CMSI Consultation Response

Respondent Details

NAME
Not Specified

COUNTRY
Philippines

PERMISSION
Yes, CMSI can disclose my feedback, name, and organisation.

STAKEHOLDER
Indigenous peoples / organisation

ORGANISATION
Indigenous Peoples Rights International (IPRI)

Comments & Questions by Document

Document:
Standard

General comment on Performance Area

COMMENT:

Indigenous Peoples Rights International ("IPRI"), an international Indigenous Peoples' organization, values the opportunity to comment on the CMSI Consolidated Standard (Final Consultation Draft, October 2025) ("the Draft Standard"). Our comments primarily address proposed Performance Area 14. They are not exhaustive, and we may choose to further address these or other issues during the consultation process.

We conclude that, while it contains positive elements, the Draft Standard requires revision. It would be very difficult to implement transparently and, ultimately, it would be ineffective as drafted. The main concern involves the alleged prerogative of States to override Indigenous Peoples' decisions and the ability of mining companies to choose to rely on the same and to again disrespect those decisions. The clarity provided by the model employed in International Finance Corporation Performance Standard 7 on Indigenous Peoples, supplemented by other measures, some of which are now in PA14, would be more understandable, more appropriate and more effective, and would provide much greater certainty to business, investors, States and Indigenous Peoples.

Performance Area 14: Indigenous Peoples

SECTION: 14.1 Indigenous Peoples

COMMENT:

However, despite the positive elements above, we are concerned that PA14's expressed intent is not adequately operationalized and, worse, is seriously undercut by other parts of PA14. In addition to facilitating inter-cultural dialogue and relationship building, FPIC is also a means by, and a requirement that, Indigenous Peoples' decisions are respected, where "consent" is understood in accordance with its plain meaning: yes

or no or conditionally yes or no.11 FPIC is not merely a species of consultation (e.g., with the objective of obtaining consent), nor is such a view supported in relevant jurisprudence.

The Human Rights Committee ("CCPR") has long held that the admissibility of measures which compromise or interfere with Indigenous Peoples' culturally significant economic activities depends on whether they have participated in decision-making processes. It "considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent" of the affected Indigenous Peoples.12 Put another way, the failure to obtain and respect FPIC would render the participation right in question ineffective. In 2024, this test was modified to include "measures that compromise Indigenous Peoples' culturally significant territories…"13 Similar decisions have been reached by the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child, the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination Against Women as well as the regional human rights mechanisms.14 Therefore, in addition to other foundational rights, FPIC is an integral part of Indigenous Peoples' right to effective participation and self-determination, and despite its characterization in PA14 and elsewhere as a principle or safeguard, it is routinely described as a right itself.15

The preceding is especially apparent in relation to relocation of Indigenous Peoples considering the drastic and intergenerational consequences of forced relocation for dignity, survival and well-being and a broad range of human rights. This was recently emphasized by the CCPR, which referenced Article 10 of UNDRIP in this regard:16 "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return."17 It concurred with the Inter-American Court that forced displacement has "'destructive consequences on the ethnic and cultural fabric," generating "a clear risk of extinction, cultural or physical, of Indigenous Peoples'."18 This prohibition also has been highlighted regularly by the UN Committee Against Torture.19 In 2022, CEDAW highlighted that forced displacement is a major form of violence affecting Indigenous women, "severing their connection to their lands, territories and natural resources and permanently harming their life plans and communities."20 It is unclear whether PA14 upholds the prohibition of forced displacement and whether it supposes that FPIC in relation to relocation also may be overridden by a unilateral decision of the State (as is the case generally in PA14).

COMMENT:

States do not have a Prerogative to Overturn FPIC

Second, as above, FPIC effectuates Indigenous Peoples' collective right to make, and to have respected, self-determined decisions about whether impacts on their rights are acceptable and the nature of any measures that may be required to offset those impacts. Nonetheless, PA14 provides that a State may simply override Indigenous Peoples' decisions "where agreement with affected Indigenous Peoples is not obtained, and where the State has lawfully limited Indigenous Peoples' rights through a process that is necessary, proportionate, and directed toward a legitimate public interest objective…" It is then incumbent on the company to verify if the State did so lawfully when assessing whether to proceed or not, an analysis that is not within the normal competence of most companies, local facilities, especially. Moreover, States themselves are often ignorant of and/or routinely disregard the criteria for lawful restrictions21 and they typically privilege economic gains over respect for Indigenous Peoples' rights.22 These issues are sometimes the subject of extended litigation, over decades, including, in some cases, decades after the mining operation has finished and the company has left the country.23

This condition in PA14 is neither appropriate nor acceptable; it is not a workable or pragmatic approach, and it greatly undermines -even negates -the important progress elsewhere in PA14. It also calls into question the commitment in PA14 to respect Indigenous Peoples' rights as it could allow companies to rely on unilateral decisions by States to disregard a key guarantee prior to the operation even commencing.

This condition is also contrary to relevant -if not, on point -jurisprudence. For instance, a national law allowing the State to cite the public interest to justify overriding Indigenous Peoples' FPIC in the case of large-scale mining was adjudicated by the Inter-American Commission on Human Rights. It ruled that the provision in

question was "wholly incompatible with the inter-American human rights standard by which large-scale mining operations… must be preceded by the prior, free and informed consent of [Indigenous Peoples] in order to proceed in a legal fashion."24 The Working Group on Business and Human Rights addressed a similar situation in Colombia, where the State mostly reverts to a proportionality analysis of the sort proposed in PA14 when Indigenous Peoples do not consent. It observed that this process represents "a backward step" in the implementation of Indigenous Peoples' rights and the UNGP.25 The Working Group recommended that the State "consider abandoning" this approach as an undue restriction on Indigenous Peoples' right to FPIC.26 EMRIP also recalls in this regard that the United Nations Global Compact's guidance on UNDRIP "advises its members not to proceed with a project after the withholding of consent by indigenous peoples," as does the EMRIP itself in its advice on FPIC.27 Thus, the scheme proposed in the PA14 has already been found to be contrary to human rights norms by international authorities and by one iteration of industry best practice, and it has been characterized as a retrograde measure in relation to the UNGP by a competent monitoring body.

COMMENT:

Turning to the extent to which a State may lawfully restrict Indigenous Peoples' rights, UNDRIP, article 46(2) broadly restates the conditions in human rights law. It provides that any restrictions must be exceptional, shall be provided for by a prior law, and shall be non-discriminatory and strictly necessary for securing due respect for the rights of others and a compelling public interest. This also requires consideration of the countervailing public interest of respect for Indigenous Peoples' rights as well as Indigenous Peoples' views in this regard, where Indigenous Peoples' participation in the process is integral to the validity of the public interest declaration.28 Strict necessity and proportionality are questions of fact, not discretion. Also, this standard is not met by mere commercial purposes, private gains or revenue-raising objectives.29 It requires that the least restrictive measures from a human rights perspective are employed and perforce focuses on the nature of the impacts on Indigenous Peoples' rights.30 For example, given that forced relocation will always have dire and intergenerational consequences, it is per se disproportionate as the impacts cannot be justified relative to human rights norms. More generally, concurring with the former SRIP, the EMRIP concludes that "[g]iven the nature of the impact of large-scale development projects on the rights of indigenous peoples, it will often be difficult to justify such projects" in the light of the conditions that apply to "lawful limitations".31

Various international authorities have also explicitly held that "exploitation of natural resources, as a legitimate public interest, does not absolve States parties from their obligation not to discriminate against an indigenous community that depends on the land in question by mechanically applying a procedure of consultation without sufficient guarantees or evidence that the free, prior and informed consent of the members of the community can be effectively sought and won."32 Similarly, CEDAW advises that the failure to secure "the effective participation and consent of Indigenous Women in all matters affecting them constitutes discrimination against them and their communities."33

Various authorities, UNDRIP included, also consider that discrimination in itself strongly supports a finding that restrictive measures are impermissible, and this "consideration must carry great weight in the assessment of the proportionality issue…"34 That is, the failure to obtain FPIC and reliance on a State's choice to disregard Indigenous Peoples' decision is highly suspect from the perspective of both non-discrimination and interrelated proportionality requirements. The latter is the case in no small part as overriding Indigenous Peoples' decisions substantially impairs, if not, negates, the rights to effective participation and self-determination35 and, thus, is not interfering as little as possible with exercise of the restricted rights.36 To avoid being discriminatory, proportionality tests also must be adjusted to account for Indigenous Peoples' characteristics and rights.37 For example, in the case of lands and resources, they should be appreciated not only in monetary terms, but be based on Indigenous Peoples' cultures, ways of life and, critically, understanding that their identities are interwoven with their territories38 as are their survival, dignity and well-being.39 They must also consider the effect of reading various rights conjunctively with the right to self-determination and its core decision-making attributes.40

Additionally, the CCPR and CERD, among others, have held that States "must respect the principle of proportionality when limiting or regulating indigenous peoples' land rights… so as not to endanger the very survival of the community."41 The Inter-American Court has defined the term "survival" to mean Indigenous and Tribal

peoples' "ability to "preserve, protect and guarantee the special relationship that they have with their territory", so that "they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected"."42 The impacts of operations that could significantly affect survival per this definition, all the more when rejected by Indigenous Peoples in an FPIC process, would be disproportionate and, thus, cannot be undertaken pursuant to lawful restrictions. Moreover, to avoid endangering Indigenous Peoples' "very survival," the CCPR and others require that "measures that compromise indigenous peoples' culturally significant territories are taken after a process of effective participation and [FPIC]."43 Again, considering the severely negative impact of non-consensual extractive projects on Indigenous Peoples' rights, inevitably it will be extremely difficult to justify such projects and impacts without obtaining FPIC and States are not permitted to simply annul decisions rejecting the impacts.

COMMENT:

Further, to be valid, restrictions may not impair the "essence"44 or core of a right or "put in jeopardy the right itself."45 Therefore, reliance on a State's choice to override FPIC where Indigenous Peoples have not consented is again highly suspect, at best. Among other reasons, this is because the essence/core of the right is effective participation in decision-making -rendered ineffective by the State's invalidation -as well as connected rights of self-determination (having decision-making authority at its core), effective control over lands, territories and resources that sustain culture, survival, dignity46 and well-being, and prohibitions of racial discrimination that are firmly grounded in non-derogable norms. Even in extraordinary circumstances, overriding Indigenous Peoples' FPIC -the right to effectively participate in and to make self-determined decisions and to have the same respected -eviscerates the rationale for and essence of the right, whether characterized as a right itself or a safeguard derived from other rights, and it is difficult to see how this could be considered lawful or proportionate. To paraphrase the CCPR, "the relation between right and restriction and between norm and exception would be reversed" if PA14 retains the language that legitimizes States quashing FPIC decisions they disagree with and mining companies' reliance thereon.47

In addition to considerations related to "survival", as above, there are also scenarios where the State cannot cite economic development or other objectives to restrict rights vested in Indigenous Peoples under any circumstances.48 The rights protected by article 27 of the ICCPR, for instance, shall not be denied, which places a concrete limit on State action.49 The Human Rights Committee has long held article 27 does not allow States to substantially impair the rights of Indigenous Peoples, even for legitimate purposes, and that they may only do so with full respect for effective participation and FPIC as conditions precedent.50 Likewise, and recalling the above, the CESCR has identified that a "core obligation" of the right to enjoy culture is to obtain FPIC "when the preservation of [Indigenous Peoples'] cultural resources" is threatened.51

COMMENT:

Concluding remarks

The preceding illustrates the complex nature of the system as now drafted in the Proposed Standard. IPRI's interest is respect for and effective protection of the rights of Indigenous Peoples, concerns that are especially fraught in the extractive sector. We recall the severe impacts that have been and continue to be suffered by Indigenous Peoples in the context of mining.52 Obtaining FPIC, not merely seeking it, and respect for Indigenous Peoples' decisions are an indispensable component of correcting this situation. This consideration is even more relevant in the light of the expansion of mining for transition minerals and the fact that most of these minerals are on or adjacent to Indigenous Peoples' territories.

Yet, PA14 would require that the preceding complicated analysis be undertaken should the State unilaterally decide to prioritize its perceived interests over the rights of Indigenous Peoples. Notably, this is an outcome regularly experienced by Indigenous Peoples in all corners of the World and notwithstanding the requirements of human rights law. Companies then must decide if they will move forward without FPIC should their analysis support the view that the State's decision was based on lawful considerations. Will the companies signing on to the Draft Standard also potentially wait for decades of national and international litigation to determine

if the State lawfully restricted rights? What will a company do -and when -if its own analysis is subsequently demonstrated to be incorrect and substantial harm has been inflicted? IFC Performance Standard 7 on Indigenous Peoples requires FPIC for any adverse impacts on Indigenous Peoples' traditional lands, territories, and resources, for relocation, for impacts on critical cultural heritage and for the use of traditional knowledge (para. 13-7). There is no provision therein for a State to override FPIC, by reference to the public interest or otherwise, or for a company to rely on the State's decision. This is clear, straightforward and transparent, not opaque and convoluted and based on procedures often disregarded by States and which, likely, are little understood by companies. Recall that the UNGP were developed precisely because States fail to fulfil their duties to respect and protect human rights, when States' failure to protect against the extractive industry's impact on Indigenous Peoples' rights was flagged as particular egregious, and this has not changed since their adoption. Moreover, independent adjudication of these issues, where available, normally takes years and cannot be replaced by company-based grievance mechanisms.

PA14, as currently drafted, does not rise to the level of PS7, considered a benchmark by various institutions (e.g., the Equator Banks and the OECD), nor does it contain the same level of clarity that would be conducive to its effective application. There is a strong argument that it also does not meet relevant human rights norms, including the UNGP. We stress that the effectiveness of the implementation of PA14 and the consistency of that implementation in terms of positive outcomes relative to Indigenous Peoples' rights are the primary measures of its value. As currently drafted, it will not be effective, and violations of Indigenous Peoples' rights will continue to be prominent features of extractive industry operations. Claims to respect these rights are also greatly undermined by the position that one of those rights -and/or a crucial safeguard for all those rights - can simply be disregarded.

SECTION: Intent

COMMENT:

The stated "Intent" of Performance Area 14 on Indigenous Peoples ("PA14") is to "[r]espect Indigenous Peoples' individual and collective rights as outlined in the United Nations Declaration on the Rights of Indigenous Peoples" ("UNDRIP"), confirming the obligations of States and the responsibilities of companies, e.g., in line with the UN Guiding Principles on Business and Human Rights ("UNGP").1 Presumably, the same also applies to rights that are guaranteed in applicable human rights treaties and authoritative interpretations thereof per the requirements in Performance Areas 5 and 14 and related due diligence responsibilities,2 bearing in mind that UNDRIP contains "the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."3

The stated intent of PA14 also includes conducting "ongoing engagement processes and… human rights due diligence" and obtaining "agreement… through a process demonstrating free, prior and informed consent (FPIC) to anticipated impacts on [Indigenous Peoples'] lands, territories or other rights." We observe, first, that FPIC is derived from various foundational rights vested in Indigenous Peoples4 and "operates as a safeguard for the[ir] collective rights."5 Characterizing FPIC in this way, as PA14 does, presupposes that those rights, and the nature of any impacts thereon, must be the primary focus and from the outset (rather than a disconnected decision on a project or operation as such).6 In this regard, we also highlight Indigenous Peoples' right to effective participation in impact assessment and due diligence processes7 as a guarantee to improve the likelihood that impacts and rights will be adequately identified, assessed and addressed as a crucial part of obtaining and documenting ongoing agreement(s) reached through an FPIC process.8 This right is operative from the inception to evaluation and monitoring and compliance of assessments/due diligence, and these processes also must be tailored to Indigenous Peoples' rights and address cumulative impacts.9

We welcome the intention of PA14 to respect the rights of Indigenous Peoples and to additionally safeguard those rights through agreement(s) arrived at via an FPIC process. We also welcome the intention to adhere to FPIC instruments adopted by Indigenous Peoples as well as relevant customs and traditions in this context. If understood correctly and implemented effectively, this could represent important progress in reducing the negative impacts of extractives on Indigenous Peoples. We stress in this regard that the former SRIP has explained that, given "the invasive nature of industrial-scale extraction of natural resources, the enjoyment of

[Indigenous Peoples'] rights is invariably affected in one way or another when extractive activities occur within indigenous territories -thus the general rule that indigenous consent is required for extractive activities within indigenous territories."10 This rule is also part of jurisprudence under UN and regional human rights treaties that are applicable to the vast majority of States worldwide, treaties that are also integral to implementation of the UNGP and corporations' responsibilities in general.
