

Towards ‘Free, Prior, Informed Consent’ in Natural Resource Development Projects

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Abstract

Global demand for natural resources has pushed development projects into increasingly remote areas that are usually occupied by indigenous people. These communities are highly dependent on the natural environment for their survival, culture, and identity with a historically poor relationship with governments. Thus, the concept of Free Prior and Informed Consent (FPIC) has arisen as a right of indigenous people to self-determination under international law. Articulated in a variety of soft and hard-law instruments, FPIC has been outlined by the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) 2007 which essentially requires that indigenous people have the right to accept or reject natural resources developments that affect them, their land or territories. This has not been fully accepted by governments. Hence, this article investigates the application of this emergent concept to natural resources developments; and comes to the view that FPIC is still in a state of flux but is nevertheless critical to resource development stakeholders. The article concludes that FPIC is here to stay and governments need to update national laws to accommodate this important concept.

Keywords: Free, Prior, Informed Consent; International law; Natural resources



Introduction

The increasing demand for energy and natural resources has expanded the arena for resource exploration, and this has driven multinational companies into remote territories usually occupied by indigenous people.¹ Natural resource development and extraction thus directly impacts the rights of indigenous peoples, particularly, rights relating to property, culture, religion, non-discrimination, health and physical well-being, a clean and healthy environment; and freedom to pursue their own priorities for development, emanating from their fundamental right to self-determination.²

This can be worrisome due to the close connections between indigenous peoples and the natural world.³ At the same time, project developments especially on natural resources, have been subject to controversy and violence owing largely to the devastating impact of such activities on the lives, health, resources, and culture of the local population.⁴ One way of resolving the unhealthy contest between development and the rights of the local indigenous populace, is through a mechanism that obtains and respects the views of local people. In particular, the right to agree to or disagree with specific resource development projects by way of ‘the community referendum or *consulta popular*’.⁵ This provides the backdrop to the notion of ‘free, prior and informed consent’ (FPIC).

Simply stated, FPIC refers to the right of indigenous peoples to give or withhold consent to any action that impacts their lands, territories, resources, and rights. In practice, the term FPIC is convoluted and contested, majorly due to the variant soft and hard international legal instruments and industry standards that purport to require FPIC. Terms such as ‘land’, ‘territories’ and criteria such as ‘when’, ‘how’ and ‘to whom’ FPIC applies are similarly controversial in their interpretations.⁶ However, significant legal backing can be obtained in instruments such as the Indigenous and Tribal Peoples Convention, 1989 (ILO 169) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) 2007. In addition, case law increasingly recognises FPIC as a central requirement to natural resources projects that require the interaction of national governments, investors, international organisations, financial institutions,

1 Amazon Watch, ‘The Right to Decide: The Importance of Respecting Free, Prior and Informed Consent’ (Briefing Paper) <<http://amazonwatch.org/assets/files/fpic-the-right-to-decide.pdf>> accessed 26 January 2020. Natural resources refer to products that come out of the natural environment such as energy, oil, coal, diamonds, gold, wood, natural gas, wind etc.

2 UNCHR, (Twenty-first Session) ‘Report of the Special Rapporteur on the Rights of Indigenous Peoples’ James Anaya (6 July 2012) UN Doc A/HRC/21/47.

3 Amazon Watch (n 1).

4 Brant McGee, ‘The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development’ (2009) 27 Berkeley J Intl L 2, 570.

5 *ibid*.

6 Parshuram Tamarg, ‘An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International Law and Practices’ (2005) 9(2) Australian Indigenous Law Reporter 111–116.

and indigenous people.⁷ Among these stakeholders, there is an admission that indigenous people are perhaps weaker and more vulnerable, thus deserving of special legal protection. There is, essentially, a life or death struggle over the future of indigenous people.

This article seeks to critically evaluate the conceptual dynamics of FPIC and its role in natural resources projects to determine whether it is a matter of substance or mere lip service. Accordingly, it advocates FPIC as a fundamental precondition for resources developments that safeguards indigenous people as well as the stability of business operations. This article is divided as follows: Part two investigates the legal rationale for FPIC; while part three seeks to understand the nature of FPIC; part four evaluates the applicability of FPIC in the context of natural resource project developments.

Conceptual Basis of FPIC

Free, Prior and Informed Consent (FPIC) is a matter of indigenous peoples' rights, which is recognised by intergovernmental organisations, international bodies, treaties and international human rights law to varying degrees. There is also an emerging trend towards recognition under national law. FPIC is essentially a tool that allows indigenous peoples to take part in the decision-making process on matters that affect them and their cultures.⁸

The concept is arguably an international human rights standard emanating from indigenous peoples' collective rights to their lands, territories, properties and even self-determination considerations.⁹ The concept articulates 'the right of indigenous peoples to approve or reject proposed actions or projects that may affect them or their lands, territories or resources.'¹⁰ FPIC is used in relation to indigenous peoples' rights as the

7 The Inter-American Commission on Human Rights (IACHR) in *Saramaka People v Suriname* (2007) and the case of the Kichwa Indigenous People of Sarayaku (2012) stated that community consultation must take place in advance and be in line with indigenous peoples traditions. States must recognise the juridical personality of indigenous communities. Also, in the *Endorois case* (2010), the ACHPR stated that violation of FPIC was connected with freedom of religion, cultural and property rights. Konstantin Gerber, 'Study on Free, Prior and Informed Consent in the Declaration on the Rights of Indigenous Peoples' (undated) <https://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/FPIC/Gerber_Konstantin.pdf> accessed 6 August 2020.

8 UN-REDD Programme, *Guidelines on Free, Prior and Informed Consent* (January 2013 UN-REDD Programme Secretariat) 18.

9 Food and Agricultural Organization of the United Nations, *Respecting Free, Prior and Informed Consent* (FAO, Rome 2014) <<http://www.fao.org/3/a-i3496e.pdf>> accessed 26 January 2020.

10 Amazon Watch (n 1).

status of other individuals and groups in relation to land or other resource rights who are not ‘tribal’ or indigenous is yet to be clarified under international law.¹¹

At present, there is no uniformly accepted definition of the term ‘indigenous peoples’. However, a widely accepted definition by Jose R Martinez Cobo, Special Rapporteur of the (now defunct) Sub-Commission on Prevention of Discrimination and Protection of Minorities cogently notes that:¹²

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.

The fundamental basis of the definition conflates historical continuity, occupation of ancestral lands, culture, language, and also group consciousness, as the basis for determining the indigenous status of a person or group. Now, this approach works in the Americas and Australia, but is perhaps less effective in Africa and Asia where there is sometimes no distinct pre-invasion or colonial settler community.

Even so, the actual development of FPIC in international law can be traced to the work of the United Nations. As far back as 1960, the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples, robustly stated that: ‘All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’¹³

This was further reinforced and reflected in the two major UN Covenants of 1966—the International Covenant on Civil and Political Rights (ICCPR)¹⁴ and the International

11 FAO (n 9); Amazon Watch (n 1); McGee (n 4) 572.

12 UNCHR (Sub-Commission), ‘Report by Special Rapporteur José Martínez-Cobo 1986/7’ (1986) UN Doc E/CN.4/Sub.2/1986/7 and Add 1–4; See also UN Economic and Social Council, ‘Workshop on Data Collection and Disaggregation for Indigenous Peoples’ New York (19–21 January 2004). http://www.un.org/esa/socdev/unpfii/documents/workshop_data_background.doc accessed 1 December 2018.

13 UNGA Res 1514 (1960) GAOR, 15th Session Supp 16 UN Doc A/4684, 66.

14 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); and International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) 1057 UNTS 407 (ICESCR) 6 ILM 368.

Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁵ The right to self-determination affirmed in article 1 of both Covenants essentially replicates the earlier UN Declaration on the Granting of Independence to Colonial Countries and Peoples.

Self-determination in this context, includes economic autonomy which entails control over traditional lands, territories and resources, and the right to grant or withhold consent on such matters. This means that even where the state owns the resources on or under indigenous land, as is usually the case, the free, prior and informed consent of indigenous people to assent to resource development must be obtained.¹⁶ This amounts to free choice of economic development and these determinatory rights are based on the peoples' customary and historic connections with the land and resources.¹⁷

Interestingly, prior to this, the UN General Assembly and the International Court of Justice (ICJ) had set out the legal underpinnings of FPIC in the framework of the free and informed choice of the people as expressed through fair elections, with a particular reference to referenda. In the *Western Sahara* case, the ICJ in its 1975 advisory opinion recognised the principle of consent as expressed through referendum.¹⁸

Furthermore, the Indigenous and Tribal Peoples Convention 1989, is an International Labour Organisation Convention (ILO 169)¹⁹ which contains key provisions relevant to FPIC. Article 6 obliges governments to consult indigenous people through appropriate procedures, in good faith, in order to ensure their agreement or consent to measures that may directly affect them. More specifically, Article 15 ensures that the rights of indigenous people over natural resources located on their land is specifically safeguarded, and they are allocated the right to use, manage and conserve such resources.

Even if the state is the legal owner of the minerals or resources, there must be procedures for indigenous consultation to ascertain the extent to which their interests might be prejudiced. This is done prior to granting permission for exploration or exploitation. Indigenous people are entitled to participate in the benefits of resource development and should receive fair compensation for any damage sustained by them. Simply put, the

15 International Covenant on Economic, Social and Cultural Rights (1967) 993 UNTS 3 (ICESR) 6 ILM 360.

16 McGee (n 4) 9.

17 UNCHR, 'Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making: Report of the Expert Mechanism on the Rights of Indigenous Peoples' (17 August 2011) UN Doc A/HRC/18/42; 'Making FPIC – Free, Prior and Informed Consent – Work: Challenges and Prospects for Indigenous Peoples' FPIC Working Papers (Forest Peoples Programme June 2007) <<http://www.forestpeoples.org/sites/fpp/files/publication/2010/08/fpicsynthesisjun07eng.pdf>> accessed 24 November 2018.

18 *Western Sahara (Advisory Opinion)* 1975 ICJ 12,32–33 (16 October). The court considered UNGA Res 1541 (XV) and UNGA Res 2229 (XXI).

19 Indigenous and Tribal Peoples Convention No 169 (adopted on 27 June 1989) 28 ILM 1382.

ILO 169 provides binding legal protection for indigenous peoples in relation to their territory, survival, well-being and development. Signatories to the Convention are obliged to implement the treaty in domestic law which is enforceable through international courts and UN treaty bodies.²⁰

More generous protection can also be found in the 2007 UNDRIP.²¹ It observed that the historical injustices outlined in the preamble have allowed the exploitation of indigenous lands in violation of indigenous peoples' right to choose forms of development that best meet their needs and interests. UNDRIP specifies the standards necessary to ensure the continued survival, dignity and well-being of indigenous peoples. UNDRIP further supports the right of indigenous peoples to determine the control and use of their lands through the requirement of a free, prior and informed consent on projects affecting their territories.

Key provisions for the purpose of this article include Article 8 which requires states to provide effective mechanisms to prevent and redress any action that deprives indigenous people of their land and resources. Article 10 provides for the right of free, prior and informed consent of indigenous peoples on relocation, including the inclusion of a just and fair compensation, and where possible the option of return. Article 11 recognises the right of indigenous peoples to practise and revitalise their cultural traditions and customs. States are to provide redress, which may include restitution, developed in conjunction with indigenous peoples, where cultural, intellectual, religious, and spiritual property is taken without free, prior and informed consent or in violation of indigenous laws, traditions and customs.

Article 19 ensures that states should consult indigenous people in good faith, through their own representative institutions, to obtain their free prior and informed consent before implementing legislative or administrative measures that affect them. Also, Article 29 expresses the extensive right of indigenous people to conserve and protect their environment, and the productive capacity of their lands or territories and resources. States are also to take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent. Under Article 30, due consultation and

20 Note that the right to FPIC within international human rights jurisprudence is legally based on property rights, cultural rights, and the right to non-discrimination. Tara Ward, 'The Right to Free, Prior and Informed Consent: Indigenous Peoples' Participation Rights within International Law' (2011) 10 *Northwestern Univ J Intl Human Rights* 56.

21 Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA Res 61/295 (UNDRIP). Since UNDRIP is a declaration, it is not legally binding unlike a treaty or convention. This causes some uncertainty over its legal impact. Yet, it is important to note that UNDRIP was adopted in 2007 after 144 states voted in favour with only four votes (Canada, US, Australia and New Zealand) against. The four states have now endorsed the declaration, showing its widespread acceptability to the international community.

consent of indigenous peoples for the use of their lands for military activities must be sought unless justified by a relevant public interest.

The most important FPIC provision in relation to the development of natural resources projects is located in Article 32, which states explicitly:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. 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.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

The robust language in which the rights of indigenous people is expressed, and the obligations imposed on states perhaps indicates the seriousness with which the international community takes the protection and enhancement of indigenous people. This is particularly important due to the need to consult with such people prior to a state granting licences for the exploration and exploitation of natural resources.

Nature and Extent of FPIC

The nature and extent of FPIC is particularly contested in the context of natural resources projects, because significant investment capital running into billions of dollars are sometimes at stake, as well as potential state earnings. There is the difficulty of accepting that indigenous peoples are a special class of people recognised by international law. While international law articulates the FPIC rights of indigenous people, states are not particularly keen on a special class of citizens with rights not perhaps available to other citizens.

Governments are potentially wary of a potential veto power in the hands of a minority. As a result, there is no right of veto for indigenous communities under international law.²² There is a significant difference between the right to be consulted about projects, and the ability to prevent such projects from going ahead. Developing countries, in particular, would resist veto powers and insist on having final decision-making powers. Yet, the absence of consent on the part of indigenous people constitutes an economic

22 Shalanda Baker, 'Why the IFC's Free, Prior, and Informed Consent Policy Does Not Matter (Yet) to Indigenous Communities affected by Development Projects' (2012-2013) 30 *Wisconsin Intl LJ* 687.

risk to the viability of natural resource projects. There is thus the need for a genuine process that would accommodate governments, investors, and indigenous people. Hence, the need to clarify the term 'FPIC' which can be likened to the concept of 'consent' in the law of contract, and 'informed consent' utilised in medical ethics.²³

'Free' implies lack of coercion, intimidation or manipulation.²⁴ Indigenous peoples are thus free to make their own decisions, in the ways and manner they wish, and subject to their own norms and customary laws.²⁵ It should be noted that FPIC is a matter of critical importance to indigenous people above the need for investment and resource taxes, as their very survival may be jeopardised by going ahead with particular projects. Thus, if there is interference with indigenous consent processes, this should vitiate the resource development project contract.

To protect indigenous people from the machinations of the project proponents, it might be useful for the responsibility to obtain FPIC to be domiciled in a state institution which should be given financial and political independence. This will circumvent co-option problems and guard against the use of divide-and-rule tactics or outright bribery to undermine traditional indigenous institutions. It is trite that countries that suffer from corruption and rule of law problems will struggle to establish a proper FPIC process.

The element of 'prior' implies that indigenous community consent must be obtained before a decision is reached on the project. In practical terms, this is to avoid a situation whereby the government has granted approval, and indigenous communities are permitted to participate as rubber stamps. Indigenous communities' participatory rights are assured as there is a need for them to be given sufficient time to undertake their unique consultation or consensus processes.

'Informed' means that the indigenous peoples

have the legal and technical expertise and access to information in forms and languages that allows them to understand the implications of any decision on their lives and future and that allows them to make informed choices and decisions and to have the capacity to negotiate with the company they choose to do so.²⁶

This implies that full and comprehensive information is provided that encapsulates the nature, size and scope of any proposed project; its duration and purpose; the areas likely

23 Rashwet Shrinkhal, 'Free Prior Informed Consent as a Right of Indigenous Peoples' (2014) 2(1) J of National Law University Delhi 57.

24 Economic and Social Council (4th Session), 'Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples' (16 to 27 May 2005) E/C.19/2005/1, 12

25 Amazon Watch (n 1).

26 *ibid.*

to be affected; a preliminary assessment of the likely impacts, risks and benefits; procedures or processes that may be used; and the personnel involved.²⁷

‘Consent’ is the collective decision of the rights-holders of the affected communities or peoples.²⁸ It is based on the twin elements of consultation and participation; and should allow for an out-and-out approval or rejection of the project. Furthermore, it is important that consent by indigenous parties carry the interpretation that the indigenous people reasonably ascribe to it.²⁹ A negotiation in which all relevant information has been transparently provided will enable the parties to reach compromise where necessary. It might allow for instance, that the entire project or part of it must be modified. Conditions can be attached to the FPIC, allowing the project to go ahead as long as certain conditionalities are achieved.

Basically, consent can be summarised as

a collective right of indigenous peoples to make decisions through their own freely chosen representatives and customary or other institutions and to give or withhold their consent prior to the approval by government, industry or other outside party of any project that may affect the lands, territories and resources that they customarily own, occupy or otherwise use.³⁰

In a situation for instance, where a natural resource development contract has been awarded before the engagement of FPIC, then the process will essentially amount to lip service and will be of no benefit to the state, investor or indigenous community. Thus, before the government grants a licence or permit to allow the commencement of activities, the FPIC process must have been concluded. This regrettably raises the problem of pressuring indigenous people to take a decision before traditional consultation and consensus systems have run their course. Hence, the need for FPIC to be sufficiently adaptable and supportive of traditional indigenous decision-making.

Application of FPIC to Natural Resource Development Projects

Development projects relating to natural resources sometimes have a devastating impact (eg oil spills and gas flares) on indigenous peoples’ environment and ultimately lives. This further undermines the physical and cultural context of these communities. Historically, large scale resource projects have taken place on the land of indigenous people without any recognition or respect of the rights of such communities over their

27 *ibid.*

28 UN-REDD Programme (n 8) 20.

29 Economic and Social Council (n 24).

30 Food and Agricultural Organization (n 9) 4.

territories, land, and resources. Oftentimes, development has been imposed by outsiders in a top-down approach with little or no benefit to the indigenous people.

Governments are now obliged under international law to ensure that resource development plans and projects have the free, prior and informed consent of indigenous people before concessions are granted to multinational corporations.³¹ Unfortunately, some governments have discriminatory laws or approaches that undermine FPIC.³² Alone or in collaboration with companies, bribery, corruption and intimidation have been used to coerce indigenous leaders to sign away consent without appropriate consultation of their community. At the same time, it must be recognised that traditional mechanisms might not always be appropriate to decide the fate of complex natural resource projects. There is thus a need to provide indigenous people with legal and material support to enhance their decision making.

Companies on the other hand, have a duty to comply with national law and international human rights treaties applicable in the country. Failure to comply might mean that the company will be potentially liable for human rights violations. This is prevalent in the extraction of mineral resources which has a significant deleterious impact on the land and natural environment. Failure to consult indigenous people has resulted in violent conflict and the loss of billions of dollars in places like Nigeria, Ecuador, and Papua New Guinea. For instance, the cost of restarting the Panguna Coppermine in Bougainville (Papua New Guinea) where corporate practices allegedly provoked a civil war, ultimately cost mining giant Rio Tinto about USD3 billion.³³ Note also the significant reputational, litigation, financing, construction, commercial, political, social and environmental risks to business operations that can occur if FPIC is not taken seriously.

In the case of the *Saramaka People v Suriname*,³⁴ the Inter-American Court of Human Rights (IACHR) considered the Saramaka whose lands were given to mining and

31 *ibid.*

32 In the past, Nigerian governments have protected the right of Royal Dutch Shell to extract oil and gas at the expense of indigenous communities. See also, Colin Filer, Sango Mahanty and Lesley Potter, 'The FPIC Principle Meets Land Struggles in Cambodia, Indonesia and Papua New Guinea' 9 (2020) Land 67.

33 Fergus MacKay, 'Indigenous Peoples' Rights to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review' (2004) 4 Sustainable Development L & Policy 50. In Ecuador, oil company Chevron faces a potential liability of USD27 billion from taking over Texaco's toxic operations. See Amazon Watch (n 1).

34 *Saramaka People v Suriname (Preliminary Objections, Merits, Reparations, Costs)* Inter-American Court of Human Rights Series C No 172 (28 November 2007). <http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf> accessed 26 January 2020. The court issued a subsequent judgment: *Case of Saramaka People v Suriname (Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs)* (12 August 2008) <http://www.corteidh.or.cr/docs/casos/articulos/seriec_185_ing.pdf> accessed 26 January 2020.

logging companies without reference to their rights, including the right to FPIC. The court ruled that large-scale development projects that might affect indigenous and tribal peoples' lands and natural resources requires their free, prior and informed consent, in accordance with their customs and traditions. The court had earlier stated that the property rights of indigenous and tribal peoples are exercised together with the right to self-determination; and their right to freely dispose of their natural wealth and resources. Similarly, the African Commission on Human and Peoples' Rights (ACHPR) in the *Endorois* case, affirmed that: 'failure to observe the obligations to consult and to seek consent – or to compensate – ultimately results in a violation of the right to property.'³⁵

The increasingly forceful recognition of FPIC in international law and transnational courts reflect the view that indigenous peoples are rightful owners of their lands, territories and resources. This is the position taken by the UN, World Bank, International Finance Corporation (IFC), International Fund for Agricultural Development (IFAD), Multilateral Investment Guarantee Agency (MIGA), and various industry bodies.³⁶ The combination of hard and soft law pronouncements points towards the importance of FPIC. Sadly, there are huge challenges to FPIC including entrenched poverty, historic grievances of indigenous people, intra-community disputes, lack of trust in governments, inability to adapt traditional consultation mechanisms etc. More importantly, the absence of legal clarity on FPIC means it is impossible to determine whether indigenous people only have a right to be consulted or whether they possess a right of veto.³⁷ Notwithstanding these difficulties, FPIC does pose an important emergent standard critical to natural resource development projects.

That said, states must act vigorously to ensure that FPIC is a condition precedent to natural resource developments. It means strengthening FPIC to play its intended role through national law. Already, countries like Australia, Malaysia, Peru and the Philippines have domestic laws with aspects of FPIC for activities impacting on indigenous peoples' lands and territories. It is at the national law level that international law and standards meet the reality of implementation.

One would thus postulate that there are certain essential steps in the hands of a state that wishes to implement an FPIC regime to govern natural resources development projects. These include: (i) the political will to act as the primary driver that implements and

35 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, February 2010 para 226 <http://www.hrw.org/sites/default/files/related_material/2010_africa_commission_ruling_0.pdf> accessed 26 January 2020.

36 The UN Guiding Principles for Business and Human Rights for instance, aims to provide a global standard for preventing and ameliorating adverse human rights impacts arising from business activity <https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> accessed 26 January 2020.

37 See Baker (n 22) 668.

enforces FPIC; (ii) set up appropriate legal framework and institutions with relevant capacity and funding; (iii) ensure efficient monitoring and reporting mechanisms; (iv) provision of technical and other support to indigenous communities including independent expert professional advice; and (v) integrate FPIC into a robust, transparent and accountable stakeholder engagement regime. As of now, the implementation of FPIC is essentially a work in progress, though there is some cause for optimism.

Conclusion

Free, Prior and Informed Consent (FPIC) is emerging as best practice for protecting the rights of indigenous peoples in natural resources projects. In the absence of a universal definition of FPIC, the ambiguity means it is difficult but not impossible to ascribe a definitive meaning to this important concept. It is, however, recognised as a right under international law (ILO 169 and UNDRIP) and thus cannot be ignored whilst arguments regarding its actual meaning or impact continue. The key point to note is the protection of indigenous people is an important policy matter for the international community.

The problem is that international law approaches FPIC as a matter of justice and self-determination of indigenous peoples, whilst the transnational financial and institutional community (including the IFC) consider FPIC as merely a tool to mitigate socio-environmental risks. Community consent is thus aspirational and not a matter of justice nor a precondition for project approval. This position is wrong and not in line with international law. There is no doubt that states, companies, and indigenous people all benefit from FPIC as it prevents disputes from escalating into conflict, strengthens the financial viability and sustainability of business operations, and ensures investment flows into developing countries.

Besides, FPIC is a powerful concept and tool that cannot be ignored by stakeholders in the development of natural resources. It is important that governments modify national laws to reflect and operate FPIC to ensure its centrality to project decision making. Nation states are understandably cautious to adopt laws that will impose duties on them or grant a right of veto to historically disenfranchised communities. Nevertheless, the global financial and investment trend means that no significant natural resource development project will take place without an underpinning of FPIC. Simply put, the wheel has turned and there is no going back.

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