

Indigenous Rights, Environmental Rights, or Stakeholder Engagement? Comparing IFC and OECD Approaches to Implementation of the Business Responsibility to Respect Human Rights

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The Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (OECD MNE Guidelines) and the International Finance Corporation (IFC) Performance Standards on Environmental and Social Sustainability (IFC Performance Standards) are widely viewed as key international standards to which extractive companies operating internationally should comply. Indeed, these standards, together with the United Nations (UN) Guiding Principles on Business and Human Rights (UNGPs), are promoted by Canada in its November 2014 enhanced corporate social responsibility (CSR) strategy for extractive sector companies operating abroad. The strategy states that the Canadian government expects companies operating outside of Canada to “respect human rights and all applicable laws, and to meet or exceed widely-recognized international standards for responsible business conduct”. Yet the OECD and the IFC take distinct approaches to the embedding of indigenous rights and environmental rights, two categories of human rights commonly affected by extractive company operations. For example, the OECD MNE Guidelines address human rights and

environment in different guidelines, and there are no specific guidelines concerning the rights of indigenous peoples. The IFC Performance Standards, on the other hand, refers to human rights only briefly in the first performance standard as part of its social risk assessment, but provides more detailed standards on various environmental and social matters including biodiversity conservation, pollution prevention and indigenous peoples’ rights. However, in early 2016, the OECD released a Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector (OECD Stakeholder Engagement Guidance) designed to provide practical guidance in line with the OECD MNE Guidelines. This paper will examine the commonalities and differences between the IFC and OECD approaches to the integration of business responsibilities for human rights with a focus on procedural environmental rights and the right of indigenous peoples to free, prior, and informed consent (FPIC). The paper will also briefly assess the potential effectiveness of these instruments in light of associated compliance mechanisms.

Titre francophone : Droits autochtones, droits environnementaux, ou engagement des parties prenantes? Une comparaison des approches de la IFC et de l’OCDE quant à la mise en oeuvre de la responsabilité des entreprises de respecter les droits de l’homme.

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Les principes directeurs de l'Organisation de Coopération et de Développement Économiques (OCDE) à l'intention des entreprises multinationales ainsi que les normes de performance en matière de durabilité environnementale et sociale de la Société Financière Internationale (SFI) sont généralement considérés comme des normes internationales fondamentales auxquelles doivent se conformer les compagnies du secteur extractif actives à l'étranger. Ces normes, ainsi que les principes directeurs relatifs aux entreprises et aux droits humains des Nations Unies, ont été promues par le Canada en novembre 2014 à travers la stratégie améliorée du Canada relative à la responsabilité sociale des entreprises. Cette stratégie affirme que le gouvernement canadien s'attend à ce que les compagnies opérant à l'étranger « respectent les droits de la personne, ainsi que toutes les lois applicables, et qu'elles satisfassent - et même surpassent - les normes internationales généralement reconnues en matière de conduite responsable des affaires ». Cependant, l'OCDE et la SFI adoptent des approches distinctes quant à l'incorporation des droits des Autochtones et des droits environnementaux, deux catégories de droits humains les plus touchées par l'opération d'entreprises du secteur extractif. Par exemple,

les principes directeurs de l'OCDE traitent des droits humains et des droits environnementaux dans différents principes, sans faire mention des droits des Autochtones. En revanche, les normes de performance de la SFI, quoique ne référant que brièvement aux droits humains dans la Norme de performance 1 dans le contexte de l'évaluation des risques sur le plan social, offre toutefois des normes plus détaillées au niveau environnemental et social incluant la conservation de la biodiversité, la prévention de la pollution et les peuples autochtones. En avril 2015, l'OCDE a publié pour examen public une ébauche de son guide d'engagement pour parties prenantes dans le secteur extractif. Cet article examinera les similarités et les différences entre les approches de l'OCDE et de la SFI en ce qui concerne l'intégration de la responsabilité qu'ont les entreprises vis-à-vis des droits humains. Seront examinés plus particulièrement les droits procéduraux destinés à renforcer la protection de l'environnement ainsi que le droit des peuples autochtones au consentement préalable, libre et éclairé. Cet article évaluera également l'efficacité potentielle de ces deux approches à la lumière des mécanismes de conformité associés.

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1. INTRODUCTION

The importance of respect for indigenous rights and local community environmental rights for mining, oil, and gas companies operating internationally cannot be understated. From a company's perspective, empirical evidence has documented the extensive financial costs of conflict between companies and communities—conflicts often fuelled by environmental concerns and lack of community consent.¹ From a local community perspective, such conflicts can, depending on the country context, culminate in the imprisonment of community members, or, far too frequently, the killing of environmental human rights defenders.² In countries with weak protection and enforcement of indigenous or environmental rights, a company's ability to steer clear of such deadly conflicts is dependent

¹ Rachel Davis & Daniel M Franks, "Costs of Company-Community Conflict in the Extractive Sector" (2014) 66 Corporate Social Responsibility Initiative Report No 66, online: Harvard Kennedy School <www.hks.harvard.edu/m-rcbg/CSRI/research/Costs%20of%20Conflict_Davis%20%20Franks.pdf>; Daniel M Franks et al, "Conflict Translates Environmental and Social Risk into Business Costs" (2014) 111:21 Proceedings National Academy of Sciences 7576.

² Center for International Environmental Law, "Environmental Defenders Describe Human Rights Abuses Linked with the Mining Industry" (25 October 2010), online: <www.ciel.org/news/environmental-defenders-describe-human-rights-abuses-linked-with-the-mining-industry-at-the-inter-american-commission-on-human-rights/>; Global Witness, "How Many More? 2014's Deadly Environment: The Killing and Intimidation of Environmental and Land Activists, with a Spotlight on Honduras" (20 April 2014), online: Global Witness <www.globalwitness.org/en/campaigns/environmental-activists/how-many-more> [Global Witness]; Jona Razzaque, "Human Rights to a Clean Environment: Procedural Right", in Malgosia Fitzmaurice, David M Ong & Panos Merkouris, eds, *Research Handbook on International Environmental Law* (Cheltenham: Edward Elgar Publishing Limited, 2010) 28.

upon its ability to seek comprehensive and practical rights-respecting guidance. When industry understandings of environmental and indigenous rights deviate from the understandings accepted by local communities, the consequences for those engaged in peaceful protest are severe.

The Organisation for Economic Cooperation and Development (OECD) *Guidelines for Multinational Enterprises (OECD MNE Guidelines)*³ and the International Finance Corporation (IFC) *Performance Standards on Environmental and Social Sustainability (IFC Performance Standards)*⁴ are widely viewed as important international standards for guiding responsible transnational business conduct.⁵ Indeed, both are recommended to Canadian extractive companies operating internationally by Global Affairs Canada (previously the Department of Foreign Affairs, Trade and Development) in a 2014 policy document entitled *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad (2014 Strategy)*.⁶ These standards forward, to differing degrees, that businesses have a responsibility to respect human rights in accordance with the United Nations (UN) *Guiding Principles on Business and Human Rights (UNGPs)*, endorsed by the UN Human Rights Council (UNHRC) in 2011.⁷

Both the *OECD MNE Guidelines* and *IFC Performance Standards* have the potential to play an important role in providing guidance to extractive companies on respect for human rights throughout their global operations. Yet, the internationally recognized right of indigenous peoples to free, prior and informed consent (FPIC) under international law is understood differently under international law than procedural environmental rights of non-indigenous local individuals and communities. Moreover, not all peoples who self-identify as indigenous are recognized as such by the state within which they live.⁸ From the perspective of an extractive company operating internationally, it should, in principle, be important to

³ OECD, *Directorate for Financial and Enterprise Affairs, Guidelines for Multinational Enterprises*, (2011) [*MNE Guidelines*].

⁴ International Finance Corporation, *Performance Standards on Environmental and Social Sustainability* (Washington, DC: International Finance Corporation, 2012) [*IFC, Performance Standards*].

⁵ See generally Elisa Morgera, *Corporate Accountability in International Environmental Law* (Oxford: Oxford University Press, 2009) at 105–113, 117–118, and ch 7, especially 169–171; Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (New York: Routledge, 2014) at ch 3.

⁶ Canada, Global Affairs Canada, *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad* (Ottawa: Global Affairs Canada, 2014) at 6–7 [*Doing Business the Canadian Way*].

⁷ *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UNHRC GAOR, 17th Sess, Annex, Agenda Item 3, A/HRC/17/31 (2011) [*UNGPs*]; United Nations Human Rights: Office of the High Commissioner, News Release, "New Guiding Principles on Business and Human Rights endorsed by the UN Human Rights Council" (2011), online: <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11164#sthash.IaErqwjG.dpuf>.

⁸ See e.g. Michael C Davis, "China and the UN Declaration on the Rights of Indigenous Peoples: The Case of Tibet" in Mark Woons, ed, *Restoring Indigenous Self-Determination Theoretical and Practical Approaches* (Bristol: E-International Relations, 2014) 96; Jérémie Gilbert, "Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission of Human and Peoples' Rights" (2011) 60:1 ICLQ 245.

understand when FPIC is required in order to comply with the business responsibility to respect rights under international law, as distinct from similar yet distinct consultation and participation requirements for a non-indigenous local community or individuals. In theory, widely endorsed international standards for extractive companies should make this distinction clear. In practice, however, this distinction is not evident. While the *IFC Performance Standards* include a standard dedicated to indigenous rights, the *OECD MNE Guidelines* provide no specific guidance with regard to indigenous rights. Both standards approach environmental issues in distinct ways. Notably, in April 2015, the OECD posted the *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector* draft for comment that for the first time provides concrete recognition of indigenous rights, with the final text (*OECD Stakeholder Engagement Guidance*) published in 2016.⁹

This paper will first briefly explore Canada's promotion of these international standards in light of its key role in global mining, then examine international law's conceptualization of the right of indigenous peoples to FPIC as distinct from procedural environmental rights. Second, the paper will compare the approach taken to the embedding of these rights, and the business responsibility to respect rights in the *IFC Performance Standards* and the *OECD MNE Guidelines*. The implementation of these rights will also be assessed through a brief examination of compliance mechanism decisions associated with each standard. Finally, the *OECD Stakeholder Engagement Guidance* will be explored in order to determine whether it serves to align the OECD's approach with that of the IFC, or whether it confirms a different path. While in theory indigenous rights to FPIC and local community participatory environmental rights should be carefully distinguished in these standards, the reality suggests a blurring of these rights and their legal status. The paper will conclude by speculating upon why this might be, and offering recommendations for future research.

2. CANADA, ENVIRONMENTAL RIGHTS, AND INDIGENOUS RIGHTS

2.1. CANADIAN MINING INTERNATIONALLY

Canada is known as an important player in global mining and exploration. In 2013, more than half of the "publically listed exploration and mining companies" in the world had their headquarters in Canada.¹⁰ Canada also plays a lead role in the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development, an initiative that brings together governments from around the world to develop policy for sustainable mineral development.¹¹ Countries representing a diverse range of mineral-rich states from both the North and South

⁹ OECD Secretariat, *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector*, Draft for comment (2015) at 4, online: <www.oecd.org/daf/inv/mne/OECD-Guidance-Extractives-Sector-Stakeholder-Engagement.pdf> [*OECD Draft Stakeholder Engagement*]; OECD Secretariat, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*, (2016), online: <mneguidelines.oecd.org/OECD-Guidance-Extractives-Sector-Stakeholder-Engagement.pdf> [*OECD Stakeholder Engagement Guidance*].

¹⁰ *Doing Business the Canadian Way*, supra note 6 at 2. In the same year, Canadian-headquartered companies undertook nearly 31% of global expenditures on mining exploration.

¹¹ See generally, Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development, *Terms of Reference*, online: <globaldialogue.info/TOREnglish2013.pdf> and *Introduction*, online: <globaldialogue.info/intro_e.htm>. The Intergovernmental Forum was the outcome of the Global

participated in the drafting of a *Mining Policy Framework* in 2010, updated in 2013.¹² This framework is said to outline the “best practices required for good environmental, social and economic governance of the mining sector and the generation and equitable sharing of benefits in a manner that will contribute to sustainable development.”¹³ It highlights the need to respect human rights, including the rights of indigenous peoples,¹⁴ and encourages governments and “mining entities” to “respect the spirit and intent of current and future international normative language such as is found in the [*IFC Performance Standards*].”¹⁵ Should a conflict break out where there is an operating mine, “governments and operating entities should act to protect human rights and ensure the safety of miners, their families and communities in accordance with the OECD guidelines.”¹⁶ Environmental management standards and post-mining transition, including remediation, are addressed separately.¹⁷

Despite Canada’s promotion of best practices in the governance of sustainable mineral development by host states internationally,¹⁸ Canadian mining companies have been at times implicated or alleged to be implicated in violations of the rights of local and indigenous communities, including tragic incidents where peaceful protests over violations of rights to consultation and consent end in violence.¹⁹ Indeed, despite constitutional protections of

Dialogue, a Partnership Initiative co-sponsored by South Africa and Canada as an outcome of the 2002 Johannesburg World Summit on Sustainable Development.

¹² Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development, *A Mining Policy Framework: Mining and Sustainable Development* (2013) at 3–4, online: <globaldialogue.info/MPFOct2013.pdf>. State members are largely from the global south, including several BRICS countries (Brazil, Russia, India and South Africa, but not China), as well as many economically poor countries (such as Sierra Leone, Bolivia, and Papua New Guinea). By 2013, forty-seven countries participated in this initiative.

¹³ *Ibid* at 6.

¹⁴ *Ibid* at 11. Cultural heritage rights are also singled out here.

¹⁵ *Ibid* at 11, 34–35.

¹⁶ *Ibid* at 11, 34–35. This comment appears in the context of addressing potential security issues, and reference is made to the Voluntary Principles on Security and Human Rights (at 35), another international standard identified and endorsed in both the 2009 and 2014 Strategies. See *Doing Business the Canadian Way*, *supra* note 6 at 7; Sara L Seck, “Canadian Mining Internationally and the UN Guiding Principles for Business and Human Rights” (2011), 49 *Can YB Intl L* 51 at 76–77 [Seck “Canadian Mining Internationally”], citing Canada, Department of Foreign Affairs and International Trade, *Building the Canadian Advantage: A Corporate Social Responsibility Strategy for the Canadian Extractive Sector* (Ottawa: Department of Foreign Affairs and International Trade, 26 March 2009).

¹⁷ *Ibid* at 11–15, 35–41. The IFC Performance standards are referred to as guidance for mine closure. The IFC Performance standards are referred to as guidance for mine closure.

¹⁸ In addition to Canada’s role in the Intergovernmental Forum, the Canadian government has provided \$25 million in funding support to the Canadian International Resources and Development Initiative (CIRDI) in order to “foster dialogue, training and research, and promote best practices to support developing countries to enhance their capacity to manage their natural resource sector.” *Doing Business the Canadian Way*, *supra* note 6 at 16. See further CIRDI, *About*, online: Canadian International Resources and Development Institute <cirdi.ca/about/>. This initiative has been the subject of critique. See e.g. Stop the Institute/CIRDI, online: <stoptheinstitute.ca>.

¹⁹ See e.g. Inter-Am Comm HR, Thematic Hearing from 153rd Period of Sessions, *Human Rights, Indigenous Rights and Canada’s Extraterritorial Obligations*, (October 28 2014) at 10, online: <cnca-rcrce.ca/wp-content/uploads/canada_mining_cidh_oct_28_2014_final.pdf> [CNCA Report]. See also *Choc*

aboriginal rights, similar confrontations have occurred within Canada in recent years.²⁰ In addition, abroad or at home, mining has resulted in environmental harms that have not been remediated, with associated violations of environmental rights.²¹ Moreover, 2012 amendments to federal environmental assessment laws have weakened procedural environmental rights protections domestically, a problem that the current federal government has promised to fix.²²

Beyond best practices, it is often argued that home states like Canada have an obligation under international law to regulate companies operating abroad to prevent and remedy violations of human rights.²³ This particularly applies in the mining sector, as international operations do not happen without home state support, whether through financial support provided by export credit agencies, private financial institutions, or listing on a stock exchange, or through trade commissioner support provided directly by the federal government.²⁴ However, the implementation of “hard law” regulation has for the most part been resisted.²⁵

v Hudbay Minerals Inc, 2013 ONSC 1414, 116 OR (3d) 674 [Choc]; *Piedra v Copper Mesa Mining Corporation*, 2011 ONCA 191, [2011] OJ No 1041, affg 2010 ONSC 2421, [2010] OJ No 2239; Canadian Centre for International Justice, *Q & A: The Case Against Canada's Tahoe Resources Inc* (CCIJ, 2014), online: <www.ccij.ca/content/uploads/2015/07/Tahoe-QA-Filing-18-June-2014-FINAL.pdf>.

²⁰ See Rachel Ariss with John Cutfeet, *Keeping the Land: Kitchenuhmaykoosib Inninuwug, Reconciliation and Canadian Law* (Black Point: Fernwood Publishing, 2012) (describing the 2006 confrontation with mineral exploration company Platinex, which resulted in the jailing of aboriginal community leaders).

²¹ See for example the discussion of environment issues and associated human rights violations at the Omai mine in Guyana and the Ok Tedi mine in Papua New Guinea, both of which involved foreign direct investment from Canadian mining companies (albeit to differing degrees). See e.g. Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy* (March 2014) at 65–78, 81–94, online: <www.amnesty.org/en/documents/POL30/001/2014/en/>. These problems frequently arose in the past in Canada. See e.g. National Orphaned/Abandoned Mines Initiative, online: <www.abandoned-mines.org>; Abandoned Mines Project, online: <www.abandonedminesnc.com/>. Tailings spills, while rare, still arise at Canadian mines today. See the recent 2014 Mount Polley tailings spill in British Columbia: British Columbia, Ministry of Environment, “Mount Polley Mine Tailings Dam Breach, Likely” (4 August 2014), online: <www.env.gov.bc.ca/epd/mount-polley>. See also United Nations Human Rights: Office of the High Commissioner, News Release, “Brazilian mine disaster: ‘This is not the time for defensive posturing’ – UN rights experts” (25 November 2015), online: <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16803&LangID=E>.

²² Meinhard Doelle, “CEAA 2012: The End of Federal EA As We Know It?” (2012) 24:1 J Envtl L & Prac 1; Robert B Gibson, “In Full Retreat: the Canadian Government’s New Environmental Assessment Law Undoes Decades of Progress” (2012) 30:3 Impact Assessment & Project Appraisal 179. See also Mandate Letter from the Office of the Prime Minister to the Minister of Environment and Climate Change (2016), online: Prime Minister of Canada Justin Trudeau <pm.gc.ca/eng/minister-environment-and-climate-change-mandate-letter>.

²³ Sara L Seck, “Conceptualizing the Home State Duty to Protect Human Rights” in Karin Buhman, Mette Morsing & Lynn Roseberry, eds, *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives* (New York: Palgrave Macmillan, 2010) 25 [Seck “Conceptualizing”]; Sara L Seck, “Home State Responsibility and Local Communities: The Case of Global Mining” (2008) 11 Yale Human Rts & Dev LJ 177 [Seck “Local Communities”].

²⁴ Seck, “Conceptualizing”, *supra* note 23 at 45–46; CNCA Report, *supra* note 19 at 7–9; Simons & Macklin, *supra* note 5 at 260–264, 280–290.

²⁵ Seck “Canadian Mining Internationally”, *supra* note 16 at 66–75; Simons and Macklin, *ibid* at 260–264; Richard Janda, “An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries (Bill C-300): Anatomy of a Failed Initiative” (2010) 6:2 JSDLP 97.

Instead, in November 2014, Canada announced an enhanced corporate social responsibility (CSR) strategy for extractive sector companies operating abroad.²⁶ The revised *2014 Strategy* builds upon an earlier strategy dating from 2009, which was the subject of much criticism due in part to the weak mandate of the CSR counsellor who was tasked with the resolution of disputes.²⁷ Among the changes introduced in the *2014 Strategy* are a revisiting of the role of the CSR counsellor, and the proposed withdrawal of “economic diplomacy” support from companies that fail to participate in dispute resolution procedures or are found “not to be embodying CSR best practices.”²⁸

The *2014 Strategy* states explicitly that the Canadian government expects companies operating outside of Canada to “respect human rights and all applicable laws, and to meet or exceed widely-recognized international standards for responsible business conduct.”²⁹ This change is a response to the UNHRC’s 2011 endorsement of the *UNGPs*,³⁰ which are also included in the *2014 Strategy*’s updated reference list of international guidelines and standards.³¹ The *UNGPs* consist of three pillars of polycentric governance: (1) the state duty to protect human rights from violations by businesses; (2) the independent business responsibility to respect human rights; (3) and the need for access to judicial and non-judicial remedy for victims.³² According to the *UNGPs*, the responsibility to respect applies to all businesses

²⁶ *Doing Business the Canadian Way*, *supra* note 6.

²⁷ For a description of the CSR strategy of Canada, Department of Foreign Affairs and International Trade, *Building the Canadian Advantage: A Corporate Social Responsibility Strategy for the Canadian Extractive Sector* (Ottawa: Department of Foreign Affairs and International Trade, 26 March 2009); Seck, “Canadian Mining Internationally”, *supra* note 16 at 85. Among other concerns was the fact that company consent was required before the CSR Counsellor could consider a complaint, and no consequences flowed from a company’s failure to participate.

²⁸ *Doing Business the Canadian Way*, *supra* note 6 at 12–13. Companies designated as not embodying CSR best practice will also have this designation taken into account when seeking financing through Export Development Canada. On the other hand, companies that do align with the CSR guidance “will be recognized by the CSR Counsellor’s office as eligible for enhanced Government of Canada economic diplomacy” (*ibid*). For a full analysis of the 2014 Strategy, see Penelope Simons, “Canada’s Enhanced CSR Strategy: Human Rights Due Diligence and Access to Justice for Victims of Extraterritorial Corporate Human Rights Abuses” (2015) 56:2 Can Bus LJ 167 [Simons “Canada’s Enhanced”].

²⁹ *Doing Business the Canadian Way*, *supra* note 6 at 3.

³⁰ See generally Radu Mares, ed, *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Boston: Martinus Nijhoff Publishers, 2012). See also Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge: Cambridge University Press, 2013).

³¹ *Doing Business the Canadian Way*, *supra* note 6 at 6. A second new standard introduced in 2014 is the OECD Due Diligence Guidance on Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2011). Canada “played a leading role in negotiating the Guidance document” and “chairs the OECD forum on responsible mineral supply chains as well as the Multi-stakeholder Steering Group which oversees the initiative.” *Ibid* at 7.

³² *UNGPs*, *supra* note 7 at 1. While the state duty to protect is rooted in existing international human rights law, the business responsibility to respect rights arises from the expectations of society, and should be treated as a legal compliance issue. The classification of the business responsibility as a social rather than legal norm has been critiqued. See e.g. Carlos López, “The ‘Ruggie Process’: from Legal Obligations to Corporate Social Responsibility?” in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge: Cambridge University Press, 2013)

and all human rights, with the understanding that the specific rights and the extent of the responsibility will depend in part upon industry context.³³

As well as serving as an independent standard in the *2014 Strategy*, the business responsibility to respect human rights has been embedded to differing degrees in other international standards that feature prominently in both the 2009 and *2014 Strategy*, including both the *OECD MNE Guidelines* and the *IFC Performance Standards*.³⁴ Although the *2014 Strategy* frames compliance with these standards as voluntary, it is important to recognize that in addition to the implementation of incentives such as conditionality of financing and trade commissioner support proposed in the *2014 Strategy*, these standards may also be hardened by explicit incorporation in contractual agreements or used to inform the standard of care in tort.³⁵ Accordingly, while the relationship between international CSR standards and law is contested, there is increasingly little doubt that the human rights dimensions of these standards are legally relevant.³⁶

2.2. ENVIRONMENTAL RIGHTS, INDIGENOUS RIGHTS, AND INTERNATIONAL LAW

Both environmental rights and indigenous rights have been recognized in sources of international law. This part will explore each in turn, with explicit reference to recent reports by UN human rights special procedures mandate holders on environmental rights and indigenous rights. While many alternative sources could support an exploration of indigenous rights, Professor John Knox, the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment appointed in March 2012, provides a recent and authoritative mapping of environmental rights which more easily allows for a comparison with indigenous rights.³⁷ Moreover, as part of this mapping

58. However, others argue that the widespread endorsement of the UNGPs “transforms CSR strategy from public relations art to legal science by creating a new CSR paradigm driven by systemic precision based on legal concepts – one that is justiciable in a way that traditional CSR never could be.” See Yousuf Astab, “The Intersection of Law and Corporate Social Responsibility: Human Rights Strategy and Litigation Readiness for Extractive-Sector Companies” (2014) 60 *Rocky Mountain Mineral L Institute* 1.

³³ *UNGPs*, *supra* note 7 at 13–14. To be in compliance with the business responsibility to respect rights, a company must “know and show” that it accepts this responsibility, by adopting a human rights policy, undertaking human rights due diligence, and ensuring remedy for violations.

³⁴ Sara L Seck, “Business, Human Rights, and Canadian Mining Lawyers” (2015) 56:2 *Can Bus LJ* 208 at 216–224 [Seck, “Business and Human Rights”].

³⁵ On contractual aspects see Michael Torrance, ed, *IFC Performance Standards on Environmental & Social Sustainability: A Guidebook* (Markham, Canada: LexisNexis Canada, 2012) at 18–19; on CSR frameworks and the standard of care in transnational corporate accountability tort litigation, see *Choc*, *supra* note 19. See also Astab, *supra* note 32.

³⁶ Seck “Business and Human Rights”, *supra* note 34 at 234–237. See also John Morrison, *The Social License: How to Keep Your Organization Legitimate* (New York: Palgrave MacMillan, 2014); Michael Torrance, “Persuasive Authority Beyond the State: A Theoretical Analysis of Corporate Social Responsibility Norms as Legal Reasons within Positivist Legal Systems” (2011) 12:8 *German LJ* 1573.

³⁷ *Human Rights and the Environment*, GA Res 19/10, UNHRCGAOR, 19th Sess, UN Doc A/HRC/RES/19/10 (2012). John H Knox, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox Mapping Report*, UNHRCGAOR, 25th Sess, (2013) A/HRC/25/53 1 at paras 4, 20, online: United Nations Mandate on

process and in order to provide a cross-cutting analysis, Knox examined reports of Professor James Anaya, the (former) UNHRC mandate holder on indigenous rights, who had just issued a cutting edge report on indigenous rights and extractive industries.³⁸

The UN special procedures mandate holders have been described by former UN Secretary-General Kofi Annan as “the crown jewel[s] of the [UN human rights] system.”³⁹ Thematic mandate holders, which have grown exponentially in number from three in 1985 to 41 today,⁴⁰ are prominent independent human rights experts who thematically study human rights concerns (rather than country-specific concerns), and “may contribute to the development of human rights standards.”⁴¹ The first special rapporteur on the rights of indigenous peoples was appointed in 2001 and Professor Anaya held the position from 2008 to 2014.⁴² A special rapporteur on human rights and the environment was appointed in 1990 and issued yearly reports until 1994, including draft articles on human rights and the environment.⁴³ The appointment of Professor Knox in 2012 marked the first time since 1994 that the relationship between human rights and the environment was squarely on the agenda of a thematic mandate holder.⁴⁴ Notably, the *UNGP*s were the product of Special Procedures Mandate Holder Professor John Ruggie, who held the position of special representative for business and human rights from 2005 to 2011. Accordingly, recent reports by thematic mandate holders will inform the analysis below.

2.2.1. ENVIRONMENTAL RIGHTS

Human Rights and the Environment <srenvironment.org/mapping-report-2014-2/c> [Knox, *Mapping Report*]. This mapping report was presented at the 25th session of the UN Human Rights Council in March 2014.

³⁸ John H Knox, *Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Individual Report on the Rights of Indigenous Peoples*, December 2013 at 6, online: United Nations Mandate on Human Rights and the Environment <srenvironment.org/mapping-report-2014-2/> [Knox, *Indigenous Rights*].

³⁹ Henry J Steiner, Philip Alston, & Ryan Goodman, eds, *International Human Rights in Context: Law, Politics, Morals*, 3rd ed (Oxford: Oxford University Press, 2008) at 765.

⁴⁰ *Ibid* at 766; UNOHCHR, *Special Procedures of the Human Rights Council* (2015), online: <ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx> [*Special Procedures HRC*].

⁴¹ *Ibid*.

⁴² UNOHCHR, “Current Mandate Holders”, online: <www.ohchr.org/EN/HRBodies/SP/Pages/Currentmandateholders.aspx>. The current Special Rapporteur on the rights of indigenous peoples is Ms. Victoria Lucia Tauli-Corpuz.

⁴³ See discussion of the work of Ms Fatima Zhora Ksentini, including Draft Articles on Human Rights and Environment in Sumudu Atapattu, “The Right to Life or the Right to Die Polluted: The Emergence of a Human Right to a Healthy Environment Under International Law” (2002) 16 Tul Envtl LJ 65 at 78–83.

⁴⁴ UNOHCHR, Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, online: <ohchr.org/EN/Issues/Environment/ToxicWastes/Pages/SRToxicWastesIndex.aspx>. However, since 1995, a Special Rapporteur has considered the implications for human rights of the dumping and management of toxic substances and hazardous wastes. See especially Report of the Special Rapporteur on the human rights obligations related to the environmentally sound management and disposal of hazardous substances and waste, Calin Georgescu, Extractive Industries Report, UN HRC A/HRC/21/48 (2 July 2012).

International law's recognition of human rights to environmental protection is often said to distinguish between substantive rights,⁴⁵ and procedural rights.⁴⁶ While the linkage between environmental harm and human rights has been clearly established in international environmental law since at least 1972, many human rights treaties drafted before this time do not provide direct references to environmental rights.⁴⁷ However, recent international human rights treaties and two regional treaties specifically guarantee substantive environmental human rights, as do more than 100 national constitutions, which often use explicit language such as a "right to a clean and healthy environment."⁴⁸ Where substantive environmental rights are not explicitly found in formal texts, global and regional human rights bodies have interpreted rights to life, health, and property, among others, as providing protection for environmental concerns, balanced against a government's desire for economic development.⁴⁹ Moreover, procedural environmental rights to access information, participate in decision making, and access justice serve to support the realization of substantive rights.⁵⁰ International environmental law has recognized procedural environmental rights most notably in principle 10 of the 1992 *Rio Declaration* and the 1998 *Aarhus Convention*, as well as in many other sources of international, regional, and national law.⁵¹

The 2013 report of Professor Knox, the independent expert on human rights and environment, provides a "mapping" of human rights obligations relating to the environment, and notes that states and tribunals have identified mining and large-scale oil operations as threatening the enjoyment of the right to a healthy or satisfactory environment.⁵² Improper disposal of toxic wastes and hazardous substances from extractive operations are also identified as threatening the right to health and the right to water.⁵³ Pollution and habitat loss more generally threaten the right to food.⁵⁴ Women, children, and indigenous peoples may be more

⁴⁵ Dinah Shelton, "Human Rights and the Environment: Substantive Rights" in Fitzmaurice et al, *supra* note 2 at 265.

⁴⁶ Razzaque, *supra* note 2 at 284. See generally Benjamin Richardson & Jona Razzaque, "Public participation in environmental decision-making" in Benjamin Richardson & Stepan Wood, eds, *Environmental Law for Sustainability* (Oxford: Hart Publishing, 2006) 165.

⁴⁷ Shelton, *supra* note 45 at 265–266. See also Atapattu, *supra* note 43 (providing a history of the emergence of a human rights to a healthy environment in sources of both international environmental and human rights law).

⁴⁸ Shelton, *supra* note 45 at 266–267.

⁴⁹ *Ibid* at 278–279.

⁵⁰ Razzaque, *supra* note 46 at 284.

⁵¹ *Ibid* at 285–292. See further *Rio Declaration on Environment and Development*, UNGAOR, 1992, UN Doc A/CONF.151/26 vol.1, 31 ILM 874 (1992), Principle 10 [*Rio Declaration*]; Donald K Anton & Dinah L Shelton, *Environmental Protection and Human Rights* (New York City: Cambridge University Press, 2011); *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 25 June 1998, 2161 UNTS 447, 38 ILM 517 (1999) (entered into force 30 October 2001).

⁵² Knox, *Mapping Report*, *supra* note 37 at para 18.

⁵³ *Ibid* at paras 20–21.

⁵⁴ *Ibid* at para 21.

vulnerable to infringements of the right to health by extractive industries.⁵⁵ Extractive industry operations thus have the potential to threaten a broad range of substantive environmental rights, with specific rights dependent upon the context.

While all states may not have “formally accepted” all the norms identified in the 2013 report, the independent expert highlights that given the “diversity of the sources from which they arise” and their “remarkabl[e] coheren[ce]”, they “provide strong evidence of converging trends towards greater uniformity and certainty in the human rights obligations relating to the environment.”⁵⁶ Notably, the independent expert observes the striking agreement that states have procedural obligations including “duties (a) to assess environmental impacts and make environmental information public; (b) to facilitate public participation in environmental decision-making, including by protecting the rights of expression and association; and (c) to provide access to remedies for harm.”⁵⁷ The independent expert notes the “special importance” of “rights of freedom of expression and association” and the protection of life, liberty and security of individuals exercising these rights in relation to public participation in environmental decision making. This is due to the “extraordinary risks” facing human rights defenders who work to protect the environment, land rights, and natural resources.⁵⁸ This recognition accords with the widely accepted recognition of public participation rights for individuals and groups who face potential environmental impacts from the activities of extractive industries found under international sustainable development law, whether or not they self-identify as indigenous peoples.⁵⁹

With regard to substantive rights protection, the independent expert concludes that states are obligated to protect against environmental harm that interferes with the enjoyment of a broad spectrum of human rights, including an obligation to adopt a legal framework to protect against environmental harm, and to regulate private actors to protect against such harms.⁶⁰ A subsequent report of the independent expert confirms that the business responsibility to respect human rights extends to “human rights abuses caused by pollution

⁵⁵ *Ibid* at paras 23–25. See further *ibid* at paras 69–78 (obligations relating to members of groups in vulnerable situations, women, children, indigenous peoples).

⁵⁶ *Ibid* at para 27.

⁵⁷ *Ibid* at para 29. See further *ibid* at paras 30–35 (duties to assess environmental impacts and make information public), 36–40 (duties to facilitate public participation in environmental decision-making), 41–43 (duty to provide access to legal remedies).

⁵⁸ *Ibid* at paras 39–40 (referring to the work of the Special Rapporteur on the situation of human rights defenders). See *Situation of Human Rights Defenders*, UNGAOR, 68th Sess, UN Doc A/68/262 (2013) at paras 15–18 [*Situation of Human Rights Defenders*]; Margaret Sekaggya, *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, UNGAOR, UN Doc A/HRC/19/55 (21 December 2011) at paras 60–87, 124–126.

⁵⁹ Donald N Zillman, Alastair R Lucas & George (Rock) Pring, eds, *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford: Oxford University Press, 2002); Report of the World Summit on Sustainable Development, UNGAOR (2002), UN Doc A/CONF.199/20 at paras 10, 46; Penelope Simons & Lynda Collins, “Participatory Rights in the Ontario Mining Sector: An International Human Rights Perspective” (2010) 6:2 JSDLP 177; Sara L Seck, “Transnational Corporations and Extractive Industries” in Shawkat Alam et al, eds, *International Environmental Law and the Global South* (New York: Cambridge University Press, 2015) 380 at 392–393; Seck, “Local Communities” *supra* note 23.

⁶⁰ Knox, *Mapping Report*, *supra* note 37 at paras 44–48.

or other environmental harm.”⁶¹ Accordingly, irrespective of a state’s compliance with its own duty to protect environmental rights, it follows that companies should conduct human rights due diligence to identify environmental rights holders and avoid violations. The business responsibility to respect rights should logically apply equally to procedural and substantive environmental rights.

2.2.2. INDIGENOUS RIGHTS

International law’s recognition of the rights of indigenous peoples is evident in many sources, including the 2007 *United Nations Declaration on the Rights of Indigenous Peoples*.⁶² Recognition of the right of indigenous peoples to FPIC is also supported by many sources of international law, and flows from the right to self-determination. Much has been written about the contested meaning of FPIC,⁶³ and many reports and academic commentaries have explored FPIC in the context of extractive industries from a variety of perspectives.⁶⁴

Professor Anaya, the former special rapporteur on the rights of indigenous peoples, concluded a comprehensive study of the impact of extractive industries on the rights of indigenous peoples in 2013.⁶⁵ According to Professor Anaya, while the procedural right to FPIC is often given pre-eminence, it is also useful to identify the primary substantive rights implicated by natural resource development and extraction. These include “rights to property, culture, religion, and non-discrimination in relation to lands, territories and natural resources, including sacred places and objects; rights to health and physical well-being in relation to a clean and healthy environment; and rights to set and pursue priorities for development, including

⁶¹ John H Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment—John H Knox: Compilation of Good Practices*, UNGAOR, 28th Sess, UN Doc A/HRC/28/61 (2015) at para 79.

⁶² *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/61/53 (2007). See further Stephen Allen & Alexandra Xanthaki, eds, *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford: Hart Publishing, 2011).

⁶³ For a particularly comprehensive and recent analysis of the sources and meaning of FPIC under international law and its implications for resource extraction, see Cathal Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (London: Routledge, 2015).

⁶⁴ These include: Marcus Colchester & Fergus MacKay “In Search of Middle Ground Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent” (Paper delivered at the 10th conference of the International Association for the Study of of Common Property Oaxaca, August 2004), (2004) Forest Peoples Programme, online: <www.forestpeoples.org/sites/fpp/files/publication/2010/08/fpicpsaug04eng.pdf>; Jill Cariño, “Indigenous Peoples’ Right to Free, Prior, Informed Consent: Reflections on Concepts and Practice” (2005) 22:1 *Ariz J Intl J & Compl L* 19; and Cathal Doyle & Jill Cariño “Making Free Prior and Informed Consent a Reality: Indigenous Peoples and the Extractive Sector” (2013), online: <www.ecojesuit.com/wp-content/uploads/2014/09/Making-FPIC-a-Reality-Report.pdf>.

⁶⁵ See generally James Anaya, “Website archive of reports, statements, and news of the former Special Rapporteur on the Rights of Indigenous Peoples, James Anaya” (May 2014), online: <unsr.jamesanaya.org>. See also Expert Mechanism on the Rights of Indigenous Peoples, *Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries*, UNGAOR 21st Sess, UN Doc A/HRC/21/55 (2012).

development of natural resources, as part of fundamental rights to self-determination”.⁶⁶ With regard to the right to FPIC, Anaya notes that there is a “general rule that extractive activities should not take place within the territories of indigenous peoples without their free prior and informed consent” and that the territories of indigenous peoples include:

lands that are in some form titled or reserved to them by the State, lands that they traditionally own or possess under customary tenure (whether officially titled or not), or other areas that are of cultural or religious significance to them or in which they traditionally have access to resources that are important to their physical well-being or cultural practices.⁶⁷

According to Professor Anaya, the preferred model is for natural resource extraction and development to be undertaken by indigenous peoples themselves as an exercise of their right to self-determination.⁶⁸ However, the standard scenario is one in which states or businesses promote extraction within indigenous territories.⁶⁹ Under this scenario, indigenous individuals and peoples have the right to “oppose and actively express opposition to extractive projects” due in part to the “firmly established” rights of “freedom of expression and to participation.”⁷⁰ Moreover, indigenous peoples “should be free from pressure from State or extractive company agents to compel them to accept extractive projects” and “neither States nor companies need or should insist on consultations” where indigenous peoples have “affirmatively withheld their consent.”⁷¹

As a general rule, the consent of indigenous peoples on just terms is required for extractive activities to proceed, absent a theoretical situation where there is conclusive proof that the activities will have no substantial effect on the exercise of their substantive rights, or that limitations on the exercise of their substantive rights are permissible under international human rights law.⁷² Importantly, States have “asserted the power to expropriate indigenous property interests in land or surface resources in order to have or permit access to the subsurface resources to which the State claims ownership.”⁷³ Yet Professor Anaya notes that even if expropriation is “justly compensated,” it must be undertaken “pursuant to a valid public purpose” which cannot be merely for “commercial interests or revenue-raising.”⁷⁴ Moreover, “account must be taken” of indigenous peoples’ rights to “subsurface resources within their own territories on the basis of their own laws and customs, despite State law to the contrary.”⁷⁵ Should a state

⁶⁶ James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, UNHRCGAOR, 21st Sess, UN Doc A/HRC/21/47, (2012) at para 50 [Anaya, 2012 Report]. See also James Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples*, UNHRCGAOR, 24th Sess, UN Doc A/HRC/24/41, (2013) at para 28 [Anaya, 2013 Report].

⁶⁷ Anaya, 2013 Report, *supra* note 66 at para 27.

⁶⁸ *Ibid* at para 18.

⁶⁹ *Ibid* at paras 8–11.

⁷⁰ *Ibid* at para 18 (here, Anaya refers to arts 19, 22 and 25 of the *International Covenant of Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁷¹ *Ibid* at para 25.

⁷² *Ibid* at paras 26, 31.

⁷³ *Ibid* at para 35.

⁷⁴ *Ibid* at para 36.

⁷⁵ *Ibid*.

choose to proceed without indigenous peoples' consent, it remains "bound to respect and protect [their] rights" and "must ensure that other applicable safeguards are implemented."⁷⁶ These include taking steps to "minimize or offset the limitation on the rights through impact assessments, measures of mitigation, compensation and benefit sharing" and undertaking "good faith efforts to consult with indigenous peoples and to develop and reach agreement on these measures, in keeping with its general duty to consult."⁷⁷ Thus, even though indigenous peoples may affirmatively withhold consent, they do not appear to have the power to veto a proposal, as states may still proceed with extractive activities, subject to the implementation of safeguards.

Throughout the report, Professor Anaya explicitly endorses the independent responsibility of extractive companies to respect the rights of indigenous peoples, irrespective of a state's compliance with its own duties. This is accomplished by undertaking human rights due diligence at the very earliest stages of exploration and when purchasing properties to "avoid acquiring tainted assets" where permits were obtained in violation of indigenous rights.⁷⁸ The independent responsibility also applies when companies have effectively been delegated the state's duty to consult and engage in direct consultation and negotiations with indigenous peoples.⁷⁹ Concluded agreements should address impact mitigation and provide for genuine partnership, sharing of benefits, and grievance mechanisms.⁸⁰

The 2013 mapping report of the Independent Expert on Human Rights and Environment, Professor Knox, identified similar substantive and procedural rights of indigenous peoples that are threatened by environmental harm.⁸¹ Notably, the independent expert highlights Professor Anaya's 2010 observation that the greatest challenge for companies arises in states that fail to formally or fully recognize an indigenous people in their territory, creating the danger that companies will use this "as an excuse not to apply the minimum international standards applicable to indigenous rights."⁸² In this situation, due diligence requires companies to first identify the existence of indigenous peoples who may be affected, which, according to Professor Knox, may be facilitated by reference to World Bank and IFC policies.⁸³

⁷⁶ *Ibid* at para 38.

⁷⁷ *Ibid* at para 38. However, Anaya is silent on how to reconcile this duty to consult with his previous statement that no consultation is necessary where indigenous peoples have affirmatively withheld their consent, and that they should be free from pressures compelling them to accept projects they do not want. See text at n 71, above.

⁷⁸ Anaya, *2013 Report, supra* note 66 at paras 52–57. Due diligence also requires companies to not accept permits from States in violation of duties of consultation and consent.

⁷⁹ *Ibid* at paras 61–62. However, the State retains "ultimate responsibility for any inadequacy in consultation or negotiation procedures" and "should employ measures to oversee and evaluate the procedures and their outcomes, and especially to mitigate against power imbalances."

⁸⁰ *Ibid* at paras 72–78.

⁸¹ Knox, *Indigenous Rights, supra* note 38.

⁸² *Ibid* at 61.

⁸³ *Ibid*.

2.3. CONCLUSIONS

While the rights of indigenous peoples and the environmental rights of individuals and/or local communities are conceptualized differently under international law, there are clearly overlaps, as well as distinctions. Environmental rights are both substantive and procedural, and procedural environmental rights include rights to access information and to participate in decision-making. However, international law does not appear to require states to seek the consent of environmental rights holders, nor that businesses seeking to respect human rights should do so where states have failed. Indigenous rights may also be substantive or procedural, including the procedural right to FPIC. The list of substantive rights held by indigenous peoples implicated in resource extraction includes many rights that may be equally viewed as substantive environmental rights. However, the procedural right to FPIC as held by indigenous peoples clearly extends beyond the content of procedural environmental rights to consent, although arguably short of a veto. Finally, both Professors Anaya and Knox have endorsed the business responsibility to respect rights.

A few additional considerations arise that are not explicitly addressed by either special mandate holder. First, from an environmental human rights perspective, it is often considered important to distinguish anthropocentric conceptions of rights from eco-centric conceptions, which posit nature itself as the rights-holder.⁸⁴ Clearly the contributions of both Professors Knox and Anaya to the UNHRC are focused upon the need to secure rights to benefit *humans*, whether individuals or peoples, rather than *nature*. Yet from an indigenous law perspective, it may be argued that the distinction between land, mother earth, or nature and peoples is untenable due to the reality of relationships and interdependence.⁸⁵

A second consideration is the distinction between collective rights and individual rights. While the rights of indigenous peoples are clearly collective rights, environmental human rights may have an individual or collective character. For example, environmental rights may be conceived as individual rights if grounded in civil and political rights (for example, the rights to access information and judicial remedies to protect life and property), or as social and economic rights (such as the right to health and the right to food,). Alternately, environmental rights may be viewed as “third generation” rights that are held collectively by communities (peoples) rather than individuals.⁸⁶

Professor Knox does not address this conceptual question in his report, except for a note that obligations may arise in relation to members of “groups in vulnerable situations” including women, children, and indigenous peoples.⁸⁷ This is in line with understandings of participatory environmental rights under international sustainable development law as

⁸⁴ See e.g. Christina Voigt, ed, *Rule of Law for Nature: New Dimensions and Ideas in Environmental Law* (New York: Cambridge University Press, 2013).

⁸⁵ See e.g. CF Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (New York: Routledge, 2011); John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 239–248 (on Anishnabek law and the earth).

⁸⁶ Attapatu, *supra* note 43 at 68–70. See also Dinah Shelton, “Environmental Rights” in Philip Alston, ed, *Peoples' Rights* (Oxford: Oxford University Press, 2001) 189.

⁸⁷ Knox, *Mapping Report*, *supra* note 37 at paras 69–78.

described by Pring and Noé.⁸⁸ They further identify non-governmental organizations (NGOs) as “increasingly powerful participants in environmental and resource development-decision-making,” although their role in providing a “voice for the voiceless” is sometimes critiqued for failing to serve local needs.⁸⁹ On the other hand, Pring and Noé identify “local communities” as a separate category worthy of participation, in keeping with the *Rio Declaration’s* principle 22 which highlights the importance of participation by “other local communities” as well as “indigenous peoples and their communities” in sustainable development.⁹⁰ The idea that local communities have a role to play as stakeholders if not rights-holders is clearly evident in the international standards examined below.

3. INTERNATIONAL FINANCE CORPORATION

The IFC, one of the five members of the World Bank Group (WBG), is a multilateral institution designed to assist in mobilizing financing for private sector enterprises investing in developing countries.⁹¹ By sharing the WBG’s mission to reduce poverty, the IFC promotes a sustainability framework comprised of a Policy on Environmental and Social Performance, an Access to Information Policy, and the *IFC Performance Standards on Environmental and Social Sustainability (IFC Performance Standards)*.⁹² The original *IFC Performance Standards* date from 1998 and were last updated in 2012. While the two policies outline the IFC’s responsibility to ensure transparency, and environmental and social sustainability, the *IFC Performance Standards* define companies’ responsibility to manage social and environmental risks. They are broadly viewed as international standards for project financing by Equator Principles financial institutions.⁹³ They have also been identified as international standards with which all extractive companies should comply.⁹⁴

3.1. IFC PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY

There are eight IFC performance standards that touch on a wide range of sustainability concerns. Of particular interest are performance standard one (PS1), “Assessment and Management of Environmental and Social Risks and Impacts”; performance standard seven (PS7), “Indigenous Peoples”; performance standard three (PS3), “Resource Efficiency and

⁸⁸ See e.g. George R Pring & Susan Y Noé, “The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development” in Donald Zillman, Alastair R Lucas & George R Pring, eds, *Human Rights in Natural Resource Development: Public Participation in Sustainable Development of Mining and Energy Resources* (Oxford: Oxford University Press, 2002) 11 at 58–68.

⁸⁹ *Ibid* at 68–71.

⁹⁰ *Ibid* at 65–66.

⁹¹ Morgera, *supra* note 5 at 146.

⁹² *IFC Performance Standards*, *supra* note 4.

⁹³ The Equator Principles Association, “Equator Principles” (2011), online: Equator Principles <www.equator-principles.com/>. “The Equator Principles is a risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risks in projects.” As of 2015, 81 financial institutions in 36 countries accounting for over 70 percent of “international Project Finance debt in emerging markets” had officially adopted the Equator Principles. See further Simons & Macklin, *supra* note 5 at 142–145.

⁹⁴ *Doing Business the Canadian Way*, *supra* note 6 at 7; Seck, “Canadian Mining Internationally”, *supra* note 16 at 76; Simons & Macklin, *supra* note 5 at 142–145; Doyle, *supra* note 63 at 205–206.

Pollution Prevention”; performance standard four (PS4), “Community Health, Safety and Security”; performance standard five (PS5), “Land Acquisition and Involuntary Resettlement”; and performance standard six (PS6), “Biodiversity Conservation and Sustainable Management of Living Resources”.

3.1.1. ENVIRONMENTAL RIGHTS

Protection of environmental rights is embedded in many of the performance standards. PS1 specifically identifies the business responsibility to respect human rights, noting that each performance standard has human rights dimensions that can be identified if clients are guided by the standards when engaging in due diligence.⁹⁵ PS1 applies “from the early developmental stages through the entire life cycle.”⁹⁶ To comply, a client must “conduct a process of environmental and social assessment, and establish and maintain an [Environmental and Social Management System]” that is appropriate for the proposed project. This system will incorporate: “(i) policy; (ii) identification of risks and impacts; (iii) management programs; (iv) organizational capacity and competency; (v) emergency preparedness and response; (vi) stakeholder engagement; and (vii) monitoring and review.”⁹⁷ The process for the identification of risks and impacts involves considering all relevant issues, including those identified in performance standards two to eight. In “high risk circumstances”, PS1 notes it may be appropriate to complement this process with “specific human rights due diligence as relevant to the particular business.”⁹⁸ However, according to Penelope Simons, citing John Ruggie, an environmental and social impact assessment is not the same thing as a human rights impact assessment, which must

force consideration of how the project could possibly interact with each and every right. For example, an [environmental and social impact assessment] approach might not result in any discussion of freedom of expression, whereas an [human rights impact assessment] could envision a community protest against a project being suppressed by State forces.⁹⁹

Yet, when analyzed in further detail, PS1 does draw attention to direct and indirect impacts on ecosystems on which affected communities’ livelihoods may depend.¹⁰⁰ PS1 speaks to the importance of taking into account “the outcome of any engagement process with Affected Communities”.¹⁰¹ Moreover, communication with affected communities in case of emergency,¹⁰² and the involvement of affected communities in environmental monitoring are discussed.¹⁰³ The discussion of stakeholder engagement highlights that “responsive relationships” are crucial for “successful management of environmental and social impacts” and may involve

⁹⁵ IFC, *Performance Standards*, *supra* note 4 at 6.

⁹⁶ *Ibid.*

⁹⁷ *Ibid* at 7.

⁹⁸ *Ibid* at 8, n 12.

⁹⁹ Simons, “Canada’s Enhanced”, *supra* note 28 at 187, n 86.

¹⁰⁰ IFC, *Performance Standards*, *supra* note 4 at 8.

¹⁰¹ *Ibid* at 9–10.

¹⁰² *Ibid* at 11.

¹⁰³ *Ibid* at 12.

“stakeholder analysis and planning, disclosure and dissemination of information, consultation and participation, grievance mechanism, and ongoing reporting to Affected Communities.”¹⁰⁴ Exact details “may vary considerably” being “commensurate with the project’s risks and adverse impacts, and the project’s phase of development.”¹⁰⁵ With regard to consultation, the extent required “should be commensurate with the project’s risks and adverse impacts and with the concerns raised by the Affected Communities.” PS1 continues:

Effective consultation is a two-way process that should: (i) begin early in the process of identification of environmental and social risks and impacts and continue on an ongoing basis as risks and impacts arise; (ii) be based on the prior disclosure and dissemination of relevant, transparent, objective, meaningful and easily accessible information which is culturally appropriate ...; (iii) focus inclusive engagement on those directly affected as opposed to those not directly affected; (iv) be free of external manipulation, interference, coercion, or intimidation; (v) enable meaningful participation, where applicable; and (vi) be documented.¹⁰⁶

Moreover, the consultation process should be tailored to the needs of “disadvantaged or vulnerable groups.”¹⁰⁷ Where projects have potentially significant adverse impacts on affected communities, an “[i]nformed Consultation and Participation (ICP)” process will build upon these steps and involve a “more in-depth exchange of views and information, and an organized and iterative consultation” such that the client incorporate affected communities’ views into decision-making “on matters that affect them directly,” and capture gendered differences.¹⁰⁸ Where government processes do not meet the accepted standard, businesses will conduct a complementary process to identify supplementary actions where appropriate.¹⁰⁹ Clients are also required to establish a grievance mechanism “to receive and facilitate resolution of Affected Communities’ concerns and grievances” with regard to environmental and social performance, which “should not impede access to judicial or administrative remedies.”¹¹⁰

PS3 provides guidance for pollution prevention and control, including the requirement that clients justify the adoption of standards weaker than those in the *WBG Environmental, Health and Safety Guidelines (EHS Guidelines)*.¹¹¹ PS4 aims to “anticipate and avoid adverse impacts on the health and safety of [an] Affected Community” due to both “routine and non-routine circumstances,” and to safeguard “personnel and property ... in accordance with relevant human rights principles and in a manner that avoids or minimizes risks to ... Affected Communities”.¹¹² Of importance to situations of conflict or post-conflict, as well as conflicts exacerbated by projects that “stress scarce local resources,”¹¹³ reference is to be made to the *EHS*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid* at 14.

¹⁰⁷ *Ibid* at 13.

¹⁰⁸ *Ibid* at 14.

¹⁰⁹ *Ibid* at 14–15.

¹¹⁰ *Ibid* at 15.

¹¹¹ *Ibid* at 23.

¹¹² *Ibid* at 27.

¹¹³ *Ibid.*

Guidelines and other good international industry practice,¹¹⁴ with special attention to security personnel and affected communities.¹¹⁵

PS5 addresses land acquisition and involuntary resettlement, arising “when affected persons or communities do not have the right to refuse land acquisition or restrictions on land use that result in physical or economic displacement.”¹¹⁶ Involuntary resettlement should be avoided, for if not properly managed” it can “result in long-term hardship and impoverishment for the Affected Communities and persons, as well as environmental damage and adverse socio-economic impacts in areas to which they have been displaced.”¹¹⁷ This standard appears to apply to displacement of local communities that are environmentally dependent but do not self-identify as indigenous.

PS6 is guided by the *Convention on Biological Diversity*.¹¹⁸ It requires that the identification of impacts take into account “the differing values attached to biodiversity and ecosystem services by Affected Communities and, where appropriate, other stakeholders.”¹¹⁹ When affected communities are likely to be impacted they should “participate in the determination of priority ecosystem services” and adverse impacts should be avoided.¹²⁰

3.1.2. INDIGENOUS RIGHTS

The fact that indigenous peoples might have rights beyond those of other potentially affected communities is clearly recognized by PS7, which highlights that indigenous peoples “may be more vulnerable to the adverse impacts associated with project development” particularly “if their lands and resources are transformed, encroached upon, or significantly degraded” leading to “loss of identity, culture, and natural resource-based livelihoods as well as exposure to impoverishment and diseases.”¹²¹ Accordingly, PS7 seeks in part “[t]o ensure ... [that] the development process fosters full respect for the human rights, dignity, aspirations, culture, and natural resource-based livelihoods of Indigenous Peoples.”¹²²

PS7 notes that there is “no universally accepted definition” of “indigenous peoples” as they may be referred to by different terms in different countries. In order to be recognized as indigenous people, a group must: self-identify as “members of a distinct indigenous cultural group” and be recognised as such by others; have a collective attachment to natural resources in “geographically distinct habitats or ancestral territories”; have distinct “[c]ustomary, cultural, economic, social or political institutions”; and, use a distinct language or dialect.¹²³

¹¹⁴ *Ibid* at 28.

¹¹⁵ *Ibid* at 29–30.

¹¹⁶ *Ibid* at 31.

¹¹⁷ *Ibid*.

¹¹⁸ *Ibid* at 40.

¹¹⁹ *Ibid* at 41.

¹²⁰ *Ibid* at 45.

¹²¹ *Ibid* at 47. FPIC was incorporated into Performance Standard 7 in 2012. See also Doyle, *supra* note 63 at 205.

¹²² IFC, *Performance Standards*, *supra* note 4 at 47.

¹²³ *Ibid* at 48.

PS7 also notes that clients may need to seek input from competent professionals to determine whether a group is indigenous for the purpose of the standard.¹²⁴

Having identified a group as indigenous, PS7 then outlines the way in which participation and consent processes are to be enriched. This is achieved by including indigenous peoples' representatives and organisations as well as members of the affected communities, and providing sufficient time for indigenous decision-making processes. In addition, FPIC is applied to "project design, implementation, and expected outcomes" where it is anticipated that there will be:

- "[I]mpacts on lands and natural resources subject to traditional ownership or under customary use;"
- "[R]elocation of indigenous peoples from lands and natural resources subject to traditional ownership or under customary use;" or
- Significant impacts on "critical cultural heritage".¹²⁵

PS7, then, clearly provides guidance that goes beyond that provided in the other performance standards and takes into account the need to distinguish indigenous rights, including the right to FPIC, from environmental rights of other local, directly affected communities. Whether or not the rights protections that appear embedded in the *IFC Performance Standards* may be "enforced" is a different matter to which we will now turn.

3.2. COMPLIANCE ADVISOR OMBUDSMAN

The Office of the Compliance Advisor Ombudsman (CAO) has as its mission "to serve as a fair, trusted, and effective independent recourse mechanism and to improve the social and environmental accountability" of projects supported by the IFC and the Multilateral Investment Guarantee Agency (MIGA).¹²⁶ Established in 1999, the CAO serves three roles: dispute resolution, compliance oversight, and independent advice.¹²⁷

The CAO can only engage in a review of a complaint if it relates to a project in which the IFC or MIGA is participating or actively considering, if the issues raised are environmental and social in nature, and if the complainant is affected by the issues.¹²⁸ The CAO is institutionally independent from the IFC, with a centralized system and defined timeframes.¹²⁹ Notably, the CAO claims that it works with a "roster of global mediators with ... appropriate language and

¹²⁴ *Ibid.*

¹²⁵ *Ibid* at 49–51.

¹²⁶ Compliance Advisor Ombudsman, *2013 Annual Report* (Washington, DC: Office of the CAO, 2013) at 1, online: <www.cao-ombudsman.org/publications/documents/CAO_AR13_ENG_high.pdf> [Compliance Advisory Ombudsman, *2013 Annual Report*].

¹²⁷ *Ibid* at 8. For a discussion of the limitations of the CAO's complaints process, see Simons & Macklin, *supra* note 5 at 139–142.

¹²⁸ *Ibid.*

¹²⁹ Compliance Advisor Ombudsman, *Operational Guidelines* (Washington, DC: Office of the CAO, 2013) at 4, 15, online: <www.cao-ombudsman.org/documents/CAOOperationalGuidelines_2013.pdf> [CAO, *Operational Guidelines*]. But see Simons & Macklin, *supra* note 5 at 140, n 350 (claiming that the CAO acknowledged in 2011 that it is not fully independent).

cultural skills,” thus allowing the CAO to “provide a scalable, decentralized, adaptable response aimed at ensuring accessibility for the parties and *respect for indigenous dispute resolution*.”¹³⁰

In 2015, the CAO reported that it has handled over 150 cases from 46 countries during its 15 year existence.¹³¹ The mining, oil and gas, and chemicals industry accounted for 43% of all cases, with the most common grievances including “policy compliance, consultation and participation of communities, water pollution, and environmental and social management systems.”¹³² Stakeholder engagement was a concern in 62% of all complaints, with 39% of these raising issues of consultation and participation.¹³³ Human rights were explicitly cited in more than half of the cases, with environmental and indigenous rights being two of the three most frequently raised human rights concerns.¹³⁴

A recent example is the complaint against Mindoro Resources Ltd., filed by two northern indigenous Filipino communities in 2011. The complainants claimed the FPIC process was flawed, and were concerned with environmental and cultural impacts on their ancestral lands of a mining project funded by the IFC. After the CAO interviewed the indigenous groups in question, along with other stakeholders and a wider group of indigenous peoples who supported the project, the CAO was forced to forward the assessment report without conclusions to CAO Compliance due to the lack of interest by the complainants in pursuing dispute resolution with the company.¹³⁵ By this time, the junior mining company, which had also expressed reservations about the CAO process, had suspended the project.¹³⁶ The CAO subsequently noted that “this case raises issues regarding the effectiveness of IFC’s policies, procedures and standards in managing the necessarily undefined downstream risks of early stage investment in mining ventures.”¹³⁷ From the perspective of the indigenous complainants who wished to see the mining project stopped and their right to FPIC respected, the issue has been at least temporarily resolved. However, it is not clear that the application of the *IFC Performance Standards* and the involvement of the CAO were behind this result.¹³⁸

¹³⁰ Compliance Advisory Ombudsman, *2013 Annual Report*, *supra* note 126 at 117 [emphasis added].

¹³¹ Compliance Advisor Ombudsman, *2015 Annual Report: Fifteen Years of Impact* (Washington, DC: Office of the CAO, 2015), online: <www.cao-ombudsman.org/publications/documents/CAO_Annual_Report_2015.pdf> at 71 [Compliance Advisor Ombudsman, *2015 Annual Report*].

¹³² *Ibid* at 74.

¹³³ *Ibid* at 77.

¹³⁴ *Ibid* at 79.

¹³⁵ Compliance Advisor Ombudsman, *Ombudsman Assessment Regarding Community and Civil Society Concerns in Relation to IFC’s Mindoro Resources Project (#26987)* (Washington, DC: Office of the CAO, 2012) at 14, online: <www.cao-ombudsman.org/cases/document-links/documents/AssessmentReport_MRL_May2012_ENG.pdf> [Compliance Advisor Ombudsman, *Mindoro Resources*].

¹³⁶ *Ibid*. See also Compliance Advisor Ombudsman, *Appraisal for Audit of IFC, CAO Compliance, CAO Ref Code: C-I-R5-Y12-F165, IFC Investments in Mindoro Resources Limited* (Washington, DC: Office of the CAO, 2012), online: <www.cao-ombudsman.org/cases/document-links/documents/CAOAppraisalofIFCMindoroResourcesOctober2012.pdf> [Compliance Advisor Ombudsman, *Appraisal Audit*].

¹³⁷ Compliance Advisory Ombudsman, *2013 Annual Report*, *supra* note 126 at 49.

¹³⁸ See ANGOC, “Complaint of the Mamanwa Indigenous Peoples Against Mindoro Resources Limited Mining Exploration, Agusan Del Norte” (23 January 2014), online: Land Watch Asia <landwatchasia.wordpress.com/2014/01/23/complaint-of-the-mamanwa-indigenous-people-against-mindoro-

The *IFC Performance Standards* and a failure of stakeholder engagement were raised in a 2012 request for review of McEwan Mining's activities in Argentina brought before Canada's Office of the CSR Counsellor (CSRC) by two local groups.¹³⁹ The two requesters, the Centre for Human Rights and Environment and Fundacion Ciudadanos Independientes, were considered acceptable by the CSR Counsellor despite not being project-affected communities. This was due to the location of the Minera Andes exploration site at "an elevation where permanent human populations are not typically found."¹⁴⁰ The CSRC commenced a "situational assessment" following methodology similar to that used by the IFC's CAO, and concluded that standards on transparency and information-sharing as well as stakeholder engagement might be helpful for the company. However, McEwan Mining withdrew from the process before it was complete,¹⁴¹ and subsequently refused to participate in either a facilitated dialogue or an information-sharing process facilitated by the CSRC with the requestors.¹⁴² Unlike the CAO process, the CSRC mechanism does not have any means to ensure that companies participate in the process, although under the *2014 CSR Strategy* a failure to participate will lead to a withdrawal of trade commissioner services and government advocacy support abroad.¹⁴³ Without such ability, the CSRC lacks the power to oversee company compliance with the *IFC Performance Standards*.

3.3. CONCLUSIONS

The *IFC Performance Standards* do not directly align with either Professor Knox's or Professor Anaya's reports. Yet, they clearly make several steps in the right direction. This may be contrasted with the failure to adopt FPIC by the WBG's public sector institutions. Despite revisions in 1991 and 2005, the environmental and social safeguard policies of the WBG's public sector institutions do not endorse the right of indigenous peoples to FPIC. Instead, they endorse the right to free, prior, and informed consultation, "resulting in "broad community support".¹⁴⁴ Although the World Bank launched a review of its safeguard policies including indigenous peoples in 2012,¹⁴⁵ the 2014 draft "includes the requirement of FPIC

resources-limited-mining-exploration-agusan-del-norte/>; Compliance Advisor Ombudsman, *Appraisal Audit*, *supra* note 136 at 14–15.

¹³⁹ Canada, Department of Foreign Affairs and International Trade, *Closing Report: Request for Review File Number 2012-03-ARG*, (Ottawa: Office of the Extractive Sector Corporate Social Responsibility October 2012) at 2, 4 [DFAIT, *Closing Report*]. The OECD Guidelines were also raised in this request. For an overview of the CSR Counsellor's structure and review process, see Seck, "Canadian Mining Internationally", *supra* note 16 at 79–85.

¹⁴⁰ DFAIT, *Closing Report*, *supra* note 139 at 6. The requestors were concerned about the potential for increased unrest in the area relating to ecological concerns. The company considered local law sufficient to address any issues.

¹⁴¹ *Ibid* at 2.

¹⁴² *Ibid*.

¹⁴³ *Doing Business the Canadian Way*, *supra* note 6 at 12.

¹⁴⁴ Doyle, *supra* note 63 at 203. See also Fergus MacKay, "The Draft World Bank Operational Policy 4.10 on Indigenous Peoples: Progress or More of the Same?" (2005) 22:1 *Ariz J Intl & Comp L* 65 at 71.

¹⁴⁵ Doyle, *supra* note 63 at 204, citing The World Bank's Safeguard Policies Proposed Review and Update Approach Paper (World Bank, 10 October 2012) at para 35. The policy on indigenous peoples is Operational Policy 4.10, online: <go.worldbank.org/IBZABS9UU0>.

but provides borrowers with an unacceptable, from an indigenous rights perspective, ‘opt-out’ option.¹⁴⁶ Having said this, it has also been argued that ambiguities were introduced into the *IFC Performance Standards* by the development of guidance notes for implementation which suggest FPIC may not be required prior to exploration as a complete impact assessment must wait until a later stage in the project lifecycle.¹⁴⁷ Moreover, despite the IFC’s incorporation of the indigenous right to FPIC, there have been criticisms that the *IFC Performance Standards* lack clarity as to “what should happen where indigenous consent is not forthcoming in contexts other than relocation.” In these cases, the IFC has claimed that it will simply not fund such projects.¹⁴⁸

As demonstrated by the examples above, even if the *IFC Performance Standards* provide useful guidance for businesses seeking to respect environmental and indigenous rights, non-judicial mechanisms designed to promote compliance are underdeveloped and implementation is not guaranteed. While the *IFC Performance Standards* may be legally binding as a condition of financial support from the IFC and *Equator Principles* banks, indigenous peoples and local communities are not parties to these contracts so cannot directly enforce them in law.¹⁴⁹ Therefore, beyond critiques of the substance of the rights protections in the *IFC Performance Standards*, it is important to pay attention to the structure and effectiveness of non-judicial dispute resolution mechanisms such as the CAO and CSRC.

¹⁴⁶ Doyle, *supra* note 63 at 205. See further The World Bank, “Review and Update of the World Bank Safeguard Policies” (2015), online: <consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies>. See also Jim Lobe, “World Bank Declines to Revise Controversial Draft Policies”, Inter Press Service News Agency (31 July 2014), online: <www.ipsnews.net/2014/07/world-bank-board-declines-to-revise-controversial-draft-policies/>; Carey L Biron, “Changes to World Bank Safeguards Risk ‘Race to the Bottom’, U.N. Experts Warn”, Inter Press Service News Agency (19 December 2014), online: <www.ipsnews.net/2014/12/changes-to-world-bank-safeguards-risk-race-to-the-bottom-u-n-experts-warn/>.

¹⁴⁷ Doyle, *supra* note 63 at 206.

¹⁴⁸ *Ibid*; International Finance Corporation, Guidance Note 7: Indigenous Peoples, (2012) at 15–16, online: <www.ifc.org/wps/wcm/connect/50eed180498009f9a89bfa336b93d75f/Updated_GN7-2012.pdf?MOD=AJPERES>. Doyle suggests that the IFC Guidance Notes were developed following “discussions with IFC extractive industry clients”, and that ambiguities introduced were “with regard to the role that indigenous peoples themselves are entitled to play in defining and implementing FPIC processes” (Doyle, *supra* note 63 at 206). Doyle argues, consistent with Anaya, that consent may be required at multiple stages of a project (*ibid* at 206–207).

¹⁴⁹ Doyle, *supra* note 63, at 206–207. See Simons & Macklin, *supra* note 5 at 142–150 (on Equator Principles).

4. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD)

4.1. OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

The *OECD MNE Guidelines* date from 1976 and are an annex to the *Declaration on International Investment and Multinational Enterprises*.¹⁵⁰ In 1991, a chapter on environmental protection was added.¹⁵¹ Subject to an extensive review in 2000, the *OECD MNE Guidelines* now explicitly apply to MNEs and “all their entities in adhering countries and abroad.”¹⁵² The 2011 review added a chapter on human rights modeled on the 2011 *UNGPs*, and also updated the chapter on environmental protection.¹⁵³ As of 2014, 46 OECD and non-OECD member countries combined adhere to the *OECD MNE Guidelines*, including non-members Argentina, Brazil, Columbia, Peru, Egypt, Morocco, Latvia, and Romania.¹⁵⁴

Described as “recommendations addressed by governments to multinational enterprises operating in or from adhering countries,” the *OECD MNE Guidelines* “provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognized standards.”¹⁵⁵ While the guidelines themselves are voluntary for businesses, adhering states “make a binding commitment to implement them.”¹⁵⁶ As a result, adhering states commit to setting up national contact points (NCPs) in order to “further the effectiveness” of the *OECD MNE Guidelines*.¹⁵⁷

The *OECD MNE Guidelines* begin by noting that “[e]nterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders.”¹⁵⁸ The first two “general policies” state that enterprises should “[c]ontribute to economic, environmental and social progress with a view to achieving sustainable development” and “[r]espect the internationally recognised human rights of those affected by their activities.”¹⁵⁹ Additional general policies support the idea that indigenous peoples and local environmentally concerned communities are important. For example, paragraph 14 states that enterprises should “[e]ngage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision

¹⁵⁰ Morgera, *supra* note 5 at 102.

¹⁵¹ *Ibid* at 103.

¹⁵² *Ibid* at 104.

¹⁵³ *MNE Guidelines, supra* note 3 at 3–4.

¹⁵⁴ OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2014—Responsible Business Conduct by Sector* (Paris: OECD, 2014) at 13.

¹⁵⁵ *MNE Guidelines, supra* note 3 at 13.

¹⁵⁶ *Ibid*.

¹⁵⁷ *Ibid* at 71; Scott Robinson, “International Obligations, State Responsibility and Judicial Review Under the OECD Guidelines for Multinational Enterprises Regime” (2014) 30:78 *Utrecht J Intl & European L* 68 at 71.

¹⁵⁸ *MNE Guidelines, supra* note 3 at 19.

¹⁵⁹ *Ibid*.

making for projects or other activities that may significantly impact local communities.”¹⁶⁰ The commentary elaborates that this requires “interactive processes” through “meetings, hearings or consultation proceedings,” and to be “effective” requires “two-way communication” that “depends on the good faith” of participants. This is identified as “particularly helpful” in “planning and decision-making concerning projects or other activities involving ... the intensive use of land or water, which could significantly affect local communities.”¹⁶¹ Given these general policies, one would have thought that more explicit guidance would be provided in the relevant chapters on engagement with environmentally concerned local communities and indigenous peoples. However, this is not the case. As will be seen below, the approach taken by the *OECD MNE Guidelines* is one that ignores the rights of indigenous peoples, and does not fully endorse participatory environmental rights. Yet, in a stand-alone chapter, the *OECD MNE Guidelines* do fully endorse the business responsibility to respect human rights.

4.1.1. ENVIRONMENTAL RIGHTS

Chapter VI on environmental protection begins promisingly with an overarching statement:

Enterprises should, within the framework of laws, regulation and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objects, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development.¹⁶²

Eight paragraphs then detail specific recommendations. First, enterprises should “establish and maintain” appropriate environmental management systems by collecting information, establishing targets, and monitoring and verifying progress. The second paragraph touches upon access to information and public participation in environmental decision making. Accordingly, enterprises should “provide the public and workers with adequate, measurable and verifiable (where applicable) and timely information on the potential environment, health and safety impacts of the activities of the enterprise.”¹⁶³ In addition, enterprises should “engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.”¹⁶⁴ However, these considerations are subject to the caveat that enterprises “[t]ake into account concerns about cost, business confidentiality, and the protection of intellectual property rights.”¹⁶⁵ Enterprises should furthermore “assess and address” foreseeable environmental and health impacts “associated with [their] processes, goods and services ... over their full life cycle”; however, only if “subject to a decision of a competent authority” will enterprises prepare an environmental impact assessment for activities with significant

¹⁶⁰ *Ibid* at 20. This sentence was added during the 2011 revisions. *OECD Draft Stakeholder Engagement*, *supra* note 9 at 4.

¹⁶¹ *MNE Guidelines*, *supra* note 3 at 25.

¹⁶² *Ibid* at 42.

¹⁶³ *Ibid*.

¹⁶⁴ *Ibid*.

¹⁶⁵ *Ibid*.

impacts.¹⁶⁶ These recommendations fall far short of those stated in IFC PS1 which mandates in all cases a process of social and environmental assessment. In addition, per PS1, ongoing, effective consultations must be tailored to the needs of vulnerable groups, and in cases of potential serious adverse impact, must also account for gendered differences.¹⁶⁷

Paragraphs four to eight contain additional recommendations. Paragraph four calls upon enterprises to adopt a precautionary approach where scientific and technical risk assessments identify threats of serious damage to the environment; while paragraph five provides that enterprises should “[m]aintain contingency plans” and reporting mechanisms in the event of serious damage including from accidents and emergencies.¹⁶⁸ Paragraph six provides that enterprises should seek to improve environmental performance at both the enterprise level and throughout the supply chain through various means, including by adopting best performing technologies and operating procedures, and educating and training workers in environmental health and safety matters.¹⁶⁹ Finally, paragraph eight calls on enterprises to “[c]ontribute to the development of environmentally meaningful and economically efficient public policy.”¹⁷⁰ While the endorsement of a precautionary approach is commendable, the *OECD MNE Guidelines*, like IFC PS6, fail to recognize that the value placed upon biodiversity and ecosystem services may differ depending upon the values of the affected community. Consequently, it is crucial to get affected communities involved in the identification of environmental impacts.¹⁷¹ Moreover, the *OECD MNE Guidelines* make no reference to the challenges that land acquisition and involuntary resettlement pose to directly affected communities challenges that IFC PS5 explicitly confronts.¹⁷²

While paragraphs two and three particularly contribute to the realization of environmental rights, these provisions do not live up to the participatory environmental rights identified by the independent expert on human rights and the environment. Among other weaknesses, there is no mention of access to remedy or justice in the event of harm. This again distinguishes the *OECD MNE Guidelines* from the *IFC Performance Standards*, which in PS1 requires clients to establish grievance mechanisms to address social and environmental concerns and ensure that these mechanisms do not limit access to administrative or judicial remedies.¹⁷³ Yet the commentary on the text of the environment chapter of the *OECD MNE Guidelines* suggests that it “broadly reflects” principles of the *Rio Declaration* and “takes into account” the “(Aarhus) Convention”.¹⁷⁴ The commentary also suggests that information should be provided transparently to encourage “active consultation with stakeholders” including local communities and the public. Ultimately, the conclusion that “reporting and communication

¹⁶⁶ *Ibid* at 43.

¹⁶⁷ See the text accompanying nn 92–103, above.

¹⁶⁸ *MNE Guidelines*, *supra* note 3 at 43.

¹⁶⁹ *Ibid* at 43–44.

¹⁷⁰ *Ibid*.

¹⁷¹ See the text accompanying nn 116–118, above.

¹⁷² See the text accompanying nn 114–115, above.

¹⁷³ See the text accompanying n 108, above.

¹⁷⁴ *MNE Guidelines*, *supra* note 3 at 44. See also Razzaque, *supra* note 2.

are particularly appropriate where scarce or at risk environmental assets are at stake¹⁷⁵ is far less rigorous than the approach of the *IFC Performance Standards*, or an approach that explicitly recognizes environmental rights.

4.1.2. INDIGENOUS RIGHTS

No specific chapter in the *OECD MNE Guidelines* addresses the rights of indigenous peoples. Moreover, the chapter on environmental protection neither refers to consultation with indigenous peoples nor to the importance of indigenous knowledge to environmental decision-making.¹⁷⁶ Where the *OECD MNE Guidelines* do refer to indigenous peoples, it is in passing as part of a list of vulnerable groups, most notably in the commentary of the chapter on human rights which states that “United Nations instruments have elaborated further on the rights of indigenous peoples.”¹⁷⁷ The failure to incorporate explicit reference to the rights of indigenous peoples in the 2011 revisions to the *OECD MNE Guidelines* occurred despite recommendations by the special rapporteur on the rights of indigenous peoples, among others.¹⁷⁸ While this could have been accomplished in a number of ways, the explicit addition of a new chapter on indigenous peoples that mirrors the IFC PS7 would have been an easy solution.

4.1.3. HUMAN RIGHTS

Despite the criticisms above, the *OECD MNE Guidelines* do include a chapter dedicated to human rights which closely mirrors the business responsibility to respect rights under the *UNGPs*. Consequently, it is relevant to both indigenous and environmental rights. According to this chapter, enterprises should:

- Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
- Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
- Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.
- Have a policy commitment to respect human rights.

¹⁷⁵ *Ibid* at 45.

¹⁷⁶ *Rio Declaration*, *supra* note 51, Principle 22. See also Benjamin J Richardson, “The Ties that Bind: Indigenous Peoples and Environmental Governance” in Shin Imai, Benjamin J Richardson & Kent McNeil, eds, *Indigenous Peoples and the Law* (Oxford: Hart Publishing, 2009) 337.

¹⁷⁷ *MNE Guidelines*, *supra* note 3 at 32.

¹⁷⁸ James Anaya, “Update of OECD Guidelines for Multinational Enterprises: Informal Expert Meeting on Human Rights Issues” (delivered at the OECD Conference Centre, Paris, 25 January 2011), online: <unsr.jamesanaya.org/docs/presentations/2011_01_oecd-guidelines-hr-expert-meeting-summary-anaya.pdf>.

- Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.
- Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to those impacts.¹⁷⁹

According to the commentary, the failure of a state to either “enforce relevant domestic laws, or to implement international human rights obligations or the fact that it may act contrary to such laws or international obligations does not diminish the expectation that enterprises respect human rights.”¹⁸⁰ Moreover, enterprises should seek to honour internationally recognized human rights to the fullest extent possible, even where domestic law conflicts with it, so long as this does not place the enterprise in violation of domestic law.¹⁸¹ In terms of the rights of specific groups, including indigenous peoples, the commentary states that enterprises “can have an impact on virtually the entire spectrum of internationally recognized rights” and that industry context may create a situation where heightened attention should be given to rights at greater risk.¹⁸²

Unlike the chapter on environmental protection, the chapter on human rights explicitly “recommends that enterprises have processes in place to enable remediation” where human rights violations have been identified.¹⁸³ This could require co-operation with “judicial or State-based non-judicial mechanisms” or the use of “operational-level grievance mechanisms” provided such processes meet core criteria and are “based on dialogue and engagement.”¹⁸⁴

Thus, while the *OECD MNE Guidelines* do not explicitly address indigenous rights, and while the environmental chapter is weak, the inclusion of a chapter devoted to human rights suggests that the *OECD MNE Guidelines* expect enterprises to respect indigenous rights as well as environmental rights.¹⁸⁵ However, the details of what this might entail are not elaborated in the guidelines, and it is unclear what this might mean in practice.

¹⁷⁹ *MNE Guidelines*, *supra* note 3 at 31.

¹⁸⁰ *Ibid* at 32.

¹⁸¹ *Ibid*.

¹⁸² *Ibid*.

¹⁸³ *Ibid* at 34.

¹⁸⁴ *Ibid*.

¹⁸⁵ This interpretation is supported by Ruggie and Nelson, who note that the “General Policies” chapter of the MNE Guidelines “reiterates the GPs’ formulation of the corporate responsibility to respect human rights, and it establishes a new due diligence requirement for *all* subjects” with the exception of taxation “for which it was not considered appropriate.” See John Ruggie & Tamaryn Nelson, “Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges” (2015) Harvard Kennedy School Corporate Social Responsibility Initiative Working Paper No 66 at 6, online: <shiftproject.org/sites/default/files/Ruggie-Nelson_OECDNCPanalysis_May2015.pdf>.

4.2. OECD NATIONAL CONTACT POINTS

Every state adhering to the *OECD MNE Guidelines* is required to establish a NCP. NCPs are tasked with promoting the guidelines, as well as “contributing to the resolution of issues that arise relating to the implementation of the *Guidelines* in specific instances” in accordance with procedural guidance.¹⁸⁶ Adhering countries are given flexibility in terms of the institutional structure of their NCPs, and as a result there are wide differences between.¹⁸⁷

The procedure for the resolution of specific instances requires the NCP to initially assess whether the issues raised have merit, and if so, to offer to “help the parties involved to resolve the issues.”¹⁸⁸ This may require seeking advice from other relevant stakeholders, consulting NCPs in concerned countries, seeking guidance from the Investment Committee on the interpretation of the *OECD MNE Guidelines*, and ultimately offering to facilitate access to conciliation or mediation. Results of these procedures are to be made publicly available after consultation with the parties, “taking into account the need to protect sensitive business and other stakeholder information.”¹⁸⁹ However, many NCP procedures have been heavily criticized as ineffective, under-resourced and worse.¹⁹⁰

According to a survey of NCP-submitted specific instances in the OECD’s database,¹⁹¹ supplemented by information from OECD Watch including its shadow data-base,¹⁹² there were approximately 127 specific instances raised with NCPs between 2011 and mid-2015. Of these, and bearing in mind that some have multiple themes, 65 related to general policies, 65 to human rights, and 31 to the environment. Of these, 15 had human rights and environment dimensions, of which eight were related to the mining industry. According to OECD Watch, between the adoption of the 2011 updated *OECD MNE Guidelines* and 2014, 36 percent of all filed complaints were rejected for lack of merit, while 19 percent were concluded. This means that either the complaint was resolved with a joint agreement between the parties or it was not resolved and the NCP issued a statement.¹⁹³ Of the specific instances relating to

¹⁸⁶ *MNE Guidelines*, *supra* note 3 at 68.

¹⁸⁷ *Ibid* at 71–72.

¹⁸⁸ *Ibid* at 72.

¹⁸⁹ *Ibid* at 73.

¹⁹⁰ See e.g. OECD Watch, *Assessment of NCP Performance in the 2013–2014 Implementation Cycle: OECD Watch Submission to the 2014 Annual Meeting of the National Contact Points* (2014) at 3–4, online: <oecdwatch.org/publications-en/Publication_4090/at_download/fullfile> [OECD Watch, *NCP Performance*]. See generally Simons & Macklin, *supra* note 5 at 105–113; Caitlin Daniel et al, *Remedy Remains Rare*, (Amsterdam: OECD Watch, 2015) at 32, online: <oecdwatch.org/publications-en/Publication_4201> [OECD Watch, *Remedy*].

¹⁹¹ OECD, *Database of Specific Instances*, (2014) online: OECD Guidelines for Multinational Enterprises <mneguidelines.oecd.org/database>. The survey was undertaken during the summer of 2014, and updated during the summer of 2015.

¹⁹² OECD Watch, *NCP Performance*, *supra* note 190 at 9; OECD Watch, “Case Database – All Cases”, online: OECD Watch <oecdwatch.org/cases>. See also OECD Watch, “Quarterly Case Update June 2015” (2015), online: <oecdwatch.org/publications-en/Publication_4202>.

¹⁹³ OECD Watch, *NCP Performance*, *supra* note 190 at 9. See also Ruggie & Nelson, *supra* note 185 at 19–20 (claiming that since 2011 more human rights complaints have been brought than other complaints, representing a diverse set of human rights issues and involving diverse industry sectors; moreover, more human rights cases are admitted than others).

environmental and human rights concerns in the mining industry that arose between 2011 and 2014, one, filed with the UK NCP, resulted in a joint public statement in which the company agreed to rapidly conclude its operations and not “conduct any operations in any other World Heritage site.”¹⁹⁴

Interestingly, several NCP decisions prior to the 2011 update of the *OECD MNE Guidelines* addressed concerns of indigenous peoples in an arguably constructive manner, despite the lack of specific guidance from the OECD on either human rights or indigenous rights. In the Vedanta complaint concerning the indigenous Dongria Kondh in India, the UK NCP interpreted “adequate and timely communication and consultation” under the chapter on environmental protection with reference to article 10 of the *Akwé: Kon Voluntary Guidelines*. These guidelines are promoted under the *Convention on Biological Diversity*, to which both the UK and India are a party.¹⁹⁵ In a complaint against Intex Resources with regard to the Mindoro Nickel Project in the Philippines, the Norwegian NCP concluded that while the company had obtained the FPIC of some indigenous peoples, it did not systematically investigate at an early stage whether other indigenous peoples with ancestral rights to the land should also have been engaged.¹⁹⁶ In a 2011 conclusion, the NCP recommended that the company, which endorsed international standards,¹⁹⁷ should engage in human rights due diligence in according with the *UNGPs*, apply the IFC PS7 on indigenous peoples, follow IFC standards for environmental assessment and management, and follow the IFC practice for the establishment of a grievance mechanism.¹⁹⁸ Both the UK NCP¹⁹⁹ and the Norwegian NCP²⁰⁰ have been rated favourably among their peers.

¹⁹⁴ UK, National Contact Point, *Final Statement Following Agreement Reached in Complaint from WWF International against Soco International plc* (London: National Contact Point, 2013) at 7, online: Government of the United Kingdom <www.gov.uk/government/uploads/system/uploads/attachment_data/file/330392/bis-14-967-uk-ncp-final-statement-following-agreement-reached-in-complaint-from-wwf-international-against-soco-international-plc.pdf>.

¹⁹⁵ UK, National Contact Point, *Final Statement—Complaint from Survival International Against Vedanta Resources plc* by (London: UK NCP, 2009) at 14–15, 17–18, online: Government of the United Kingdom <webarchive.nationalarchives.gov.uk/20100104183612/http://www.berr.gov.uk/files/file53117.doc>; CBD, *Akwé: Kon Guidelines* (Montreal: CBD, 2004) at 3–4, online: Convention on Biological Diversity <www.cbd.int>. The outcome of this complaint has been described as favourable due to the NCP’s conclusion that Vedanta had breached the rights of local indigenous peoples, which convinced some shareholders to divest despite the companies lack of interest in the proceedings, and a subsequent court decision in India giving the communities the power to decide whether the project should proceed. See OECD Watch, *Remedy*, *supra* note 190 at 31.

¹⁹⁶ Norway, National Contact Point for the OECD Guidelines for Multinational Enterprises, *Final Statement—Complaint from The Future In Our Hands (FIOH) Against Intext Resources ASA and the Mindoro Nickel Project*, (30 November 2011) at 6–7, online: National Contact Point Norway <www.responsiblebusiness.no/files/2013/12/intex_fivh_final.pdf>.

¹⁹⁷ *Ibid* at 8, 47.

¹⁹⁸ *Ibid* at 47–50.

¹⁹⁹ OECD Watch, *NCP Performance*, *supra* note 190 at 11. The UK NCP’s high rating was in part for having a visible and accessible process and being independent of the UK government.

²⁰⁰ See generally references to the Norwegian NCP in OECD Watch, *NCP Performance*, *supra* note 190. However, see also OECD Watch, “The Norwegian Government is Getting Rid of a Critical NCP Voice”, (23 February 2015), online: <oecdwatch.org/news-en/the-norwegian-government-is-getting-rid-of-a-critical-ncp-voice>.

A more recent Canadian NCP²⁰¹ example considering indigenous rights provides a stark contrast to the pre-2011 Norwegian and UK approaches. In 2013, three NGOs brought a request for review of the mining activities of Corriente Resources Inc. and CRCC-Tongguan Investment (Canada) Co. Ltd., carried out through the Ecuador-based company Ecuacorriente at the Mirador mine in the province of Zamora Chinchipe, Ecuador.²⁰² The review request alleged a lack of respect for “right to prior consultation of the general population based on environmental risks and lack of free, prior, and informed consent of Indigenous population and environmental consultation” as well as allegations of forced displacement, state suppression of social protests, and risks to biodiversity and ecological integrity, among other issues.²⁰³ The July 2014 assessment closed the specific instance on the basis that all claims were without merit. Notably, the NCP concluded in part that the *OECD MNE Guidelines* do not require FPIC.²⁰⁴ The NCP also considered Ecuadorean court decisions that had rejected similar claims, and expressed the view that environmental claims have been inadequately substantiated.²⁰⁵ An added complication was corporate structure, as the NCP was confronted by the claim that onsite decision making was made by Ecuacorriente while the project was managed by China-based CRCC-Tongguan. Thus, despite Corriente’s incorporation in a Canadian province, relevant operations were handled by corporations registered in non-OECD countries; resulting in Corriente’s refusal to engage in a dialogue facilitated by the Canadian NCP.²⁰⁶

In 2014, a request for review was submitted by the NGO Canada Tibet Committee with regards to China Gold International Resources operation of the Gyama copper-polymetallic mine in China’s Tibet Autonomous Region.²⁰⁷ The request, arising after 83 miners were buried

²⁰¹ See further on the Canadian NCP: Canada, Global Affairs Canada, “Canada’s National Contact Point (NCP for the Organisation of Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (MNEs)” (2011) online: Global Affairs Canada <www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/index.aspx?lang=eng&menu_id=1&menu=R>.

²⁰² Canada, Global Affairs Canada, “Initial Assessment of the Specific Instance under the OECD Guidelines for Multinational Enterprises relating to Corriente Resources’ Mirador Mine in Ecuador” (24 July 2014), online: Global Affairs Canada <international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/initial-assessment-evaluation-initiale.aspx?lang=eng#IAConsiderations>. In 2010, Vancouver-based Corriente Resources Inc. was purchased by China-based CRCC-Tongguan (Canada), retaining the name Corriente Resources Inc., and subsequently delisted from the stock exchange. CRCC-Tongguan is itself a joint venture of the Chinese Railway Construction Company, a public company listed in both the Hong Kong and Shanghai Stock Exchanges, and Tongling Nonferrous Metals Group, a state-owned enterprise. See also Corriente Resources Inc, *CRCC-Tongguan Investment (Canada) Co, Ltd Completes Compulsory Acquisition And Delists Corriente Resources Inc’s Common Shares* (Vancouver: CRCC-Tongguan Investment (Canada), 2010), online: <www.corriente.com/media/PDFs/news/2010/20100804-CRIPressRelease.pdf>.

²⁰³ *Ibid* at para 8.

²⁰⁴ *Ibid* at para 16.

²⁰⁵ *Ibid*.

²⁰⁶ *Ibid* at paras 5, 10, 17, 18.

²⁰⁷ Canada, Global Affairs Canada, “Final Statement on the Request for Review regarding the Operations of China Gold International Resources Corp Ltd, at the Copper Polymetallic Mine, at the Gyama Valley, Autonomous Tibet Region” (25 April 2015), online: <www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-gyama-valley.aspx?lang=eng> (the company is registered in British Columbia, headquartered in Vancouver, and listed on the Toronto Stock Exchange). The company is registered in British Columbia, headquartered in Vancouver, and listed on the Toronto Stock

in a landslide, alleged a lack of adequate environmental due diligence, a failure to respect human rights including through forced evictions, and a failure to disclose accurate environmental and health and safety risks to local communities.²⁰⁸ In its final statement issued in April 2015, the NCP found that the issues presented in the request were partially substantiated and required further investigation. However, China Gold International Resources “did not engage or respond to the Canadian NCP’s correspondence and follow-up outreach” and without participation by both parties, the NCP was “unable to conduct dialogue facilitation for the Parties and [closed] the Specific Instance.”²⁰⁹ Nevertheless, the NCP made clear that in accordance with the *2014 Strategy*, “the Company’s non-participation in the NCP process [would] be taken into consideration in any applications by the Company for enhanced advocacy support from the Trade Commissioner Service and/or Export Development Canada (EDC) financial services, should they be made.”²¹⁰

These examples suggest that the structure of the NCP and related implementation pressures may be as or more important than the content of the *OECD MNE Guidelines* when it comes to the willingness and ability of NCPs to take claims of violation of participatory environmental rights and FPIC of indigenous peoples seriously. Notably, the Canadian NCP has been frequently criticized for being so ineffective that the substance of claims could not be considered.²¹¹ According to Simons and Macklin, while the Dutch NCP is well resourced and consists of a body of “four Independent Experts and four government advisors, with two full-time staff,” the Canadian NCP consists of “an interdepartmental committee” chaired by Global Affairs Canada (previously the DFAIT) with members from departments that “support and promote Canadian business overseas”, including Natural Resources Canada and Industry Canada.²¹² This creates the potential for conflicts of interest that are not present in the independent structure of the Netherlands.²¹³ Other criticisms of both Canadian and other NCPs include procedural concerns over transparency, confidentiality, timeliness, and the voluntary nature of corporate participation.²¹⁴ Moreover, according to OECD Watch, accessibility to NCP processes is a major concern, and NCPs should ensure that complainants are not held to an onerous standard of proof at the initial assessment stage, that allegations

Exchange. China Gold is the only overseas listing of the largest gold producer in China, China National Gold Group Corporation (“China National Gold”), which is a state-owned enterprise. In 2010, China Gold acquired the Gyama mine from China National Gold.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.* See also Ruggie & Nelson, *supra* note 185 at 21, describing Canada’s approach as an example to be followed by other NCPs.

²¹¹ See e.g. Simons & Macklin, *supra* note 5 at 105–113. See also Robinson, *supra* note 157 at 79 (arguing for the need for judicial review of NCP maladministration so as to enforce the commitments of OECD states).

²¹² Simons & Macklin, *supra* note 5 at 107.

²¹³ *Ibid.* See also OECD Watch, *Remedy*, *supra* note 190 at 6 on the need for NCPs to operate: impartially, transparently, and predictably; with meaningful outcomes compatible with the principles and standards of the guidelines by making findings of non-compliance based on independent investigations if cases are not amenable to mediation or mediation fails; and following up on cases after they are concluded to see whether mediated agreements or NCP recommendations have been implemented.

²¹⁴ Simons & Macklin, *supra* note 5 at 106–109.

relating to future harms are accepted, and that an assessment of “the risk of reprisals and other security risks” facing complainants are undertaken and, where possible, mitigated.²¹⁵ This last concern is particularly poignant in the Canadian context given the mysterious death in December 2014 of an Indigenous leader actively opposed to the mine that was the subject of the rejected Corrente NCP complaint, “the third vocal critic of the Mirador mine to be killed in recent years”.²¹⁶

4.3. OECD STAKEHOLDER ENGAGEMENT GUIDANCE

The OECD has recognized that the *OECD MNE Guidelines* alone provide insufficient guidance for mining, oil and gas companies when engaging with stakeholders. Consequently, in March 2013, the OECD Working Party on Responsible Business Conduct constituted an advisory group “to provide substantive input” on the development of the draft.²¹⁷ The advisory group, co-chaired by Canada and Norway, is comprised of OECD and non-OECD countries, as well as participants from industry (the oil and gas, mining and metals sectors), civil society, trade unions, indigenous peoples’ representatives, and international organizations.²¹⁸ In 2014, OECD-Watch expressed concerns that FPIC of indigenous peoples might not be endorsed during the development of this guidance.²¹⁹ A draft text of the *OECD Stakeholder Engagement Guidance* was posted for public comment in April 2015 with comments accepted until mid-June, and the final text was made publicly available in 2016.²²⁰

The *OECD Stakeholder Engagement Guidance* situates the importance of engaging with stakeholders in terms of both avoiding adverse impacts to human rights and the environment and contributing to business value through the attainment of a “social licence to operate” while improving corporate risk profile.²²¹ The Foreword makes clear that it “refers to existing standards to help enterprises observe them and undertake risk-based due diligence”.²²² While the guidance refers to “the most relevant parts of the OECD MNE Guidelines and other standards,” its intention is not to be a substitute for them.²²³ Importantly, the Foreword clarifies that “[n]ot all adherents” to the OECD MNE Guidelines “endorse the standards considered” in the *OECD Stakeholder Engagement Guidance*.²²⁴ This qualification is of considerable concern given the lack of guidance on indigenous and local community rights within the *OECD MNE Guidelines* themselves.

²¹⁵ OECD Watch, *Remedy*, *supra* note 190 at 6.

²¹⁶ *Ibid* at 9.

²¹⁷ *OECD Draft Stakeholder Engagement*, *supra* note 9 at 4. The draft itself was “developed by the OECD Secretariat and the Centre for Social Responsibility in Mining (CSRMI) based on consultation and feedback from the Advisory Group.”

²¹⁸ *Ibid* at 4.

²¹⁹ OECD Watch, *Submission to the joint meeting of the OECD Working Party on Responsible Business Conduct and the NCPs* (Amsterdam: OECD Watch Secretariat, 2014) at 6, online: <oecdwatch.org/publications-en/Publication_4162>.

²²⁰ *OECD Draft Stakeholder Engagement*, *supra* note 9.

²²¹ *OECD Stakeholder Engagement*, *supra* note 9 at 5.

²²² *Ibid* at 2.

²²³ *Ibid*.

²²⁴ *Ibid*.

The *OECD Stakeholder Engagement Guidance* was developed for use by “stakeholder facing staff” that is, “on-the-ground personnel of extractive sector enterprises that come into contact with communities and stakeholders” and staff in larger firms who are “responsible for stakeholder engagement.”²²⁵ It is comprised of five sections. The first provides an overview of processes.²²⁶ The second, “Recommendations to Corporate Planning,” is designed to ensure adequate prioritisation of stakeholder engagement at the “organisational level”.²²⁷ The third and most extensive section is “Recommendations to On-the-ground personnel,” which provides “practical due diligence guidance for ensuring that stakeholder engagement is effective.”²²⁸ The fourth section is found in annex A and outlines a “Monitoring and Evaluation Framework for Meaningful Stakeholder Engagement” in table form.²²⁹ Finally, four thematic annexes provide guidance on engagement with groups that are identified as having a “unique status and potential vulnerabilities” – these are indigenous peoples (Annex B), women (Annex C), workers (Annex D), and artisanal and small-scale miners (Annex E).²³⁰ This goes beyond the *IFC Performance Standards* by providing stand-alone guidance on the rights of women (which are lightly integrated into the *IFC Performance Standards*) and artisanal and small-scale miners (which are essentially not addressed in the *IFC Performance Standards*).

Before delving into the guidance itself, the introduction helpfully clarifies terminology. First, “due diligence” is defined as “the process through which enterprises identify, prevent and mitigate actual and potential adverse impacts and account for how these impacts are addressed.”²³¹ The *OECD MNE Guidelines* recommend that a “risk-based due diligence” be carried out, which may be scaled according to the particular situation.²³² The risks to be identified encompass the “range of issues covered by the OECD Guidelines including disclosure, human rights, employment and industrial relations, environment, combating bribery, bribe solicitation and extortion, and consumer interests.”²³³ Secondly, “meaningful stakeholder engagement” is defined as “ongoing engagement with stakeholders that is two-way, conducted in good faith and responsive.”²³⁴ The importance of stakeholders themselves being “actively involved in driving engagement activities” is highlighted.²³⁵ While the original draft Guidance made clear that “a refusal to engage with extractive corporations or approve of an extractive operation does not equate [with] ‘bad faith’ on the part of stakeholders, barring the use of violence or deception,”²³⁶ this text was replaced in the final text with the statement

²²⁵ *Ibid* at 6. Stakeholders and OECD NCPs may also use the guide to determine approaches to recommend to industry.

²²⁶ *Ibid* at 6, 12–13.

²²⁷ *Ibid* at 6, 13–17.

²²⁸ *Ibid* at 7, 19–69.

²²⁹ *Ibid* at 7, 70–76.

²³⁰ *Ibid* at 7, 77–98

²³¹ *Ibid* at 7.

²³² *Ibid*.

²³³ *Ibid*.

²³⁴ *Ibid* at 8.

²³⁵ *Ibid*.

²³⁶ *OECD Draft Stakeholder Engagement*, *supra* note 9 at 9.

“‘good faith’ engagement depends on the participants of both sides of engagement.”²³⁷ The relationship between due diligence and meaningful stakeholder engagement is also clarified, stating that “stakeholder engagement is an important means of implementing due diligence” because “stakeholders themselves can contribute important knowledge to help identify potential or actual impacts on themselves or their surroundings.”²³⁸ However, unless “properly supported, developed or executed”, stakeholder engagement may fail to avoid adverse impacts, while bad stakeholder engagement activities may actually “give rise to actual or perceived adverse impacts.”²³⁹ This is reminiscent of stakeholder engagement as discussed in the IFC PS1, yet with clearer explanation of the relationship between due diligence and stakeholder engagement.

The introduction continues by helpfully clarifying the differences between “stakeholders” and “rights-holders”.²⁴⁰ Stakeholders are “persons or groups who are or could be directly or indirectly affected by a project or activity”.²⁴¹ Furthermore, stakeholders “for whom the risk of adverse impacts is greatest or the potential adverse impact is severe or could become irredeemable” are to be given priority for due diligence purposes.²⁴² These include:

- potentially impacted local communities (including nomadic communities [and] communities living near an extractives concession, downstream from a river near the site, or along a transport route or near associated infrastructure such as energy grids or processing plants)
- indigenous peoples
- farmers
- workers (including local and migrant workers)
- artisanal miners
- host governments (local, regional and national)
- local civil society organisations, community-based organizations and local human rights defenders.²⁴³

In addition, other “interested stakeholders that may be important for meaningful engagement” include: NGOs, industry peers, investors/shareholders, business partners, and the media.²⁴⁴ The scope of stakeholders to be considered is thus more expansive than that of the IFC PS1, which reserves meaningful engagement for those “directly affected”.²⁴⁵

²³⁷ *OECD Stakeholder Engagement, supra* note 9 at 8.

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ *Ibid* at 9–10.

²⁴¹ *Ibid* at 9.

²⁴² *Ibid.*

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*

²⁴⁵ See no 104, above.

By contrast, the discussion of rights-holders notes that “[a]ll people have human rights and thus all stakeholders as individuals are “rights-holders”. However, not all stakeholders will have their human rights put at risk or impacted by an extractive project and its associated activities.²⁴⁶ Accordingly, it is important for a distinction to be made to enable the recognition of rights-holders such as “individuals living in a community whose only local water source may be polluted by an extractive operation” as well as “certain groups such as indigenous and tribal peoples” who “can have collective rights and consequently the group itself would be considered a rights-holder.”²⁴⁷ This suggests an important distinction that is not made explicit in the *IFC Performance Standards*.

The introduction further distinguishes “informing/reporting”, “consulting”, “negotiating”, and “responding” as distinct “modes of engagement”.²⁴⁸ Finally, the introduction highlights differences between industry sectors, noting that mining and oil and gas may give rise to different stakeholder concerns due to various factors influencing impacts, including: the method of extracting resources, the location of resources, methods of processing and transport, project life spans, and the structure of licensing processes and contracts.²⁴⁹

The recommendations to on-the-ground personnel are by far the most comprehensive and so will be the subject of analysis here. While the concepts underpinning participatory environmental rights do arise on occasion, it is clear that this perspective on rights was not central to the development of this guidance. For example, reference is made to the importance of impact assessment for information gathering purposes, and identifies Social and Environmental Impact Assessment and Human Rights Impact Assessment as possible tools, in a somewhat similar manner to that of the *IFC Performance Standards*.²⁵⁰ Environmental baselines and impact assessments are identified as important primary document-based sources for understanding local and operating context,²⁵¹ as is the identification of potential cumulative impacts.²⁵² Yet, while specific types of information are identified as important here (for example, human rights, economy and employment, cultural factors, socio-economic factors, gender factors, etc.), there is no explicit stand-alone consideration of environmental impacts, nor are environmental issues clearly intertwined with other identified factors.²⁵³ Even a table designed specifically to identify potential human rights impacts of extractive activities is curiously weak in its explicit identification of environmental rights. However, this may be explained by the table’s grounding of rights identification in the *Universal Declaration of Human Rights*, rather than on other equally authoritative sources of international human rights law.²⁵⁴ As a consequence, there are frequent references to concerns triggering rights to livelihood, food,

²⁴⁶ *OECD Stakeholder Engagement*, *supra* note 9 at 10.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid* at 10.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid* at 21.

²⁵¹ *Ibid* at 22–23.

²⁵² *Ibid* at 25, Table 2: Understanding Local Context to Shape Stakeholder Engagement Activities. Further characteristics are identified at n 1, including “fragile ecological conditions” and “communities reliant upon subsistence agriculture.”

²⁵³ *Ibid* at 25–28.

²⁵⁴ *Ibid* at 32–34, Table 4: Identifying potential human rights impacts of extractive industries.

and health, as well as rights to life, and security of person, among others.²⁵⁵ Moreover, the guidance is silent on the possibility that local communities or other stakeholders might attach “differing values ... to biodiversity and ecosystem services,” and that this is important to the identification of impacts, as identified in the *IFC Performance Standards*.²⁵⁶

While in the draft Stakeholder Engagement Guidance there was a single reference to “a local community seeking to defend its right to a healthy environment” in a context of tensions arising from large-scale arrivals of external workers seeking jobs,²⁵⁷ this is reworded in the final text to impacts on the right to an adequate standard of living including the right to food, housing, and cultural life.²⁵⁸ Concerns are raised about the depletion of local water sources,²⁵⁹ groundwater contamination,²⁶⁰ and environmental degradation more generally,²⁶¹ which are explicitly linked to the right to health. However, there is no reference to substantive environmental rights to water or a healthy environment, for example, or to the importance of procedural environmental rights. Of course, this is not so different from the *IFC Performance Standards*, which do not explicitly integrate human rights language, despite embracing in spirit the importance of affected community environmental concerns, ecosystem values, and interrelated livelihoods.

Reference is made to the importance of respecting rights guaranteeing security of the person and freedom of expression, especially where landowners peacefully protesting an overland pipeline are being removed from their land. Yet, linkage of peaceful protests and security risks to environmental concerns, particularly for those without property rights, is absent.²⁶² More helpfully, the guidance addresses the establishment of grievance mechanisms to handle adverse impacts and identifies rehabilitation, defined as “the restoration of land, water or air quality,” as among possible responses.²⁶³ This aligns with the *IFC Performance Standards* and is an important improvement over the chapter on environmental protection in the *OECD MNE Guidelines*.

On the other hand, despite the lack of explicit reference to procedural environmental rights, the *OECD Stakeholder Engagement Guidance* is rich in practical content on each identified step of due diligence. The process involves, first, ensuring that on-the-ground personnel understand the local context by consulting the right multi-disciplinary sources from law to fieldwork and vetting it for accuracy; and second, identifying priority stakeholders

²⁵⁵ *Ibid.*

²⁵⁶ See IFC, *Performance Standards*, *supra* note 4 at 41. See above IFC Performance Standard 6, text above at n 108, above. The *OECD Stakeholder Engagement Guidance* refers in passing to traditional knowledge twice, but does not elaborate on this idea. *OECD Stakeholder Engagement*, *supra* note 9 at 78-79.

²⁵⁷ *OECD Draft Stakeholder Engagement*, *supra* note 9 at 30.

²⁵⁸ *OECD Stakeholder Engagement*, *supra* note 9 at 32.

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid* at 33.

²⁶¹ *Ibid* at 34.

²⁶² *Ibid* at 33, 35 (noting that “[l]ocal human rights defenders [...] may be the targets of violence, particularly in conflict or weak governance zones”).

²⁶³ *Ibid* at 51, n 34, (though the Guidance expands upon the need to engage stakeholders in ensuring remediation is appropriate, it makes no further reference to remediation of environmental harms, *ibid* at 66-68).

(rights-holders and vulnerable groups) and verifying their representatives.²⁶⁴ Step three requires establishing support systems to ensure stakeholder engagement is meaningful, both within the company and through its support to stakeholders, while ensuring that activities are appropriately resourced.²⁶⁵ Step four discusses appropriate and effective stakeholder engagement activities and processes. It provides guidance on which of the four modes is “needed or required”: information sharing, consultation/learning, negotiation, or consent. Step four then provides guidance on how to implement commitments, address adverse impacts and share benefits, respond to grievances, and ensure remediation when appropriate.²⁶⁶ Steps five and six address the importance of follow-ups and monitoring stakeholder’s engagement activities to respond to shortcomings.²⁶⁷

The discussion of impacted community consent in the *OECD Stakeholder Engagement Guidance* makes clear that consent may be a “legal or operational requirement or an expectation in some operating contexts,” that, while arising “particularly in the context of engagement with indigenous peoples” may also arise in other contexts.²⁶⁸ It is said to be particularly relevant to “engagement prior to feasibility studies, project exploration and project development, or prior to major expansions.”²⁶⁹ Consent can be indicated in many ways, “inclu[ding] majority vote from the community, approval of a traditional decision-making body such as a council of elders, organised regional referendum or other forms determined by regulation or other mechanism defining the requirement for consent, or by agreement between the enterprise and the affected persons themselves.”²⁷⁰ This is clearly more expansive than the consultation rights understood to be part of procedural environmental rights, although it is not explicitly identified here as a “right”.

Annex B, dedicated to indigenous rights, clearly highlights the importance of the legal dimension of the obligations owed to indigenous peoples, including the local regulatory context, customary land tenure, as well as indigenous self-governance legal systems.²⁷¹ Moreover, the challenge of identifying indigenous peoples is highlighted where they are not recognized by local law, in which case the guidance states “self-identification as indigenous should be regarded as a fundamental criterion for identifying indigenous peoples.”²⁷² Here, the idea that indigenous peoples have a “special connection to and/or rights to ancestral lands” even if not officially recognized, is matched with the importance of understanding intangible values associated with “sacred sites or areas of cultural significance.”²⁷³ However, the actual guidance on whether or not consent is required highlights the fact that while other

²⁶⁴ *Ibid* at 22–24, 30–31, 35–37.

²⁶⁵ *Ibid* at 39–45.

²⁶⁶ *Ibid* at 47–66.

²⁶⁷ *Ibid* at 67–69.

²⁶⁸ *Ibid* at 50.

²⁶⁹ *Ibid*.

²⁷⁰ *Ibid*. Guiding questions are provided with regard to whether or not consent is required. These are: (a) “Is consent required by law, enterprise policy, or financing agreements?” (b) “Would proceeding without consent pose a significant risk to rights holders or operations?”

²⁷¹ *Ibid* at 77, Table 12.

²⁷² *Ibid* at 78, Box 5.

²⁷³ *Ibid*.

international instruments recognize FPIC for indigenous peoples, the *OECD MNE Guidelines* themselves are silent on this.²⁷⁴ Moreover, according to the guidance, FPIC is not mandated in some states.²⁷⁵ In this situation, enterprises should “consider local expectations, the risks posed to indigenous peoples and to the operations as a result of local opposition.”²⁷⁶ The key for companies is to be able to meet the “legitimate expectations of indigenous peoples” without violating domestic laws.²⁷⁷ Should an indigenous community withhold consent or refuse to engage, and a company conclude through its due diligence process that consent is required, “activities should not proceed.”²⁷⁸

5. CONCLUSIONS

This paper has explored the treatment of environmental and indigenous rights, as embedded within two different international standards promoted by the Canadian government, to extractive companies operating internationally. While the approach taken in each was notably different, particularly with regard to the recognition of indigenous rights, the recently released *OECD Stakeholder Engagement Guidance* takes a considerable step forward both in terms of its explicit identification of the right of indigenous peoples to FPIC and in its expansive treatment of stakeholder consent whether or not local communities self-identify as indigenous. Despite this, it cannot yet be said that an extractive company seeking guidance from these standards in an honest attempt to respect environmental rights and the rights of indigenous peoples in overseas operations would have a clear idea of what steps to take. Moreover, if an environmentally affected community indigenous or not were to seek information, participation, or remedy if not consent through either the OECD NCP process, the IFC CAO, or the Canadian CSRC, it appears unlikely that there would be a satisfactory conclusion.

There appear to be two issues. First, while there is clearly a difference between procedural environmental rights and the indigenous right to FPIC under international law, this distinction is blurred in the international guidance. This may be for a good reason. For example, where the identification of a local community as indigenous or not is contested by the state in which a company is operating, there may be advantages to having a fall back standard that applies to all affected local communities. However, the treatment of local community engagement in the *IFC Performance Standards*, the *OECD MNE Guidelines*, and the *OECD Stakeholder Engagement Guidance* also appears to distinguish between the legal status of these approaches. While indigenous peoples are clearly identified as having legal rights under international law (whether or not these are recognized by the host state), non-indigenous affected communities appear more likely to be treated as stakeholders rather than rights-holders. This too has advantages and disadvantages to the extent that guidance suggests that stakeholders may in some circumstances be entitled to consent, the substance of entitlement goes beyond what non-indigenous communities would be entitled to as part of procedural environmental rights

²⁷⁴ *Ibid* at 80.

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid* at 82, Box 6. Note that an example given in Box 6 is of a project financed by IFC – which would not proceed even if state consent was given, where relocation of indigenous peoples was required without their consent.

as described in this paper.²⁷⁹ However, by treating the community engagement process as a non-legal entitlement (stakeholders, rather than rights-holders), there may be a temptation to devalue the importance of non-indigenous local communities, a worrying situation given the prevalence of violence against environmental human rights defenders.²⁸⁰ This situation could be alleviated if proper attention was paid to the respect of procedural environmental rights, irrespective of the indigenous status of the local communities.

The second issue relates to the process of resolution of complaints. The extensive reference to international standards by independent and well-resourced OECD NCPs beyond the *OECD MNE Guidelines*, including those of the IFC, suggests that process and substance may be intertwined. If the content of the final *OECD Stakeholder Engagement Guidance* is weaker in its indigenous rights protections than the *IFC Performance Standards*, for example, it may discourage independent NCPs from seeking guidance beyond the confines of the OECD. This is particularly worrisome, given the clear statement in the *OECD Stakeholder Engagement Guidance* that not all adhering states accept its content. This statement could be read as a signal to NCPs to inquire into whether or not the state in which the operations take place or an NCP home state agree with the content, rather than asking whether the company itself aspires or is obligated under international human rights law to comply with the highest standards of rights respecting best practice. The statement is also misleading in so far as it could be taken to suggest that states may choose to accept or not accept human rights obligations that have acquired customary international law status. Clearer and more frequent endorsement of business responsibilities to respect environmental and indigenous rights by UN human rights mechanisms might assist in overcoming the limitation of prevalent state-centric assumptions about the respective duties and responsibilities of states and businesses.

Other questions remain. The *OECD Stakeholder Engagement Guidance* is a document of potentially great importance due to the “interpretive function of the OECD Investment Committee supported by its Working Party on Responsible Business Conduct” in the development of “more granular guidance for specific industry sectors and operating contexts.”²⁸¹ Moreover, the *OECD MNE Guidelines* bind state parties to provide an implementation mechanism in the form of an NCP process.²⁸² Yet, the regional and geographic distribution of committed parties does not include key BRICS²⁸³ nations like the Russian Federation, India,

²⁷⁹ Some authors argue that all local communities should be entitled to consent. See Abbi Buxton & Emma Wilson, *FPIC and the Extractive Industries: A guide to applying the spirit of free, prior and informed consent in industrial projects* (London: International Institute for Environment and Development, 2013) at 46–49, online: <pubs.iied.org/pdfs/16530IIED.pdf>. For an alternate conception of rights to underlie such a claim, see Kabir Sanjay Bavikatte and Tom Bennett, “Community Stewardship: the Foundation of Biocultural Rights” (2015) 6:1 *J Human Rights & Environment* 1 at 9–10 (arguing for recognition of biocultural rights that have arisen out of the convergence of four movements: post-development; the commons; third-generation rights; and indigenous peoples.)

²⁸⁰ Global Witness, *supra* note 2; Knox, *Mapping Report*, *supra* note 37 at para 11; Situation of Human Rights Defenders, *supra* note 58; Sekaggya, *supra* note 58.

²⁸¹ Ruggie & Nelson, *supra* note 185 at 20.

²⁸² Robinson, *supra* note 157 at 70.

²⁸³ University of Toronto BRICS Information Centre, “About the BRICS”, online: <www.brics.utoronto.ca/about.html>.

or China,²⁸⁴ although the OECD is actively engaging with emerging market states including China and India.²⁸⁵ The *IFC Performance Standards*, emanating from a member of the WBG and endorsed by *Equator Principles* financial institutions, would appear to have more universal influence, although limited in practice as a condition of financing projects in developing countries.²⁸⁶ The endorsement of indigenous rights to FPIC is therefore notable. However, the potential for states to opt out of the World Bank's revised operational policy on indigenous peoples is concerning. Moreover, the announcement of a new development bank formed by BRICS countries raises questions as to what if any standards it might endorse in its policies.²⁸⁷

The focus of this article has been on the relationship between international law on the rights of indigenous and environmentally affected communities as well as international standards for mining companies operating *outside* of Canada. While Canada claims leadership in this area, it is often viewed as a laggard as a consequence of its reluctance to endorse the rights of indigenous peoples to FPIC both internationally and *within* Canada, due to concerns over the interpretation of aboriginal rights by Canadian courts.²⁸⁸ This was accompanied in 2012 by the weakening of procedural environmental rights protections in environmental assessment at the federal level.²⁸⁹ Research identifying and analyzing the treatment of indigenous and environmental rights in international standards promoted by non-OECD countries to extractive industries operating internationally thus becomes a crucial consideration. Interestingly, a recent policy adopted by China for *outbound* investment in mining explicitly endorses the right of indigenous peoples to FPIC.²⁹⁰

²⁸⁴ OECD, "Responsible Business Conduct, OECD Guidelines for Multinational Enterprises", online: <mneguidelines.oecd.org/oecddeclarationanddecisions.htm> (listing the 12 non-OECD countries that adhere to the MNE Guidelines). See also Sara L Seck, "Emerging-Market Multinational Enterprises, Human Rights, and Sustainable Development: Lessons from the Canadian Experience" (2013) 22:3 *Transnational Corporations* 75 at 95–96 [Seck, "Emerging Market"];. Talks concerning Russian accession to the OECD were broken off in 2014. <www.oecd.org/newsroom/statement-by-the-oecd-regarding-the-status-of-the-accession-process-with-russia-and-co-operation-with-ukraine.htm>

²⁸⁵ OECD, "China and the OECD" (2016), online: <www.oecd.org/china/china-and-oecd.htm>; OECD, Meeting of the OECD Council at Ministerial Level, *Strengthening the OECD's Global Reach*, (Paris, 6–7 May 2014) at 49, online: <[www.oecd.org/mcm/C-MIN\(2014\)11-ENG.pdf](http://www.oecd.org/mcm/C-MIN(2014)11-ENG.pdf)>.

²⁸⁶ Seck, "Emerging Market", *supra* note 284.

²⁸⁷ Raj M Desai & James Raymond Vreeland, "What the New Bank of BRICs is All About", *The Washington Post* (17 July 2014), online: <www.washingtonpost.com/news/monkey-cage/wp/2014/07/17/what-the-new-bank-of-brics-is-all-about/>; Business & Human Rights Resource Centre, "Weekly Update 15 July" (15 July 2014), online: <business-humanrights.org/en/civil-society-proposes-principles-for-brics-new-development-bank-including-respect-to-human-rights-and-environment-participation-transparency>.

²⁸⁸ Shin Imai, "Consult, Consent, and Veto: International Norms and Canadian Treaties" in Michael Coyle & John Borrows, eds, *Historic Treaties and Appropriate Remedies for Treaty Implementation* (forthcoming). See also Canada, Permanent Mission of Canada to the United Nations, "Canada's Statement on the World Conference on Indigenous Peoples Outcome Document", (New York, 2014) at para 4, online: <www.canadainternational.gc.ca/prmny-mponu/canada_un-canada_onu/statements-declarations/other-autres/2014-09-22_WCIPD-PADD.aspx?lang=eng>.

²⁸⁹ Doelle, *supra* note 22; Gibson, *supra* note 22. But see PMO Mandate letter, *supra* note 22.

²⁹⁰ See e.g. China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters, "Guidelines for Social Responsibility in Outbound Mining Investments" (2014), online: Emerging Market Multinationals Network for Sustainability <www.emm-network.org/wp-content/uploads/2015/03/Guidelines_for_Social_Responsibility_in_Outbound_Mining_Investments.pdf>. For example, the

By comparison, and unlike the mining policy framework promoted through the Intergovernmental Forum, the *2014 Strategy* does not elaborate upon the rights of indigenous peoples.²⁹¹ Instead, it refers frequently to the importance of “community engagement” and the need for Canada to provide “improved guidance related to stakeholder engagement” so as to prevent disputes through early detection and resolution.²⁹² Moreover, the *2014 Strategy* explicitly notes that the role of the CSRC office will “include strengthened guidance on developing meaningful, effective dialogue between companies and communities.”²⁹³ A key question, then, is what form that guidance will take, and whether it will reflect the rights of indigenous peoples to FPIC, procedural environmental rights, and/or stakeholder engagement that is not rights based. Given Canada’s role as a co-chair of the Advisory Group on the *OECD Stakeholder Engagement Guidance*, the combination of this new guidance, together with any changes in the implementation roles played by both Canada’s OECD NCP and the CSRC, will be important developments to watch.

English text of this guidance endorses the business responsibility for human rights and FPIC for indigenous peoples (at 2.4.1–2.4.5).

²⁹¹ *Doing Business the Canadian Way*, *supra* note 6. Indigenous rights are referred to once in the text, on page 8 as part of a long list of rights that could be impacted by extractive companies.

²⁹² *Ibid* at 3, 9. There are multiple references to “community”, “communities”, and “stakeholders” throughout the text.

²⁹³ *Ibid* at 12.

