



2008

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Recommended Citation

Connie K. Chan, *Lisa J. Laplante & Suzanne A. Spears, Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 *YALE HUM. RTS. & DEV. L.J.* (2008).

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Response

Lisa J. Laplante & Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*

Connie K. Chant[†]

I. INTRODUCTION

Lisa Laplante and Suzanne Spears undertake an admirable agenda in their article, *Extracting Without Conflict: The Case for Community Consent Processes*.¹ Employing an anthropological approach to understanding community resistance to extractive industry projects, the authors posit that the escalating conflicts between extractive industry (EI) firms and host communities can be “better understood as disputes over community control of resources and the right of community members to control the direction of their lives.”² Their proposed solution is that EI firms voluntarily engage in consent processes with host communities, with a commitment to obtaining their free, prior and informed consent (FPIC) before receiving legal authorization and financial approval of an extractive project. It is obvious that host communities would favor a process that accords them full participatory rights—including the right to withhold their consent—in development decisions affecting the land and resources on which they subsist. Laplante and Spears present the more complicated case for why EI firms should likewise be amenable to voluntary FPIC procedures, relying on the fact that community opposition can prove to be cost-prohibitive.

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1. Lisa J. Laplante and Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes*, 11 YALE HUM. RTS. & DEV. L.J. 69 (2008).

2. *Id.* at 69.

While this Response in no way intends to undermine the value of voluntary corporate commitments to obtain community consent, it questions the extent to which the enforcement of community FPIC rights can or should be entrusted to private entities. While it may make business sense to pursue voluntary FPIC in certain concession agreements, others scenarios may not present such a clear business case. Absent robust legal safeguards enforceable against corporate actors, it is somewhat misleading to regard community consent as a right creating an obligation on the part of private extractive industry firms, as such so-called rights are effectively granted or withdrawn at the behest of the company. To that end, this Response strives to restore attention on the goal of securing community participatory rights in enforceable international law and argues that, while voluntary FPIC processes are certainly desirable, they should not divert attention away from holding host state governments accountable for obtaining a community's free, prior, and informed consent before undertaking development projects that impact its land and resources. By enforcing these legal obligations against state actors, international law also strengthens the business case for FPIC compliance among non-state actors.

This Response will first briefly outline the current scope of FPIC rights as recognized under international law and identify their limitations. Next, it will suggest why the lack of adequate community rights guarantees under international law may undermine or even defeat the business and development case for voluntary FPIC. Finally, this Response will propose that a more compelling business and development case for voluntary FPIC can be made if the FPIC model is focused less on granting communities veto power over development projects and more on achieving multi-stakeholder consensus through guarantees of robust procedural participation rights.

II. THE LIMITED SCOPE OF COMMUNITIES' RIGHTS TO FREE, PRIOR INFORMED CONSENT UNDER INTERNATIONAL LAW

In building their business case for voluntary adoption of FPIC procedures, Laplante and Spears point to the fact that "communities—particularly of indigenous peoples—are growing more vocal and are gaining increasing recognition of their rights."³ Other authors have similarly argued that indigenous peoples' right to free, prior informed consent is gaining "increasing currency" in international law, as recognized by various international organizations and in binding and non-binding instruments.⁴ The International Labor Organization's Convention concerning Indigenous and Tribal Peoples in Independent Countries imposes treaty obligations upon ratifying states to recognize the rights or

3. *Id.* at 84.

4. E.g., Fergus MacKay, *Prior Informed Consent*, 4 SUSTAINABLE DEV. L. & POL'Y 43, 43

ownership and possession of indigenous peoples over the lands which they traditionally occupy or to which they have traditionally had access for their subsistence and traditional activities.⁵ In addition to the ILO Convention, a fair amount of jurisprudence regarding FPIC has accumulated in recent years, particularly by the Inter-American Commission on Human Rights (IACHR).⁶ Many international organizations have also issued guidelines and other non-binding norms affirming indigenous peoples' right to FPIC, including the U.N. Committee on the Elimination of Racial Discrimination, the U.N. Committee on Economic, Social and Cultural Rights, the U.N. Sub-Commission on Promotion and Protection of Human Rights, the U.N. Permanent Forum on Indigenous Issues, the World Commission on Dams, and the Convention on Biological Diversity.⁷

Yet it is important to recognize the limited scope of this "increasing recognition" and distinguish the legally binding from the non-binding instruments. Much of this ambiguity arises from the complex nature of indigenous peoples' rights in lands and resources and the fact that ownership of subsurface minerals belongs to the state in most of the developing world.⁸ Although indigenous peoples' participatory rights have been recognized in various emerging human rights standards, the extent to which these rights are rigorously captured by binding treaty obligations or rules of customary international law remains controversial at best.⁹ To date, the ILO Convention No. 169 remains the only binding instrument explicitly recognizing indigenous peoples' FPIC rights, and it has so far been ratified by only nineteen countries.¹⁰ Moreover, even the ILO Convention "falls short of upholding rights to mineral or subsurface resources in cases in which the state generally retains ownership of those resources."¹¹

Recently, the United Nations adopted the landmark Declaration on the Rights of Indigenous Peoples,¹² which is the first widely adopted international text on indigenous peoples' rights. In contrast to ILO

5. See also Convention Concerning Indigenous and Tribal Peoples in Independent Countries, adopted June 27, 1989, 169 I.L.O. 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991), available at <http://www.unhchr.ch/html/menu3/b/62.htm>.

6. See MacKay, *supra* note 4, at 51-53.

7. *Id.* at 52.

8. Anne Perrault et al., *Partnerships for Success in Protected Areas: The Public Interest and Local Community Rights to Prior Informed Consent (PIC)*, 19 GEO. INT'L ENVTL. L. REV. 475, 494 (2007).

9. See John W. Head, *Protecting and Supporting Indigenous Peoples in Latin America: Evaluating the Recent World Bank and IDB Policy Initiatives*, 14 MICH. ST. J. INT'L L. 383, 407-09 (2006); James Anaya, *Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, 22 ARIZ. J. INT'L & COMP. L. 7, 7 (2005)

10. Int'l Labour Org., Convention N.C. 169, <http://www.ilo.org/ilolex/cgi-lex/ratifice.pl?C169>.

11. Anaya, *supra* note 9, at 10.

12. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc.

A/RES/61/295 (Sept. 13, 2007).

Convention No. 169, which was signed by only nineteen countries, this U.N. Declaration was approved by 143 Member States. In contrast to the ILO Convention, however, the U.N. Declaration is a non-binding instrument, imposing no legal obligations on the signatories. Moreover, the U.N. Declaration has failed to attain the support of Australia, Canada, New Zealand, and the United States—the only four Member States that voted against the Declaration.¹³ Canada's Ambassador remarked, specifically, that the provisions on the need for States to obtain free, prior and informed consent before it can act on matters affecting indigenous peoples were unduly restrictive, and that the provisions on lands, territories and resources "are overly broad, unclear and capable of a wide variety of interpretations."¹⁴ Thus, despite the growing trend toward international recognition of community consent rights, the human rights framework is still far from offering clear consensus on the legal enforceability of these rights. In summary, community rights to FPIC are limited in four important ways: 1) these rights are *sui generis* to indigenous communities and are not readily extended to non-indigenous communities; 2) even as applied to indigenous communities, they fall short of applying to disputes over subsurface resources; 3) these rights are thus far legally binding on only nineteen countries; and 4) to the extent that these rights are recognized, they are generally enforceable only against states and not against private actors.¹⁵ An appropriate question to ask, then, is why states have not yet agreed to binding treaty obligations, for it is against this legal backdrop that Laplante and Spears' motivation for building a "business case" for voluntary corporate FPIC processes becomes clearer.

III. SHORTCOMINGS OF A VOLUNTARY FPIC MODEL

Even in the absence of binding international legal obligations on

13. *United Nations Adopts Declaration on Rights of Indigenous Peoples*, U.N. News Centre, Sept. 13, 2007, <http://www.un.org/apps/news/story.asp?NewsID=23794&Cr=indigenous&Cr1=> (last visited Apr. 21, 2008).

14. *Id.*

15. In 1998, the UN Sub-Commission on the Promotion and Protection of Human Rights (Sub-Commission), a subsidiary of the then-Commission on Human Rights, established a working group of independent experts to make recommendations and proposals relating to the nexus between transnational corporations and human rights. The Sub-Commission approved the working group's draft "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (draft Norms) in 2003, which enumerated a series of corporate responsibilities with respect to human rights for which businesses could be held directly accountable under international law. Among other enumerated rights, the draft Norms acknowledged the principle of free, prior and informed consent of both indigenous peoples *and* communities. The Human Rights Commission, however, declined to adopt the draft as non-voluntary international norms. John G. Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819, 821 (2007); see also *id.* at 832 (explaining that international human rights instruments are traditionally viewed as imposing only "indirect" responsibilities on corporations).

corporations, Laplante and Spears focus on building a business case for voluntary FPIC measures. Their argument is built, at least in part, upon the arguments generated by the World Bank Group's Extractive Industries Review, released in 2003. In crafting their business case, they point to the vulnerability of extractive industries to popular protest in the form of blockades, work stoppages, and other forms of violent resistance, all of which can prove highly costly to extractive enterprises. The authors argue that the extractive industries are uniquely vulnerable to community opposition, due to the inherently high financing, construction, operational, reputation, and corporate risks that they already face when pursuing development projects in host countries.¹⁶ Their conclusion is that it is in the EI firm's own interest to undertake voluntary FPIC processes, suggesting that doing so takes communities and companies out of their "defensive positions" and puts them in "proactive" stances.¹⁷ The World Resources Institute (WRI) applies the same reasoning, concluding that voluntary FPIC is simply a matter of business "common sense."¹⁸

Despite the ostensible "common sense" business case that Laplante and Spears present, many extractive industry participants continue to resist the principle of FPIC. This may result from the reality in which FPIC makes "business sense" in some scenarios and not in others. While it may make business sense to forego investment in a particular extractive project in a particular region, the authors fail to counter the very obvious possibility that it may not make business sense for the industry as a whole to defer to community consent processes as a matter of universal principle. Along similar lines, the authors do not adequately address the possibility that FPIC processes could undermine overarching development goals. The International Council on Mining & Metals (ICMM) issued a response to the Extractive Industries Review, voicing concerns that "[t]he net effect of the Review would be a reduction in private sector foreign direct investment going to emerging economies for which extractive industries' projects are the only available path to development."¹⁹ The ICMM considered the EIR recommendations to be "costly, counterproductive and unrealistic," arguing that "their aggregate impact would add excessive complexity to the process of preparing and implementing projects. . . . The end result would be a 'chilling effect', especially in poor countries."²⁰ In particular, the ICMM cautioned that the adoption of voluntary FPIC standards could

16. Laplante & Spears, *supra* note 1, at 73.

17. *Id.* at 72.

18. WORLD RESOURCES INSTITUTE, DEVELOPMENT WITHOUT CONFLICT: THE BUSINESS CASE FOR COMMUNITY CONSENT, at v (2007).

19. Letter from David Kerr, Chairman of ICMM, to James Wolfensohn, President, World Bank Group (Dec. 23, 2003), in INT'L COUNCIL ON MINING & METALS, COMMENTS ON "STRIKING A BETTER BALANCE: THE FINAL REPORT OF THE EXTRACTIVE INDUSTRIES REVIEW" (2003) [hereinafter ICMM COMMENTS] available at http://www.icmm.com/uploads/201BETTER_BALANCE_EIR_ICMM_COMMENTS_web_version.pdf.

20. Executive Summary, in ICMM COMMENTS, *supra* note 20.

result in a “reduction in development opportunities and a switch away from responsible mining companies towards those unconcerned with adopting international social and environmental standards.”²¹

This concern reflects a fundamental weakness in building a voluntary rather than a mandatory legal standard for community consent rights: without uniform guarantees of enforcement, voluntary adoption of FPIC standards may put socially responsible corporations at a comparative disadvantage relative to competing firms that do not pursue community consent. Under the current state of international law, many state government interests are aligned with those of the extractive company and not with those of the local community.²² Consequently, the host government may find itself confronted by a choice between, on the one hand, a firm that demands costly and complex community consent processes which, if consent is withheld, could result in no investment, and on the other hand, a firm that bypasses community consent processes and guarantees foreign investment. Thus, the interests of the state and the corporation that avoids FPIC procedures are perversely aligned.²³ The end result may be that voluntary FPIC processes on the part of extractive corporations, absent a robust international legal framework holding state governments accountable for first obtaining community consent, do not, in fact, make business sense.

In demanding that FPIC be a process by which host communities retain the power to withhold their consent and thereby unilaterally block a development project, Laplante and Spears describe a type of CSR initiative that may prove cost-prohibitive. By insisting not only upon an absolute veto power for communities at the initial project approval stage, but also a continuing veto power at any point of the project’s development and implementation, FPIC proponents inadvertently make a business case not to engage in consultation processes at all. Currently, where FPIC of non-indigenous communities is not an international legal norm, EI companies are faced with a choice between bypassing community consultation procedures, resulting potentially in the financially devastating consequences described above, or adopting a voluntary model of community consent. Under a consent model, as proposed by Laplante and Spears, the business incentives are decidedly skewed towards bypassing the community altogether. If an EI company enters into a contract with the community, committing to uphold the principles of FPIC, then the company agrees to grant the community unilateral veto power over the project at any given stage of its implementation, and the company is bound by legal contract. In contrast, if the company disregards the community’s

21. *Id.*

22. Lillian Aponte Miranda, *The Hybrid State-Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility and Accountability Under International Law*, 11 LEWIS & CLARK L. REV. 135, 154-55 (2007).

23. See Ruggie, *supra* note 15, at 822.

resistance, it is not liable under any international legal obligations; more importantly, it is not entirely clear that the community could recover restitution from the host government either. In the absence of an international law holding either a company or a state accountable for failure to obtain the consent of a local community, it may remain in a business' best financial interests to avoid engaging with the community and entering into an FPIC arrangement.

In addition to difficulties with their business case, the authors also face challenges in making a development case for voluntary FPIC. A major vulnerability in the voluntary model is that it forces communities to rely on their non-legal leverage in negotiating with extractive firms rather than granting them genuine enforceable rights. Without robust guarantees under international law, communities remain dependent on their ability to stage (often violent) protest, and this defensive negotiating posture erodes communities' entitlements as rights-holders, rather than mere stakeholders. A further detrimental development effect of voluntary rather than mandatory FPIC is that it detracts attention from state responsibilities to promote public participation in state decision-making. Currently, corporate and state interests are often allied against community interests, and standard licensing practices allow extractive firms to bypass community dissent by negotiating directly with the government. In an effort to fold communities into the licensing dialogue, Laplante and Spears present an FPIC procedure that asks companies to bypass state governments by negotiating directly with local communities. Putting aside sovereignty concerns, this model still raises serious developmental issues, as it erodes the state's obligations under international law to engage indigenous populations in state policy- and decision-making. This erosion of state responsibility to engage the public in meaningful participation can have detrimental long-term development effects.

While it may seem convenient to ask extractive firms to step in where government actors fail to meet their international legal obligations, it is important to remember that "any 'grand strategy' needs to strengthen and build out from the existing capacity of states and the states system to regulate and adjudicate harmful actions by corporations, not undermine it."²⁴ Before turning to voluntary corporate FPIC measures, it may be imperative to focus first on strengthening the international human rights framework for holding states accountable for obtaining community consent before negotiating concessionary agreements with extractive firms.

IV. CONCLUSION: REVISING THE LEGAL CALCULUS TO BUILD A BUSINESS CASE FOR FPIC

Laplante and Spears argue that existing voluntary CSR initiatives are

²⁴ *Id.* at 838.

inadequate mechanisms for extractive industry companies to mitigate or reduce the risks of community opposition. The authors respond to this deficiency by proposing more substantive voluntary initiatives on the part of individual EI firms; however, this Response suggests that the deficiency of extant voluntary initiatives resides not in their substantive content but rather in their voluntary nature. Thus, the deficiency cannot be resolved with new substantive voluntary commitments, but rather only through more robust procedural safeguards rooted in enforceable international law. Only by changing the legal parameters within which extractive industry firms and their financial backers are forced to calculate project costs can meaningful community participation become a genuinely viable principle from both a business and a development perspective.

First, the procedural rights that indigenous peoples currently have to meaningful participation in decisions affecting their land and resources should be extended to all local communities under new international legal norms.²⁵ Although it is useful to make the business case for community rights in the extractive industry, doing so in the absence of an international legal backbone leaves these communities vulnerable to the variability of the extractive sector's business calculus. To secure participatory rights for all communities, the theory must ultimately be grounded in rights-based norms and not simply discretionary business models.

Second, to make a genuine business case for community consent, the principle of absolute veto inherent in "consent" may need to be abandoned in favor of robust procedural guarantees of negotiation leverage. In order to make community participation a lucrative proposition from a financial perspective, communities may have to recognize that they lose corporate buy-in if they insist on a right to veto. Alternatively, if communities are endowed with a procedural right to prior, meaningful consultation, then the business incentives for upholding those rights will be adjusted in favor of meaningful consultation. The reluctance of both the extractive industry and host governments to adopt the principle of free, prior informed consent stems from wariness over the grant of unilateral veto power to communities. The cost of losing a development contract altogether often outweighs the costs of managing various forms of community social protest.

Rather than framing FPIC as a community's right to withhold consent, international law should adopt a model of stakeholder engagement that holds both states and corporations accountable for ensuring community participation in decisions affecting their land and resources. As prescribed in the Final Report of the World Bank's Extractive Industries Review, the concept of free, prior and informed consent should not be viewed as a:

one-off, yes-no vote or as a veto power for a single person or group.

Rather, it is a process by which indigenous peoples, local communities,

25. Existing articulations of indigenous peoples' FPIC rights are *sui generis*. Anaya, *supra* note 9, at 9-10.

government, and companies may come to mutual agreements in a forum that gives affected communities enough leverage to negotiate conditions under which they may proceed and an outcome leaving the community clearly better off.²⁶

By offering instead a guarantee that the communities themselves will engage in "good faith negotiations" with the extractive industry corporations, rather than exercise absolute refusal to consent, communities create more obvious incentives for businesses to engage in meaningful consultations with the community.

Finally, the addition of corporate accountability under international law should not undermine state responsibilities. While states should be held primarily responsible for ensuring meaningful community participation in decisions affecting their land and resources, extractive industry firms should be held responsible for acquiring state licensing only after the state has successfully consulted with the local community and obtained its broad support. While it is necessary to reconfigure the current imbalance of negotiating power, whereby the corporate interests are aligned with the state's, it is insufficient to rearrange the negotiating structure by creating a bilateral partnership between the communities and the corporations, to the exclusion of the state. In order to facilitate genuine long-term country stability and sustainable enforcement of public rights to participate in decisions affecting their lands and resources, consultation processes in the extractive sector must ultimately create a bridge between communities and the state.

26. 1 EMIL SALIM, STRIKING A BETTER BALANCE 50 (2003), available at

http://www.commdev.org/files/1955_file_Extractive_Industries_Review.zip.

