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To cite this article: Philippe Hanna & Frank Vanclay (2013) Human rights, Indigenous peoples and the concept of Free, Prior and Informed Consent, Impact Assessment and Project Appraisal, 31:2, 146-157, DOI: [10.1080/14615517.2013.780373](https://doi.org/10.1080/14615517.2013.780373)

To link to this article: <https://doi.org/10.1080/14615517.2013.780373>



Published online: 22 May 2013.



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Human rights, Indigenous peoples and the concept of Free, Prior and Informed Consent

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The human right to self-determination is enacted in various international treaties and conventions. In order to facilitate self-determination, it is necessary to provide Indigenous peoples with opportunities to participate in decision-making and project development. The obligation for governments and companies to engage impacted communities is recognized in international law, especially with the principle of 'Free, Prior and Informed Consent', which is outlined in the United Nations Declaration on the Rights of Indigenous Peoples and in the International Labour Organization Convention 169. The encounter between human rights, Indigenous peoples and mining and other extractive industries is discussed, especially as it is has played out in Brazil. We recommend that companies should fully endorse and respect these internationally recognized human rights, including self-determination, even where not required by national or local legislation. We also discuss the relationship between Free, Prior and Informed Consent and Impacts and Benefits Agreements.

Keywords: social impact assessment; right to have rights; social licence to operate; corporate social responsibility; human rights impact assessment

Introduction

This paper discusses various contemporary issues surrounding human rights, Indigenous peoples and their relationship with the extractive industries, focusing on the Brazilian context. In particular, the concept of 'Free, Prior and Informed Consent' (FPIC) is detailed. A major demand of Indigenous peoples facing development projects likely to impact their livelihoods (e.g. mines, dams) is to be able to have a say about whether and how the project should proceed. In effect, this demand has been provided for with the provision of FPIC. However, the practical implementation of FPIC is often very far short of the ideal.

FPIC "recognizes indigenous peoples' inherent and prior rights to their lands and resources and respects their legitimate authority to require that third parties enter into an equal and respectful relationship with them based on the principle of informed consent. Procedurally, free, prior and informed consent requires processes that allow and support meaningful choices by indigenous peoples about their development path" (UN Sub-Commission on the Promotion and Protection of Human Rights 2004, p. 5). FPIC is intrinsically connected to the idea of self-determination, which basically argues that 'human beings, individually and as groups, are equally entitled to be in control of their own destinies, and to live within governing institutional orders that are devised accordingly' (Anaya 2009, p. 187). As stated in the Charter of the United Nations (United Nations 1945) and in Article 1 of the International Covenant on Economic, Social and Cultural Rights (UN General Assembly 1966), self-determination is to be provided to 'all peoples'.

The history of the relationship between the human rights discourse and Indigenous peoples is described, including a discussion of the anthropological contribution to this topic, particularly in the context of how it has

played out in Brazil. In the first section of this paper, the process of recognizing human rights for Indigenous peoples as collective rights is described. The activities of companies and development agencies in relation to this issue are presented in the second section. In the third section, the concept of FPIC and its origins are described. Recommendations for companies wishing to respect human rights, particularly towards Indigenous peoples, are provided in the conclusion.

The Indigenous peoples' struggle for the 'right to have rights'

'Human rights are commonly understood as inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being' (Sepúlveda et al. 2004, p. 3). These rights, which are considered to be indivisible (apply equally to everyone) and inalienable (always apply and cannot be voided or extinguished), include the right to life, property, health, education, free association, among others (Sepúlveda et al. 2004). Human rights are intended to be universal, 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' (UN General Assembly 1948a, Article 2). However, Indigenous peoples still experience unequal access to human rights and systematic ethnic discrimination (Cobo 1986; Stavenhagen 2009; ILO 2012). They face higher levels of infant mortality and fare worse on most health indicators when compared with non-Indigenous groups (Stavenhagen 2003; Montenegro & Stephens 2006; Gracey & King 2009), a situation often described as the 'fourth world' (Dyck 1985; Wright 1988; Watkins 2005). Anaya (2004) classifies it as a dual discrimination – there is denial of access to land, basic resources and services, leading to difficulties in sustaining

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Box 1. Selection of the key international agreements that address Indigenous rights

Charter of the United Nations (1945) – Article 1, Clause 2 articulates ‘the principle of equal rights and self-determination of peoples’, which is still one of the major demands of Indigenous peoples (United Nations 1945).

Universal Declaration on Human Rights (1948) – This declaration addresses several universal rights, which also apply to Indigenous peoples, such as the right to life, property, health, education and free association, among others (UN General Assembly 1948a).

Convention on the Prevention and Punishment of the Crime of Genocide (1948) – Article 2 defines genocide as ‘acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group’. Indigenous peoples historically were and still are targets of genocide, perpetrated in different ways by various national governments and racist groups (UN General Assembly 1948b).

UN Convention on the Elimination of All Forms of Racial Discrimination (1965) – This convention promotes the elimination of racial discrimination against ethnic groups, including Indigenous peoples (UN General Assembly 1965).

International Covenant on Economic, Social and Cultural Rights (1966, entered into force in 1976) – Article 1 of this UN covenant states that ‘all peoples have the right to self-determination’, and thus to ‘freely determine their political status and freely pursue their economic, social and cultural development’ (UN General Assembly 1966).

Indigenous and Tribal Peoples Convention (International Labour Organization C169 (1989)) – This convention is a revision of the 1957 Indigenous and Tribal Populations Convention (ILO C107). Although C169 has been ratified by only 20 countries to date, it is the most important, legally binding international document about Indigenous rights. It promotes rights in different areas (e.g. education, health and land). It requires governments to consult Indigenous peoples regarding any administrative or legislative measures that affect them directly, and to guarantee that Indigenous peoples can participate in the process of decision-making (ILO 1989, Article 6).

World Bank Operational Directive 4.20 (1991) – This Operational Directive regulates how borrowers from the World Bank should proceed when their projects affect Indigenous peoples (World Bank 1991).

Declaration on the Rights of Persons Belonging to National or Ethnic Religious and Linguistic Minorities (1992) – The main provision of this UN Declaration is stated in Article 4, which requires states to take measures to ensure that ‘minorities may exercise fully and effectively their human rights and fundamental freedoms without any discrimination and

in full equality before the law’ (UN General Assembly 1992a).

Rio Declaration on Environment and Development (1992) – This Declaration is a product of the United Nations Conference on Environment and Development (or Earth Summit) held in Rio de Janeiro in 1992. Principle 22 establishes the crucial role of Indigenous peoples in environmental management because of their traditional knowledge (UN General Assembly 1992b).

Convention on Biological Diversity (1992) – Like the Rio Declaration, this Convention was signed at the Earth Summit. It recognizes the role of Indigenous peoples in promoting biodiversity through their traditional knowledge (UNEP 1992).

Vienna Declaration and Programme of Action (1993) – Article 1.20 outlined some basic principles, while Article 1.28 called for the establishment of a Working Group to prepare a Declaration on the Rights of Indigenous Peoples (which was not finalized until 2007). Article 1.2 states that ‘The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right’ (UN General Assembly 1993).

UNESCO Universal Declaration on Cultural Diversity (2001) – ‘The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples’ (UNESCO 2001, Article 4).

Equator Principles (2003) – A voluntary set of standards developed by several major banks for assessing and managing risks related to development projects. Indigenous peoples are considered to be a stakeholder needing to be fully considered (Equator Principles Association 2003).

World Bank Operational Policy (OP) and Bank Procedure (BP) 4.10 (2005) – The OP/BP 4.10 replaces OD 4.20 for investment projects financed by the World Bank that affect Indigenous peoples (World Bank 2005).

International Finance Corporation (IFC) Performance Standard 7 (2006, updated in 2012) – IFC Performance Standards (PS) are similar to World Bank safeguard policies, but are adapted to be applicable to IFC borrowers. PS7 is related to Indigenous peoples and articulates specific procedures for projects that affect them (IFC 2006, 2012).

UN Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007) – This Declaration addresses a large range of rights of Indigenous peoples. It affirms that governments should obtain ‘free, prior and informed consent’ from Indigenous peoples about any project that may affect their livelihoods (UN General Assembly 2007a, Articles 10, 19, 29 and 32).

traditional ways of life; in addition, there is systematic discrimination that arises especially when Indigenous peoples attempt to participate in the dominant society.

The Indigenous peoples' struggle to ensure respect for their human rights started with the demand for the 'right to have rights' (Stavenhagen 2003, linking to Arendt 1951), and has culminated in the drafting and endorsement of several international conventions and agreements that were conceived to guarantee the access of Indigenous peoples to human rights. A list of the various international documents that directly or indirectly address the rights of Indigenous peoples is provided in Box 1.

It is important to clarify that these documents do not provide Indigenous peoples with any 'extra' human rights that are not also accorded to non-Indigenous persons; nevertheless these documents are intended to guarantee that Indigenous peoples have equal access to human rights (Anaya 2009). However, as presently understood in a legal sense, FPIC is currently provided exclusively for Indigenous and other 'traditional peoples', such as the descendants of escaped slaves (*quilombolas* in Brazil) and tribal peoples in Africa, although there is a push to widen the application of FPIC (Goodland 2004; Hill et al. 2010; Vanclay & Esteves 2011). FPIC is not a 'right' per se, but a mechanism to ensure progress towards the right of self-determination for Indigenous Peoples (Anaya 2009). Even though FPIC itself may not be a right, Indigenous peoples do have the right to be consulted on issues that affect their lives, which we will refer to as the right to FPIC.

The process of establishing this international body of law (Box 1) has been controversial from the beginning. Anthropologists in general – as reflected in an American Anthropological Association (AAA) statement of 1947 (AAA, The Executive Board 1947) – were critical of the concept of universal human rights, which they considered to be a Western ethnocentric concept (Messer 1993; Preis 1996; Riles 2006). The major arguments of the AAA statement were that rights are culturally relative and that Western notions of progress should not be imposed on other cultures. Another reason that led to anthropologists boycotting the international human rights agenda was the predominantly legal approach that prevailed, allied to an exclusive focus on individuals rather than collective groups. However, with the Indigenous struggle for rights in the 1980s, anthropologists were addressing human rights through a sociocultural and political rather than legal framework (Messer 1993). They advocated for collective rights. This led to a change in the perspective of both sides, as the international discourse on human rights has now accepted the idea of collective rights and has even accepted 'some form of weak cultural relativism; that is, on a fundamental universality of basic human rights, tempered by a recognition of the possible need for limited cultural variations. Basic human rights are, to use an appropriately paradoxical phrase, relatively universal' (Donnelly 1984, p. 419).

The anthropological perspective has also broadened, particularly around the formulations of social transformation and the anthropology of development (Messer 1993). In its 1999 Statement about Human Rights, the AAA

embraced the human rights discourse; however, it pointed to the need for advocating for collective and cultural rights and for tolerance across different cultures (Messer 1993; AAA 1999; Engle 2001; Riles 2006). Wright (1988) discussed the dilemmas anthropology found itself in during those decades, as the native peoples it studied were facing a range of problems, as described above, and often their very survival was in question. Although Indigenous peoples played a major role themselves (Miranda 2010), Wright identified ways in which anthropologists were engaged in advocacy for Indigenous peoples. One way was through influencing international organizations and international law; and some positive results have occurred, such as the approval of the UNDRIP by a large number of countries, something that can be considered to be a major victory for Indigenous peoples, even if it was a long time coming.

The debate around collective and cultural rights was very important in the lead-up to and the drafting of the UNDRIP, as these rights clashed with the Western concept of individual rights (Clinton 1990; Anaya 2004). As explained by Wiessner (2011, p. 124):

one of the major objections to the novel rights of indigenous peoples has been that they are largely rights of collectivities, not individuals. Thus, they appear to sit uneasily with the traditional human rights regime, which in the eyes of many is constructed around the interests and concerns of individual human beings.

The human right to self-determination is provided for in several international instruments. Many countries were reluctant to recognize the collective right of Indigenous peoples to self-determination because they feared it could threaten state sovereignty and lead to an escalation in claims for independence by Indigenous peoples (Engle 2011). A complicating factor is that there is a difference between internal and external self-determination. External self-determination refers to the aspiration of an ethnic group to claim statehood, sovereignty or secession, while internal self-determination provides some level of autonomy to operate within the existing state (Sterio 2009). The UNDRIP provides only for internal self-determination, which is comprehended by Engle (2011, p. 148) as a 'collective human rights demand rather than a claim for statehood'.

Another important argument towards collective human rights is that an individual cannot exercise their culture alone (Anaya 2004). This leads us to the question of cultural rights, which also became an important claim and one of the major strategies of Indigenous rights advocates since the 1990s (Engle 2011). Cultural rights, that is, the right of a particular ethnic group to maintain its own culture, are broad. For example, for Indigenous peoples, access to land and natural resources are fundamental to exercise and reproduce their culture. Thus, the human right to culture necessarily includes rights to land and its resources (Wiessner 2011).

The UNDRIP does not establish any new rights for Indigenous peoples that are not already provided by other international human rights instruments; however, it synthesizes how these rights need to be applied as a map

of action for human rights policies towards Indigenous peoples (Stavenhagen 2009). Several authors (e.g. Royo 2009; Stavenhagen 2009; Wiessner 2011), as well as most of the states voting in favour of the UNDRIP, clearly comprehend the Declaration as a non-binding legal instrument, or 'soft-law', which does not require ratification, and for which non-compliance by its signatories would not result in any sanctions. Burger (2009) argued that the Declaration brought no substantial change to what already existed, unless states would make changes to their own legislation and, above all, have the political will to do so. However, various authors (e.g. Anaya & Williams 2001; Royo 2009; Stavenhagen 2009) expect that, with time, full compliance with the UNDRIP and related instruments is likely as it will become part of customary international law (cf. Bradley & Goldsmith 1997), and thus be fully applied.

The role of corporations

Most transnational corporations in the extractives sector have adopted Corporate Social Responsibility standards for regulating their activities, sometimes including specific policies relating to human rights and/or Indigenous peoples. Despite the UNDRIP and Corporate Social Responsibility standards, human rights violations towards Indigenous peoples keep occurring, and the direct and indirect consequences of resources extraction by companies in or nearby Indigenous lands remain one of the major problems that Indigenous peoples continue to face (Stavenhagen 2003; ILO 2012; Verdum 2012).

Professor John Ruggie, the Special Representative of the UN Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises between 2005 and 2011, determined that companies should respect internationally recognized human rights, even if it was not required by host governments. In the Guiding Principles, Ruggie (2011) specified the minimum standards that companies should follow, specifically those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work. The right to self-determination is thus included in the minimum standards. The lack of regulation or enforcement in national legislation to ensure that transnational companies comply with these standards is what Ruggie called a 'governance gap' (B&HRI 2010), which provides opportunities for companies to perform 'wrongful acts' without any legal consequences. A similar phenomenon is described by Stavenhagen (2009, p. 367) as the 'implementation gap between laws and practical reality'. This situation can be worsened in hybrid state-corporate enterprises where confluences of interest lead to conflicts of interest and role confusion, as highlighted by Miranda (2007, p. 139):

Arguably, the most significant violations of indigenous peoples' land rights occur in the context of a hybrid state-corporate enterprise, where through a collaborative legal

arrangement, a state effectively delegates many of its human rights responsibilities toward indigenous peoples to a joint corporate actor.

The governance gap is that, in these circumstances, the state fails in its duty to protect, partly because there frequently is no mechanism to verify compliance with human rights responsibilities. Also, there is no entity or legal instrument at the international level to enforce companies to comply. As mentioned earlier, the UNDRIP is not legally binding. Many authors have exposed a vast number of cases where Indigenous rights are threatened by industry activities (e.g. Colchester 2010; Haalboom 2012; Coumans 2012). Miranda (2007) warns of the need to create accountability mechanisms to ensure that companies respect the internationally recognized rights of Indigenous peoples.

A solution that has been proposed to address and prevent human rights violations in the development of large projects is to conduct a human rights impact assessment (HRIA) prior to project implementation. MacNaughton and Hunt (2011, p. 362) define HRIA as 'a process of predicting the potential consequences of a proposed policy, program or project on the enjoyment of human rights'. Maassarani et al. (2007) see the potential of HRIA to contribute to the progressive realization of human rights, if it is integrated into the early stages of company decision-making processes. The UN Global Compact (2011) created a Guidance Tool for companies, based on Ruggie's Guiding Principles (Ruggie 2011). The first step of their approach is to identify potential violations of human rights throughout the company production chain, including taking into account indirect violations, such as from suppliers or contractors. This can be achieved using the techniques typically used in HRIA and social impact assessment (SIA) (Esteves & Vanclay 2009; Esteves et al. 2012). After assessing the impacts, the Global Compact Guidance Tool emphasizes the need to involve the top management of the company in order to have a real commitment to respecting human rights. In addition to management support, training is needed for employees and contractors. Grievance mechanisms for affected communities and performance indicators are necessary to monitor if human rights are being respected, and to check whether improvements are being made (B&HRI 2010). This approach is well aligned with Messer's (1993) proposal, where anthropologists were seen as having a role in preventing, rather than simply reporting, human rights abuses in contexts of inter-ethnic conflict.

Human rights violations towards Indigenous peoples in Brazil often occur in the development of large projects, particularly mines and dams sponsored by Brazilian state-corporate enterprises. These situations can be characterized as contexts of inter-ethnic conflict, or a form of 'internal colonialism' (Cardoso de Oliveira 1978). This arises partly because of the perception of many Latin American elites that Indigenous cultures are 'backwards', and the lack of respect they have for Indigenous peoples, often believing that greater attention to Indigenous peoples' rights would slow down the development of the

nation. This context of class struggle or ‘inter-ethnic friction’ (Cardoso de Oliveira 1978) has led to several conflicts, including deaths, violence and protracted legal battles (Coelho dos Santos 1981; Miranda 2007; Jampolsky 2012). The ‘national interest’ is often advocated as a reason to ‘legitimately’ violate Indigenous rights, especially in large development projects. This reason was even stated in a recent and controversial government act, Ordinance 303 (*Portaria 303 da AGU*), which was enacted on 16 July 2012 and states: ‘the enjoyment of the riches of the soil, rivers and lakes existing in indigenous lands (art. 231, §2 of the Constitution) can be relativized whenever, as in art. 231, 6°, of the Constitution, there is relevant public interest of the Union, in the form of a supplementary law’ (Brasil 2012, Article 1.1). Following protests, this Ordinance has been suspended, but not revoked (Mongabay 2012).

Another example, which has also been the subject of much controversy, is the planned Belo Monte dam in the State of Pará, Brazil. If built, Belo Monte would be the third largest dam in the world, would displace between 20,000 and 40,000 people, and would impact, directly or indirectly, on some 10 different Indigenous groups (Jampolsky 2012). The major argument against the construction of the Belo Monte dam (and other large projects) is the lack of genuine commitment to the principle of FPIC by the developers, and consequently a denial of the right to self-determination, arguably the most violated Indigenous right in the Brazilian development context (ILO 2012).

Free, prior and informed consent

It is hard to determine when the term ‘Free, Prior and Informed Consent’ first appeared, but the literature suggests that the FPIC idea arose in the mid 1980s as part of the Indigenous peoples’ struggle for self-determination (Colchester & Ferrari 2007). Goodland (2004) concurs that FPIC appeared in the 1980s, particularly related to cases of involuntary displacement of Indigenous peoples. The term ‘Free and Informed Consent’, a precursor to the current concept of FPIC, first appeared in the International Labour Organization (ILO) *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, C169/1989. The concept has developed over time, with Vanclay and Esteves (2011, pp. 6–7) describing it as follows:

In both the formal and more general utilization of FPIC, each word contributes meaning to the concept. **Free**, meaning that there must be no coercion, intimidation or manipulation by companies or governments, and that should a community say ‘no’ there must be no retaliation. **Prior**, meaning that consent should be sought and received before any activity on community land is commenced and that sufficient time is provided for adequate consideration by any affected communities. **Informed**, meaning that there is full disclosure by project developers of their plans in the language acceptable to the affected communities, and that each community has enough information to have a reasonable understanding of what those plans will likely mean for them, including of the social impacts they will

experience. **Consent**, meaning that communities have a real choice, that they can say yes if there is a good flow of benefits and development opportunities to them, or they can say no if they are not satisfied with the deal, and that there is a workable mechanism for determining whether there is widespread consent in the community as a whole and not just a small elite group within the community.

The right to FPIC is intrinsically linked to the right to self-determination, which is articulated in the 1945 Charter of the United Nations: ‘To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace’ (United Nations 1945, Article 1). Later, the UNDRIP would refer specifically to the rights of Indigenous peoples to self-determination (UN General Assembly 2007a). This right is about having the ability to choose to live accordingly to a group’s institutions and traditional organization, and above all, by its own will. The right to self-determination may be seen as the basis or inspiration by which the right to FPIC was elaborated and claimed by Indigenous peoples, scholars and activists (Page 2004).

FPIC is also related to the concept of ethnodevelopment, which was elaborated by Stavenhagen (1985) around the same time as FPIC emerged, and was adopted into Brazilian law in 2004 (Resolução CONDRAF no. 44, Brasil 2004). Ethnodevelopment proposes that development should be defined according to each cultural context, giving the right to communities to decide over their own future and the use of their resources, as guided by their own cultural frameworks, which may differ from the Western notion of economic development (Stavenhagen 1985). Of course, inside the same community there may be political and inter-generational conflicts, with different perspectives for development. Even despite these possible divergences, ethnodevelopment is defined by the community itself, by its own cultural framework.

The terms self-determination, ethnodevelopment and FPIC are now embedded into international and national laws and have been incorporated into the discourse of Indigenous peoples when claiming their rights (e.g. Brasil 2004; Tauli-Corpuz et al. 2010; Hill et al. 2010). As previously mentioned, the ILO addresses it in its Convention 169, which states in Article 6(1):

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; (b) 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. (ILO 1989, p. 4)

According to MacKay (2004), the ILO Convention 169 does not require ‘consent’, although Article 6 obliges governments to ‘consult’ Indigenous peoples. Article 7(1) states that: ‘The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual

well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development'. This could be regarded as being a right to FPIC.

Tugendhat et al. (2009) consider that the ILO 169 is the only legally binding document regarding the rights of Indigenous peoples. Besides this Convention, the UNDRIP is the most referred to international document regarding the Indigenous right to FPIC, despite the fact that a UN Declaration does not have the same legal status as an ILO Convention. The Declaration is not legally binding, while the Convention provisions can be enforced in court. This may be one of the reasons why there are only 20 signatories to ILO Convention 169, but the UNDRIP was endorsed in 2007 by a vote of 143 countries in favour, 11 abstaining (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine), and four against (Australia, Canada, New Zealand and the United States). The four countries that voted against the declaration argued that 'they could not support it because of concerns over provisions on self-determination, land and resources rights and, among others, language giving indigenous peoples a right of veto over national legislation and State management of resources' (UN General Assembly 2007b, p. 1). Between 2009 and 2010, the four opposing countries changed their position and are now signatories to the Declaration, along with two of the abstaining countries, Colombia and Samoa. Nevertheless, at their respective announcements of endorsement, Australia, Canada, the United States and New Zealand all emphasized that they did not consider UNDRIP to be a legally binding document, but rather an aspirational goal (Engle 2011; Wiessner 2011).

FPIC is addressed in several places in the UNDRIP. According to the Declaration, governments need to consult Indigenous peoples in order to obtain their consent about the following topics: relocation (Article 10), administrative measures that affect them (Article 19), the storage of hazardous materials inside Indigenous land (Article 29) and utilization of their resources, as stated in Article 32:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. (UN General Assembly 2007a, p.12)

Some international entities that recognize the right to FPIC are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (Linde 2009). The World Bank's position on FPIC, however, is very controversial. Despite recommendations from the World Commission on Dams and the World Bank's own Extractive Industry Review, after a very long debate and an arguably inadequate consultation with Indigenous organizations (Linde 2009; Cariño & Colchester 2010), the World Bank adopted a lower standard – that of 'free, prior, and informed *consultation* resulting in broad community support' – in their Operational Policy

on Indigenous Peoples, OP 4.10 (World Bank 2005). OP 4.10 is criticized by Indigenous organizations, nongovernmental organizations, academics and activists because it does not clearly recognize FPIC, but instead proposes this dubious concept of 'FPICon' (free, prior and informed consultation) (Caruso et al. 2003; MacKay 2005; Griffiths 2005). Goodland (2004), however, argues that 'meaningful participation', as required by the World Bank, can lead to FPIC if applied in good faith.

The World Bank's adoption of FPICon gave a mandate to other agencies to adopt similar requirements, including the International Finance Corporation (IFC) in its Performance Standard 7 (PS7), which provides guidelines for engagement between Indigenous peoples and the companies/projects it finances (IFC 2006). However, the 2012 revision of PS7 recognized the right to FPIC in special circumstances, such as 'Impacts on Lands and Natural Resources Subject to Traditional Ownership or Under Customary Use', 'Relocation of Indigenous Peoples from Lands and Natural Resources Subject to Traditional Ownership or Under Customary Use' and for projects that impact 'Critical Cultural Heritage' (IFC 2012).

Another institution that has adopted a concept similar to FPICon is the International Council on Mining and Metals (ICMM), with its 'Community Development Toolkit' containing guidelines for mining companies to engage with communities. Regarding Indigenous peoples, it proposed that 'all development programs should be based on engaging and consulting with Indigenous Peoples in a fair, timely and culturally appropriate way throughout the project cycle' (ICMM 2012, p. 22). In an earlier document focused exclusively on Indigenous peoples and mining, the ICMM stated that it agreed with the 'free, prior and informed' elements of FPIC, but not with the 'consent' component. ICMM members are expected to engage in FPIC only where it is required by national legislation. Their argument is that the right of FPIC is not feasible at present owing to the difficulties in implementation and definition (ICMM 2010). The position ICMM is taking could lead to breaches of international human rights standards, as companies might only do the minimum necessary to meet the requirements of local legislation (Haalboom 2012), potentially failing to recognize the right to FPIC, and thus infringing the Indigenous right to self-determination.

Arguably, the Philippines and Australia (somewhat ironically given that Australia was one of four objectors to UNDRIP) were the first countries to require FPIC or consent in local legislation (MacKay 2004). In the Philippines, the right to FPIC is provided by the Indigenous Peoples' Rights Act of 1997 and is effected through the mediation of a government agency responsible for Indigenous peoples in the country (National Commission on Indigenous Peoples, NCIP). The Act defines FPIC as:

Free and Prior Informed Consent – as used in this Act shall mean the consensus of all members of the ICCs/IPs [Indigenous Cultural Communities/Indigenous Peoples] to be determined in accordance with their respective customary laws and practices, free from any external

manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community. (Indigenous Peoples' Rights Act of 1997, section 3)

MacKay (2004) suggests that FPIC has been required (albeit implicitly) in the Northern Territory of Australia for more than 30 years through the Aboriginal Land Rights (Northern Territory) Act 1976. Since then, New South Wales, Queensland and some other states have adopted similar regulations. However, while FPIC may be inferred to apply (and consent is specifically mentioned), none of this legislation specifically mentions FPIC per se, but requires a mining entrepreneur to formalize 'consent' in an agreement with the Aboriginal 'traditional owners', usually mediated by a Land Council or similar body.

Cariño and Colchester (2010) note that Bolivia, Venezuela, Colombia and Guyana adopted national laws recognizing the Indigenous right to FPIC and that New Zealand requires it for mining activities. In Venezuela, FPIC is implied in a law on biological diversity that also protects cultural diversity (Gupta 2002). In 2012 the Inter-American Court of Human Rights decided on a decade-long judicial battle, *Sarayaku v. Ecuador*, which was about rights over oil exploration in the Kichwa Sarayaku territory. With the Ecuadorian Government losing, this case can be considered an important legal precedent as it establishes a legal meaning on how and when FPIC should be applied (Amnesty International 2012).

Despite the fact that local law in many places requires FPIC, experience in the Philippines demonstrates that a regulatory process on its own is not enough to ensure that it is applied properly, as community consent has been manipulated through bribery or other coercion methods, as Cariño (2005, p. 39) informs:

The experience of indigenous communities in the Philippines stands as a vehement reminder that surface level [i.e. superficial] change is not sufficient; despite progressive law that promises to involve indigenous communities in the future of their ancestral lands, the indigenous voice continues to be manipulated and ignored in the face of foreign owned mining firms. When industry interests clash with local interests, the former continues to prevail.

There is also the risk of FPIC becoming a box-ticking procedure made just to comply with local legislation, but with no real commitment to get a clear statement of consent from the impacted party. Cariño and Colchester (2010) call this kind of process the 'engineering of consent'. As shown in case of the Philippines, achieving FPIC might be done just to comply with government requirements, sometimes including the bribery of community leaders and government employees, in order to 'tick the box' of FPIC in the list of project requirements (Colchester & MacKay 2004; Cariño & Colchester 2010). According to Colchester and MacKay (2004, p. 26), 'extractive industries have consciously manipulated communities, introducing factionalism, dividing communities and promoting individuals, who may have no traditional authority as leaders, to represent the commu-

nities. The illusion of free, prior and informed consent is thus achieved by the exclusion of the majority of community members from effective participation in decision-making'.

Despite being a signatory to the ILO Convention 169 and the UNDRIP, the only legislation in Brazil that implies FPIC to any degree is the Brazilian Constitution of 1988, specifically Article 231 §3 (Brasil 1988). Even though not specifically referring to 'consent', it states that the use of water resources, potential for hydropower or mineral riches in Indigenous lands may only be exploited 'after hearing the communities involved'. However, there are no guidelines regarding how and when any consultation process must be applied. For that reason, in January 2012 a working group was formed by the government to develop and present a proposal for regulation (Verdum 2012), which at the time of finalizing our paper in early 2013 was yet to report.

In Brazil, mining can take place near Indigenous lands, but not inside their lands owing to regulatory restrictions. Because of this, various questions arise. For example, despite Indigenous peoples being directly affected by operations, where they are not the landowners of the actual mining lease, should their consent be required? Should the community have a veto power over the project? What defines consent, especially if the project is opposed by only a few community members?

In order to answer these questions, and notwithstanding our view that FPIC is not in itself a right but is in effect 'the right to be consulted', we believe, consistent with many others (e.g. Vanclay & Esteves 2011), that FPIC should be comprehended as a philosophy rather than a legal procedure. If operations affect Indigenous peoples' lives, they should have the right for their views to be considered and respected, regardless of the national legislation requirements. Cariño and Colchester (2010, p. 434) propose that "the spirit of FPIC is that development should become accountable to peoples' distinctive cultures, priorities, and unique paths to self-determination, not endanger their very survival". However, speaking about the practical operationalization of FPIC, Goodland (2004) suggests that consent should be regarded as the support from 51% or more of community members. However, this majority vote is a Western conception of democratic decision-making, and is not likely to be endorsed by many Indigenous political organizations, who, for example, depending on the ethnic group, may prefer that decisions be based on the elders' opinions or by reaching consensus between members (Bauman & Williams 2004; van Dam 2008).

Despite being recognized by international treaties, as at the time of writing in late 2012, only a small number of companies have made public statements of commitment to FPIC, including: Inmet, Newmont, Rio Tinto, Talisman and Xstrata (Voss & Greenspan 2012). Despite the expressed support of Talisman Oil for FPIC, Amazon Watch is criticizing them for their operations close to the Achuar Indigenous group on the border between Peru and Ecuador. Talisman alleges that they have community consent, although according to the nongovernmental

organization, the Achuar oppose the project (Amazon Watch 2012).

This low level of corporate commitment to FPIC to date may be because companies might consider that their interests are threatened by recognition of an Indigenous community's right to FPIC. The argument provided is the same espoused by ICM (2010), as mentioned earlier, for whom the consent part of FPIC was unclear and/or not feasible to be implemented in practice. Besides this argument, giving the power of veto to communities is seen as a menace that could tip the power balance in favour of communities and restrain possibilities for new ventures. Relations between companies and Indigenous communities are usually difficult, but that should not become a barrier to companies in adopting best practices and respecting internationally recognized human rights such as FPIC. In any case, we argue that when undertaken, FPIC can provide benefits to both sides. Companies that apply FPIC are likely to benefit from an improved social licence to operate and are likely to have a better public image than those who do not recognize the right to FPIC. Communities that enjoy their right of being informed, consulted and heard by the project proponents are able to provide positive feedback on project design, for example, that could contribute to cost savings. The enjoyment of this right also raises a community's confidence, as it becomes an important stakeholder during the whole project development process and puts it into a position that enables it to have a real opinion about the project's impacts and possible measures to avoid or mitigate these impacts. This could lead to simpler and cheaper solutions, as social impacts are identified at an earlier stage. Applying FPIC can also avoid conflicts with communities (De Echave 2010) and reduce costs and risks for companies (Davis & Franks 2011; Vanclay 2012).

Various authors suggest that the concept of FPIC should not be limited to Indigenous peoples, recommending its adoption to projects affecting all local communities (Goodland 2004; Hill et al. 2010; Vanclay & Esteves 2011; Langbroek & Vanclay 2012). According to Goodland (2004), we cannot advocate democracy only for some, leaving autocracy to the others. Thus, every affected community should have the right to be informed and to have its opinion on the developments that affect their lives fully considered. Useful tools for making the FPIC process more effective are SIA and HRIA, which can be perceived as the 'informed' component of FPIC, allowing both companies and communities to comprehend what the expected impacts are and, if they are acceptable to the community, the possible ways of avoiding or mitigating them. Vanclay and Esteves (2011) perceive that the FPIC and SIA processes are similar and that the basic steps for accomplishing them are fundamentally the same. Additionally, where there are unavoidable impacts, SIA can help ascertain what would be fair compensation to the community, and to formalize this in an Impacts and Benefits Agreement.

The relationship between FPIC and Impacts and Benefits Agreements

Impacts and Benefits Agreements (IBAs) are a form of community development agreement that communities negotiate with developers, usually without the mediation of government. They emerged in Canada and Australia as a way of formalizing the negotiations between extractives companies and Indigenous peoples. Earlier forms of arrangements failed to guarantee respect for Indigenous rights and/or their adequate participation in the process (O'Faircheallaigh 1999; O'Faircheallaigh & Corbett 2005). Before the IBA model, the social and environmental impacts of development projects on communities used to be addressed only through environmental impact assessment procedures, regulated by the government (Galbraith et al. 2007). Prno et al. (2010) consider that IBAs emerged as a community response to the 'business as usual' modus operandi that existed in Canada during the environmental impact assessment regime. IBAs have now become the standard model of negotiation between extractive companies and Indigenous peoples in Canada and Australia, and are being implemented in many other countries and contexts (O'Faircheallaigh 2010). In Brazil, although current laws forbid mineral extraction within Indigenous lands, a concept similar to IBA exists for where Indigenous peoples may be affected by developments close to their lands. Because of the context specificity and changing nature of IBAs, we endorse Caine and Krogman's (2010, p. 80) definition that IBAs are 'agreements that establish formal relationships between signatories, mitigate negative development impacts, and enhance positive development outcomes for Aboriginal communities'.

In the literature on the topic, IBAs are generally seen as positive tools for mitigating impacts, but some studies demonstrate that important issues, such as governance and implementation of the provisions, are often left out (Siebenmorgen 2009; O'Faircheallaigh 2010). Hitch (2006) also considers IBAs to be an innovative tool for promoting more equitable and sustainable development for all stakeholders, but suggests that, for IBAs to be successful in achieving their goals, it is crucial that companies have high levels of cultural sensitivity, apply participative and transparent approaches to decision making and work in collaboration with the communities. Similarly, O'Faircheallaigh (2010, p. 70) suggests that agreements can provide substantial benefits, but many issues need to be addressed, 'including confidentiality, Aboriginal support for projects, and Aboriginal access to judicial and regulatory systems. Also vital is the need to break down the barriers that often exist between processes for negotiating project agreements and broader processes for community planning and decision making'.

The existence of a signed IBA between a company and a community does not necessarily confirm that the conditions of FPIC were applied. For example, a signed agreement could be the result of coercion of various kinds (i.e. not free). Companies may not have acted in good faith by not revealing all relevant information and/or

communities might not have understood the implications of what was going to happen (i.e. not informed). And quite often, agreements may have been finalized, and in some cases not even started, until after project activities had commenced (i.e. not prior). Thus the development of an IBA needs to be consistent with the philosophy of FPIC.

Because of potential future litigation (refer to the examples of human rights abuse in Kemp & Vanclay 2013), an issue for companies will be to ensure that they can establish into the future that FPIC was observed and fully applied. Although the mere existence of an IBA is not proof of FPIC (as discussed above), where IBAs are carefully written and document all the relevant details, it is likely that an IBA can establish that FPIC was observed. An IBA is an appropriate conclusion to an FPIC process.

Conclusion

The concept of 'Free, Prior and Informed Consent' is a fundamental component of the Indigenous right to self-determination. Unfortunately, neither FPIC nor the right to self-determination are being respected in Brazil and many other countries. Violations of these rights are overlooked by governments, especially in the case of 'projects of national interest', and particularly in relation to Brazil's hybrid state-corporate enterprises. Violations can also happen when companies, as a box-ticking procedure, only do the absolute minimum required by environmental licensing processes and ignore international human rights standards.

FPIC should be taken seriously by companies that interface with Indigenous peoples. In order to achieve a legitimate social licence to operate and to refrain from violating human rights, companies need to respect FPIC, arguably with non-Indigenous as well as Indigenous communities. The right to self-determination is conceived as being applicable to all peoples (United Nations 1945), thus respecting FPIC in relation to all local communities would be complying with international human rights standards. Complying with FPIC should not be seen as being a voluntary measure that companies can choose to follow or not – it is necessary to ensure the self-determination of Indigenous peoples.

If companies are committed to fully respecting human rights, recognizing the right to FPIC, and actually implementing it, are important steps. The alleged difficulties in applying FPIC result from a lack of experience, with few initiatives so far. With good faith and qualified professionals, any company that chooses to adhere to FPIC, or is forced to by legislation, should be able to implement it. Also, there are now many handbooks available on how to implement FPIC, describing the successes and difficulties in different situations (e.g. Colchester and Ferrari 2007; Colchester 2008; Hill et al. 2010; Lehr and Smith 2010; Weitzner 2011; Persoon and Minter 2011). Therefore, although it can be considered as being difficult, as company-community relations usually are, it is not infeasible. In fact, relationships between companies and communities may become easier if FPIC is applied, as they will probably be based on trust instead of

conflict. However, companies need to be ready to listen and to accept 'no' as an answer sometimes, as not every community will be agreeable to accept all development projects affecting them, despite the potential benefits they might receive. Organizations (corporate and government) should not try to coerce communities into accepting a project. SIA and HRIA can be useful tools for ensuring that human rights are being respected in a company's projects and operations, if performed at an early stage and in a participatory manner. Companies that adopt the FPIC philosophy and fully implement it in practice, in addition to respecting the right of communities to participate in decisions that affect their lives, will probably benefit from reduced conflict, reduced likelihood of reputational damage, as well reduced risks and costs.

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