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**Transnational Social Justice and the Forest Stewardship
Council's Endorsement
of Free, Prior and Informed Consent**

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The TBGI Project: Transnational initiatives to regulate business activities interact increasingly with each other and with official regulation, generating complex governance ensembles. Heterogeneous actors and institutions interact at multiple levels and in various ways, from mimicry and cooperation to competition and conflict. The TBGI Project investigates the forms, drivers, mechanisms, dynamics, outputs and impacts of transnational business governance interactions (TBGI) from diverse theoretical and methodological perspectives. It is led by Stepan Wood, Professor and Canada Research Chair in Law, Society and Sustainability at the Peter A. Allard School of Law, University of British Columbia.

Transnational Social Justice and the Forest Stewardship Council's Endorsement of Free, Prior and Informed Consent

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Abstract

This chapter analyzes the adoption, development and promotion of the emerging customary international legal norm of indigenous peoples' free, prior and informed consent (FPIC) by the Forest Stewardship Council (FSC). This case reveals how transnational business governance interactions can offer an avenue to develop, import and apply elements of the powerful international discourse of human rights inside states, with the potential of strengthening domestic standards and advancing marginalized actors. It also offers insight into the influential role that can be played in these interactions by a class of non-state actor often neglected in accounts of transnational governance: the transnational indigenous peoples' movement. Indigenous representatives and their allies leveraged FSC's inclusive governance structures, the moral force of international human rights law, and interactions between FSC International and FSC Canada to strengthen the FPIC norm in FSC standards. This has led to the FSC's advocacy of a strengthened and enriched version of FPIC that compares favorably with the most robust readings of FPIC by international organizations and states, situates FSC Canada at the leading edge of indigenous rights norm development in transnational governance, and opens an avenue toward a *de facto* requirement for ongoing indigenous consent to forestry operations in Canada.

Keywords

Forest Stewardship Council (FSC); indigenous peoples; free, prior and informed consent (FPIC); customary international law; transnational business governance interactions

1. Introduction

The question of whether the burgeoning human rights commitments of private transnational actors could impact public governance of social justice issues opens a new vista of dangers and empowering possibilities. On the one hand, worries about public interest consequences of private actors' standard-setting are often connected with the perceived absence of traditional rule of law requirements that legitimize rule-making by governments, such as checks and balances, accountability and transparency. Such concerns can also arise from another kind of absence: a popular mandate for promotion of a social justice agenda that may not align with local or national values, and could be regarded as reflecting alien and regionally inappropriate priorities. On the other hand, rights-enhancing possibilities created by the impact of private transnational organizations' standard-setting on public governance can flow from the effective establishment of just such a mandate, and from the opportunities for the empowerment of marginalized actors that could result.

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This chapter offers a preliminary analysis of a phenomenon that abides at the intersection of these dangers and possibilities: the adoption and development of an emerging customary international legal norm by a transnational hybrid actor. It surveys the promotion by the Canadian chapter of the Forest Stewardship Council (FSC) of the norm of free, prior and informed consent (FPIC) where indigenous peoples' rights and entitlements are at stake. In recent years, the much-studied, multi-stakeholder FSC revisited its early interpretation of FPIC as part of an extensive internal review process. This led to its advocacy of a strengthened and enriched version of the FPIC norm that compares favorably with the most robust readings of FPIC by international organizations and states, and situates the FSC, and especially FSC Canada, at the leading edge of indigenous rights norm development in transnational governance.

The FSC's recent history reveals how transnational business governance interactions can offer a means for developing, importing and applying elements of the powerful international discourse of human rights within states, with the potential to strengthen domestic standards and empower weaker actors. Additionally, it offers insight into the influential role that can be played in these interactions by a class of non-state actor often neglected in theories of standard-setting through transnational governance – the transnational indigenous peoples' movement.

The chapter argues that human rights commitments by private transnational actors can impact public governance of social justice issues -- but indirectly, through their contribution to the evolution of customary international law. It introduces three linked hypotheses in support of this claim, based on the author's qualitative research, which included interviews with members and officials of FSC Canada and FSC International, and indigenous forestry initiatives:

- (1) By changing the frame of reference used to assess the human rights and ecosystem impacts of forest development in accordance with emerging norms of customary international law, FSC Canada's regulatory standard-setting (RSS) process serves as an alternative non-state route to establishing a *de facto* veto for indigenous peoples over forest development projects in Canada.
- (2) FSC Canada and FSC International's development of a robust reading of FPIC is a manifestation of a broader campaign led by the global indigenous peoples' movement¹ to use international human rights law as a tool for advocating for specifically indigenous rights, drawing in part on indigenous legal norms.
- (3) This movement has the potential to impact the core meaning of indigenous legal rights such as FPIC in customary international law, making what H.L.A. Hart (1958, p. 607) would have called 'penumbral' interpretations of FPIC more widely accepted.

This chapter ventures into this arena by exploring the cross-cutting influences among iterative normative interactions between emerging customary international law fostered by international organizations, and a transnational private actor – the FSC. In order to understand these interactions and their outcomes, it further sketches the main routes of intra-institutional interactions among norm entrepreneurs in subunits of FSC International and FSC Canada.

It looks at two types of interactions: those between a norm of emerging customary international law and a transnational private governance institution, and interactions among subunits of that organization, in order to develop hypotheses about two issues central to the TBGI project. These issues are: (1) what conditions within a transnational private governance institution enable marginalized actors to engage in strategic interactions intended to improve social justice outcomes; and (2) how transnational business governance interactions (TBGIs) are impacted by processes of customary international law formation, and perhaps impact those processes in turn (customary international law being one of the traditional sources of transnational governance).

This chapter argues that through their contributions to the evolution of customary international law, the human rights commitments of private transnational actors do impact public governance of social justice issues in practice. This preliminary study forms part of a larger project

seeking to reconceptualize the conventionally-recognized sources of international law so that theory better aligns with real-world practice. It has been widely-recognized for some time that international lawmaking is no longer the exclusive purview of states, if indeed it ever was (Alvarez 2006; Paust 2011); this chapter's line of research contributes to a much broader effort that owes much to Third World Approaches to International Law (TWAIL) and the work of Martti Koskenniemi, Benedict Kingsbury and José Alvarez, and that marks Jean d'Aspremont, James Anaya, Eyal Benvenisti and Anne Peters among its fellow travellers.

In order to gain theoretical purchase on the interactions among international legal norms, private governance norms, and domestic state law standards, I will turn to the work of H.L.A. Hart in an investigative mode. The impact of these varied iterative and mutually ramifying processes of norm consolidation on the content of FPIC is helpfully illuminated by Hart's conception of core and penumbra. Hart argued that the 'open-textured' nature of natural language means that words and concepts have 'a core of settled meaning,' but that this core about which no controversy exists will shade into more ambiguous cases in which the applicability of a proffered interpretation is debatable. He termed this zone of contested interpretations the penumbra (Hart 1958, p. 607).

Applying Hart's concepts and contemporary international legal theory to the case of the FSC and FPIC, this chapter offers insights into promising mechanisms for empowering marginalized interests through transnational business governance interactions. Among the most significant of these insights are:

- (1) that the FSC's participatory governance features play a key role in facilitating marginalized actors' creation of opportunities for norm entrepreneurship within the organization (the focus of attention here is on 'what interacts' (Eberlein et al. 2014, p. 7)--actors and sub-units within and between a 'parent' transnational organization and its national affiliate);
- (2) that successful intra- and inter-organizational norm entrepreneurship employed an international legal norm and leveraged the moral suasive force of its association with the international discourse of human rights through an alignment of interests and values; and
- (3) that this may have impacted and strengthened the international legal norm of FPIC itself.

2. The FSC's Transnational Business Governance Interactions

FSC International is a hybrid civil society-business NGO established in 1993,² following the Earth Summit convened by the United Nations (UN) in Rio de Janeiro the previous year. The FSC sets voluntary transnational standards for forest management, chain of custody and traceability. Compliant forestry industry actors are eligible for FSC certificates that provide evidence of social and environmental responsibility. Auditing and certification are performed by third-party organizations accredited by the FSC. The organization is funded in large part by corporate and private charitable funds committed to sustainable development and conservation, along with revenues generated from certification fees. As of April 2019, the global forest area certified by the FSC comprised about 198 million hectares in 84 countries. There were 50.7 million hectares of FSC-certified forests in Canada, representing 15 per cent of all Canadian forests and 26 per cent of the total FSC certified area (FSC International 2019a). Total certified area in Canada grew rapidly from 30 569 hectares in 1998 to 23.3 million hectares in 2008 to 50.7 million hectares in early 2019, an increase of 163 455 per cent in two decades (FSC International 2019a, b).

The FSC's original regulatory standard-setting (RSS) practice was based on two of the aspirational outcome documents of the Earth Summit: the Forest Principles and Agenda 21. The core elements of the organization's certification scheme are described in its ten (originally nine) FSC Principles and accompanying Criteria (P&C) (FSC International 2015).

FSC International's original commitment to respect the rights of indigenous peoples was contained in Principle 3, which asserted that '[t]he legal and customary rights of indigenous peoples

to own, use and manage their lands, territories, and resources shall be recognized and respected' (Principle 3, in its original form). This goal was to be achieved by recognizing that 'Indigenous peoples shall control forest management on their lands and territories unless they delegate control with free and informed consent to other agencies' (Criterion 3.1, in its original form). This language and aspiration followed those of the Earth Summit documents that were cited as the Principle's inspiration.

Over the past two decades the FSC has continued to develop the P&C through a recursive process involving substantial grassroots input. All aspects of the FSC framework are subject to periodic review and revision, with extensive field testing, public and stakeholder consultations, and educational and consensus-building discussions. The aim of this inclusive system of adaptive improvement is effective implementation and increasing uptake of the FSC's normative framework.

The FSC Principles constitute the fundamental rules of forest stewardship. The Criteria elaborate and contextualize the principles. Indicators for each criterion provide performance direction to FSC certificate applicants and auditors. The P&C apply globally and may not be altered at the national or subnational levels. They are elaborated through international generic indicators (IGIs). National forest management standards have been developed in many countries to customize the application of the global P&C and IGIs to fit local conditions. This is accomplished through the development of additional indicators, verifiers and norms, as well as guidance documents and interpretations. All of these bespoke elements that tailor the international P&C and IGIs to particular national contexts are subject to approval by FSC International's Policy and Standards Unit and the FSC International Board's Policy and Standards Committee.

FSC International has a participatory, multi-chambered governance structure involving environmental, economic and social representatives from the global South and North. This tri-chamber governance structure is reproduced at the level of its national organizations. The FSC performs legislative, executive, and judicial functions at both levels, and is organized hierarchically. The highest-order legislative body is FSC International's General Assembly, which meets roughly bi-annually. The General Assembly debates and votes on policy resolutions, and elects the organization's nine-person Board of Directors. The Board fulfills the role of executive branch for the organization, and its membership is balanced with respect to both the three chambers (economic, social, and environmental) and Global North and South. The social chamber has special responsibility for indigenous issues; in addition, since 2011 the original three chambers have been complemented by the Permanent Indigenous Peoples Committee at the international level.

Uniquely in Canada, a fourth Aboriginal chamber participates equally alongside the standard three chambers. The FSC Canada General Assembly meets annually, and an executive director reports to the chamber-balanced FSC Canada Board of Directors. At both the international and national levels, a small secretariat assists the executive branch. In addition, should differences of interpretation arise concerning any aspect of the FSC's forest management framework, there is a sophisticated system of dispute resolution that includes rapid resolution requirements at every stage and emphasizes consensual outcomes. This system provides for appeals up to the level of FSC International, as well as (in recent years) culturally sensitive dispute resolution mechanisms for indigenous peoples and local communities.

FSC Canada, like the FSC's other national organizations, is involved in both international standard-setting and the generation and refinement of national and local implementation guidelines. This bottom-up institutional governance process has enabled the enhancement of the FPIC requirement and the deepening of the emphasis on the connection between the FSC's recognition and enforcement of FPIC, on the one hand, and the international legal norms discussed below, on the other.

3. Evolution of the FSC's Policy on Indigenous Consultation

From its inception, the FSC committed to developing its standard for forest management to reflect evolving environmental, social, legal and economic circumstances. This commitment has been expressed both through FSC International's revisions of the P&C, and the creation and modification of customized local standards that adapt the international P&C to the realities of local conditions. The development of the FSC British Columbia (FSC BC) standard is a well-chronicled example of the latter process (for example, Tollefson, Gale & Haley 2008). The FSC BC standard and the people involved in its development had a major influence on subsequent revision of FSC International and FSC Canada approaches to indigenous engagement and indigenous rights. A short summary of the FSC BC development process is therefore in order.

Between 1996 and 2005, FSC BC developed a regional standard that included a robust interpretation of the requirement, outlined in original Criterion 3.1, to attain the 'free and informed consent' (FIC) of indigenous peoples (FSC International 2015, Criterion 3.1). This was consistent with the first objective in FSC BC's Statement of Purpose: '[e]nsuring that the rights and interests of indigenous peoples are recognized in certification initiatives' (FSC BC 2002, p. 6). The interpretation of FIC advocated by the steering committee and standards and technical advisory teams, which included significant involvement by indigenous actors (ibid, pp. 5-6), reinforced the idea that forest managers were expected to exceed existing legal requirements in these respects. Accordingly, the FSC BC regional standard states: '[u]nder no circumstances should certification proceed in the face of dissatisfaction of the affected First Nation(s) regarding management activities within the Management Unit' (FSC Canada 2005, p. 13). Further, the standard included a strong commitment to ecosystem-based management that reflected the approach being employed by indigenous communities in northwestern BC based on traditional knowledge of watershed-based management.³

This doubling down on FSC's commitment to recognize indigenous peoples' rights occurred in a climate of increasing indigenous activism in BC. Well-publicized litigation and protests opposing logging in old-growth forests during the 1970s and 80s led to judicial recognition of the continuing existence of Aboriginal title and rights.⁴ Aboriginal and treaty rights were affirmed in the 1982 Canadian Constitution.⁵ In this rapidly transforming legal and economic context, the government of BC agreed to open a treaty negotiation process to address the claims of the indigenous peoples of mainland BC whose land had never been ceded in any form to the Crown. Previously, the province had steadfastly refused to address indigenous land claims, partly on the ground that acknowledgement of indigenous rights and title would undercut the province's resource economy by creating an uncertain investment climate.

In a deliberate effort to create the conditions for better outcomes for indigenous peoples, FSC BC proposed to reverse the flow of interpretive authority regarding indigenous claims by beginning with the presumption that claims were legitimate and possessed legal significance, in line with the requirements established in ILO Convention 169 on Indigenous and Tribal Peoples (ILO C169)⁶ and the then-draft United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The standard developers used the draft UNDRIP as a guide in formulating the pivotal definitions of 'legal and customary rights' and 'land, territories and resources', stating that where treaty definitions of land, territories and resources are lacking, 'the default definitions used are the FSC-BC Glossary definitions and the geographic interpretations used are the First Nation(s)' interpretations' (FSC Canada 2005, p. 70). By aligning these definitions with the draft UNDRIP, FSC BC committed its regional organization to a strong reading of two concepts crucial for the meaningful application of FPIC. FSC BC also included an explanatory note in the standard guidance document indicating that forest managers were expected to respect 'all [relevant] binding international agreements,' even those to which Canada is not a party (ibid., p. 18). The document then listed ten such ILO Conventions, including ILO C169, that contained international legal norms that were binding on FSC-certified organizations. In this way, FSC BC established that certificate holders should comply with the best available international legal norms, even if this meant exceeding the domestic government's legal requirements for indigenous rights protection. Yet while FSC BC referenced 13

international legal sources in total that were relevant to forest managers, it did not detail how specific articles of these international legal sources impacted the responsibilities of forest managers. Thus, the elements for a justificatory narrative grounded in international law were present in FSC BC's standard, but they were not yet well developed as authorities for the shift to what came to be known as a free, *prior* and informed consent (FPIC) orientation.

However, key indigenous players in the BC process including Dave Monture, George Watts, Russell Collier, Russell Diabo and David Nahwegahbow, along with more recent FSC Canada members and allies including Bradley Young, Larry Joseph and Pamela Perreault, subsequently pursued the tactic of making more explicit these international legal grounds for a thematized recognition of indigenous rights generally and FPIC specifically. The achievements and lessons of the FSC BC process were transmitted by a committed group of actors through the participatory governance structures of the FSC, in which many of those listed above played and play formal leadership roles. They were further developed through outreach initiatives to encourage input from indigenous communities created in partnership with the National Aboriginal Forestry Association (NAFA) and an Indigenous Advisory Council jointly appointed by NAFA and the FSC (Tollefson, Gale & Haley 2008, p. 234). This body of practice and indigenous and non-indigenous expertise on FPIC were eventually determinative in shaping the revision of FSC International's P&C and IGLs that took place between 2009 and 2012.

This dramatic reimagining of the larger organization's procedures where indigenous rights were affected by certificate holders' operations was signalled by the creation of the Permanent Indigenous Peoples Committee in 2011, and the change of a single word in FSC International's P&C. 'Free and informed consent' of indigenous peoples in the original international standard became 'free, prior and informed consent' in the new standard (FSC International 2012b, Criteria 3.2, 3.3, 3.6, 4.2, 4.8), reproducing the terminology of UNDRIP. This seemingly minor addition was the tip of the iceberg: the new standard expanded the ambit of indigenous rights recognition by featuring FPIC requirements in five Criteria within two Principles. It emphasized the significance of engagement and consultation with indigenous peoples, clearly distinguished these from consent, and underscored the expectation of consent. To ensure that stakeholders understood these changes, FSC International not only produced new IGLs but provided a companion document to the new international standard offering guidance on implementing FPIC, which included an expanded definition of and justification for the indigenous consent requirement, and highlighted and explained the international legal grounds for the right to FPIC (FSC International 2012a).

In Canada, the principles that guided the FSC BC process and shaped the international standard and IGLs continued to have an impact, most notably on the development of a new consolidated national forest management standard, the evolution of the customized FSC Canada guidelines on FPIC, the restriction of the application of the concept of FPIC to indigenous peoples, the development of the concept of indigenous cultural landscapes (ICLs) and the revision of dispute resolution mechanisms (FSC Canada 2016b).

Since 2012, FSC Canada has taken the lead on the policy of implementing a 'mainstreamed' version of FPIC – comprehensively revising all FSC Canada standards and policies to align them with the FPIC requirements in the new international standard (which was updated in 2015) and to adapt them to the complex legal landscape of Aboriginal rights in Canada. This included development of the first national guidance on FPIC, which identifies 23 indicators across four Principles in the draft FSC Canada National Standard that are 'relevant to the FPIC process,' and provides a foundation for mainstreaming FPIC in an appendix of 25 applicable UNDRIP articles and 13 applicable ILO C169 articles (ibid., pp 25, 27, 28). The development and implementation of the new national standard entailed an exhaustive process including extensive consultation with stakeholders and donors, and a testing phase incorporating 23 separate trials in public and private forests across the country, both FSC-certified and non-certified, with significant indigenous community participation (FSC Canada 2018a, p. 4). As a result, the new Canadian national standard underwent substantial changes from one draft to the next. The draft was finalized and submitted to FSC International for approval in 2018

(FSC Canada 2018b). As of January, 2019, FSC Canada expected FSC International's outstanding concerns to be resolved shortly (FSC Canada 2019).

Two key changes introduced through this process were (1) a crucial refinement of the conception of FPIC through a restriction of its application to indigenous peoples, and (2) the introduction of the analytical category of 'indigenous cultural landscapes' (ICLs).

The first change was a reaction to developments at FSC International. In the revised P&C approved in March 2012, FSC International expanded the scope of FPIC and developed criteria for determining the circumstances in which consent is required, as well as emphasizing the need to obtain consent before commencing management activities (FSC International 2012b). In a guide on implementing FPIC released the same year, FSC International asserted that revisions to the recognition of indigenous FPIC flowed from the fact that 'it is a right under international law and is an expression of indigenous peoples' collective right to self-determination,' as well as, in some cases, FPIC's enshrinement in national legislation (FSC International 2012a, p. 16). In addition, the revised P&C and the FPIC implementation guide extended FPIC beyond indigenous peoples, explicitly requiring FSC certificate holders to recognize and address the right to FPIC of local communities whose interests might be impacted by forest management (FSC International 2012a, p.6; 2012b, pp. 15-16). The decision to apply FPIC to local communities was not grounded in any legal right in international or domestic law, but rather based on FSC International's support for such a right for these groups.

This broadening of the scope of FPIC was congruent with the *UN REDD Guidelines on Free, Prior and Informed Consent* (UN-REDD Programme Secretariat 2013), the authoritative source on FPIC at the time. However, in consultation with members, FSC Canada's national standard development group introduced a dramatic rollback of this change that underscores the distinctively indigenous nature of the right of FPIC in the Canadian context. Based on the rationale that local communities already possess legal rights rooted in 'general human rights and access to public land,' and that no customary rights have been identified for Canadian local communities to date, FSC Canada's December 2016 summary of key changes in its new Forestry Management Standard stated: '[t]his means that the Free, Prior and Informed Consent concept will not be applicable for local communities in this version of the FSC Canada National Forest Management Standard, and will be applicable only to Indigenous Peoples' (FSC Canada 2016a, pp. 8, 9).

In a policy motion passed at its 2014 general assembly, FSC Canada committed itself to ensuring that the existence of large-scale, intact forest landscapes are taken into account whenever it considers any change to indicators within standards, with the goal of ensuring minimal disturbance to ecosystems that have not been significantly altered by human economic activity. The Aboriginal chamber put forward the concept of ICLs as a means of implementing FPIC within the motion, and as an alternative forest management method led by indigenous peoples. The concept affirms the ongoing normative significance of traditional indigenous land management systems and their relevance to RSS:

Indigenous Cultural Landscapes are living landscapes to which Indigenous peoples attribute social, cultural and economic value because of their enduring relationship with the land, water, fauna, flora and spirits, and their present and future importance to their cultural identity. An ICL is characterized by features that have been maintained through long-term interactions with the landscape based on land-care knowledge, and adaptive livelihood practice. They are landscapes over which Indigenous peoples exercise responsibility for stewardship. (FSC Canada 2016c, pp. 1-2).

Both of these revisions to the FSC Canada guidelines valorize indigenous legal norms, and this entails a radical reconceptualization of the normative framework employed by FSC certificate holders. The negotiation process during the implementation phase was eventful, for this reason and others, resulting in a number of significant shifts from Draft 2 to the final draft of the national

standard. These include attention to the impact that FPIC rights will have on privately-owned forests, increased acknowledgement of the challenges posed if indigenous communities impacted by forest management activities choose not to participate in FSC FPIC processes, and decisions to develop a simplified certification process for smallholders and to continue working on the ICLs concept until 2019 (FSC Canada 2018c). The focus of the national standard remains on benefit sharing and relationship-building with indigenous peoples impacted by forest management activities, and a fundamental commitment not to proceed with forest development without indigenous consent (or acquiescence, in the case of indigenous non-engagement in FPIC processes). In discussing the standard at the 2018 annual general meeting, members of FSC Canada's leadership referred routinely to embedding the international legal norms contained in UNDRIP and ILO C169 in the national standard; the consensus view among them appeared to be that FPIC and indigenous legal normativity are now so deeply interwoven throughout the standard that no revision could reverse their cumulative effect.⁷ The results of this extraordinary effort will be determined by FSC International when its Policy and Standards Committee decides whether to remove the outstanding conditions on final approval of the proposed Canadian National Standard.

This preliminary research suggests that by changing the frame of reference used to assess the human rights and ecosystem impact of forest development, FSC Canada's RSS process serves as an alternative route to establishing a *de facto* veto for indigenous peoples over forest development projects in Canada, and does so in part, on the basis of indigenous legal norms. As discussed below, a requirement for ongoing consent has proven to date to be unattainable via state-sponsored channels of public policy negotiation.

Interview subjects involved in FSC Canada and FSC International explained the FSC's steadfast commitment to Principles, Criteria and indicators that operationalize FPIC and related indigenous norms by saying that they seek to implement 'the highest standards' in their work.⁸ They spoke of a sense of obligation to put into practice international human rights norms. One FSC Canada employee described the organization as involved in a process of clarification and anticipation of the development of international human rights standards, and another member spoke of the organization as being subject to international legal norms.⁹ Those interviewed consistently felt they did this work with a high degree of legitimacy because of the participatory, democratic structure of FSC's national and international organizations.

4. FPIC's Origin in International Law

FPIC's origin in contemporary international law lies in the right of informed consent established by the International Labour Organization's Convention (No. 107) on Indigenous and Tribal Populations of 1957 (ILO C107).¹⁰ The Convention recognizes indigenous rights to land and rejects coerced assimilation or displacement of indigenous communities. Article 12.1 states that indigenous peoples 'shall not be removed without their free consent from their habitual territories', except where government development of those lands is the justification. ILO C107's authority is, however, diminished by the fact that it was drafted by UN agencies without consultation with indigenous peoples. Although ILO C107 is the first modern international agreement to address indigenous peoples' human rights, its language is shaped by paternalistic assumptions regarding indigenous cultural inferiority.

The limitations of the model of informed consent established in ILO C107 were remedied in part by several subsequent international legal developments including a judgement by the International Court of Justice (ICJ) in 1975 on the issue of self-determination, revisions to ILO C107 indigenous consent provisions in the late 1980s, and the 1985 commencement of negotiations on the text of the UNDRIP. In its 1975 advisory opinion in the *Western Sahara* case, the ICJ addressed the competing colonial claims of Spain, Mauritania and Morocco to the Western Sahara territory of the indigenous Sahrawi people.¹¹ The Court linked the right of FPIC with the right of self-determination, and recognized consent as the necessary legal foundation for relations between

States and indigenous peoples. In 1985, this theme was taken up by the ILO Committee of Experts charged with revising ILO C107. The Convention had come to be regarded as deeply flawed in its language and assumptions, in large part because of political pressure exerted by the international indigenous peoples' movement. The ILO revision process resulted in ILO C169, which superseded ILO C107 and included a stronger recognition of indigenous rights. Most notably, ILO C169 asserts the foundational role of consent that is free, prior and sought through culturally-appropriate indigenous institutions where any policy or development that could impact indigenous peoples' societies or territories is at stake. ILO C169 enhanced international legal recognition of indigenous peoples' right of self-determination within the existing framework of states, but still fell short as a comprehensive statement of the FPIC principle. While ILO C169 constituted a gain in substantive legitimacy for many indigenous activists and their allies, it was weak in terms of process legitimacy (Clarkson & Wood 2010, pp. 36-37) because it was drafted with incomplete input from indigenous peoples and the Committee did not include indigenous representatives among its members. Despite this shortcoming, ILO C169 is a binding international treaty with an impact that goes far beyond its twenty-three parties.¹² This far-reaching influence is explained in part by the fact that just as the ILO Committee of Experts was completing its work on FPIC, the UN body charged with developing an international instrument on indigenous rights, the Working Group on Indigenous Populations (WGIP), was being constituted.

When WGIP undertook the task of developing an international instrument articulating indigenous rights in 1985, the responsibility for drafting the text lay formally with five independent members of the body. As the process unfolded, indigenous peoples were active participants, and after a contentious decade-long period of consultation and development, an open-ended, inter-sessional working group was created to elaborate a draft declaration of the UN General Assembly (UNGA) based on the WGIP's text (Davis 2008).

The resulting UNDRIP¹³ was adopted by an overwhelming majority of members of the UNGA in September 2007, with 144 votes in favour, 11 abstentions, and 4 majority settler-states opposed – Australia, Canada, New Zealand, and the USA. Article 19 of the Declaration affirms that 'States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them', and indigenous peoples' right of FPIC is also explicitly invoked in articles concerning relocation and resource exploitation, among others. UNDRIP, like the Universal Declaration of Human Rights, possesses the formal status of a declaration of the UNGA, rather than a treaty. Under the traditional categories of sources of international law, UNGA declarations are not a source of international legal rules in the way that treaties are. However, norms articulated in UNGA declarations can contribute to the formation of rules of customary international law (International Law Commission 2016, p. 2).

FPIC is now widely – although not uncontroversially – regarded as a norm of customary international law, one of the five conventionally-recognized sources of international law identified in the Statute of the ICJ.¹⁴ A customary international legal norm is a general practice accepted as law (*opinio juris*); according to the International Law Commission (ILC), such norms are to be identified with 'regard ... to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found' (ibid.). The ILC's draft conclusions regarding customary international law go on to assert that it is 'primarily the practice of States that contributes to the formation, or expression, of rules of customary international law', although the practice of international organizations may also contribute 'in certain cases', and the 'conduct of other [presumably non-state] actors... may be relevant' when evaluating whether a general practice exists (ibid.). The existence of *opinio juris* is established with reference to 'public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference' (ibid., p. 3).

FPIC is now variously referred to as both a principle and a right in international legal and political fora, and has notably been affirmed as a right by the United Nations Committee on the Elimination of Racial Discrimination, the UN Committee on Economic, Social, and Cultural Rights, the UN Human Rights Committee, the UN Expert Mechanism on the Rights of Indigenous Peoples, and the UN Permanent Forum on Indigenous Peoples.

The foremost source on the nature and operationalization of FPIC is a set of guidelines developed in connection with the UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (REDD), involving 65 partner states in Latin America, Asia-Pacific and Africa. The UN REDD Guidelines on Free, Prior and Informed Consent define FPIC as 'a legal norm imposing clear affirmative duties and obligations on States' (UN-REDD Programme Secretariat 2013, p. 9). The Guidelines emphasize the disproportionate role played by indigenous and forest-dependent peoples in the stewardship of forested lands and the legal and practical need to build partnerships with them. The former Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, emphasized that while FPIC, like other fundamental human rights such as free speech, is not an absolute right in international law, it requires circumstances of an exceptional nature to justify overriding the norm in practice.¹⁵

5. The Relationship between International Law and Transnational Non-State Actors

The principle of FPIC is recognized as having normative force by other actors as well, including the FSC. It is provided for in the UN Guiding Principles on Business and Human Rights (UNGPs), and in a variety of corporate codes of conduct and voluntary principles developed by private and hybrid transnational actors and international organizations (for example, World Commission on Dams 2000; World Bank 2013, para. 2; Initiative for Responsible Mining Assurance 2018; Hershey Co. n.d.).

The UNGPs, which influenced the development of many of these normative regimes, were created under the sponsorship of the UN Human Rights Council during the same period in which the most recent revision of the FSC Canada standard was initiated (although the UNGPs fall well short of the FSC's interpretation of the requirements involved in fulfilling FPIC). The UNGPs promote respect for human rights in a business context. Principle 12 spells out the requirement that business enterprises respect foundational human rights. It defines those rights, at a minimum, as including those set out in the International Bill of Human Rights and the ILO's Declaration on Fundamental Principles and Rights at Work, while adding that

[d]epending on circumstances, business enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. *In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families.* (United Nations 2011, p. 15, emphasis added).

The UN instruments referred to in this excerpt include those recognizing the right of FPIC that are outlined above. In addition, Principles 17-20 of the UNGPs, which address human rights due diligence, discuss the requirement of consultation with those whose human rights will potentially be affected adversely by corporate activities.

Despite their limitations, the UNGPs and the associated voluntary principles and codes of conduct adopted by non-state actors of various stripes provide evidence of a growing recognition of the perceived authority of international human rights standards -- and in particular of those

associated with the indigenous right of FPIC – over non-state entities. Many, like the FSC's P&C, contain an explicit acknowledgement that the human rights norms to which they voluntarily bind themselves (including FPIC) are rooted in international human rights law, specifically, the Universal Declaration on Human Rights and ILO Convention 169.

Notably, this explanation suggests that the motivation of non-state actors such as the FSC aligns with the defining quality of a customary international legal norm – that it is followed out of a sense of legal onus or obligation (*opinio juris*) (International Law Commission 2016, p. 2). What mechanism could explain such a normative relationship between non-state actors and international legal rules?

6. How International Legal Norms Bind Transnational Private Actors

The question of how a private transnational actor becomes an international law-applying body is of more than academic interest if we seek to determine whether transnational business governance interactions (TBGIs) can be harnessed to advance marginalized actors. In this Part, I canvas selected formal resources of international law in order to investigate how an explanation of the grounds for the FSC's claims to be bound by international legal norms might be developed that is grounded in formal international legal rules.

In order to determine whether private transnational actors can be subjects and appliers of international law, it is important to identify the mechanism(s) by which international legal norms exert compliance pull upon them, if only because of the widespread positivist conviction that in 'any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits' (Gardner 2001, p. 201). Surveying this terrain holds the potential of insulating the question of whether specific international legal norms are legally binding upon private transnational actors from debate over their particular (and often contentious) social justice content.

There are various recognized means rooted in legal theory by which international norms might exert mandatory force for non-state actors with only minor theoretical alteration. One legal technique that offers a suggestive starting-point builds on a theory of how constitutional human rights norms come to exercise influence on the obligations ascribed to third parties in domestic contexts. This theory of 'structural effects' plays an important role in constitutional courts' reasoning in Canada, Italy, Israel, Germany, Spain, Japan, and South Africa (Barak 2001, pp. 22-25; Teubner 2012, p. 132).

Legal theorist and former Israeli Supreme Court Justice Aharon Barak outlines this theory in the following terms: in domestic law settings, human rights have bearing on the 'horizontal' relations between private parties in one of two ways, depending upon whether constitutionalization of human rights has or has not occurred. In countries where the constitutionalization of human rights has taken place, Barak avers, human rights apply indirectly in private law through a 'cascade effect' (Barak 2001, p. 21). On this view, constitutional human rights pass into private law through the medium of public policy. Barak explains this phenomenon as follows:

The point of departure for indirect application is that human rights have always played a role in private law. Indeed, at the foundation of the private law system are human rights ideals such as personhood, self-realization and dignity. The specific private law rules – for example, protection of one's good name or property – reflect the rights of the private individual (as against the State and other private parties). At the same time, 'value' concepts such as 'good faith', 'reasonableness' and 'negligence' reflect, *inter alia*, an appropriate balance of opposing human rights. Moreover, the concept of public policy essentially absorbs human rights originating in the constitution. From time immemorial, confrontations between human rights – for example, freedom of contract versus freedom of occupation – have been resolved within the framework of the public policy principle, which weighs conflicting rights

according to their relative status in the constitutional system. Indeed, public policy is the channel through which constitutional values flow into private law. (Ibid., pp. 21-22.)

In this way, constitutionalized human rights are viewed as exercising third-party effects through private law doctrine, whether existing or newly-created. Barak concludes that whereas '[i]n the past, common law human rights infiltrated private law by means of private law value terms... [n]ow constitutional human rights do the same' (ibid., p. 22). On this model, human rights apply to third parties indirectly, within the existing structures of the (domestic) private law system, but their constitutional origin lends them greater normative status than common law-derived human rights, and this structural effect allows courts to grant a wider range of remedies when constitutionalized human rights are violated.

This model also offers an explanation of the (weaker) role played by human rights in the private law of countries where constitutionalization of human rights has not occurred. In such cases, value terms serve as vehicles for conveying common law human rights into the private law even in the absence of constitutionalized human rights norms.

The International Commission of Jurists is a transnational organization of legal professionals that endorses the application of a variant of this domestic theory at the international level.¹⁶ In an article outlining the findings of its 2008 report on the subject of transnational corporate responsibility for human rights abuses (International Commission of Jurists 2008), Ian Binnie, a former Justice of the Supreme Court of Canada, advocated the notion of third-party responsibility for human rights abuses (Binnie 2009). The Commission's primary concern in this connection is to establish a formal legal framework of accountability for human rights violations by transnational corporations (TNCs). This approach complements and extends the animating themes of the UNGPs developed under the aegis of the UN Human Rights Council.

The Commission advocates civil enforcement of human rights where the violators are international corporations. In his discussion of the Commission's position, Binnie echoes Barak in suggesting that the logical starting points in attributing obligations to third parties are the existing principles of civil liability that already protect some human rights. In extending this argument to third parties in the international arena, Binnie follows Barak in advocating the development of new tools to address violations using established private law techniques (Binnie 2009, p. 50).

Binnie highlights promising elements of criminal liability such as the law of corporate complicity, as well as more traditional criminal liability approaches, and both innovative and traditional civil avenues for redress. His specifically civil-law prescriptions echo the structural effects process for developing the third-party effects of constitutionalized human rights. Such a position seems to assume a constitutionalist reading of international law, and by implication, to rely on a public policy-type mechanism for the transmission of human rights norms to transnational non-state actors along the lines suggested by Barak.

A variety of constitutionalist readings of international law might be recruited to support the application of a 'structural effects' account of the indirect application of constitutional human rights norms to non-state actors (for example, Fassbender 1998). However, most or all of them face the challenge, identified by Hauke Brunkhorst and others, of the 'weak public' character of nascent global civil society (Brunkhorst 2005, pp. 159-161). More importantly, it is difficult to see how a direct analogy to the policy-making function of a national government can be readily developed in the international legal arena on a conventional constitutionalist reading due to the lack of centralized and vertically-integrated legislative and executive bodies.

Another theorist who seeks to extend the structural effects approach to the transnational realm may help to answer this challenge by reconceptualizing some of the apparently absent elements of a global constitutionalism. Gunther Teubner (2012) shares the preoccupation of Binnie and the Commission with seeking remedies where TNCs are the perpetrators of human rights violations. He also occupies common ground with Aharon Barak in favoring an 'indirect third-party effects' approach to the question of how private actors become subject to human rights claims.

Teubner joins the conversation about constitutionalist interpretations of international law from a functionalist, systems-theoretical perspective, while situating his own view squarely in the camp of the 'structural effects' doctrine with respect to the methodology of uptake by non-state actors of constitutional human rights norms.

Teubner self-consciously builds on the structural effects tradition, albeit on the basis of some distinctive assumptions. He holds that human rights norms exercise what he calls 'horizontal effects' on transnational actors through a two-stage process of generalization and respecification, akin to that described by Barak in the domestic setting (Teubner 2012, pp. 131-142). A 'social positivization' of concrete human rights norms takes place through their institutionalization in conflict resolution bodies such as the Appellate Body of the World Trade Organization and the arbitration tribunals of private regulatory regimes such as the Internet Corporation for Assigned Names and Numbers (ICANN) and the International Chamber of Commerce (*ibid.*, p. 129). Teubner notes that the human rights at issue are often 'scandalized norms' that temporarily arouse the attention of global publics when a local crisis occurs, such as the Bhopal disaster of 1984 or the Rana Plaza garment factory collapse of 2013 in Bangladesh. Such fundamental norms are integrated into global law as secondary rules that are incorporated into the validity decisions of arbitral tribunals associated with the diverse types of regulatory bodies noted above.

Teubner also ambitiously tries to account for the seemingly missing source of public policy-making when the structural effects model is translated to the transnational arena. Teubner adopts Andrew Hurrell's (2007, p. 53) notion of a common law constitution to describe how 'fundamental rights are positivized in transnational (public and private) regimes: an iterative decision-making process occurs between the rulings of arbitration tribunals, decisions of national courts, contracts of private actors, social standardizations, and the scandalization actions of protest movements and NGOs' (Teubner 2012, p. 130).

Teubner's account of the positivization of fundamental rights in this way leans heavily upon processes of arbitral review to explain how transnational actors become subject to international human rights norms such as FPIC. Although the FSC possesses a quasi-judicial review procedure in which the secondary rule incorporation process outlined by Teubner certainly does occur, this does not seem to offer a satisfying explanation of the primary means by which international human rights norms come to exercise normative force within that organization. Instead, the participatory democratic structure of the FSC is regarded by activist members as having been both responsible for the strengthening of the indigenous consultation norm in policy and practice, and the source of the perception that the FSC is an addressee of international law. A more accurate and productive approach to understanding the normative processes at work in this case might be achieved if transnational actors such as the FSC were regarded in formal terms as addressees of international law, rather than only as its indirect subjects, as the existing theories outlined above allow.

7. FPIC and the Canadian State

After being actively involved in the process of drafting UNDRIP over more than a decade, Canada was one of only four countries that voted against the historic UN General Assembly resolution to adopt UNDRIP in 2007. The Canadian government's concerns at the time revolved primarily around Article 26, dealing with FPIC and land.

Between 2009 and 2012, all of the UNDRIP-opposing countries altered their positions, deciding ultimately to endorse (Australia, Canada and the US) or support (New Zealand) the Declaration.¹⁷ In its own 2010 statement of endorsement, the Canadian government reiterated the concerns it had expressed at the time of the 2007 General Assembly vote. These ongoing reservations concerned provisions of the Declaration that addressed 'lands, territories and resources; free, prior and informed consent when used as a veto; self-government without recognition of the importance of negotiations; intellectual property; military issues; and the need to achieve an appropriate balance between the rights and obligations of Indigenous peoples, States

and third parties' (Government of Canada 2010, n.p.). The Canadian government indicated that despite these concerns, it was 'now confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework' (ibid.). This confidence appeared to rest upon the government's key assertion that it saw UNDRIP as 'a non-legally binding document that does not reflect customary international law nor change Canadian laws' (ibid.).

With the election of a new federal government in 2015, however, Canada changed its position on UNDRIP. In May 2016 it announced its unreserved support for the General Assembly resolution. In an address to the UN Permanent Forum on Indigenous Issues, the Canadian Minister for Indigenous and Northern Affairs, Carolyn Bennett, announced that Canada was now an unqualified supporter of UNDRIP and pledged 'nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution' (Fontaine 2016a, n.p.).

This change of official policy seemed to herald a reversal of the previous government's rejection of the principle of FPIC and the associated idea of recognizing a veto authority for indigenous peoples where infringements of their rights are at stake. However, subsequent events have raised doubts about this interpretation of the government's still ambiguous position.

In a speech to members of the major national organization representing indigenous Canadians, the then Minister of Justice, Jody Wilson-Raybould, cautioned that 'simplistic approaches, such as adopting the UNDRIP ... [into] Canadian law are unworkable and, respectfully, a political distraction to undertaking the hard work required to actually implement it' (Wilson-Raybould 2016, n.p.).¹⁸ Following a furor caused by media reports portraying these comments as a retreat from the government's commitment to implementing the Declaration, the Minister subsequently explicitly affirmed that the Canadian government supported all articles of UNDRIP 'without reservation' (Kirkup 2016, n.p.).

On the evidence available to date, it seems that Canada's current interpretation of the meaning of UNDRIP provisions regarding FPIC 'in accordance with the Canadian Constitution' will result in little practical deviation from the existing requirements set out by Canada's Supreme Court, of good faith consultation with the aim of achieving consent.¹⁹ This is supported by Minister Bennett's statement at the time of UNDRIP's formal adoption, indicating that "Canada believes that our constitutional obligations serve to fulfill all of the principles of the Declaration, including free, prior and informed consent" (Fontaine 2016b, n.p.). It remains to be seen how the Canadian government will reconcile its assertion of unqualified support for UNDRIP with economic development pressures and the constitutional division of powers that assigns authority over natural resources to the provinces.

Following the adoption of UNDRIP, the Liberal government of Prime Minister Justin Trudeau either granted approval or allowed approvals to stand in a series of resource development projects that faced significant opposition by potentially affected indigenous communities. Among these are the Pacific Northwest liquefied natural gas (LNG) project approved without the consent of the Lax Kw'alaams First Nation (on whose territory the LNG terminal will be built); and the Site C dam construction permits issued despite a lack of consent by the Prophet River and West Moberly First Nations. During this same period following UNDRIP's adoption, Canadian provincial and federal appeal courts have issued injunctions or reversals of a number of other resource development projects in response to pre-existing suits by indigenous plaintiffs asserting that the common law duty to consult had not been adequately fulfilled by the Crown. These include, for example, the Enbridge Northern Gateway pipeline,²⁰ Alton natural gas²¹ and Kinder Morgan Trans Mountain pipeline projects.

The tension between the federal government's commitment to economic development and its 'thin' reading of FPIC is most evident in its handling of the high-profile Kinder Morgan Trans Mountain pipeline expansion plan. Its 2016 decision to approve the project was reportedly opposed by two-thirds of the indigenous communities potentially affected by the project. These include 51 indigenous nations whose territory is spanned by the existing pipeline and dozens of others that

might potentially be impacted. The proposal became the subject of court challenges brought by various indigenous nations, environmental groups, and local and provincial governments. Seven First Nations were parties to a consolidated challenge to the project which resulted in a 2018 Federal Court of Canada (FCC) decision that the Crown's agents violated the duty to consult during the review process.²² Nevertheless, despite this opposition, the federal government has been a staunch champion of the project and announced in May 2018 (prior to the FCC decision) that it would purchase the project from Kinder Morgan to ensure that it would be built. The decision was precipitated by Kinder Morgan's increasing signals of concern about proceeding with the project in light of the determined opposition, and the government's calculation that the domestic political cost of the project's collapse would be prohibitive.

This inconsistency in FPIC's implementation – the robust version of the norm being operationalized by the FSC and the weaker form employed by the Canadian government -- is characteristic of emerging principles of customary international law.

8. Conclusion

This preliminary survey of the TBGIs associated with the FSC's advocacy of a strong reading of FPIC suggests several conclusions. The FSC, led by FSC Canada and its indigenous network, has framed itself and its members as subjects of international law, while emphasizing the international legal grounds of an indigenous right of FPIC and related indigenous rights and entitlements. This technique has helped indigenous and allied norm entrepreneurs within the organization to entrench generous interpretations of the two axes on which FPIC's definition hinges – the definitions of 'legal and customary rights' and of 'lands, territories and resources.' These robust readings have in turn supported a broad construal of the as yet unsettled customary international legal norm of FPIC.

As a consequence, indigenous peoples in Canada who are affected by FSC certificate holders' activities exercise, in theory at least, a higher degree of control over, and participation in, the management of their lands, territories and resources than is available to them via Canadian government policy, legislation, or jurisprudence. This control can extend to an effective veto if they so choose. This preliminary case study therefore demonstrates that marginalized actors can enhance social justice outcomes by leveraging international legal norms through TBGIs.

Further, the participatory governance structure of the FSC opens an access point for members of the global indigenous peoples' movement to exercise international legal agency. This study provides an instance of how non-state actors such as the FSC and the transnational indigenous peoples' movement can be understood as agents with the capacity to contribute to the development of customary international law, in legal formalist terms.

This preliminary survey of selected policies and principles of FSC Canada, their root norms in international law, and the contrasting interpretations of those norms by the Canadian state also suggests some theoretical considerations that are relevant in determining how a hybrid or private transnational actor could be an addressee of international law.

This overview of the FSC's policies and practice regarding FPIC offers insights into the complex, iterative process of norm formation that functions at the transnational and intra-state levels. It involves horizontal interstate norm consolidation that is often, but not always, manifested in treaties and declarations of international organizations. Treaties and other interstate normative expressions influence the FSC and, we see, are in turn contributed to by the FSC and other transnational actors, both in their substance and in their practical interpretation. The process of intra-state norm consolidation is influenced by these same international norms to which the FSC and the Canadian state themselves also contribute.

Such a process could be responsible in part for the shift in the Canadian federal government's policy toward UNDRIP and the customary international legal principle of FPIC. However, this course alteration is now being tested as indigenous peoples' rights to participate in decision-making about their lands, territories and resources are being pitted against the exigencies

of economic development and certainty as the Trans Mountain pipeline expansion is cast as a zero-sum game, according to the classic agonistic model of colonialism.

It thus seems possible that the greatest contribution of FSC Canada's TBGIs around FPIC may come in the future. With its new national Standard, FSC Canada has taken on the mission of demonstrating the practical implementability of a robust reading of FPIC. It has committed much of its moral and political clout to deflating the myth that recognizing indigenous rights to land and resources and respecting an indigenous right of veto can only occur at the cost of economic development. If FSC Canada is able to fulfill this plan, this would effectively undercut the perpetual argument of state governments that a strong interpretation of FPIC would be unworkable and economically destructive.

A happy byproduct of this outcome could be the transformation of international law itself, as the FSC and like-minded non-state actors working in concert with the transnational indigenous peoples' movement 'shift the goal posts' by injecting penumbral readings into the core meaning of the concept of FPIC. In traditional, formalist international legal theory, the core of settled meaning of an international legal norm is understood to be determinable only by states. This study suggests that this assumption is inadequate to describe the reality of transnational legal processes today. Here, it appears that the FPIC norm may be subject to influence by international organizations, the transnational indigenous peoples' movement, and other hybrid and private transnational actors, including the FSC. The influence of these transnational actors on the development of the norm could, in effect, exercise an osmotic pull on the restrictive, original core meaning of the norm of indigenous consultation, and lead to an expansion of the norm to encompass what were once penumbral elements of its definition, such as the effective veto advocated by the FSC and other non-state actors. As a consequence, it can be posited that over time, the *opinio juris* of governments may evolve (and may have already evolved), and state practice will follow. The result of this phenomenon could be a ratcheting up of international social justice norms, indirectly, through the detour of customary international law formation. This chapter's overview of FPIC's evolution through the FSC's TBGIs suggests that FPIC is an incipient example of this process.

¹ Kingsbury (2001) employs the term 'international indigenous peoples' movement' with similar intent.

² FSC Canada was founded the following year (1994).

³ Interviews with Neil Sterritt, Jr., Don Ryan (Hanamuxw), Herb George (Satsan), and Russell Collier, (Summer 1996).

⁴ 'Aboriginal rights' is a term of art referring to rights recognized by the Canadian state as attaching to indigenous peoples in Canada. *Calder et al. v. Attorney-General of British Columbia*, [1973] SCR 313 established the continuing existence of aboriginal title; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 set out the test for proof of aboriginal title and confirmed the Crown's obligation to consult with indigenous peoples before infringing their aboriginal rights.

⁵ Constitution Act, 1982, s. 35(1) (Canada).

⁶ Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383 (Indigenous and Tribal Peoples Convention, 1989).

⁷ Personal observation of the FSC Canada Annual General Meeting, Montréal, Canada (29 May 2018).

⁸ Interview with Subject No. 6 (9 February 2017).

⁹ Interviews with Subjects No. 6 (9 February 2017) and No. 7 (29 May 2018).

¹⁰ Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (adopted 26 June 1957, entered into force 2 June 1959) 328 UNTS 247 (Indigenous and Tribal Populations Convention, 1957).

¹¹ *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12.

¹² Luxembourg became the twenty-third state to ratify the Convention in 2018. The Convention entered into force for Luxembourg on 5 June 2019.

¹³ United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007) UN Doc A/RES/61/295 (UNDRIP).

¹⁴ See Oman 2019, chapter 5 for elaboration of the evolving process by which norms acquire customary international legal status, and the role that transnational actors are now playing in it.

¹⁵ Such circumstances would have to involve an extremely significant public interest: 'such a valid public purpose is not found in mere commercial interests or revenue-raising objectives, and certainly not when benefits from the extractive activities are primarily for private gain.... Even if a valid public purpose can be established for the limitation of property or other rights related to indigenous territories, the limitation must be necessary and proportional to that purpose. This requirement will generally be difficult to meet for extractive industries that are carried out within the territories of indigenous peoples without their consent' (Special Rapporteur on the Rights of Indigenous Peoples 2013, paras. 35-36).

¹⁶ The Commission is a transnational non-governmental organization that promotes the rule of law, human rights and judicial independence, both domestically and internationally. It actively attempts to shape emerging international legal developments to align with these aims.

¹⁷ 'Endorsement' of a General Assembly declaration entails a qualified form of affirmation that does not include signing the document or incorporating its values in domestic legislation.

¹⁸ The 'hard work' Wilson-Raybould referred to was the task of identifying and building appropriate indigenous governance institutions – the main subject of her remarks that day. The Assembly of First Nations (AFN) represents 'status Indians': those categorized as having particular legal characteristics under the infamous federal Indian Act (which remains in force).

¹⁹ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511.

²⁰ The Northern Gateway Joint Review Panel process was described by the Federal Court of Canada as having provided 'only a brief, hurried and inadequate opportunity ... to exchange and discuss information and to dialogue' to the seven indigenous nations that were plaintiffs in the action. As a result, the Court found that the Crown had failed to meet the 'reasonable efforts to inform and consult' standard, and required it to re-engage with the potentially-affected indigenous nations, either by reviewing the original consultation process or undertaking new consultations. *Gitxaala Nation v Canada*, 2016 FCA 187, [2016] 4 FCR 418, paras 325, 332, 333.

²¹ The Nova Scotia Supreme Court quashed the provincial Environment Minister's approval of the Alton natural gas project in January 2017 and referred the matter back to the Minister due to a failure of disclosure to the potentially affected Sipekne'katik First Nation. *Sipekne'katik v Nova Scotia (Environment)*, 2017 NSSC 23.

²² The Federal Court of Appeal quashed the approval of the proposed Kinder Morgan Trans Mountain pipeline project because the federal government failed 'to engage, dialogue meaningfully and grapple with the real concerns of [affected First Nations] so as to explore possible accommodation of those concerns'. *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, para 6.

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