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The Challenge of Sustainable Resource Development in Indigenous Communities

by

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Executive Summary

The intrinsic link between democratic governance and the achievement of sustainable development in indigenous communities provides the conceptual underpinning for this review. Challenges to achieving sustainable development in indigenous communities reflect the continued impact of colonialism and postcolonial legacies on high rates of poverty and socio-economic exclusion, as well as the contested nature of indigenous peoples' sovereignty. They are compounded by divisions within communities, problematic property rights and mechanisms for dispute resolution, low human capital, and limited capacity for negotiating agreements and ensuring follow-through on commitments. Following from the findings of the Harvard Project on American Indian Governance and Economic Development, tackling these issues will require policies of *nation-building*. The governments of Australia, New Zealand and the US have enacted legislative and policy reforms with the explicit goal of increasing indigenous peoples' control over the natural resources in the communities in which they live. While significant, they demonstrate important limitations. The principle of Free Prior Informed Consent is a good example. Its impact has been limited in these countries. This demonstrates how FPIC and related rights issues are necessary, but not sufficient, for facilitating sustainable resource development in indigenous communities. This is confirmed by research on the implementation of FPIC in southern countries. Most surprisingly, this was the case in Bolivia. Principal lessons learned: First, sustainable development in indigenous communities is dependent on the quality of democratic governance, which is understood as responsive, accountable government through active citizen participation. It can include traditional, non-traditional or hybrid institutions. At the national, democratic governance requires creating effective institutions for generating collaborative dialogues involving all relevant stakeholders. These need to be transparent and accountable, with decision-making authority. At the community level, it entails establishing the appropriate mix of institutions that reflect the unique context of each community. Their role is to enable communities to mediate internal disagreements in order to define public policy objectives and priorities, and then ensure follow-through. Second is that regularizing land tenure and security of ownership is often a pressing need. This is less a problem of collective or individual land title, than a the need for effective mechanisms for determining ownership, dispute resolution and, once ownership is established, mobilizing resources and coordinating the activities of numerous people who live off the land.

The Challenge of Sustainable Resource Development in Indigenous Communities

The challenge of achieving sustainable development in general, and particularly on the basis of resource extraction, is often daunting, with only a handful of countries succeeding. Yet however difficult this has been for most nation-states, the challenge is far more daunting for indigenous peoples given centuries of socio-economic exclusion and often blatant racism, both under colonialism and later under sovereign regimes. This paper will examine a variety of national contexts in order to understand both the obstacles and potential solutions. Its principal argument is that the challenges reflect problems of democratic governance involving indigenous communities, provincial or state governments, and national governments, as well as the private sector. It is divided into 7 sections: 1) the democratic governance-sustainable development nexus; 2) the unique challenges faced by indigenous communities; 3) barriers to economic development and investment in indigenous communities; 4) the conditions under which indigenous communities have been able to use resources to promote sustainable development; 5) the limits to government efforts to facilitate greater indigenous control over natural resources; 6) approaches to free prior and informed consent; and 7) lessons learned.

The Democratic Governance-Sustainable Development Nexus

The intrinsic link between democratic governance broadly defined and the achievement of sustainable development in indigenous communities provides the conceptual underpinning for this review. Governance is understood as rule of law, as well as state capacity to design and implement effective policies intended to achieve some sense of “public good.” Clearly defined property rights with established procedures for dispute resolution are central to this, regardless

of whether those property rights are recognized as collective or individual rights. Good governance provides the foundations for economic growth and development, which is a prerequisite for improving the quality of life in poor, marginalized communities.

While good governance is necessary for economic development, it is not sufficient to ensure inclusive development that ensures the wealth generated by economic development reaches all stakeholders in an appreciable way, particularly groups which have historically been discriminated against. Nondemocratic governments have generated impressive levels of development, yet such success still remains the exception. China, for example, experienced successive economic failures with huge social costs (e.g. the Great Leap Forward, the Cultural Revolution) before its current successful economic model was adopted in the aftermath of Tiananmen Square and the violent quashing of the pro-democracy movement in 1989. It is impossible to know what the consequences of China's predicted slowdown in economic growth will be, but there are increasing concerns about rising inequality, independently of the ongoing exclusion of ethnic minorities (including indigenous people) and religious movements.

To best ensure that inclusive development takes place, good governance also needs to be democratic (Oxhorn, 2011). Democracy in this case is broadly defined as *responsive, accountable* government through *active citizen participation*. These three concepts together are the source of legitimacy for governments at any level (local, regional and national) and the decisions they make. They help distinguish the effective rule of law associated with police states from a democratic rule of law that respects citizens' rights. "Democracy" in this context reflects the active role played by community members in defining what it means to be a member of their community, a process that can be described as the *social construction of*

citizenship. Who participates in political decision-making and how they do so is critical. The historical exclusion of particular groups, including indigenous people, results in citizenship regimes that are similarly exclusionary. This was made clear, for example, by the emergence of women's movements throughout much of the world in the 1960s and 70s and their subsequent success in ensuring that women played a direct role in decision-making a variety of arenas that directly affected them.

While normally associated with free and fair elections, this definition of democratic governance is also compatible with traditional indigenous institutions of self-governance. Achieving culturally appropriate measures of responsiveness and accountability is dependent upon community participation. The lack of such participation is often responsible for poor governance and a concomitant low level of economic development, a problem that will be addressed below.

The Unique Challenges Faced by Indigenous Communities

While the basic goals and processes of sustainable, inclusive development are similar when comparing the situation found in much of the developing world with the situation of indigenous people in both developing and developed countries such as Canada, Australia, New Zealand and the US, there are some important differences that also deserve highlighting because of the unique challenges they create. First, unlike the African, Asian and Latin American colonies that gained formal independence, the extent to which indigenous populations enjoy any level of national sovereignty remains contested, at least in practice. Whereas development has traditionally been understood in terms of traditional nation-states,

the situation faced by indigenous peoples in most instances is complicated by their ambiguous status.

At the same time, indigenous communities enjoy varying levels of self-governance and legal rights that condition their relations with the provincial or state and federal governments. These can be a source of contestation, particularly regarding rights granted through the formal treaties to which first nations peoples are a party. Divisions within indigenous populations have further complicated this reality of multiple nations within a single nation-state. Rather than the predictability normally associated with democratic rule of law, this threatens sustainable development by introducing uncertainty and increasing investor risks. It is also problematic because of an often stark cultural clash between indigenous and non-indigenous cultures that has only been exacerbated by a long history of overt racism within developed countries, as well as the concomitant low levels of education among poor indigenous communities. The result has often been that vicious cycles of poverty set in as social mobility, particularly for youth, is extremely constrained, feeding high unemployment and school dropout rates, family violence and drug abuse.

The strong democratic institutions of developed countries such as Canada, particularly in terms of the judiciary and the rule of law, mean that indigenous communities often can take advantage of a variety of institutional mechanisms to contest their status and seek recourse for the violation of their rights. These mechanisms are rarely available to disadvantaged groups in developing countries. Among other things, this has resulted in relatively large transfers of resources from federal and provincial governments into indigenous communities. Given the obvious shortcomings in terms of what this resource transfer has actually achieved,

fundamental questions are raised in the field of international development, particularly issues of the effective use of economic resources, accountability and good governance, are central to debates involving the potential for sustainable development in indigenous communities. The decades-long gap between resources spent and achieved outcomes raises serious questions of good governance at the level of indigenous communities, provinces or states, and federal governments.

Barriers to Economic Development and Investment in Indigenous Communities¹

An inevitable consequence of colonialism is the concentration of indigenous populations in remote, unproductive land as colonizers and their descendants post-independence usurped the most productive and accessible land. This fact is a principal reason for the lack of development in areas dominated by indigenous people (Dodson and Smith, 2003; Kingi, 2008). Aside from its direct consequences for laying a foundation for sustainable economic development, the concentration of indigenous people on remote, unproductive land has had a variety of other negative impacts that have only been exacerbated by historical neglect on the part of national governments, as well the clash resulting from a resurgence of mining activities on indigenous peoples' land as a result of recent high mineral prices and technological change.

The first indirect consequence is the complexity of property rights on indigenous land (Dodson and Smith, 2003; Kingi, 2008; Henson, 2008). This includes fragmentation of land holdings and legal uncertainty over the extent of rights (e.g., ownership of subsurface rights).

¹ Unless otherwise noted, the rest of the paper draws on the experience of Australia, New Zealand and the United States. This is because the long tradition of democratic rule of law and high level of economic development make them the best case in terms of all the factors that will be discussed. It also reflects the lack of research on indigenous people in developing countries. The application of FPIC is the most noticeable exception.

Particularly in Australia, it also reflects the limits imposed on the productive use of communally held land, including the need for gaining the support of the entire community and the allegedly inalienable character of such rights. While some argue the inhibiting effects of communal property rights are exaggerated (Calma, 2008), the experience of privatized land holdings in the US and New Zealand has been no more promising for promoting economic development (Stephenson, 2008; Boast, 2008). Overall, the uncertainty of legal processes associated with property rights—collective or individual—makes investments in such land relatively risky, further exacerbating an endemic problem of the lack of credit resources in indigenous communities (Dodson and Smith, 2003); Kingi, 2008; Boast, 2008). In developing countries, weak state capacity and continued policies of racial discrimination only exacerbate such problems. For example, Gatmaytan (2007) shows how the *Indigenous Peoples' Rights Act 1997* (IPRA) in the Philippines has had some success in increasing the security of tenure for indigenous groups, this success has been undermined in practice by new regulations and the continuation of previous patterns of domination. As a result, indigenous groups frequently continue to be denied control over natural resources on their land.

In many respects, the recent experience in Australia highlights many of the problems facing indigenous peoples with regard to achieving sustainable economic development. The confluence of a myriad of negative dynamics seems to create a vicious cycle of poverty. Low human capital in terms of educational levels and health reflect the lack of quality government

services (Dodson and Smith, 2003; Limerick, et al., 2012A).² Among other things, this makes it difficult for mining operations to employ local people (Altman, 2009b).

Low human capital, particularly in terms of organizational and governance capacity, in turn, limits the ability of communities to satisfactorily respond to the opportunities and potential threats posed by extractive industry investment. Distrust of outsiders (Limerick, et al., 2012), the lack of a political strategy (O’Faircheallaigh, 2006), and limited experience with the private sector (Kingi, 2008; Limerick, et al., 2012) all conspire against the ability of indigenous communities to negotiate fair agreements. This, combined with a lack of resources, tends to increase the dependency of indigenous communities on mining companies (O’Faircheallaigh, 2006; Limerick, et al., 2012).

Yet negotiating agreements, however good they may be, is only the starting point for subsequent economic development. Ensuring the effective implementation of agreements has proven quite difficult (Limerick, et al., 2012; Martin, 2009). When mining investment actually begins, communities frequently divide over how any benefits will be shared, further undermining their bargaining capacity (Altman, 2009b; Limerick, et al., 2012; Scambary, 2009). These basic asymmetries between mining companies and indigenous communities are only accentuated by the lack of effective coordination between mining companies and the government, in collaboration with affected communities (Altman, 2009a). Finally, as the example of the US demonstrates, when multiple government institutions are involved, the result is often the loss of transparency and extensive decision-making delays (Grogan, Morse, and Youpee-Roll, 2011).

² And in at least some cases, the Australian Government has reduced funding for such services when mining revenues come into the community. See Altman, 2009b.

Divisions within indigenous communities reflect more than disagreements over the distribution of resources. They often reflect fundamental issues of representation (Oxhorn, 2011). Their legitimacy cannot be assumed given the colonial experience and its continuing effects on them after independence (Mamdani 1996). Moreover, the lack of engagement between traditional indigenous leadership and community members is often a real problem, particularly in developing countries. Traditional governance institutions can atrophy, under pressure from out-migration, poverty and the leaders' own political opportunism. Paradoxically, reforms intended to embed traditional indigenous governance institutions within the governance institutions of political democracy—an explicit attempt to blend traditional and modern forms of governance into hybrid ones—can have the opposite effect by co-opting disconnected traditional elites into the authoritarian political networks such reforms were designed to undermine. The result is far from responsive, accountable government through active citizen participation.

The Conditions under Which Indigenous Communities Have Been Able to Use Resources to Promote Sustainable Development

A principal finding of the Harvard Project on American Indian Governance and Economic Development is the central importance of indigenous self-governance for achieving sustainable development (Cornell and Kalt, 2007). Traditional approaches toward indigenous development did not succeed because they failed to recognize this. Instead, their short-term focus, externally imposed agendas, a narrow economic view of development that viewed indigenous culture as an obstacle, and the role played by elected leadership in distributing resources undermined effective self-governance.

The alternative “nation-building” approach seeks to reverse this in several ways. A comprehensive formula for self-rule or sovereignty is combined with effective governing institutions. Instead of imposing external models, governing institutions are matched with indigenous culture. Leaders are committed to nation-building and short term policies are replaced by a strategic orientation.

Ultimately, the goal of nation-building is “practical sovereignty.” This is seen as necessary, but not sufficient, for sustainable development. It improves the quality of governance by making leaders more accountable to their communities (as opposed to external government authorities). This can be achieved by in several ways. In particular, reforms designed to lengthen electoral terms and staggering the election of tribal council members can contribute to greater leadership stability (Kalt, 2007).

Achieving practical sovereignty will also require that the system of tribal courts be strengthened (Kalt, 2007; Flies-Away, Garrow and Jorgenson, 2007). Based on a considerable body of evidence, effective court systems facilitate sustainable development by reassuring investors that contracts will be enforced, while disputes will be resolved expeditiously and fairly. Strong tribal courts also free elected leaders to focus on their own roles. Greater judicial capacity can be achieved in a number of ways, and the key is to do so in ways that reflect local contexts.

More generally, “successful economic development is most likely to occur when tribes effectively assert their sovereignty and back up such assertions with capable and culturally appropriate institutions of self-government.” (Henson, 2008, 121). Indigenous communities take ownership of their future, investing in their own governance capacity. In turn, this

improves local accountability and encourages investments, by community and non-community investors alike, based on multi-faceted development strategies rather than focusing on a single sector. The most prominent example of such success is the Mississippi Band of Choctaw. This tribe has succeeded in promoting sustained economic development since the 1970s, led by manufacturing and assembly. Such strategies have meant that the incomes of Indian nations increased twice as fast as the rest of the US in the 1990s.³

Such positive outcomes inevitably reflect the strength of the US' democratic institutions, downplaying the importance of indigenous communities' relations with national and provincial/state governments. Where such relations are problematic, so too are the community's prospects for sustainable development. Similarly, as Henson (2008) underscores, improved indigenous self-government is not sufficient for overcoming all obstacles to sustainable development, including access to investment capital and the need to address the problematic nature of property rights discussed above, although it is a necessary first step.

The Limits to Government Efforts to Facilitate Greater Indigenous Control over Natural Resources

In recent years, the governments of Australia, New Zealand and the US have enacted legislative and policy reforms with the explicit goal of increasing indigenous peoples' control over the natural resources found in the communities in which they live. While significant, they also demonstrate important limitations on that control.

³ A similar conclusion comes from the experience of New Zealand. The colonial experience left traditional Maori governing structures relatively intact, though it led to a number of changes including a shift away from hapū (clans or descent groups) towards iwi (tribes) as the main political body in Maori society (Ballara, 1998). As a result, poverty has been a less determining constraint on the development of indigenous communities than elsewhere.

In Australia, the absence a treaty recognizing indigenous land rights has limited indigenous control of natural resources. It was only in 1992 that native title was recognized as existing in common law by the High Court of Australia in *Mabo v Queensland (No 2)* (1992) 175 CLR 1. These rights are now governed by the *Native Title Act 1993 (Commonwealth)*.

Native title rights in Australia do not include rights to sub-surface minerals. Instead, native titleholders have the right to negotiate the terms on which the development of natural resources will occur. Both parties are required to negotiate “in good faith.” This falls short of a veto right. The High Court of Australia has interpreted the obligation to negotiate in good faith fairly narrowly and if the terms of agreement cannot be negotiated, the matter can be referred to binding arbitration.⁴

One partial exception is the Northern Territory, where the *Aboriginal Land Rights (Northern Territory) Act 1976* (Commonwealth) or ALRA provides traditional indigenous landowners with a right to veto mining exploration and development on traditional lands. However, the right is subject to a number of exceptions and qualifications (Rumler, 2011).⁵

⁴ The Australian Government is currently considering legislative amendments that would clarify the scope of this obligation, potentially strengthening the position of Aboriginal communities in negotiations. See the *Native Title Amendment (Reform) Bill (No. 1) 2012* [available at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query%3DId%3A%22legislation%2Fbillhome%2Fs869%22;rec=0>].

⁵ Another partial exception is *Indigenous Land Use Agreements* (ILUAs), also under the *Native Title Act*. While more flexible than agreements negotiated under the NTA, and applicable even in cases where land title has not been determined, ILUAs have no procedures for finalizing agreements if negotiations fail. Mining companies can initiate negotiations under the NTA given that both processes occur in parallel. They are potentially more constraining for indigenous groups than NTA negotiations because ILUA’s bind future titleholders who were not involved in the negotiations and also cover future acts (whereas NTA agreements can cover only one). See Limerick, et al, 2012.

ALRA authorizes Aboriginal Land Councils to determine consent. Land Councils are representative bodies and the primary mechanisms of aboriginal self-governance in the Northern Territory. ALRA provides that consent means consent as a group, determined "to the satisfaction of the Land Council." It provides that neither unanimity, majority, nor the decision of any one individual or any other principle is determinative. As a result, a Land Council can accept or reject a majority decision. ALRA also provides single right to consent or refuse to consent to exploration or mining. There is no second chance for veto between exploration and mining.

ALRA provides that the terms of an agreement to consent can be settled by arbitration if the parties agree, the "national interest" exception applies, or the parties have not reached an agreement within the time provided by the ALRA (12 months plus any agreed extension). The national interest exception allows referral to arbitration when the Governor-General (or in practice the relevant Minister) declares that the national interest requires that an exploration and mining license be granted. If the developer and indigenous community fail to reach an agreement within six months, subject to agreed extensions, either side can request that the Minister refer the matter to conciliation and, subsequently, arbitration. If a Land Council refuses to enter into an agreement on the terms set out by arbitration, the Minister can override that refusal. Ultimately, this allows the government to determine the final outcomes associated with ALRA negotiations.

Turning to New Zealand, in June 2012 the government launched a review of legislation governing Maori land, the Te Ture Whenua Maori Act 1993 (Maori Land Rights Act; see Finlayson, Christopher. 2012). The goal of the review is to identify amendments that would allow

Maori communities to more effectively utilize the economic potential of their land, including natural resources. The expert panel conducting the review, which included a number of Maori members, submitted a discussion paper to the government in February 2013. This was released for public comment on 3 April 2013. The expert panel has put forward a package of five integrated propositions which are intended to increase the likelihood of the utilization of Maori land (Review Panel, 2013). Broadly speaking, this is to be done by simplifying decision making procedures, streamlining regulatory requirements and increasing transparency around issues of ownership. More specifically, the propositions are as follows:

1. *Utilisation of Maori land should be able to be determined by a majority of engaged owners*, meaning those owners who have actively participated in decision making. These decisions should not require endorsement by the Maori Land Court.
2. *All Maori land should be capable of utilisation and effective administration*. This would entail the appointment of an external manager or administrator in cases where owners are either not engaged, or unable to be located.
3. *Maori land should have effective, fit for purpose, governance*. The duties and obligations of trustees and other governance bodies who administer or manage Mäori land should be consistent, and should be aligned with the laws that apply to non-Maori land and corporate bodies.
4. *There should be an enabling institutional framework to support owners of Maori land to make decisions and resolve any disputes*. Mechanisms should be put in place to refer disputes to mediation prior to determinations by the Maori Land Court.

5. *Excessive fragmentation of Maori land should be discouraged.* Succession to Maori land should be simplified and a register should be maintained to record all interests in Maori land.

As part of the public review of these propositions, the expert panel will hold a series of regional *hui* (social gatherings or assemblies) during April and May in areas with high concentrations of Maori land or Māori land owners. The expert panel is expected to make final recommendations in late 2013.

Finally, beginning in the 1980s US legislative reforms strengthened tribal control of mineral developments, giving tribes a more substantial role in the negotiation of agreement with developers (Grogan, Morse, and Youpee-Roll, 2011).

A key development was the enactment of the Indian Mineral Development Act (IMDA) in 1982. This "substantially strengthened tribal control of minerals development, allowing tribes to enter into any sort of agreement for extraction they desired, including leases and joint-venture and production-sharing agreements. Tribes can negotiate IMDA terms directly with companies and other partners, or can seek assistance from the federal government" (Grogan, Morse, and Youpee-Roll, 2011, p. 15). Despite this, the federal government must still approve these agreements. Moreover, the capacity of indigenous communities limits their ability to negotiate favourable agreements.

The most recent legislative reform was The Indian Tribal Energy Development and Self-Determination Act (2005), which aimed to reduce the role of the Secretary of the Interior in approving the agreements entered into by tribes, thus reducing delays and increasing certainty for investors. More specifically, it allows tribes to create Tribal Energy Resource Agreements

(TERAs). Unlike previous types of agreements, once approved by the Secretary of the Interior, a TERA gives the tribe authority to undertake mineral development on its lands, with no requirement to get approval for individual business agreements made subsequently. However, this reform has yet to have much practical impact. As of 2011, some tribes had entered into negotiations regarding TERAs, but none had been finalized.⁶

Despite the limits placed in indigenous peoples' negotiating autonomy in Australia, it also demonstrates the important role that state governments can play in helping aboriginal communities negotiate better agreements with mining companies. This is clear in the Century Mine Agreement (Altman, 2009b). The Queensland Government is party to the agreement. It is committed to providing \$30 million for education, training and infrastructure (Altman, 2009b, p. 37). Through the right to negotiate process, the company's initial offer of \$70,000 eventually became a package worth \$60 million. Similarly, it has been one of the most successful agreements in terms of employment outcomes: over 100 indigenous people have been employed continuously (around 20 percent of the mine site labor force). This outcome is attributed in part to operation of Community Liaison Offices funded by the State of Queensland for mine related training, as well as the proactive employment strategies of the major contractor (Scambary, 2009). At the same time, however, the issue of benefit distribution has become a source of conflict. In particular, a lack of clarity regarding the identification of beneficiaries has led to a number of disputes.

Approaches to Free Prior and Informed Consent

⁶ This appears to still be the case.

The principle of Free Prior Informed Consent (FPIC) for projects impacting indigenous communities has often become one of the most politically contentious aspects of indigenous peoples' rights claims. Recognized in the UN Declaration on the Rights of Indigenous Peoples, FPIC inevitably raises fundamental issues of competing claims to sovereignty that reflect the problematic relationship among multiple nations within a single nation-state. While indigenous groups welcome such claims to sovereignty over the land they occupy, most national governments are leery of the precedent recognizing FPIC would create. Ironically, both positions reflect historical experiences of socioeconomic exclusion and racism dating back to the colonial period that still persist, politicizing the issue in often dramatic ways in both developed and developing countries alike.

While the reasons for this politicization are undeniable and ultimately will need to be addressed directly in order to achieve true reconciliation between indigenous and nonindigenous peoples, the basic problem of reconciling community interests with an allegedly larger public good is common in all societies. Democracies, in contrast to nondemocratic regimes, attempt to resolve this problem through the legitimacy of their procedures for achieving due process. In Canada, for example, it would be very difficult to impose major construction projects anywhere without community buy-in. Institutionalized mechanisms for community consultation through hearings, assemblies, public relations campaigns, etc., are evidence of this, as are the inevitable and frequently successful protests that arise when communities feel marginalized from decisions affecting the quality of life of their members. Of course, this is not without costs as evidenced the "not in my backyard" phenomenon in which communities reject projects with obvious public importance because of their perceived

negative impact on those communities. Even if communities do not have a *de jure* right to veto, they frequently have a *de facto* one. At the same time, disadvantaged communities often feel—and justifiably so—that they disproportionately bear the consequences of the “not in my backyard” phenomenon because they lack the political capacity to resist pressures from more advantaged groups to push such projects into poorer areas, directly challenging the democratic legitimacy of procedures intended to resolve conflicting local and national interests.

Given the long history of unequal, often overtly abusive, relations between indigenous communities and other groups, the push for the codification of FPIC as an obligation for states is an attempt to address a similar kind of democratic deficit. In fact, the concept of free, prior and informed consent represents the essence of good democratic procedure—informed citizens freely expressing their preferences. But there is no straight forward democratic solution in the case of indigenous peoples given the problem of contested sovereignty. In practice, the closest governance model would be that of consociational democracy, which is found in countries such as Switzerland, the Netherlands (until 1967) and Lebanon (Lijphart, 1977). Among other things, it is characterized by *shared sovereignty* among distinct groups based on ethnic, religious, or linguistic lines, in which none represents a majority of the population and each group has a veto over collective decisions. This is neither desirable nor politically viable in the case of indigenous groups. Minority indigenous populations would not accept the principle of mutual veto, and majority groups are reluctant to accept a right to veto on the part of indigenous minorities. In the absence of a clear basis of shared sovereignty, recent efforts to institutionalize the concept of pluri-national states in countries like Bolivia have similarly failed to respect FPIC’s basic tenants (see below).

New Zealand has gone the furthest in institutionalizing important aspects of FPIC (New Zealand Ministry of Economic Development, 2012). Although the government views the Declaration as nonbinding and aspirational, the owners of Maori land have an absolute veto over mining activities on their land, except for “minimum impact activities.”⁷ This right was granted under the 1991 *Crown Minerals Act*, so it is unrelated to the UN Declaration. More generally, the Government of New Zealand endorsed an “Action Plan” in 2012 that aims to promote active discussion with the Maori around natural resource development (Parliamentary Counsel Office, 2013). The discussions will be guided by four “Treaty Principles” that have emerged in court decisions regarding the 1840 Treaty of Waitangi: the principle of active protection, the tribal right to self-regulation, the right of redress for past breaches, and the duty to consult (Waitangi Tribunal, 2013).

Like New Zealand, Australia views the UN Declaration as aspirational and nonbinding (Australian Government, 2012a). Unlike New Zealand (and the US as well), the absence of treaties with Australian indigenous communities means that they are not formally recognized as nations. As a result, there is no legally recognized duty to consult (Aboriginal and Torres Strait Islander Affairs, 2012). Nor, at the federal level, do there appear to be any guidelines for consultations with indigenous people. Despite this lack, relatively extensive consultation processes have taken place with respect to significant policies and legislation targeted towards the indigenous community (see, for example, Australian Government 2012b). It is significant in this regard that ALRA is seen as reflecting the key components of FPIC, despite its serious limitations as discussed above (Rumler, 2011).

⁷ These are also regulated with the aim of ensuring community consultation. This kind of flexible approach is seen as a model for FPIC implementation. See Barelli 2012.

While the US similarly views the UN Declaration as aspirational and nonbinding, it has had a long term policy of consultation with indigenous peoples. For example Executive Order 13175 (2000) requires each federal government departments and agency to establish a formal process for consultation with Indian Tribal governments that includes appointing a tribal consultation officer. This was expanded upon by President Obama, who declared that “My Administration is committed to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications including, as an initial step, through complete and consistent implementation of Executive Order 13175” (Obama, 2009). At the same time, while recognizing “the significance of the Declaration’s provisions on free, prior and informed consent,” the US interprets FPIC as a “call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken” (U.S. Department of State, 2010, p. 5). The fact that most indigenous groups own the sub-surface minerals associated with their land means that, in practice, their consent is commonly required.

Perhaps more importantly, current US policy emphasizes the importance indigenous self-government and sovereignty, with a commitment to honor treaty and other rights (Executive Office of the President, 2010). This includes endeavoring to allow indigenous peoples’ governments the maximum administrative discretion possible and encouraging them to develop their own policies to achieve program objectives, among other goals intended to promote their autonomy.

In sum, the impact of FPIC has been limited at best in these three countries, as evidenced by the continued prevalence of poverty and exclusion among their indigenous

populations. This demonstrates how FPIC and related rights issues are perhaps necessary, but not sufficient, for facilitating sustainable resource development in indigenous communities. This is confirmed by recent research focusing on the implementation of FPIC and respect for the UN Declaration in southern countries.

The Philippines stands out for having passed legislation which sets out a specific process for achieving FPIC under the *Indigenous Peoples' Rights Act 1997* (IPRA). While this has had some success in increasing land tenure security for indigenous groups, it has not necessarily increased their control over natural resources because the relationship between indigenous people and the state has not fundamentally changed (Gatmaytan, 2007). For example, recognition of Ancestral Domain Titles under IPRA often led to increased state intervention in indigenous communities through the imposition of new regulations that did not exist previously.

The reasons for this lack of effective control become clear when examining actual FPIC processes. A study of the consent process in the case of the Agta indigenous group in the northeastern part of the country over the period from 2003 to 2011 found that it failed to achieve any meaningful FPIC standard in terms of procedure and outcome (Minter et al, 2012).

Under IPRA, the National Commission on Indigenous Peoples (NCIP) is responsible for facilitating the process of obtaining and giving consent. In the case of a logging concession held by a company called LUZMATIM, consent was biased by NCIP's insistence that a larger group of Agta living in a local town be included in the process along with the smaller number of Agta who still lived in the affected forest. This allegedly shifted the balance of opinion from

opposition to logging toward consent. Even then, the agreement was poorly implemented and many of the promised benefits (e.g. royalties) have not been delivered.

Similarly, in relation to a mining concession in the same region, a number of obstacles to meaningful consent were encountered. Agta participants in the FPIC process complained that meetings were held far away from their settlements and that the issues under discussion were not clear. As in the previous example, Agta groups were divided regarding the project, and NCIP replaced some of the elected Agta representatives who opposed the project with people favoring it. In the end, the majority of promised benefits (employment and financial payments) were again not delivered.

It is also worth noting that in both of these cases, operations had actually commenced prior to the FPIC process. Moreover, the quality and accessibility of information provided to communities was questionable. Finally, once consent was officially provided, the actual agreements were largely drawn up by NCIP and the companies, with little indigenous input. Under these circumstances, it is not surprising that as of 2012, no FPIC process in the Philippines has resulted in a refusal of consent.

In many ways, the experience of the Andean nations is particularly telling given their high levels of mobilization by indigenous people. In general, the formal legal framework is relatively favorable to indigenous communities (Oxfam America, 2011). Their rights to land and the right to prior consultation are recognized legally, often at the constitutional level. Both Colombia and Ecuador recognize FPIC. However, in most cases there is also a substantial gap between these formal requirements and the quality of their implementation. Ecuador, for example, lacks local legislation for implementation of FPIC and the principle has not been

applied in practice. While Colombia has established several mechanisms intended to foster better dialogue between indigenous communities and the state, they are poorly established and under-resourced. In general, the application of consultative processes has been severely constrained by language barriers, unfamiliarity with language rights, and substantial delays with respect to the legal recognition, titling and demarcation of their lands.

The obstacles to FPIC in Peru are more transparent. The Congress passed a new Prior Consultation Law in September 2011, with enabling regulations for the law being approved in April 2012. The law was, in part, a response to delays that indigenous communities' opposition to a number of significant resource extraction projects have created. Focusing on consultation, the new law stops short of providing a right of prior informed consent. More seriously, the law stipulates that the final decision about whether or not a project will proceed is taken by the state.

The situation in Bolivia is perhaps the most paradoxical. The only country in South America where the indigenous population is the majority, it has been governed by Evo Morales, the first indigenous president in the country's history, since 2005. Coming to power on an unprecedented wave of indigenous peoples' mobilization, his 2009 Constitution declared Bolivia a "Plurinational State." Bolivian law recognizes the right to prior consultation through the incorporation of international law into domestic law, and through the adoption of regulations that govern the consultation process, particularly the Hydrocarbons Law which governs the country's principal export. Yet the Constitutional Court ruled that the requirement to obtain community consent under the Hydrocarbons Law was unconstitutional. Instead, it declared that the purpose of consultation is to quantify damage, not to obtain consent (Oxfam

America, 2011). Oxfam has also found various gaps in the regulations. It found "the prevailing notion in some State entities [was] that prior consultation is a waste of time and detrimental to projects" (p. 7). Similarly, a 2010 electoral law established that the results of consultations are not binding (Schilling-Vacaflor, Almut. 2012). Not surprisingly under these circumstances, resource extraction projects have tended to have a negative rather than a positive impact on the livelihoods and welfare of indigenous communities.

Before concluding, it is important to underscore the importance of local governance structures. The shortcomings of FPIC are not limited to national governance issues, and are frequently exacerbated by divisions within indigenous communities that the communities themselves cannot adequately mediate. "Consent" in any meaningful sense is predicated on this, and FPIC depends on the capacity of communities to determine the "public interest" and set priorities. It is the legitimacy of local governance institutions designed to accomplish this (traditional or non-traditional, formal or informal, majoritarian or through deliberation, or any combination thereof) that ultimately ensures both the legitimacy of the outcome and its sustainability. Conversely, divisions within indigenous communities only open the door to manipulation by outside actors—including the state—and weaken efforts to enforce FPIC agreements, if they even come about. This is because the same local governance institutions play an essential role in negotiating agreements and monitoring their implementation. Just as they must mediate conflicts within communities, local governance institutions are integral to mediating conflicts with external actors.

Lessons Learned

The potential for sustainable development in indigenous communities is fundamentally dependent on the quality of democratic governance. Democratic governance is understood as responsive, accountable government through active citizen participation, and can include traditional, non-traditional or hybrid institutions. It is essential because it allows for security and predictability through rule of law, provides mediation of conflicts in order to build socially legitimate consensus, and offers the best assurance that the benefits from economic development are equitably shared.

Achieving democratic governance is always a challenge in the context of striving for sustainable development, and it is particularly challenging in the case of indigenous communities. This is due to a number of factors, including a history of contested sovereignties, the continued legacies of colonialism and abuse, as well as poverty. As a result, it is further complicated because it involves at least two levels of governance—central states and local communities—that need to work in unison, not to mention the private sector, whose interactions with both levels is conditioned by their respective levels of democratic governance.⁸ Ironically, these same complexities make democratic governance even more important. The shortcomings of democratic governance have been the principal reason for a poor historical record of sustainable development in indigenous communities in general, and the failure to implement FPIC principles in particular.

At the national (as well as the provincial or state-level subnational levels), democratic governance requires creating effective institutions for generating collaborative dialogues involving all relevant stakeholders. These need to be transparent and accountable, with

⁸ Corporate social responsibility requires a facilitating environment to succeed, and this is best achieved through democratic institutions.

decision-making authority. Their role should be viewed in terms of a process that does not end with the signing of agreements. This will allow for flexibility and opportunities to address future concerns in a holistic fashion, including issues relating to compliance. To minimize uncertainty, regulations are essential to ensure due process.

At the community level, democratic governance entails establishing the appropriate mix of traditional, nontraditional and hybrid institutions that reflect the unique context of each community. Their role is to enable communities to mediate internal disagreements in order to define public policy objectives and priorities, and then ensure follow-through. On this basis, such institutions will serve as the interlocutors for determining consensus and for interacting with external actors, including the state and private sector firms. This also requires that these institutions be transparent. External actors can facilitate local level capacity building, for example, by following the example of international development programs which similarly are founded on the basis of stakeholder buy-in.

Finally, the issue of regularizing land tenure and security of ownership is often a pressing need and a good example of the importance of democratic governance. As discussed above, this is an essential precondition for sustainable development. It is also central to the basic tenants of FPIC. This is less a problem of collective or individual land title, than a the need for effective mechanisms for determining ownership, dispute resolution and, once ownership is established, mobilizing resources and coordinating the activities of numerous people who actually live off the land. In many respects, the Maori Land Court is a good model given its recent effort to become proactive in facilitating better use of Maori land (Kingi, 2008). This centers on improving the quality of information available to land holders by

increasing the proportion of Maori land titles that are registered (it is currently less than 60%), and providing more information online, via Maori Land Online.

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