THE RIGHT OF INDIGENOUS PEOPLES TO MEANINGFUL CONSENT IN EXTRACTIVE INDUSTRY PROJECTS

Symposium Introduction[+]

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A rights-based approach to development is one that explicitly ties development policies, objectives, projects and outputs to international human rights standards requiring, among others, that development be directed towards fulfilling human rights. Conversely, it is a proactive strategy for converting rights into development goals and standards.[1]

The right of indigenous peoples to consent to – or to withhold consent from – the development of extractable resources located on or under ancestral lands is hotly contested by those in the extractive industries, governments, and even some development theorists. Those who support such a right argue that it is a logical progression of the well-established right to meaningful prior consultation, as well as being integral to the right to self-determination of peoples whose relationship to the land is often inextricably intertwined with their identity and way of life. On the other side are industries seeking valuable resources and promising lucrative returns to governments, as well as some development analysts who point to extractive projects as important anti-poverty measures. The international financial institutions continue to advocate for mineral, water, oil, and gas projects and private investment while purporting to uphold the rights of indigenous peoples through "participatory" programming and other non-binding initiatives.

States take on different roles in these debates. Some states present themselves as "protectors" of indigenous peoples through legislation that regulates industry conduct and requires some form of indigenous consent. Others act as

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** University of Virginia School of Law, Chair (2005-2006), AALS Section on International Human Rights Law, AALS Annual Meeting Int'l Human Rights Law Section Program Co-Chair (January 2005). We would like to express our gratitude to the Editorial Board of the Journal, Alison Bachus in particular, for their professionalism and forbearance.

1. Fergus MacKay, *Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review,* 4 SUSTAINABLE DEV. L. & POL'Y 43, 59 n.18 (2004).

facilitators of extraction, implementing free trade rules and property laws that enable industries to obtain rights over minerals, oil, and gas without the consent of indigenous communities. Still others take a softer role, encouraging dialogue between communities and industry but refusing to resolve issues using legal apparatus.

At the heart of the debate are disagreements about the extent of tribal and community self-determination and state sovereignty, the legitimacy of ad-hoc "participation" schemes initiated by industry and governments, and the role of human rights law in solving such disputes. A few recent events demonstrate the relevance of these debates. In the past several months, for example, the following developments took place: the United Nations Permanent Forum on Indigenous Issues adopted elements for a "common understanding" of free prior and informed consent, finding that such consent is especially important in extractive industry projects,[2] a subcommittee of the World Bank's Board of Executive Directors adopted a revised version of its operational policy on indigenous peoples that uses the term "free, prior and informed *consultation*" instead of *consent*,[3] and the Inter-American Commission on Human Rights found that a petition filed by the people of Sarayacu, who have been targeted for their long-time opposition of oil industry development of their ancestral lands in Ecuador, was admissible and will be examined on the merits.[4]

The Symposium papers included in this volume were developed in response to a topic defined as the "right of indigenous peoples to meaningful consent in extractive industry projects." This brief introductory comment will consider the key elements in the title that are examined by the articles included in the Symposium. One of the main elements at issue is the "right" we are discussing – something we have described as a right to "meaningful consent" in order to invoke the important debates that have been taking place concerning the exact contours of the right. A number of formulations are in use in relation to extractive industries today. Here are a few examples of the way the right is described: the right to "free, prior and informed consent;"[5] the right to

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2. *Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent and Indigenous Peoples,* U.N. ESCOR, Permanent Forum on Indigenous Issues, 4th Sess., at paras. 40-51 (advance unedited version) (Feb. 8, 2005) [hereinafter *Report of the International Workshop*].

3. WORLD BANK, WORLD BANK OPERATIONAL MANUAL, OPERATIONAL POLICIES, DRAFT OP 4.10 ON INDIGENOUS PEOPLES 3 (Dec. 1, 2004) (emphasis added) [hereinafter Draft Operational Policy] . For an analysis and discussion of the drafting process of this revised operational policy, *see* Fergus MacKay, *at* pages 65-98 of this volume.

4. *The Kichwa Peoples of the Sarayaku Community and its Members (Ecuador)*, Inter-American Comm'n on Human Rights, Report No. 64/04, Petition 167/03, Admissibility (Oct. 13, 2004) (official opinion not yet published), *available at* http://www.cidh.oas.org/annualrep/2004eng/Ecuador.167.03eng.htm.

5. *See Report of the International Workshop*, *supra* note 2, at 47-49, for a discussion of the sources for this formulation of the right. The ILO, in Convention (No. 169)

"participation" in decisions about natural resource development;[6] and the right to "prior informed consultation."[7] Each of these formulations – which have been used variously by international financial institutions, U.N. development agencies, human rights bodies, environmental organizations, and indigenous advocates – has a different texture and content, as well as a different provenance in the human rights legal framework. The choice of term, therefore, often has profound consequences for the rights of indigenous peoples.

Indeed, the right to consent itself may be recast as a component of underlying substantive rights – to ownership of land, to sovereignty, and to self-determination – rather than being conceived of as a stand-alone right. James Anaya's contribution to this symposium, *Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have In Lands and Resources*, takes this approach. Professor Anaya explains that the contours of the right to consent and the state's corollary duty to consult with indigenous peoples depends logically and legally on the extent to which the right to land and resources have been recognized for indigenous peoples. Applying this principle, he then provides an overview of the state of the law concerning indigenous land and resources and the resulting duty for states to consult with indigenous peoples and to accommodate their concerns "whenever state action is contemplated that would affect their interests."[8] Bartolome Clavero takes up similar issues in his article, *The Indigenous Right of Participation and International Cooperation Agencies*. Professor Clavero argues that international law concerning the consent of indigenous peoples is in a "transitional phase" characterized by a spectrum of obligations (to simply consult or to achieve full consent) and a variety of sources (from human rights treaty law to the customary norm of self-determination).

In addition to considering the source and formulation of the right at issue, we wish to call attention to the context in which the right is being invoked: the hotly contested terrain of extractive industry projects. Indigenous peoples all over the world have long histories with the exploitative extraction of natural resources on their ancestral lands. Extractive industries are among the worst of the worst in terms of their impact on the rights of indigenous peoples to self-determination, land rights, and economic development. Our discussion will focus on this context because it is one of the most crucial environments in which the assertion of a right

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Concerning Indigenous and Tribal Peoples in Independent Countries, sets out the right to free and informed consent when indigenous peoples are subject to relocation. 169 I.L.O. 1989 at art. 16 (*entered into force* Sept. 15, 1991) [hereinafter ILO Convention No. 169].

6. This formulation is included in *Agenda 21, Chapter 26: Recognizing And Strengthening The Role Of Indigenous People And Their Communities*, *available at* http://habitat.igc.org/agenda21/a21-26.htm. The State's obligation to consult and ensure the participation of indigenous peoples in matters that affect them is also included in ILO Convention No. 169 Concerning Indigenous and Tribal Peoples (arts. 6, 7 and 16).

7. *See* Draft Operational Policy, *supra* note 3, at 3.

8. James Anaya, *at* pages 7-17 of this volume.

to consent – and to *withhold* consent – must be recognized. Joji Carino of the Tebtebba Foundation draws lessons for extractive industry projects from her experience as a Commissioner on the World Commission on Dams. Explaining the "rights and risks" framework that the Commission developed, Carino suggests in her article that this model may be especially helpful for indigenous peoples in extractive industry disputes, since it "explicitly combines human rights impact assessments with risks assessments to encompass in one tool the concerns and interests of all parties."[9]

Finally, and most importantly, we would like to emphasize the identity of the rights-holder we are discussing in this Symposium: *indigenous peoples*. We are asking what human rights law, in the form of a right to meaningful consent, has to contribute to the larger fight for self-determination of indigenous peoples. This is important because the various formulations of the right vary in their content partly because they relate to differently described rights-holders. For example, both the Inter-American Court of Human Rights and the Inter-American Commission for Human Rights have found that a right to informed consent exists for indigenous peoples stemming from their traditional land tenure systems.[10] In her article entitled *The Rights of Indigenous Peoples and the Inter-American Human Rights System,* Commission attorney Isabel Madariaga Cuneo provides an overview of the Inter-American system's approach to indigenous peoples' rights. Exploring the relevant case law, Madariaga demonstrates that the right to consent is one among many manifestations of the Inter-American system's affirmative approach to the rights of indigenous peoples.

Unlike the Inter-American system's indigenous-specific approach, many U.N. development agencies and environmental organizations discuss the rights of "indigenous and local communities" – thereby conflating two distinct types of rights-holders and thus the rights that accrue to each group. Some states insist on the formulation "indigenous populations" or "indigenous people" (instead of "peoples") – a familiar move calculated to avoid the recognition of collective rights.

Finally, the World Bank talks of "stakeholders" – a term that includes anyone with an interest in the outcome of a project (including even the companies at issue and the governments granting concessions). This is a term that appears to carry with it no rights or obligations whatsoever. In response to this World Bank formulation, indigenous leaders have forwarded the message: "We are rights-holders, not mere stake-holders."[11] An in-depth analysis of the World Bank's

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9. Joji Carino**,** *Indigenous Peoples' Right to Free, Prior, Informed Consent: Reflections on Concepts and Practice* at pages 19-39 of this volume

10. *See* Isabel Madariaga Cuneo, *The Rights of Indigenous Peoples and the Inter-American Human Rights System* at pages 53-63 of this volume.

11. Joji Carino*, Statement of Indigenous Peoples to Working Group 2, Preparatory Conference for the World Summit on Sustainable Development***,** Jan. 29, 2002**,** *available at* http://www.tebtebba.org/tebtebba_files/wssd/wssdmsd.html#first.

current approach to indigenous peoples' right to consent is provided in Fergus MacKay's article in this volume entitled *The Draft World Bank Operational Policy 4.10 on Indigenous Peoples: Progress or More of the Same?* Providing a careful examination of the World Bank's recently revised policy on indigenous peoples, MacKay demonstrates that while the revised policy may be considered an improvement in some aspects, the true test will be in implementation. In this way, the potential improvements depend almost entirely on the degree to which those governed by the policy decide to embrace and enforce its provisions.

The articles in this Symposium consider where human rights law stands on meaningful consent; what states, corporations, and financial institutions are doing to respect or ignore this right on the ground; and what indigenous peoples are demanding in relation to meaningful consent. We hope this discussion contributes to the work of advocates and scholars seeking a greater role for indigenous peoples in determining their own destinies.