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Democratic Pragmatism or Green Radicalism?
A critical review of the relationship between Free, Prior and Informed Consent and Policymaking for Mining

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ABSTRACT

The right to Free, Prior and Informed (FPI) Consent is increasingly proposed as a deliberative forum by academics and as the 'social licence' for mining corporations to operate. This framing exists within a literature that seeks to increase participation in environmental policymaking and democratise scientific knowledge. The constructivist approach adopted in this study analyses the discourses which permeate participatory framings and its impact on institutional design. FPI Consent is considered within a discourse of Green Radicalism against FPI Consultation within a discourse of Democratic Pragmatism. Case studies from Canada and the Philippines examine the operationalisation of the right to FPI Consent and the impacts of national norms and values. The study concludes that discourses are permeated by power inequalities and dominated by an industrial and liberal capitalist discourse, which impacts upon participatory framings and restricts the ability of more radical approaches to secure equality within deliberative forums.

Key Words:

Deliberative Forums; Discourse Analysis; Free, Prior and Informed Consent; Mining; Participation

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LIST OF ACRONYMS

CLCs	Comprehensive Land Claims, Canada
DERN	Department of Environment and Natural Resources, Philippines
ESSC	Environmental Science for Social Change, Philippines
FPI	Free, Prior and Informed
ICMM	International Council on Mining and Minerals
IFC	International Finance Corporation
IIED	International Institute for Environment and Development
INAC	Department of Indian and Northern Affairs Canada
IPRA	Indigenous Peoples' Rights Act of 1997, Philippines
IRR	Implementing Rules and Regulations
MA	The Mining Act 1995, Philippines
MMSD	Mining, Minerals and Sustainable Development
MVEIRB	Mackenzie Valley Environmental Impact Review Board, Canada
MVRMA	Mackenzie Valley Land and Water Board, Canada
NCIP	National Commission on Indigenous Peoples, Philippines
NSI	North South Institute
NWT	Northwest Territories, Canada
UN	United Nations
UNHCR	Office of the United Nations High Commissioner for Refugees
WBG	World Bank Group

1. INTRODUCTION

Some may feel that by saying a blanket "no" to the issue of mining we have solved the problem. Others may feel that by saying a blanket "yes" to mining, we have significantly addressed the economic concerns of the country. Both answers have the appeal of simplicity, but in fact only reinforce our natural tendency to avoid dealing with the real problem.

Pedro Walpole – Environmental Science for Social Change, Philippines (ESSC 1999:ii)

An increasing number of developing countries rely on mineral resource extraction to finance their development activities. Industrialisation and growth policies of developing country governments, influenced significantly by the World Bank, promote a regulatory and legal environment that prioritises economic growth and capital investment for poverty alleviation. Since 1985, more than ninety countries have revised or adopted mining codes and laws to increase or initiate foreign investment into the sector consistent with neoliberal growth policies (Bridge 2004). Increased mining activity has inevitability led to a greater encroachment on remote and previously unexploited indigenous lands (Gedicks 2001 in Holden 2005:417). Estimates indicate that in twenty years around half of all copper and gold will be mined on land used or claimed by indigenous people (Bass et al 2004:2). Indigenous people, here defined as having a pre-colonial relationship with their ancestral territories and distinct cultural, social and legal institutions, often represent marginal economic and political interests (cf. Render 2004, Doyle 2009). The distribution of capital investments, however, is a function not only of perceived reward but further the perceived economic, political and technological risks – "geographies of mining investment…may be structured in outline by geology but are socially mediated in their details" (Bridge 2004:416). The right to Free Prior and Informed (FPI) Consent, increasingly expounded in international laws and conventions, is predicated on the principle that "while development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognised human rights" (Vienna Declaration and Programme of Action 1993:para 10).

FPI Consent aims to achieve greater participation in decision-making for development policies by including a right for indigenous people to veto development projects on their land. Participation is an oft-used narrative within international development discourse, criticised for its semantic ambiguity, which generates varying degrees of participation (cf. Biggs 1989). More recent development narratives have attempted to repoliticise the nature of participation within rights-based approaches and empower local people through institutional accountability, transparency and incentives within democratic structures (Holland et al 2004). It is within this context that FPI Consent is considered – as a derivative of the right to self-determination (Colchester and

Ferrari 2007). Advocates are increasingly asserting its status as a right of customary international law and the United Nations regards it as the "desired standard" for promoting and protecting rights within development affecting indigenous peoples.[1] Along with a rights-based rationale, FPI Consent is professed to promote 'sustainable development'. The implicit assumption in this argument is that the more participatory a forum, the greater its ability to balance economic, environmental and social considerations within policymaking and "the greater its capacity to encourage the formulation of *viable* economical and political proposals" (Coehlo and Favareto 2008:2940, emphasis added). However, the mining industry's position on FPI Consent is that "practical implementation of FPIC presents significant challenges for government authorities, as well as affected companies, as the concept is not well-defined and, with very few exceptions, is not enshrined in local legislation" (ICMM 2006 in MacKay 2004). This points to a gap in the FPI Consent literature, still in its infancy, on the necessary conditions and design principles for deliberative forums to achieve their goals.

This study considers the institutional designs capable of achieving dialogue and inclusion for improved policy-making. It does this by considering the values that motivate the strategic processes involved in the creation of these forums. This study adopts a constructivist approach in analysing the discourses inherent to participatory framings on the environment and situates institutional design within the social and political context from which it emerges. This is particularly appropriate to a discussion on FPI Consent and FPI Consultation in which both the actors and issues are diverse and explicitly aim to address social and political structures and inequalities in policymaking.

Chapter Two begins with a discourse analysis to identify the assumptions and judgments of actors, within certain political economic and social contexts, which serve to legitimate certain types of knowledge and participatory framings. Discourse analysis embedded within the political economic context of mineral resource extraction and development considers the extent to which the interests of economic development and minority human rights motivate the creation of forums for FPI Consent versus FPI Consultation. 'Sustainable development', an opaque and polysemic discourse, is often employed by advocates of both FPI Consent and FPI Consultation but fails to provide a rigorous framework for analysis and juncture for competing worldviews. FPI Consultation, most popularly advocated by the World Bank, is thus considered within a Democratic Pragmatism discourse deferential to the liberal capitalist status quo. FPI Consent, supported by the United Nations and numerous development and indigenous peoples' organisations, is analysed here within a discourse of Green Radicalism in its attempts to reconfigure the power relations that are characteristic of that status quo.

[1] See Appendix for a list of the international statutes and conventions as well as national laws that have adopted the right to FPI Consent.

It is not the aim of this study to make a value judgment on the comparative merits of these discourses but to analyse the impact these norms and values have on the institutionalisation of FPI Consent. An analysis of these discourses and norms allows us to consider whether there is a political will to make policymaking under the auspices of FPI Consent more deliberative or whether deliberative practices are simply being bolted on to existing practices and institutions to satisfy current trends (cf. Isaksson et al. 2009). This discourse analysis is then applied to the theoretical literature and support for FPI Consent and FPI Consultation to allow conclusions to be drawn on the relationship between discourse motivation and institutional design principles.

Chapter Three's empirical study, and the accompanying discussion in Chapter Four, brings together these theoretical conclusions by considering three points on institutional design. First, the legal framework for participation and FPI Consent, which according to Richardson and Razzaque (2005:167), acts to "codify norms and structure institutions" to channel democratic political power through society; "law creates a structure for participation that helps crystallise and protect society's environmental goals". Second, any changes in the environmental politics, discourse and development of countries, whether towards sustainable development, economic growth, or the protection of indigenous rights. Third, and finally, the internal structure and participatory dynamic of inclusive forums and the extent to which they bring together the demands of different social groups, values and discourses in a deliberative fashion.

The empirical study is based on a comparative content analysis of secondary data from Canada and the Philippines. These cases were selected on the basis of the analytical framework identified in Figure 1.

Figure 1: Analytical Framework for Case Study Selection

	Developed	**Developing**	
FPI Consent		Philippines	***Green Radicalism?***
FPI Consultation	Canada		***Democratic Pragmatism?***
	Strong institutional design?	***Weak institutional design?***	

Both Canada and the Philippines have large indigenous populations. Canada is widely considered a leader in social policies for minority groups and FPI Consent. The Philippines is one of the few countries to have enshrined FPI Consent within its national laws. Although Canada has a high level of economic development, its indigenous populations suffer from relative poverty. The Philippines is a developing country with weak

institutions and widespread poverty, bringing the debate between economic growth and minority rights to the fore, as well as highlighting the difficulties in institutionalising participation within a weak institutional structure. The nature of the information available for each of these case studies differed greatly as is seen in the descriptive sections of Chapter Three. Rather than viewing this as a limitation, this study sacrifices a comprehensive review of participatory forums (for which primary data collection and analysis is best suited) and embraces the diversity of the information to demonstrate a range of institutional design possibilities for participation.

2. THEORETICAL FRAMEWORK

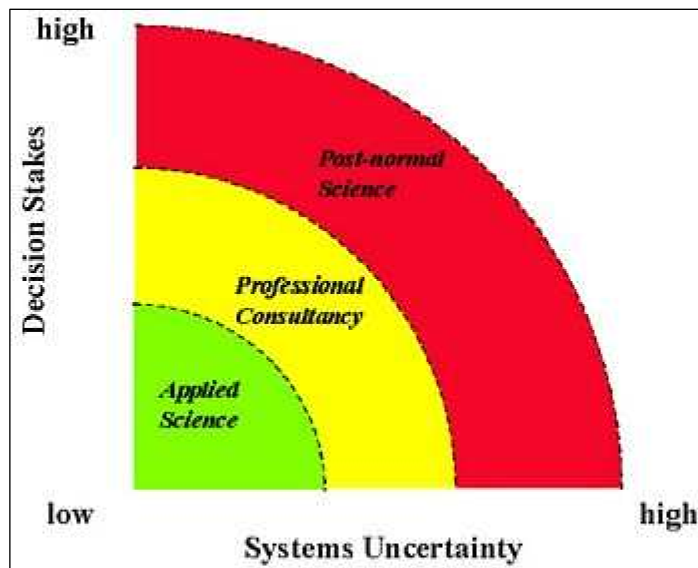
2.1 A DISCOURSE FRAMEWORK FOR ENVIRONMENTAL POLICYMAKING

2.1.1 A Constructivist Approach to Environmental Decision-Making

The way policy decisions are made has important implications for the outcome (Tribe 1972 in Richardson and Razzaque 2005:166). Analyses of policymaking for the environment demonstrate the extent to which value judgements and subjectivities permeate the closure of environment problems and predicate solutions. Social constructivist approaches have highlighted the way in which science and policymaking are bound up with political and social-cultural experiences. Perceptions towards the environment are socially and politically constructed according to people's worldviews and experiences and are reflected in the discourse they adopt. These constructivist views have come to the fore as the increasing globalisation of environmental problems and a growing dissonance with modern science has put pressure on the ability of national and international institutions to achieve scientific consensus and formulate adequate policies in response to global environmental problems (Jasanoff and Wynne 1998). Increasingly, discourses on participation, which have long featured in writings on development, have come to be accepted as a means to overcome the technocratic and linear policy models that tended to characterise environmental policymaking.

Functowicz and Ravetz (1992:259,260) have developed a model for policymaking that suggests the democratisation of the environmental agenda at the point when uncertainty and decisions stakes become so high as to "border with ignorance" and "threaten the survival of civilisation as we know it" (see further Figure 2.1 below). In these cases the simple puzzle-solving rubric of 'normal' science, with its closed community of experts determining the quality of scientific decision, is no longer considered capable of accommodating sciences' ethical and societal responsibilities. Thus, post-normal science is defined as instigating an "interactive dialogue" within an "extended peer community" in democratic processes that make both values and facts explicit (ibid. 271). Politically defined agendas and 'expert' scientific knowledge are thus considered as just one vision within the co-production of a political order for the environment that is inclusive, flexible and responsive to situations of uncertainty and high decision stakes.

Figure 2.1: Problem-Solving Strategies and Post-Normal Science (Functowicz and Ravetz 1992)



Although the co-production of environment knowledge and policy-agendas is recognised in environmental decision-making, the extent of participation and the equality given to different views remains ambiguous in practice. Academics have charted the possible degrees of participation (cf. Arnstein 1969; Biggs 1989) and critics have noted how the inherent ambiguity of the concept has allowed for the more radical aspects to be diluted and 'participation' to be used as a narrative to legitimise pre-defined agendas (cf. Mosse 2001; Cleaver 2001). It is thus necessary to consider the values and motivations behind an agent's design for participatory institutions.

2.1.2 A Discourse Framework for Analysis

The discourse framework adopted in this study is based on analyses undertaken by Dryzek (2005) on broad environmental discourses and Richardson and Razzaque (2005) on theoretical approaches to public participation in environmental decision-making. Dryzek's categorisation of discourses on the environment centre on the concept of industrialism, which is particularly relevant to the political economic context of mining. Industrialism, a western complex concerned with economic growth and industrial development (Ellis 2005), is defined by Dryzek (2005:13) as "an overarching commitment to growth in the quantity of goods and services produced and to the material well-being that growth brings". The classification is thus based on a discourse's divergence from the dominant discourse of industrialism and its political economic context of market liberalism. Dryzek categorises discourses as 'reformist' or 'radical', as related to industrialism, and

'prosaic' or 'imaginative', with regards to the degree of departure from the dominant political economic status quo (see Figure 2.2 below).

Figure 2.2: Classifying environmental discourse (adapted from Dryzek 2005:15)

	Reformist	**Radical**
Prosaic	Problem Solving • Administrative Rationalism • Democratic Pragmatism • Economic Rationalism	Survivalism [contrast Promethean]
Imaginative	Sustainability i.e. Sustainable Development	Green Radicalism • Green Consciousness • Green Politics

To Dryzek's broad discourse framework we can align Richardson and Razzaque's analysis of theoretical approaches on the role and rationale of public participation.

The first discourse that Dryzek identifies within the framework of approaches to environmental problem solving is Administrative Rationalism. This approach views science as apolitical and objective and forms the basis for constructivists' critique. The discourse aligns with Richardson and Razzaque's 'rational elitism' school. These approaches view environmental policy as complex and technical and thus favour expert scientific participation in decision-making. Tools of participation in these cases include technical environmental impact assessments and cost-benefit analyses. This approach can be critiqued using the theory of post-normal science outlined above. In cases where there is high uncertainty and decision-stakes it becomes imperative to recognise the impact of social values and constructions on environmental perceptions.

The second problem-solving discourse that Dryzek identifies is that of Democratic Pragmatism. Richardson and Razzaque refer to participation within a 'liberal democratic' framework which reflects this discourse's orientation as defined by Dryzek towards the political economic status quo of liberal democratic capitalism. The term pragmatic is further meant to reflect a process of flexible and pluralistic learning in a world of uncertainty, in reference to the philosophical school of pragmatism (Dryzek 2005:99-100). This discourse is compatible with post-normal science as it supports democratic involvement and "illuminates the uncertainties and value judgments inherent in experts' advice, allowing *political* decision-makers to reach conclusions on the

basis of a wider array of evidence" (Richardson and Razzaque 2005:171, emphasis in original). In environmental discourses, this approach is seen as a remedy to the technocratic expertise of bureaucratic models (Dryzek 2005). In the broader political economic context, this approach represents a deliberate effort to improve democratic accountability based on elections and facilitates supplementary public consultation and information processes for legislative decision-making (Richardson and Razzaque 2005:171). The limit to this discourse is the simple existence of power: "Politics in capitalist democratic settings is rarely about disinterested and public-spirited problem solving in which many perspectives are brought to bear with equal weight" (Dryzek 2005:117).

The third school of thought that Richardson and Razzaque identify, 'deliberative democracy', is arguably consistent with Dryzek's second political, Green Radical discourse. Deliberative democracy explicitly seeks to empower citizens in decision-making and "reorientate decision processes to fundamental ethical and social values" (Richardson and Razzaque 2005:172). Deliberative democracy is expected to foster social and individual learning within a dialogue of different perspectives and requires that participants are open to new ideas and willing to change their existing preferences and worldviews (Fitzpatrick et al. 2008:2). "Public deliberation is viewed to educate citizen participants, empower communities, result in fairer participatory processes, strengthen the quality of the decisions, and result in decisions that reflect modern social norms" (ibid.). Richardson and Razzaque (2005:172) consider the deliberative models of decision-making to "dovetail closely with the deep and radical ecological schools of thought", which Dryzek terms Green Radicalism. The discourse of Green Radicalism is both imaginative and radical. According to Dryzek it explicitly rejects the basic structure of industrial society as well as the liberal capitalist hierarchy. However, it is necessary to distinguish two schools of thought within this broader discourse. The first includes ideologies such as deep ecology and ecofeminism and thus represents a strong green agenda and attempt to change people's consciousness in favour of environmental policies (Dryzek 2005). By contrast, the second school of thought covers a range of movements such as social ecology, environmental justice, and 'environmental of the global poor', which are concerned with the social and political structural barriers that prevent societies from responding to environmental threats and risks (ibid.). Deliberative policymaking and political restructuring provide solutions to the problems identified within this second school of thought.

The final discourse to be considered here is that of Sustainable Development. Richardson and Razzaque do not consider this to be a separate school of thought for discussions on participation, but adopt it themselves as the value and discourse to characterise their arguments in their introductory statements. Dryzek's analysis of the

Sustainable Development discourse considers it to be imaginative, in questioning the structure of political systems, but not radical, in its acceptance of the basic premise of the capitalist economy. This discourse is particularly wide-ranging in adopting values of economic growth, environmental protection, distributive justice and the reconfiguration of power relations. Dryzek considers sustainable development to be essentially anthropocentric with nature regarded foremost as something that is useful to humans. However, it will be argued here that this discourse is too opaque and indeterminate to provide a rigorous analytical framing for the participation rationale. This study therefore adopts Coehlo and Favaretos' (2008:2994) characterisation of the term as "polysemic" – used widely by advocates on different sides of the debate and therefore inappropriate to use in projects that seek to bring together a diverse range of actors and groups within a single approach. Thus, before going on to discuss the impact of the above mentioned discourses on the institutional designs for participation, it is necessary to consider the nature of the Sustainable Development discourse within the literature on FPI Consent and FPI Consultation.

2.1.3 A Cursory Note on Sustainable Development

Both FPI Consent and FPI Consultation are justified in the literature using the rhetoric and values of sustainable development. Coehlo and Favareto (2008:2941) regard sustainable development as "an attempt to balance environmental conservation with the expectations of economic development". Indigenous communities' discourses on sustainability emphasise the recognition of rights to natural resource use and existing socio-cultural practices. Within these communities disparate groups may view sustainable development as economic employment whilst others may consider the opportunities for external investment in infrastructure, education and health facilities. For government agencies, particularly within developing countries, the emphasis is often on increasing foreign investment and profitable exploration of natural resources in support of economic development and majority interests.

For private actors sustainability is synonymous with profit and competitive development. For mining corporations, in particular, sustainable development requires finding, extracting and recycling minerals resources in the "most efficient, competitive and environmentally sustainable manner possible, utilising best practices" and ensuring the economic benefits of the industry are invested in human and physical capital for future generations (Shinya 1998:97). These principles are reflected in industry-wide initiatives such as the Minerals, Mining and Sustainable Development research programme (cf. IIED 2002). Moreover, mining corporations are warned that if civil society is not "engaged *proactively* in a *positive* relationship they may have to be engaged *retroactively* in a *negative* relationship when they challenge the social licence of the mining

company; this could make profitable development of the property difficult" (Holden 2005:432, emphasis in original).

At the international level, the World Bank maintains the right to FPI Consultation within its mandate of poverty alleviation and sustainable development thus rejecting the conclusion of the Extractive Industries Review that recognition of FPI Consent as a necessary condition for the achievement of these goals. The World Commission on Dams (WCD 2000) recognised the right to FPI Consent within its sustainable development objectives of equity in resource and benefit allocation, sustainability in resource use, participation in decision-making, efficiency in infrastructure development and accountability towards present and future generations. In line with this approach, the WCD argued that it is equally important to consider the extent to which alternatives to economic growth exist in resource rich countries, the extent to which adverse environmental and social impacts are acceptable or capable of being mitigated or avoided, and the degree to which local consent should govern development decisions across a wider spectrum of activities.

This analysis supports Coehlo and Favareto's assessment of 'sustainable development' as polysemic. Although this discourse may appear to represent a half-way point between radical and conservative discourses, consent and consultation framings, its current ambiguity risks ongoing uncertainty and variation as to the values for operationalisation of the right to FPI Consent.

2.2 INSTITUTIONAL DESIGNS FOR FPI CONSENT AND FPI CONSULTATION

2.2.1 Free, Prior and Informed Consultation

This study submits that FPI Consultation is best considered within the framework of Democratic Pragmatism. Richardson and Razzaque (2005) specifically identify public consultation processes within the 'liberal democratic' framework and Dryzek (2005) considers public consultation within Environmental Impact Assessments (EIAs) and localised policy dialogues as representative of Democratic Pragmatism. Democratic processes are thus adopted for their inherent value but their design is considered against the need for effective and efficient governance. This approach does not favour minority groups, as advocated by difference democrats (cf. Young 1989, 1992 in Dryzek 2000), nor does it give them a veto. Rather, it recognises the imperatives on the state to achieve re-election through support by majority interests. This approach seeks to secure the

legitimation of minority groups, with the capacity to destabilise the political economy (cf. Dryzek 2000:96), by involving them in consultation processes.

The right to FPI Consultation leading to 'broad community support' is the standard adopted by the World Bank Group and International Finance Corporation. The WBG Management (2004:v) rejected FPI Consent within mining as put forward by the Extractive Industries Review to the extent that the right represents a "veto on development". The rationale for this approach is based on neoliberal growth polices whereby, for many developing countries, mineral resources are important assets supporting economic growth and development. The WBG asserts that communities should benefit from projects that continue to contribute to broader regional and national development goals (ibid. para.15). The IFC's Principles for Stakeholder Engagement (2007:40) attempts to frame consultation as a dialogue between stakeholders including "an implicit 'promise' that at a minimum their views will be considered during the decision-making process" (ibid. 41). Further, it is considered "good practice and common courtesy to follow up with stakeholders whom you consulted, to let them know what has happened and what the next steps in the process will be" (ibid.).

Consultation processes thus defined serve to provide "public input into decisions taken elsewhere" – providing information so the decision-maker can make the most informed and well-considered decision (O'Faircheallaigh 2009:3). In this process, decision-makers bring their worldviews and values to bear in identifying policy outcomes and solutions. As a participatory framing, Isaksson et al (2009) argue that consultation fails to embrace deliberative norms and a reciprocal dialogue in which participants are open to new ideas and change in their existing preferences. In institutional design, power pervades the expression of interests and restricts equality in decision-making. However, participation involves dynamic and political processes in which lower forms of participation may provide the opportunity for the acquisition of skills, such as social mobilisation and communication, which create political pressure for increased participation (O'Faircheallaigh 2009:6.).

2.2.2 Free, Prior and Informed Consent

It is argued here that FPI Consent can be analysed within a discourse of Green Radicalism. The framing aims to equalise power relations between local communities and government agencies and private actors by giving the community equal decision-making power on whether or not the development project goes ahead. Advocates regard 'broad community support', as purported by the World Bank, to be ineffective given communities are aware from the outset that their agreement is irrelevant (MacKay 2004). Bass et al (2004) argues that indigenous communities are better placed to shape the development of mining activity it they can approve of,

or reject, the project. Though Weitzner (2009) of the North South Institute is keen to stress that FPI Consent should not be conflated with the right to veto – containing as it does other fundamental human rights such as self-determination, cultural autonomy and identity – the ability of local communities to make this decision, on the basis of their customary laws and practices, is a radical step in the assertion of indigenous rights. Development and indigenous peoples' organisations thus advocate a move towards more egalitarian power structures, protection of subsistence livelihoods, and decentralised and radical democratic processes. These values are further representative of the Green Radical approach characterised by Environmental Justice and Social Ecology movements and are premised on the conservation of tradition, indigenous livelihoods and natural resources against 'development aggression'. That "indigenous peoples want to be equal partners rather than mere beneficiaries" in development projects (Weitzner 2009:1) requires a fundamental change in values, exemplified in Carino's (2005:39) commentary on FPI Consent:

> "While we must muster all of the economic, developmental, environmental and technical arguments in support of FPIC, ultimately it will require a political process that prioritises cultural and natural diversity as core values in our lives and our survival."

The key elements of FPI Consent as identified within the UN Guidelines (2005:12) are outlined below.

'Free'	"Indigenous people are not coerced, pressured or intimidated in their choices of development"
'Prior'	"Their consent is sought and freely given prior to authorisation and the of development activities"
'Informed'	"Indigenous people have full information about the scope and impacts of the proposed development activities on their lands, resources and well-being"
'Consent'	"Their choice to give or withhold consent over developments affecting them is respected and upheld"

Institutional design principles for FPI Consent should reflect indigenous peoples' customary laws and practices. 'Free' is defined as allowing indigenous peoples to make decisions "in their own time, in their own ways, in the languages of their own choosing and subject to their own norms and customary laws" (Colchester and Ferrari 2007:5). FPI Consent is "an iterative process of inter-cultural transaction" (ibid.) which incorporates local knowledge processes and is essentially deliberative. Responsibility for monitoring and enforcement of the right should be vested in a "constitutionally recognised, independent (politically and financially), centralised or regionalised bodies directly elected by indigenous peoples", with locally defined accountability and incentive

structures (ibid.). However, although indigenous decision-making systems are often highly inclusive in certain cases they may entail social exclusion, particularly of women and marginal groups. “Prescriptive notions of who should represent a community” are seen as a recurring problem resulting in dual or multiple systems of decision-making (ibid.). Rights and claims to resources are embedded in cultural systems of meaning, symbols and values that are continuously evolving and negotiated by people who shape and are shaped by a variety of institutions of varying degrees of formality (Cleaver 2000).

2.2.3 Concluding Remarks on Deliberative Forums

Foucauldian arguments of power permeate discourses and deliberative forums based on Habermasian ideals of communicative rationality (cf. Flyvbjerg 1998). Nelson and Wright’s (1995) formulation of power within participation is instructive on the discourses and institutions needed to affect empowerment. Participation as a tool can achieve ‘power to’ through capacity building and increasing knowledge and confidence. ‘Power over’ is required to strengthen political decision-making (particularly within marginalised groups). FPI Consent represents a push to achieve ‘power over’ decision-making processes for the environment. ‘Power over’ is difficult to attain as it exists within the ‘decentred power’ of institutions, discourses and actors. For empowerment to occur, it is necessary to effect change in the discourses and institutions that conceive ‘decentred power’. However, “Foucault would prescribe neither process nor outcome; he would only recommend a focus on conflict and power relations as the most effective point of departure for the fight against domination” (Flyvbjerg 1998:223). Indeed, Dryzek’s (2005:226) conclusion on Green Radicalism points to the discourse’s lack of a blueprint solution in the face of a dominant liberal capitalist status quo as allowing “room for a variety of experiments whose general orientation is given by green discourse, but whose specifics can vary substantially”.

Attempts to establish hard and fast rules on the relationship between policy-making and public participation are likely to be counterproductive (O’Faircheallaigh 2009:7). The post-normal framework identified above advocates different approaches to public participation depending on the nature of the problem and makes an assumption “that fundamental choices regarding the nature of policy issues or problems and regarding the appropriate approach to public participation should be made by public officials” (ibid. 6). The emergence of law, including property rights, is never a simple matter of spontaneous development but often the outcome of a power struggle between the citizen and the state (Harris 2003). Natural resources are not seen by users as only economic resource but further areas for struggles over power and authority with powerful symbolic significance (Mosse 1997). Attempts to ‘craft’ institutions by state agencies within a top-down strategy may

serve to intensify disputes over social positions and authority. Bottom-up processes for institutional design can thus be distinguished from top-down processes (Ellis 2005). Top-down strategies are employed by those with the power to regulate and legislate (ibid.). The institutional design principles adopted are in line with new institutional economic and rational choice theories, which seek to reduce the transaction costs inherent to participation through effective institutions. In this way institutions for participation can be crafted to a set of principles that ensure clearly defined boundaries, graduated sanctions for effective monitoring and enforcements, and 'nesting' within higher state institutions (Ostrom 1990). Bottom-up approaches focus on increasing the capacity of local communities to exert control over decision-making leading to empowerment and self-determination (Ellis 2005). This approach is consistent with 'legal pluralism', which recognises overlapping claims for resources and the "coexistence and interaction of multiple legal orders" within a social context (Meinzen-Dick and Pradhan 2002:4). Thus, although the appropriate legal and institutional framework, outlined by the state, is regarded as crucial to effective FPI Consent, these efforts should be combined with bottom-up strategies for institutional design and empowerment.

3. EMPIRICAL STUDY

3.1 CANADA

Canada is one of the largest mineral producing countries in the world. In 2007, the mining sector contributed $41.9 billion to GDP (Stohart 2008). Canada is also home to a large number of Aboriginal communities, over 1,200 of which are located within 200 kilometres of mining operations (ibid.).

3.1.1 National Framework of Rights

Indigenous rights, including the right to consultation, are enshrined within the constitution and common law of Canada. Section 35 of the Canadian Constitution Act 1982 states "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed". The Supreme Court of Canada has ruled this law to include the right to be consulted and, in certain cases, accommodated regarding developments on aboriginal land. These decisions are premised on the right to self-determination.

The Canadian government does not, however, recognise the right to FPI Consent. Although acknowledging the importance of "meaningful involvement" in "life changing decisions", it argues that the equitable and fair balancing of interests is more important than consent per se (UN Observer Delegation of Canada 2005). The government maintains that FPI Consent fails to balance the rights of indigenous peoples against those of non-indigenous Canadians (Simms 2009). Canada's metals and mining policy is "premised on the recognition that a sustainable minerals and metals industry must be internationally competitive in an increasingly global economy" though acknowledging that such initiatives should be inclusive (Shinya 1998:98). The government thus recognises a continuum of consultation processes of which consent is "one important option" (UN Observer Delegation of Canada 2005). This duty does not give indigenous communities a right to veto developments nor is it necessary for parties to come to an agreement on accommodating concerns. Rather, the government envisages a deliberative approach in which each party provides feedback and becomes better informed.

Aboriginal communities have the right to control development projects (in effect FPI Consent) on lands secured under the Comprehensive Land Claims Act (CLCs). CLCs are negotiated in areas where there are no pre-existing treaties to recognise the rights of Aboriginals. CLCs vary in their content and scope but often create provisions for self-government, the protection of traditional resource use and co-management boards to manage resources and plan development (Hipwell et al. 2002:5). These co-management boards usually have

equal representation of government and aboriginals and are often responsible for reviewing the environmental impacts of developments within the land claim area. In cases where CLCs cover both surface and sub-surface resources, these boards and communities have the right, although not explicitly, to FPI Consent and veto of mining developments. Indeed, this assertion is supported by the Supreme Court of Canada's ruling in *Delgamuukw* which states that, in the case of titled lands, the government's duty to consult is often "significantly deeper than mere consultation" and on a spectrum that includes the right to "full consent" (*Delgamuukw v. British Colombia* (1997) 3 S.C.R. 1010, para 6). According to Doug Paguet (2009) of the Department of Indian and North Affairs Canada (INAC):

> "… a company hoping to develop a project will not only have to consult with the local people, it has to convince the appropriate board, which has local representation, that is has a good environmentally and economically sustainable project. It is these boards and agencies that have the say as to whether or not a project goes ahead."

Government policies further seek to increase Aboriginal participation in the economy. Aboriginal Canadians suffer from high unemployment rates and low individual incomes with more than twice as many Aboriginal Canadians living in poverty compared to non-Aboriginal Canadians (INAC 2009). In 2009, the federal government issued the Federal Framework for Aboriginal Economic Development, the first policy framework for Aboriginal economic development since 1989. This framework aims to increase private sector interest in the economic development potential of Aboriginal peoples and the land that they own (ibid.):

> "Aligning federal investments with viable economic opportunities, better management of business and community assets, and a modern lands/resource management regime will help enhance the value of assets."

3.1.2 Deliberative Forums

Aboriginal groups form a majority of the population in Canada's Northwest Territories, an area rising in mineral prominence due to its diamond reserves. CLCs cover the majority of land in the Northwest Territories (NWT) and in 1998 the federal government passed the Mackenzie Valley Resource Management Act (MVRMA) to implement the CLCs of the Gwich'in and Sahtu communities.

The MVRMA establishes an environmental planning, management and assessment regimes in the NWTs aiming to "provide northerners with decision-making participation and responsibility in environmental and natural resource matters" (Fitzpartick et al. 2008:2). The MVRMA replaced the authority of the Department of

Indian and North Affairs Canada (INAC), which previously had responsibility for environmental assessments under a broader mandate of resource and economic development.

MVRMA institutionalised collaborative assessment processes under newly created and regionally distributed organisations, with clear requirements for participation and integration of different knowledge types (Armitage 2005:243). According to Armitage (ibid., 246), the creation of these new institutions and organisations was key to "creating the preconditions necessary for enhanced collaboration and learning in environmental assessments". Thus, responsibility for reviewing and approving land use permits in the NWT lies with four regional co-management boards and two pan-territorial co-management boards: the Mackenzie Valley Environmental Impact Review Board (MVEIRB) and the Mackenzie Valley Land and Water Board (MVLWB). These boards (outlined in the Figure 3.1) are intended to decentralise the decision-making process for land use and facilitate cooperation between aboriginal communities, government agencies and private actors. Armitage (2005:247) provides evidence of 'double-loop learning' within these boards – "learning that addresses and seeks to change worldviews and values" – thus evidence of a deliberative approach. Accordingly, he argues these boards, through increasing involvement of aboriginal groups, have successfully transformed previous political and institutional processes, reconfiguring entrenched power relations and assumptions about environmental assessment (ibid.).

Figure 3.1: Claims-mandated IPGs in the MacKenzie Valley (Armitage 2005:244)

Board	Primary mandate	
Mackenzie Valley Environmental Impact Review Board (MVEIRB)	Environmental assessment and review throughout the Mackenzie Valley, including the Gwich'in and Sahtu settlement areas.	www.mveirb.nt.ca
Mackenzie Valley Land and Water Board (MVLWB)	Issuing land use permits and water licenses for all areas in the Mackenzie Valley outside of the Gwich'in and Sahtu settlement areas; preliminary screening.	www.mvlwb.com
Gwich'in Land and Water Board (GLWB)	Issuing land use permits and water licenses within the Gwich'in settlement area; preliminary screening.	www.glwb.com
Gwich'in Land Use Planning Board (GLUPB)	Development and implementation of a land use plan for the Gwich'in settlement area.	www.gwichinplanning.nt.ca
Sahtu Land and Water Board (SLWB)	Issuing land use permits and water licenses within the Sahtu settlement area; preliminary screening.	www.slwb.com
Sahtu Land Use Planning Board (SLUPB)	Development and implementation of a land use plan for the Sahtu settlement area.	www.sahtulanduseplan.com

Mining, and other resource development projects, submit applications to MVLWB, which then distributes them to all potentially affected aboriginal groups (i.e. those with traditional land-use interests near the proposed development). This 'pre-screening' process typically allows 30-45 days for aboriginal groups to provide comments and recommendations, which are often substantiated with traditional knowledge (MVEIRB 2003; Ellis 2005). The MVLWB will then review the application, consult with technical experts and decide whether to approve or reject the application based on environmental and economic considerations. If a project is deemed to have significant adverse environmental impacts it will be recommended to the MVEIRB for environmental assessment. Further, if a proposed project is deemed to be of significance to the wider population, public hearings will be held to gain public input. Finally, the minister of INAC, which retains ultimate authority on land and resource use, signs off all decisions made by the board.

These processes were adopted recently in the consideration of a new uranium mine in Screech Lake. Following the pre-screening process, initial environmental assessment and public hearings, the MVLWB concluded that the project should be rejected (WISE 2009). The decision cited the ecological and cultural significance of the area to the aboriginal communities, which had not yet agreed a regional land use plan (Sustainability Perspectives 2008). This recommendation was upheld by INAC. The aboriginal communities are now in discussions with the mining company on conditions which may allow exploration to go ahead (WISE 2009.).

The internal structure of the participatory forums under MVRMA attempt to bring together the demands of different social groups and discourses. Half the members of the MVLWB and MVEIRB are aboriginal representatives who evaluate proposed projects on the basis of values, information and experience stemming from traditional practices. Further, aboriginal groups are able to make statements and presentations at technical sessions and hearings. According to Ellis (2005:68), "in all these processes, ostensibly, concerns and recommendations stemming from traditional knowledge are considered fully and equally with those based on science".

However, White's (2006) analysis of MVEIRB identified barriers to incorporating traditional knowledge including language barriers – that some aspects of traditional knowledge are "practically impossible" to translate into English – and an incompatibility between indigenous values and the Euro-Canadian bureaucratic structures of the MVEIRB. This includes extensive reliance on written rules, complex documentation and hierarchal structures, which are fundamentally contrary to the informal process, oral communication and egalitarian structures which predominate in aboriginal communities. Participation and communication are said to have improved under the MVRMA following greater standardisation of procedures to ensure effective

consultation (Armitage 2005). The Sahtu Land and Water Board, for example, has established a standard stratified list of referrals to ensure the appropriate organisations and community groups are consulted. However, increased standardisation and bureaucracy has been criticised as reflecting western values and science that are inconsistent with aboriginal values and traditional knowledge. Armitage (2005:253) recognises that integrating traditional knowledge into environmental assessments may require a "value shift" and a more fundamental transition in procedures. This is partly because these processes are proponent-driven. The screening processes described above are the results of a top-down regulatory initiative by INAC. Mining corporations have also implemented top-down initiatives to foster greater participation in environmental decision-making. For example, De Beers Canada Mining Inc. proposed an environmental assessment for the Snap Lake Diamond Project in which it was maintained "traditional knowledge shall be given full and equal consideration to that of western science" (De Beers Canada Mining Inc. 2002).

Fitzpatrick et al. (2008) have considered the extent to which the MVMRA provides an opportunity for deliberative democracy within the environmental assessment of the Snap Lake diamonds project. Their conclusions maintain that true deliberative potential "may not rest in the opportunities for participation outlined by legislation or policy, but rather in the flexibility of the institutions implementing those programmes to create more opportunities for interactions with the public" (ibid. 3). Thus, they found that unplanned technical sessions, which allowed one-to-one dialogue with mine proponents and decision-makers, provided the best deliberative context. Given that the Snap Lake project was the third mine in the area, but the first to be reviewed in its entirety under the MVRMA, this flexibility further reflects increasing familiarity with participatory processes and gradual pressure for adopting deliberative norms. Fitzpatrick et al., however, consider the lack of funding given to participant groups as a restriction on their ability to participate equally and be judged on the merit of their argument – in the spirit of communicative rationality. They also criticise the modern bureaucratic structures, which restrict dialogue between cross-cultural perspectives and only allow empowerment "in the broader context of the needs and expectations of Euro-Canadian agencies and their decision-making processes" (Ellis 2005 in Fitzpatrick et al 2008:13). As one First Nations participant commented (ibid.):

> "The opportunity is provided to participate… but that participation is conditional on people being able to act like Western bureaucrats, and that is the real problem."

3.2 PHILIPPINES

The Philippine's total mineral wealth is estimated at $3 trillion in gold, copper, nickel and other minerals, with less than 2% of the mineral area currently explored (Goodland and Wicks 2009:18). Mineral sales were estimated to reach $27 billion in 2009, following a 33% growth in 2007 (ibid.), and are thus regarded as a key component of the country's development model, in line with World Bank recommendations.

The Philippines has a large indigenous population constituting 15-20% of the population. It is estimated that half of all areas identified for mining development in the Philippines are areas subject to indigenous land claims (Holden 2004:422). Indeed, eighteen of the governments' twenty-three priority large scale mining projects are located on indigenous territories (Doyle 2009:55). Like the aboriginal communities in Canada, land is a key part of indigenous communities' cultural identity.

3.2.1 National Framework of Rights

The Philippines is regarded as having some of the most progressive environmental laws and judiciary with constitutional protection for the environment and indigenous groups (IIED 2002). However, according to Hughes (2000:3) "the government of the Philippines has demonstrated a pattern of promoting economic development goals at the expense of the human rights of indigenous cultural communities and peoples".

Indigenous rights are protected under the Indigenous Peoples' Rights Act (IPRA) 1997. The Act embodies the rights to ancestral domain, self-governance, cultural integrity and FPI Consent – "essentially the heart and soul of the entire law" (ESSC 1999:33). Consent is defined as "the consensus of all members of the ICCs/IPs [Indigenous Cultural Communities/ Indigenous Peoples] to be determined in accordance with their respective customary laws and practices" (Section 3(g)). Section 59 explicitly states that ICCs/IPs "shall have the right to stop or suspend" any project that does not conform to FPI Consent.

The National Commission on Indigenous Peoples (NCIP) is the government agency charged with implementing the IPRA. In 2002, the NCIP expounded the right to FPI Consent based on the principles of self-determination (NCIP 2002: s.6):

> "… The ICCs/IPs shall have the right to accept or reject a certain development, activity or undertaking in their particular communities. The acceptance or rejection of proposed policy, program, project or plan shall be assessed in accordance with the following IPs' development framework and value systems…"

The NCIP's Implementing Rules and Regulations (IRR 1998) further outline the operational elements of FPIC certification such as who shall be present, the period in which elders/leaders should hold consultative meetings with their members (fifteen days), and how the decisions shall be arrived at (s.14). Section 29 further requires that the community write down the customary practice of consensus building to be followed, identify in writing and register with the NCIP their Council of Elders and, in the case of non-consent, specify in writing the reasons for the decision.

The IPRA exists alongside the Mining Act (MA) 1995. The MA was introduced specifically to revive the mining industry, which had taken a dip in the early 1990s, "by providing a positive and competitive climate for mining investments" (ESSC 1999:23). Towards this goal the MA was successful, with the number of foreign mining companies represented in the country increasing 400% between 1994 and 1996 (US Geological Survey 1996 in Holden 2005:420). The MA allows greater foreign ownerships, full repatriation of profits, tax breaks and tax holidays of 5-10 years (Goodland and Wicks 2009:23). The MA seeks to promote sustainable mining, employing the Brundtland Commission definition of sustainable development, and has explicit environmental and social provisions requiring mining operations to place "due and equal emphasis on economic and environmental considerations" (ESSC 1999:26). According to the Mines and Geosciences Bureau of the Philippines (ESSC 1999:32):

> "Compared to any developing country trying to develop its mineral resources, and for that matter, also trying its best to welcome foreign investment, the current Mining Act and its Revised Implementing Rules and Regulations could be said to be the most socially and environmentally sensitive in its genre. Its consideration for local government empowerment, respect and concern of indigenous cultural communities, and drive for equitable sharing of the benefits of natural wealth, it is the envy of most countries in the region."

This Act is thus seen as central to the country's economic growth. However, according to Carino (2005:29), "this development objective conflicts with the land rights aspirations of indigenous peoples throughout the country". Subsequent revisions to the MA have aimed at simplifying procedures for mining applications and environmental permissions, regulations which the Department of Environment and Natural Resources (DERN) Secretary described as "obstacles for private investment to the country" (Goodland and Wicks 2009:21). Hughes (2000:15) identifies a number of direct conflicts between the two acts, including that the MA provides the that State owns all natural resources and retains full control over their exploration and development whereas the IPRA grants indigenous communities the right to "develop, control and use land and territory traditionally occupied, owned or used" by indigenous people (s.7(c)). Further, the Revised IRR of the MA requires FPI

Consent from communities between mining agreements and permits yet fails to identify and define the role of the NCIP in this process.

3.2.2 Deliberative Forums

The NCIP is widely said to have failed in its mandate to protect and uphold the rights of indigenous peoples (UNHCR 2008). The NCIP is not independent from the political agenda and is often seen to promote mining interests over those of indigenous people. Though all seven commissioners of the NCIP are to be members of indigenous communities (IPRA 1997: s.40), the selection process is undertaken by the office of the President and not indigenous communities themselves. There are numerous allegations that the NCIP has bribed village leaders and even *created* indigenous leaders when consent was not forthcoming (Rovillos et al. 2003).

Although the legislation explicitly states that FPI Consent should be achieved "in accordance with [indigenous peoples'] value systems", the NCIP is said to view the requirement as "a technical obstacle to be overcome as quickly as possible" (UNHCR 2008:2). Thus, meetings are not organised on the basis of the traditional customs of indigenous communities and rarely meet the requirements of consensus as identified in customary laws. According to the NCIP guidelines, the total timeframe for completion of FPI Consent is 55 days, which does not give traditional peoples sufficient time to conduct traditional decision-making processes (UNHCR 2008). Gradually the implementing rules and regulations issued by the NCIP have been watered down, allowing for greater latitude in their interpretation. Guidelines issued in 2006 significantly weakened the right to FPI Consent following efforts by the government to streamline the consultation processes. The current guidelines on FPIC are thus regarded as hurried and mechanical, providing limited information to communities and prescribing the establishment of indigenous authorities even where these are in contradiction of customary laws and practices (Colchester and Ferrari 2007:12). Investigations provide evidence of NCIP staff acting in collusion with governments and mining corporations purposefully misleading communities and falsifying documents to secure FPIC certification (ibid.). Information provided to local communities has been described as "little more than propaganda by mining companies" with local communities in one case being told that those directly affected by the mining operations would become millionaires and be able to buy Mercedes Benz cars (Goodland and Wicks 2009:13; note.75). Further, FPI Consent is seen as a one-off process for initial exploration rights rather than an ongoing and iterative consultation with communities.

The indigenous people of the Philippines have reacted to the failure of national institutions through protests and organised movements. The Philippines is regarded as having "one of the most active and rigorous [civil

society] in the world" (ESSC 1999:91) with a strong "culture of empowerment" (Broad 1994:816 in Holden 2005:428) and a history of challenging legislation and policies. "Third parties – such as NGOs – can play an instrumental role in helping to level the power balance between communities and mining companies in the community consultation process" (Bass et al. 2004:37). To this end, the strong well-organised NGO movement in the Philippines have played a key role.

This is exemplified in research undertaken on communities living near and affected by the Dipido mine in the Nueva Vizcaya and Quirino provinces (cf. Rovillos et al. 2003; Martin et al. 2007). The potential positive and negative impacts from the mine have divided the local indigenous communities. However, the democratically-elected Didipio Barangay Council, which has primary responsibility for development projects in the area, has consistently rejected the proposed mine (Martin et al. 2007). In response to claims that *barangay* ('village') officials were being co-opted by the mine and government officials, the local communities further established the Didipio Earth Savers Movement Association (DESAMA). DESAMA submitted a petition to the state invoking their 'power of initiative' – a legal mechanism allowing officials and laws deemed detrimental to the interests of the people to be recalled – and calling for a referendum on whether the mine should go ahead (Rovillos et al. 2003:20). Shortly thereafter DENR declared the project "closed to any form of mining" and suspended its contract with the government, stating that the project was not socially acceptable (Martin et al. 2007). The establishment of the group had significant impacts on the empowerment of the local communities (Rovillos et al. 2003:20).

Incidents such as these are not uncommon in the Philippines with regards to mining. According to ESSC (1999:xii), communities across the country are "yet to be convinced that mining does not destroy their lives and that after mining the environment will be rehabilitated". A resolution of the Association of Barangay Captains of Kasibu, Nueva Vizcaya, regarding the Didipo mine, stated (Rovillos et al. 2003: 22):

> "… we believe that Kasibu is best suited for agriculture as it is the fruit and vegetable bowl of the province; … mining will destroy the agricultural lands which is the main source of livelihood in the area; … the CAMC project is not socially acceptable by the community."

These values and strong anti-mining sentiment deepened following the Marcopper tailings spill, which left the Boac River "biologically dead" (IIED 2002:208) and the Philippine nation "shocked and traumatised" (Tujan 2001:154 in Holden 2005:425). Proponents of mining have thus adopted the language of 'sustainable mining' and enacted the National Mineral Policy on this basis (cf. Rovillos et al. 2003). However, according to Rovillos et al. (ibid. 24), although the policy discusses the environmental and social impacts of mining "this is still

within the framework of growth-driven, profit-motivated export-oriented industrialization as encoded in the Philippine Mining Act of 1995".

4. DISCUSSION AND CONCLUSIONS

4.1 CASE STUDY DISCUSSION

Legal frameworks act to “codify norms and structure institutions” (Richardson and Razzaque 2005:167). According to the Canadian government, the legal framework for participation in environmental policy-making in Canada seeks to balance the interests of aboriginals with non-aboriginals. This is explicitly Democratic Pragmatism. Although indigenous rights are constitutionally protected, meaning they cannot be overridden or overturned by government policymaking, the right to FPI Consent is not currently constitutionally recognised. INAC retains the right to overturn decisions made under the MVMRA and therefore pursue national economic goals. Recent efforts to address poverty and increase aboriginal participation in the economy reflect the ongoing dominance of economic development and growth narratives.

The debate between economic growth and minority rights is more pronounced in the case of the Philippines. The development perspective and widespread poverty in the Philippines means that “those who oppose mining have the serious obligation to come up with an alternative development plan that is realistic” (ESSC 1999:x). The competing discourses and values expressed in the IPRA and the Mining Act define this conflict. Recent efforts to assert mining’s sustainability fail to achieve the discursive deliberation needed to bring together the pro- and anti-mining factions. Rather, social movements and protests further polarise the divide between Green Radical and Democratic Pragmatist values.

Both the NCIP in the Philippines and the MVMRA in Canada are examples of top-down strategies for institutional design. The co-management boards of the MVMRA have the potential for discursive deliberation but may in fact serve to limit real empowerment “via integration in the Euro-Canadian context” (Ellis 2005:75). Carino (2005:39) regards the Philippines case as a failure to implement the “spirit” of FPI Consent as distinct from efforts to engineer consent and achieve formal compliance with the law. The weak structure of the NCIP renders it powerless in the face of government bodies and mining corporations which share a pre-determined agenda (Doyle 2009:63). There is therefore a need for ‘bottom-up’ strategies to allow FPI Consent to achieve its transformative potential. Strategies for inclusion which are primarily top-down risk making participants feel like they have been disempowered through their participation (Cheney et al 2002:21). The success of social movements in the Philippines highlights the ability of bottom-up processes in achieving empowerment and FPI Consent. However, both cases demonstrate the difficulties in achieving legal pluralism and incorporating

customary practices for decision-making within institutional frameworks based on rational choice and efficiency.

The Canadian case study further demonstrates O'Faircheallaigh's (2009) assertion that participatory framings should resist rigid classification and allow for the dynamic processes and political pressure that come with the opportunity for participation. The true deliberative potential of participatory forums may rest with the flexibility of their institutions rather than legislative definition. This is seen clearly in Fitzpatrick et al's (2008) assessment of MVRMA which demonstrates social learning and the gradual institutionalisation of deliberative norms. Thus, institutions which "prescribe neither process nor outcome" (Flyvbjerg 1998:223) may, in a Foucauldain manner, provide the best approach for Green Radicals seeking to restructure liberal capitalist power relations.

4.2 CONCLUDING REMARKS AND RECOMMENDATIONS

The theoretical development of the concept of FPI Consent is still in its infancy. The legacy of participation's ambiguity makes it increasingly important for FPI Consent's values and operational elements to be identified. This study aimed to analyse the participatory framing of FPI Consent through its discourse motivations and institutional design features. The relationship between these two variables has been demonstrated as the participatory forums are shown to reflect the strategic motivations and values of their design processes. The political economic context of the mining industry and the constructivist approach towards democratising environmental decision-making highlight the issues involved in FPI Consent. Mining's economic, social and environmental impacts divide Democratic Pragmatists and Green Radicals despite the efforts by both to situate their values within a framework of Sustainable Development. This study draws two conclusions, the first broad and the second specific to FPI Consent.

The first can be stated briefly. Discourses are permeated by power inequalities which impact upon participatory framings. Institutional designs can be analysed as a reflection of the discourses they embody. As related to participation, this 'decentred power', in Nelson and Wright's (1995) analysis, necessarily affects the ability of participants to achieve 'power over' decision-making. The dominant discourse identified in this study, that of industrialism and the liberal democratic capitalist status quo, should properly be considered as the point from which new discourses on the environment diverge (Dryzek 2005). Deliberative forums have the potential to

bring together divergent discourses as participants are open to change their perspectives and norms. Deliberation should not necessarily seek to achieve consensus but “workable agreements in which participants agree on a course of action, but for different reasons” (Dryzek 2000:170). However, in most cases, a power deferential exists between perspectives regarded as the ‘norm’ and those regarded as ‘additional’ to that norm (Isaksson et al 2009:301).

This first conclusion provides the basis for the second, namely that advocates of FPI Consent threaten the power structures and discourses embedded within the Western Industrialism context of economic growth and economic development and are thus restricted in their institutional design. Science has traditionally been employed as a tool in the industrial complex within a discourse of technocratic policymaking and Administrative Rationalism. Efforts to democratise environmental policymaking and science reflects a desire to give equal weight to marginalised discourses, values and knowledge. However, that values inherent to FPI Consent are difficult to equate with industrialism and economic growth mirrors the fact that equitable social and human development can be difficult to equate with quantifiable economic objectives. Hughes (2000) remarks that the situation demonstrated in the Philippines is not unique, as many countries seeking to achieve economic growth tend to violate the human rights of their underrepresented minorities. “The conflict is an unfortunate one between competing interests, all of which have been recognised as legitimate in the international arena” (ibid. 21). FPI Consent may be seen as a reaction to the politicisation of mineral development and the surrounding risk complex, which has polarised the mining debate into ‘for’ and ‘against’ camps and, arguably, undermined the ability to make rational judgements based on individual project circumstances (cf. Smith 2006). Marvic Leonen, Executive Director of the Philippine’s Legal Rights and Natural Resources Centre, considers the existence of endemic poverty to put too much economic and political pressure on communities’ ability to exercise the right to FPI Consent (ESSC 1999:33):

> “Liberal concepts such as free and informed consent will not work under conditions where the government is closely abdicating its role in actively and immediately equalising economic opportunities”.

The potential of deliberative forums is thus limited by extreme differences in power, position and worldviews (Dryzek 2009:296). Despite efforts to reconfigure socio-political power relations within a Green Radical discourse, governments maintain the dominance of the liberal capitalist, industrial discourses. These discourses continue to structure the procedures and institutions of environmental governance. FPI Consent challenges the values and beliefs of both the industrial complex and the institutions that uphold them. Achieving

empowerment and equal bargaining power under this participatory framing may require the establishment of objectives and practices that oppose the status quo. “The problem is partly one of very different and seemingly incompatible systems of understanding, and fundamentally one of power” (Ellis 2005:75). Mechanisms to adopt FPI Consent are inevitably couched in the terms of the industrialism complex. Attempts to successfully incorporate FPI consent into national legal frameworks and institutional designs requires a shift in discourse towards Green Radicalism, which targets a shift in the balance of power, values and practices that underlie environmental decision-making. Thus the ‘decentred power’ to which Nelson and Wright refer is identified as the preliminary competent of successful deliberative forums.

In conclusion, participatory framings such as FPI Consent and Consultation involve process of knowledge creation, community formation and expert institutionalisation which “are themselves deeply political exercises, with substantial implications for broader debates concerning how people of vastly unequal technological capacity and means are going to live together on the planet” (Jasanoff and Wynne 1998). Rationalising FPI Consent within a discourse of Green Radicalism better aligns with the values of its advocates and the institutional designs needed to achieve its goals. Discursive platforms for combining the values inherent in FPI Consent and FPI Consultation are needed to identify a juncture for competing worldviews. In operationalising the values and principles of FPI Consent, proponents should seek flexible designs that allow for deliberative norms to develop within the dominant liberal capitalist status quo and recognise the limits in prescribing legal frameworks within top-down strategies. FPI Consent can thus further be considered a debate within the literature on capacity-building and the strengthening of civil society.

APPENDIX

LAWS AND CONVENTIONS INCLUDING FPI CONSENT

INTERNATIONAL

Convention on Biological Diversity

Convention to Combat Desertification

European Union Resolution Indigenous Peoples within the framework of the development cooperation of the Community and Member States 1998

Inter-American Commission on Human Rights

Inter-American Development Bank

International Labour Organisation Convention 169

International Petroleum Industry Environmental Conservation Association and the International Association of Oil & Gas Producers

IUCN Vth World Parks Congress

Organization of African Unity

UN Centre for Transnational Corporations

UN Commission on Human Rights, Special Rapporteur on situation of the rights and fundamental freedoms of indigenous people

UN Committee on Economic, Social and Cultural Rights

UN Committee on the Elimination of Racial Discrimination

UN Development Programme

UN Permanent Forum on Indigenous Issues

UN Sub-Commission on Promotion and Protection of Human Rights

UN Working Group on Indigenous Populations

World Commission on Dams

NATIONAL

Australia: Aboriginal Land Rights (Northern Territory) Act of 1976

Philippines: Indigenous Peoples Rights Act of 1997

BIBLIOGRAPHY

Acemoglu, D., Johnson, S. and Robinson, J.A. (2001) "The colonial origins of comparative development: an empirical investigation" *American Economic Review*, 91, 1369-1401.

Armitage, D.R. (2005) "Collaborative environmental assessment in the Northwest Territories, Canada" *Environmental Impact Assessment Review*, 25, 239–258.

Arnstein, S.R. (1969) "A ladder of citizen participation" *American Institute of Planners Journal,* 35:4, 216–224.

Bass, S., Parikh, P.S., Czebiniak, R. and Filbey, M. (2004) "Prior Informed Consent and Mining: Promoting the Sustainable Development of Local Communities" *Environmental Law Institute*. Washington D.C. Available at http://www.elistore.org/reports_detail.asp?ID=10965.

Biggs, S. (1989) "Resource-poor farmer participation in research: A synthesis of experiences from nine national agricultural research systems", *OFCOR Comparative Study Paper*, 3:37.

Bridge, G. (2004) "Mapping the Bonanza: Geographies of Mining Investment in an Era of Neoliberal Reform", *The Professional Geographer*, 56:3, 406-421.

Carino, J. (2005) "Indigenous Peoples' Right to Free, Prior, Informed Consent: Reflections on Concepts and Practice". Talk delivered to AALS Annual Conference. Available at http://www.law.arizona.edu/journals/ajicl/AJICL2005/vol221/Carino%20Formatted.pdf.

Cheney, H., Lovel, R., and Solomon F. (2001) "People, Power, Participation: A Study of Mining-Community Relationships". Paper Commissioned for the Mining, Minerals and Sustainable Development Project, International Institute for Environment and Development. Available at http://www.iied.org/sustainable-markets/key-issues/business-and-sustainable-development/mmsd-working-papers.

Cleaver, F. (2000) "Moral Ecological Rationality: Institutions and the Management of Common Property Resources" *Development and Change*, 31:2, 361-83.

Cleaver, F. (2001) "Institutions, Agency and the Limitations of Participatory Approaches to Development" in Cooke, B. and Kothari, U. (eds) Participation: The New Tyranny, Zed Books: London.

Coehlo, V.S. and Favareto, A. (2008) "Questioning the Relationship between Participation and Development: A case study of the Vale do Ribeira, Brazil" *World Development*, 36:12, 2937–2952.

Colchester, M. and Ferrari, M.F. (2007) "Making FPIC Work: Challenges and Prospects for Indigenous Peoples", Forest Peoples Programme: Moreton-in-Marsh. Available at http://www.forestpeoples.org/documents/asia_pacific/bases/philippines.shtml.

De Beers Canada Mining Inc. (2002) "Snap Lake Diamond Project Environmental Assessment Report", Yellowknife: De Beers Canada Mining Inc.

Doyle, C. (2009) “Indigenous peoples and the Millennium Development Goals - 'sacrificial lambs' or equal beneficiaries?” *The International Journal of Human Rights*,13:1,44-71.

Doyle. C, Wicks, C. and Nally, F. (2007) *Mining in the Philippines: Concerns and Conflicts*, Solihull, UK: Columban Fathers. Available at http://www.piplinks.org/miningorfood.

Dryzek, J.S. (2000) *Deliberative democracy and beyond: liberals, critics, contestations*. Oxford: Oxford University Press.

Dryzek, J.S. (2005) *The politics of the earth : environmental discourses*, New York: Oxford University Press, 2nd Edition.

Ellis, S. (2005) “Meaningful Consideration? A Review of Traditional Knowledge in Environmental Decision Making” *Arctic* 58:1, 66-77.

Environmental Science for Social Change (1999) *Mining Revisited*, Emiluz Printing Industries: Philippines. Available at http://essc.org.ph/content/category/4/13/46/.

Fitzpatrick, P., Sinclair, J. and Mitchell, B.(2008) “Environmental Impact Assessment Under the Mackenzie Valley Resource Management Act: Deliberative Democracy in Canada’s North?” *Environmental Management* 42:1–18.

Flyvbjerg, B. (1998) “Habermas and Foucault: Thinkers for Civil Society?” *Journal of Sociology*, 49:2, 210-233.

Funtowicz, S. O., and Ravetz, J.R. (1992) “Three types of risk assessment and the emergence of post-normal science” in Krimsky, S. and Golding, D., (eds). *Social theories of risk*. Westport, CT: Praeger.

Goodland, R. and Wicks, C. (2009) “Philippines: Mining or Food?” *The Working Group on Mining in the Philippines*. Available at http://workinggrouponmininginthephilippines.blogspot.com.

Harriss, John (2003) “Contextualising the commons : a note on the study of culture, power and institutions” in *Conversations Between Economists and Anthropologists II*. Available at http://eprints.lse.ac.uk/485/.

Hipwell, W., Mamen, K., Weitzner, V. and Whiteman, G. (2002) “Aboriginal Peoples and Mining in Canada: Consultation, Participation and Prospects for Change” *Working Discussion Paper for the North South Institute*. Available at http://www.nsi-ins.ca/english/pdf/syncanadareport.pdf.

Holden, William N. (2005) “Indigenous peoples and non-ferrous metals mining in the Philippines”, *The Pacific Review*, 18:3, 417-438.

Holland, J., Brocklesby, M.A. and Aburge, C. (2004) “Beyond the technical fix? Participation in donor approaches to rights-based development” in Hickey, S. and Mohan, G. (eds) *Participation: From Tyranny to Transformation? Exploring New Approaches to Participation in Development*, Zed Books: London.

Hughes, M.L. (2000) "Indigenous Rights in the Philippines: Exploring the Intersection of Cultural Identity, Environment and Development" *Georgetown International Environmental Law Review,* 13, 3.

IFC (2007) "Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets", *International Finance Corporation*. Available at http://www.ifc.org/ifcext/sustainability.nsf/ContentPageDesignPreview/Publications_GoodPractice_StakeholderEngagement.

INAC (Indian and Northern Affairs Canada) (2009) "Federal Framework for Aboriginal Economic Development". Published under the authority of the Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians. Available at http://www.ainc-inac.gc.ca/ecd/ffaed1-eng.asp.

IIED (International Institute for Environment and Development) (2002) *Breaking New Ground: Mining, Minerals and Sustainable Development*. London, UK: Earthscan. Available at http://www.iied.org/mmsd/finalreport

Isaksson, K., Richardson, T., and Olsson, K. (2009) "From consultation to deliberation? Tracing Deliberative norms in EIA frameworks in Swedish roads planning" *Environmental Impact Assessment Review*,29, 295-304.

Jasanoff, S and Wynne, B (1998) "Science and decision-making", in Rayner, S and Malone, E. (eds) *Human Choice and Climate Change Vol.1 The Societal Framework*. Columbus, Ohio: The Battelle Press.

MacKay (2004) "Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review", *Sustainable Development Law and Policy*, 4, 43-65.

Martin, S., Vettori, L. and McLeod, J. (2007) "Mining Ombudsman case report: Didipio gold and copper mine", Oxfam Australia: Australia. Available at www.oxfam.org.au/campaigns/mining.

Meinzen-Dick, R.S. and Pradhan, R. (2002) "Legal Pluralism and Dynamic Property Rights" CAPRi Working Paper No. 22. Available at http://www.capri.cgiar.org/pdf/capriwp22.pdf.

Mosse, D. (1997) "The Symbolic Making of a Common Property Resource: History, ecology and locality in a tank-irrigation landscape in South India" *Development and Change*, 28:3, 467-504.

Mosse, D. (2001) "People's Knowledge, Participation and Patronage: Operations and Representations in Rural Development" in Cooke, B. and Kothari, U. (eds) *Participation: The New Tyranny*, Zed Books: London.

MVEIRB (Mackenzie Valley Environmental Impact Review Board) (2003) "Local government and the MVRMA". Available at www.meirb.nt.ca/HTML/MVEA/localgov.asp.

Nelson, N. and Wright, S. (1995) "Participation and power" in Nelson, N. and Wright, S. (eds) *Power and Participatory Practice*, IT Publications: London.

O'Faicheallaigh, C. (2009) "Public participation and environmental impact assessment: Purposes, implications, and lessons for public policy making" *Environmental Impact Assessment Review*.

Ostrom, E. (1990) *Governing the Commons: The Evolution of Institutions for Collective Action*. New York: Cambridge University Press.

Paguet, D. (2009) Personal Communication.

Render, J.M. (2004) "Mining and Indigenous Peoples Issues Review" Prepared for the International Council on Mining and Metals. Available at http://www.icmm.com/page/1161/mining-and-indigenous-peoples-issues-review.

Richardson , B.J. and Razzaque, J. (2005) "Public Participation in Environmental Decision-making" *Environmental Law for Sustainability*. Available at http://osgoode.yorku.ca/osgmedia.nsf/0/88A128A17FD77C39852571DA00662EC6/$FILE/07_ch-06.pdf!OpenElement.pdf.

Rovillos, R.D., Ramo, S.B. and Corpuz, C. (2003) "When the 'Isles of Gold' turn into Isles of Dissent: A Case Study on the Philippine Mining Act of 1995" Presented to the EIR's Eminent Person and participants at the meeting on Indigenous Peoples, Extractive Industries and the World Bank. Available at http://www.forestpeoples.org/documents/asia_pacific/bases/philippines.shtml.

Shinya, W.M. (1998) "Canada's new minerals and metals policy: Advancing the concept of sustainable development in the minerals and metals industry" *Resources Policy*, 4:2, 95-104.

Simms, M. (2009) "Moving FPIC from the fringes to the centre stage: Exploring the context of opposition and opportunity in Canada", Prepared for the International Conference on Extractive Industries and Indigenous Peoples, Manila. Available at http://www.tebtebba.org/index.php?option=com_docman&task=doc_details&gid=362&Itemid=27.

Smith, J. (2006). "The challenge of sustainable local development at the site of the Tampakan Copper Project in the Philippines". PQDT - UK & Ireland.

Stothart, P. (2008) "Facts & Figures 2008: A report on the Canadian mining industry", The Mining Association of Canada. Available at http://www.mining.ca/www/media_lib/MAC_Documents/Publications/2008/08_FFeng.pdf.

Sustainability Perspectives (2008) "Winning the social licence to operate: Resource extraction with free, prior and informed community consent", The Ethical Funds Company. Available at https://www.ethicalfunds.com/SiteCollectionDocuments/docs/FPIC.pdf.

UN Observer Delegation of Canada (2005) Statement by the Observer Delegation of Canada United Nations Permanent Forum on Indigenous Issues Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples, New York, January 17 - 19, 2005. Available at http://www.ainc-inac.gc.ca/ap/ia/stmt/unp/05/fpi/mrf-eng.asp.

UNHCR (2008) "NGO Submission to the Human Rights Council Universal Periodic Review Mechanisms" UPR 1st Session, 7th – 18th April 2008, Philippines. Available at http://www.upr-info.org/IMG/pdf/CAFOD_PHL_UPR_S1_2008_CatholicAgencyForOverseasDevelopment_etat_uprsubmission.pdf

Weitzner, V. (2009) "Bucking the Wild West - Making Free, Prior and Informed Consent Work" Speaking Notes for Free, Prior and Informed Consent Panel, Prospector and Developer's Association of Canada annual convention. Available at http://www.nsi-ins.ca/english/pdf/PDAC_FPIC_%20panel_%20feb_%202009.pdf.

White, G. (2006) "Cultures in Collision: Traditional Knowledge and Euro-Canadian Governance Processes in Northern Land-Claim Boards" *Arctic*, 59:4, 401-414.

WISE Uranium Project (2009), "New Uranium Mining Projects - Northwest Territories & Nunavut, Canada". Available at http://www.wise-uranium.org/upcdnnn.html

World Bank Group (2004) "Striking a better balance: the World Bank Group and extractive industries: The final report of the extractive industries review, World Bank Group Management response" The World Bank Group. Available at http://www.ifc.org/ifcext/eir.nsf/AttachmentsByTitle/FinalMgtResponseExecSum/$FILE/finaleirmanagementresponseexecsum.pdf.

World Commission on Dams (2001) *Dams and Development: A New Framework for Decision-Making – The Report of the World Commission on Dams*. London, UK: Earthscan Publications Ltd. Available at http://www.dams.org .

For the Indigenous Peoples Rights Act of 1997 and its Implementing Rules and Regulations see http://www.ncip.gov.ph/downloads/irr.pdf.