From Rights to Results

An Examination of Agreements between International Mining and Petroleum Companies and Indigenous Communities in Latin America

RESOLVE
ABOUT RESOLVE

RESOLVE builds strong, enduring solutions to environmental, social, and health challenges. We help community, business, government, and NGO leaders get results and create lasting relationships through collaboration. RESOLVE is an independent non-profit organization with a thirty-eight year track record of success.

RESOLVE was founded in 1977 to promote the effective use of collaboration and consensus building in public decisions and to help people with diverse interests engage in dialogue to achieve outcomes. RESOLVE helped institutionalize the use of dispute resolution in policymaking. RESOLVE continues to support critical policy initiatives and designs and implements solutions-focused programs.

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ABOUT THE RESEARCH TEAM

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Steve D’Esposito, Senior Project Advisor and Interviewer: Stephen D’Esposito is the President of RESOLVE. Steve previously held executive leadership roles in the New York Public Interest Research Group, Greenpeace, and EARTHWORKS, where he developed new models for solutions focused campaigns and built groundbreaking partnerships with leaders in business and civil society. During Steve’s tenure, RESOLVE has expanded its international program; launched a series of solutions programs on energy, food, sustainable development, natural resource conflicts, and species and habitat protection; and strengthened program partnerships with leading companies and civil society organizations.

Kate Kopischke, Interviewer: Kate Kopischke is a mediator and Senior Advisor to RESOLVE specializing in private and public sector consensus building and dispute prevention and resolution. Her focus areas include environmental and social conflict assessment and resolution, multiparty dialogue facilitation, grievance mechanism design, collaborative problem solving, and mediation. From 2005 to 2010, Kate served as Ombudsman & Dispute Resolution Specialist for the Office of the Compliance Advisor Ombudsman, an independent accountability mechanism of the International Finance Corporation – working with stakeholders involved in disputes arising from private sector investments of the World Bank Group.

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Sallie Dehler, Policy Research Associate and Supporting Author: Sallie Dehler is an associate at RESOLVE, where she assists in convening and facilitating consensus building and policy dialogues. She provides support through data analysis, in-depth research, and the production of reports and draft discussion documents. Her project issue areas include sustainable development, stakeholder engagement, and natural resource supply chains. Prior to joining RESOLVE, Ms. Dehler researched human migration to edges of national parks in Costa Rica.
**Erin Scarrow, Contributor:** Erin is an independent environmental management consultant and prospective PhD student (School of Resources and Environmental Management, Simon Fraser University, Canada). Her Indigenous environmental management practice areas include benefit and impact sharing agreements; free, prior, and informed consent; sustainable fisheries; international Indigenous knowledge sharing; community capacity development; and Indigenous protected areas (IPAs). Erin holds a Master’s degree in Environmental Management from the University of Queensland, Australia, and Bachelor’s degrees in law and commerce. Erin is qualified to practice law in Queensland, the United States, and Canada, and has over a decade of experience as a commercial lawyer, focusing on the drafting and negotiation of multi-million dollar commercial contracts. As an environmental management consultant, she has assisted non-governmental organizations and Indigenous communities with research, policy development, preparing reports, project management, Indigenous rights, and working closely with government officials on national and regional environmental strategy.

**Jason Knickmeyer, Research Intern:** Jason Knickmeyer served as the Natural Resources and Community Relations Intern at RESOLVE in 2014, in which he provided policy research, translation, and other support to the FPIC Solutions Dialogue. He is currently earning his Master’s degree in Urban and Environmental Planning at the University of Virginia, where he’s concentrating his studies on public policy, conflict resolution, and land use topics. In addition to his studies, Jason works part time as a graduate intern with the Institute for Environmental Negotiation, as a graduate level TA for GIS and planning methods courses, and as a GIS spatial analyst with Dobbin International and Renaissance Planning Group. He is also a current James Pate Memorial Scholar and serves in student government as the planning program’s liaison to the American Planning Association. Next year, he will start his career as a research analyst with the Corporate Executive Board.
As we promised anonymity and confidentiality, we cannot name the interviewees and survey respondents who gave so generously of their time. We are very grateful for the valuable expertise and insights many shared in support of this research, and we hope this report is useful to all of those who helped us.

We also wish to thank participants in the FPIC Solutions Dialogue for their guidance and support, without which this research would not have been possible. We would like to acknowledge BG Group, a member of the FPIC Solutions Dialogue, who proposed this study to the Steering Committee. BG Group provided key feedback as the study progressed for which we would like to thank them. We also thank First Peoples Worldwide, who has provided assistance in establishing connections with interviewees from a range of Indigenous communities in Latin America.

The title of this study, FROM RIGHTS TO RESULTS, comes from the book VIKINGS ON A PRAIRIE OCEAN, in which RESOLVE Chairman Glenn Sigurdson recounts his background and professional life. Glenn has deep relationships and experience living and working with the Cree and Ojibway of Manitoba, and other First Nations in Canada. “From rights to results” expresses the idea that rights can and must lead to practical and positive outcomes.

Finally, we would like to prospectively thank you, our readers, for your participation in ongoing dialogue. We invite your reactions and contributions to this research via our website: http://solutions-network.org/site-fpic/.
The Free, Prior, and Informed Consent (FPIC) Solutions Dialogue is a multi-sector dialogue, housed at RESOLVE, to develop practical guidance that supports implementation of FPIC around mining, oil, and gas development projects. The partnership brings together civil society and companies to share perspectives and respond to challenging FPIC implementation issues. We use the dialogue to explore solutions – learning from experience and testing approaches to help implement FPIC at sites.

FROM RIGHTS TO RESULTS looks at company-community agreements and relationships in Latin America to explore whether and how government and corporate policies around Indigenous rights and FPIC are having an impact. FROM RIGHTS TO RESULTS is intended to provide insights for those in communities, companies, civil society, and government looking to improve the way the extractive sector can respect and contribute to Indigenous rights and community development in Latin America. A RESOLVE research team interviewed stakeholders who have interest, knowledge, and experience with agreements between companies and Indigenous communities in a subset of countries in the region. Because these types of agreements can provide important information on benefit sharing and compensation for impacts, and because they represent a form of sanction granted by some communities for projects or key project elements, RESOLVE believes that FROM RIGHTS TO RESULTS will help us to advance our understanding of implementation trends and challenges related to FPIC. We are not asserting that any of the agreements we heard about represents FPIC; rather we think understanding these agreements may offer guidance with regard to FPIC implementation.

In the course of this study, we learned that interest in this topic is broadly shared and there is strong appetite for dialogue on how to create conditions for successful agreements, including site-based guidance. Agreements are now a normal part of doing business, though stakeholder perspectives and needs, as well as the character and content of these agreements differ. Many expressed that their experience with agreements fell short of expectations and potential. At the same time, it’s clear that agreements between companies and communities – when they define relationships that respect and protect rights and when they respond to authentic community aspirations – are a very important practical expression of international norms on Indigenous rights.

Establishing norms and effective site-based implementation is more important than ever in our globalized world. This is particularly true with regard to projects in the mining and petroleum industries that affect the environmental, social, and cultural systems which sustain Indigenous Communities. Moreover, establishing mutually beneficial relationships between companies and Indigenous communities that allow for the full enjoyment of Indigenous rights and generate opportunities for development is central challenge in today’s natural resource sector in Latin America and beyond. It is our hope that this report makes a solid contribution to construction of sustainable relationships between companies and Indigenous Communities.

Our work is not yet complete. RESOLVE is planning additional work with Indigenous Communities and other stakeholders to deepen our understanding of their views, following which we will publish an update. Please visit http://solutions-network.org/site-fpic/ for more information and updates.

Stephen D’Esposito
President, RESOLVE
EXECUTIVE Summary

This report, FROM RIGHTS TO RESULTS, examines the agreements through which companies and Indigenous communities define the key elements and terms of their relationship with respect to mining and petroleum projects in seven Latin American countries: Bolivia, Brazil, Colombia, Mexico, Nicaragua, Peru, and Suriname. The report is a project of the Free, Prior, and Informed Consent (FPIC) Solutions Dialogue, a multi-sector dialogue housed at RESOLVE to develop practical guidance that supports FPIC implementation for mining, oil and gas development.

The analysis of company-community agreements in Latin America was based on 27 in-depth interviews with respected practitioners and engaged observers who provided information and opinions from company, community, human rights and political perspectives. We also conducted a survey of 37 selected experts to solicit additional data. The research team complemented the interviews and surveys with focused country analyses of national legal frameworks, human rights issues, and profiles of countries’ extractive sectors. The analysis focused on governmental policies on Indigenous rights, the impact of international norms, trends and expectations, the importance of relationship management, factors contributing to success or failure of agreements, and the specific content of the compensation and benefits included in agreements.

The research and analytical work indicate there are specific opportunities to create conditions for better agreements. This report identifies those opportunities, as well as a range of challenges and research gaps.

Governance

National governance, including policies and capacity, emerged as a critical variable in our analysis on company-community agreements. Government policy and constructive government presence were seen across the board as necessary conditions for agreements to be concluded and implemented successfully. Policies and legal frameworks that oblige companies to consult with communities shape the nature and outcomes of the agreements that result.

It is essential that governments provide an adequate framework that both protects Indigenous peoples’ rights and meets the requirements of complex natural resource development projects. However, ensuring such a framework is inherently complex and is subject to factors outside a government’s control, such as community dynamics, culture, and history; commodities prices; decision-making processes of international resource corporations; and others. Yet current policies are lacking; only 37% of survey respondents felt that government policies on Indigenous rights encourage successful company-community agreements.

Governments in the countries examined seek investment to develop their natural resources and have a simultaneous constitutional and international duty to protect and implement Indigenous rights. When there is a lack of coherence in the pursuit of these objectives, or when implementation is faulty, friction between the two objectives can result. Inadequate consultation can result in tension or disagreements which sometimes trigger social protest. This in turn can result in unstable conditions for long-term investment, undercutting national development objectives. Respondents identified numerous projects
in many regions that were licensed, in their view, on the basis of inadequate agreements between companies and Indigenous communities, which resulted in underlying tension around the project. This observation is consistent with those of the International Council on Mining and Metals that community-company conflict is on the rise in many regions.1

Governments in the countries we examined appear to have an uneven and incomplete presence across their national territories. The state’s absence can negatively affect the negotiation and implementation of agreements. Additionally, where governments do not provide adequate public services, pressure falls on companies to carry out this role – often through agreements with communities. When Indigenous communities and companies do not reach agreement, communities may then try to engage with states on strategies for protecting their interests, where they often face complex bureaucracies and confusing procedures. Fundamentally, the state has the obligation to guarantee Indigenous rights, but it cannot do this if it is not effectively present where communities are affected by projects.

Judicial posture and capacity is important. With the exception of Suriname, Indigenous rights are enshrined in the constitutions of the countries we examined. The judiciary was cited repeatedly as a factor that shapes agreements by judging the adequacy with which rights are expressed in agreements, or by defining rights where they are not clear.

Infrastructure projects (such as building of roads, dams, etc.) also are a factor impacting the interests of Indigenous people, and thus the nature of company-community agreements. Such projects have a high likelihood of changing the social character of previously remote territory, or causing significant change to natural environments. This can be a difficult issue for governments, because it requires decision making which properly includes Indigenous peoples’ rights and interests within the context of choices related to economic development.

For governments, coordinated planning for natural resource projects is critical. It is important to synchronize licensing or permitting requirements and operational phases of a project with community consultation. For example, projects could have multiple and sequential agreements with communities that correspond to phases of the project cycle and their differential impacts. Similarly, early-stage consultation is critical, yet this often is a period of uncertainty for companies seeking to develop mining, oil or gas projects. Successful agreements need companies, communities, and governments to consult together before major project decisions are made.

From a human rights perspective, it was observed that the home governments of international mining and petroleum companies have a human rights and foreign policy responsibility with respect to the conduct of these companies abroad. It was indicated that this responsibility should include policy instruments that require companies working internationally to comply with the human rights (including Indigenous rights) obligations of their head office jurisdiction.

Indigenous Rights and International Standards

There was strong agreement among respondents that awareness and knowledge of international standards, policies, and norms is continuing to grow within industry and government, and among Indigenous communities and human rights advocates. Information and awareness about norms and rights flows from multiple sources and across several networks. This includes the international fora
where rights and norms are negotiated, national governments, project sites, and communities. The key observation is that there is a dynamic process of increasing awareness and knowledge which drives expectations at national and international levels. NGO, Indigenous, and commercial networks are engaged, but awareness is uneven. National companies are said to be less aware, or less sensitive, than multi-nationals. Juniors are said to be less engaged than majors. Not all communities receive the information they need. This is a factor that generates disparities in implementation of prior consultation and resulting agreements in the countries examined.

With the proliferation and growing awareness of standards and norms, many Latin American governments have enacted constitutional reforms and legally binding policies that recognize the rights of Indigenous peoples. This includes the ratification by many countries of ILO 169, which deals with the rights of Indigenous and tribal peoples, and increasing adherence to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which represents an advance in the recognition of Free, Prior, and Informed Consent (FPIC) internationally. FPIC is a powerful mechanism for rights protection because it puts decision making in the hands of rights holders, and recognizes that, where Indigenous people are threatened or at risk of extinction, their ability to deny projects may be critical to their cultural and physical survival.

Respondents affirmed that these instruments influence company practices and the agreements they negotiate with communities, though they are not the only drivers. Industry association standards (e.g., ICMM, IPIECA, etc.), as well as standards and policies of financial institutions that support natural resource development projects also have a strong impact on companies’ human rights and engagement practices – including how they define and implement FPIC.

Some respondents described FPIC as good business practice because it creates a desirable social environment for a project. But there are different perspectives on how best to implement FPIC within the context of norms and standards. Human rights and Indigenous peoples’ advocates emphasize that for FPIC to be authentic and consequential, communities should have the ability to reject projects on their territory that they deem undesirable. Others argue that giving power to Indigenous communities to reject projects would be unmanageable and create impediments to national economic development. For some, the solution lies in an effective consultation process. Considering the importance of community acceptance as a precondition for responsible development, FPIC can and should be key aspect of consultations and agreements between companies and Indigenous communities.

Despite differences of views about requirements for community consent or the consequences of its absence, there is general agreement that norms and standards empower communities to claim and utilize rights, and to connect with national systems. It was suggested that company-community agreements should contain explicit references to rights, and that when national policy frameworks fall short on recognition of Indigenous rights, companies should be guided by the appropriate international norms and standards.

While many interviewees reported that formal Impact and Benefit agreements between communities and companies are not common in the countries we examined, there is an expectation that this is coming, and that Latin American countries may follow a path to highly developed jurisdictions such as Canada and Australia, where such structured and comprehensive agreements are more common. Notwithstanding the challenges faced in Canada and Australia, their resource sectors are generally viewed as having relatively strong systems and approaches for improved relationships between companies and Indigenous communities.
Quality of Company-Community Relationships

Interviewees who were directly involved in company-community agreements emphasized the fundamental importance of good relationships between a company and an Indigenous community. Successful agreements require building trust among and between parties, and maintaining that trust over the long term. Yet relationships between companies and Indigenous communities are highly complex. As respondents noted, they are subject to influence by governments with ever-changing political priorities; international and national organizations exerting disparate interests and pressures; and sometimes even criminal actors who use intimidation, extortion, and violent coercion to gain territorial or economic control.

Moreover, companies and communities have very different paradigms. The capital intensity of a resource project may be difficult for a community to appreciate, and issues such as communal ownership of land or traditional governance may be hard for companies to understand.

Such complexities can lead to tension between companies and communities, and conflict over things like economic benefits, terms of benefit transfers, royalty regimes, project phases and production schedules, etc.

A number of respondents described failed agreements that were later able to get back on track, either because communities returned to the table with more specific requirements or through more formal channels (e.g., company or lender grievance mechanism), or because companies re-engaged by addressing the issues underlying the poor relations.

There was wide agreement among respondents that company-community agreement-seeking processes can be technically, legally, environmentally, and financially complex, placing heavy responsibility on some communities. For this reason, interviewees stressed the importance of capacity building programs to help stakeholders negotiate and engage more effectively, develop or access technical expertise, and use tools and learn strategies for resolving conflict and reaching consensus.

Respondents were in broad agreement that the measure of a good relationship between a company and community requires company compassion and respect for the inherent dignity of those impacted by their operations, and acting in ways that are supportive of communities’ interests, aspirations, and culture.

Character and Content of Agreements

Our research indicates that while there are few case-examples of successful company-community agreements in the countries examined, there is a growing focus on strategies for improving the nature and outcomes of agreement-seeking processes, and demonstrating success. Where agreements may previously have been informal and based on consultation and good faith, there is now greater emphasis on structured negotiations that are legally binding.

For both companies and communities, agreements have multiple purposes. When asked what it is companies receive through negotiated agreements, survey respondents highlighted access to land, community support for the life of a project, and community support for a period of time.
Communities and companies negotiate both non-financial and financial benefits. Survey respondents confirmed that the range of non-financial benefits of agreements for communities include: training, employment, and contracting opportunities; infrastructure or other social investments; health, education or other services; business development assistance; environmental or cultural heritage protection measures; and management assistance and governance support for Indigenous representative bodies.

Financial arrangements agreed with communities include: payment to a trust or community fund; annual or regular payments; one-time payments; revenue sharing agreements; and equity arrangements.

Survey results indicate that the time it takes to negotiate agreements is increasing, likely due to companies and communities engaging in more structured and complex negotiations. Respondents reported that most agreements in the countries surveyed take between six and 18 months to negotiate.

Successful agreements hinge on a number of factors and considerations. For one, negotiators and signatories to agreements must be legitimate community representatives. But identifying who is ‘legitimate’ and who is not can be extremely challenging. As in any community, Indigenous peoples are organized according to their own social, economic, and cultural realities, rather than the needs and realities of a company seeking to implement a profitable resource project. Interviewees reported that, in many cases, company negotiators who engaged only with community “leaders” later discovered that rifts or conflicts exist between factions within the community, or that community leaders simply do not have the support or confidence of citizens. In these cases, negotiated agreements were often considered illegitimate by the wider community. Generally, questions of community representation and stakeholder legitimacy – and how best to navigate a community’s complex social and political organization – were topics of substantial interest to all respondents.

Other factors that contribute to successful agreements, as identified by the research, included mutual respect between a company and Indigenous community; a strong commitment to avoiding negative impacts – with equally strong commitment to mitigation and compensation when impacts do occur; broad community involvement; and robust monitoring programs, and a willingness to correct problems quickly.

Respondents also said that good agreements are centered on a shared, long-term development vision and a structured approach to engagement and problem solving. This requires authentic community engagement and community relations (as opposed to public relations) throughout the life of the project, and spelling out in agreements the roles and responsibilities of each party.

Challenges and Opportunities: Suggested Priorities for Future Work

There was broad awareness that Indigenous peoples have a right to consultation, compensation, and benefits, and that clear and durable agreements are necessary to ensure those rights are upheld. Improving the quality and implementation of agreements between international mining and petroleum
companies and Indigenous communities will be an important step forward in protecting and advancing Indigenous communities’ aspirations for social and economic development.

Based on our analysis of the interviews, surveys and country research, we have identified the following challenges to realizing these goals, and suggested priorities for further work by the FPIC Solutions Dialogue and others:

1. National policy frameworks do not always encourage successful agreements. There is a need for country focused research and multi-stakeholder policy dialogue which leads to reforms in policy and regulation, and the development of appropriate tools and mechanisms to support good agreements.

2. Decisions by governmental authorities on natural resource development are often granted in advance of full and meaningful consultation with Indigenous communities. Research is needed on approaches to consultation prior to concession award and for joint company-community environmental and social impact assessments, so that consultation and consent occur at all stages of project planning. While some companies are already taking this approach, the outcomes and lessons from these and new pilot projects should be evaluated and reported.

3. Indigenous communities can be vulnerable to coercion when their rights are not adequately recognized and protected, or when they are not protected from illegal (sometimes armed) actors and criminal organizations who are present in their territory. Additional research and in-depth dialogue and feedback from Indigenous people will increase understanding of the problems and threats that can undermine and inhibit Indigenous communities from fully exercising their rights to consultation and consent. Ultimately, community safety and security come into play, requiring an integrated government response, with support from civil society, international agencies, and others. For example, effective consultation process may need to be coupled with an increase in government presence, training in human rights protection, and other strategies.

4. Developing productive long-term relationships between companies and Indigenous communities can be extremely difficult. More case examples and success stories are needed on the strategies and approaches companies and communities have used to build durable and mutually beneficial relationships. Success factors from Canadian and Australian experiences may help inform projects operating in Latin America and elsewhere. Lessons from these successes can then be applied and evaluated on new projects, and/or on those struggling to improve existing conflictive relationships. As one example, while a mine may change owners, the community is there for the life of the mine. Measures to ensure follow-through on processes and specific commitments when ownership or management changes can build confidence.

5. The confidentiality of most company-community agreements prevents proper analysis. There is a need for discussion and design of a strategy for gathering agreements for placement in a database that can yield publicly accessible aggregate information. Researchers and other interested parties could analyze the meta-data and identify good practices and models worth piloting elsewhere.

6. It is often easier for parties to reach and sign an agreement, than it is to implement it over the long run. Case examples of previous agreements that were successfully implemented (or
where implementation is on-going), and analysis of the success factors, will offer guidance to negotiators in developing criteria for measuring performance, methods for measuring and enforcing compliance, specific implementation steps, and procedures for managing changes or future conflicts.
INTRODUCTION to the Report. Purpose, Methodology, and Key Facts and Concepts

Background

This research project was designed to identify the current status and key issues involved in the agreements reached between companies and Indigenous Communities for projects in the mining and petroleum sectors in seven Latin American countries: Bolivia, Brazil, Colombia, Mexico, Nicaragua, Peru, and Suriname. Latin America is a particularly instructive region because of the broad recognition of Indigenous rights (most Latin American countries have ratified ILO 169), the prominent role of natural resources in economic growth, and the recognized tensions and social challenges associated with the sector in Latin America. Through interviews, surveys, and policy review, this study was conducted by a team of RESOLVE researchers with combined background and knowledge of the extractive sector, community relations, Latin America, and human rights.

The report is primarily based on the insights and opinions we heard from interviewees. We have organized the report so that their voices are clear and distinctive. We have highlighted their statements in orange italics. Where there is text in brackets, we have edited their statements to preserve confidentiality.

Methodology

The methodology of this study reflects its primary purpose, which is to provide input to the participants in the FPIC Solutions Dialogue and other practitioners. The terms of reference for FROM RIGHTS TO RESULTS were elaborated in consultation with members of the FPIC Solutions Dialogue, as were the interview and survey questions and approaches.

This analysis is qualitative and interpretive. It is based on three sets of information: interviews with practitioners and experts, a review of the country policy and political context, and an electronic survey. See Annex 2a for the list of interview and survey questions.

In-depth telephone interviews with experts, decision makers, and opinion leaders with knowledge of the topic of agreements in the countries examined were conducted according to a structured set of questions. Interviewees were provided with prior written information on the purpose of the study, and where requested, with the list of questions. Interviewees were offered the choice of whether to conduct the discussion in English or in Spanish. Information provided in the interviews revealed a clustering of issues in four themes:

- Governance
- Rights and international norms;
- The quality of the company/community relationship and;
- The character and content of agreements.
The interpretive analysis was conducted according to these themes.

Desk research was undertaken in order to establish baseline information on recognition of Indigenous rights and the human rights situations in the countries considered, with a focus on the policy context, as well as the institutional framework for policy implementation. Sources include governments of the countries under review, United States Department of State Country Reports on Human Rights Practices, and reports of the United Nations Special Rapporteur on Indigenous Rights. Additionally, the briefs include indicators on the size and scope of the petroleum and mining sectors of the countries examined based on official or industry sources.

The survey was conducted electronically and served both to collect additional information and for validation of the interview information.

THE RESPONDENTS

The report is based on perspectives from consultants and independent experts, Indigenous communities, the human rights community, mining and petroleum companies, development organizations, and the academic community. Interviewees and survey respondents were carefully selected for their depth of knowledge, their differing perspectives on company community agreements, and in order to achieve geographic coverage of our selected countries. Annex 2b provides a breakdown by country of interview and survey respondents. This report has been shared with all those who contributed to it.

SENSITIVITY AND CONFIDENTIALITY

FROM RIGHTS TO RESULTS examines complex and sensitive issues. Indigenous people in Latin America have suffered human rights violations, and the process to secure their rights is incomplete. Resource development is a political priority in the countries examined, but many respondents were critical of current regulatory practices. In order to obtain frank information, RESOLVE has assured respondents that their information will be protected as confidential. Consequently, interview and survey respondents have not been identified, nor has attribution been made to individuals. The reader will also observe that we have not identified statements according to whether the individuals represent companies, Indigenous communities, governments, or technical experts. In our analysis, it emerged that the same observations were frequently made from different perspectives and forcing categories on the statements would not have led to greater insight.


The countries examined are resource rich with substantial reserves of oil, natural gas, and minerals. In all countries examined, governments have adopted strategies to promote economic growth and finance public services through the development of natural resources. Part of this strategy is the encouragement of external investment in resource projects by foreign companies with multinational operations.
These seven countries are home to a total population of approximately 34.7 million Indigenous people, representing over 500 Indigenous groups. Most of the countries have also adopted laws and enacted policies that recognize Indigenous rights.

As Figure 1 below indicates, given the presence of Indigenous peoples and natural resource wealth, the current and future development of natural resources in the countries examined has and will continue to have a significant impact on the rights and living conditions of Indigenous people. How companies and Indigenous communities arrive at agreements about natural resources is a large scale and long term issue of international significance.

**Figure 1: Summary Country Data on Indigenous Populations and Resource Indicators.**

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>INDIGENOUS POPULATION</th>
<th>INDIGENOUS GROUPS</th>
<th>PROVEN OIL RESERVES (BILLION BARRELS)</th>
<th>ILLUSTRATIVE MINERAL PRODUCTION INDICATORS (2013)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brazil</td>
<td>896,000</td>
<td>305</td>
<td>15.311</td>
<td>Gold: 75 metric tons</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Iron: 398,000,000 metric tons</td>
</tr>
<tr>
<td>Bolivia</td>
<td>2,800,000</td>
<td>37</td>
<td>.21</td>
<td>Tin: 18,000 metric tons</td>
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<td></td>
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<td></td>
<td></td>
<td>Lead: 90,000 metric tons</td>
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<td></td>
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<td>Zinc: 400,000 metric tons</td>
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<td></td>
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<td>Tungsten: 1,200 metric tons</td>
</tr>
<tr>
<td>Colombia</td>
<td>1,450,000</td>
<td>87</td>
<td>2.45</td>
<td>Gold: 66,178 kilograms</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Silver: 19,368 kilograms</td>
</tr>
<tr>
<td>Mexico</td>
<td>15,704,000</td>
<td>&gt;60^5</td>
<td>10.0</td>
<td>Gold: 100 metric tons</td>
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<tr>
<td></td>
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<td>Silver: 5,400 metric tons</td>
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<tr>
<td>Nicaragua</td>
<td>443,847</td>
<td>11</td>
<td>0</td>
<td>Gold: 6,981 kilograms</td>
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<tr>
<td></td>
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<td>Silver: 10 metric tons</td>
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<tr>
<td>Peru</td>
<td>13,162,000</td>
<td>51</td>
<td>.74</td>
<td>Gold: 150 metric tons</td>
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<td>Silver: 3,500 metric tons</td>
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<td>Lead: 250,000 metric tons</td>
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<td></td>
<td></td>
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<td>Tin: 26,100 metric tons</td>
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<tr>
<td>Suriname</td>
<td>18,200</td>
<td>17</td>
<td>.09</td>
<td>Bauxite: 3.4 million dry tons</td>
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</table>

Note: Indigenous population numbers are taken from national census material. These numbers are meant for indicative purposes, and do not imply comment or endorsement of national policies on Indigenous identity.

**Today’s International Norms and Standards**

International instruments define the obligations of States with respect to the rights of Indigenous peoples. In Latin America, the Indigenous and Tribal Peoples Convention of the International Labour Organization (ILO 169) of 1989 is the primary legally binding instrument governing the topic of agreements between companies and Indigenous communities in Latin America. It sets out the
obligations of states to ensure consultation and calls on them to establish the legislative and regulatory frameworks necessary.

The United Nations General Assembly adopted the Declaration on the Rights of Indigenous People (UNDRIP) in 2007. UNDRIP goes further than ILO 169 on the matters of the self-determination of Indigenous peoples and their right to free, prior, and informed consent (FPIC). Recognition of the right of Indigenous people to consultation is close to universal, but recognition of the right to consent is not. Whether projects must obtain the consent of Indigenous communities as a condition for implementation is a matter of some disagreement.

The International Financial Corporation (IFC) has a set of performance standards which define the requirements for social and environmental risk management of clients who receive IFC loans or other services. IFC Performance Standard 7 concerns projects that affect Indigenous Peoples. IFC Performance Standards are very significant because they prescribe private sector obligations and specify measures required for compliance. Performance Standard 7 is also consequential because it is accepted as a part of the Equator Principles for financial institutions (major global banks adhere to the Equator Principles). IFC Performance Standard 7 includes FPIC and defines the circumstances in which it is required.

The International Council on Mining and Metals (ICMM), as well as the IPIECA (the global oil and gas industry association) have published industry standards for relations between companies and Indigenous communities which include guidance on the issues of impact, compensation, benefits, and consent. The ICMM Position Statement on Indigenous Peoples and Mining includes FPIC and calls for members to work to obtain the consent of Indigenous People for new projects.

Current practice in certain jurisdictions involves the negotiation of formal Impact and Benefit Agreements between companies and Indigenous Communities. These are agreements that are typically comprehensive with respect to the identification of impacts, measures to avoid or mitigate them, as well as compensation for impacts and benefits from the project for the community. Formal Impact and Benefit Agreements are not yet common in the countries we examined.

For more information on ILO 169, UNDRIP, key industry standards, and Impact and Benefit Agreements, please see Annex 3.
CHAPTER 1. Governance

National governance, including policies and capacity, emerged as a critical variable in our analysis on company-community agreements. By governance, we mean the role of the state and the manner in which it plays this role. Governance has several dimensions. The seven countries we examined have independent branches of executive, legislative, and judicial powers. All three branches have significant influence on the topic of Indigenous rights, as well as the legal and political terms of reference for the negotiation and establishment of agreements between companies and communities. Executive branches of government establish policies, institutions, programs, and practices that affect the way consultation takes place and agreements are reached. The executive branch is responsible for a range of duties, from allocation of financing for implementation of Indigenous policies to ensuring that Indigenous rights are respected in agreements. Sectorial policies and the licensing system, as well as environmental management, are also executive responsibilities. Legislatures establish the legal framework in which agreements are made and amend laws or create new laws when a country so requires it. Legislatures may also be the forum for political debate on Indigenous rights and how consultation requirements affect other national interests. The judicial branch, when cases are brought before it, makes decisions that interpret constitutionally guaranteed Indigenous rights.

A recurring issue across countries examined is the proper role of government when companies conclude agreements with Indigenous communities. Of course, governments are responsible for protecting and enabling Indigenous rights, which are human rights. We heard that governments should play that role with integrity and coherence, and they should not over-emphasize commercial interests. With the exception of Brazil, no national policy framework clarified with specificity the role of government in the guarantee of agreements. Sometimes this is because the remote geography of project sites means that government does not have an effective presence. Sometimes it is because of low institutional capacity and lack of clear policies.

In our research, government policy and constructive government presence were seen across the board as necessary conditions for agreements to be concluded and implemented successfully. Policies and legal frameworks that oblige companies to consult with communities shape the nature and outcomes of the agreements that result.
The Importance of Governance

Figure 2: Government Policy on Indigenous Rights (Survey Results)

It is essential that governments provide an adequate framework that both protects peoples’ rights and meets the requirements of complex natural resource development projects. However, ensuring such a framework is inherently complex and is subject to factors outside government control, such as community dynamics, culture and history, commodities prices, decision making processes of international mining and petroleum corporations, and others.

Companies investing in resource projects benefit when governments provide a stable policy environment. These projects typically require large capital outlays at their outset, and their project cycles have durations of many years. Companies need government to provide clear rules, but with one or two exceptions, they are not doing so.

“The government has offered no policy guidance to companies with respect to structure or content of agreements.”

We heard from interviewees that the subject of agreements is not static; it is in motion and moving forward. With the possible exception of Brazil, there was no case where a long-standing and well-understood framework for consultation was in place.

Given evolving policies, it is no surprise that institutional structures to manage consultation policy are not fully formed or resourced, nor that uniform procedures are lacking at the national level. For this reason, consultation and agreements are characterized by a high degree of improvisation as governments are confronted with a rapidly evolving landscape.

“Although there are not many examples of impact/benefit agreements, they are coming – and coming too fast for governments to manage the process.”

A basic and obvious political task of government is to support the aspirations of its citizens and assist with the redress of grievances. We heard that Indigenous communities in some countries are disappointed by the limited social and economic development resulting from resource projects in or near their territory. This also suggests that governments have not created adequate linkages between resource projects and the well-being of Indigenous communities.
“Those who least benefit from natural resources are the Indigenous People.”

“The poverty of the people is the strongest proof of failure (of agreements).”

Notwithstanding the depth of challenges governments are facing, for the most part we heard that there is progress. Governments in the region are taking measures to implement their obligations. They are showing positive intent in engaging with the issues of consultation and agreements, and there is an emerging view that they are trying to play their role to the best of their ability.

“Government involvement is growing and becoming more effective. A Presidential program has been established called Presidential Program for the Formulation of Strategies and Actions for the Integral Development of the Indigenous Peoples.”

“The government is a partner and will come on the journey with us.”

The following suggestions were offered to improve government’s role in agreements:

- Provide institutional support for companies and Indigenous peoples, with qualified human resources;
- Provide clarity regarding expectations for consultation/consent and revenue sharing modules;
- Establish clear rules for the interaction between companies and communities;
- Have greater presence in the zone or region surrounding development projects;
- Improve communication mechanisms; and
- Clarify the role of agency and government.

Respondents stressed the importance of government neutrality in agreements. We heard that:

- Government neutrality is paramount, and respondents expressed concern that government is not always seen this way. Governments should not take sides but rather should serve as neutral arbiters of agreements between companies and communities.
- To be credible and in order to support successful agreements, governments must recognize and execute their obligations with regard to the rule of law.

GOVERNANCE WITHIN INDIGENOUS COMMUNITIES

Our research revealed that Indigenous communities require strong governance, organization, and internal communication during the consultation and agreement processes. Respondents indicated that communities would benefit from having their own protocols for consultation and consent in place. Strong leadership and channels of communication help communities establish their development priorities and make informed and inclusive decisions. The following suggestions were given to improve communities’ experiences in developing agreements with companies:

- Ensure and secure transparency and accountability from community leaders or representatives;
- Design and carry out a consultation process that is recognized as legitimate by the community; and
• Develop local development plans that build local consensus on how to invest the revenues generated by agreements.

Policy Frictions

Governments in the countries we examined are seeking investment to develop their natural resources. However, they have a simultaneous constitutional and international duty to protect and implement Indigenous rights. When there is a lack of coherence in the pursuit of these objectives, or when implementation is faulty, friction between the two objectives is the result. Inadequate consultation can result in tension or disagreements which sometimes can trigger social protest by Indigenous and other communities.

“If Indigenous people have not participated in consultations, social protest is their form of response.”

This in turn can result in unstable conditions for long-term investment, undercutting national development objectives.

Partly, this may be a coordination problem across ministries. Ministries of Interior or Indigenous Affairs are responsible for ensuring that Indigenous Communities effectively enjoy their consultation rights. Sectorial ministries and agencies do licensing, investment promotion, and control. There are unresolved frictions across ministries and organizations.

“This has to be addressed, streamlined. It needs to be more coordinated.”

Additionally, the effectiveness of public institutions to ensure proper consultation in most of the countries we examined falls short of their mandate.

We heard that older projects faced particular challenges. Current laws and policies are very different from ten years ago, and the projects licensed before current policy was enacted are operating under outdated guidance. Some commented that operational projects in Latin America have been licensed on the basis of faulty and inadequate consultations, compensations, and benefits. This presents a governance dilemma, and we did not hear of procedures for retrofitting of contemporary consultation processes to mature projects.

“There are many projects already being implemented close to or on Indigenous peoples’ lands, and thus a legacy of past processes….with different characteristics. Some are really bad. Others are not. But these projects have already been approved…so what to do about that?”

The Critical Role of the State

Consensus political support for Indigenous rights in Latin America might not yet be fully consolidated. There are complaints that government policies and processes result in consultations that take too long.
In some cases, this has been interpreted as a costly and avoidable delay in the implementation of projects that are of national priority. This is to say that political debate and decision on this subject has and will continue to affect the governance context in which agreements happen.

Governments in the countries we examined appear to have an uneven and incomplete presence across their national territories. The state’s absence can negatively affect the negotiation and implementation of agreements. Additionally, where governments do not provide adequate public service, pressure falls on companies to carry out this role – often through agreements with communities.

“The ‘nasty bit’ is that the inability of the state to provide services means that the company needs to become a substitute for the state and community agreements are often the vehicle for this.”

When Indigenous communities and companies do not reach agreement, communities may then try to engage with their government on strategies for protecting their interests, where they often face complex bureaucracies and confusing procedures.

“[The Government is] difficult to work with, and were terrible stakeholders… In [one] case, the Indigenous people were totally unprepared to deal with such complex situations, and government did nothing to address that.”

A significant example of injury to the right of consultation was explained in one country where projects were licensed without the knowledge of the communities. In this case, the government failed to inform the Indigenous people concerned about the projects, a basic pre-condition for proper consultation and good agreements.

“…the Indigenous representatives asked the Ministry of the Interior for a list of the concessions on their land. They were surprised and shocked to see what had been awarded, and asked who agreed to these awards.”

Most fundamentally, the state has the obligation to guarantee Indigenous rights, but it can’t do this if it does not have an effective presence. This responsibility should include being aware of agreements and encouraging good agreements that respect rights, take commercial interests into account, and are properly implemented.

“The state is like the father of the country. It needs to be present, sitting and listening to what is agreed between companies and communities. It cannot be distant. It needs to be with everyone. As communities, we need to analyze and decide according to our own interests, but we need Señor Estado to be present and oversee that commitments are kept.”
The Role of Courts

Judicial posture and capacity is important. With the exception of Suriname, Indigenous rights are enshrined in the constitutions of the countries that we examined. The judiciary was cited repeatedly as a factor that shapes agreements by judging the adequacy with which rights are expressed in agreements, or by defining rights where they are not clear.

“[In Colombia], a complaint that the process of consultation was unsatisfactory was brought to the Supreme Court. The court judged that the consultation process was inadequate and required the company to start over.”

Where rights are not clear, courts will define them, and we heard several examples of the judiciary playing such a role. One case described by an interviewee involved special protections for Indigenous groups at risk of extinction, as is the case in certain parts of Latin America. In view of the vulnerability of these groups, courts in Colombia established special new provisions for groups at risk of extinction. As a result, these groups now do have the right of consent or denial of projects.

“These groups can stop any project they don’t want.”

In those cases where national governments fall short of international standards, International courts can over-ride them. This occurred in Suriname. Indigenous people filed a complaint that a forestry project was granted a permit to operate by the Government, but without any consultation with the community. This complaint was upheld by the Inter American Human Rights Court.

“…there have not been major investments since the Saramalla Forestry Project which was the subject of a complaint against the Government of Suriname in the Inter American Human Rights Court.”

According to one respondent, companies have not yet developed a practice of consulting with Afro-Bolivians in the context of Indigenous rights. For this reason, it was expected that the definition of their rights would be determined through court findings.

“In Bolivia, the requirement for consultation also includes Afro-Bolivians. In the private sector, the precedence of Indigenous rights in this context is not well understood. It will be important for Bolivia to develop a body of jurisprudence through court cases. Colombia has this.”

Economic Priorities and Indigenous Rights

Of course, the subject of consultation and the need for agreements does not apply only to mining and petroleum projects. It applies to all activities that affect the rights of Indigenous People. This includes national economic priorities such as energy and transportation infrastructure which are indispensable for economic and social development.
Infrastructure projects (such as building of roads, dams, etc.) impact the interests of Indigenous people, and thus the nature of company-community agreements. Such projects have a high likelihood of changing the social character of previously remote territory, or causing significant change to natural environments. This can be a difficult issue for governments, because it requires decision making which properly includes Indigenous peoples rights and interests when strategic economic choices are made.

“A problem we see is that the Government is investing in hydro electricity and roads in the Amazon – this creates a conflict of interest.”

In some cases, the response has been to question the absolute requirement for community consent and seek legislative reform to proceed with projects in the absence of Indigenous community agreement. For instance, in Colombia, we heard that:

“The delays and the de facto veto on infrastructure projects is damaging and delaying national economic development ... There is work being done on new legislation in order to correct this problem. It will provide for more clarity and flexibility. It will provide a procedure for implementing projects of national priority in the case that they do not enjoy Indigenous community consent.”

In other cases, projects have been cancelled because they were ultimately incompatible with the rights of Indigenous communities.

“In Chile and Peru, there are examples of hydro electric projects which were shelved because of Indigenous issues.”

Governance and the Project Cycle

For governments, coordinated planning for natural resource projects is critical. It is important to synchronize licensing or permitting requirements and operational phases of a project with community consultation. For example, projects could have multiple and sequential agreements with communities that correspond to phases of the project cycle and their differential impacts. Similarly, early-stage consultation is critical, yet this often is a period of uncertainty for development companies. Successful agreements appear to hinge on governments’ ability to strike a balance between consultation and these early stage uncertainties.

A key issue is deciding the first point in the project cycle that affects Indigenous rights and therefore triggers the requirement for consultation. Communities express frustration when significant decisions to proceed with a project are made without consultation about the presence or absence of community consent or rejection. Concerns were expressed that the award of concessions, even though this is in the pre-production phase of a project, prejudices the views of a community because the government has decided to proceed with resource development without talking to the community.
“We have experience with oil companies and mining companies. Our major problem is that it is unacceptable that government enters into agreements with companies without consulting with us. In my opinion, it is an injustice that the government enters into agreements about resources in our territory without consulting us.”

“In Colombia, with the current business model, projects enter the consultation phase after concessions have been awarded. Then the projects are faced with social protest or conflict by the communities.”

Government licensing procedures that move faster than community processes can create tension and conflict around projects. Interviewees emphasized the importance of synchronizing licensing requirements and operational phases of a project with community consultation. An important implication of this is that projects should have multiple and sequential agreements with communities that correspond to the phases of the project cycle and their differential impacts.

“Agreements should be phased according to the project cycle. The agreement associated with exploration should be different than that of development.”

Positive developments were cited in Peru, which now requires consultation before awarding concessions in the petroleum sector, and there is discussion about embedding the community consultation process in the Environmental and Social Impact determination work. This would have the beneficial effect of moving community agreements to the front end of the project cycle and facilitating authentic community participation in impact determination.

“In Peru, what’s positive is that for oil and gas they are undertaking consultations before going to auction. [However, this is] not happening in the mining sector.”

Project closure is a particularly sensitive and difficult point in company community relations, in the view of one interviewee. It is also the point at which companies and communities need a strong government presence, although this was not forthcoming in one example we heard:

“As part of this process, [the company] is discovering how little the government wants to get involved. This presents a big capacity challenge for companies. It’s important for the government to be involved at this stage [of mine closure] to ensure ongoing opportunities [for the community]. The company can’t do this on its own.”

The Role of Home Jurisdictions

From a human rights perspective, it was observed that the home governments of international mining and petroleum companies have a human rights and foreign policy responsibility with respect to the conduct of these companies abroad. It was indicated that this responsibility should include policy
instruments that require companies working internationally to comply with the human rights (including Indigenous rights) obligations of their head office jurisdiction.

“We feel that governments have the responsibility to ensure that the companies subject to their jurisdiction are respecting the full range of their human rights obligations.”

At the same time, this responsibility is yet to be visibly exercised at the international level by home jurisdictions of extractive companies.

Analysis

GOVERNANCE LAG AND GAP

In most countries we examined, it was observed that there is a governance gap with two components. Firstly, there is a lag between current constitutional frameworks on Indigenous rights and the establishment of systems for their implementation in the context of mining and petroleum projects. This interaction of constitutional provisions, judicial decisions, laws, policies and politics generates dynamic movement and some friction between communities, companies and governments. In Colombia, for example, systems are not yet prepared for the autonomy or self-determination granted to Indigenous communities in Colombia’s constitution of 1991. In Bolivia, new legislation for Free and Prior Informed Consultation will make consultation compulsory and include monitoring and evaluation. What is more, agreements will be legally binding. This in turn will require procedural reform across sectors to achieve consistent implementation. The Brazilian Government has struck an internal working group on Free and Prior Informed Consent which could have knock-on effects through the licensing and consultation structures.

Secondly, there is a gap because of the uneven territorial presence of the state where communities and projects are located. As a consequence, sometimes communities look to companies to provide services they should receive from their government. In Suriname, there is a gap between international standards and national provisions which was revealed when the Inter American Court on Human Rights found in favor of an Indigenous community which complained about the government’s award of a project on their territory.
CHAPTER 2. Rights and Norms

There was strong agreement among respondents that awareness and knowledge of international standards, policies, and norms is continuing to grow within industry and government, and among Indigenous communities and human rights advocates.

In Latin America, ILO Convention 169 of 1989 is the primary instrument governing the topic of agreements between companies and Indigenous communities. The convention establishes obligations on states that generate requirements for resource projects. This includes the duty to consult with Indigenous people on matters that affect them, and to do so through their traditional institutions (it is important to underscore that the duty to consult is not the same as the requirement to obtain FPIC). It also calls for compensation when natural resource projects have negative impacts and for Indigenous people to benefit from participation in projects. More specifically, Article 15 states:

“The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

“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 programs 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, and shall receive fair compensation for any damages which they may sustain as a result of such activities.”

All countries examined, with the exception of Suriname, have ratified ILO 169.

With the proliferation and growing awareness of standards and norms, many Latin American governments have enacted constitutional reforms and policies that recognize the rights of Indigenous peoples. These constitutions, laws, and regulations, are described in the country briefs in Annex 1. Also, international norms have been established which are voluntary in nature, but influential on the behavior of firms. This chapter examines the drivers for rights and norms, and how they affect agreements between companies and Indigenous communities. It also examines trends, expectations, and other factors affecting how rights and norms are expressed in agreements between companies and Indigenous Communities.

Macro-Political Drivers

There are two inter-linked macro-political drivers of consultation rights and approaches in Latin America, both of which are legally binding on governments at the highest levels. Firstly are the
constitutional reforms of the 80’s and 90’s in Latin America. At the same time as they reflected the advances in democratization and peace processes of that time, reformed constitutions included new international norms, such as strong recognition of Indigenous rights – these are outlined in the country briefs in Annex 1. Secondly is the Ratification of the ILO Indigenous and Tribal Peoples Convention 169. The diagram below illustrates the temporal relationship between these drivers for each of the countries examined.

Figure 3: Timeline for Constitutional Reforms and Ratification of ILO 169

Colombia represents a case where the ratification occurred at the same time as its new constitution defining the country as a Social State of Law was adopted. Bolivia is somewhat of a special case. It was slow to constitutionally recognize Indigenous rights, despite having a majority Indigenous population. A new constitution in 2009 has redefined the nature of the Bolivian state as secular and plurinational. This sets the stage for new legislation on Free Prior Informed Consultation.

The message of this chart is that recognition of Indigenous rights to consultation, and hence the requirement for agreements, has forward historical momentum. It has been consolidated at the constitutional level in tandem with democratization in Latin America. What is more, the process is ongoing. On the one hand, policies and practices keep evolving. On the other hand, norms keep advancing – for example, the UN Declaration of the Rights of Indigenous People (UNDRIP) that was adopted by the General Assembly in 2007. UNDRIP represents an advance in the recognition of FPIC internationally. It is a powerful mechanism for rights protection because it puts decision making in the hands of rights holders, and recognizes that, where Indigenous people are threatened or at risk of extinction, their ability to deny projects may be critical to their cultural and physical survival.

The Impact and Operation of International Norms

We asked interviewees about the impact that international norms on Indigenous rights and FPIC have on agreements between companies and Indigenous communities. Respondents affirmed that these instruments indeed influence community and company practice in terms of the agreements they negotiate with each other. Norms on consultation and Indigenous rights can enhance the negotiating power of Indigenous communities in terms of their ability to influence projects and secure compensation and benefits for local inhabitants. Industry association standards are important as they often set a baseline for company conduct. This includes relevant standards such as those advanced by the International Council on Mining and Metals (ICMM) and the Global Oil and Gas Industry Association.
(IPIECA). Additionally, policies of financial institutions have influence, such as the performance standards of the International Financial Corporation and the Equator Principles for major private banks.

This is a complicated topic because there are multiple norms and standards, as well as variations in capacity and will to enact them.

“The situation is bad for Indigenous people, and we are dying. Our rights are not respected. They are destroying the lands and the rivers. Fish are dying.”

It was suggested that agreements should have explicit references in them to rights and that when national policy frameworks fall short on Indigenous rights, companies should be guided by international standards. Further, the best way to protect rights is to ensure the effective and consequential participation of rights holders.

“Sometimes the infringement on rights can be insidious and complicated. FPIC has been developed over the years in recognition that, in the unique circumstances of Indigenous people, special factors can undermine and impinge on these rights. FPIC is the best form of protection because the rights holders are themselves the decision makers.”

There was understanding that finding the right expression of norms in the national context can be very challenging. This is because international norms need to be articulated with different national systems of land tenure, as well as distinct policies for surface and subsurface rights.

“The government’s recognition [under Mexican law] of people’s title to land is positive and unusual among Latin American countries. Nonetheless, they are struggling to implement ILO 169, and to interpret its meaning, and how to implement it.”

Requirements of financiers as defined by IFC performance standard 7 and the Equator Principles were one very significant vector of influence. Political processes were noted as another.

“These norms will enter into practice through financing arrangements or through political processes.”

Company representatives indicated that Industry standards are helpful. They bridge international political agreements with attainable commercial and industrial practices. A number of times the work of ICMM was mentioned as an important reference point. In the quote below, we can see again the importance of IFC Performance standard 7 in terms of agreements and FPIC:

“This is an important factor for us as a company. The company has a commitment to the ICMM and to its internal standards. International norms have been around for a long time, and the IFC establishment of its performance standard on FPIC was a watershed moment. This forced the ICMM to deal with it because the ICMM needed to demonstrate leadership. Leadership includes FPIC.”
We heard that agreements should be specific and explicit about rights, because it is the impact on Indigenous rights that triggers the obligation of companies to consult. At the same time, it did not appear that many agreements contain these explicit linkages between agreements and rights.

“The proper approach is to examine the effects of a project on the rights of the Indigenous Community. A project must have a demonstrable effect in order to talk about consultation. From the companies’ perspective, a focus on compensation is expedient in order to get projects moving. Companies are looking for quick solutions.”

If companies find themselves in countries where governments are falling short of their obligations with respect to Indigenous rights, international norms can be essential terms of reference for company practice.

“International norms are critical considerations when national governments say they do not recognise certain rights.”

At the same time, many experts found the proliferation of norms and guidelines confusing.

“It is important, but there is a plethora of this stuff.”

While those we spoke with pointed to the value of evolving international norms, these were seen as having secondary importance in the survey. As shown in the figure below, our survey found that international norms are not the most important drivers for agreements. But our interviews painted a more nuanced picture. They indicated that, in fact, there is an interplay of multiple variables at the levels of community, company, and national conditions.

Figure 4: Most important drivers for company/community agreements

What is the most important driver for company/community agreements in this country?
Agreements, FPIC, and Community Rejection

We asked if agreements are equivalent to Free Prior Informed Consent (FPIC). The different responses we received revealed a confused panorama. None of the countries we examined have a right to consent. At the same time, IFC Performance Standard 7, ICMM guidance, and UNDRIP call for FPIC. The issue of consent or rejection has become a focus of debate.

It was pointed out that the existence of an agreement between a community and a company probably indicates that the community concurs with benefits offered. However, this is not the same as clear consent to the project. This is to say that the existence of an agreement between a company and an Indigenous community is not, a priori, an indicator that FPIC has been secured.

“… an [Impacts and Benefit Sharing] agreement indicates that benefits are acceptable, but this does not necessarily imply agreement with the project.”

Many human rights and Indigenous voices emphasized that communities should have the ability to reject projects that they do not desire on their territory. It was said that this is a pre-condition if prior consultation is to be authentic and consequential. Others said that giving approval authority to Indigenous communities would be unmanageable and create impediments to national development.

“For the process to be acceptable, the community needs to be able to reject the project in extreme cases if they so decide.”

“My advice to companies is to sit with us and consult. If we are not in agreement with a project, then the company should leave us alone and not bother us.”

“[Many] companies do seem quite worried about the ‘consent’ discussions, because consent gives more power to Indigenous people…. But this has meant that many more companies and Indigenous groups and associations have begun these discussions.”

A sensitive issue is how, or whether, to arbitrate when a company and a community are unable to arrive at an agreement. The current constitutional frameworks do not require consent, but expectations and international norms have moved in the direction of FPIC.

“The law (on consultation) is as good as you could expect to get. But the law is also imperfect. The law hinges on ILO 169, article 6. A challenge is a later article in the law, which essentially says that if you can’t reach an agreement, the government will make a decision. Some communities have now become frustrated and want ‘veto’ rights. Some NGOs and Indigenous groups now want the law repealed”
At the same time, we heard that FPIC is a good business practice. For some respondents, it was evident that obtaining authentic and legitimate consent of a community creates a desirable and stable social environment for a project.

“FPIC is emerging as a good business practice.” To push ahead with big investments without FPIC could be a bad business risk”. (20)

Illegal Actors and Violence

It is no secret that many Latin Americans are negatively affected by long-standing problems of insecurity and violence. In the case of Colombia, a fifty year long armed conflict has left some 5 million victims. Mexico has called upon its military to provide domestic security because of criminal violence. Trafficking in illegal narcotics by organized crime has regional and international dimensions. Moreover, illegal mining and logging are associated with environmental damage, widespread extortion, and problems of corruption.

Repeatedly, interviewees said that criminality and violence is a troubling presence in their areas of operation, and this affects the way agreements are concluded and operate.

“In Mexico especially, narco-trafficking has created a lack of security in and around the local ejidos….This is a common dynamic that is fundamentally at odds with robust community agreements. The same is true in Guatemala.”

“There is a high degree of corruption, which negatively affects the right to consultation plus a high degree of influence by illegal actors.”

Communities in some jurisdictions can be subject to intimidation, extortion, and violent coercion as illegal actors seek territorial control to pursue their criminal economic activities. This contaminates local governance and impedes communities from freely determining and expressing their priorities and interests - a necessary condition for proper consultation.

“Logging and narco-trafficking has hugely complicated – and derailed – agreement-seeking processes in many contexts. This is an issue that is massively difficult.”

Another factor is that petroleum and mining projects are often accompanied by governmental presence in the form of military or police forces to provide protection. This is contrary to the interests of illegal armed actors, and they may seek to influence communities to reject projects in order to prevent formal state and company presence in their areas of operation.

“The guerillas normally seek for the Indigenous communities to reject petroleum projects. This is because the army accompanies the companies to their project sites.”
Awareness, Expectations and Social Protest

Almost without exception, our interviewees said that the trend is to more awareness of rights and international norms and higher expectations for how those rights and norms are demonstrated.

“This has evolved through time. Indigenous people always knew they had rights, really by instinct. But they never received proper legal advice, and as this topic has grown in importance, and groups have brought cases, they now know very well.”

Information and awareness about norms and rights flows from multiple sources and across several networks. This includes the international fora where rights and norms are negotiated, national governments, project sites, and communities. The key observation is that there is a dynamic process of increasing awareness and knowledge which drives expectations at national and international levels.

“There’s no question that expectations and awareness have grown, and continues. Not just in Panama and Colombia. This is very clear, and local NGOs know instantly that they can call a national or international NGO who is well versed in these standards and norms.”

NGO, Indigenous and commercial networks are engaged, but awareness is uneven. National companies are said to be less aware, or less sensitive, than multi-nationals. Juniors are typically seen as less engaged than majors. Not all communities receive the information they need. This is a factor that generates disparities in implementation of prior consultation and resulting agreements in the countries examined.

“This discussion [on international norms] has reached us as a global multinational [company]. Brazilian companies and communities are not that aware. The exception is when they have a connection with international NGOs. Operationally, we don’t see it at the level of communities.”

Awareness of agreements and the norms that require them is high and growing, but different Indigenous communities have different levels of access and understanding.

“[Indigenous communities in this country] had no development six years ago. Now they have advanced considerably and their expectations as well.”

“…there is a very large disparity across Indigenous groups … There is a large disparity in terms of the level of participation of different groups.”

It was underlined that communities – when they are informed of their rights – will participate in consultations. Naturally, this creates expectations that they will receive benefits and have a role in decision making.
“People understand things like ‘to be informed’. Or what ‘prior’ or ‘advance’ notice means. That is actually a standard in Maroon culture. They have a saying: ‘If you want to help someone, you have to sit and listen to them first.’ This makes general concepts like ‘prior’ and ‘consent’ fairly straightforward.”

“Communities want to be partners, rather than just stakeholders.”

We heard that consultation, and agreements with extractive companies based on Indigenous rights, is a consequential phenomenon that could challenge entrenched interests. This could result in social or political tension around the issue.

“This process is enormous. It is not understood how large this process is. The status quo is OK for a lot of people with power, but they don’t understand how far they are from the real problems.”

Generally speaking, the expectation of disappointment by communities is higher than the expectation of improvement in respect for rights. Where communities are dis-satisfied that their rights will be respected, or have outstanding grievances about projects, interviewees indicated that social protest will often be the community response. In the absence of a governmental presence, or trust in the ability of the government to protect their interests, communities view protest or project blockage as their proper recourse.

“I do not expect improvement in the future. There is a lack of sincerity with the communities that are inside the concession. There are some agreements, but their terms are not respected. They need to respect us. We will see how far they will go in their failure to respect us. When laws and the terms of agreements are not respected, there will be resistance. Based on my experience, I do not wish to have further dealings with oil companies. When agreements are dis-respected – then there will be resistance.”

There is also uncertainty and some nervousness about the political consequences of consultation requirements. Some identified concerns about NGO engagement in the process and the implications of growing community expectations with respect to social tensions. This is not a universal view, but we heard these themes on a consistent basis.

The Example of First Nations in Canada and Aboriginal People in Australia

Respondents told us that formal and structured Impact and Benefit Agreements are not common in the countries we examined. However, a number of experts and practitioners thought that the countries examined would follow a similar path as Canada and Australia in terms of the relationships between companies and Indigenous communities as well as increasing recognition of the Indigenous status of
self-recognized groups. In this regard, the IBA Community Toolkit is illustrative of the structure and content of contemporary IBAs (http://www.ibacommunitytoolkit.ca/index.html).

“What is happening in Canada will happen in Peru. There will be a greater distinction between Indigenous and non-Indigenous communities. This raises difficult questions between the haves and have nots. Like the Métis in Canada who [because of a recent court decision] get a special deal because of special legal status they obtained.”

Although the governance framework in the constitutional monarchies of Canada and Australia are quite distinct from the Latin American presidential republics examined, there are a number of factors that suggest convergence of practice in the future. Canada and Australia have more mature natural resource sectors, highly developed regulatory institutions, a longer experience of agreement negotiations, and extensive bodies of case law to guide policy.

We should look at Canada and Australia to better understand successful community benefit agreements and draw lessons for Latin America. For example, look at the Impact and Benefit Agreement toolkit for Canada. The toolkit focuses on how to get it right.”

There is increasing communication between Latin American Indigenous groups with Canadian First Nations. Additionally, the Canadian example has been conveyed to Latin American countries in the context of technical assistance.

“A Bolivian delegation visited Nova Scotia and Ottawa, Canada to consult on the provisions of the law. They also visited Colombia and Peru.”

Influence of the UN and the Convention on Biological Diversity

In the context of the General Assembly’s adoption of the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP), UN agencies are making best efforts to implement its principles. In particular, the UN REDD+ program is relevant. REDD stands for “Reducing Emissions from Deforestation and Forest Degradation,” and it assists developing countries to achieve their carbon emissions targets. Where its work affects Indigenous communities, REDD+ includes FPIC as a standard operating procedure. Of the countries we examined, all but Brazil participate in the REDD program. REDD+ has experienced challenges with the implementation of FPIC, the details of which can be found in the draft evaluation of the Panama program. Notwithstanding these operational difficulties, it seems reasonable to expect that this UN operational standard will have broader influence in the region.

One respondent drew attention to the Nagoya Protocol on Access and Benefit Sharing of the Convention on Biodiversity (adopted in 2010) as another possible influence on the countries examined with respect to agreements and FPIC. The Protocol provides a legal framework for the fair and equitable sharing of the benefits of the utilization of Indigenous traditional knowledge on genetic resources. For example, a company that uses genetic resources based on traditional knowledge for food or cosmetic products is obliged to obtain community consent and share the benefits fairly and
equitably with the Indigenous people who were the source of this knowledge. Brazil, Colombia, Mexico, and Peru have signed the Nagoya Protocol.

“It resulted in a protocol for acknowledging the right of Indigenous People to develop and articulate their own knowledge – their own view – of biodiversity, and no one can use that knowledge without their consent. It’s a tool that comes from the Conference of Parties on Biodiversity, and is an interesting approach.”

Although genetic resources are different from the products of mining and petroleum production, this is significant in that it sets an international standard for Indigenous Peoples with respect to fair and equitable sharing of benefits. The governments party to this protocol are obliged to “take measures to ensure these communities’ prior informed consent, and fair and equitable benefit-sharing, keeping in mind community laws and procedures as well as customary use and exchange.”

Analysis

For Indigenous peoples there is a unique bundle of rights around water, land, and air that intersect with the multifaceted drivers of resource development. Critically, prior consultation and community consent practices put decisions in the hands of Indigenous peoples as the holders of their social, cultural, and economic rights. Careful and deep attention to community consent is incumbent on companies that plan projects where communities exist in an environment of intimidation due to human rights violations, or the presence of illegal armed groups.

The integration of Indigenous rights into industry norms and standards provides a mechanism for convergence between company practice, community expectations, and government legal and policy frameworks. Most interviewees said norms play an important role in the way agreements are made. However, the awareness of norms is uneven. Not all communities know their rights and not all companies have a clear understanding of how to integrate these rights in their projects. Many interviewees thought the multiplicity of normative frameworks out there has become confusing and onerous. Company/community agreements are of great interest to international NGOs because they are connected to the subject of rights and development.

Governments are not always able to prevent corruption and insecurity from negatively interfering with the consultation and agreement process. Another challenge for governments and communities is finding ways that formal national processes can mesh with traditional practices and concepts with respect to land and internal community decision-making. A problem that was observed is that agreements are also affected when illegal armed actors are present in a project area.

The emergence of Free Prior and Informed Consent as an international norm has not yet been accompanied by its broad adoption as a legal requirement at the national level. At the same, it is reasonable to expect FPIC to become an increasingly important influence on agreements because it has been adopted as a standard by leading industry and financial groups, as well as adopted as an operational requirement by UNDP in its REDD+ program.
CHAPTER 3. Relationships

Respondents who were directly involved in company-community agreements emphasized the fundamental importance of good relationships between a company and an Indigenous community. The implication of this is that the quality of an agreement cannot be better than the quality of the relationship through which it was concluded. This also implies that special attention should be given to establishing the right relationship from the very outset. This is a precondition for socially viable projects and successful agreements.

“If I view these kinds of agreements as somewhere along the continuum of marriage and inter-personal relationships. If there isn’t mutual trust, it doesn’t matter what’s written on the paper.”

The negotiation of agreements is very much a human endeavor, even though it has a technical content. In order to be successful, parties should have the objective of creating relationships of trust as a foundation for relationships. Interestingly, we heard that it is important for companies to have a recognizable corporate identity in order to build the relationship with the community.

“Communities do not usually ‘see the face of the company so early in the process. It is appreciated by the community and very beneficial, because it sets the stage for a good relationship.”

Also, relationships should be understood as long term in nature. Project cycles are long, and a vision of what happens after project closure needs to be included in the process of dialogue. So do approaches to manage relationships through changes of ownership or community leadership. The relationship should have a structural expression so it endures when individuals come and go.

“Company and community relationships should include a long-term vision for the future of the place and people affected by the project. This requires a structured forum for discussion of the environmental and social impacts of the projects in the context of the concerns and aspirations of the community as well as the commercial requirements of the company.”

We heard from experts from all sectors, including companies, about the value of transparency and the need to nurture respectful, long-term relationships. Communication was seen as an integral part of building company-community relationships as well. The following bullet points are additional recommendations from respondents for how companies could improve the outcome of agreements:

- Establish a social dialogue mechanism with all the communities, have regular weekly meetings, talk...hire locals, use local businesses.
- Be transparent, responsible, and communicate, to strengthen the coexistence with the community.
- Documented systematic schemes and pro-active relationships exceeding the established legal parameters.
Relationships are Complex

Agreements between Indigenous communities and companies reflect a complicated interplay of different incentives and pressures. The diagram below illustrates the drivers organized according to the different key players that affect agreement making.

**Figure 5: Primary Considerations and Motivations for Key Stakeholders in Agreements**

- **GOVERNMENT**
  - Constitutional provisions
  - Legislative framework
  - Sector policies and practices
  - Technical competence of state

- **INTERNATIONAL AND CIVIL SOCIETY ACTORS**
  - Reputation of country (indigenous rights and human rights)
  - External relations of community with international actors (UN/rights NGOs/development NGOs)
  - Consumer or down-stream requirements

- **COMMUNITIES**
  - Community Aspirations
  - Cultural
  - Economic
  - Political
  - Legacy grievances
  - Competence and capacity of local government
  - Legitimacy of community leadership
  - External relationships of the community

- **COMPANIES**
  - Project requirements
  - Corporate IP, HR and consultation policy
  - International norms and requirements
  - Resources available
  - Quality of company-community relationship
  - Competence and capacity of local company reps
Governments have legal obligations, political priorities, and capacity limitations. International actors deliver pressure for Indigenous and human rights advances and demand compliance with international norms. Communities have a spectrum of interests and needs from redress of their grievances to improvement of their material well-being. Companies have operational project requirements, shareholder value and reputational assets to consider, as well as the values of corporate leadership.

The interplay of these actors, and their distinct drivers affect the making of agreements.

It seems obvious, but bears repeating, that companies and communities, having very different interests and perspectives, may not understand each other well. The capital intensity of a resource project may be difficult for a community to appreciate, and issues such as communal ownership of land or traditional governance may be hard for companies to understand.

“The essence of the problem is how do companies find economic balance between costs and community benefits. This is very difficult when communities don’t see the capital intensity behind the projects. Especially with gold and oil.” (22)

Large companies have extensive and diverse relationships to manage across communities and Indigenous peoples. We also heard examples of individual projects that involved multiple communities.

“In Peru, [my company] has relations with 60 Indigenous communities, and in Bolivia, with 57 Indigenous communities.” (5)

This makes for a difficult mix to manage. Some interviewees from companies felt that the challenges involved were not properly appreciated by outside observers.

“Companies are trying hard to get this right. [Some NGOs] don’t have a clue how complicated this is. Indigenous community consent is not a simple issue when the decisive project approval authority is the government.”(21)

It is difficult for communities, too. As with the challenges that remote communities have in dealing with government, the same applies to dealing with companies. The relationship is inherently asymmetrical with the human, technical, and financial resources of the company being vastly greater than those of the Indigenous communities affected by a given project.

“The problem is that very few communities have the resources and help to [organize themselves to most productively negotiate with companies]... In the face of weak government, and lack of emphasis on such an approach, communities become much more divided when they’re facing a company, or the government.”
Observed Tensions

The needs, interests, goals, and priorities of Indigenous communities can be very different from those of international mining and petroleum companies. This divergence has been manifested in tensions between companies and communities. These tensions form an important context in which agreements are established and managed.

“Companies need to know that these people are the owners, and treat them as equals.”

Economic inequality bedevils Latin America, and Indigenous peoples suffer disproportionate levels of poverty in the countries examined. Inequity between international companies and poor communities was raised as a source of tension.

“The reality is that we do not benefit much from natural resources.”

Friction can also build when the agreements specify terms of payment that do not correspond to the governance structures or the preferences of the community.

“All agreements have room for improvement. [In Brazil, under agreements which began] in the 80s… we would transfer resources to FUNAI. Now communities have their own institutions and want resources to go directly to the community.”

The structure of royalty regimes influences agreements because both community agreements and national royalty systems influence how much local benefit is derived from a resource project. Where royalties are highly centralized, and are not perceived to benefit communities, local leaders will look to company-community agreements to compensate.

“Recent reform of royalty legislation has resulted in the centralization of petroleum royalties and a diminution of financial flows to local leaders. This has put stress on local leaders and is reflected in their attitude to community agreements with companies.”

New agreements can result in sudden increases of financial flows to a community. It was mentioned that tensions arise when communities do not have the institutions in place to manage new financial inflows adequately. Companies worry about misuse of funds, and community members may be disappointed in the lack of development impact stemming from a project. One survey respondent noted that in order to improve the success of agreements, companies must recognize that their new cash injections to a community can causes stresses and tension.

“When the municipality in Guatemala began getting … royalty payments [there, half of those payments go to local communities – avoiding the risk that money goes only to the national government], they got substantially more money in a single year than they’d ever gotten before…”
Additional comments spoke to the role of NGOs in the agreement process. Sometimes the relations between companies and NGOs are antagonistic in nature. Nevertheless, respondents emphasized the importance of building NGO-company relationships. NGOs can help bridge company and community interests and facilitate fair and balanced agreements. Still, respondents cautioned that NGOs should:

- Put the interests of the communities before the interests of the NGO;
- Work with companies to understand their concerns and restrictions and facilitate balanced agreements with the communities;
- Provide pro-active and positive collaboration schemes with companies aimed at reducing conflict in the territory;
- Ensure a level playing field in all interactions between communities and companies, in which FPIC plays an enormous part; and
- Engage in open dialogue with the company also, not just the impacted communities.

Relationships between communities and companies can be strained when traditional community practices and livelihoods must adapt and adjust to industrial scale resource development in their midst. For example, when mining companies receive rights to a concession, artisanal miners who have traditionally worked ore without legal title may face pressure to change their traditional practices or to leave. Artisanal miners – especially from Indigenous communities – often work informally. If they do not formalize, they may be considered illegal and be subject to prosecution. It has been observed that artisanal miners may be resistant to the structures, controls, and requirements that come with formalization, many of which can seem like a puzzling maze of bureaucracy. In one discussion, we heard about a community that was unwilling to give up the freedom and independence that came with working informally.

“…formalization did not work because the artisanal miners were resistant to the constraints involved in formalization.”

Tensions can also arise because of the time pressures that companies face. Corporate commercial needs and expectations are different from the more extensive time frames that Indigenous communities require for their traditional processes of information gathering, consultation, and communication.

“In Bolivia, Indigenous people have voiced their frustration about time pressure to arrive at agreements.”

Resetting the Relationship

While there were examples where tensions led to problems in the relationships between companies and Indigenous communities, it is equally true that these problems have solutions. In this regard, a number of respondents spoke about how projects with agreement problems were able to get back on track. These are examples of re-engagement between the company and the community.

Communities can reset the terms of the relationship by expressing their requirements with specificity and formality, including their requirements for a presence of the national government at the table.
“[The communities are] saying, ‘Hey, Government – we want a tripartite dialogue,’ and, ‘Hey, Company, we want to develop a protocol with you – a bi-lateral code of conduct.’ [They are] basically using the same terms [NGOs] used 16 years ago to pressure government and industry. This is the policy that Canadian Indigenous People developed – a policy for mining, or for investment in general.”

Companies can correct course when they observe that community relations are not positive. As the example below shows, this may require going back to the first principles with respect to how impact studies were conducted and the way in which compensation/benefits were negotiated.

“… the project began with bad community relations. The community didn’t want [the company present]. Then meetings were held in 2010 and agreements were negotiated. The pre-existing impact studies and compensation measures were not working. Efforts were made to improve the quality of the dialogue and the participation of the state...”

In some cases, resetting the relationship was the result of international NGO opposition to a project. This raised scrutiny of the company practices, broader awareness of a problem, project review, and subsequent establishment of a new relationship between the company and the community.

“The currently positive community relations stemming from the round table process was the result of past community and NGO opposition to the project.”

It is highly important to examine how companies and communities have been able to successfully reset their relationships on a positive track because, as mentioned in the Governance chapter, there are many operational projects in the countries observed that were licensed and initiated on the basis of inadequate community involvement and consultation.

Examples of Resetting the Relationship

While our sample size was not big enough to draw conclusions about examples of success, the agreements that were mentioned as significant all had a common thread. All of these projects faced problems in community relations in their earlier phases, which resulted in communities withdrawing their support or in the projects facing serious criticism. In response, company management undertook remedial measures to reset and restructure the relationship between the project and the community. The following are projects that interviewees cited where companies engaged with communities to redefine their relationship and improve the consultation and agreement process. (It should be noted that subsequent consultations on the draft of this report showed that debate exists about how successful these agreements really are. More case based research is required.)

- Peru
  - Tintaya: notable for Roundtable relationship structure.
  - Camisea: notable for sensitive treatment of remote communities.
- Colombia:
- **Cerrejon**: notable for foundation approach to benefits.

- **Bolivia**:
  - **Charagua Norte e Isoso**: In 2010, The Bolivian Ministry of Hydrocarbons and Energy (MHE) and the Guarani Peoples Assembly of Charagua Norte and Isoso reached a successful agreement over a hydrocarbon exploration project. Indigenous leaders were not satisfied with the initial consultation, so MHE responded with a more thorough and transparent approach. Local monitoring networks strengthened Indigenous capacity to participate and make informed decisions. Overall, the process is regarded as a successful example of FPIC.12

## Community Capacity

It was widely recognized that individual communities are often faced with heavy responsibilities to engage in negotiations that are technically, legally, environmentally and financially very complex. Traditionally governed communities are not organized or prepared for these functions, which may occur infrequently, or only once. For this reason, it was seen as important that communities are supported with capacity building. At the same time, resources for this are lacking. Also, it could be seen as a conflict of interest if the resources required come from commercially self-interested companies.

> “There needs to be a public fund, whereby tax monies paid by companies, for permits, exploration, operating, etc., fund capacity building, negotiation processes, [and] evaluation processes. It should NOT be managed by the company or by the government, but independently by a 3rd party, or collaborative commission. Companies actually agree with this approach. They want it.”

Beneficial third party involvement in company/community agreements is happening more frequently. Most respondents thought that this was a positive development and that third party involvement to provide additional capacity to communities led to better balanced outcomes.

> “Companies don’t know much about community development. And frankly, you don’t want them to develop that capacity. We certainly don’t want to go back to the ‘company town’ model, and have everyone indebted to the company store. Hopefully we learned from all that. There are NGOs who have the capacity and talent. Pair them up with companies and you’ll see a lot more successes.”

A case was cited of an advisory relationship between a Latin American Indigenous group and a Canadian First Nation for the purposes of providing advice during resource development negotiations. In another case, a company indicated that it decided that third party mediation agreement would result in the best agreement. In some recent cases, qualified development organizations are participating in the implementation of the social benefit provisions of agreements.

It was observed that where communities are effectively empowered (legally and technically) and have strategic objectives to guide negotiations, they can be in a strong position to defend their interests and secure meaningful benefits.
“Nothing is possible without communities having a strategy – a legal and negotiating strategy – and companies need to know this. They have theirs, after all. Communities have to be on equal footing. The perfect scenario is for the communities to have the proper legal counsel.”

At the same time, it was recognized that Indigenous communities want to determine their own future and have the right to do so. Consequently, it was observed that, when community technical and administrative capacity exists, communities prefer to receive financial transfers and then implement their spending program without external involvement.

“It really depends on the community concerned. If the community has an administrative capacity, they don’t want a third party involved. When a community receives cash, it does not want to go back to social investment. The trend is toward community management of resources.”

“Indigenous peoples know they need legal representation. But in [a particular case], the lawyer they had turned out to be an ‘NGO’ lawyer who also worked for the company. The Indigenous peoples knew this and rejected it. So at the beginning, that intermediation by the NGO lawyer was not defending the rights of the Indigenous peoples. This was a big deal, and important for NGOs to consider.”

Maturity, Sector, and Corporate Standards Matter

Respondents were asked about the differences between mining and petroleum industries with respect to agreements with Indigenous communities. We heard that there are significant differences. Companies can be differentiated according to their maturity. This in turn is a reflection of their experience, policy, and organization. Experience leads to learning. Some companies have corporate policies that direct operational staff to adopt progressive policies on Indigenous rights.

“As a company, [we have] a policy on Indigenous people and prior consultation, and we are more conscious of the need for dialogue. However, there is a cost to project timing and it needs to be factored in.”

Certain multinational companies have organizational units dedicated to the social performance requirements of doing business in areas with Indigenous peoples and community relations more broadly.

“The whole process has been one of continuous improvement. This used to be managed as part of the environmental group…. Now it is under the community relations group which is much better. There is a team that is qualified. It is 13 people dedicated to working in the regions. It is a multidisciplinary team including anthropologists, foresters and biologists.”
The observation that newer projects are doing a better job at developing successful agreements also suggests that a learning process is advancing in Latin America. Additionally, larger, international companies are widely judged to do a better at managing the agreement process than national or junior companies.

“Newer projects (vs. older) are absolutely more state of the art. Not just in Peru, but all over, and especially in Latin America. And size of company / operation matters: typically places where you have small operators, it’s still problematic. Artisanal and small operators are still the most polluting – doing things like dumping directly into water sources.”

Analysis

The success or failure of agreements has a great deal to do with the quality of the relationship that connects companies with communities. These relationships are determined by the policy, objectives, and project of the company in the context of the aspirations, territorial extent, homogeneity, prior experience, and negotiating capacity of the community. The best relationships are characterized by mutual confidence between the company and community supported by good communication. This is a necessary condition for a mining or petroleum resource to responsibly contribute to community transformation in line with the aspirations of that community. Good relationships are also important because significant projects usually are governed through the negotiation of multiple company/community agreements over the life of a project.

Communities are unique and diverse, and this demands flexibility from companies. Large projects may impact an area that includes multiple communities with different rights and aspirations.

Relationships between companies and Indigenous communities are complex and dynamic. Companies have very different interests and goals than communities, and robust dialogue structures and trust are necessary for authentic communication to bridge this divide. The relationship often includes tensions that require management. These tensions can include economic inequity, financial procedures that impede community self-determination, and friction between modern business requirements and traditional lifestyles, as well as different time frames for decision-making. At the same time, respondents gave us examples of companies and communities which confronted deep problems and succeeded in overcoming them through dialogue and resetting the terms of their relationship.

Creating the foundation for a good relationship is challenging because of deep asymmetry. Companies have more information, technical, legal and financial expertise access to government, and money than communities. For this reason, it is very important that Indigenous communities receive support to develop their capacities to negotiate balanced agreements.
CHAPTER 4. Character and Content of Agreements

Interviewees were asked about the character of agreements, what they provide for companies and communities. We also asked about the contents of agreements in terms of financial and non-financial forms of compensation and benefits. Additionally, respondents told us about the reasons for success or failure of agreements. As indicated in the governance chapter, agreements are very rarely made public. As a result, we were not able to study agreement documents for the purpose of this report. Nevertheless, patterns emerged about the content and the character of the agreements, and what agreements secure for the parties to them.

The Purposes of Agreements

Agreements have multiple purposes. The most basic expectation for successful agreements is that they give the company access to project sites while providing for the necessary measures to mitigate any negative impacts on an Indigenous community and its land. More common is the understanding that agreements have additional components for communities – to provide communities compensation for the direct and indirect impacts of a project and to provide community benefits, financed by the companies involved. These additional components can include new lands to replace those occupied by the company’s project, culturally appropriate development activities, and payments to community funds.

As shown in the figure below, companies can also find additional benefits from agreements. Survey respondents indicated that community support – whether for a period of time or for the life of the project – is an additional benefit for companies. In responding to the question about company benefits from agreements, the majority of respondents who selected ‘other’ added the phrase “social license to operate” as a distinct and additional benefit resulting from agreements. While the distinction between “community support” and “social license to operate” is unclear to the researchers, what is clear is that stakeholders from all sectors appreciate that access to land is an incomplete condition for successful projects.

Figure 6: Company benefits from agreements

What does the company receive in the agreement(s)?

- Access to land: 53%
- Community support for a period of time: 25%
- Community support for the life of the project: 39%
- Other: 19%
The following sections will review the character and content of agreements and factors that contribute to their success or failure.

**Morally or Legally Binding?**

Respondents were asked if agreements were legally binding. There were a range of responses which indicates that there is not a standard practice, with the exception of Brazil where the implementation of agreements is consequential for the license to operate, as described below,

“[The elements arrived at in negotiations] then become legally binding commitments in a document entitled ‘Obligations of the Licensing Structure.’ Communities have legal recourse in the case that there is non-compliance by the company. The company could lose its license. Similarly, if the community subsequently prevents the company from operating, the company can go to court.”

But this is a relatively new development. In Brazil, there are also agreements that were arrived at with Indigenous Communities in the past which are still valid, but do not meet today’s requirements.

Bolivia looks to be the next country which will adopt an approach in which the agreements arrived at between companies and communities will be formal and legally binding documents known as “actas.” As of the writing of this report, the new law has not been brought into force.

“There is a legal requirement that is about to be codified in a special law. Monitoring and evaluation of the implementation of the law are included. The big issues are about the representation of Indigenous groups. In Bolivia, according to the new law, the process of consultation is obligatory and the agreements are binding.”

The trend that emerges is one of increasing formality. Agreements used to be of a verbal and good faith character. Now agreements are in the form of written documents, signed by competent authorities, which spell out roles and responsibilities, but do not have the legal force of a contract. It appears likely that agreements will accumulate legal force in the future.

**When Companies Operate Without Agreements**

Our survey asked respondents about what alternatives exist where companies operate without agreements. We found that various alternatives can take place. In some cases, companies maintain an ongoing informal dialogue with communities or provide land and environmental management plans. Other times, companies make charitable contributions and provide job opportunities to help secure community support. We also heard from one respondent that the lack of agreement can create conditions for land expropriation.
Legitimacy of Community Signatories

We asked the question “Who signs the agreements” and elicited a broad range of responses and comments. We heard that identifying who is ‘legitimate’ and who is not can be extremely challenging. As in any community, Indigenous peoples are organized according to their own social, economic, and cultural realities, rather than the needs and realities of a company seeking permission to implement a project. Interviewees reported that, sometimes, company representatives fail to identify the correct individuals or groups with whom to negotiate. Sometimes they were blind to internal debates and differences of opinion within communities. In these cases, negotiated agreements were often considered illegitimate by the broader community.

“So one of the root problems is the legitimate representation issue. Many times companies do not even know who are the true leaders, and who they need to talk with.”

We heard about some negative community experiences that circumvented proper consultations by choosing the most agreeable leaders with whom to conclude agreements.

“It was found that the agreements signed by the company were sometimes with ghost organizations. There was a practice of ‘leadership cherry picking.’ In order to obtain agreements that, ultimately, were of very limited scope in their compensation.”

These negative experiences highlight the importance of companies carefully understanding the communities with whom they seek to work. That includes dialogue and due diligence to ensure that the interlocutor between the community and the company has the required legitimacy to represent the interests of his people.

In one case, there was a community divided between those who stayed on their traditional territory, and those who migrated to urban areas and retained their Indigenous territorial rights. The two groups had very different interests and opinions.

“The biggest problem is absent leadership and fractured, dispersed, diverse communities.”

Practical challenges can crop up at many turns. Communities are organized according to their own needs – not in order to sign agreements with companies. Successful implementation of agreements can hinge on practical questions of community administrative and service capacity.

“It is often a problem that communities do not have a corporate structure for the implementation of agreements. For example they may not have a community bank account to receive funds, or an employment office to allocate jobs.”
Non-Financial Compensation and Benefits

Our survey asked respondents about the common types of non-financial arrangements in Agreements. Non-financial arrangements fall into two categories. Firstly, those connected to project implementation, such as training and employment and assistance in developing businesses. These arrangements are intended to create opportunities for communities to participate in the project’s supply chain. Secondly, there are benefits that are outside the operational scope of the project, such as health, education and social services, environmental or cultural heritage protection, and institutional support for communities. Figure 7 below shows the responses received.

Figure 7: Common Non-Financial Arrangements in Agreements

Financial Agreements

As the survey results below demonstrate, there is diversity in the kinds of financial arrangements contained in agreements. What is notable here is the relative scarcity of equity and revenue sharing arrangements that ensure proportionality between the financial dimension of a project and the compensation and benefits received by a community. Also notable is the commonality of one-time payments, which would seem to be unlikely to produce lasting developmental benefits to a community.
“Other” Types of Financial Arrangements

According to one survey respondent, Peru has a policy for “Voluntary Social Contribution” (VSC) funds for companies to provide additional funds for social development projects. The VSC is managed and distributed by the Cerro Verde Civil Association (CVCA), which is administered by a board composed of community, government, and company representatives. The funds go towards health, education, nutrition, and infrastructure initiatives.

Calculating Financial Arrangements

Survey results conveyed a number of different ways for calculating financial arrangements. In some cases, the amount was determined by a negotiation; in others, it was fixed by law. Some negotiations were based on a percentage of profits, while others were made without reference to a project-related value. The value of the Indigenous territory affected by the project could influence the amount, as could the extent of the project’s impact. We also found that community responsibility is part of some arrangements. For example, one respondent mentioned a community whose financial benefits depended on their compliance with a set of conservation commitments.

Benefits and Compensation Issues

Several common issues and considerations were described by interviewees in relation to benefits and compensation. As expectations and practices have advanced, older projects find themselves with inadequate bases of community agreement. In Colombia, for example, the national Indigenous organization has secured a broad governmental review of operating mining projects on Indigenous territory which includes review of the terms under which they were initiated.

Proportionality is a consideration in terms of the relative amount of benefits received by a community in the context of company earnings or the expected financial dimension of the project. The perception of proportionality can change as a project moves through its cycle. Perceived proportionality is different at the exploration stage in comparison to the production stage.

“When we first started doing community agreements, they were life-of-mine agreements. In exploration and development, that wasn’t a big deal. But once they were in production, and then started telling the world it was the largest, most lucrative mine … the (communities) said: wait - we only got a pittance.”

The scale, cost, and time requirements to establish benefits and compensation can be very large and a significant part of total project cost. This is particularly so in cases where re-location and re-settlement is required.

“The monetary costs of these resettlements, and all that went into them – including compensation, foundations for sustainable development and the range of other items – are huge.”
“Negotiating agreements is a major undertaking: In resettlement cases – these take enormous amounts of time.”

It was also very interesting to hear a case of unforeseen benefits from company operations where company presence served to protect a community from the damage caused by illegal logging. There may be potential non-conventional benefits in relationships between communities and companies that is unrealized. This may be especially relevant where a project can result in the extension of formality and rule of law in an area affected by illegal armed actors and criminality.

“In one case, we significantly reduced infant and elder mortality through the provision of health services. This same community suffered problems of illegal logging and mining. [The company] was able provide security and prevent these illegal and environmentally damaging activities so that the community is more independent from illegal activities. Additionally, we assisted the community to officially certify its territory.”

A number of interviewees from different perspectives said that there is an issue in how benefits are transferred – i.e. cash compared to social development projects. For community autonomy purposes, cash may be preferred but where communities lack financial management capacity, social development projects may generate better community results. Policy frameworks for this are muddy. Also, obligatory compensation and benefits seem to be frequently co-mingled with voluntary Corporate Social Responsibility activities.

“My advice to communities is that they seek a direct benefit from projects. At the same time, the way these benefits are delivered can create conflict within a community. This is especially the case when the benefit is in cash.”

“Social investment by the company makes for a better relationship with the community because cash causes internal community tensions.”

“Good agreements do not involve cash. They emphasize infrastructure and are specific. The more specific, the better.”

Agreement Duration

There was not a uniform answer to the question of how long agreements take to negotiate and how long they last. The trend appears to be that agreements are taking longer to conclude, with very few examples of negotiations of less than six months, as indicated in the survey results below. The stage of agreement negotiation therefore becomes a significant, but unpredictable, planning factor.
Indigenous communities may require a substantial period of time to interpret, analyze, discuss, and understand the implications of a project. Communities require sufficient time to understand the implications of a project for their rights and interests, to consult internally, and engage with complex bureaucracies and regulatory systems.

“Companies need to be patient. These processes are slow and painstaking for communities, especially when communities are having to adapt to new realities, technologies, bureaucracy, and cultural practices.”

The duration of agreements vary, and projects are often characterized by multiple agreements because the impact and relationship of a community to a project changes as project stages and conditions change. We heard about agreements that defined the consultation process at the outset of a project, prior to definition of impacts, compensation, and benefits. While companies had a preference for predictable agreements that covered the period of the operating license, this was seen to be unrealistic by some because new factors and expectations are bound to be introduced in the long life-cycle of resource projects.

“So now they negotiate every 4 or 5 years. And this represents an evolution in that respect.”

Management and Monitoring

The management of agreements is critical, and it works best when done in the context of a long-term co-governance structure. The endowment of foundations for this purpose appears to be the leading practice. A weakness observed is that agreements are not systematically monitored and evaluated, and recourse in the case of non-compliance on either side is difficult. Additional challenges in implementing agreements can occur when market conditions change, when projects change or move into new phases, and when company ownership changes.
“As mentioned, good monitoring or evaluation is hardly ever built in to agreements, and often is a cause for agreements failing to be implemented properly. What happens when things go wrong? What are the clauses or roles of the parties to get help when they need it? Where do those resources come from?”

Reasons for Success

Reasons given by respondents for success or failure were specific, basic, and to be expected in any kind of agreement process. Mutual respect is a key factor, as it would be in any negotiation. Mutual respect enables parties to bridge differences and fosters a flexibility that is integral to good agreements.

“…the dignity and social conditions of the community are the most important factors to take into consideration.”

“If the process of getting to that agreement is one where there’s development of mutual respect and trust, then the problems that arise over time will be resolved in a constructive, rather than conflictive, way.”

Technical experts on agreements and Indigenous rights said that a comprehensive and structured approach was required for good agreements. This means that agreements should be specific on how a project affects Indigenous rights and what measures are to be taken as a consequence. These measures are:

- Avoidance of impacts;
- Mitigation of impacts;
- Compensation for impacts and;
- Benefits.

All four of these measures should be based on the community’s understanding of the project’s impacts and the community’s development priorities. Naturally, feasibility and practicality of measures in the operating context of the community are very important as well.

“You need to work on the priorities as perceived by the community. Of course, you need to consider what works. This operates best when it starts small. Use a certain quantity of funds to begin, and then develop the partnership.”

In other words, agreements are not one-time deals, or static arrangements. Rather, agreements should be the product of ongoing company-community communication and decision-making.

For some, the matter of consent was also seen as a necessary condition for successful agreements because it contributes to creating a more even playing field between the company and the Indigenous community. The requirement of consent, and the option of rejection, can be considered as tools communities need to protect their interests.
“But it can work well when there is a good process of consultation that results in a proper document that is consequential and linked with impacts. And also, for the process to be acceptable, the community needs to be able to reject the project in extreme cases if they so decide.”

Another widespread view was that systematic monitoring and follow-up is an essential ingredient for agreement success. Monitoring allows for parties to quickly identify and address any issues as they come up. Clearly defined roles and resources can also help parties get help when they need it. Furthermore, comprehensive evaluations contribute to better future agreements.

“So if we’re going to improve outcomes in this area, we need the impacted parties themselves to provide in-depth feedback. For example, [one company and community that reached an agreement] has a follow-up commission comprised of one member from each party.”

Challenges and Reasons for Failure

The reasons for failure were similarly basic.

For indigenous communities, damage caused by oil or mining projects to the natural environment is a costly negative direct impact on them. Project agreements that did not prevent environmental damage, or where companies did not correct and clean up environmental damages are considered to be failed agreements.

“There are many agreements that have been negotiated and concluded with us. Although they have been concluded, they are not successful. The communities were required to accept them and take the benefits. They did not have the possibility to reject the projects. And then the communities identify the environmental liabilities, but no one corrects them. Additionally, there is no consideration of cumulative impacts.”

Lack of mutual understanding can be a risk. If the consultation process fails to capture true community needs and priorities, or if community leaders do not express authentic community needs, the agreement could be at risk of failure.

“Soon after, a number of the women contacted us and said ‘wait – we are worried about the river.’ So we then spent 2 days talking to the [women]… But if we had only stuck to the expectations of the men, this important topic would not have made the report, or been discussed locally.”

Additionally, mid-stream changes in companies, projects, and community requests can cause agreements to fail.
“The agreement with the [Indigenous Community] is also unsuccessful. In 1997, [the company] was privatized. In 2006, the community had been receiving an annual amount of [2.88 million USD]. They requested [8.3 million USD] and cancelled the agreement with the company. We then stopped operations.”

Inadequate situational awareness of external factors which will affect a community because of a project can be a reason for failure. Illegal logging and narco-trafficking were mentioned as complicating factors that derailed negotiations Peru. In a separate case in Colombia, the implications of armed conflict in the project area were not taken into account properly.

“There is an oil pipeline through the territory of [one Indigenous community]. [The community members] claim that there was no prior consultation. There is much spillage and environmental damage because people tap the pipe to steal oil and because the FARC blows it up from time to time. This problem was entirely foreseeable and avoidable.”

**Failure is mostly for Predictable and Avoidable Reasons**

Below are the survey results for the same question, which paint the same picture, but suggest relative magnitudes of risk. It is notable that the good faith issue is the least significant of all, which indicates that there is not an *a priori* obstacle to companies and communities arriving at acceptable agreements.

**What contributes to failed agreements?**

<table>
<thead>
<tr>
<th>Contribution</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lack of mechanisms for review or amendment</td>
<td>33%</td>
</tr>
<tr>
<td>A general view that the agreement was not negotiated in good faith</td>
<td>17%</td>
</tr>
<tr>
<td>A lack of planning around the implementation of the agreement, including the disbursement of the financial benefits</td>
<td>36%</td>
</tr>
<tr>
<td>A sense of inadequate consultation in the community when negotiating the agreement</td>
<td>42%</td>
</tr>
<tr>
<td>Changes in conditions, such as economic, political, or community conditions</td>
<td>36%</td>
</tr>
<tr>
<td>Other</td>
<td>28%</td>
</tr>
</tbody>
</table>

**Good Practices**

A set of good practices emerged from our research. They are characterized by a long term perspective a structured approach to relationships, authentic community involvement and clarity. Establishing and endowing foundations for community development is a good practice. Foundations can provide for
community leadership in their governance structures, and they can have a “post-extractive”
development time horizon that goes beyond the life of the project.

“It has a community relations structure based on a set of developmentally
oriented foundations that deliver local development projects in
education, water, small business development etc. “

Authentic community involvement in multiple dimensions is a good and important practice. This
involves going beyond simple negotiation over access and benefits. It involves communities working
together with companies and government to understand impacts, monitor implementation, and be
integ rally involved through the entire project cycle.

“In particular, Indigenous communities are involved in environmental
recovery in the mine area in a very positive way."

Striving for and achieving clarity of understanding and commonality of expectations is also a good
practice.

“When done right, there is clarity between what the communities will
provide and what the company will provide. “

Leading Practice

The leading practice we observed has two components. Firstly is a proportional and direct financial
linkage between the project and benefits. This could be connected to company investment, or earnings.

“1%-2% of the value of the investment [will] be in benefits for the
community. An innovative aspect of this is that the United Nations
Development Program will manage the social investment fund for the
company.”

“Benefits include employment and training, a supplier development
program, commitment to fund a trust, or community development
foundation. … The amount of financing that the project would contribute
to the trust would be about 1% of net profits.”

Secondly is partnership with a high quality development agency. One company is working with the
United Nations Development Program, which is a prestigious and effective partner, as indicated above.
It needs to be said that this is a new and groundbreaking role for UNDP. They are including a
reputational risk assessment of companies before getting in bed with them.

“There is a risk assessment tool for UNDP to assess the company in terms of
its policies on human rights, FPIC, and stakeholder dialogue processes. If
companies are deemed high risk, then the project will be declined.”
Analysis

Agreements have multiple purposes. For companies, they most often serve to ensure access to project sites. In terms of transfers of resources from companies to communities, there are two additional components. Firstly is to compensate a community for the direct and indirect impacts of a project (additional land was cited as an important compensation in one country), and secondly to provide benefits financed by the company concerned. These benefits can be connected to participation in the economic and commercial activities of the project, or they can be social, cultural, financial or economic benefits extraneous to the project. A range of financial arrangements were reported, from single cash payments to revenue sharing. Direct financial linkages between project cost or revenue is rare.

Community/Company agreements are much more numerous and more formal than they have been in the past. Where they had been informal arrangements based on good faith, they are now increasingly legally binding. In Brazil, for example, commitments arrived at in an agreement become “obligations of the licensing structure.” Because agreements are usually confidential in character, they are rarely available for study and review or independent monitoring. A critical and sometimes sensitive step in all agreements is determination of legitimate community representation. Where this is not conducted properly, community rights and interests may suffer and agreements will not be successful or lasting.

The management of the agreement is critical, and works best when it is done in the context of a long-term co-governance structure. Where benefits are to be provided in the form of social development projects, using a development agency for implementation is another leading practice. A weakness observed is that agreements are not monitored and evaluated on a systematic basis and that recourse in the case of non-compliance on either side is difficult. Additional challenges in implementing agreements can occur when market conditions change, when projects change, or move into new phases, and when company ownership changes.

The reasons for success are: mutual respect and trust; a systematic and comprehensive approach to impacts, compensation and benefits; authentic community participation, development according to community priorities, and clarity of roles and responsibilities. The reasons for failure are managerial and avoidable in character. Insufficient consultation, poor planning, lack of monitoring, and the inability to adjust to change can cause agreements to fail.
Chapter 5. Challenges and Suggested Priorities for Future Work

There was broad agreement that Indigenous peoples have a right to consultation, compensation, and benefits, and these rights are codified in all of the countries examined, with the exception of Suriname. However, implementation of these rights is very uneven within countries and across countries. A significant number of past and current petroleum and mining projects are operating with agreements that do not meet current international standards or expectations. At the same time, norms and regulatory frameworks are advancing, with progress underway in a number of projects that are now being planned. Free, Prior, and Informed Consent is a relatively new element that is being increasingly adopted at the level of industry standards. However, there is an unfinished debate about how FPIC could find proper expression in agreements between international extractive companies and Indigenous communities.

Improving the quality and implementation of agreements between international extractive companies and Indigenous communities in the countries we examined can be an important step forward in protecting and advancing Indigenous communities’ aspirations for social and economic development. From our analysis, we have identified the following challenges to realizing these goals, and suggested priorities for further work toward them. We expect that the RESOLVE-hosted FPIC Solutions Dialogue may wish to take up some of these questions, and we raise them here for the consideration of others who are developing approaches to improve company-community engagements.

- National Policy Frameworks do not always encourage successful agreements. There is a need for country focused research and multi-stakeholder policy dialogue which leads to reforms in policy and regulation, and the development of appropriate tools and mechanisms to support good agreements. An outcome of this process could be ideas for standardized approaches and protocols for agreements and protocols that meet company and community needs. Given an evolving normative and regulatory environment, these discussions could include considerations on how companies and communities can structure their relationships to adapt to future policy changes and the emerging FPIC standard.

- The award of concessions by government for mining, oil and gas projects often takes place in advance of full and meaningful consultation with Indigenous communities. There is a concern that failure to consult at the first point of decisions impacting Indigenous rights can pre-judge communities’ views and damage the quality of resulting agreements. This is particularly important in the environmental and social impact assessment phase of a project, which serves as a key premise of any agreements for compensation that may follow. Research is needed to understand how to advance consultation in the project cycle, and the potential for joint company-community environmental and social impact assessments, so that consultation and consent occur at all stages of project planning. While some companies are already taking this approach, the outcomes and lessons from these and new pilot projects should be evaluated and reported.

- Indigenous communities can be vulnerable to coercion when their rights are not adequately recognized and protected, or when they are not protected from illegal (sometimes armed)
actors and criminal organizations who are present in their territory. Additional research and in-depth dialogue and feedback from Indigenous people will increase **understanding of the problems and threats that can undermine and inhibit Indigenous communities from fully exercising their rights to consultation and consent**. Ultimately, community safety and security come into play, requiring an integrated government response, with support from civil society, international agencies, and others. For example, effective consultation processes may need to be coupled with an increase in government presence, training in human rights protection, and other strategies. Research could include consideration of the appropriate mechanisms to assess and address risks to communities, and integration of standards like the Voluntary Principles on Human Rights and Security in agreements. Additionally, research is required to assess how companies and communities can establish satisfactory agreements even when there are shortcomings in national policy or regulatory frameworks and implementation.

- International companies and Indigenous communities have different interests, needs and capacities that make the formation of productive long-term relationships difficult. It is an asymmetric relationship in which the community often requires technical, legal, and financial assistance in order to protect rights and advance community interests. This can be done through independent community advisors or other methods. *Further research is required to develop practical models for the delivery and financing of Indigenous community advisors in order to boost community negotiation capacity.*

- The confidentiality of most company-community agreements prevents proper analysis, and severely limits the lessons that can be drawn about common factors in developing successful agreements (or conversely, common indicators of failure). This secrecy also notably excludes the broader stakeholders from the governance and knowledge benefits that come from transparency. *Further work to examine the potential for voluntary placement of agreement documents in a public repository of agreements.* This could be done in partnership with transparency organizations, or seek to build on existing mechanisms such as the data-base of the Impact and Benefits Research Network ([www.impactandbenefit.com](http://www.impactandbenefit.com)).

- Our study found that the way agreements are implemented is an important factor in their success or failure. This is independent from the specific content of agreements. In particular, agreements can be subject to failure when there are changes in company ownership, project plans, or community leadership and needs. *Case examples of previous agreements that were successfully implemented (or where implementation is ongoing), and analysis of the success factors,* will offer guidance to negotiators in developing criteria for measuring performance, methods for measuring and enforcing compliance, specific implementation steps, and procedures for managing changes or future conflicts.
Annex 1a. COUNTRY BRIEFS. **Bolivia**

**Extractive Sector Overview**

- Proven oil reserves – 210 million barrels\(^{13}\)
- Bolivia claims to have 391 million barrels of probable crude\(^{14}\)
- Natural gas reserves – 9.9 trillion cubic feet, fifth largest reserves in South America
- In 2013 Bolivia produced:
  - 90,000 metric tons of lead
  - 1,200 metric tons of silver
  - 18,000 metric tons of tin
  - 1,200 metric tons of tungsten
  - 400,000 metric tons of zinc

**Overview of Indigenous Peoples and Organizations**

The Indigenous groups of Bolivia are separated into highland and lowland groups. The Aymara and Quechua populations occupy the highland and valley areas and represent the majority of the Indigenous population. Metal is the most prevalent natural resource in the highland areas. The Guarani occupy the lowland areas, where there is hydrocarbon exploitation.

According to the 2012 census, 2.8 million people over the age of 15 (41% of total population) are of Indigenous origin. The Quechua and Aymara people constitute the majority of the Indigenous population, but there are 37 officially recognized Indigenous peoples within the country. The most populous Indigenous groups in Bolivia include (listed from most to least populous):

- **Quechua** (3,189,446 people in 2010),\(^{16}\) living mainly in the Andean region in the western valleys of the country and in urban areas
- **Aymara** (2,657,872 people in 2010),\(^{17}\) living mainly in the Andean region in the western valleys of the country and in urban areas
- **Chiquitano** (108,206 people in 2001),\(^{18}\) living in the eastern lowlands of the Chaco and Amazonian region
- **Guaraní** (81,011 people in 2001),\(^{19}\) living in the eastern lowlands of the Chaco and Amazonian region
- **Mojeno** (76,073 people in 2003),\(^{20}\) living in the eastern lowlands of the Chaco and Amazonian region\(^{21}\)
Principle Indigenous Political Organizations

Confederation of Bolivian Indigenous Peoples (CIDOB) – President: Adolfo Chavez Beyuma. Federation representative of four Indigenous peoples of the Bolivian East (Guarani-Izoceños, Chiquitanos, Ayoreos and Guarayos) and composed of:22

- Assembly of the Guarani People (Asamblea del Pueblo Guaraní, APG)
- Center of Guarayo Native Peoples’ Organizations (Central de Organizaciones de los Pueblos Nativos Guarayos, COPNAG)
- Center of Indigenous Peoples of Beni (Central de los Pueblos Indígenas de Beni, CPIB)
- Indigenous Center of the Bolivian Amazon Region (Central Indígena de la Región Amazónica de Bolivia, CIRABO), including the following peoples: Cavineño, Chácobo, Esse Eija, Takana, Pacahuara, and Araonas.
- Indigenous Center of the Originary Amazon Peoples of Pando (Central Indígena de la Pueblos Originarios Amazónicos de Pando, CIPOAP)
- Center of Indigenous Peoples of La Paz (Central de Pueblos Indígenas de La Paz, CPILAP)
- Coordination of Indigenous Peoples of the Tropic of Cochabamba (Coordinadora de Pueblos Indígenas del Trópico de Cochabamba, CPITCO)
- Organization of Weehnayek and Tapiete Captaincies (Organización de Capitanías Weehnayek y Tapiete, ORCAWETA)
- Chiquitano Indigenous Organization

Indigenous Rights and Legal Status

According to James Anaya, the UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people:

“Since coming to power in 2005, the Government has initiated profound political, legal and institutional reforms with the aim of reversing the situation of exclusion and marginalization of the predominantly Indigenous population in the context of a new State model. Some of these reforms have met with opposition from some social, political and economic sectors, particularly in the eastern departments, leading to the state of crisis in which the country currently finds itself. The confrontation between these sectors and the central Government has its roots in historical models of differentiation between the various regions and peoples of Bolivia. This has created a very disturbing rise in racism, including physical and verbal assaults against Indigenous leaders and human rights defenders.”23

“In the past few decades, inadequate socio-environmental regulation and lack of oversight of corporate activities, together with the absence of mechanisms to regulate consultation with the Indigenous communities affected by such activities, have created severe environmental crises in the country’s Indigenous territories.”24
CONSTITUTION AND OTHER LAWS PERTAINING TO INDIGENOUS RIGHTS

Indigenous rights were first constitutionally recognized in the 1994 reform of the Bolivian Constitution. This reformed constitution established the country’s multicultural and multi-ethnic nature and provides for a series of Indigenous-rights-oriented legislative amendments, including the promotion of land titling in Indigenous territories.

The 1996 National Agrarian Reform Service Law outlines the institutions and procedures for legal recognition of Indigenous lands. This law was revised in 2006 by the INRA law (National Institute of Agrarian Reform, No. 1715), which sought to improve the security and equality of land distribution practices. This law launched a new administrative organization which was responsible for supervising the legal processes involved with land titling. However, some criticize that the implementation of the law has been weak and inconsistent. Bureaucratic procedures and inability of IPs to develop their own models of management and organization are still major obstacles in Bolivia.

As of 2012, approximately 20 million hectares of land are recognized under the status of Native Community Lands (Tierras Comunitarias de Origen).

Article 30 of the Constitution of Bolivia, as amended in 2009, grants the following rights to the Indigenous peoples of Bolivia:

- To exist freely.
- A cultural identity, religious beliefs, spirituality, practices and customs, and to their own worldview.
- A cultural identity of each of its members, if desired, be registered with Bolivian citizenship in his identity card, passport or other identification documents with legal validity.
- A self-determination and territoriality.
- That their institutions are part of the overall structure of the state.
- A collective title to lands and territories.
- A protection of their sacred sites.
- To create and manage systems, media and communication networks themselves.
- A that their knowledge and traditional knowledge, traditional medicine, its languages, rituals and symbols and dress are valued, respected and promoted.
- To live in a healthy environment, with proper management and use of ecosystems.
- The collective intellectual property of their knowledge, science and knowledge, and as their appreciation, use, promotion and development.
- A multilingual education intracultural, intercultural and system-wide education.
- The system of free universal healthcare that respects their worldview and practices Traditional.
- The exercise of political, legal and economic systems according to their worldview.
- To be consulted through appropriate procedures and in particular through its institutions, whenever legislative or administrative measures which may affect them. In this context, respect and guarantee the right to Prior consultation conducted by the State, in good faith and agreed, with respect to exploitation of non-renewable natural resources in the territory they inhabit.
- The sharing of benefits from the exploitation of natural resources in their territories.
- The autonomous Indigenous territorial management, and exclusive use and exploitation existing renewable natural resources in their territory subject to the legitimately acquired rights of third parties.
- The participation in the organs and institutions of the State.
LEGAL RECOGNITION OF IP LANDS

Article 2 in the amended 2009 Constitution grants Indigenous peoples consolidation of their territorial entities. Article 30, sections 4, 6, and 7, grant “a self-determination and territoriality,” a collective title to lands and territories,” and “a protection of their sacred sites.”

NATIONAL APPLICATION OF INTERNATIONAL LAWS AND POLICIES

Demonstrating continued commitment to the promotion and protection of Indigenous rights, the Bolivian General Assembly adopted Act No. 3760 in 2007, which elevates the UN Declaration of the Rights of Indigenous Peoples to the rank of domestic law. Additionally, Bolivia has ratified the core Organization of American States (OAS) and United Nations human rights treaties, as well as ILO Convention No. 169.

According to the UN Special Rapporteur report,

“The draft new Constitution approved by the Constituent Assembly in December 2007 reflects the intention to redefine the relationship between the State and the Indigenous peoples based on the premise of the multicultural and plurinational nature of Bolivian society. The recognition of the rights of the Indigenous peoples in the draft text takes full account of the provisions of ILO Convention No. 169 and of the United Nations Declaration on the Rights of Indigenous Peoples, which have already been incorporated into domestic law, as well as other international norms on the subject.”

CONSULTATION WITHIN CONTEXT OF DEVELOPMENT PROJECTS ON INDIGENOUS LANDS

Recently, Bolivia replaced the Ministry for Indigenous and Native Peoples’ Affairs (MAIPO) with an approach that intends to strengthen Indigenous inclusion and participation by integrating Indigenous affairs into all levels of public policy. For example, the Indigenous Rights Mainstreaming Unit and the Inter-agency Technical Committee for Indigenous Peoples are attached to the Ministry of the Presidency. Also established were the Vice-Ministry of Community-Based Justice, which is attached to the Ministry of Justice, and the Vice-Ministry of Traditional Medicine Interculturalism, which is attached to the Ministry of Health.

Since MAIPO had acted as a forum for Indigenous issues, its dissolution faced some controversy with Indigenous groups and development agencies. The UN Special Rapporteur cautions that “Although it is still too early to evaluate the impact of this change in policy, necessary precautions should be taken in order to avoid disrupting channels of communication between the organs of the central Government and the Indigenous peoples.”

The UN Special Rapporteur recommended that local and departmental authorities work with Indigenous leaders and organizations to develop their own policies about natural resource extraction and Indigenous rights that are congruent with international standards.
The UN Special Rapporteur also called on companies to develop and apply “clear and precise guidelines” for the consultation process, which emphasize the consultation and participation of Indigenous groups and adhere to the State’s laws as well as international standards.

Indigenous rights issues related to developments on Indigenous lands

The annual Country Reports on Human Rights Practices – the Human Rights Reports – cover internationally recognized individual, civil, political, and worker rights, as set forth in the Universal Declaration of Human Rights and other international agreements. Section 6 of each report, titled “Discrimination, Societal Abuses, and Trafficking in Persons,” includes a synopsis of the human rights situation of Indigenous peoples’ in the country. Extracts from the 2013 Human Rights Report for Bolivia that are relevant to this brief, those that reference to intersection with extractives, social conditions, and issues of vulnerability, are included here:

“The IACHR reported that 70 percent of Indigenous persons lived in poverty or extreme poverty with little access to education or minimal services to support human health, such as clean drinking water and sanitation systems.”

“Indigenous lands were not fully demarcated, and land reform remained a central political issue. Historically, some Indigenous persons shared lands collectively under the “ayllu” system, which was not legally recognized during the transition to private property laws. Despite laws mandating reallocation and titling of lands, recognition and demarcation of Indigenous lands were not completed.”

“Indigenous communities were well represented in government and politics, but they bore a disproportionate share of poverty and unemployment. Government educational and health services remained unavailable to many Indigenous groups living in remote areas.”

From the UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, “The environmental pollution of many Indigenous territories as a consequence of mining operations, especially in Oruro and Potosí, and of hydrocarbon production in the Chaco and Amazonian regions, has not been subject to effective environmental control by the competent authorities, nor has it given rise to the proper consultation procedures to which the Indigenous peoples are entitled. Instead, it has posed serious problems to the health and traditional economic activities of the Indigenous communities. Despite the many complaints submitted to this effect, there is a reported failure to provide redress and compensation by those responsible for the polluting activities.”
Examples of FPIC related issues between companies and Indigenous groups

**The Bolivian Ministry of Hydrocarbons and Energy (MHE):** In 2010, The Bolivian Ministry of Hydrocarbons and Energy (MHE) and the Guarani Peoples Assembly of Charagua Norte and Isoso reached a successful agreement over a hydrocarbon exploration project. Indigenous leaders were not satisfied with the initial consultation, so MHE responded with a more thorough and transparent approach. Local monitoring networks strengthened Indigenous capacity to participate and make informed decisions. Overall, the process is regarded as a successful example of FPIC.34

**TIPNIS road project:** In 2012, plans were announced for the Villa Tunari Highway, which would cross the Isiboro Sécure national park and Indigenous territory. Indigenous communities, who had not been consulted about the decision, organized in protest of the road construction as a violation of the right to prior consultation.35 As a result, President Evo Morales withdrew plans for construction and initiated a new law to guarantee Indigenous peoples the right to prior consultation in February of 2012.36 Plans for construction have now been postponed until after elections in 2015.37

**Mallku Qota mining project:** In 2012, the Bolivian government’s concession to a project proposed by the Canadian mining company, South American Silver, sparked opposition from the Indigenous communities whose territories overlapped with the project area.38 The protests resulted in the kidnapping of several mining company representatives and the death of an Indigenous leader by police confrontation. President Morales revoked the concession and commended the communities for defending their rights over natural resources.39
Brazil

Extractive Sector Overview

- Crude oil reserves – 15.31 billion barrels of proved reserves
- Proven natural gas – 6.22 trillion cubic feet of proved reserves
- Leading Mineral Exports (listed in order of value):
  - Iron ore – ~398 million metric tons of usable ore produced in 2013, reserve of 31 billion metric tons in 2013
  - Gold – 75 metric tons produced in 2013, reserve of 2,400 metric tons, 4.5% of global gold reserves
  - Copper – 216,970 metric tons produced in 2012, reserve of 11,419 thousand metric tons
  - Aluminum – 1,666,000 metric tons produced in 2012, reserve of 2,600,000 thousand metric tons of bauxite ore
  - Manganese – ~21,310 metric tons produced in 2012, reserve of 53,500 thousand metric tons
  - Tin – 11,955 metric tons produced in 2012, reserve of 712 thousand metric tons, 11% of global tin reserves, world’s largest tin producer in 2010

Overview of Indigenous Peoples and Organizations

According to data from FUNAI, the National Health Foundation, and the 2010 census, there were about 896,000 Indigenous persons from 305 Indigenous groups in 2010. About 57.5% of the country’s Indigenous population lives on officially recognized Indigenous lands. The most populous Indigenous groups in Brazil include (listed from most to least populous):

- Ticuna (36,377 people)
- Kaingang (33,064 people)
- Makuxi (29,931 people)
- Terena (24,776 people)
- Guarani-Kaiowa/Pai Tavytera (18,000 people)
- Mura (15,713 people)
- Pataxo (11,833 people)
- Ixomami (11,700 people)
- Munduruku (11,630 people)
- Satare Mawe (10,761 people)
- Bare (10,275 people)
- Kokama (9,636 people)
- Xavante (9,602 people)

PRINCIPAL INDIGENOUS ORGANIZATIONS

- Coordinator of Indigenous Organizations of the Brazilian Amazon (COIAB), Coordinator – Marcos Apurinã
Indigenous Rights and Legal Status

Brazil’s constitutional and legal recognition of Indigenous rights is considered progressive, and the country has committed to both ILO 169 and UNDRIP. Brazilian law ensures “the Indigenous population broad protection of their cultural patrimony, exclusive use of their traditional lands, and exclusive beneficial use of their territory.” The law also outlines policies and practices regarding Indigenous right to natural resources on their territory. While the constitution grants the State ownership over hydroelectric-power and above and below ground minerals, Indigenous groups have the right to receive a portion of profits from mining on their territory.

The UN Special Rapporteur, Mr. James Anaya, noted that Brazil has significant number of programs in place that concern Indigenous land tenure, health, development, and education. However, Mr. Anaya also found that Brazil’s legal framework regarding IP rights is in need of update and revision. Despite progressive constitutional provisions, obstacles and challenges still remain.

CONSTITUTION AND OTHER LAWS PERTAINING TO INDIGENOUS RIGHTS

Identity

The 1988 Brazilian Constitution affirmed a multi-ethnic identity in Brazil and provides all Indigenous peoples within Brazil with their “social organization, customs, languages, creeds, and traditions.”

Article 216 of the Brazilian Constitution states:
“The Brazilian cultural heritage consists of the assets of a material and immaterial nature, taken individually or as a whole, which bear reference to the identity, action, and memory of the various groups that form the Brazilian society, therein included: forms of expression; ways of creating, making and living; scientific, artistic and technological creations; works, objects, documents, building and other spaces intended for artistic and cultural expressions; and urban complexes and sites of historical, natural, artistic, archaeological, paleontological, ecological and scientific value.”

The following paragraph outlines the government’s responsibility in protecting Brazilian cultural heritage:

“The Government shall, with the cooperation of the community, promote and protect the Brazilian cultural heritage, by means of inventories, registers, vigilance, monument protection decrees, expropriation and other forms of precaution and preservation.”

Land Rights

Articles 231 and 232 Indigenous peoples’ rights, including land rights, are recognized in Articles 231 and 232 of the Brazilian Constitution, as amended in 1988 and 2004. Article 231 recognizes the “social organization, customs, languages, creeds, and traditional, as well as their original rights to the lands they traditionally occupy” of the Indigenous peoples of Brazil, provides for the protection of these rights (especially protection from the exploitation of natural resources within these traditional lands), guards them from forced removal from or dispossession of their lands, and charges the Union to demarcate Indigenous peoples’ traditional lands and “to protect and ensure respect for all their property.”

Article 232 provides Indigenous peoples with standing to sue to defend their rights and authorizes the Federal Prosecutor’s Office to intervene on behalf of Indigenous peoples in all pertinent cases.

The 1988 Constitution of Brazil entitles Indigenous peoples to the “permanent possession” of the lands they traditionally occupy, and declares that they “have the exclusive usufruct of the riches of the soil, the rivers and the lakes existing therein.” However, article 20 of the Constitution also deems these lands to be the inalienable property of the Union, which complicates the concessions made in article 231.

Natural Resources and Indigenous Territory

Article 231, Paragraph 3: “Hydric resources, including energetic potentials, may only be exploited, and mineral riches in Indian land may only be prospected and mined with the authorization of the National Congress, after hearing the communities involved, and the participation in the results of such mining shall be ensured to them, as set forth by law.”
Paragraph 6: “Acts with a view to occupation, domain and possession of the lands referred to in this article or to the exploitation of the natural riches of the soil, rivers and lakes existing therein, are null and void, producing no legal effects, except in case of relevant public interest of the Union, as provided by a supplementary law and such nullity and voidness shall not create a right to indemnity or to sue the Union, except in what concerns improvements derived from occupation in good faith, in the manner prescribed by law.”

Anti-Discriminatory Code

According to the UN Special Rapporteur’s report, a new Civil Code was enacted in 2002. This new Code: “in line with the Constitution, eliminates discriminatory restrictions on the exercise of civil rights by Indigenous peoples that were contained in the former 1916 Civil Code. Previous to the enactment of this new code, Indigenous peoples were categorized as ‘relatively incapable’ and effectively treated as ‘minors’, with FUNAI in a guardianship (tutela) position.”

National Application of International Laws and Policies

The ratification of the ILO Convention No. 169 in July of 2002, whose implementation was mandated by a presenting decree in 2004, and the adoption of UN Declaration on the Rights of Indigenous peoples in 2007 demonstrate the country’s commitment to recognize and respect the rights of its Indigenous peoples.

UN Special Rapporteur’s Comments on Brazil and International Standards

In 2009, the UN Special Rapporteur found that Brazil had constitutional and other legal protections for Indigenous populations. Brazil also has programs in place that deal with land rights, development, education, and health. However, according to the report, “Indigenous peoples of Brazil continue to face multiple impediments to the full enjoyment of their human rights. Further efforts are needed to ensure that Indigenous peoples are able to fully exercise their right to self-determination within the framework of a Brazilian State that is respectful of diversity, which means exercising control over their lives, communities and lands, and effectively participating in all decisions affecting them in accordance with their own cultural patterns and authority structures.”

State Involvement in Consultation and Consent Policies

National Indian Foundation (FUNAI): Established in 1967, the National Indian Foundation (Fundação Nacional do Índio, FUNAI) is the primary Brazilian State agency responsible for executing government policy on Indigenous peoples and for developing programs to advance their interests. Currently, FUNAI is an agency of the Ministry of Justice and is led by a foundation president, Márcio Augusto Freitas Meira. It is responsible for “promoting and protecting Indigenous peoples’ interests and rights; demarcating and ensuring protection of Indigenous lands; carrying out studies on the various Indigenous groups; and raising awareness on Indigenous peoples and their challenges.”
The UN Special Rapporteur describes FUNAI’s “advanced methodology” for delineating and registering Indigenous lands here:

“The demarcation process begins with the identification of the area through a detailed multidisciplinary study by FUNAI, conducted with the participation of the Indigenous group or groups concerned through their own representative institutions. In identifying the area, attention is given to historical land use patterns, as well as to the present and future needs of the Indigenous people for their physical and cultural survival, in accordance with the Constitution (art. 231).”

The Integrated Project for Protection of Indigenous Populations and Lands in the Legal Amazon (PPTAL): Part of FUNAI’s approach to demarcating Indigenous territory is the Integrated Project for Protection of Indigenous Populations and Lands in the Legal Amazon (PPTAL). This initiative takes a participatory approach, where Indigenous groups are responsible for demarcating lands, rather than contracted firms. This approach has been lauded for being efficient, cost-effective, and fostering of Indigenous organization and agency. According to Philip Fearnside, “The 160 reserves in the PPTAL program have an Indigenous population of 62,000; encouraging this population to solve its own problems with a minimum of dependence on outside resources and initiative is a major achievement for conservation.” Forty million hectares in the Amazon region have been secured for Indigenous tenure under this initiative. The UN Special Rapporteur is supportive of the initiative as well. Mr. Anaya’s report writes that the initiative “is reported to have contributed to ensuring Indigenous peoples’ access to natural resources and to have increased the participation and control of Indigenous peoples in the process of securing and managing their lands.”

Indigenous Rights Issues Related to Developments on Indigenous Lands

LACK OF ADEQUATE FPIC MECHANISMS

The UN Special Rapporteur noted:

“According to numerous reports, with regard to many such projects consultations have not taken place directly with the affected Indigenous peoples through their own representative institutions, prior to approval of the projects and with the objective of achieving informed consent, as required by ILO Convention 169 (art. 6) and the Declaration on the Rights of Indigenous Peoples (arts. 19, 32.2).”

Additionally, the US State Department Human Rights Practices Report found that lack of funding was crippling FUNAI’s capabilities:
“President Rousseff’s chief of staff, Gleisi Hoffmann, stated that FUNAI did not have the capacity to mediate conflicts between Indigenous people and rural landowners and that the government would explore including other government agencies in the decision-making process for demarcating Indigenous lands. Since 2010 the government has cut funding to FUNAI by 67.8 percent to 5.9 million reais ($2.5 million).”

TENSION BETWEEN STATE ECONOMIC AGENDAS AND RIGHTS OF INDIGENOUS PEOPLES.

From the UN Special Rapporteur:

“The absence of an adequate consultation mechanism reflects a broader problem: the need for fully harmonizing Government policies, laws and initiatives for economic development with those to ensure the realization of the self-determination and related rights of Indigenous peoples.”

“There is an apparent lack of full harmonization of the Government’s priorities for economic development with the existing laws, policies and Government commitments aimed specifically at benefiting Indigenous peoples. This problem is manifested by the absence of adequate consultation with Indigenous peoples in the planning and execution of major development projects such as dams and natural resource extraction activities that affect them.”

NEED FOR POLICY AND LAW REVISION

The UN Special Rapporteur also found that Brazil’s legal provisions needed updating in order to reflect international standards. Currently, the Indian Statute of 1973 (Law 6001) applies to Indigenous groups and their rights. The implementation of this law has not been revised since 1988, despite ongoing debates to replace the law with a new one. Once considered progressive, the law is now seen as outdated and criticized for “encouraging Indigenous peoples to “evolve” and become more “civilized.”

Examples of FPIC Related Issues Between Companies, the State, and Indigenous Groups

According to the US State Department Human Rights Practices Report, conflict over territory and land demarcation is a major source of violence against Indigenous communities:

“According to a June report released by the Indigenous Missionary Council, 60 Indigenous persons were killed in 2012, 11 more than in 2011. In addition, 1,054 Indigenous persons suffered death threats and attempts on their lives... Most of the violence against Indigenous people was connected to contentious land demarcation disputes.”
The *Raposa Serra do Sol* case involved a dramatic challenge to the demarcation of 1.74 million hectares of Indigenous land by powerful non-Indigenous rice farmers who had invaded the land to farm on an industrial scale. The demarcation was issued as a presidential degree in 2005 and called for the removal of non-Indigenous occupants of the newly demarcated land within one year. The farmers, however, resisted the decree, sometimes by violently attacking Indigenous inhabitants. They argued that the demarcation of such a large territory had no constitutional grounding and affronted economic development objectives they believed to be protected by the Constitution. Brazilian military officials also contributed to the argument against the decree, stating that creating a large quasi-autonomous Indigenous territory along the border with Venezuela and Guyana posed a national security risk. However, Indigenous people and organizations, particularly the Indigenous Council of Roraima (CIR), supported the Raposa Serra do Sol Indigenous communities to oppose the challenge. By the time this case reached the Federal Supreme Tribunal, its potential implications for the future of Indigenous peoples’ rights in Brazil had acquired major proportions because the case had come to represent the clash of two opposing visions of development and the place of Indigenous peoples in relation to it. After a lengthy process, the Federal Supreme Tribunal voted to uphold the Raposa Serra do Sol demarcated land as a contiguous territory, which was a huge victory for the country’s Indigenous peoples.82

This case is important because the court articulated 19 conditions about Indigenous land rights that were much more specific than what was outlined in the Constitution or other legislation. For example, the ruling clarified that Indigenous territories were allowed “exemption from taxation and prohibition of non-Indigenous hunting, fishing, and gathering activities.”83

However, the court also asserted that the State possessed ultimate ownership over land. This means that the State reserves the right to certain actions, such as monitoring of IP lands (e.g. for conservation purposes), stationing of military presence without consultation, and control over natural resource production.84

The UN Special Rapporteur elaborated on the issues surrounding Brazil’s 2007 *Programme to Accelerate Development (PAC)*, which put US$ 50.9 billion towards the development of infrastructure and energy projects. Many of these projects, such as the Belo Monte dam, affect Indigenous populations. Indigenous groups feel that they have been left out of the planning and implementation of these projects and that the PAC initiative does not provide adequate safeguards to ensure that their rights are respected. The Brazilian government asserts that they are taking care to fulfill FPIC requirements through FUNAI, citing cases where projects were halted due to opposition from Indigenous groups.85

Mr. Anaya found that the Brazilian government’s approach to consultation to be in need of clarification. “In any case, there appears to be an absence of a well-defined procedure for consultations that conforms to the relevant international standards and that Indigenous peoples consider will consistently provide them adequate opportunity to be heard. Major infrastructure projects affecting, in the aggregate, thousands of Indigenous peoples include the construction of dams on the Xingu, Tocantins, Madeira, Estreito, Tibagu, Juluena, Cotingo and Kulune rivers, and the transposition of the São Francisco River... The construction of the Belo Monte hydroelectric dam on the Xingu river is one of series of dams that were planned as part of the Complexo Hidrelétrico Xingu project, affecting at least 10 Indigenous groups by the environmental changes caused by the dam. Faced with criticism about the impacts of the project on the environment and Indigenous peoples, the Government reports that it has pledged not to pursue the project beyond the Belo Monte dam. Even so, Indigenous groups and NGOs complain that the Belo Monte project is being carried out without adequate mitigation measures and consultations with the affected Indigenous communities.”86
Extractive Sector Overview

- Proven crude oil reserves: 2.45 billion barrels, just over 1 million barrels produced in 2013.  
- Proven natural gas reserves: 3.96 trillion cubic feet (as of 2010), 10,900 million cubic meters produced in 2012.  
- Strategic minerals of interest as defined in MME (Ministerio de Minas y Energía) Resolution No. 180102:
  - Coal (metallurgical and thermal) - 89,024 thousand metric tons produced in 2012  
  - Coltan (niobium and tantalum) – estimated 5% of the world’s reserve (~9,000 metric tons)  
  - Copper – 690 metric tons produced in 2012  
  - Gold – 66,178 kg produced in 2012  
  - Silver 19,368 kilograms produced in 2012  
  - Iron – 173 thousand metric tons produced in 2012

Overview of Indigenous Peoples and Organizations

According to the 2012 projections from the National Statistics Department, there are approximately 1,450,000 Indigenous people in Colombia (about 3.5% of the national population). These people belong to 87 different Indigenous peoples, making Colombia the second most ethnically diverse country in the Americas behind Brazil. About 27% of Colombia’s territory is occupied by traditional Indigenous groups, totaling 712 reservations.

In addition to Colombia’s ethnic diversity, the United Nations Environment Program has identified Colombia as one of the world’s seventeen mega-diverse counties, which together host more than 70% of the earth’s species.

Colombia’s Indigenous groups live in a variety of ecological zones, including the Andes, the Amazon, the Pacific, the Eastern Plains, and the desert peninsula of Guajira. The Andean provinces of Cauca and Nariño, as well as La Guajira, are home to approximately 80 percent of the country’s Indigenous population. Regions including the Amazon and Orinoquia are home to 70 distinct Indigenous groups, and have a low demographic density and a high level of settlement dispersion.

Sixty-five Amerindian languages are spoken within the country, along with two Creole languages spoken by the Afro-Colombians. Five Amerindian languages – Pisamira, Carijona, Totoró, Nonuya, Tipinga, have too few speakers to be revived, while 19 other languages have almost entirely disappeared.

PRINCIPLE INDIGENOUS POLITICAL ORGANIZATIONS

There are two national-level organizations that represent Indigenous communities in Colombia:
The National Indigenous Organization of Colombia (ONIC; President – Juvenal Arrieta González)

The Indigenous Authorities of Colombia (AICO).

There are also a number of regional organizations, namely, the Organization of Indigenous Peoples of the Colombian Amazon (OPIAC; President – José Soria) and the Tairona Indigenous Confederation (CIT; Council Governor – Rogelio Mejía).103

Indigenous Rights and Legal Status

The 1991 Political Constitution recognizes the fundamental rights of Indigenous peoples, and Law 21 of this constitution incorporates the ratified ILO Convention 169. In 2009, Colombia signed the UN Declaration on the Rights of Indigenous Peoples. Through Ruling 004 of 2009, the Constitutional Court of Colombia mandated that the government take measures to protect the lives of 35 Indigenous groups at risk of physical and cultural extinction, due to the internal armed conflict.104

CONSTITUTION AND OTHER LAWS PERTAINING TO INDIGENOUS RIGHTS

The World Bank Environmental Department considers Colombia an example of a country with a highly developed constitutional and legal framework for recognizing Indigenous rights. The Colombian constitution recognizes Indigenous territories as reservation lands, which function as political and administrative entities. The constitutional framework supports secure Indigenous land tenure and communities’ right to choose their own authorities and administer their internal affairs according to customary laws. The Constitution places responsibility on Indigenous authorities to “ensure the preservation of natural resources” but does not clearly define who has ownership over natural resources in their land.105

Article 63: “Property in public use, natural parks, communal lands of ethnic groups, security zones, the archaeological resource of the nation, and other property determined by law are unalienable, imprescriptible, and unseizable.”

Regarding natural resource extraction on Indigenous territory, the 1991 Political Constitution states that:

“Exploitation of natural resources in the indigenous (Indian) territories will be done without impairing the cultural, social, and economic integrity of the indigenous communities. In the decisions adopted with respect to the said exploitation, the government will encourage the participation of the representatives of the respective communities.”

This statute has been upheld through several rulings of the Constitutional Court, ordering the suspension of projects or declaring the unconstitutionality of norms due to a lack of prior consultation. Examples of such projects include the filling of a reservoir located in Indigenous territory, aerial fumigations of illicit crops, logging by a lumber company in the territory of an Afro-descendent community, and gold, copper and oil exploration and exploitation.
Regarding rights to consultation and land expropriation, the Constitution also contains the following provision:

“The state will protect and promote associational and collective forms of property. Due to public necessity or social interest as defined by the legislator, expropriation will be possible pursuant to a judicial determination and prior indemnification. The latter will be determined in consultation with the interests of the community and of the affected party. In cases determined by the legislator, such expropriation may occur by administrative mean, subject to a subsequent administrative legal challenge, including with respect to price.”

According to the Constitutional Court, consultation must take place before the granting of an environmental license. Moreover, simply providing information or notification to an Indigenous community about a natural resource exploration or exploitation project does not constitute prior consultation. Finally, according to the Court, prior consultation consists both of communication and also understanding, characterized by mutual respect and good faith between communities and the government authorities.106

Communities have veto power in consultation for projects that:

- Completely relocate the community
- Store or dump toxic substances on their territory
- Risk the very existence of the community

For all other projects, the Colombian government has the final say107

However, UN Special Rapporteur James Anaya finds that Colombia’s constitutional framework does not sufficiently adhere to international standards and procedures. According to his 2009 report,

“The development of effective consultation procedures that conform to international standards is one of the main challenges facing Colombia. According to information provided by the Ministry of the Interior and Justice, Decree 1320 of 15 July 1998, which creates a framework for consultations with Indigenous peoples, is continuing to be implemented even though both the Constitutional Court and ILO have concluded on numerous occasions that it is incompatible with Convention No. 169 and have called for the competent ministries to revise it. It is essential, therefore, to develop and implement, in cooperation with the Indigenous organizations and authorities, consultation procedures as stipulated by the Constitutional Court and ILO.”108

There is a working group within the Ministry of the Interior and Justice that focuses on the subject of prior consultation. Their goal is to create and implement a draft law to regulate the consultation process. Mr. Anaya noted that such a law could make the consultation process more effective and more closely aligned with international standards.
NATIONAL APPLICATION OF INTERNATIONAL LAWS AND POLICIES

According to Mr. James Anaya, the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, Colombia needs to further engage with the provisions of ILO 169 and UNDRIP and incorporate these standards in their economic development policies. This applies to areas of natural resource extraction, agro-industry, and tourism infrastructure.

“Although the Government has provided information about consultations regarding various projects, the information does not establish that the consultations were carried out in accordance with the relevant international standards.”

Mr. Anaya found that Colombia has yet to fully comply with the former Special Rapporteur’s recommendations on Indigenous consultation for extractive projects. He emphasized the importance that Indigenous rights to free, prior, and informed consultation be explicitly outlined in Colombia’s recent free trade agreements. These free trade agreements pose a particular threat to IPs because they “facilitate the exploitation of natural resources within Indigenous territories.”

CONSULTATION WITHIN CONTEXT OF DEVELOPMENT PROJECTS ON INDIGENOUS LANDS

In 2011, the Colombian government obtained 640 agreements with Indigenous groups, however there was much criticism that the agreements and consultations were not carried out in a satisfactory manner, especially among the Afro-Colombian communities.

A major problem within the FPIC process in Colombia is unclear demarcation and legal recognition of Indigenous territory, leading to disputes between Indigenous groups, neighboring landowners, and the government. Dispute over land ownership can lead to violent protests.

Additionally, the constitution only requires that the government conduct “prior consultation” with Indigenous communities. The government is not required to secure consent for all projects.

The government does not have to obtain consent for military action against illegal armed groups in Indigenous territories, but defense military directives “instruct security forces to respect the integrity of Indigenous communities, particularly during military and police operations.”

In 2013, the Colombian governments passed a presidential directive to reform prior consultation regulations and expedite the process. This directive was met with controversy from Afro-Colombian groups who felt that it was enacted without their participation.

The General Forestry Act (Law 1021 of 2006) and the Rural Development Statute were ruled as unconstitutional by the Constitutional Court “as they had not been the subject of appropriate consultation with the Indigenous peoples.” According to the Special Rapporteur’s report,
“On declaring the General Forestry Act to be unconstitutional, the Court stressed that the Constitution provided for special protection of the right of ethnic groups to participate in the taking of decisions that affected them and that such special protection implied a duty to develop processes for consulting with Indigenous and tribal communities on the adoption and implementation of decisions that might affect them. There are currently several draft laws on Indigenous matters under consideration in Colombia, and these should be the subject of consultation and agreement with the Indigenous peoples; the Special Rapporteur notes Government statements that steps have been taken in that regard.”

State Involvement in Consultation and Consent Policies
The ministries and institutions responsible for consultation and consent policies include the Prior Consultation Group of the Ministry of Interior and Justice, the Permanent Roundtable for Consensus with Indigenous Peoples and Organizations, and the Amazonic Indigenous Regional Roundtable.

Indigenous Rights Issues Related to Developments on Indigenous Lands
Between 1993 and 2006, the Constitutional Court found 18 cases where Indigenous land rights were violated by “intrusive initiatives” or large infrastructural projects. Examples of Indigenous groups who did not receive appropriate consultation include:

- The Motilón Bari people (oil prospecting and drilling),
- The U'wa people (oil prospecting and drilling),
- The Embera Katio people of the Alto Sinú (the Urrá I hydroelectric project).

The 2013 Human Rights Report for Colombia addressed the challenges and discrimination that Indigenous groups face and highlighted the vulnerability of Indigenous women, who faced discrimination based on gender, ethnicity, and reduced economic status. The report found that,

“Despite special legal protections and government assistance programs... The Indigenous persons were the country’s poorest population and had the highest age-specific mortality rates.”

The report also found that, “As of November 15, 2013, the Prosecutor General’s Office reported there were 27 active investigations of military members accused of violating the rights, culture, or customs of Indigenous groups.”

Examples of FPIC Related Issues Between Companies and Indigenous Groups
In 2011, the Colombian Constitutional Court halted the Acandi-Unguia highway project because the Ministry of Transportation failed to conduct an environmental impact assessment and did not carry out
consultation with Indigenous communities before commencing exploration for a binational electric line crossing the Panama-Colombia border.  

In 2012, The Colombian Constitutional Court upheld a 2009 ruling that shut down the Mandé Norte mining project in the northwestern department of Chocó. Muriel Mining Corp, a U.S. –based company (also associated with British-Australian mining giant Rio Tinto), intended to mine in the Indigenous territories for copper, gold, and molybdenum, which could have inflicted substantial environmental damages. The Colombian government granted Muriel Mining Corp. a concession two years before any attempt at consultation was undertaken. The ensuing consultation was conducted without regard to traditional forms of decision making, did not involve authorized community representatives, and failed to produce cultural or environmental impact assessments. Consequently, the court found the project to be in violation of ILO 169 and ruled in favor of the area’s Afro-Colombian Indigenous communities.
Annex 1d. COUNTRY BRIEFS. Mexico

Extractive Sector Overview

- Crude oil: Proven oil reserve – 10 billion barrels (2013), Crude oil production of 2.5 million barrels per day in 2013
- Natural Gas: Proven natural gas – 17 trillion cubic feet (2013), natural gas production – 1.7 trillion cubic feet per day in 2012
- Gold: accounted for 25.4% of total mineral industry production in Mexico in 2010, when 72,596 kilograms of gold mine output were produced
- Silver: accounted for 20.3% of total mineral industry production in Mexico in 2010, when 4,410,749 kilograms of silver mine output were produced
- Copper: accounted for 15.9% of total mineral industry production in Mexico in 2010, when 237,609 metric tons of copper mine output were produced

Overview of Indigenous Peoples and Organizations

According to 2010 Census of Population and Housing, conducted by the National Institute for Statistics, Geography and Computing (INEGI), there are a total of 15,703,747 (about 14.5% of the total population in Mexico) Indigenous people in Mexico. The Mexican Constitution asserts that “Communities of Indigenous people are those which constitute a social, economic, and cultural unit, are situated in a territory, and have their own authorities in accordance with their traditional customs.”

The most populous Indigenous groups within Mexico include (listed from most to least populous):
- Nahuatl (2,445,969 people), living mostly in Central Mexico
- Maya (1,475,575 people), living in southern Mexico
- Zapotec (777,253 people), living in eastern and southern Oaxaca in Southern Mexico
- Mixtec (726,601 people), living in the Mexican states of Oaxaca, Guerrero, and Puebla
- Otomi (646,875 people), living in the central antiplano of Mexico
- Totonac (411,266 people), living in the Mexican states of Veracruz, Puebla, and Hidalgo
- Tzotzil (406,962 people), living in the central Chiapas highlands in southern Mexico
- Tzeltal (384,074 people), living in the state of Chiapas in the highlands of Mexico
- Mazahua (326,660 people), living primarily in the State of Mexico, Michoacan and Queretaro
- Mazatec (305,836 people), living in northern Oaxaca in southern Mexico
- Huastec (296,447 people), living in the states of Hidalgo, Veracruz, San Luis Potosi, and Tamaulipas concentrated along the Panuco River and along the coast of the Gulf of Mexico
- Ch’ol (220,978), living in the northern Chiapas highlands in the states of Chiapas, Mexico

Principal Indigenous Organizations

- Indigenous National Congress (Congreso Nacional Indígena, CNI)
- Consejo Indígena Popular de Oaxaca “Ricardo Flores Magon” (CIPO-RFM)
Indigenous Rights and Legal Status

Mexico faces some challenges and inadequacies regarding Indigenous rights. In 2013, the Human Rights Report for Mexico stated that Indigenous groups felt that the country’s constitutional and legal framework “did not respect the property rights of Indigenous communities or prevent violations of those rights. Communities and NGOs representing Indigenous groups continued to report that the government failed to consult Indigenous communities adequately when making decisions about the implementation of development projects on Indigenous land. Consultation with Indigenous communities regarding the exploitation of energy, minerals, timber, and other natural resources on Indigenous lands remained limited.”

In addition, the report elaborated on the difficult situation of Indigenous women in Mexico: “The CNDH reported that Indigenous women were among the most vulnerable groups in society. They experienced racism, discrimination, and violence. Indigenous people generally were excluded from health and education services. The CNDH stressed that past government actions to improve the living conditions of Indigenous people, namely social programs geared specifically to women, were insufficient to overcome the historical marginalization of Indigenous populations.”

CONSTITUTION AND OTHER LAWS PERTAINING TO INDIGENOUS RIGHTS

Article 2 of the Political Constitution of Mexico, as amended in 2005, recognizes the right of Indigenous peoples and communities to self-determination, but does not officially recognize full Indigenous autonomy. Each federal State is expected to develop constitutions and laws that “establish the characteristics of self-determination and autonomy that best express the situations and aspirations of Indigenous peoples of each state.”

Within the constitution, the unity of the nation is stressed over Indigenous autonomy:

“The right of Indigenous peoples to self-determination shall be exercised within a constitutional framework of autonomy that ensures national unity.”

“The Mexican nation is unique and indivisible. The nation is pluricultural based originally on its Indigenous tribes which are those that are descendants of the people that lived in the current territory of the country at the beginning of the colonization and that preserve their own social, economic, cultural, political institutions. The awareness of their Indigenous identity should be fundamental criteria to determine to whom the dispositions over Indigenous tribes are applied. They are integral communities of an Indigenous tribe that form a social, economic and cultural organization.”
The constitution outlines Indigenous rights to carry out elections and governance according to their traditional customs, resolve internal conflicts, preserve all elements of their cultural heritage, and access to the nation’s court system.\textsuperscript{136}

In 2001, articles 1, 2, 4, 18, and 155 of the Mexican Constitution were amended to better reflect the points negotiated in the “San Andreas Accords,” the most important of which include:

- Recognition of Indian peoples in the Constitution, including their right to self-determination within the constitutional framework of autonomy.
- Broader political representation and participation. The recognition of their economic, political, social and cultural rights, as collective rights.
- A guarantee of full access to justice. Access to the legal system and recognition of Indigenous normative systems. Respect for difference.
- Promotion of the cultural manifestations of Indian peoples.
- Promotion of their education and mining, respecting and building on traditional knowledge.
- Increased production and employment opportunities. Protection of Indigenous migrants.

However, many Indigenous communities felt that these reforms omitted some fundamental issues, as will be discussed below.

**Land Rights**

The following provisions of Article 2 of the constitution outline Indigenous rights to land and natural resources. Indigenous communities are granted autonomy in:

“Protecting and improving their living environment and preserving the integrity of their territories in accordance with the terms established by this Constitution.”\textsuperscript{137}

“Having access to the preferential use of natural resources in the territories that these communities occupy and in which they live, except for those that correspond to strategic areas as determined by this Constitution, while respecting the forms and categories of property and land usage established by this Constitution and the relevant laws as well as any rights acquired by third parties or by members of the community. To this end Communities may merge with others in the terms provided for by the law.”\textsuperscript{138}

Under Article 27, “the law protects the integrity of the lands of Indigenous groups.”\textsuperscript{139}

“The law, taking into consideration the respect for and strengthening of the community life of the agricultural corporations (ejidos) and communities shall safeguard the land for human settlement and regulate the usage of common lands, forests, and waters and the necessary measures to stimulate and elevate the standard of life of their inhabitants.”\textsuperscript{140}
Article 27 also mentions concessions and communal lands and declares null and void, “All concessions, deals, or sales of lands, waters, and mountainous lands made by the Secretariats of Development, Finance, or any other federal authority, from December 1, 1876 to this date, which encroach upon or illegally occupy communal lands, lands held in common, or lands of any other kind belonging to villages, settlements, groups or communities, and centers of population.”

**Communal Lands (Ejidos)**

Under Article 27:

“The law, while respecting the will of the owners of communal lands (ejidatarios) and the community members to adopt the conditions most suitable to them for the use of their productive resources, shall regulate the exercise of the rights of the peasant communities over the land and of each community member over his or her own tract of land. At the same time, it shall establish the procedures by which the peasant communities and their members may associate with each other, with the State, or with third parties, and cede the use of their lands, and, in the specific case of community members, convey their parcel rights among the individual members of the local community; at the same time, it shall establish the requisites and procedures by which the community assembly may grant its members ownership of their tracts of land or parcels. The right of preference established by law shall be respected in cases where parcels are transferred.”

**Agrarian Revolution and Indigenous Land Rights**

According to the UN Special Rapporteur on Indigenous Rights,

“A century ago, the Indigenous communities that made up the majority of the population in Mexico, hard hit by the loss of their communal lands and by the poverty, exploitation and oppression under which they lived, were one of the key social forces which were to precipitate Mexico’s agrarian revolution in 1910. The 1917 Constitution initiated a process of agrarian reform which in the course of time benefited some 3 million peasants, for the most part Indigenous, grouped under various landholding arrangements in agrarian communities, ejidos (units of communal land) and small properties. The agrarian reform, however, soon lost impetus, and numbers of landless farmers and migrant day labourers increased again, their situation aggravated by population pressure on limited natural resources.”

**The Peace and Concord Commission (COCOPA) of the National Congress**

In 2001, in response to the EZLN uprisings, President Fox initiated legislative reforms that would benefit Indigenous groups in Mexico. The reforms incorporated some aspects of the COCOPA Act, but Indigenous groups felt that the most critical aspects were neglected. Indigenous groups felt manipulated and deceived by the omissions, and the reforms were not ratified by the states with large Indigenous populations. Indigenous groups unsuccessfully sought annulment of the reforms from the Supreme Court. According to the UN Special Rapporteur, “The fact that Congress had not carried out a wide-
ranging consultation on the constitutional reform, as it should have done in accordance with the commitments Mexico had made in ratifying ILO Convention No. 169, also prompted complaints to ILO.\textsuperscript{144}

The UN Special Rapporteur elaborated on the reforms:

\begin{quote}
“The constitutional reform of 2001, a late and adulterated product of the San Andrés Agreements between the Federal Government and EZLN, formally recognizes the right of the Indigenous peoples to self-determination but hems it round with restrictions which make it difficult to implement it in practice. For this reason the reform has been challenged by the official Indigenous movement which insists that it should be revised as a necessary condition for achieving peace in Mexico and ensuring the human rights of the Indigenous peoples. Furthermore, the reform did not respect the principles of ILO Indigenous and Tribal Peoples Convention No. 169 (1989), ratified by Mexico, particularly as regards the obligation of consulting the Indigenous peoples.”\textsuperscript{145}
\end{quote}

The National Commission for the Development of the Indigenous Peoples

The National Commission for the Development of the Indigenous Peoples was established in 2003. According to the UN Special Rapporteur, “Present State policy towards the Indigenous peoples is designed to produce negotiated solutions to the conflict “hot spots”, to promote and support productive activities and provide various social services to the communities. It does not depart significantly from the trend that has characterized Indigenous policy for more than half a century, but it is very much restricted by the limitations and cuts in the public budget and the clear fact that the problem of the Indigenous peoples is not one of high priority for the Mexican State. Indigenous bilingual and intercultural education has been one of the most visible results of Indigenous policy in Mexico, and certainly contributes to the cultural rights of the Indigenous peoples; the indicators for this educational sector, however, are still below the national average.”\textsuperscript{146}

NATIONAL APPLICATION OF INTERNATIONAL LAWS AND POLICIES


STATE INVOLVEMENT IN CONSULTATION AND CONSENT POLICIES

Article 2 outlines the responsibilities of the State in ensuring Indigenous protection and wellbeing. Obligations include stimulating regional development and economies, providing educational opportunities and access to healthcare, and establishing social protection policies.\textsuperscript{147}

Regarding consultation and development, Article 2 asserts that the State is obligated to: “Consult with Indigenous peoples in the elaboration of the National Development Plan and the development plans of states and municipalities and incorporate their recommendations and proposals, as appropriate.”\textsuperscript{148}

The national Institute for Indigenous Affairs was established in 1948 to implement Indigenous policy in Mexico. In 2003, the Institute became the National Commission for the Development of the Indigenous Peoples (Comisión Nacional para el Desarrollo de los Pueblos Indígenas, CDI), charged with the goal of
“directing, coordinating, promoting, supporting, encouraging, providing follow-up and evaluating programmes, projects, strategies and public action for the integrated and sustainable development of Indigenous peoples and communities, of being a consultative body and of assisting in the exercise of the self-determination and autonomy of the Indigenous peoples and communities.”

The CDI is headquartered in Mexico City and has been headed by Luis H. Álvarez, a former Mexican Senator, since 2006.

EXAMPLES OF FPIC RELATED ISSUES BETWEEN COMPANIES, THE STATE, AND INDIGENOUS GROUPS

**First Majestic Silver Corp Mining Concessions**: The Mexican state of San Luis Potosí allocated of 22 mining concessions covering an area of 6,327 hectares around Wirikuta, Real de Catorce to the Canadian company First Majestic Silver Corp. This land was awarded without prior consultation of the Indigenous Wixarika people who live on that land, and consider Wirikuta a sacred site. 68.92% of concession falls within a protected area known as the Wirikuta Ecological and Cultural reserve.

**Cuzcatlán Mining Project**: The Oaxaca government refused to acknowledge the requests of the Coordinating Body of the united peoples of Ocotlan Valley (CPUVO) to stop the Canadian Fortuna Silver Inc. mining project on their land.

**Electricity production in the Isthmus of Tehuantepec**: There is a conflict over the acquisition of Indigenous lands in the Zapotec and Huave territories by international companies to produce clean energy (primarily wind). The Assemble of Peoples in Defense of Land and Territory has stated that it is rejecting the wind projects within the territory, but these companies are successfully acquiring land anyways.

**Mining, Forestry, Agro-Industry, and Construction**: The International Working Group for Indigenous Affairs reported on conflict between extractive industries (mining, forestry, agro-industry, and coastal highway construction) the Nahua of Santa María Ostula, Michoacán. According to the report, “In the last two years, 28 of their members have been murdered, and in November and December 2011 they suffered two more; to these must be added four cases of enforced disappearance (Enrique Domínguez Macías, Francisco de Asís Manuel, Javier Martínez Robles and Gerardo Vera Orcino). They are accusing the army, navy and federal police of these crimes, which have led them to create their own Community Guard as a form of self-defense, with the approval of the community’s assembly.”
Extractive Sector Overview

- As of October of 2014, mining is Nicaragua’s third most important export category, generating approximately $334 million dollars.\textsuperscript{150}
- In 2012, Nicaragua produced 6,981 kilograms of gold and 10 metric tons of silver.\textsuperscript{151}
- As of October 2014, 228,578 ounces of gold and 355,292 ounces of silver have been produced since January 2014, generating about $322 and $7 million in exports, respectively.\textsuperscript{152}
- As of October 2014, metallic and non-metallic mining generate 4,423 formal jobs.\textsuperscript{153}
- As of October 2014, there are 303 metallic and non-metallic mining concessions in Nicaragua; 29 of which are in the exploitation stage; 9 in exploration; 27 in prospecting; and 238 are inactive.\textsuperscript{154}
- In 2012, Nicaragua had the highest historical gold production in Central America.\textsuperscript{155} That year, gold production increased 9.2%, and silver production increased 28.8%.
- Increase in gold production was a result of B2 Gold Corp. of Canada’s La Libertad Mine.\textsuperscript{156}
- According to a 2013 report from the US Geological survey, “Foreign investment in mining has been encouraged in recent years, and the country had a less complicated exploration permitting process than some other countries in Central America.”\textsuperscript{157}

Overview of Indigenous Peoples and Organizations

Indigenous people make up 8.6% of Nicaragua’s 5.4 million people.\textsuperscript{158} The total Indigenous population is 443,847.\textsuperscript{159} The 2005 Nicaraguan census lists 11 Indigenous peoples and ethnic communities.\textsuperscript{160} The Garífuna and the Kriol are both ethnic communities of African descent.\textsuperscript{161}

- Rama (population 4,185)
- Garífuna (population 3,271)
- Mayangna’Sumu (population 9,576)
- Miskitu (population 120,817)
- Ulwa (population 698)
- Creole (Kriol) (population 19,890)
- Mestizo de la Costa Caribe (population 112,253)
- Xiu’Sutiava (population 19,949)
- Nahoa’Nicarao (population 11,113)
- Chorotega’Nahua’Mange (population 46,002)
- Cacaopera’Matagalpa (population 15,240)

PRINCIPLE INDIGENOUS ORGANIZATIONS

- YATAMA – Indigenous party from Nicaragua’s Atlantic Coast.\textsuperscript{162} YATAMA has participated in several regional elections since 1990.\textsuperscript{163}
Indigenous Rights and Legal Status

CONSTITUTION AND OTHER LAWS PERTAINING TO INDIGENOUS RIGHTS

Identity

Article 5 of the Constitution states that:

“The state recognizes the existence of the Indigenous peoples, that enjoy the rights, responsibilities, and guarantees outlined in the Constitution and especially those to maintain and develop their identity and culture, to have their own forms of social organization and to administer their local subjects; and maintain the communal forms of ownership of their land and the pleasure, use, and enjoyment thereof, all in accordance with the law. This Constitution establishes the autonomous regime for the communities of the Atlantic Coast.”

Article 181 establishes the autonomous regime of the Atlantic Coast and mandates laws to clarify “the attributions of their government bodies, their relation with the Executive and Legislative branches and with the municipalities, and the exercise of their rights.”

Agrarian Reform

Article 107 of the Constitution states “The agrarian reform will eliminate the idle estates and will prioritize land of the State. When the expropriation of idle lands affects private properties, it will comply with the provisions of article 44 of this Constitution. The agrarian reform will eliminate whatever form of exploitation of the farmers, the country’s Indigenous communities, and will promote forms of ownership compatible with the economic and social objectives of the nation established in this Constitution. The regime of ownership of the lands of Indigenous communities will be regulated according to the law of the matter.”

Access to Education

Article 121 of the Constitution states, “Access to the education is free and equal for all Nicaraguans...The Indigenous peoples and ethnic communities of the Atlantic Coast have the right in their region to intercultural education in their mother tongue, in accordance with the law.”

Other initiatives taken to establish regulations for and to improve regional autonomy:

- The 1993 Languages Law
- The 2003 General Health Law, which promotes respect for community health models
- Law 445 on the System of Communal Ownership of Indigenous Peoples and Ethnic Communities of the Autonomous Regions of the Atlantic Coast of Nicaragua and the Bocay, Coco, Indio and Maiz Rivers, which came into force at the start of 2003 and which also clarifies the communities’ and titled territories’ right to self-government
- The 2006 General Education Law, which recognizes a Regional Autonomous Education System (SEAR).
National Application of International Laws and Policies

Nicaragua has signed ILO 169. According to the International Labor Organization, Nicaragua’s adoption of ILO 169 legally binds the country to all of the Convention’s provisions, including the commitment to free, prior, and informed consent processes. Nicaragua has also committed to UNDRIP.

Consultation within Context of Development Projects on Indigenous Lands

CONADETI - “The National Commission for Demarcation and Titling is the body responsible for overseeing and implementing the process of demarcation, as set forth by Law 445 (2003). According to the Commission’s website, “The Law... is an opportunity to ensure legal certainty of land that has been occupied and possessed by original peoples for immemorial times in harmony with nature.”

CONADETI provides technical and financial assistance to all those communities engaged in demarcation, and is also charged with resolving any conflicts that may arise out of the process.

CONADETI is integrated by various governmental institutions. Its directive board includes one representative from each of the Atlantic coast’s ethnic groups: Garifuna, Rama, Miskito, Mayagna (Sumo) and Creole. It is spear-headed by the Presidents of the two regional councils (RAAS and RAAN), who rotate presidential control annually. Individuals from national government also work within CONADETI and its members are approximately 32 in total.

CONADETI receives funding directly from the government, but in the expensive work of demarcation, individual communities may also seek financial backing from outside sources such as NGOs and foreign consulates.

However, researchers from the University of Arizona’s Indigenous Peoples Law and Policy Program argue that the Law 445s effectiveness is severely compromised by inadequate technical and financial support from the Nicaraguan government.

Indigenous Rights Issues Related to Developments on Indigenous Land

The 2013 US State Department Human Rights Practices Report for Nicaragua found that Indigenous groups were not always included in decisions regarding development projects on their land.
“Some Indigenous communities in the RAAN and the RAAS continued to report that authorities excluded them from meaningful participation in decisions affecting their lands and natural resources. Representatives of autonomous regions and Indigenous communities regularly noted that the government failed to invest in infrastructure. Throughout the year Indigenous leaders alleged that logging concessions were granted to private firms and government-affiliated businesses, such as ALBA-Forestral, by the regional and national governments in violation of national autonomy laws in the RAAS and the RAAN.”

The report also found that infrastructure and access to services in Indigenous territories was limited. “Indigenous people from rural areas often lacked birth certificates, identity cards, and land titles. Although they formed political groups, these often held little sway and were ignored or used by major national parties to advance their own agendas. Most Indigenous people in rural areas lacked access to public services, and deteriorating roads made medicine and healthcare almost unobtainable for many. The rates of unemployment, illiteracy, and truancy of school-age children were among the highest in the country. Some Indigenous groups continued to lack educational materials in their native languages and relied on Spanish-language texts provided by the national government.”

As in many other areas, Indigenous women were found to be more vulnerable and faced greater discrimination based on their ethnicity and gender. “NGOs and Indigenous rights groups claimed that the government failed to protect the civil and political rights of Indigenous communities. Indigenous women faced multiple levels of discrimination based on their ethnicity, gender, and lower economic status. The National Commission of Demarcation and Titling, Attorney General’s Office, and Nicaraguan Institute of Territorial Studies generally failed to demarcate effectively Indigenous lands, and CENIDH denounced an atmosphere of impunity and corruption in the territorial demarcation process.”

Examples of FPIC Related Issues Between Companies, the State, and Indigenous Groups

The 2013 US State Department Human Rights Practices Report on Nicaragua recounted the case between the Rama-Creole Indigenous community and the State. “On June 29, Rama-Creole Indigenous leadership filed a case in the CSJ against the government for granting a concession to a private enterprise to build an interoceanic canal that would cross certain parts of Indigenous community territory. In 2012 the same group filed a separate claim protesting the formation of the Grand Canal Authority, which oversees the implementation of the canal project. While no land had been appropriated, the community alleged that the government did not follow required consultative procedures with the Indigenous population before granting the concession or creating the administrative body. There was no known government response in either case by year’s end.”
Another case mentioned in the report involved *illegal land grabs and natural resource exploitation in the Mayangna territory.* "Violations of Indigenous lands in the Bosawas Biosphere Reserve, RAAN, continued during the year, according to press reports. The Mayangna Indigenous group, who have territorial rights to much of the Bosawas Reserve, strongly criticized the government’s unwillingness to prevent alleged land grabs by non-Indigenous settlers, as well as illegal logging and other exploitation of natural resources. In March the government announced the formation of an inter-institutional commission charged with the protection of Indigenous lands. The army’s Ecological Battalion, created in 2011, is also responsible for patrolling the reserve. No public information on government activities to respond to Indigenous claims was available."177
Extractive Sector Overview

- **Proven oil reserves**: 740 million barrels, seventh-largest crude reserve holder in Central and South America\(^{178}\)
- **Proven natural gas reserves**: 15.05 trillion cubic feet, fourth-largest in Central and South America\(^{179}\)
- In 2013, Peru produced\(^{180}\)
  - 150 metric tons of gold
  - 3,500 metric tons of silver
  - 250,000 metric tons of lead
  - 26,100 metric tons of tin
- As of 2006, Peru was a leading global producer of the following minerals:\(^{181}\)
  - Arsenic trioxide (fourth after China, Chile, and Morocco)
  - Bismuth (third after China and Mexico)
  - Copper (third after Chile and the United States)
  - Gold (fifth after South Africa, Australia, the United States, and China)
  - Lead (fourth after China, Australia, and the United States)
  - Molybdenum (fourth after the United States, China, and Chile)
  - Rhenium (fourth after Chile, Kazakhstan, and the United States)
  - Silver (first followed by Mexico and China), tin (third after China and Indonesia)
  - Zinc (third after China and Australia)
- In Latin America, Peru is the #1 producer of:\(^{182}\)
  - Gold
  - Silver
  - Zinc
  - Lead
  - Tin
  - Tellurium
- For the past years, more than half of the country’s exports correspond to mining or hydrocarbons.\(^{183}\)

Overview of Indigenous Peoples and Organizations

There are approximately 13,162,024 Indigenous people in Peru, accounting for about 45% of the total Peruvian population as of 2011. Principle Indigenous peoples in Peru include the Achuar, Aguaruna, Ashaninka, Shipibo, Huambisa, Quechua, and Aymara.

There are 51 Indigenous peoples in Peru. The largest of these is the highland Quechua. Approximately 4.5 million Peruvians speak Quechua, and 8 million identify as Quechua. The Aymara population (apx. 500,000) is concentrated in the southern highland region near Puno, while the Achuar, Aguaruna, Ashaninka, Huambisa, Quechua, and Shipibo, are located in the lowland areas.\(^{184}\)
PRINCIPLE INDIGENOUS ORGANIZATIONS

- Coordinadora Nacional de Comunidades Afectados por la Minería (CONACAMI): Magdiel Carrión Pintado (President); Luis Siveroni Morales (Vice President)
- Asociación Inter-étnica para el Desarrollo de la Selva Peruana (AIDESEP): Alberto Pizango (President)
- Conferencia Permanente de los Pueblos Indígenas del Perú (Permanent Coordinator of Indigenous Peoples in Peru, COPPIP): Gil Inoach (President)
- Asociación pro Derechos Humanos del Negro
- Asociación Palenque

Indigenous Rights and Legal Status

CONSTITUTION AND OTHER LAWS PERTAINING TO INDIGENOUS RIGHTS

Self-Determination and Identity

*Article 89 of the Constitution* states: “They are autonomous in their organization, community work, and usage and free disposal of their lands, as well as in the economic and administrative aspects within the framework as provided by law. The ownership of their lands is imprescriptible, except in the case of abandonment described in the preceding article. The State respects the cultural identity of the rural and native communities.”

*Article 149* states “Authorities of peasant and native communities, in conjunction with the peasant patrols, shall exercise jurisdictional functions at territorial level in accordance with customary law, provided they do not violate the fundamental rights of the individual. The law provides for the way of coordination of such jurisdiction with justice-of-the-peace court and other instances of the Judiciary.”

According to the UN Special Rapporteur, “The 1993 Constitution recognizes Peruvian rural and Indigenous communities, their legal status, and affirms that these are ‘autonomous in their organization, in communal work and in the use and free disposal of their lands, as well as in economy and administration.’”

In 2012, the Constitutional Court of Peru ruled in favor of Indigenous self-determination, by recognizing the rights of Tres Isalas Madre de Dios community to autonomy, self-government, and self-determination within its own territory. This was the first pronouncement of a national jurisdictional body, in Peru, on the issue of Indigenous self-determination.

Land Rights

According to the UN Special Rapporteur, property rights and titling procedures for rural and Indigenous communities are recognized by several different laws. For example, *Article 89 of the 1993 Constitution* establishes the inalienable right to ownership of communal land. “Under this framework, 6,381 Indigenous peasant and native communities have titled land, and approximately 1,200 rural communities await a title to the lands they occupy or claim.”
Law No. 28736 of 2006, Protection of Indigenous or Native peoples in isolation and initial contact situation, establishes a "sectoral special protection regime" for the rights of the peoples inhabiting parts of the Peruvian Amazon. The law provides for the establishment of Indian reservations in "intangible" nature, in which settlements, activities, and use of natural resources aside from those of the Indigenous peoples living there are not allowed. Notwithstanding this prohibition, the law provides an exception in the case of a public need for the state that necessitates the exploitation of a susceptible natural resource within the reservation.\textsuperscript{189}

Though Indigenous leaders have submitted a number of proposals for constitutional reforms on the issue of collective rights, the majority of such proposals have not been implemented as formal legislation.\textsuperscript{190}

Issues with Indigenous Land Rights

There are several complicating factors at play in Indigenous land rights. According to the US State Department Human Rights Practices Report, “While the constitution recognizes that Indigenous persons have the right to own land communally, Indigenous groups often lacked legal title to demarcate the boundaries of their lands, making it difficult to resist encroachment by outsiders. By law local communities retain the right of unassignability, which should prevent the reassignment of Indigenous land titles to nonIndigenous tenants. Some Indigenous community members, however, sold land to outsiders without the majority consent of their community. Moreover, in the absence of an effective representative institution, there were continuing social conflicts between Indigenous and nonIndigenous persons, particularly concerning environmental issues and extractive industries, which occasionally led to violence. Additionally, mineral or other subsoil rights belong to the state, which often caused conflict between mining interests and Indigenous communities. The law requires the government to conduct consultations with Indigenous communities before authorizing extractive industry activities that will affect their land and livelihoods. The law requires the government to establish a database of Indigenous communities entitled to consultation under the law and to produce a detailed implementation guide to facilitate government and private-sector compliance under the law. On April 2, the government published the implementation guide, and on October 25, it published the first version of the database. Several Indigenous organizations and the ombudsman expressed concern that Indigenous communities did not have sufficient training and capacity to engage appropriately in consultations with government and industry. As of September the government had not completed a prior consultation process.”\textsuperscript{191}

Indigenous Peoples and Representation

Article 191 determines the minimum percentage to facilitate representation of women, rural and Indigenous communities, and aboriginal peoples in regional councils. The same applies for municipal councils.\textsuperscript{192}

In 2002, a reform was instituted for regional elections, which sought to increase the participation of Indigenous peoples in national politics. Party list quotas now mandate that at least 15% of candidates be Indigenous.
Lack of identification inhibits Indigenous access to certain rights. “Many Indigenous persons lacked identity documents. In many cases there were no government offices in the areas where they lived; in some instances government officials allegedly sought bribes in exchange for documents, which Indigenous persons were unable or unwilling to pay. Without identity cards they were unable to exercise basic rights, such as voting and gaining access to health services and education”.

In addition, the Report found that Indigenous rights were not sufficiently protected by government resources, resulting in the further marginalization of Indigenous peoples. “The constitution and law stipulate that all citizens have the right to use their own language before any authority by means of an interpreter and to speak their native language. In the zones where they are predominant, Quechua, Aymara, and other Indigenous languages share official status with Spanish. Nevertheless, insufficient resources resulted in language barriers that impeded the full participation of Indigenous persons in the political process.”

NATIONAL APPLICATION OF INTERNATIONAL LAWS AND POLICIES

Peru has ratified ILO Convention 169 on Indigenous and Tribal Peoples and has voted in favor of the UN Declaration on the Rights of Indigenous Peoples.

STATE INVOLVEMENT IN CONSULTATION AND CONSENT POLICIES

LEGAL STATUS OF FPIC REQUIREMENTS

In September 2011, the government of Peru signed into action the **Law No. 29785**, the Law of the Right to Prior Consultation with Indigenous or Tribal Peoples – a law of free, prior, and informed consent for Peru’s Indigenous population, in accordance with ILO Convention 169.

The law’s language is similar to that of ILO Convention 169, as well as the UN Declaration on the Rights of Indigenous Peoples and the American Convention on Human Rights. The law addresses the right of Indigenous peoples to FPIC, participation, good faith negotiation, absence of coercion, and inter-cultural dialogue. In doing so, it states that both Indigenous groups and the Peruvian government may identify projects that will impact the Indigenous. The government is to maintain a registry of different Indigenous peoples’ representative organizations (published in October 2013) and to produce a detailed implementation guide so as to facilitate government and private-sector compliance (published in April 2013).

In any case, the government has the final say in deciding which projects move forward if there is a dispute between the parties. According to the UN Special Rapporteur on Indigenous Rights, “As for the rights of the Indigenous peoples over natural resources within their traditional or titled lands, they are limited by the rights and interests of the State over the same. Under the Constitution, renewable and non-renewable resources are the heritage of the nation; according to national legislation mineral resources and hydrocarbons are property of the State.”
STEPS OF THE FPIC PROCESS

According to the UN Special Rapporteur’s report, the new Single Consolidated Text on administrative procedures outlines the three stages where it is necessary to conduct a consultation:

- Before authorizing construction.
- Before starting exploration.
- Before approving a mining plan.

However, according to the UN Special Rapporteur, mining concessions can be awarded without prior consultations “under the assumption that the mining concession by itself is not an ‘authorization to the owner for conducting mining exploration, operation, or processing of minerals.’” Mr. Anaya finds this approach to be problematic, but the government responded that “apart from prior consultation, after granting the concession, there is a public participation process to inform about ‘the scope of the concession rights granted by the State, the mineral activity, the environmental obligations, and of the rights of the populations involved, among other things.’”\textsuperscript{197}

Law 38 outlines another important part of the FPIC process- the creation of a database for the country’s Indigenous groups, in order to identify groups that need to be consulted.\textsuperscript{198}

DELAYS IN INDIGENOUS LAND TITLING

Certain factors have contributed to the slowing of Indigenous land titling in recent years. Responsibility for Indigenous land titling was delegated to regional governments in 2009. Regional governments lacked a clear and uniform methodology for awarding titles. As a result, no titles have been awarded in the Amazon region since 2010. In order to fix this issue, the Ministry of Agriculture was reinstated as the rural and Indigenous community titling office in 2013. The Ministry of Culture also acts as a facilitator between the parties involved.\textsuperscript{199}

GOVERNMENT OFFICES FOR CONFLICT RESOLUTION

According to the UN Special Rapporteur, communication and dialogue between Indigenous groups and the State has greatly improved over the past few years. The National Office of Dialogue and Sustainability of the Presidency of the Council of Ministers was established in 2013. Its purpose is to create a space for different sectors to meet and discuss issues of conflict and facilitate better relationships between companies, communities, and the government. The office has managed several conflicts relating to the extractive industry and natural resources. According to government reports, the office has been involved in resolving 86 cases of social conflict.\textsuperscript{200}

INDIGENOUS RIGHTS ISSUES RELATED TO DEVELOPMENTS ON INDIGENOUS LANDS

Mining has a devastating history of social and environmental degradation for Indigenous peoples in Peru. Typically, Indigenous groups have received very little benefit from the industrial exploits.\textsuperscript{201} The UN Special Rapporteur found that despite a framework for land protection and consultation, Indigenous rights were still vulnerable to the extractive industry.\textsuperscript{202} According to the Mr. Anaya:
“While there are positive aspects of the consultation process embodied in the law and its regulations, the challenge now is to implement consultation so that it is instrumentalized and safeguards the entire spectrum of human rights of Indigenous peoples.”

“There are no precise official figures about the percentage of concessions affecting Indigenous lands already titled or under traditional use. However, in terms of hydrocarbon activities, it is estimated that about 88% of the concession areas in Amazonia currently under exploration or exploitation are superimposed on lands titled to Indigenous communities, and around 32% of the concession areas are superimposed on reserved created for towns in isolation and initial contact.”

However, Indigenous communities are not entirely against extractive projects on their lands. While there have been many Indigenous protests against mining projects, the Special Rapporteur noted that Indigenous representatives “…did not express a position of complete rejection of mining activities, but have stressed the need that their rights are respected, including their rights over their traditional lands and waters, and their related rights to self-determination and establish their own priorities for development.”

NEED FOR GREATER INDIGENOUS PARTICIPATION IN THE PLANNING PROCESS

According to the UN Special Rapporteur: “A necessary condition for the respect of the rights of Indigenous peoples in the context of extractive projects is their participation in the strategic planning process in this sector, which would include the selection and division of lots for the exploitation of hydrocarbons, the definition of initiatives to attract investment and allocation of the priority given to extractive activities to promote economic development. As the Special Rapporteur has previously emphasized, in addition to contributing to respect for the rights of Indigenous peoples, ‘Indigenous participation in the strategic planning of resource extraction will increase the chances of agreement with Indigenous peoples on specific projects’ in their territories. Despite progress in the inclusion of Indigenous peoples in the process of granting permits for mining projects through consultation (see section VI below), to date in Peru Indigenous peoples have not been implicated in the strategic planning on natural resources.”
ADDITIONAL RECOMMENDATIONS FROM THE UN SPECIAL RAPPORTEUR

“In cases where mining projects are developed on their territories, Indigenous peoples should receive compensation and direct financial benefits for allowing access to their territories and the adverse effects of the projects that have been accepted, as well as significant capital contributing under the set of historical and contemporary circumstances. However, in Peru the law does not provide a direct participation of Indigenous peoples in royalties and taxes from extractive projects developed on their territories, but if it establishes that, such as any owner, they should be compensated for the use of their land and compensated for damages, or limitations on rights that may result from the projects.”

“As a result of mining activities in Peru along several years, many Indigenous peoples in the country have suffered devastating social and environmental impacts, and without receiving many benefits from these activities. Following this, there has been a high level of discontent and distrust among Indigenous peoples to the state and the extractive industry, which has resulted in numerous protests and clashes. Despite these negative experiences, it should be noted that Indigenous peoples in Peru have not expressed a position of complete rejection of mining activities, but have stressed the need that their rights are respected, including their rights to their traditional territories, their right to participate in all levels of decision-making processes related to extractive industries that may affect them and their right to obtain benefits and severance for the activities in their territories. Peru is making significant efforts to address the problems associated with the extraction of natural resources affecting Indigenous peoples, such as the strengthening of environmental legislation, the development of a legal framework for consultation with Indigenous peoples, measures to establish forums for dialogue to promote social peace in conflict areas, and the establishment of a specific protection regime for Indigenous groups in isolation and initial contact. However, further efforts to ensure that mining activities are conducted in a manner consistent with the rights of Indigenous peoples and through a coordinated and comprehensive effort to address the concerns of Indigenous peoples and social peace are required.”

Examples of FPIC Related Issues Between Companies, the State, and Indigenous Groups

Perupetro Lot 67 Project. In November 2013, Peru’s state agency promoting oil and gas operation – Perupetro – announced that oil production would soon begin in a remote part of the Peruvian Amazon near the border with Ecuador. However, this area, known as Lot 67, is located within the boundaries of a proposed reserve for Indigenous peoples who are living in voluntary isolation, putting their community at risk of destruction by contact with outsiders. Although Perupetro is arguing that no evidence of non-
contacted tribes in block 67 have been documented since 1995, continuing with these plans would seem to be in violation of Peruvian Law 28736, which protects voluntarily isolated Indigenous peoples.209

**Bagua, 2009.** In 2009, Indigenous protests against natural resource exploitation on their territory resulted in the death of 33 people- 23 police, 5 local people, and 5 Indigenous people, and hundreds more were injured.210 The Bagua protest was in response to an oil pipeline, but there were other violent protests going on at the same time in other areas against hydroelectric and mining projects. People rallied against the governmental decrees that reduced the restrictions for international extractive industries operating in the Amazon and the lack of prior consultation played a major part in the unrest 211. An Asháninka leader told the New York Times that his people were calling “an immediate halt to every project that was conceived without consulting those of us who live in the forest.”212 Protestors used tactics such as roadblocks and occupying company stations in effort to stop production.213

In response to the protests, President Alan García said “We have to understand when there are resources like oil, gas and timber, they don’t belong only to the people who had the fortune to be born there, because that would mean more than half of Peru’s territory belongs to a few thousand people.”214

The New York Times also cited a [study from Duke University](#) that found that “In the case of oil...at least 58 out of the 64 areas secured by multinational companies for oil exploration overlay lands titled to Indigenous peoples.”215 The UN Special Rapporteur’s report says that the Block 169 exploitation of hydrocarbons was the only project to undergo the consultation process under the new legislation. In this case, an agreement was reached between the Indigenous groups and Perupetro, the state entity developer. The project encompassed over 400,000 hectares, which overlapped with Amahuaca, Asheninka, and Yaminagua territories.

The UN Special Rapporteur visited Peru after the Bagua protests to investigate the situation as well as others. For example, dozens of Aymara people were imprisoned after protesting the Santa Ana’s concession. In addition, there were “protests about the Conga mining project in the Cajamarca region, which raised the declaration of the two states of emergency in 2011 and 2012, and violent occurrences between protestors and security forces in July of 2012 that resulted in five community deaths and dozens injured.”216
Annex 1g. COUNTRY BRIEFS. Suriname

Extractive Sector Overview

- Proved petroleum reserves: 90 million barrels
- Proved natural gas reserves: 0 trillion cubic feet
- Gold – 11,882 kilograms produced in 2012
- Bauxite – produced 3,400 metric dry tons in 2013; 580,000 in reserve

Overview of Indigenous Peoples and Organizations

The total population of Suriname is approximately 492,000. Of this number, 27.4 percent are of South Asian descent, 17.7 percent are Creoles, 14.7 percent are Maroons, 14.6 percent are Javanese, 12.5 percent are mixed, 3.7 percent are Indigenous or ‘Amerindians’, and 1.8 percent are Chinese.

Indigenous peoples in Suriname number 18,200 people. An additional 2-3,000 Indigenous people live in neighboring French Guiana, after fleeing the Interior War in the late 1980s. The four most numerous Indigenous peoples are the Kali’ña (Caribs), Lokono (Arawaks), Trio (Tirio, Tareno) and Way-ana. In addition, there are small settlements of other Amazonian Indigenous peoples in the southwest and south of Suriname, including the Akurio, Wai-Wai, Katuena/Tunayana, Mawayana, Pireuyana, Sikiiyana, Okomoyana, Alamayana, Maraso, Sirewu and Sakëta. The Kali’ña and Lokono live mainly in the northern part of the country and are sometimes referred to as ‘lowland’ Indigenous peoples, whereas the Trio, Wayana and other Amazonian peoples live in the south and are referred to as ‘highland’ peoples.

Most Indigenous people and Maroons live in the forest.

Suriname’s population of ‘Maroons’ are descendants of African slaves and have established communities in the Interior. They live tribally, according to ancestral cultures and traditions, under comparable circumstances as the Indigenous peoples. There are six Maroon tribal peoples in Suriname: the Saamaka, Okanisi, Paamaka, Matawai, Kwinti and Aluku.

According to the 2013 Human Rights Report for Suriname, “The law affords no special protection for, or recognition of, Indigenous people. Most Amerindians (approximately 2 percent of the population) live in the remote and undeveloped interior of the country, where government services are largely unavailable. Geographic isolation, limited opportunity to participate in national and regional policymaking, including decisions affecting interior lands, cultures, traditions, and natural resources. The IACHR identified the Maroons as a tribal people and thus entitled to the same rights as the Indigenous Amerindian communities.”

Lowland Peoples include the Kali’ña (Caribs) and Lokono (Arawaks).

Highland Peoples include: Trio (Tirio, Tareno), Wayano, Pireuyana, Sikiiyana, Okomoyana, Alamayana, Maraso, Sirequ, and Sakëta.
PRINCIPLE INDIGENOUS ORGANIZATIONS

- Vereniging van Inheemse Dorpshoofden in Suriname, the Association of Indigenous Village Leaders in Suriname (VIDS)
- Vereniging van Saramakaanse Gezagdragers, the Association of Saramaka authorities (VGS)
- Moiwana Human Rights Association

Indigenous Rights and Legal Status

The lack of constitutional or legal recognition of Indigenous rights poses a great threat to Indigenous and tribal peoples. With no formal protection of rights, IPs are left with little legal recourse to object to projects or actions that affect their territories and livelihoods.

CONSTITUTION AND OTHER LAWS PERTAINING TO INDIGENOUS RIGHTS

Suriname law affords no special protection for, or recognition of, Indigenous people. The 1987 Constitution affords no legal recognition for the collective rights of Indigenous peoples and their traditional authorities and governance structures, nor does it secure for Indigenous peoples’ rights to traditional lands, territories and resources, or their right to prior consultation.

There exist several government resolutions that include a reference to ‘traditional rights’ or ‘customary rights,’ though the implementation of these resolutions is unclear. Where legislation does make reference to Indigenous rights, these rights are uniquely restricted, made subject to public interest and other conditions developed by the State.

One such resolution is the Decree on the Principles of Land Policy, which mentions Indigenous rights in its article 4.1: “When deciding over domain land, the rights of tribally living Bushnegroes and Amerindians on their villages, settlements and livelihood plots will be respected in as far as this does not conflict with the public interest.” Public interest, however, is not described in the decree beyond stating in article 4.2 that “Under public interest is also included the execution of any project within the framework of an approved development plan.”

The 2013 Human Rights Report for Suriname outlined some of the disadvantages and challenges faced by Indigenous peoples, particularly Maroons. “The law prohibits discrimination on the basis of race or ethnicity, and no such discrimination complaints were filed during the year. However, Maroons, who represent an estimated 15 percent of the population, generally continued to be disadvantaged in the areas of education, employment, and government services. Most Maroons lived in the interior where limited infrastructure reduced their access to educational and professional opportunities and health and social services. Some forms of discrimination that affected Indigenous Amerindians also extended to Maroons.”

NATIONAL APPLICATION OF INTERNATIONAL LAWS AND POLICIES

Suriname signed onto UNDRIP in 2007 but has not adopted ILO 169.
The right to prior consultation among Indigenous groups in Suriname is not recognized. Moreover, there are no compulsory legal provisions for meaningful participation or consultation in decisions affecting Indigenous peoples. In many cases, Indigenous peoples are only superficially consulted, or they are notified of decisions after they have been made.\textsuperscript{234}

By law, the Suriname state owns all ungranted land and natural resources and can, therefore, issue resource exploitation concessions without regard to Indigenous rights. Though Indigenous peoples are entitled to use and to enjoy their land and villages, the state has the authority to negate such privileges should it require Indigenous areas for other activities.\textsuperscript{235}

**CONSULTATION WITHIN CONTEXT OF DEVELOPMENT PROJECTS ON INDIGENOUS LANDS**

No central ministry or state institution is responsible for consultation and consent policies in Suriname. Not only are Indigenous rights (including land rights), not recognized in Suriname’s legislation, but Indigenous peoples in Suriname suffer from a lack of legal recognition of their traditional authorities, which often results in a lack of consultation and FPIC prior to actions that could affect Indigenous peoples and/or their lands. Instead of consulting with the traditional authorities of the Indigenous and tribal peoples, “the official administrative system formally only knows political representative structures (Resort and District Councils) and local government structures (local government service or ‘bestuursdienst’) and officials (government supervisors or ‘bestuursopzichters’), who do not necessarily represent the opinions and aspirations of the communities and are often affiliated to and influenced by political parties. It is therefore easy for outsiders to ‘consult’ with those structures and obtain their agreement, instead of with the legitimate traditional authorities. This has substantial impacts and constitutes a threat to traditional community governance, including governance related to territorial and resource management.”\textsuperscript{236}

According to the report of the sixth session of the Permanent Forum on Indigenous Issues, pressure on Indigenous and tribal groups located in the interior have intensified since Suriname began intensifying development of gold, oil, and timber and water resources.\textsuperscript{237} Since Indigenous peoples are excluded from participation in policy or project development processes (and have no legal recourse to object), their lands are vulnerable to over-exploitation by concession holders.\textsuperscript{238}

In 2011, the UN Special Rapporteur called for Suriname to not only adopt laws and policies to ensure Indigenous rights, but also to include and consult Indigenous groups in the process of policy formation. He also commented on the Saramaka case, which involved Chinese and other multinational logging companies and the Saramaka maroon community.\textsuperscript{239} Mr Anaya wrote:
“As stated by the Declaration on the Rights of Indigenous Peoples, ‘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.’ In its judgment in the Saramaka case, the Inter-American Court of Human Rights emphasized the need for consultation with Indigenous and tribal peoples on development projects within or affecting their traditional lands. It is clear that consultations with these peoples, through procedures meeting certain minimum criteria, are also required in the drafting and adoption of legislation or administrative regulations that concern them”\(^{240}\)

The Special Rapporteur also gave suggestions on how to approach legislation for Indigenous rights. He advised “...the formation of a joint commission, made up of both Government representatives and representatives of Indigenous and tribal peoples, with adequate financial and technical support, to collaboratively develop a text that is agreeable to the Government and Indigenous and tribal representatives alike.”\(^{241}\)

In addition, the Special Rapporteur proposed the following requirements for consultations with Indigenous groups. Consultations must:

- “Be distinct from consultations that may involve the general public or ordinary political processes
- Take place at the earliest possible stage
- Be a genuine dialogue and more than just the provision of information
- Be in good faith with the objective of obtaining agreement or consent
- Be carried out with due regard for Indigenous peoples’ traditional decision-making institutions in the appropriate languages
- Provide the time necessary for the Indigenous peoples to make decisions, taking into account their customary ways of decision-making
- Provide information sufficient to allow Indigenous peoples to make decisions that are informed.”\(^{242}\)

**INDIGENOUS RIGHTS ISSUES RELATED TO DEVELOPMENTS ON INDIGENOUS LAND**

According to the UN Special Rapporteur, Suriname needs to adopt adequate procedures for granting land titles to Indigenous peoples. The country must also establish a consent and consultation process that includes clear expectations from the government and the involved third parties.\(^{243}\) In his report, Mr. Anaya clarified that international laws do not prohibit development on Indigenous lands, but they do require that projects respect Indigenous rights and undertake proper consultation procedures.

“Again, no one formula exists for adherence to the relevant standards, and hence the consultation procedure to be adopted for development projects affecting Indigenous and tribal lands or territories in Suriname could be developed in various ways.”\(^{244}\)
Lack of land titling is a key issue for protecting Indigenous rights in Suriname. According to the 2013 Human Rights Report for Suriname:

“Because Amerindian and Maroon lands were not effectively demarcated or policed, populations continued to face problems with illegal and uncontrolled logging and mining. No laws grant Indigenous people rights to share in the revenues from the exploitation of resources on their traditional lands. Organizations representing Maroon and Amerindian communities complained that small-scale mining operations, mainly by illegal gold miners, some of whom were themselves Indigenous or supported by Indigenous groups, dug trenches that cut residents off from their agricultural land and threatened to drive them away from their traditional settlements. Mercury runoff from these operations also contaminated and threatened traditional food sources.”

In addition to illegal and uncontrolled logging, lack of titling leaves Indigenous and tribal territories vulnerable to concessions granted by the State. Various NGOs and organizations have attempted to address this issue:

“Indigenous groups, with the assistance of the Amazon Conservation Team, mapped their lands and presented proposed demarcation charts to the government in 2000 and to the Ministry of Physical Planning, Land, and Forestry Management in both 2006 and 2009. Maroon and Amerindian groups continued to cooperate with each other to exercise their rights more effectively. The Moiwa Human Rights Association, the Association of Indigenous Village Leaders (an umbrella group that represents the many smaller associations of Indigenous persons), and other NGOs continued to promote the rights of Indigenous people.”

According to the report on the sixth session of the Permanent Forum on Indigenous Issues, differences between State and Indigenous approaches to land and resource use and conservation is a source of conflict:

“In the atmosphere of legal uncertainty and sometimes forceful enforcement of governmental rules, the communities may put less effort in conserving and sustainably use biodiversity and ecosystems. This goes hand-in-hand with a corresponding loss of certain traditional knowledge, customs and traditions, but also to the loss of traditional custodianship over these areas and species, making them prone to ‘lawlessness’ and unsustainable use or depletion.”

The report also noted that Indigenous communities’ need for infrastructural, health, and educational projects can “…result in the use of less sustainable methods for more or faster utilization of natural resources to have a monetary income.”
Examples of FPIC Related Issues Between Companies, the State, and Indigenous Groups

Association of Indigenous Village Heads Petition for Legal Recognition of Land: The 2013 Human Rights Report for Suriname recounted a petition filed with the IACHR in 2007, which sought land titles for the Kalina and Lokono Peoples of the Lower Marowijne River. The petition was filed by the Association of Indigenous Village Heads, who “…stated that the government violated their rights by continuing to issue land, grant concessions, and establish nature reserves on these lands without recognizing their rights. The case continued at year’s end. In its September 2011 response to the recommendations from the UN Human Rights Council’s Universal Periodic Review, the government rejected several recommendations concerning the Indigenous and tribal peoples, arguing that it was conducting its own process of consultations with the Maroon and Indigenous people.”

Moiwana Community v. Suriname

In June of 2005, the Inter-American Court of Human rights ruled in favor of the Moiwana Village in their case against Suriname. The following paragraph is an extract from the court case that summarized the events:

“According to the Commission, on November 29, 1986, members of the armed forces of Suriname attacked the N’djuka Maroon village of Moiwana. State agents allegedly massacred over 40 men, women and children, and razed the village to the ground. Those who escaped the attack supposedly fled into the surrounding forest, and then into exile or internal displacement. Furthermore, as of the date of the application, there allegedly had not been an adequate investigation of the massacre, no one had been prosecuted or punished and the survivors remained displaced from their lands; in consequence, they have been supposedly unable to return to their traditional way of life. Thus, the Commission stated that, while the attack itself predated Suriname’s ratification of the American Convention and its recognition of the Court’s jurisdiction, the alleged denial of justice and displacement of the Moiwana community occurring subsequent to the attack comprise the subject matter of the application.”

The Court unanimously found that Suriname committed the following violations:

- The right to humane treatment
- The right to freedom of movement and residence
- The right to property
- The rights to judicial guarantees and judicial protection

The Court ordered Suriname to provide compensation to the Moiwana community for material and moral damages and establish a community development fund. Suriname was also ordered to issue a public apology, establish a memorial, identify and prosecute responsible parties, and return the remains of the Moiwana people who were killed in the conflict. The Court also issued the following order:
“The State shall adopt such legislative, administrative, and other measures as are necessary to ensure the property rights of the members of the Moiwana community in relation to the traditional territories from which they were expelled, and provide for the members’ use and enjoyment of those territories. These measures shall include the creation of an effective mechanism for the delimitation, demarcation and titling of said traditional territories, in the terms of paragraphs 209–211 of this judgment.”

Case of Saramaka v. Suriname

In 2007, the Inter-American Court of Human Rights ruled in favor of the Saramaka people in their case against Suriname. The following paragraph from the court report summarizes the situation:

“The representatives asked the Court to declare that the State had violated the same rights alleged by the Commission, and additionally alleged that the State had violated Article 3 (Right to Juridical Personality) of the Convention by “failing to recognize the legal personality of the Saramaka people”. Moreover, the representatives submitted additional facts and arguments regarding the alleged ongoing and continuous effects associated with the construction of a hydroelectric dam in the 1960s that allegedly flooded traditional Saramaka territory. Additionally, they requested certain measures of reparation and the reimbursement of the costs and expenses incurred in processing the case at the national level and before the international proceedings.”

“The Commission asked the Court to determine the international responsibility of the State for the violation of Articles 21 (Right to Property) and 25 (Right to Judicial Protection), in conjunction with Articles 1(1) and 2 of the American Convention. Furthermore, the Commission requested that the Court order the State to adopt several monetary and nonmonetary reparation measures.”

The Court unanimously found that the State committed the following violations, to the detriment of the Saramaka people:

- The right to property
- The right to juridical personality
- The right to judicial protection

The Court ordered that Suriname adopt consultation processes into their legal framework, grant the Saramaka people the right to communal property, and develop a legislative framework which allows the Saramaka people to bring violations of their rights to the court of law. Additionally, Suriname must ensure that environmental and social impact assessments are conducted by an impartial firm prior to awarding concessions. The Court also ordered Suriname to provide compensation for the material and non-material losses incurred by the Saramaka and disseminate the rulings of the Court via radio for the benefit of the Saramaka people.
"The State shall delimit, demarcate, and grant collective title over the territory of the members of the Saramaka people, in accordance with their customary laws, and through previous, effective and fully informed consultations with the Saramaka people, without prejudice to other tribal and Indigenous communities. Until said delimitation, demarcation, and titling of the Saramaka territory has been carried out, Suriname must abstain from acts which might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the territory to which the members of the Saramaka people are entitled, unless the State obtains the free, informed and prior consent of the Saramaka people. With regards to the concessions already granted within traditional Saramaka territory, the State must review them, in light of the present Judgment and the Court’s jurisprudence, in order to evaluate whether a modification of the rights of the concessionaires is necessary in order to preserve the survival of the Saramaka people, in the terms of paragraphs 101, 115, 129-137, 143, 147, 155, 157, 158, and 194(a) of this Judgment."
Annex 2a. INTERVIEW AND SURVEY.

Questions

Interview

1. Which countries in Latin America are you most familiar with?
2. What’s the status of government recognition of Indigenous peoples in this country?
3. With regard to mining, oil and gas development, are you familiar with company-community benefit or impact agreements in this country – whether these take the form of legal agreements, MOUs or other structures?
   o What examples do you know of where successful agreements were reached? (Prompt: both on the phone and by sharing agreements where possible—including with an NDA if needed)
   o Do you have examples of agreements that failed or that were attempted but not finalized?
   o What about for other natural resource development such as water projects, infrastructure, and large-scale agriculture?
4. We would like to learn more about company-community agreements – both specific agreements that you are aware of and overall trends
   o What trends are you seeing? (e.g., country X now requires that companies reach agreements with communities; civil society is increasing pressure on the country’s government; etc.)
   o Are the agreements you’re familiar with typically about compensation, or are other issues included? Please describe specific agreements, as well as overall trends you think have emerged (or are emerging).
   o What is the nature of the compensation that communities have received? For example, are these one-time payments, fixed regular payments; production or revenue based; equity participation? Or are payments designated for specific community projects? Can you provide amounts of specific agreements? Do you know if the financial benefits were calculated based on a particular formula (e.g., percentage of CAPEX or percentage of revenues) or were they negotiated based on precedents? Is it possible for us to obtain copies of the agreements?
   o What authority signed on behalf of the community?
   o What did each party get out of the agreement? (Prompts: recognition of rights, access, reputation)
   o In your opinion, is the agreement (compensation, benefit, etc.) perceived as being equivalent to FPIC – or the community’s consent to proceed with the project?
   o What is the length of time for which most agreements are valid? At what point in the project cycle was the agreement initiated and finalized? Do most agreements extend over the project life, or only for specific phases?
   o How long do most agreements take to negotiate?
   o Is there a legal requirement for consultation/consent (which?) in this country? Are there agreements driven by voluntary company-community consultations or negotiations (e.g., when some companies seek to engage communities through consultation processes?)
   o Are these agreements contractually based, or more oriented around good faith?
5. Are agreements more or less likely for IP communities, as opposed to non-Indigenous local communities, affected by resource projects?
   - Is national government recognition of IPs a factor? Does it leading to more agreements?
   - Are emerging international norms (e.g. IFC, ILO, UN, OAS) on Free, Prior and Informed Consent (FPIC) a factor with regard to community-company agreements?

6. To what extent are expectations and/or awareness growing with regard to benefits sharing and consent agreements? Are there precedents, or trends toward greater company-community engagement around benefits agreements or ‘consent’ processes?
   - Do you have a view with regard to the trends or expectations that define a good agreement?
   - What gaps exist between expectations and practice?

7. Regarding projects that develop projects in phases: what approaches have you seen to address agreements around each phase?
   - Are there differences depending upon the type of project – mining or hydrocarbon?
   - What about onshore v. offshore?
   - Are there differences with regard to the maturity of the sector in a particular country—e.g. countries with a history of mineral or hydrocarbon development v. countries new to mineral/hydrocarbon development?

8. Who else do you recommend that we talk to?
FPIC Latin America Assessment Survey

This survey is designed to collect information about the context and application of FPIC procedures in Central and South America. This survey will be treated confidentially; the results will be aggregated and will not be attributed to you or your organization.

* Required

Your sector:
- Community
- Civil Society/ NGO
- Mining or Oil and Gas Company
- Government
- Academia
- Consultant

Which country are you commenting on? (Please choose only one country. If you are familiar with company-community issues in other countries, we welcome you to complete separate surveys for each country) *
- Bolivia
- Brazil
- Colombia
- Mexico
- Nicaragua
- Peru
- Name
- Latin America in General
- Other:

Does the country have a clear policy with respect to Indigenous rights to consultation? *
- Yes
- No
- N/A (I am commenting on Latin America in general)

Does the Government’s policy on Indigenous rights encourage successful company/community agreements?
- Yes
- No
- N/A (I am commenting on Latin America in general)

What is the most important driver for company/community agreements in this country?
- Emerging international norms on FPIC such as ILO 169, IFC performance standard 7, or UNDRIP.
- Country-specific legal and political factors
- Corporate policy and practice
- Community expectations
- Other:

Do you know of any project-based community benefit or impact agreements (or similar agreements or MOUs) between mining, oil and gas companies and local communities in this country?
- Yes
- No
Community benefit agreement details

If you are aware of project-based community benefit or impact agreements between mining, oil and gas companies and local communities, what type of project/s do they relate to? (Check all that apply)
- Onshore
- Offshore
- National company
- International company
- Junior company
- Larger company

In what stage is the project(s) - if multiple projects, check all that apply
- Exploration
- Development
- Mature operation

What types of financial arrangements does the agreement(s) contain? (Select all that apply)
- One-time payments
- Annual or regular payments
- Revenue sharing deal, or a percentage
- Equity arrangements
- Payment to a trust or community fund
- Other: 

What are the conditions on how the financial benefit is disbursed? (For example, is it disbursed in cash or as financing for specific community projects? If it is disbursed in cash, is it tied to a trust?)

What was the basis of calculating and the quantum for the financial arrangements? (For example, was the final amount based on a percentage of CAPEX, a percentage of profits, or other?)
Does the agreement(s) contain any of the following non-financial arrangements (check all that apply)

- Training, employment, or contracting opportunities
- Business development assistance
- The promise of infrastructure or other types of social investment projects
- Health, education, or other services
- Environmental and/or cultural heritage protection measures
- Management assistance and governance support for Indigenous representative bodies

What does the company receive in the agreement(s) (check all that apply)?

- Access to land
- Community support for a period of time
- Community support for the life of the project
- Other: [ ]

How long does it typically take to negotiate successful agreement(s)?

- Less than 6 months
- 6-18 months
- 18 months - 3 years
- More than 3 years

For UNSUCCESSFUL agreements, which elements of agreements may contribute to their lack of success or full implementation? (Select up to three)

- Lack of mechanisms for review or amendment
- A general view that the agreement was not negotiated in good faith
- A lack of planning around the implementation of the agreement, including the disbursement of the financial benefits
- A sense of inadequate consultation in the community when negotiating the agreement
- Changes in conditions, such as economic, political, or community conditions
- Other: [ ]
Without benefit agreements?

Where mining or oil and gas companies are operating in Indigenous communities without benefit (or similar) agreements, what sorts of alternatives do they have in place?

What is the most important thing COMPANIES should do to improve the success of agreements?

What is the most important thing NGOs should do to improve the success of agreements?

What is the most important thing COMMUNITIES should do to improve the success of agreements?

What is the most important thing GOVERNMENTS should do to improve the success of agreements?

Never submit passwords through Google Forms.
## Annex 2b. INTERVIEW AND SURVEY.

### Respondants

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Annex 3. KEY CONCEPTS IN INTERNATIONAL NORMS AND STANDARDS. ILO 169, UNDRIP, IFC Performance Standard 7, and Impact and Benefit Sharing Agreements

Consultation, Compensation and Benefits - ILO 169

As mentioned in the introduction, the Indigenous and Tribal Peoples Convention of the International Labour Organization (often referred to as ILO 169) was adopted in 1989. The motivation for the convention, as stated in its preamble, is to protect Indigenous people from discrimination, and also from the assimilation policies that characterized approaches to Indigenous peoples in the context of decolonization. The convention calls for states to adopt special measures to protect persons, institutions, property, labor, cultures, and environments of Indigenous peoples.

The convention establishes a number of obligations on states which generate requirements for resource projects. This includes the duty to consult with Indigenous people on matters that affect them, and to do so through their traditional institutions. It also calls for compensation when natural resource projects have negative impacts and for Indigenous people to benefit from participation in projects. More specifically, Article 15 states:

> “The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
>
> “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 programs 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, and shall receive fair compensation for any damages which they may sustain as a result of such activities.”

Cases of population relocation are considered differently because of the major impact they have on affected Indigenous people. For this reason, Article 16 states:
Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

All of the countries we examined, except Suriname, have ratified ILO 169. Therefore their governments are legally bound to implement its provisions. Table 2, below, lists all countries that have ratified the convention.

Table 2: Ratifications of the Indigenous and Tribal Peoples Convention of the ILO (169)

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>DATE</th>
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<tbody>
<tr>
<td>Argentina</td>
<td>July 2000</td>
</tr>
<tr>
<td>Bolivia</td>
<td>December 1991</td>
</tr>
<tr>
<td>Brazil</td>
<td>July 2002</td>
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<tr>
<td>Central Africa Republic</td>
<td>August 2010</td>
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<tr>
<td>Chile</td>
<td>September 2008</td>
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<tr>
<td>Colombia</td>
<td>August 1991</td>
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<tr>
<td>Costa Rica</td>
<td>April 1993</td>
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<tr>
<td>Denmark</td>
<td>February 1996</td>
</tr>
<tr>
<td>Dominica</td>
<td>June 2001</td>
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<tr>
<td>Ecuador</td>
<td>May 1998</td>
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<tr>
<td>Fiji</td>
<td>March 1998</td>
</tr>
<tr>
<td>Guatemala</td>
<td>June 1996</td>
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<tr>
<td>Honduras</td>
<td>March 1995</td>
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<tr>
<td>Mexico</td>
<td>September 1990</td>
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<tr>
<td>Nepal</td>
<td>September 2007</td>
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<tr>
<td>Netherlands</td>
<td>February 1998</td>
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<tr>
<td>Nicaragua</td>
<td>August 2010</td>
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<tr>
<td>Norway</td>
<td>June 1990</td>
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<tr>
<td>Paraguay</td>
<td>August 1993</td>
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<tr>
<td>Peru</td>
<td>February 1994</td>
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<tr>
<td>Spain</td>
<td>February 2007</td>
</tr>
<tr>
<td>Venezuela</td>
<td>May 2002</td>
</tr>
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</table>
Self-Determination and FPIC - UNDRIP

The United Nations Declaration on the Rights of Indigenous Peoples, UNDRIP, was adopted by vote at the General Assembly of the United Nations (UNGA) in 2007. It builds on and expands rights defined in ILO 169, but as a declaration of the UNGA, it does not have binding legal force or treaty status. Its negotiation was very long and difficult, taking over 20 years. UNDRIP defines further the nature of the rights of Indigenous Peoples. It affirms that other UN human rights instruments, like the Universal Declaration of Human Rights, fully apply to Indigenous people and it defines additional rights which correspond to the special cultural, institutional, and social requirements of Indigenous peoples. In its preamble, UNDRIP recognizes that Indigenous people have suffered historical injustice, and have inherent rights that stem from “their political, economic, and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources...” UNDRIP has two articles in particular which affect resource projects. Article 3 states that “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.” This creates a status for Indigenous peoples distinct from that of non-Indigenous citizens. Article 32 states 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 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.”

IFC Performance Standards

The International Financial Corporation of the World Bank Group is the world’s largest global development institution focused on the private sector. As a multi-lateral organization, it is managed by its shareholders, which are member governments from nations around the world. IFC has established a set of performance standards to which its clients are expected to adhere in order to manage environmental and social risks and impacts. These standards were identified as an important point of reference by interviewees. Also, they are a reference point for the Equator Principles for financial institutions. Major global banks utilize the Equator Principles to guide their lending. It is reasonable to consider that these performance standards represent international consensus expectations of business. The standards were updated in 2012.

Community relations are a central component of the IFC Performance Standards which direct clients to anticipate and avoid impacts on affected communities, to do so throughout the project cycle, and to compensate or offset those impacts where they cannot be avoided. Because of the high vulnerability and special needs of Indigenous peoples in this context, IFC has developed Performance Standard 7 for projects that affect Indigenous people. Key provisions are:

Participation and Consent

- The client will undertake an engagement process with the affected communities of Indigenous peoples as required in Performance Standard 1. This engagement process includes stakeholder analysis and engagement planning, disclosure of information, consultation, and participation, in a culturally appropriate manner. In addition, this process will:
- Involve Indigenous peoples’ representative bodies and organizations (e.g., councils of elders or village councils), as well as members of the affected communities of Indigenous peoples; and
- Provide sufficient time for Indigenous peoples’ decision-making processes.

Affected communities of Indigenous peoples may be particularly vulnerable to the loss of, alienation from or exploitation of their land and access to natural and cultural resources. In recognition of this vulnerability, in addition to the general requirements of this Performance Standard, the client will obtain the FPIC of the affected communities of Indigenous peoples in the circumstances described in paragraphs 13–17 of this Performance Standard. FPIC applies to project design, implementation, and expected outcomes related to impacts affecting the communities of Indigenous peoples. When any of these circumstances apply, the client will engage external experts to assist in the identification of the project risks and impacts...

...There is no universally accepted definition of FPIC. For the purposes of Performance Standards 1, 7, and 8, “FPIC” has the meaning described in this paragraph. FPIC builds on and expands the process of ICP (informed consultation and participation) described in Performance Standard 1 and will be established through good faith negotiation between the client and the affected communities of Indigenous peoples. The client will 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. FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree.259

Impact and Benefit Sharing Agreements

Impact and benefit sharing agreements are company-community agreements entered into to establish communication, cooperation, and compensation arrangements to help mitigate the impacts of extractive and development projects on traditional Indigenous territories, and secure permission for company access. These types of agreements represent a growing trend of looking beyond compensation to form a relationship of benefit and impact sharing. In Peru, they may be known as ‘Socio-economic Development Benefit Agreements’, and some companies may refer to them as ‘Social Responsibility Agreements’. Respondents indicated that impact and benefit sharing agreements are not common in Latin America now, but could be in the future.
2 See country briefs in Annex 1 for references supporting information on Indigenous populations and groups, as well as oil reserves in each country.
7 According to US Geologic Survey Mineral Commodity Summaries, 2014, 4 tons of dried bauxite produces 2 tons of alumina, which in turn produce 1 ton of primary aluminum metal. The 3,400 metric dry tons of bauxite produced in Suriname in 2013 represent 1,700 metric tons of alumina, or 850 tons of primary aluminum.
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111 US Department of State, Colombia 2013 Human Rights Report.
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