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NO GOING BACK: THE IMPACT OF ILO CONVENTION 169 ON LATIN AMERICA IN COMPARATIVE PERSPECTIVE*

José Aylwin and Pablo Policzer

SUMMARY

This paper assesses the impact of the International Labour Organization's 1989 Indigenous and Tribal Peoples Convention (ILO C-169) since it entered into effect in 1991. It compares advances on Indigenous Peoples' rights in key Latin American states that have ratified the convention (Bolivia, Brazil, Chile, Colombia, Mexico and Peru) with two which have not (Australia and Canada). It analyzes each country's constitutional order, legislative and jurisprudential developments, as well as policy developments concerning Indigenous Peoples and their rights.

In particular, the paper examines the Indigenous right to political participation and autonomy or self-government, as well as the right to land, territories and natural resources in each context. It also assesses the right of Indigenous Peoples to prior consultation and to free, prior and informed consent, as well as to participating in the benefits provided by resource extraction on their lands and territories. While important gaps and substantial differences in the

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implementation and current status of these rights can be identified among the states analyzed, all of them have made progresses since ILO C-169 came into effect.

While ILO C-169 has directly and deeply influenced relations between Indigenous Peoples and states in Latin American countries that have ratified it, it has also had an indirect but nevertheless decisive impact in Australia and Canada. This can be seen in legal developments, jurisprudence and policies that concern Indigenous Peoples in these two countries. In this sense, ILO C-169 cannot be understood in isolation. Rather, it is part of a broader international legal corpus that has emerged in recent decades, and which has strongly influenced legal and jurisprudential transformations concerning Indigenous peoples' rights in both signatory and non-signatory countries, including Australia and Canada. This legal corpus has expanded in recent years, especially through the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which Canada and Australia initially did not adopt, but later endorsed. In addition, the convention has not only influenced states, but also discourses and strategies of Indigenous Peoples and the business community in these two countries, which have in turn also shaped their legal and policy developments concerning Indigenous rights.

ILO C-169 represents a key step in the recognition and protection of Indigenous Peoples' rights. Whether directly or indirectly, and notwithstanding the many gaps still left to address, its impact demonstrates that there is no going back on Indigenous Peoples' rights.



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NO HAY MARCHA ATRÁS: EL IMPACTO DEL CONVENIO 169 DE LA OIT EN AMÉRICA LATINA EN PERSPECTIVA COMPARADA[†]

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RESUMEN

Este documento evalúa el impacto del Convenio 169 de la Organización Internacional del Trabajo sobre Pueblos Indígenas y Tribales de 1989 (C-169 OIT), desde que entró en vigencia en 1991. Compara los avances sobre los derechos de los Pueblos Indígenas en algunos Estados latinoamericanos claves que han ratificado este convenio (Bolivia, Brasil, Chile, Colombia, México y Perú) con dos Estados que no lo han suscrito (Australia y Canadá). Analiza el orden constitucional, legislativo y jurisprudencial de cada país, así como desarrollos de políticas relacionadas con los Pueblos Indígenas y sus derechos. En particular, el documento examina el derecho de estos Pueblos a la participación política y a la autonomía o autogobierno, así como el derecho a la tierra, los territorios y recursos naturales en cada contexto. También evalúa el derecho de los Pueblos Indígenas a la consulta previa y al consentimiento libre, previo e informado, así como a participar en los beneficios proporcionados por la extracción

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de recursos en su tierras y territorios. El documento constata que, aunque persisten importantes brechas en materia de derechos de Pueblos Indígenas y diferencias sustanciales en la implementación del Convenio entre los Estados analizados, en todos ellos se identifican avances desde la entrada en vigor del C-169 OIT.

En este documento se sostiene que si bien el C-169 OIT ha influido directa y marcadamente en las relaciones entre los Pueblos Indígenas y Estados en los países latinoamericanos que lo han ratificado, también ha tenido un efecto indirecto, pero sin embargo decisivo en Australia y Canadá. Esto se puede ver en los avances legales, jurisprudenciales y en las políticas públicas que conciernen a los Pueblos Indígenas en estos dos países. En este sentido, el C-169 OIT no puede entenderse aisladamente. Más bien, es parte de un corpus jurídico internacional más amplio que ha emergido en las últimas décadas, y que ha influido fuertemente en las transformaciones legales y jurisprudenciales relativas a los Pueblos Indígenas en los países signatarios y no signatarios, incluidos Australia y Canadá. Este corpus jurídico se ha visto incrementado en los últimos años, especialmente después de la aprobación de la Declaración de las Naciones Unidas sobre los Derechos de los Pueblos Indígenas, en 2007, declaración que Canadá y Australia inicialmente no aprobaron, pero que más tarde suscribieron. El C-169 de la OIT, además, no solamente ha tenido un impacto en los Estados, sino también en los discursos y estrategias de los Pueblos Indígenas y de la comunidad empresarial en estos dos países. A su vez también ha impactado en su legislación y políticas públicas en materia de derechos indígenas.

El documento concluye afirmando que el C-169 de la OIT representa un paso clave en el reconocimiento y la protección de los derechos de los Pueblos Indígenas. Ya sea directa o indirectamente, y a pesar de las muchas brechas que aún quedan por abordar, su impacto demuestra que no hay marcha atrás respecto al respeto de los derechos de los Pueblos Indígenas.



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PAS DE RETOUR EN ARRIÈRE : ANALYSE COMPARATIVE DE L'IMPACT DE LA CONVENTION 169 DE L'OIT SUR L'AMÉRIQUE LATINE[†]

José Aylwin et Pablo Policzer

RÉSUMÉ

Cet article évalue l'impact de la Convention de 1989 relative aux peuples indigènes et tribaux (C-169), de l'Organisation internationale du travail, depuis son entrée en vigueur en 1991. On y compare les progrès réalisés en matière de droits des peuples autochtones dans les principaux États d'Amérique latine qui ont ratifié la convention (Bolivie, Brésil, Chili, Colombie, Mexique et Pérou) et dans deux pays qui ne l'ont pas fait (Australie et Canada). Pour chaque pays, on analyse l'ordre constitutionnel, les développements législatifs et jurisprudentiels ainsi que l'élaboration de politiques relatives aux peuples autochtones et à leurs droits.

Le document examine en particulier la question du droit des Autochtones à la participation politique et à l'autonomie gouvernementale, ainsi que le droit à la terre, au territoire et aux ressources naturelles. Il évalue également le droit des

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peuples autochtones à la consultation et au consentement préalable donné librement et en connaissance de cause ainsi que le droit de participer aux avantages de l'extraction des ressources sur leurs territoires. Bien qu'on puisse observer, parmi les États à l'étude, d'importantes lacunes et des différences substantielles dans la mise en œuvre et le statut de ces droits, ils ont tous accompli des progrès depuis l'entrée en vigueur de la C-169.

La C-169 a directement et profondément influencé les relations entre les peuples autochtones et les États des pays d'Amérique latine qui l'ont ratifiée, mais elle a également eu un impact indirect mais néanmoins décisif en Australie et au Canada. Cela se voit dans les développements juridiques, la jurisprudence et les politiques relatives aux peuples autochtones dans ces deux pays. En ce sens, la C-169 ne peut pas être comprise isolément. Elle fait plutôt partie d'un corpus juridique international plus large qui a émergé au cours des dernières décennies et qui a fortement influencé les changements juridiques et jurisprudentiels relativement aux droits des peuples autochtones dans les pays signataires et non signataires, notamment l'Australie et le Canada. Ce corpus juridique s'est élargi ces dernières années, notamment grâce à la Déclaration des Nations Unies sur les droits des peuples autochtones (DNUDPA) de 2007, que le Canada et l'Australie ont éventuellement entérinée. En outre, la convention a non seulement influencé les États, mais aussi les discours et les stratégies des peuples autochtones et du monde des affaires dans ces deux pays, qui ont à leur tour façonné leurs mesures juridiques et politiques concernant les droits autochtones.

La C-169 représente une étape clé dans la reconnaissance et la protection des droits des peuples autochtones. Que ce soit directement ou indirectement, et malgré les nombreuses lacunes qui restent à combler, son impact démontre qu'il n'y a pas de retour en arrière sur la question des droits des peuples autochtones.

INTRODUCTION

The International Labour Organization's Indigenous and Tribal Peoples Convention (ILO C-169)¹ was approved by the International Labour Conference in 1989 and came into effect in 1991 after its ratification by Norway and Mexico. The convention affirms in its preamble that "in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live, and that their laws, values, customs and perspectives have often been eroded." The same preamble acknowledges these peoples' aspirations "to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live." Among the main rights of Indigenous Peoples the convention recognizes are those of a political nature, which include consultation and participation in decision-making processes which may affect them directly, the right to decide their own priorities for the process of development as it affects their lives, and the right to retain their own customs and traditional institutions.² Also central to this convention are Indigenous Peoples' rights to their land, territories and resources that they traditionally occupy or use, as well as their collective relationship with those lands and resources.³ Furthermore, the convention also covers other relevant issues pertaining to Indigenous Peoples, including employment and vocational training, education, health and social security, languages, religious beliefs and cross-border co-operation.⁴ It commits its parties to "co-ordinated and systematic action to protect the rights of (Indigenous and tribal) peoples and to guarantee respect for their integrity."⁵ As the only modern international treaty specifically and entirely dealing with Indigenous Peoples, ILO C-169 is considered a landmark international achievement in advancing these peoples' rights globally. Today, three decades after ILO C-169 came into effect, we can look back and assess its impact and effectiveness globally, not only on state parties but also on states where the convention has not been ratified.

Most ILO C-169 state parties are in Latin America. In this paper, we compare the impact of the convention on a selection of key Latin American states (Bolivia, Brazil, Chile, Colombia, Mexico and Peru) against progress on advancing Indigenous Peoples' rights in two states that have not signed the convention: Australia and Canada. We argue that, despite its implementation gap, ILO C-169 has had a direct and strong impact on advancing Indigenous Peoples' rights in Latin America. We also argue that ILO C-169 has had an indirect impact in those states that have not ratified this international treaty, specifically in Australia and Canada. This is as a result of its relevance in an emerging international legal corpus, especially in the way in which treaty bodies have interpreted

¹ Convention Concerning Indigenous and Tribal Peoples in Independent Countries (https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169).

² *ibid.*, articles 6, 7 and 8.

³ *ibid.*, articles 13 to 15.

⁴ *ibid.*, parts III to VI.

⁵ *ibid.*, Article 2.1.

other existing international human rights conventions and declarations—which Canada and Australia have either signed or endorsed. This legal corpus would later be expressed in the 2007 United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP). Although Australia and Canada did not initially approve this declaration, both countries eventually endorsed it. These international human rights instruments, which are applicable to Indigenous Peoples today, have deeply influenced the global agenda concerning them. This is reflected both in the kinds of discourse and claims made by these peoples and in how states and businesses have responded to them. Although there remains much to be done to ensure respect for Indigenous Peoples and their rights, the impact of ILO C-169 is clear.

In Section 1, we assess the impact of ILO C-169 in Latin America along three dimensions: different countries’ constitutional and legal orders, jurisprudence and policy developments. In Section 2, we trace the development of Indigenous Peoples’ rights in Australia and Canada along the same three dimensions. In Section 3, we compare the impacts that these laws and policies have had on Indigenous Peoples’ enjoyment of rights, both in Latin American state parties as well as in Australia and Canada. In particular, we examine the Indigenous right to political participation and self-government, as well the right to land, territories and natural resources. In doing so we examine the right of Indigenous Peoples to prior consultation and free, prior and informed consent (FPIC), and to participate in the benefits provided by resource extraction on their lands and territories. We conclude in Section 4 by discussing the indirect impact of ILO C-169 on non-ratifying states. Whether directly or indirectly, and notwithstanding the many gaps still left to address, ILO C-169 demonstrates that there is no going back on Indigenous Peoples’ rights.

1. INDIGENOUS RIGHTS THROUGH ILO C-169 IN LATIN AMERICA

Fifteen of the 23 states that have ratified ILO C-169 are in Latin America. In this section, we examine the convention’s impact on a selection of key Latin American cases (Bolivia, Brazil, Chile, Colombia, Mexico and Peru), focusing on each country’s constitutional order, legislative and jurisprudential developments, as well as on different policy developments concerning Indigenous Peoples’ rights.

1.A CONSTITUTIONAL TRANSFORMATIONS AND LEGAL DEVELOPMENTS

One of the most visible impacts of ILO C-169 has been the inclusion of the rights it considers in different states’ domestic constitutional and legal orders. As **Table 1** shows, of the cases we examine here, Colombia (1991), Mexico (1992 and 2001), Peru (1993), and Bolivia (2009) have all adopted constitutional provisions on Indigenous rights affirmed by ILO C-169. Indeed, observers have noted the influence of ILO C-169 on this phase of constitutional reform in Latin America, considering not only these states but also others in the region. Paraguay (1992), Argentina (1994), Ecuador (1994), and Venezuela (1999) have also adopted similar constitutional reforms, in a period identified as one of

“multicultural constitutionalism” in the region (e.g., Yrigoyen 2011; Aparicio 2011).⁶ So far, Chile remains the only Latin American country that has not granted its Indigenous population constitutional recognition, although there have been repeated proposals for it to do so.

TABLE 1: CONSTITUTIONAL PROVISIONS IN LATIN AMERICA

Constitutional provisions concerning Indigenous Peoples	Brazil (1988)*	Colombia (1991)	Mexico (1992)	Peru (1993)	Bolivia (2009)
Rights to lands traditionally occupied	✓	✓	✓	✓	✓
Rights to natural resources on Indigenous lands and/or territories (participation and/or preference in their use and management)		✓	✓		✓
Prior consultation on resource extraction/or development programs			✓		✓
Participation in the benefits of exploitation of natural resources on Indigenous lands and territories					✓
Right to forms of Indigenous autonomy and self-government within their territories		✓	✓		✓
Rights to self-determination within the state context			✓		✓
Customary laws and institutions		✓	✓	✓	✓
Political participation and/or special representation in elective institutions		✓	✓		✓
Cultural and linguistic rights, bilingual education	✓	✓	✓	✓	✓

* Although approved prior to ILO C-169, Brazil’s 1988 constitution was drafted in the context of the revision process of ILO Convention 107 on Indigenous and Tribal Populations of 1957, which gave birth to the 1989 convention.

ILO C-169 has also deeply influenced legislation in the region. Indeed, throughout Latin America, international treaties like this are normally considered to be, if not part of the constitution, at least having a higher authority than ordinary domestic law. Consequently, rights and obligations contained in ILO C-169 generally prevail in these states over those in ordinary laws (Courtis 2009; Uprimny 2011). **Table 2** shows that Latin American states have enacted abundant legislation inspired by ILO C-169, pertaining to land and natural resource rights of Indigenous Peoples, a matter central to Indigenous claims.

⁶ In contrast with this phase of constitutionalism in Latin America, a later phase, which is expressed in the constitutions of Ecuador in 2008 and the constitution of Bolivia in 2009, which gave birth to what has been called “plurinational constitutionalism,” was strongly influenced by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), approved in 2007 (Aylwin in IWGIA 2017).

They have also enacted legislation on the recognition of Indigenous customary laws and institutions, and on the duty to consult with Indigenous Peoples when adopting measures that may affect them directly (ILO C-169, Article 6.1), particularly in the context of resource developments impacting their communities. Less abundant has been legislation pertaining to Indigenous Peoples' autonomy or self-government.⁷

TABLE 2: KEY LEGISLATION ENACTED

Legislation concerning Indigenous Peoples' rights	Brazil	Bolivia	Chile	Colombia	Mexico	Peru
Ratification of ILO C-169	2002	1991	2008	1991	1991	1994
Demarcation and/or titling/regularization of traditionally occupied Indigenous lands	1973,* 1991 & 1996	1996, 2006 & 2010	1993	1994, 1995, 2014 & 2015	1992, 1993 & 1996	1987**
Protection Indigenous natural resources		2006	1993 & 2008		1996 & 1997	
Duty to consult	2003; 2007 & 2012	2005; 2007; 2010; 2014	2012 & 2013	1998	2003	2011 & 2012
Indigenous rights and protected areas			1993		1997	
Special Indigenous representation in state institutions (congress and/or regional and municipal entities)		2010		2001	1994	2002
Self-governed or autonomous Indigenous territorial entities		2007 & 2010		2014	1998 & 2017	
Indigenous customary laws and systems		2010 & 2012	1993		2011; 2014 & 2015	2003

*Brazil had enacted the “Indian Statute” in 1973, which regulated lands considered as Indigenous lands.

** Peru had previous legislation pertaining to native communities in the Amazon (Law on Native Communities and Agricultural Development of the Forest and Forest-rim Regions, Decree Law No. 22175 of 1978).

Although not always complying with ILO C-169 standards, these legal developments demonstrate the significant impact of ILO C-169 on Latin American states in establishing a legal framework in their relationship with Indigenous Peoples. Notwithstanding these changes, it is also worth noting that this normative shift has not been fully carried out. Former UN Special Rapporteur on the Rights of Indigenous Peoples (UNSRIP) Rodolfo Stavenhagen and others have referred to an “implementation gap,” present in all states considered here (United Nations Economic and Social Council 2006; Economic Commission for Latin America 2014; Del Popolo ed. 2017). Nevertheless, the enactment

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ILO C-169 does not explicitly acknowledge Indigenous Peoples' rights to autonomy or self-government, but rather recognizes their right “to decide their own priorities for the process of development” (Article 7.1), to “their customs and customary laws” (Article 8.1) as well as to “retain their own customs and institutions” (Article 8.2).

of this legislation reflects a consensus that states need to put an end to the integrationist, if not assimilationist laws that until recently had framed relations between states and Indigenous Peoples, with very negative implications throughout the region.

1.B JURISPRUDENCE

Jurisprudence or case law emerging from courts of justice or constitutional courts has also played a significant role in upholding the rights stipulated in ILO C-169. Although the jurisprudence concerning Indigenous Peoples emerging from the Latin American region’s courts since ILO C-169 entered into effect has referred to diverse matters, one of the most frequent issues the courts have dealt with, outlined in **Table 3**, has focused on the duty of states to ensure prior consultation with Indigenous Peoples and to their right to free, prior and informed consent.⁸ This duty is especially important in the context of resource exploitation directly affecting Indigenous communities.

TABLE 3: KEY JURISPRUDENCE ON THE DUTY TO CONSULT AND ON INDIGENOUS PEOPLES’ RIGHT TO FREE, PRIOR AND INFORMED CONSENT

Duty of states to consult with Indigenous Peoples (in different contexts) and Indigenous Peoples’ participation on benefits of developments projects	Indigenous Peoples’ right to free, prior and informed consent
<p>Bolivia</p>	<p>The Constitutional Tribunal of Bolivia initially affirmed that the approval of Indigenous Peoples in consultation processes was not a requisite for the exploitation of state subsurface resources (Sentence N°0045/2006). The Bolivian Plurinational Constitutional Court later recognized the existence of situations where consent is mandatory in consultation processes (Sentence N° 2003/2010). An exception to this was the court’s ruling in the <i>TIPNIS</i> case (Plurinational Constitutional Court. Judgment No. 0300/2012).⁹</p>
<p>Brazil</p> <p>By 2015, more than 3,000 development projects that required environmental approval had not involved consultations with Indigenous Peoples. However, the federal justice stated that prior consultation with Indigenous Peoples was required in nine large development projects, including hydro dams, power lines and roads, two legislative initiatives, and in one national park (Rojas Garzón, Yamada and Oliveira 2016). In the Belo Monte hydro dam case, the Regional Federal Tribunal ordered a halt to the project until consultation was undertaken with the affected peoples (Federal Regional Tribunal, Action N°. 2006. 39. 03. 000711-8).</p>	

⁸ Article 16.2 states that “(w)here the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent.”

⁹ The case involved native rights regarding development in the Isiboro-Sécure Indigenous Territory and National Park, or in Spanish, the Territorio Indígena y Parque Nacional Isiboro-Sécur (TIPNIS).

Duty of states to consult with Indigenous Peoples (in different contexts) and Indigenous Peoples' participation on benefits of developments projects

Indigenous Peoples' right to free, prior and informed consent

Chile

Chile's supreme court initially assumed that the duty to consult with Indigenous Peoples was fulfilled through citizens' participation in the environmental impact assessment (EIA) process. Later on, in at least 10 cases, it reversed its jurisprudence, acknowledging the specificity of this duty of states and ordering the enactment of a special procedure to consult with Indigenous Peoples (Due Process of Law Foundation and Oxfam 2015). In one emblematic case concerning a large mining project, it also ordered Indigenous participation on benefits of development projects (Supreme Court, Case N°2211-2012).

Colombia

The Constitutional Court of Colombia (CCC) handed down 77 judgements from 1997 to 2015 on the right to consultation in diverse contexts, including cases concerning the state and private entities, concluding in its decisions that the duty to consult with Indigenous Peoples is mandatory. It also invalidated forestry legislation enacted by the Colombian congress on the basis that it had not involved prior consultation with Indigenous communities (CCC Judgement C-030/2008).

The CCC has held that, in view of particularly adverse effects on the collective territory of Indigenous Peoples, the duty to ensure their participation is not exhausted by consultation. Rather, their free, informed, and express consent must be obtained as a precondition for the measure (CCC Judgment T-376 of 2012; and Judgment T-704 of 2016).

Mexico

Mexico's supreme court has ordered the suspension of projects launched without consultation. However, those orders have been ignored by state officials and the private sector and do not yet constitute binding case law according to the Mexican legal tradition (United Nations Special Rapporteur 2018).

Peru

The Peruvian Constitutional Court (PCC) has stated on a case on the right to prior consultation that ILO C-169 is a treaty with constitutional status (PCC Judgement 03343-2007-AA). Later it affirmed that in the absence of specific legislation, the convention developed the content, stages, and rules to enable the effective implementation of the consultation process (PCC Judgement 00022-2009-PI). In another case, it addressed the failure to implement regulations on the right to consultation, and concluded that they do not establish consultation processes consistent with the requisite standards (PCC Judgement 05427-2009-AC).

ILO C-169 has also influenced case law and jurisprudence in the region on other matters, including Indigenous Peoples' rights to lands, autonomy, and traditional legal systems. Mention should be made of the jurisprudence of the Constitutional Court of Colombia (CCC), which has played a leading role in upholding Indigenous rights on these matters. Indeed, the CCC explicitly followed ILO C-169 when recognizing Indigenous land rights as protected rights, granting collective ownership.¹⁰ Based on ILO C-169 and on other international law instruments, which the CCC considers to be part of domestic constitutional law, it has also asserted Indigenous Peoples' rights to autonomy on

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Constitutional Court of Colombia, Decision T-257/93.

internal matters, including legislation.¹¹ At the same time, it has also declared that such autonomy is limited by fundamental rights defined in international law,¹² affirming that a high degree of autonomy is a precondition for the survival of Indigenous communities.¹³ The same court has also supported the implementation of Indigenous justice systems, notwithstanding the fact that constitutional provisions acknowledging such systems has not been enacted. In doing so, it has affirmed that its only limits are respect for a group of what it calls an “essential nucleus” of rights considered in Colombian constitutional law, namely the right to life, to not be tortured, to due process, and to minimal rights of subsistence¹⁴ (Thornhill et al. 2018).

Finally, mention should be made of the jurisprudence that has emerged in recent decades in the Inter-American Human Rights System after the approval of ILO C-169. Of particular relevance is reference to Indigenous Peoples’ rights to communal property based on traditional occupancy, regardless of the existence of a formal legal title issued by states. This jurisprudence emerged since the decision of the Inter-American Court of Human Rights (IACHR) in the *Mayagna (Sumo) Awas Tingni vs. Nicaragua* case (2001), followed later by several other courts’ decisions reinforcing such a right. The jurisprudence of the IACHR in the case of *Sawhoyamaxa Indigenous Community vs. Paraguay* (2006) would later expand by acknowledging Indigenous Peoples’ rights over natural resources traditionally used or occupied (2007). Moreover, in its decision in the case of *Saramaka People vs. Suriname* (2007), this court ruled that, in the context of large developments, states not only needed to consult with Indigenous Peoples, but also needed to obtain their free, prior and informed consent. Since the Inter-American Human Rights System did not have a specific instrument concerning Indigenous Peoples’ rights until recently—when, in 2016, the American Declaration on the Rights of Indigenous Peoples (ADRIP) was approved by the Organization of American States—the IACHR referred extensively to ILO C-169, considering it to be part of an international legal corpus applicable to Indigenous Peoples in the Americas. It did this according to ILO C-169 provisions, by interpreting the existing Inter-American legal instruments—the American Declaration on the Rights and Duties of Man (1948) and the American Convention on Human Rights (1969)—in an evolutionary manner (Inter-American Commission on Human Rights 2007).

1.C POLICY DEVELOPMENTS

The normative transformations introduced in Latin America by ILO C-169 have also prompted a broad range of public policies aimed at securing Indigenous Peoples’ rights. These have been varied in nature, including policies aimed at promoting Indigenous social and economic development and Indigenous access to health, as well as policies related to cultural and linguistic rights (Del Popolo ed. 2017; Economic Commission on Latin America 2014). Latin American states have essentially responded to Indigenous Peoples’ land claims by identifying, demarcating and, in some cases, titling lands and territories traditionally occupied by Indigenous Peoples. Some countries, such as Brazil

¹¹ Constitutional Court of Colombia, Decision T-201/16.

¹² Constitutional Court of Colombia, Decision T-778/05.

¹³ Constitutional Court of Colombia, Decision T-349/96.

¹⁴ Constitutional Court of Colombia, Decision T-254/94.

and Colombia, have made significant progress in this regard. The lands they have recognized and secured for Indigenous Peoples are, in proportion to their demography, larger in size than those of non-Indigenous proprietors. Nevertheless, a common problem throughout Latin America is that Indigenous Peoples' lands and territories continue to be subject to different threats, including the imposition by states of extractive industry projects, especially mining and oil and gas, as well as infrastructure initiatives, including highways and hydro dams. Indigenous lands and territories have also been affected by the expansion of a broad range of illegal activities, including logging and farming, most of which have also generated violence that has deeply affected the community members (Economic Commission on Latin America 2014; Inter-American Commission on Human Rights 2016).

In Section 2, we trace the emergence of a comparable set of rights in two countries that have not signed on to ILO C-169, Australia and Canada, but which nevertheless have been indirectly influenced by the normative sea change the convention is a part of.

2. INDIGENOUS RIGHTS IN AUSTRALIA AND CANADA

Notwithstanding many shortfalls and challenges still in place, Australia and Canada have also made significant progress in recognizing and protecting Indigenous Peoples' rights. In recent decades, both countries have taken important steps to move away from an older, colonial assimilationist institutional framework towards establishing new relationships with Indigenous Peoples.¹⁵ Even though neither country has signed on to ILO C-169, it is significant that many of these developments have occurred *after* the convention came into place.

In this section, we detail the changes in each country. In Section 3 below, we trace how the new international legal context concerning Indigenous Peoples, which includes ILO C-169, has influenced these changes, having an indirect, but nevertheless critical impact on them.

2.A CONSTITUTIONAL RECOGNITION

In Canada, a decade prior to ILO C-169, Section 35 of the Constitution Act of 1982 recognized Aboriginal and treaty rights of the Aboriginal Peoples of Canada, which include the Indian, Inuit and Metis peoples.¹⁶ By contrast, although they have demanded it for decades, Australian Indigenous Peoples have not yet been granted constitutional recognition. Since 2007, however, there has been bipartisan support in Australia to amend the constitution to recognize Aboriginal and Torres Strait Islander Peoples' rights and, in 2015, a referendum council was appointed to consider options for constitutional recognition of Australia's First Peoples.¹⁷

¹⁵ In the case of Canada, see Royal Commission Report on Aboriginal Peoples (1996). In the case of Australia, see the federal government's apology to the Aboriginal and Torres Strait Islander Peoples for the grief and suffering inflicted by laws and policies in the past (2008).

¹⁶ Section 35 of the Constitution Act states: "(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada. (3) For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired."

¹⁷ See Referendum Council Report released in 2017, available from: <https://www.referendumcouncil.org.au/>. No substantial progress has been made since then to make this constitutional recognition possible.

2.B JURISPRUDENCE AND LEGAL DEVELOPMENTS

Because both Australia and Canada are common law countries, legislation concerning Indigenous Peoples has been less abundant in these states when compared to Latin America. Legislation in both states has instead emerged from jurisprudence resulting from litigation undertaken by Indigenous Peoples to assert their rights.

In Australia's landmark *Mabo vs. Queensland* (1992),¹⁸ the High Court (HCA) held that the people of Murray Island, which is part of the Torres Strait Islands, retained native title to their lands and surrounding waters in accordance with their laws, customs, traditions and practices. In stating this, the court overturned the doctrine of *terra nullius*, which until then had prevailed on jurisprudence and land rights policy. The *Mabo* decision was instrumental in the enactment of the Native Title Act of 1993 (NTA), which by recognizing and protecting native title, shaped how future dealings affecting native title would proceed. The NTA established an independent body, the National Native Title Tribunal, to manage existing native title as well as future title claims applications. It also recognized that Aboriginal and Torres Strait Islander people held rights and interests in waters according to their traditional laws and customs, for the purposes of hunting, fishing, gathering and cultural activities.

The uncertainties that the NTA left in the relationship between native title and mining and pastoral leases resulted in intensive litigation. In its jurisprudence, the HCA generally stated that such interests could co-exist. Decisions in the *Western Australia vs. Commonwealth* (1995, *Native Title Act case*) and in the *Wik Peoples vs. Queensland* (1996) cases, resulted in the Native Title Amendment Act (Cwlth 1998), which limited native title protection by validating new grants issued by state governments since the introduction of the NTA, as well as renewals of leases issued before 1994. It also did so by extinguishing native title in relation to freehold, leasehold and other tenures, as well as by confirming government authority over water and airspace, and by expanding the rights of pastoralists to undertake agricultural activities on native title lands (Strelein 2010). It also introduced a scheme of Indigenous land use agreements (ILUAs), which are voluntary agreements entered into by native title groups and other interested parties, aimed at providing certainty for non-Indigenous stakeholders on land interests. ILUAs generally refer to activities to be undertaken in the land, such as infrastructure or mining development, which can include provisions for traditional owners to have their consent determinations approved in exchange for their agreement on future projects or acts (O'Bryan 2006). The NTA requires native title holders to establish a prescribed body corporate (PBC) when a determination of native title is made.¹⁹ When entered into the National Native Title Register, these become a registered native title body corporate representing native title holders.

¹⁸ High Court of Australia, *Mabo vs. Queensland* [No 2] (1992).

¹⁹ PBCs are regulated by the Native Title Act 1993; the Native Title (Prescribed Bodies Corporate Regulations (1999)) and by Corporations (Aboriginal and Torres Strait Islander Act 2006). PBCs hold in trust, or act as agent to manage, their native title rights and interests. The PBC can represent the native title holders in any future matter or assist with the negotiation of an ILUA. Such agreements can cover both future acts (e.g., exploration or mining activity) and non-future acts (e.g., use and access agreements that regulate co-existing rights).

In 2013, in the *Akiba on behalf of the Torres Strait Regional Seas Claim Group vs. Commonwealth of Australia* case, the HCA argued that native title included the right to commercially exploit fish. In 2014, in *Willis on behalf of the Pilki People vs. State of Western Australia* and *BP (Deceased) on behalf of the Birriliburu People vs. State of Western Australia*, the federal court affirmed that the native title holders hold non-exclusive rights to access and take the resources within their territory for any purposes, including commercial purposes, when consistent with their law and custom.

The Aboriginal Land Rights (Northern Territories) Act (Cwlth) (ALRA) was enacted in the Northern Territories in 1976, creating a special form of land title—Communal Inalienable Freehold Title—to be held by land trusts and managed by statutory authorities called land councils. ALRA considers a financial framework with mining royalties on Aboriginal land shared between people in areas affected by mining, the administrative costs of land councils and other Indigenous interests in the Northern Territory in similar percentages (Altman 2009). It also provides for a land council consultation process—which includes the right to permit or refuse mining exploration to be conducted on native land—with the participation of miners and explorers, along with ministerial representatives for oversight purposes.

Also relevant for Indigenous Peoples in Australia is the Environment Protection and Biodiversity Conservation Act (1999), which provides for the involvement of Indigenous Peoples in conservation, the protection of traditional use of land and waters, and promoting Indigenous involvement in the management of protected areas. In 2013 the Aboriginal and Torres Strait Islander Peoples Recognition Act committed Australia's parliament to place before the Australian people through a referendum a proposal for constitutional recognition of Aboriginal and Torres Strait Islander Peoples. Such a referendum is still pending.

As in Australia, jurisprudence in Canada has played a central role in the recognition of Indigenous Peoples' rights. A landmark decision by the Supreme Court of Canada (SCC) is the *Calder vs. Attorney General of British Columbia* (1973) case. It affirmed that Canadian law recognizes "Aboriginal title," which encompasses rights of enjoyment and use of ancestral land that stem from Aboriginal occupancy and not legal enactment. In recent decades, such jurisprudence has been further expanded in decisions of the same court in, among other cases, *Delgamuukw vs. British Columbia* (1997), *Haida Nation vs. British Columbia (Minister of Forests)* (2004), *Taku River Tlingit First Nation vs. British Columbia* (2004), and *Mikisew Cree First Nation vs. Canada* (2005). Through these cases, the SCC has reaffirmed the rights of Indigenous Peoples over their lands and resources, grounded in their "Aboriginal title." The same court has also elaborated on the contents of meaningful consultation, compensation and extinguishment of such title.

Of particular relevance is the *Delgamuukw vs. British Columbia* (1997), where the SCC affirmed that if an Aboriginal group can establish that, at time of sovereignty, it exclusively occupied a territory to which it maintained a substantial connection, then it has the communal right to exclusive use and occupation of such lands. The Aboriginal group can use the lands for different purposes, including economic exploitation. The only limitation is that lands cannot be disposed of without surrender to the Crown, nor can they be used in such a fashion that would destroy the Aboriginal group's special bond with the land. The court also provided guidance on the powers of governments

to infringe on Aboriginal title, as well as the contents of meaningful consultation, compensation and extinguishment, acknowledging the desirability of negotiations between First Nations and governments.

Also central in this jurisprudential evolution has been the *Tsilhqot'in Nation vs. British Columbia* (2014) case, where the SCC recognized that Aboriginal title gave this First Nation the right to decide how to enjoy, occupy and possess the land, and to use and manage the land, including its natural resources. Where Aboriginal title has been recognized, economic development requires not only consultation but also the consent of the First Nation that holds title. The Crown can develop the land without the consent of the First Nation, however, if it is able to demonstrate a substantial public purpose for the proposed activity. The judgment reaffirms that consultation processes and the justification of infringements of Aboriginal rights and title are the responsibility of the Crown and not of project proponents.

Paradoxically, the 1876 Indian Act, an assimilationist legislation, continues to be applied only to First Nations peoples, not to the Metis or Inuit. The act, which has been amended several times, including in 1951 and 1985,²⁰ removing its discriminatory sections, outlines governmental obligations to First Nations peoples, and determines “status”—a legal recognition of a person’s First Nations heritage—which affords certain rights such as the right to live on reserve land. Since 1975, the Parliament of Canada has enacted legislation to give its assent to modern treaties entered into by the federal government with Aboriginal Peoples. It has also enacted legislation dealing with lands and resources. Among them it is relevant to mention the First Nations Land Management Act (1999), granting Indigenous Peoples the right to govern their lands, communities and resources. The act applies to those communities that have signed a framework agreement for this purpose, and establishes land codes to regulate land use. It grants these communities the right to interests and licenses in relation to that land, to manage their natural resources, and to receive revenues for resource exploitation.

Also relevant is the First Nations Oil and Gas and Moneys Management Act (2005), which allows for Aboriginal participation in the management and control of oil and gas resources on reserve land, as well of the moneys otherwise held by the Crown. This act also grants them the power to protect the environment on such lands and to conduct environmental assessments concerning exploration. Laws concerning Aboriginal peoples have also been enacted by provincial legislatures.²¹ **Table 4** below summarizes the major jurisprudential and legal developments in Australia and Canada.

²⁰ Interestingly, this amendment of the Indian Act was a consequence of the decision made by the UN Committee on Human Rights in the case of Sandra Lovelace, an Aboriginal woman who lost her Indian status as a result of marrying a non-native.

²¹ According to the Canadian Constitution, the federal government is responsible for the relationship with Aboriginal peoples. This is a consequence of Parliament’s jurisdiction over “Indians and lands reserved for Indians,” a jurisdiction that since April 2014 includes Metis (See *Daniels vs. Canada* 2013; Anaya 2014, p. 6).

TABLE 4: KEY JURISPRUDENCE AND LEGAL DEVELOPMENTS

Country/ Themes or Rights	Australia		Canada	
	Year	Case	Year	Case
Indigenous lands (Native/ Aboriginal title)	1992	<i>Mabo vs. Queensland</i> . HCA overturned the doctrine of <i>terra nullius</i> , until then prevailing on jurisprudence and policy on land rights. It recognized that the people of Murray Island, part of the Torres Strait Islands, retained native title to their lands and surrounding waters in accordance with their laws, customs, traditions and practices.	1973	<i>Calder vs. Attorney General of British Columbia</i> . The SCC affirmed that Canadian law recognizes "Aboriginal title," which encompasses rights of enjoyment and use of ancestral land that stem from Aboriginal occupancy, and not legal enactment.
	1995	<i>Western Australia vs. Commonwealth (Native Title Act case)</i> . HCA confirmed the power of the Commonwealth to pass legislation affecting native title.		
	1996	<i>Wik Peoples vs. Queensland</i> Provided certainty for pastoralist and farming groups in their tenures in conflict with native rights and interests. As a consequence, in 1998 the Native Title Amendment Act (Cwlth) was passed, limiting native title protection by validating new grants by state governments.		
Rights over natural resources	2013	<i>Akiba on behalf of the Torres Strait Regional Seas Claim Group vs. Commonwealth of Australia</i> . Native title included the right to commercially exploit fish.	1997	<i>Delgamuukw vs. British Columbia</i> . The SCC affirmed that if an Aboriginal group can establish that, at time of sovereignty, it exclusively occupied a territory to which a substantial connection was maintained, then it has the communal right to exclusive use and occupation of such lands and resources for different purposes, including economic exploitation. The SCC provided guidance on contents of meaningful consultation, compensation and extinguishment, acknowledging the desirability of negotiations between First Nations and governments.
	2014	<i>Willis on behalf of the Pilki People vs. State of Western Australia and BP (Deceased) on behalf of the Birriliburu People vs. State of Western Australia</i> . The federal court affirmed that the native title holders had always held the right to access and take the resources within their territory for any purposes, including commercial purposes, provided the right was consistent with the group's traditional system of law and custom.	2004	<i>Haida Nation vs. British Columbia (Minister of Forests)</i> . The SCC held that B.C. had a duty to consult with the Haida about decisions relating to the harvest of timber from an area of the Queen Charlotte Islands claimed by the Haida, but where Aboriginal title was not proven. The SCC stated that good-faith consultation may lead to an obligation to accommodate Haida concerns in the harvesting of timber.

Country/ Themes or Rights	Australia		Canada	
	Year	Case	Year	Case
Duty to consult			2004	<i>Taku River Tlingit First Nation vs. British Columbia</i> The SCC held that the process undertaken by British Columbia under the Environmental Assessment Act fulfilled the requirements of the Crown's duty to consult with the First Nation and to accommodate its concerns. Also, that the province was not under a duty to reach agreement with the First Nation, and its failure to do so did not breach its duty of good-faith consultations.
			2005	<i>Mikisew Cree First Nation vs. Canada</i> The SCC held that the Crown's duty of consultation, which flows from the honour of the Crown and its obligation to respect the existing treaty rights, was breached due to lack of government consultation of the decision to build a road. The SCC reiterated that consultation will not always result in an agreement.
			2014	<i>Tsilhqot'in Nation vs. British Columbia</i> . The SCC stated that Aboriginal title conferred on this First Nation the right to decide how the land will be used, to enjoy, occupy and possess the land, and to use and manage the land, including its natural resources. Where Aboriginal title has been recognized, economic development will require not only consultation, but the consent of the First Nation that holds title. The Crown however can proceed to a development without the consent of the First Nation if it is able to demonstrate a substantial public purpose for the proposed activity.

2.C POLICY DEVELOPMENTS

Parallel to the entry into force of ILO C-169, Australia and Canada have taken important steps to move away from the assimilationist institutional framework characteristic of their colonial legacy and towards building a new foundation for their relationship with Aboriginal peoples.²² In Australia, the complex legal and policy frame established by jurisprudence in the *Mabo* case and the NTA have had a significant policy impact on Aboriginal land titling. This includes progress on a range of land rights grants, purchases, native title determinations and areas subject to ILUAs or other joint management arrangements. The areas covered by titling include three different categories: land claimed or automatically scheduled under land rights law, determinations of exclusive possession under native title law, and determination of non-exclusive possession under native title law. According to the NTA, as of 2014, 36 claims had been determined in the

²²

In the case of Canada, see Royal Commission Report on Aboriginal Peoples (1996). In the case of Australia see the federal government's apology to the Aboriginal and Torres Strait Islander Peoples for the grief and suffering inflicted by laws and policies in the past (2008).

federal court, while the rest were determined through agreements between traditional owners and interested parties—individuals, proponents and/or governments—later ratified by the court (Australian Law Reform Commission 2014). Among the difficulties that Indigenous Australians face in asserting their land rights under this act is the fact that claimants must prove that they have had an uninterrupted connection to the area being claimed, and also identify that they continue to practice their traditional laws and customs. As UNSRRIP Victoria Tauli-Corpuz (2017) noted in the report on her visit to Australia, the difficulties in asserting land rights are also related to a complex system with multiple and overlapping legal regimes applicable to native title claims and land rights at the federal, state and territory levels.

Canada implemented different policies to deal with Indigenous Peoples' land and self-government claims. One of these has been the "comprehensive claims policy," initially established in 1973, which dealt with claims and proposals for the settlement of long-standing Aboriginal grievances relating to the loss of land in certain parts of Canada (British Columbia, Northern Quebec, the Yukon and Northwest Territories), where Indian title to land was never extinguished by treaty or superseded by law. Also, a specific claims policy aimed at addressing grievances related to the non-fulfilment of promises made within treaties and disagreements or improper interpretation of the same documents was launched in parallel. Canada has signed 25 modern treaties with Aboriginal peoples since 1975.²³ According to official data, these treaties have provided Indigenous ownership over 600,000 square kilometres of land, certainty with respect to land rights in around 40 per cent of Canada's land mass, capital transfers of over \$3.2 billion, the protection of traditional ways of life, access to resource development, and participation in land-management development opportunities. Eighteen of these treaties include recognition of different forms of self-government rights and political recognition (Government of Canada n.d.).

Notwithstanding these positive aspects, Indigenous Peoples have expressed their discontent with the policy of modern treaties. This is rooted the long period of time that treaties take to be reached and the minimization or refusal to acknowledge Aboriginal rights through them, often relying on extinguishing or not asserting such rights and title. Their discontent is also rooted in the fact that the government tends to favour monetary compensation over the rights to return the lands (United Nations General Assembly (a) 2014).

3. COMPARATIVE IMPACT OF ILO C-169

Assessing the impact of ILO C-169 requires considering the counterfactual: comparing outcomes in countries that have ratified it versus countries that have not done so. Such a comparison is challenging, not only because of the substantial differences among diverse legal, political and economic systems, but also because of Indigenous Peoples' distinctive cultures and demographics in each case. These challenges notwithstanding, we need to

²³

Including the federal as well as the provincial and territorial governments. Cf. <https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231#chp4> (accessed May 14, 2019).

understand whether there are substantially different outcomes in states that have ratified ILO C-169 against those that have not.

In this section, we consider outcomes in terms of the extent to which Indigenous Peoples participate in different countries' legislatures, their degree of autonomy or self-government, their land rights, and their rights to natural resources, to be consulted on and to provide consent to developments in their territory, and to participate in the benefits of natural resource exploitation.

3.A PARTICIPATORY RIGHTS.

ILO C-169 Article 6.1(b) stipulates that state parties shall:

“...establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;”²⁴

The table below summarizes the degree to which Indigenous Peoples participate in their country's legislatures in the different cases considered here.

TABLE 5: INDIGENOUS REPRESENTATION IN STATES' LEGISLATURES

	% Indigenous population*	Number of Indigenous members of legislative bodies ****	Total members of legislative bodies	% of Indigenous representation on legislative bodies *****
Bolivia	62.2	41	130	31
Brazil	0.5	1	513	0.2
Colombia	3.4	3	268	1.1
Mexico	15.1	14	500	2.8
Peru	24	9	130	6.9
Chile	11	5	201	2.4
Canada	4.3**	10	338	3
Australia	3.0***	5	150	3.3

Sources: * Economic Commission on Latin America, 2014.

** United Nations Human Rights Council, (a) 2014.

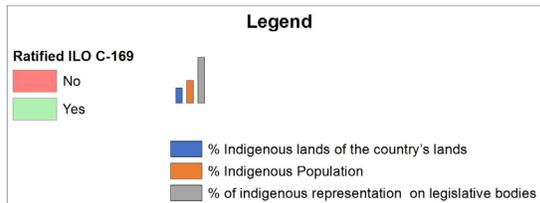
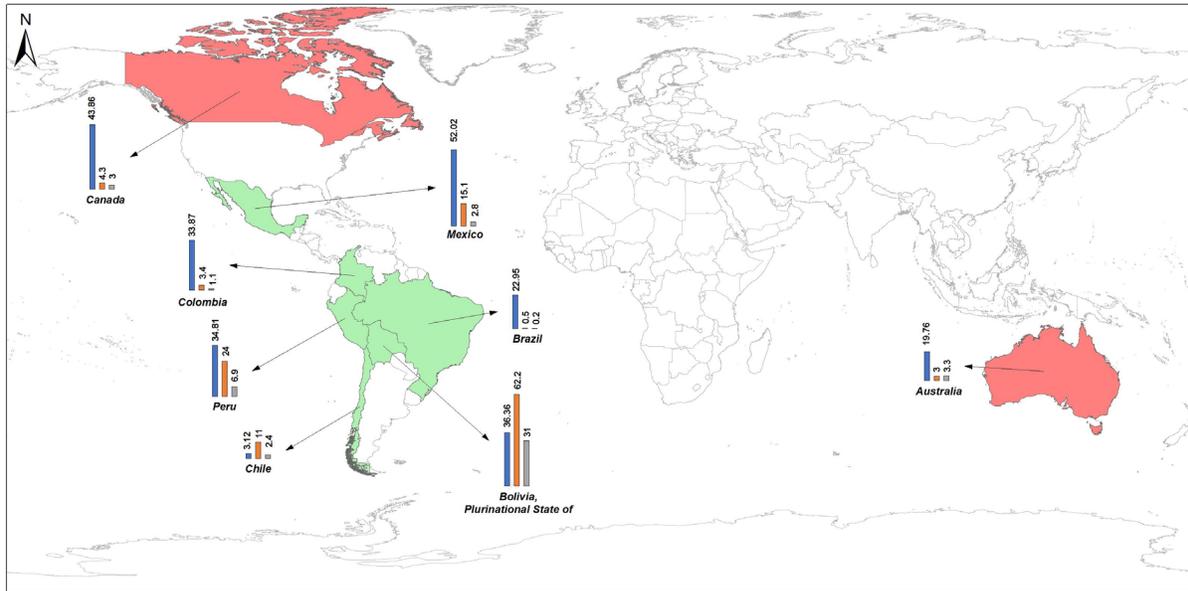
*** United Nations Human Rights Council, 2017.

**** Figures for Latin American states are based on Programa de las Naciones Unidas para el Desarrollo, 2015.

***** Bolivia: Indigenous members of the Plurinational Legislative Assembly. Brazil: Indigenous members of the Deputy Chamber. Peru, Chile and Colombia: Indigenous members of congress. Mexico: Indigenous members of the federal congress. Canada: Indigenous members of the House of Commons. Australia: Indigenous representatives of the federal parliament.

²⁴

Cf. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169#A6 (Accessed May 14, 2019).



With 41 Indigenous members out of a total of 130, representing 31 per cent of its Plurinational Legislative Assembly as of 2015, Bolivia is quantitatively the best performer in terms of Indigenous participation in its legislative branch. This outcome is a consequence of constitutional and legal provisions that guarantee special seats in the legislature for Indigenous Peoples. Yet it is also important to note that this figure is lower than Indigenous Peoples' demography, since they represent almost two-thirds of the total population. In all other states, except for Australia and Canada, Indigenous political representation in legislative bodies is far from equivalent to Indigenous demography and does not guarantee their representation to the same extent as for other sectors of the population.

3.B AUTONOMY OR SELF-GOVERNMENT

ILO C-169 only indirectly recognizes Indigenous Peoples' autonomy or self-government (Article 7.1 affirms Indigenous Peoples' right to decide their own development priorities and Article 8.2 acknowledges their right to retain their customs and institutions).²⁵ Among the Latin American states analyzed here, this right has formally been acknowledged and developed in Bolivia, Colombia and Mexico.²⁶ As Table 6 indicates, respect for this right differs across the countries we consider.

²⁵ Cf. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169#A7 (Accessed May 14, 2019).

²⁶ This right of course also exists in Canada.

TABLE 6: INDIGENOUS AUTONOMY AND SELF-GOVERNMENT

Country	Autonomy or self-government arrangements
Bolivia	14 Indigenous autonomies with a municipal frame and three territorial autonomies have been established (Los Tiempos 2018).
Brazil	None.
Chile	De facto Indigenous autonomies implemented by the Rapa Nui people (IWGIA 2019) and the Mapuche people.
Colombia	The autonomy of Indigenous Peoples' <i>resguardos</i> (areas administered by native authorities legitimized by inalienable communal land titles), 750 which cover almost one third of the state's surface, is acknowledged in the constitution, and has been reinforced by the jurisprudence of the Constitutional Court of Colombia, which had recognized them as autonomous entities whose governments have ample powers on internal matters (Garzón 2017).
Mexico	Although constitutionally entrenched, Indigenous autonomies have had limited development in practice. Institutional autonomous experiences are limited to the municipal level. This is the case especially in federal entities with large Indigenous demographics. For example, in Oaxaca, a state with 34 per cent of the national Indigenous population, where 418 of 570 municipalities are elected according to Indigenous <i>usos and costumbres</i> (customary laws), and as of 2012 are being governed to a great extent by Indigenous Peoples (Aylwin 2014). De facto autonomies are also relevant, particularly in the state of Chiapas, after the Zapatista uprising in 1994.
Peru	De facto Indigenous autonomy in the case of the Wampis Nation (IWGIA 2019).
Canada	Currently there are 22 self-government agreements with 43 Indigenous communities and about 50 self-government negotiating tables throughout Canada, which in many cases are being negotiated in conjunction with modern land claim treaties. Among those matters addressed in these agreements are the structure of Aboriginal government and its relationship with other governments; funding arrangements; the relationship of laws between jurisdictions; programs and services to be delivered to community members; and community well-being, including issues such as heritage and culture and socio-economic initiatives (Government of Canada n.d.). The number of peoples and communities with self-government regimes is still reduced considering the 617 Indian bands, 1,000 communities and 50 cultural groups existing in Canada (United Nations Human Rights Council (a) 2014).
Australia	None.

Through the figure of *resguardos*, Colombia has a broader framework for Indigenous autonomy at a national level. Bolivia, Canada and Mexico have some degree of Indigenous self-government or autonomy, although they are limited to some entities (communities, bands or municipalities) and in relation to the total Indigenous population. Self-government arrangements in Canada, although important in number and varied in nature, are also limited in some key respects. One of them is legal pluralism and legal systems, particularly on criminal issues.²⁷ Australia, Brazil, Chile and Peru, however, show little progress in implementing similar rights.²⁸ Although no strict rule can be made on this matter, federal or quasi-federal states such as Canada and Mexico, or semi-federal states, such as Bolivia, seem to be more flexible and perform better on autonomous regimes for Indigenous Peoples.²⁹

²⁷ See Borrows (2010) for the challenges Canada faces on this matter.

²⁸ In the absence of official recognition, in recent years de facto Indigenous autonomy has gained traction in parts of Latin America, particularly in Peru (the Wampis Nation) and in Chile (the Mapuche people and the Rapa Nui) (IWGIA 2019).

²⁹ As Papillon (2009) affirms, federal systems seem to have the plasticity to adapt to the tensions created by ethnic and linguistic divisions, including those involving Indigenous Peoples. Moreover, he suggests that federalism in Canada and the United States has evolved in light of Indigenous demands for autonomy.

3.C RIGHTS TO LANDS

ILO C-169 Article 14 establishes that “(t)he rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized.”³⁰ All states here analyzed show some progress since the 1990s, regardless of whether they have ratified this convention.

TABLE 7: INDIGENOUS POPULATION AND LANDS (IN PERCENTAGES)

	% Indigenous population*	% Indigenous lands of the country's lands
Bolivia	62.2	36.36
Brazil	0.5	22.95
Colombia	3.4	33.87
Mexico	15.1	52.02
Peru	24	34.81
Chile	11	3.12
Canada	4.3**	43.86****
Australia	3.0***	19.76

Sources: Rights and Resources Initiative, “Who Owns the World’s Land? A global baseline of formally recognized Indigenous and community land rights” (Washington, DC: RRI, 2015).³¹

* ECLAC 2014.

** United Nations Human Rights Council, (a) 2014.

*** United Nations Human Rights Council, 2017.

It should be clarified that some of the processes implemented to acknowledge Indigenous land rights—especially in Brazil, Chile, Colombia, Canada and Mexico—pre-date ILO C-169. Moreover, in Brazil and Canada the state usually still holds the land for Indigenous Peoples. In Canada, the figure considered above refers to reserve lands and areas covered by treaties, but not necessarily to lands of Indigenous property. In other states, such as Australia, Indigenous Peoples do not have exclusive rights, but instead have shared rights over lands. According to these figures, Mexico and Canada have made more progress on this matter in recent decades. However, considering Indigenous demography, Brazil, followed by Colombia, are the states that have proportionally recognized more lands for Indigenous Peoples. Considering Indigenous Peoples’ demography,³² Chile is clearly the worst performer on this matter, especially when considering that most lands were allocated to Indigenous Peoples before Chile ratified ILO C-169.

³⁰ https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169#A14 (Accessed May 14, 2019).

³¹ Although including not only Indigenous Peoples but also local communities’ lands, we have used the Rights and Resources Initiative (2015) global baseline, since in the states considered in this analysis the vast majority of lands owned communally are Indigenous.

³² Population statistics in Latin America are taken from Economic Commission for Latin America (ECLAC) 2014.

3.D INDIGENOUS PEOPLES' RIGHTS OVER NATURAL RESOURCES IN THEIR LANDS AND TERRITORIES.

Less progress has been made in recognizing Indigenous Peoples' rights over natural resources in their lands and territories (ILO C-169, Article 15).³³ Although the right to use renewable natural resources is acknowledged to Indigenous Peoples in all states analyzed here, the general rule on subsurface resources, including minerals and oil and gas, is that states own such resources and consequently regulate and manage their exploration and exploitation.

TABLE 8: RIGHTS TO NATURAL RESOURCES

Country	Rights to natural resources
Bolivia	Constitutional and legal provisions recognize Indigenous Peoples' participation in the use and management of renewable natural resources on Indigenous lands and/or territories.
Brazil	Exploitation of the natural riches of the soil, rivers and lakes existing therein, are null and void, producing no legal effects, except in case of relevant public interest of the "Union" (Political Constitution of Brazil, Article 231, para. 6).
Chile	Law 19.253 of 1993 created a water fund for the acquisition of water rights for Indigenous individuals and communities and protected traditional use of water by Andean peoples. Law 20,249 of 2008 acknowledged rights of customary use of Indigenous Peoples' coastal marine spaces.
Colombia	Constitutional and legal provisions recognize Indigenous Peoples' participation in the use and management of renewable natural resources on Indigenous lands and/or territories. Jurisprudence of the CCC on this matter has upheld Indigenous Peoples' rights to own and use surface natural resources existing in their lands and territories. The Mining Code (Law 685 of 2001) establishes norms acknowledging "Indigenous Mining Zones" within their territories, zones in which Indigenous Peoples have preferential rights to exploit the minerals and where Indigenous authorities can exclude some areas of cultural or economic significance from mining activities. There is no evidence either that such zones have been established or that preferential rights have been respected.
Mexico	Constitutional and legal provisions recognize Indigenous participation in the use and management of renewable natural resources on Indigenous lands and/or territories.
Peru	Legislation recognizes the Indigenous Peoples' preferential use of natural resources within their lands.
Canada	Jurisprudence on this matter has upheld Indigenous Peoples' rights to own and use renewable natural resources existing in their lands and territories. Modern treaties have provided a varied range of rights over the same resources, including rights to hunt and fish, in some cases exclusively, and have also provided for joint or exclusive management of wildlife management and conservation. Legislation allows Indigenous Peoples on reserve to control and manage oil and gas, although there is no evidence that First Nations are making use of this legislation. Modern treaties, particularly those entered into north of the 60 th parallel, grant Aboriginal Peoples rights over subsurface resources in some limited portions of those lands settled, as well exclusive or joint management, along with the federal or provincial governments, of such resources in treaty areas.

³³

According to ILO C-169 these rights include "the right of these peoples to participate in the use, management and conservation of these resources" (Article 15.1). Also, "(in) cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands" (Article 15.2).

Country	Rights to natural resources
Australia	<p>The NTA also recognized that Aboriginal and Torres Strait Islander people held rights and interests in waters according to their traditional laws and customs, for the purposes of hunting, fishing, gathering and cultural activities. Jurisprudence of the HCA has upheld Indigenous Peoples' rights to own and use surface natural resources existing in their lands and territories.</p> <p>In the case of the Northern Territory in Australia, ALRA established statutory mining royalties for exploration on Aboriginal land in the benefit of those directly impacted and as well as other Indigenous interests in that territory.</p> <p>Similar rights can be established through ILUAs.</p>

Despite progress in the constitutional, legal and jurisprudential spheres, conflict over natural resource management remains, especially in the context of lands of traditional use and occupation claimed but not owned outright by Indigenous Peoples. Mining exploration and exploitation of Indigenous lands and territories are arguably the main causes of conflicts between states, businesses and Indigenous Peoples in Latin America. Canadian companies play a leading role in mining activities in Latin America and their impact on the rights of Indigenous Peoples have been a matter of increasing concern.³⁴ The Economic Commission on Latin America and the Caribbean (Economic Commission on Latin America 2014) affirms that extractive industries operating on Indigenous territories have often contributed to the social marginalization and exclusion of Indigenous Peoples. Conflicts triggered by mining on Indigenous lands and territories in Australia and Canada are also well documented (Cf. Altman 2009 and United Nations Human Rights Council 2017 for Australia; United Nations Human Rights Council (a) 2014 for Canada).

3.E RIGHT OF INDIGENOUS PEOPLES TO PRIOR CONSULTATION AND FPIC

Closely related to resource extraction is the right of Indigenous Peoples to prior consultation and to free, prior informed consent (ILO C-169, articles 6.1, 15.2 and 16.2).³⁵ Prior consultation has been upheld as a statutory right in all states considered here, and has been systematically asserted in the same states by the jurisprudence of higher courts.

³⁴ As of 2013, nearly 198 active conflicts caused by mega-mining were reported in the region, many of them involving Indigenous Peoples. Of these conflicts, 20 took place in Brazil, 34 in Chile, 12 in Colombia, 29 in Mexico, and 34 in Peru. Many of these conflicts were triggered by Canadian-based mining companies. As of 2013, such Canadian companies were involved in the development of 1,526 mining projects in Latin America, particularly in Mexico and Chile (Grupo de Trabajo sobre Minería y Derechos Humanos en América Latina 2013). See also Inter-American Commission on Human Rights, 2016.

³⁵ Article 6.1 of ILO C-169 states that “governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.” Right to free, prior and informed consent, as previously stated, is only recognized by ILO C-169 in the case of Indigenous Peoples’ relocation (Article 16.2).

TABLE 9

Location	Consultation and FPIC
Latin America	<p>Although the duty to consult with Indigenous Peoples has been constitutionally or legally acknowledged in most states, such legislation has often lagged behind ILO C-169 standards (e.g., in Chile and Peru). Its limitations as an effective way to address the concerns of Indigenous Peoples in the context of resource extraction, are visible in all states analyzed here. FPIC has been acknowledged in domestic jurisprudence of high courts in Bolivia and Colombia. It has also found a precedent in the jurisprudence of IACHR in its judgement in the <i>Saramaka vs. Suriname</i> case (2007) pertaining to large-scale projects that would have a major impact on Indigenous and tribal people. The assertion of FPIC in different circumstances, including natural resource exploration and exploitation on Indigenous lands and territories, was expressed in UNDRIP in 2007, an instrument approved by all Latin American states considered here.</p>
Australia	<p>ILUAs provide the framework for consultation between Indigenous Peoples holding rights to land with proponents of infrastructure or mining development who have interest in native title lands and resources. Such consultations cannot be considered consistent with ILO C-169 standards.</p> <p>A form of FPIC has been statutorily considered in ALRA in the Northern Territory of Australia. ALRA considers the right of a land council to consent or refuse to a mining exploration within a certain time frame, and if the terms of an agreement with a proponent are reasonable.</p> <p>Australia adhered to UNDRIP in 2009.</p>
Canada	<p>Although consultation is a duty of the Crown, it has also been undertaken by provinces with diverse policies due to the duty's jurisdiction regarding natural resources. The federal court has allowed for governments to delegate procedural aspects of consultation to private project proponents, a practice that is not consistent with ILO C-169. According to the SCC decision in the <i>Taku River Tlingit First Nation vs. British Columbia</i> case (2004), resource development consultations can take place in the frame of the EIA process. However, in parallel, impact benefit agreements (IBAs) are being negotiated privately and confidentially between proponents and First Nations, weakening and disrupting the process and its outcomes (Papillon and Rodon 2017).</p> <p>FPIC was affirmed by the SCC in the <i>Tsilhqot'in Nation</i> case (2014). However, the ruling also acknowledged the right to proceed to a development without the consent of the First Nation if it is possible to demonstrate a substantial public purpose for the proposed activity. FPIC, however, is not considered in legislation. The IBA practice has emerged as the most common form of relation between business and Indigenous Peoples in the context of resource developments on Aboriginal title lands. The limits of proponent-led IBAs has given rise to a truncated version of consent that does not truly allow for the realization of the principle of FPIC (Papillon and Rodon 2016). Canada also adhered to UNDRIP (2010; 2016), which considers FPIC.</p>

UN bodies have expressed concern over conflicts in Latin America generated by resource extraction without adequate consultation (ECLAC 2014). The outcomes of consultation processes have been frustrating to Indigenous Peoples and have lost credibility. States have come to see them more as a requirement to proceed with a development on Indigenous lands and territories, rather than as a tool of dialogue to be held in good faith and in an appropriate manner aimed at reaching agreement or consent, as ILO C-169 mandates (Due Process of Law Foundation 2015 and OXFAM 2015). The exception to the rule continues to be FPIC, an international standard considered by ILO C-169 in cases of Indigenous Peoples' relocation, by UNDRIP, and in some domestic and international court decisions. FPIC is increasingly part of corporate discourse and practice not only in Australia and Canada, but also in Latin America. This is reflected, for instance, in the commitments of the International Council on Mining and Metals (ICMM), which has included FPIC in its policy statement on operations relating to Indigenous Peoples (ICMM 2013). The council is composed of key mining corporations from Australia, Canada, Chile, Bolivia and Brazil, among other countries.³⁶ Recent studies have noted the double standard of some Canadian companies, which as part of ICMM acknowledge FPIC as a

³⁶ Barrick and Goldcorp (Canada); BHP, MMG and Newcrest and South32 (Australia); Codelco and Antofagasta Minerals (Chile); Minera San Cristobal (Bolivia); Minsur (Brazil). See <https://www.icmm.com/en-gb/members>.

policy standard, who may apply this standard in the states in which they are domiciled, but not in their operations in Latin America (Grupo de Trabajo sobre Minería y Derechos Humanos en América Latina 2013; Observatorio Ciudadano 2016).

3.F INDIGENOUS PARTICIPATION ON BENEFITS OF NATURAL RESOURCE EXPLOITATION

Finally, mention should be made of Indigenous participation in the benefits of natural resource exploitation on traditional lands and territories (ILO C-169, Article 15.2).³⁷

TABLE 10

Location	Participation on benefits of resource extraction
Latin America	Regardless of the constitutional provisions existing in several states ensuring Indigenous Peoples' participation and benefit from resource extraction, and that they should not be negatively impacted by such activities, little progress on this matter is visible in the region on this matter. An exception is the royalty of five per cent of the revenues of oil and gas exploitation established in Bolivia by law in 2005 (Law 3058 of 2005, later amended in 2016), which should be destined to a development fund for Indigenous Peoples to be administrated by Indigenous and peasant confederacies. Aside from this experience, Indigenous involvement in resource extraction, particularly on mining in the region, has been limited to the employment of community members surrounding mining operations as an unskilled labour force.
Australia	<p>According to the NTA, Indigenous groups can negotiate agreements (ILUAs) with the proponents of a mining project on native title lands. Mining agreements with Indigenous groups typically comprise compensation for impairment of native title rights and interests or for impacts on land owners, and for arrangements for heritage and environmental protection. They also include a commercial component for participation in various regulatory approval processes to facilitate land access for mining project development; compensation for impacts on nearby communities; benefit sharing; and investment in community development through, among other matters, education, training and employment (Minerals Council of Australia and National Native Title Council 2010).</p> <p>The confidential nature of these agreements has been a matter of concern. The number of registered ILUAs dealing with mining operation since the passing of the NTA is by far outweighed by the number of less formal future act agreements, also considered in the NTA, which are not subject to the same notice and registration requirements. Government and private parties wishing to obtain consent for future acts clearly prefer to do this without going through the process of registering an ILUA (Steward, Tehan and Boulot 2015).</p> <p>While admitting that some of these agreements have brought important economic benefits for Indigenous communities, Tauli-Corpuz (2017) recognizes that such benefits represent a small fraction of the projects proposed and do not constitute a meaningful recognition of their interest in the land.</p> <p>ALRA, in the Northern Territory, which provides mining royalties to be distributed between people in areas affected by mining on native title lands, as well as land councils and other Indigenous stakeholders, in similar percentages, provides an interesting framework through which Indigenous Peoples can participate in the benefits of mining activity.</p>

³⁷

Article 15.2 of ILO C-169 states that "(t)he peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities."

Location	Participation on benefits of resource extraction
Canada	<p>There has been a significant increase in the number of IBAs signed in Canada in the context of resource exploitation, from 23 signed between 2001 and 2005 to 102 between 2006 and 2010 (Northern Development Ministers Forum in Kielland 2015).</p> <p>This private and confidential mechanism is considered to have the potential to provide for accommodation of Aboriginal interests and address what Aboriginal communities identify as bio-physical and social effects of mineral development. However, concerns have been expressed about how IBAs can perpetuate injustices if benefits are not equally distributed to and within the community, or if monitoring of provisions on behalf of both parties is not continuous (Fidler and Hitch 2007). Because IBAs have evolved only in the last three decades, the long-term benefits they will provide to communities are unclear, particularly in consideration of the fact that Aboriginal youth are the fastest-growing segment of the Canadian population.</p> <p>UNSRIP James Anaya (2014) acknowledges that there are several examples in which Indigenous Peoples have benefited from social and economic benefits of resource projects, including through the development of business, joint ventures or benefit sharing. However, he is also concerned about the fact that Indigenous Peoples also face the highest risks to their health, economy and cultural identity from any associated environmental degradation.</p>

Aside from employment opportunities near mining operations, evidence from Latin America suggests that Indigenous Peoples have not benefited from resource extraction in their territories. Moreover, there are no studies that assess the comprehensive benefits of employment in resource extraction for Indigenous communities.

Relations between Indigenous Peoples and the extractive industry in Australia and Canada are increasingly dealt with through IBAs, as confidential private contractual agreements among businesses and Indigenous Peoples. Some positive elements of IBAs in both countries have been identified, such as incomes resulting from employment or royalties considered in them. Yet there is also concern over their negative implications on the environment and wildlife, impacting the capacity of Indigenous people to produce food and other necessities of life (O’Faircheallaigh 2015). Different analysts, especially in Canada, argue that there is a need to build a more solid legal framework for the protection of Indigenous rights in accordance with international standards, in order to ensure the protection of such rights in the context of IBAs and resource extraction (Onele 2017; O’Faircheallaigh 2015; Papillon and Rodon 2017).

IBAs common to Australia and Canada have not been systematically introduced in Latin America. However, recent studies suggest that the Canadian model of IBAs will be introduced as a way to avoid conflicts with Indigenous Peoples (Bustamante and Martin 2018).³⁸ The same study, however, identifies the risks that IBAs pose to Indigenous Peoples’ rights, due to the asymmetries existing between business and Indigenous communities involved in them, and also due to the absence of the state in such agreements.

³⁸

Recent IBAs entered into by BHP Billiton, an Australia-based company, and by Rockwood Lithium, a part of Albemarle, a U.S.-based corporation, with Atacamenian communities in northern Chile, for the exploitation of lithium on Indigenous claimed lands, which include financial compensation, can serve as an example (Gundermann and Göbel 2018). The weak presence of the Chilean state in these cases is a cause for concern insofar as there is little institutional or policy capacity to manage the conflicts that may arise when agreements reached with one set of communities cause asymmetries with others.

4. CONCLUSION: A NEW INTERNATIONAL CONTEXT

The impact of ILO C-169 on Indigenous Peoples' rights in Latin America is clear. Our analysis of the constitutional, legal, jurisprudential and policy developments in a selection of state parties shows that it has directly and deeply influenced relations between Indigenous Peoples and states in the region. This is not to deny that the implementation gap that UNSRRIP Stavenhagen identified in 2006 still persists, with many of the convention's provisions not fully implemented. Despite major advances, Latin American states face many challenges, including economies heavily dependent on resource extraction in the context of strongly mobilized Indigenous movements now advocating for self-determination in line with rights stipulated in UNDRIP and other international and domestic laws, treaties and declarations.

As stated at the beginning of this article, we also argue that ILO C-169 has had an indirect but nevertheless relevant impact on states that have not ratified this international treaty, specifically Canada and Australia. Indeed, this convention cannot be understood in isolation, but is part of a broader international legal corpus that has emerged in recent decades, strongly influencing and impacting legal and jurisprudential transformations concerning these peoples' rights.³⁹ This international legal corpus on Indigenous Peoples' rights includes not only ILO C-169, but also several other international conventions, such as the UN International Covenant on Civil and Political Rights (UNICCPR), the UN International Covenant on Economic, Social and Cultural Rights (UNICESCR), and the UN's International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), among others, treaties to which Canada and Australia are parties. More recently, this corpus has been expanded, particularly by the inclusion of the United Nations Declaration on the Rights of Indigenous Peoples of 2007 (UNDRIP), which Canada and Australia initially did not adopt, but later endorsed. In the context of the Americas, this corpus includes the American Declaration of the Rights and Duties of Man (1948), the American Convention on Human Rights (1969), as well as the American Declaration on the Rights of Indigenous Peoples (ADRIP), approved by the Organization of American States in 2016.

The same corpus is not only limited to the provisions of these international instruments, but also their authoritative interpretation by treaty bodies in charge of monitoring and applying these instruments. In the absence of other international norms specifically referring to Indigenous Peoples, ILO C-169 has been central in the interpretation of general human rights instruments of universal application. This explains why the UN Human Rights Committee has affirmed that the provisions of the UNICCPR on self-determination (Article 1) and on the rights of minorities (Article 27), which refer to ethnic and linguistic minorities, also apply to Indigenous Peoples.⁴⁰ UNESCR General Comment

³⁹ Some reputed international legal scholars, such as Anaya and Weissner (2007), argue that ILO C-169, as well as several UNDRIP provisions, are part of a broad international normative transformation concerning Indigenous Peoples, which makes up customary international law recognized and practised by the community of nations, including Australia and Canada. But there seems to be no consensus on this matter. It should be noted that when the government of Canada endorsed UNDRIP in 2010, it stated that the declaration was a non-legally binding document that did not reflect customary international law or change Canadian laws (Indian and Northern Affairs Canada 2010).

⁴⁰ Human Rights Committee. CCPR/C/USA/CO/3.

No. 21 of 2009, as well as ICERD General Recommendation XXIII of 1997, have also affirmed that states need to protect the rights of Indigenous Peoples to own, develop, control and use their communal lands, territories and resources, and to take steps to return lands and territories that were taken without informed consent. Moreover, the same treaty bodies in the context of the examination of states' fulfilment of their treaty obligations have made recommendations to Canada and Australia for addressing the need to respect and protect Indigenous Peoples' rights in accordance not only with UNDRIP, but in the case of Australia, also with ILO C-169, including recommending that Australia consider ratifying the convention (United Nations Human Rights Committee 2015⁴¹; United Nations Committee on the Elimination of Racial Discrimination 2017).⁴²

In the context of the Inter-American Human Rights System, of which Canada is a part,⁴³ the jurisprudence of the IACHR should also be considered as part of the international legal corpus concerning these peoples' rights. Such jurisprudence has not only relied on ILO C-169 as previously mentioned, but has also been influenced by legal and jurisprudential developments in Canada and Australia. In fact, the IACHR jurisprudence on Indigenous Peoples' rights to communal property grounded on traditional occupation (IAHRC *Awas Tingni vs. Nicaragua* 2001), has followed Canadian and Australian Courts' previous jurisprudence on Aboriginal title (SCC *Calder vs. Attorney General of British Columbia* 1973) and native title (HCA *Mabo vs. Queensland* 1992). On the other hand, jurisprudence of the IACHR on the need of states to obtain Indigenous Peoples' FPIC in the context of large developments (IAHRC *Saramaka People vs. Suriname* 2007), has probably influenced, or at least could not have been ignored, by the Supreme Court of Canada when asserting this right to the Indigenous Peoples of the Northwest Coast (SCC *Tsilhqot'in Nation* 2014).

ILO C-169 influence in Australia and Canada is not limited to jurisprudence emerging from courts. Aboriginal Peoples in these countries have also referred to ILO C-169 when asserting their rights. Especially in Canada, Indigenous Peoples have a long tradition of participating in international forums⁴⁴ and have participated in the debates that led to the elaboration of international rights instruments concerning them (Sanders 1994; and Coates and Holroyd 2014). This includes not only the ILO, but also the UN Working Group on Indigenous Populations (created in 1982) and the Inter-American Human

⁴¹ In Canada, the Human Rights Committee (2015) has recommended that the government "consult Indigenous people to (a) seek their free, prior and informed consent whenever legislation and actions impact on their lands and rights; and (b) resolve land and resources disputes with Indigenous Peoples and find ways and means to establish their titles over their lands with respect to their treaty rights" (United Nations Human Rights Committee 2015, para. 16).

⁴² In Australia, ICERD recommended that it move urgently "to effectively protect the land rights of Indigenous Peoples including by amending the Native Title Act 1993 with the view to lowering the standard of proof and simplifying the applicable procedures. It also urges the State party to ensure that the principle of free, prior and informed consent is incorporated in the Native Title Act 1993 and in other legislation as appropriate, and fully implemented in practice" (United Nations Committee on the Elimination of Racial Discrimination 2017 para. 22).

⁴³ Although Canada approved the American Declaration of the Rights and Duties of Man, it has not ratified the American Convention on Human Rights. Consistently, it does not recognize the jurisdiction of the IACHR, but it does recognize that of the Inter-American Commission on Human Rights.

⁴⁴ That tradition dates back to 1923 when Deskaheh, a Huadenosaunee Confederacy leader, took the claims of his people to the League of Nations.

Rights System. Although not necessarily using the language of ILO C-169, but that of Aboriginal title and self-determination in Canada and Aboriginal and native title lands in Australia, Indigenous Peoples through litigation and mobilization have asserted the rights considered in this convention.

Policies in Australia and Canada have responded to Indigenous Peoples' strategies. Indeed, such policies have been framed by court decisions resulting from Indigenous litigation on key cases, which on many occasions have relied on international developments concerning their rights, including on ILO C-169. Courts have also referred to international human rights concerning Indigenous Peoples when adjudicating Indigenous claims. The High Court of Australia relied on international law in *Koowarta* (1982) and *Mabo* (1992). Interestingly, in *Police vs. Abdulla* (1999), a case concerning the imprisonment of an Aboriginal individual, Judge Perry of the Supreme Court of South Australia referred to ILO C-169 in stating that a sentence of imprisonment must be regarded as a last resort.⁴⁵ More recently, courts in Australia have also referred to UNDRIP in litigation concerning Indigenous Peoples.⁴⁶ In Canada, the SCC has referred to international human rights law in its decisions on several cases, though not yet on cases concerning Indigenous Peoples.⁴⁷ More recently, lower courts have made reference to UNDRIP in their decisions (Joffe 2018).

This evolution explains why since 2007, when UNDRIP was approved, and despite initially opposing the declaration, Canada and Australia have assumed this international corpus concerning Indigenous Peoples' rights in their normative and policy practice. As Anaya and Weissner (2007) affirm, Canada and Australia's posture on UNDRIP contradicted the fact that most of the rights it acknowledged were already in effect domestically in these two states. Indeed, Canada has guaranteed widespread autonomy through the concept of Aboriginal and treaty rights grounded in its 1982 Canadian Charter of Rights and Freedoms and also fostered land-settlement claims and treaties. Australia's courts had invigorated the international Indigenous Peoples' movement with their decisions (*Mabo*, referred to earlier), which preceded the Native Title Act and land settlements with native peoples.

Finally, but no less importantly, reference should be made to the impacts that ILO C-169, as part of the international legal corpus concerning Indigenous Peoples, has had on the powerful business community in both states. This can be seen, for instance, in the participation of relevant Canadian and Australian mining companies in the International

⁴⁵ Judge Perry stated: "In the area of human rights particularly, Australian courts should always be prepared to take into account international instruments where they identify precepts of universal application, at least where they are not in conflict with the domestic laws of this country" (*Police vs. Abdulla* (1999) 106 A Crim R 466, 472, in Davis 2012).

⁴⁶ Including the 2012 High Court of Australia proceedings in *Maloney vs. The Queen*, the 2010 High Court of Australia decision in *Wuridjal vs. Commonwealth*, and in a Supreme Court of Queensland decision in 2010, *Aurukun Shire Council* (Davis 2012).

⁴⁷ According to Joffe (personal communication with José Aylwin, December 28, 2018), the Supreme Court of Canada relies on international law in many cases relating to the Canadian Charter of Rights and Freedoms in Part I of the Constitution Act, 1982. However, to date, the SCC does not appear to do so in relation to Aboriginal and treaty rights in Part II of the Constitution Act, 1982, Section 35, something he considers a discriminatory double standard.

Council on Mining and Metals (ICMM), whose policy statement includes respect for Indigenous Peoples' rights and FPIC.⁴⁸

The evolution of international law concerning Indigenous Peoples allows us to conclude that, although it was never ratified by Canada and Australia, ILO C-169 has not, and could not have been ignored by these states nor by their business communities. Progress on advancing Indigenous Peoples' rights in each case is consistent with, and indeed connected to the normative shift brought about by ILO C-169.

Whether through direct or indirect influence, ILO C-169 represents a key step in the recognition and protection of Indigenous Peoples' rights. It is clear that much remains to be done to ensure respect for these rights in all contexts analyzed here. Simply signing an international commitment, however significant, does not guarantee implementation, as we have seen in some Latin American cases, especially in states such as Chile and Brazil. This is as true for Indigenous rights as it is for other such commitments. Closing the remaining gaps will require attention to a broader set of factors than we can consider in this paper. Pointing out the gaps is at best a necessary, but not a sufficient condition to improve outcomes. Instead, future efforts will likely require a focus on improved mechanisms of governance through which different parties can collaborate on setting new and improved standards and holding each other to account to meet these goals. In Latin America especially, where hierarchical and discriminatory modes of governance are deeply rooted, this may prove to be at least as much of a challenge as overcoming the barriers discussed in this paper in regards to respecting Indigenous Peoples' rights. The international legal corpus of which ILO C-169 is an early expression has evolved over time with UNDRIP, whose provisions seem to reflect the global contemporary consensus on Indigenous Peoples' rights shared both by states that adhered to this instrument, as well as Indigenous Peoples who promoted its approval by the UN. As a consequence of this evolution, the challenge for relations between states and their Indigenous Peoples' should not be restricted today to complying with ILO C-169 standards, or to ensuring the convention's adoption by non-parties, such as Australia and Canada. Instead, the current challenge is compliance with the standards set up by UNDRIP, which have already been incorporated into domestic legal frames and jurisprudence in several states considered here. Indeed, a central debate on Indigenous Peoples' rights is currently taking place in the Canadian Senate over Bill C-262, an act to ensure that the laws of Canada are in harmony with UNDRIP, following the declaration's approval by the House of Commons in 2018 (Government of Canada 2018). This is a clear expression of what we have stated in our introduction: that notwithstanding the many challenges ahead, there is no going back on Indigenous Peoples-state relations internationally.

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These include Barrick and Goldcorp in Canada, and BHP, MMG, Newcrest and South32 in Australia. See <https://www.icmm.com/en-gb/members>.

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Robert Falconer | March 2020

ENERGY & ENVIRONMENTAL POLICY TRENDS: ADDRESSING THE THREAT OF COVID-19 AND THE OIL PRICE WAR IN THE PETROLEUM SECTOR

<https://www.policyschool.ca/wp-content/uploads/2020/03/EPT-Addressing-the-Threat-of-COVID19-in-the-Petroleum-Sector-final-2.pdf>
Richard Masson and Jennifer Winter | March 2020