Rights, 10 December 1948, 217 A (III), available at: http://www.refworld.org/docid/3ae6b3712c.html [last accessed 2 May 2013]; Article 23, American Convention on Human Rights, 9 ILM 99 (1969); Article 13, African Charter on Human and Peoples Rights, 21 ILM 58 (1982); and in relation to participation in environmental decision-making see Convention of the United Nations Economic Commission for Europe (UNECE) on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1988 (Aarhus Convention)
[8] S. Alkire and S. Deneulin, "A Normative Framework for Development" (n.d) available at: http://css.escwa.org.lb/sd/1382/chapters1-3.pdf (last accessed 2 May, 2013)
[9] *Ibid.*
[10] R. Jolly, et al, "The UN and Human Development", UN Intellectual History Project, Briefing Note 8, July 2009, available at: http://hdr.undp.org/en/media/Jolly%20HDR%20note%20%20UN%20Intellectual%20History%20Project%208HumDev.pdf (last accessed 2 May, 2013)
[11] I. Robeyns, *The Capability Approach: A Theoretical Survey*, Journal of Human Development, 6(1), 2005, pp.93-114; S. Amartya, "The Concept of Development", In H. Chenery and T.N. Srinivasan (eds.) *Handbooks of Development Economics*, Vol. 1 (Elsevier: North-Holland, 1988) pp. 2–23

Thus from a limited conceptualisation of 'human development' as economic growth, human development focused on human well-being that emphasises economic and political freedom and empowerment of peoples.

The latest in the vocabulary of the United Nations and globally is 'sustainable development', a concept that is still evolving but defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[12] This means that development has to balance competing interests and needs of different people and groups falling in the same generation and forthcoming generations especially in environmental, social, and economic areas that are interrelated. To achieve this balancing, governments have to be equitable, democratic and participatory otherwise development becomes unsustainable. In the context of the right to development of natural resource by the State and the duty to consult indigenous peoples, it means that investment development projects in the natural resource sector that will impact adversely environmentally, socially and economically on indigenous peoples have to involve the latter in the process of decision-making. This ensures that development projects have achieved the standard requirement of being equitable, democratic and participatory. In a world where decisions taken at the national level have international consequences, States do not want to be seen as 'exporting unsustainability'[13] because people that are at the centre of development are impacted.

Another dimension to sustainable development that focuses on peoples is that human beings are considered to be at the heart of sustainable development and are thus 'entitled to a healthy and productive life in harmony with nature'.[14] Human rights are, therefore, at the very core of sustainable development with the effect that development and investment projects have to be balanced against the human rights obligations of States. It means that apart from the obligation not to harm the environment of neighbouring States[15] as a limitation of the sovereign right of States to explore and exploit their resources, another limitation in resource development projects is that States have to respect and comply with human rights including those of indigenous peoples. That is, a State has to respect the human rights of its citizens such as the right to participation in decision-making for proposed investment projects with possible adverse impacts when contemplating the exercise of its own right to develop resources within territorial boundaries.

[12] World Commission on Environment and Development (WECB), *Our Common Future* (Oxford: OUP, 1987) p. 43

[13] _____What is Development, (n.d) available at: http://www.worldbank.org/depweb/english/beyond/beyondco/beg_01.pdf (last accessed 2 May, 2013)

[14] Rio Declaration, adopted by the United Nations Conference on Environment and Development in 1992 (also called the Earth Summit, held in Rio de Janeiro, Brazil)

[15] X. Hanqin, *Trans-boundary Damage in International Law* (Cambridge: Cambridge University Press, 2003)

Development and investment projects in relation to natural resources such as concessions for oil and gas development, building of ports, roads, dams, etc. have to be done sustainably so as not to impact adversely on the environments, economy, social and cultural life of indigenous peoples. Natural resource investment projects have to thus respect human rights of indigenous peoples where the development takes place. It is well-documented that the activities of extractive and logging companies impact negatively on indigenous peoples and communities causing displacement, relocation, water contamination, oil spills, biodiversity loss, gas flaring, disruption in social, cultural and spiritual life, and many more.[16] These disruptions have direct adverse impact on the livelihood of indigenous peoples and violate the property rights of indigenous peoples. Therefore, some measures have been put in place to ensure that indigenous peoples are not exploited by the State working with companies. One such measure is the duty by the State to consult indigenous peoples in the development of natural resources even though the former has the 'absolute' right to develop the resources in its territory.

3. Free, Prior Informed Consent: Right and Duty

FPIC means the right of indigenous peoples to be informed of development activities on a timely basis with to view to providing approvals for commencement, and this means the participation of IPs in developmental projects.[17] 'Free' means that it is free from any form of coercion or manipulation.[18] 'Prior' means that it is done before any project is undertaken,[19] while 'informed' means that all information about the project has been brought to the attention of IPs.[20] Consent finally means IPs agreeing to the development project to take place on their land having understood all about it.[21]

FPIC in my view thus revolves around consultation with IPs which forms the right of IPs on one hand when contextualised as participation, and on the other hand, a corresponding duty of the State. It will be shown, however, that there is a practical difference between consultation and consent that relates to higher impacts and safeguards. The right to participation is interestingly seen as an essential

[16] G. McDonald, "Impacts of Extractive Industries in Latin America", January 2009 available at: http://www.trocaire.org/sites/trocaire/files/pdfs/policy/EPLAanalysisfinalENG.pdf (last accessed 2 May, 2013)

[17] The Ethical Funds Company, "Sustainability Perspectives: Winning the Social License to Operate, Resource Extraction with Free, Prior Informed Community Consent" February 2008, available at: http://www.neiinvestments.com/neifiles/PDFs/5.4%20Research/FPIC.pdf. (Last accessed 10 April, 2013.

[18] United Nations Permanent Forum on Indigenous Peoples (UNPFII), Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples, 2005 (Document E/C.19/2005/3)

[19] S. Irene, 'License to Operate: Indigenous Relations and Free, Prior and Informed Consent in the Mining Industry'.*Sustainalytics 2011*, available at http://www.sustainalytics.com/sites/default/files/indigenouspeople_fpic_final.pdf (last accessed 11 April 2013)

[20] UNPFII, *supra*, note 19

[21] U.N. Econ. & Soc. Council, Permanent Forum on Indigenous Issues, '*Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, 12, U.N. Doc. E/C.19/2005/3 (Feb. 17, 2005).

component of the human right to development discussed above. In this context, indigenous peoples have the right to participate in decision-making processes on matters and policies that impact or are capable of impacting their rights in development projects embarked upon by the State even through proxies such as Multinational Enterprises. Participation requires that there is access to information so that States disseminate information on development projects to IPs as this is a prerequisite for access to justice in the event that rights of IPs are breached.[22] The right to participate in decision-making is flawed when there is no access to information by indigenous peoples on which basis the participation can take place. The obvious link between the right to participate and information availability and its importance to enriching the participatory process perhaps contributed to the freedom of information laws in various countries today.
Various areas of law helped in shaping the FPIC right such as medical law where FPIC is required for experimentation[23] and is considered "law of nations" actionable under the U.S. Alien Torts Claims Statute.[24]

Interestingly, just as the development right of the State is based on the self-determination principle, the legal basis of the principle of FPIC and a right enjoyed by IPs is rooted in the principle of self-determination. After years of denial as a legal principle,[25] self-determination has not only been recognised as a legal principle but has evolved into a "right" with the decolonisation movement in the 60s when many former colonies gained independence. The Declaration on the Granting of Independence to Colonial Countries and Peoples stated that "all 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." Although the instrument was intended for "colonial countries", it referred to "all peoples" having the right to self-determination. Another instrument on self-determination is the Declaration on Friendly Relations[26] providing self-determination as a right belonging to "all peoples" but limiting its relevance to States' co-operation and end to colonialism. The non-definition of "all peoples" in this instrument notwithstanding, it is clear that self-determination is not necessarily aimed at providing ethnic groups with independent States provided governments are representative of the different ethnic groups in a country thereby emphasising the principles of territorial integrity and national unity.

[22] M. Daruwala and V. Nayak (eds.), "Our Rights Our Information: Empowering People to Demand Rights through Knowledge", Commonwealth Human Rights Initiative, 2007
[23] The Nuremberg Code and cases Nuremberg Trials after World War II establishes the FPIC norm
[24] Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009).
[25] Two groups of international experts appointed by the League of Nations to examine the Aland Islands case agreed that self-determination had not attained the status of international law.
[26] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN G.A. Res. 2625, Annex (24 Oct. 1970).

In this vein, the common articles[27] recognise the universality of the right to self-determination of "all peoples" to freely determine their political status, pursue their economic, social and cultural development, and to freely "dispose of their natural wealth and resources".[28] In General Comment No.21, it was observed that the right to self-determination has both an external and internal dimensions noting that international law has not recognised unilateral secession of peoples.[29] In the African context, the right to self-determination[30] seems to be given an internal interpretation as the continent upholds the principle of inviolability of colonial frontiers due to its decolonisation history. In Canada where the region of Quebec was denied the right to secede, the Supreme Court affirmed more the internal dimension of self-determination.[31] Self-determination is therefore State centric focusing on borders and territory.[32]

Interestingly, although IPs have been recognised as possessing the right to self-determination as being the basis for their rights as peoples under international law,[33] contemporary interpretations generally exclude the external dimension of secession. It limits it to the internal dimensions of achieving economic fortunes by controlling their traditional lands and natural resources including alternatives that includes self-autonomy or governance.[34] As an extension, IPs must have the right to FPIC to participate in natural resource development projects within their land.[35] Jurisprudentially, it is within this context that the legal basis for FPIC can be said to be found in property and cultural rights.

However, the legal basis of FPIC can further be attributed to international instruments such as the ILO Convention 169,[36] UNDRIP, regional instruments, the policies of multilateral financial institutions, and domestic laws of some countries. The ILO Convention 169 as the first international human right instrument that establishes the FPIC right[37] only required consultation with IPs

[27] Article 1 of International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (1978); and International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (1967)
[28] At the European regional level, *see also* Final Act of the Conference on Security and Cooperation in Europe, adopted 1 Aug. 1975, reprinted in 14 Int'l Legal Materials 1292 (1975).
[29] Convention on the Elimination of All Forms of Racial Discrimination, General Recommendation No. 21: Right to self-determination, adopted 23 August 1996, UN Doc. A/51/18 (1996).
[30] *See* article 20, African Charter on Human and People's Rights, adopted 27 June 1981, entered into force 21 Oct. 1986, O.A.U. Doc. CAB/LEG/67/3 Rev. 5.
[31] Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at 66, 71, 67
[32] Oloka-Onyango, J. 'Heretical Reflexion on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in the New Millennium', 15 *American University International Law Review* (1999) 1, 151.
[33] *See* article 3, U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (13 Sept. 2007)
[34] Huff, A. 'Indigenous Land Rights and the New Self- Determination', 16 *Colorado Journal of International Environmental Law and Policy* (2005)
[35] U.N. Comm'n. on Human Rights, Sub-Comm. on the Promotion and Protection of Human Rights Working Group on Indigenous Populations, *Working Paper: Standard-Setting: Legal Commentary on the Concept of Free, Prior and Informed Consent*, ¶ 10, U.N. Doc. E/CN.4/Sub.2/AC.4/2005/WP.1, 2005 (July 14, 2005) (*prepared by* Antoanella-Iulia Motoc and the Tebtebba Foundation)
[36] Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72 ILO Official Bull. 59 (1989)
[37] Ibid, Article 16.

regarding development projects that would impact them. Consent is only required in resettlement cases; even this can be overridden by the State if proper legal procedures are followed that allows for IPs effective representation.[38] UNDRIP in general terms provides that States to consult with IPs to obtain their FPIC for projects that would affect their land, territories and resources.[39] FPIC also applies with respect to relocation,[40] adoption of legislative or administrative measures,[41] storage or disposal of hazardous materials,[42] and redress for property taken without FPIC.[43] Although a soft law and non-binding instrument, its adoption by the General Assembly in 2007 has given it a momentum influencing domestic laws of countries and it is only a matter of time before it becomes State practice. The Akwe Kon Guidelines, another international instrument recognises the FPIC right of IPs in the context of biodiversity protection.[44]

FPIC right for IPs can be further located in treaties entered into between States and IPs[45] while multilateral financial institutions have not been left out in this standard-setting. The 2012 International Finance Corporation (IFC) Performance Standard 7,[46] includes FPIC requirement for IPs while the 2006 standard only required consultation. Project financing by the Equator banks will apply FPIC for new investment projects while consultation continues to apply for existing projects as the revised Equator Principles III reflect this new standard.[47] The World Bank safeguard policies contain similar provisions[48] together with the policies of various regional banks.[49] Domestic laws in the Philippines,[50] Peru, and Malaysia provide for FPIC with the jurisprudence from courts further affirming FPIC as a principle and right.[51] Finally, within the context of the United Nations Guiding Principles that enjoins States and companies to protect and respect human rights respectively, FPIC as a right should be treated accordingly.[52]

4. Minimum Consultation and Consent Obligation

[38] Ibid, Art. 16.2,
[39] Article 32, UNDRIP 2007
[40] Article 1, ILO Convention 169.
[41] Ibid, Article 19
[42] Ibid, Article 29(2)
[43] Ibid, Article 11
[44] Akwe: Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities (2004)
[45] Such treaties can be found in Canada, Australia and New Zealand.
[46] IFC Environmental and Social Performance Standards 2012
[47] Equator Principles III, Draft and Summary of Key Changes, 13 August 2012
[48] *See*, World Bank Safeguard Policies, OP 4.01 - Environmental Assessment, The World Bank Group (January 1999)
[49] European Bank for Reconstruction and Development, Environmental and Social Policy, May 2008; Asian Development Bank, Safeguard Policy Statement (second draft), October 2008, pp. 11–12, 19.
[50] Indigenous Peoples Act of 1997
[51] Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v. Kenya, Communication 276/2003 (Nov. 25, 2009).
[52] Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Mapping International Standards of Responsibility and Accountability for Corporate Acts, U.N. Doc. A/HRC/4/035 (9 Feb. 2007).

The State has a duty to consult with indigenous peoples so as to ensure their participation if development projects are to impact on their land and livelihood. Thus States have to take into consideration the link that exists between indigenous peoples and their land and natural resources, and the aim of the consultation with indigenous peoples is to have their free, prior and informed consent (FPIC). The duty to consult with the objective of obtaining a FPIC also applies when legislative and administrative measures are taken that impact on the rights of indigenous peoples.[53] It is imperative to point out that the obligation to consult can shift to a consent requirement under certain circumstances. Importantly, how can the State get FPIC right, and who will the State consult or seek consent from, as the case may be?

International and domestic law regulates the issue of consultation with indigenous peoples especially on how to get FPIC right and on who to consult on measures whether it concerns legislative or administrative measures or investment and development projects that will impact on indigenous peoples.

Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[54] 2007 provides that:

> *"States shall consult and cooperate in good faith with the indigenous 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."*

Furthermore, Article 6 of the ILO Convention No. 169[55] provides that:

> *"States must consult indigenous peoples through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly."*

The above provisions underscore the importance of getting FPIC right and whom to consult which the paper will now explore by examining some of the minimum contents of the duty to consult as enunciated under international law instruments such as the ILO Convention 169, the United Nations Declaration on the Rights of Indigenous Peoples, the reports of the Human Rights Committee and the UN Special Rapporteur on the situation of human rights and elaborated upon mainly by the Inter-American jurisprudence whose jurisprudence in this regard is not only evolutionary but revolutionary.

[53] R. Houston, "Do Agreements Negotiated under the Free, Prior and Informed Consultation Standards required by the World Bank and the Equator Principles give Mining Companies an Appropriate Social Licence to Operate", *CEPMLP Annual Review*, Vol. 14, 2009/2010

[54] United Nations Declaration on the Rights of Indigenous Peoples UNGA Res. 61/295, 13 September 2007 (UNDRIP)

[55] Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 28 I.L.M. 1382 (1989) [ILO Convention No. 169]

First, the duty to consult is the obligation of the State and not that of any third parties including companies as this amount to 'de facto privatisation of the State's responsibility'.[56] This means that IPs have to be consulted by the State first in development projects but it is argued that this does not preclude companies from also consulting with IPs as companies are increasingly 'held to standards that mirror the duties of States'.[57] Besides, companies may need to consult to obtain 'social licence to operate'.

The duty to consult from Article 19 and 6 has to be 'through the representative institutions of IPs so that the traditional institutions of IPs are their channels of communication with the State. However, such customary institutions have to be representative of the will of the IPs as held in the Saramaka case[58] where the Inter-American Court held that "it is the Saramaka people, not the State, who must decide which person or group of persons will represent the Saramaka people in each consultation process ordered by the Tribunal".[59] Another side to culture is that consultation with IPs should be through culturally adequate procedures so that IPs are engaged based on their customs and traditions of decision-making and even formats have to comply with 'culturalness'.[60] It means that information has to be put in a language understood by IPs and where necessary the State has to provide for means of interpreting the information into the language understood by IPs and even provision of technical assistance to facilitate the consultation process, where necessary.[61]

Furthermore, consultation is an on-going process and not a one-off event between the State and IPs because development projects such as oil and gas and mining usually take decades to come to completion and expectations of the parties might change. Furthermore, consultation should involve proper engagement with the objective of giving regard to its results and not just for box-ticking purposes.

Consultation with IPs still has to be complied with even when they do not possess formal titles to property over their lands because it is the State's responsibility to demarcate, delimit and title lands before granting concessions. In the Awas Tingni

[56] IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 143
[57] L. Brunner and K. Quintana, "The Duty to Consult in the Inter-American System: Legal Standards after Sarayaku", *ASIL Insights*, 16(35), 28 November, 2012; Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Eterprises, Ruggie, R., "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31 (Mar. 21, 2011)
[58] Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 93-95, 130-34, 146, 154 (Nov. 28, 2007) [*Saramaka People*]
[59] Case of the Saramaka People v. Suriname, Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs, Judgment of August 12, 2008. Series C No. 185, par. 18
[60] Case of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 28, 2007. Series C No. 172, par. 133
[61] ILO Convention No. 169, Article 12

case[62] the Inter-American Court held that the right of the members of the Mayagna Awas Tingni Community to the use and enjoyment of their property has been violated by the State for granting concessions to 'third parties…in an area which could correspond, fully or in part, to the lands which must be delimited, demarcated, and titled'.[63]

Consultation by the State with IPs should be done in good faith and with the aim of determining benefits to be received by IPs, if any, and whether and to what extent IPs will be impacted, and for further reaching mutual agreement or consent to the investment project. Good faith consultation means that IPs must not be coerced, intimidated or manipulated in any form either through the use of security forces or corrupting their leadership with bribes or inducements or setting up parallel leadership. Good faith consultation also requires that IPs actively participate in the process but this does not mean that IPs cannot embark on peaceful protests. Good faith consultation thus 'requires the establishment of a climate of mutual confidence between the parties, based on the principle of reciprocal respect'.[64] It should be noted that, although good faith consultation requires reaching an agreement or obtaining consent, where this is not achieved and there are reasonable and objective motives in proportion to legitimate interests of a democratic society for the investment project to proceed as determined by the State, this must be communicated formally to IPs. The State's decision must also be subject to review by a higher administrative or judicial body.[65]

Although it is apt that States are parties to the aforementioned international regimes and further put in place domestic regimes to guarantee the rights of IPs, the recent Sarayaku case[66] has shown that it is immaterial that a State is not a signatory and therefore, not bound by the duty to consult. In other words, the duty to consult by States could be said to be attaining the status of customary international law so that IPs must be consulted with whether States are signatories or not to the international regime.[67] Similarly, the duty to consult cannot be met or

[62] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 25 (Aug. 31, 2001

[63] I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*, Judgment of January 31, 2001. Series C No. 79, par. 153

[64] UN – Human Rights Council - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, 15 July 2009, par. 51; Report of the Committee set up to examine the representation alleging non-observance by Guatemala of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Federation of Country and City Workers (FTCC), GB.294/17/1; GB.299/6/1 (2005), para. 53

[65] I/A Court H.R., Case of Apitz Barbera *et al.* ("First Court of Administrative Disputes") v. Venezuela (Preliminary Objection, Merits, Reparations and Costs), Judgment of August 5, 2008, Series C No. 182, para. 78; I/A Court H.R., Case of Tristán Donoso v. Panama, Judgment of January 27, 2009, Series C, No. 193, pars. 152-153

[66] Kichwa Indigenous Community of Sarayaku v. Ecuador, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 176 (June 27, 2012)

[67] See Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 84, 127–37, 141, 156 (June 17, 2005)

satisfied by mere compliance with the participation requirements under environmental law of nations or international law.[68]

Importantly, consultation with IPs must take place during the early stages of the development project and not after actions have already been taken to endanger the property rights of IPs.[69] The Saramaka and Sarayaku cases are illustrative of this very important minimum requirement. IPs should be given early notices to allow for proper internal community discussions on the proposed project. The UN Special Rapporteur notes that 'consultations should occur early in the stages of the development or planning of the proposed measure, so that indigenous peoples may genuinely participate in and influence the decision-making'.[70] Article 15 of ILO Convention No. 169 also requires States to conduct consultations with IPs "before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands"

Now, the consent (as opposed to consulting with IPs) of IPs must be obtained by the State where the proposed development and investment project poses a significant threat to the right of use and enjoyment of the ancestral territories of IPs. This occurs when large-scale projects will touch on the integrity of the land and natural resources of IPs by leading to loss of traditional land, depletion of resources necessary for survival, devastation of environment, long-term negative health and nutritional impacts, and so on. In other words, where there is a higher threat to the continued existence of IPs with large-scale development projects, a higher standard is set by international law so that States do not only have to consult with IPs but must obtain their free, prior informed consent. Thus consent is mandatory under the following circumstances:

i) Where there is a likely displacement of IPs as a result of large-scale development projects as guaranteed by Article 10 of the UNDRIP that states that IPs must not be displaced from their land without their FPIC;
ii) Where IPs land and territories will be used for the storage or disposal of hazardous materials consent of IPs is required as enshrined in Article 29 of UNDRIP; and
iii) Where IPs' land and natural resources that is their source of livelihood is destroyed to the extent of depriving them of its use for survival.[71]

Although the non-observance of the minimum content of the duty to consult or seek consent as noted above leads to reparations, the minimum content of the duty to consult or seek consent are not cast in stone due to the diversity of IPs as the ILO

[68] Columbian Constitutional Court in Judgment on Tutela action T-652, of November 10, 1998
[69] I/A Court H.R., *Case of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007, Series C No. 172, par. 133
[70] UN – Human Rights Council – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, July 15, 2009, par. 65
[71] See generally Saramaka Case; Human Rights Committee, General Comment No. 23: The Rights of Minorities (Art. 27), CCPR/C/21/Rev.1/Add.5, ¶ 7 (1994); CERD, General Recommendation No. 23: Indigenous Peoples, Official Records of the General Assembly, 52d Sess., Supp. No. 18 (A/52/18) annex 5, ¶ 5 (1997).

Convention No. 169 under Article 39 allows for flexibility according to each country's conditions and characteristics in the measures to be taken in giving effect to the Convention.[72]

5. Conclusion

The paper had set out to examine the extent to which the State's right to the development of its natural resources can be balanced against the right of indigenous peoples to be consulted by the State in the process. It found that the obligation to consult or seek consent is a principle of both international and domestic law, and another limitation on the right of the State to develop its natural resources. The paper finds that the right of development of the State in the context of its right to develop its natural resources has to be balanced against the right of IPs to be consulted, a right arising from IPs' property right to land and natural resources as rooted in their right to self-determination. IPs right to be consulted in development projects when contextualised as participation thus becomes the corresponding obligation of the State to be balanced with the effect that development projects have to meet human rights obligations. It is argued in this paper that in balancing the right to development and the duty to consult, a State has to obtain the FPIC of IPs and this requires complying with the minimum consultation requirements established under international laws, norms and standards as expounded by the Inter-American System with its evolutionary approach. Thus in obtaining FPIC, a State must comply with the requirements of the minimum duty to consult by consulting with IPs in good faith; at an early stage; on an on-going basis; from representatives of IPs' traditional institutions; in a culturally appropriate way; and with an agreement-reaching mind-set. These expositions from the Inter-American System has started having impact in other jurisdictions such as Africa where the African Commission on Human Rights gave a ground-breaking decision[73] to the effect that the Endorois people are IPs relying mostly from jurisprudence emanating from the Inter-American System. These pronouncements from the Inter-American System with respect to right to development and duty to consult have legal and policy implications for governments mostly in developing countries in Africa, and have changed the landscape on which consultations between IPs and governments including companies take place. In many African countries where the governments have continued to debate the existence of IPs and refused to ratify the treaties on IPs, it becomes very important to clarify the issues on the duty to consult or seek consent. The point being made here is that whereas the FPIC right was originally intended for IPs as the main beneficiaries, its application has been arguably extended to local communities that bear the brunt of large-scale resource development similar to those suffered by IPs.[74] This academic argument by Goodland has received judicial blessing and legal support from the Inter-

[72] UN, Human Rights Council – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, July 15, 2009, pars. 37, 45

[73] Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v. Kenya, Communication 276/2003 (Nov. 25, 2009).

[74] Goodland, Robert. "Free, Prior and Informed Consent and the World Bank Group, "Sustainable Development Law and Policy, 4(2), 2004, pp. 66-74.

American System in its decision in the case of *Moiwana Village v. Suriname*.[75] In that case, it was found that IPs and other local communities not indigenous to the area but with strong cultural, physical and spiritual ties to land do have FPIC rights and rights to property. In the instant case, the IACHR found that the Moiwana community members, N'djuka tribal people had relationship with their traditional lands that is based on the community as a whole, and not on the individual. This decision first stresses how the human rights implementation mechanisms can be used to address the problems faced by local communities.[76] Importantly, it shows that local communities in Africa including Nigeria that unarguably have strong cultural, physical and spiritual ties to their land, are entitled to the FPIC right. Interestingly, the jurisprudence on FPIC continues to evolve and will most definitely continue to enrich the legal analysis in this area to the benefit of IPs and local communities.

[75] Moiwana Village v. Suriname, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, at 54-55 (15 June 2005)

[76] See, San Mateo de Huanchor v. Peri, Petition 504/03, Inter-Am. C.H.R., Report No. 69/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004); Mayagna (Sumo) Awas Tingni v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, at 25 (31 August 2001)