The Right to Free, Prior and Informed Consent in an International Context

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This contribution highlights the normative standards and international law concerning the right of Indigenous peoples to free, prior, and informed consent [FPIC]. In particular, focus is placed on the right to FPIC as affirmed in the ILO Convention No. 169 [ILO C169], the *UN Declaration on the Rights of Indigenous Peoples* [*UN Declaration*], and the American Declaration on the Rights of Indigenous Peoples [American Declaration]. I also include very brief commentary on FPIC in the context of customary international law provisions of the *UN Declaration* as well as brief reference to provisions of the International Finance Corporation Performance Standards.

Normative Standards

United Nations Declaration on the Rights of Indigenous Peoples

For Indigenous peoples, free, prior, and informed consent is sourced in the right to self-determination. As a collective right of Indigenous peoples, it is an inherent or pre-existing right based on their legal status as distinct peoples. Significantly, the right of self-determination is recognized as the pre-requisite to the exercise and enjoyment of all other human rights, including FPIC. Simply put, the right of self-determination must be the foundation upon which all other human rights are exercised and enjoyed.

The principle of self-determination is affirmed in the *United Nations Charter* and the right is explicitly affirmed in common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. For clarity, it is useful to restate the twin Article 1 of the International Covenants because these few words encapsulate much of what we are concerned about as Indigenous peoples:

> 1. All peoples have the right of *self-determination*. By virtue of that right *they freely determine* their *political status* and freely pursue their economic, social and cultural *development*.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
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> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Article 3 of the *UN Declaration* is complemented by several contextual provisions that affirm that the right of Indigenous peoples to self-determination is identical to that enjoyed by all other peoples, including UN member states.

> Indigenous 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.

One key element and characteristic of all human rights is that they are interrelated, interdependent, interconnected, and indivisible. This central dynamic of human rights must be remembered within the context of FPIC in order to ensure that the integrity of all aspects of the exercise and enjoyment of the rights of Indigenous peoples is not disrupted or interfered with -- one disruption or interference will have a direct impact upon all other human rights.

In addition, one must interpret every provision of the *UN Declaration* in the context of the "whole of the *UN Declaration* and other international human rights law" including its overall spirit and intent. Consistent with the interrelated nature of human rights and the linkage between the exercise of the right to self-determination and the right of Indigenous peoples "to own, use, develop and *control* the lands, territories and resources"[1] such an expression has sweeping and positive dimensions akin to free, prior and informed consent.

Therefore, when one considers both the interrelated nature of human rights and the need for a holistic approach to the interpretation of the joint and several provisions of the *UN Declaration*, it becomes clear that the explicit reference to FPIC in particular articles does not limit the right of FPIC to those specific articles. Indeed, the preamble of the *UN Declaration* affirms that UN member states are

> *Convinced* that ***control*** **by indigenous peoples over developments affecting them and their lands, territories and resources will** enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs [emphasis added]

In the context of the operative provision of the *UN Declaration*, article 26 affirms that

> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
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> 2. **Indigenous peoples have the right to own, use, develop and *control* the lands, territories and resources** that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
>
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Another feature of the numerous provisions of the *UN Declaration* require States to undertake action "in consultation and cooperation with the peoples concerned." The term *consultation* is commonly defined as "the action or process of formally consulting or discussing"[2] and cooperation is

[1] Article 26(2) of the UN Declaration on the Rights of Indigenous Peoples.

[2] Oxford Dictionary, last accessed 21 October 2020, https://languages.oup.com/google-dictionary-en/

defined as "the process of working together to the same end". This discussion is in no way meant to indicate that consultation and cooperation are a substitue for FPIC. Rather, it demonstrates that States must recognize that the *UN Declaration* provisions on consultation take on a fuller, more comprehensive understanding of engagement with Indigenous peoples. Here again, the preamble of the *UN Declaration*, which informs the spirit and intent of this significant international human rights instrument, emphasizes a call to States to implement their obligations to Indigenous peoples

> *Encouraging* States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, **in consultation and cooperation** with the peoples concerned

There are numerous operative paragraphs that include the important objective of States directly collaborating and cooperating with Indigenous peoples to achieve the intent or the essence of the right being affirmed. For example, the provision that motivate the whole of the *UN Declaration* and its comprehensive implementation is article 38, which affirms that

> **States in consultation and cooperation with indigenous peoples**, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Before continuing, the legal status of the *UN Declaration* deserves some treatment in regard to both general and customary international law. First, it is indisputable that "customary norms concerning Indigenous peoples and their pull toward compliance"[3] are a reality in the context of the contemporary international legal order. According to both the International Law Association and the former Special Rapporteur on the rights of Indigenous peoples, S. James Anaya, the *UN Declaration* does include such customary international norms. Both the ILA and scholar S. James Anaya have asserted that though the whole of the *Declaration* cannot be considered as an expression of customary international law, some of its key provisions can reasonably be regarded as corresponding to *established principles of general international law*, thereby implying the existence of equivalent and parallel international obligations to which States are *bound* to comply.

According to the ILA and their expert commentary on the *UN Declaration*, "the relevant areas of indigenous peoples' rights with respect to which the discourse on customary international law arises are self-determination, autonomy or self-government, cultural rights and identity, land rights as well as reparation, redress and remedies. However, it would be inappropriate to deal with these areas separately…the rights just listed are all strictly interrelated…to the extent that 'the change of one of its elements affects the whole'".[4] This is significant for a host of reasons, including the creation of a pathway for regulatory oversight by government of third parties in connection to the exercise of the right to free, prior and informed consent as affirmed within the *UN Declaration* and other international human rights instruments.

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[3] Anaya, S. James, (1996) *Indigenous peoples in international law*, New York: Oxford University Press, "The existence of customary norms concerning indigenous peoples and their pull toward compliance is confirmed especially by statements that governments make about relevant domestic policies and initiatives before international bodies concerned with promoting indigenous peoples' rights." p 56.

[4] International Law Association, The Hague Conference report (2010), Committee on the Rights of Indigenous Peoples, at https://www.ila-hq.org/index.php/committees last accessed 28 October 2020, p 43.

Explicit Provisions to Free, Prior and Informed Consent

The *UN Declaration* includes six specific provisions that comprise the normative standards related to free, prior and informed consent.[5] Two of the provisions relate to forcible removal [Article 10] and storage and disposal of hazardous materials [Article 29(2)] without the free, prior and informed consent of Indigenous peoples. The other two relate to redress for cultural property [Article 11(2)] and lands, territories, and resources [Article 28(1)] taken without the free, prior, and informed consent of Indigenous peoples. Articles 19 and 32 make a clear connection between the duty of states to "*consult and cooperate in good faith* with the indigenous peoples…*in order to obtain their free, prior and informed consent*" in legislative and administrative matters [Article 19] and in the approval of projects affecting the lands, territories and resources of Indigenous peoples [Article 32], respectively.

Because of the reality of historical and ongoing contention between States and Indigenous peoples specifically over lands, territories and resources and the abuse of Indigenous Peoples rights related to forced development or the exercise of development by others, namely colonial forces and powers, the cluster of articles concerning lands, territories and resources was one of the most difficult to negotiate. Numerous States found not only affirmation of the right of self-determination indigestible, but also the right to free, prior, and informed consent. In fact, one formulation of Article 32 attempted to dramatically lower the threshold for States by requiring them to "seek" Indigenous peoples' consent, rather than to "obtain" consent.

Fortunately, the matter was resolved in the Working Group on the draft *UN Declaration* and what emerged is the present wording of Article 32(1) affirming that Indigenous peoples have the right to determine and develop strategies for the development or use of their lands, territories and other resources. In accordance with Article 32(2), states must consult and cooperate with Indigenous peoples 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.

> 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.
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> 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.

[5] Articles 10, 11, 19, 28, 29 and 32 of the UN Declaration on the Rights of Indigenous Peoples.

International Labor Organization Convention No. 169, 1989

The ILO Convention is the only legally binding international treaty specifically concerning Indigenous peoples. It is the result of a two-year revision process of the outdated 1957 *ILO Convention No. 107*, which took place in 1988 and 1989, amid the standard setting exercise driven by the United Nations. Regarding *ILO Convention No. 169*, one may argue that Article 7(1) is essentially an expression of the right of self-determination:

> 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. In addition, they shall participate in the formulation, implementation, and evaluation of plans and programmes for national and regional development which may affect them directly.

Prior to addressing the interrelated provisions of ILO C169, one must be cognizant of the interpretive language of several preambular paragraphs. Specifically, the recognition of other international human rights instruments:

> Recalling the terms of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the many international instruments on the prevention of discrimination, and

The fact that another ILO C169 preambular paragraph recognizes the progressive development of international law and the need for "removing the assimilationist orientation of the earlier standards" provides an important acknowledgement and orientation. And significantly the term *control* is explicitly used in relation to the aspirations of Indigenous peoples:

> Recognising the aspirations of these peoples 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

As noted above, article 7 and the right to decide their own priorities for the process of development and "to exercise *control*, to the extent possible, over their own economic, social and cultural development" and that Indigenous peoples shall participate in the "formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly" is highly significant in the context of use of lands, territories and resources. The same article goes on to address the obligation for governments, "in *cooperation* with the peoples concerned, to protect and preserve the environment of the territories they inhabit."

Given the ongoing pandemic as well as the interrelated nature of Indigenous peoples' health and wellness, article 25 engages the term *control* by affirming that

> Governments shall ensure that adequate health services are made available to the peoples concerned, or shall provide them with resources to allow them to design and deliver such services **under their own responsibility and *control***, so that they may enjoy the highest attainable standard of physical and mental health.

In addition, the explicit articles that reference consent include an overarching implementation provision that specifically refers to procedural elements for consultations by indicating that the "application of this Convention shall be undertaken, **in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.**"[6] Furthermore, article 16, which was regarded as one of the most problematic provisions due to the past and future potential for relocation of Indigenous peoples. Nevertheless, consent was included as well as other criteria in the event of relocation. In addition, articles 27 and 28 invoke the right of FPIC in relation, respectively to educational institutions and Indigenous language instruction of children and youth.

American Declaration on the Rights of Indigenous Peoples, 2016

In relation to the recently adopted *American Declaration on the Rights of Indigenous Peoples*, Article III provides:

> Indigenous 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.

Consistent with the trend of intergovernmental organizations undertaking efforts responsive to Indigenous peoples' human rights, the Organization of American States, as far back as 1989 began the process of drafting a regional instrument to complement its diverse human rights regime and to be taken up by its Inter-American Institute of Human Rights, the Inter-American Commission on Human Rights, and the Inter-American Court on Human Rights. The *American Declaration on the Rights of Indigenous Peoples* was finalized on June 16, 2016. Here again, this regional instrument must be read in the context of other international human rights standards, including the *UN Declaration*. Making the linkage clear and reinforcing the interrelated, interdependent, and indivisible nature of human rights, the *American Declaration* invokes the *UN Declaration* and ILO C169 in its preamble by

> BEARING IN MIND the progress achieved at the international level in recognizing the rights of indigenous peoples, especially the 169 ILO Convention and the United Nations Declaration on the Rights of Indigenous Peoples….

Again, it is crucial to underscore the fact that the right to self-determination applies to Indigenous peoples as collectivities inasmuch as it is binding on nation States. As affirmed in both the *UN Declaration* and the *American Declaration* as international human rights instruments, the right to self-determination it is exactly the same right as that affirmed in the International Covenants.

The 2016 American Declaration of the OAS includes explicit reference to FPIC in articles XIII-cultural identity and intellectual, religious and spiritual property; XVIII concerning research programs

[6] Article 6, ILO C169.

and health; XXIII-administrative and legislation measures concerning their lands, territories and resources; and XXVIII-cultural heritage. Significantly, article XXIX in the context of the right to development affirms the right to free, prior, and informed consent in relation to lands, territories, and resources, including exploitation of mineral resources. In addition, the right to restitution in relation to "damage caused to them by the implementation of state, international financial institutions or private business plans, program, or projects."

> **Article XXIX.** Right to development
>
> 1. Indigenous peoples have the right to maintain and determine their own priorities with respect to their political, economic, social, and cultural development in conformity with their own world view. They also have the right to be guaranteed the enjoyment of their own means of subsistence and development, and to engage freely in all their economic activities
>
> 2. This right includes the development of policies, plans, programs, and strategies in the exercise of their right to development and to implement them in accordance with their political and social organization, norms and procedures, their own world views and institutions.
>
> 3. Indigenous peoples have the right to be actively involved in developing and determining development programmes affecting them and, as far as possible, to administer such programmes through their own institutions.
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> 4. 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.
>
> 5. Indigenous peoples have the right to effective measures to mitigate adverse ecological, economic, social, cultural, or spiritual impacts for the implementation of development projects that affect their rights. Indigenous peoples who have been deprived of their own means of subsistence and development have the right to restitution and, where this is not possible, to fair and equitable compensation. This includes the **right to compensation for any damage caused to them by the implementation of state, international financial institutions or private business plans, programs, or projects**.

It is imperative that one understands the important synergy between this trilogy of Indigenous specific international human rights instruments. Article 3(1) of ILO C169 affirms that Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. This necessarily includes Indigenous peoples' right to self-determination, and FPIC as a right sourced in self-determination. Furthermore, article 35 of ILO C169 affirms that

> The application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.

Even more significant, the ILO has reviewed the relationship between their Convention and other progressive developments, including the *UN Declaration*. Specifically, the ILO has highlighted the legal status of the *UN Declaration* by stating that

> A Declaration adopted by the General Assembly reflects the collective views of the United Nations which must be taken into account by all members in good faith. Despite its non-binding status, the *Declaration has legal relevance*. UNDRIP is a Declaration adopted by the General Assembly of the United Nations. … For instance, it may reflect obligations of States under other sources of international law, such as customary law and general principles of law. Differences in legal status of UNDRIP and Convention No. 169 should play no role in the practical work of the ILO and other international agencies to promote the human rights of indigenous peoples through advocacy, capacity building, research, or other means.

In addition, the ILO has affirmed that C169 and the *UN Declaration* are "compatible and mutually reinforcing"

> Crucial for the technical and promotional work of the UN system is the commitment of governments wishing to benefit from such assistance to promote and protect indigenous peoples' rights … The provisions of Convention No. 169 and the Declaration are *compatible and mutually reinforcing.* [emphasis added]

The International Context for Implementing FPIC

According to a growing body of international law, States have legally binding obligations to uphold the rights of Indigenous peoples. As noted above, the rights relating to free, prior, and informed consent intersect with those that are within the neighborhood of customary international law. Indigenous peoples, have the right to be consulted with respect to any project that may affect them as well as related rights concerning projects that may significantly impact them and their ways of life when carried out without their free, prior, and informed consent.

The matter of free, prior, and informed consent has been and continues to be the subject of growing concern of the supervisory bodies of a number of legally binding UN human rights treaties. In fact, some of these important jurisprudential decisions by treaty bodies were being made well before the adoption of the *UN Declaration* in 2007, demonstrating that the *UN Declaration*, in its draft form, held the force of legal and moral imperatives in regard to the conditions Indigenous peoples were facing and their distinct status and human rights.

Specifically, the Human Rights Committee has made the linkage between Article 27[7] and the protection of Indigenous life ways [as a matter of culture] and "*control*" over their lands and resources, to a State duty to consult with Indigenous peoples prior to any development activities.[8] The Committee on Economic, Social and Cultural Rights, in elaborating upon the rights of Indigenous peoples to

[7] ICCPR, Article 27: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, *to enjoy their own culture*, to profess and practise their own religion, or to use their own language."
[8] Human Rights Committee, General Comment No. 23, 1994

maintain their "cultural life"[9] in both country-specific cases as well as a General Comment have affirmed a link between participation, consultation and that States "should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk."[10]

In the context of equality, the Committee on Elimination of Racial Discrimination adopted a General Recommendation[11] outlining the right of Indigenous peoples to participate in decision making effecting them and that no decisions relating specifically to them should be taken without their free, prior and informed consent. They further elaborated upon such an interpretation in various country specific Concluding Observations.[12] Finally, within the UN system, a range of special procedures, including the Permanent Forum on Indigenous Issues, the Special Rapporteur on the Rights of Indigenous Peoples, the Expert Mechanism on the Rights of Indigenous Peoples,[13] UN agencies and specialized agencies[14] as well as the General Assembly have all embraced and affirmed the right of Indigenous peoples to free, prior and informed consent.

In addition, the ILO Committee of Experts, in its interpretation of C169, has affirmed the state obligation to consult Indigenous peoples and C169 itself includes a wide range of provisions to ensure direct participation of Indigenous peoples. Significantly, Article 6 requires that "the consultations carried out in the application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, *with the objective of achieving agreement or consent to the proposed measures."* Furthermore, Article 4 provides a stronger consent provision by affirming that:

> 1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.
>
> 2. Such special measures shall not be contrary to the freely expressed wishes of the peoples concerned.

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[9] In its General Comment No. 21 [2009], *Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, the Committee on Economic, Social and Cultural Rights (CESCR) indicated that the following minimum "core obligation is "applicable with immediate effect":
(e) To allow and encourage the participation of ... indigenous peoples ... in the design and implementation of laws and policies that affect them. In particular, States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk. (para. 55(e)).

[10] Supra.

[11] Committee on Elimination of Racial Discrimination, General Recommendation 23, 1997

[12] Committee on Elimination of Racial Discrimination, Concluding Observations, 2008, in relation to Ecuador, Namibia, and USA

[13] Free, prior and informed consent: a human rights-based approach, Study of the Expert Mechanism on the Rights of Indigenous Peoples, UN Document A/HRC/39/62

[14] For example, IFAD Executive Summary on Engagement with Indigenous Peoples Policy: "In its engagement with indigenous peoples, IFAD will be guided by nine fundamental principles: (a) cultural heritage and identity as assets; *(b) free, prior and informed consent;* (c) community-driven development; (d) land, territories and resources; (e) indigenous peoples' knowledge; (f) environmental issues and climate change; (g) access to markets; (h) empowerment; and (i) gender equality."; FAO document entitled "Respecting free, prior *and* informed consent, Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition" and FAO's Forest Stewardship Council Guidelines for implementation of FPIC;

Within the Organization of American States, which includes the Inter-American Court of Human Rights and the Inter-American Commission, a range of specific cases have been adjudicated, positively affirming a duty to consult and to ensure the direct participation of Indigenous peoples concerned in matters that affect them as well as a range of safeguards [in the Saramaka case in the Inter-American Court] that outline the content and scope of the right to free, prior and informed consent.[15]

In addition to the United Nations' human rights regime, the International Labor Organization,[16] the Inter-American Human Rights system and the African Commission on Human and Peoples' Rights have also pronounced important interpretive jurisprudence on the matter of the right of Indigenous peoples to free, prior and informed consent.

It has become clear that all consultation should be undertaken with the objective of obtaining indigenous peoples' free, prior and informed consent and that, especially in cases of large-scale development or investment projects that may have a major, severe or adverse impact on Indigenous peoples' territories, consent is *necessary*. Moreover, consultation must be undertaken in good faith, with the participation of Indigenous representatives, and the State must provide all relevant information well in advance of the decision-making.

In regard to its practical application, both procedurally and substantively, many of these elements must be defined by the Indigenous peoples concerned, ranging from their own political institutions to selection of their own representatives to time frame to decision-making protocols and methods. However, the basic content for the operation of free, prior, and informed consent must include [at a minimum] the following key elements:

> • *Identification of Indigenous Peoples and all communities affected as well as the geographic areas, including governance structures, institutions and how decisions are made, especially in relation to FPIC.*
>
> • *Development of clear communication plans, including participation of the broader community, a convenient time and place for dialogue, documentation of process and subject matter, including its access and availability of all information for those not able to participate.*
>
> • *Importance of researching and understanding of Indigenous peoples' protocols, rules/laws/practices, customs, ethical codes, and spiritual and other traditional practices and to respect them throughout the process.*

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[15] Inter-American Court of Human Rights Case of the Saramaka People v. Suriname Judgment of November 28, 2007, paras 134, 135, and 136, at https://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf last accessed 27 October 2020.

[16] When the C169 was negotiated, the ILO did not consider the right of self-determination. The ILO felt it did not have the mandate to consider S-D and left it to the UN. Thus, C169 should now be interpreted together with UNDRIP. See, *e.g.*, UN-Indigenous Peoples' Partnership (UNIPP), "For democratic governance, human rights and equality", Multi-Donor Trust Fund, Terms of Reference ILO, OHCHR, UNDP, Framework Document, 15 February 2010, at 4: "With the adoption of the UN Declaration, the international normative framework regulating the protection of the rights of indigenous peoples has been firmly strengthened. The [*Indigenous and Tribal Peoples Convention, 1989*], is fully compatible with the UN Declaration on the Rights of Indigenous Peoples and the two instruments are mutually reinforcing."

> *• Consultation and FPIC require an understanding non-negotiable thresholds or issues and a clear understanding that the Indigenous Peoples concerned have the right to accept, partially accept, reject or not to express an opinion and that more time is needed.*
>
> *• Recognition that where agreement is reached it must be mutually acceptable and clearly documented. If there are additional needs, they must be recorded and responded to. Where no agreement has been reached, there should be clarity about renegotiation and acceptance of a potential refusal to renegotiation. Where no agreement is reached, one must be prepared to adapt or abandon a project.*

In summary, in addition to the explicit reference to the right to free, prior and informed consent in the *UN Declaration*, there is a clear consensus in international human rights law that there is a State duty to consult with the goal of operationalizing the right to free, prior, and informed consent. This is especially true in the area of development projects and extractive industry activities in relation to the lands, territories, and resources of Indigenous peoples. These circumstances require the consent of the peoples concerned. A critical element of this right is for member States to dialogue and negotiate in good faith in order to achieve consent based on the human rights framework that has become the universal consensus for Indigenous peoples.

Furthermore, there are numerous other provisions affirmed in the *Declaration* that require states to undertake actions "in conjunction with" Indigenous peoples and "in consultation and cooperation with" Indigenous peoples. In addition, the language of Article 26(2), as noted above, affirms:

> Indigenous peoples have the right *to own, use, develop and control the lands, territories and resources* that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

Again, the term used is "*control*", which in its plain meaning suggests: to have power over, to influence, manage, restrain, limit, or prevent something from taking place. This term has been wrongfully confused by some states.

The government of Canada previously advanced that free, prior, and informed consent translates to a purported right of Indigenous peoples to a "veto". There is a major distinction between the procedural and substantive aspects of free, prior, and informed consent and the notion of the power to veto an action. The latter is often outlined and reserved to a legislative or constitutional authority and vested in a political leader such as the President or a Governor [of a state]. In contrast, free, prior, and informed consent entails dialogue, negotiation between the parties concerned, in good faith, and again, with the objective of achieving consent. Even then, the peoples concerned may choose to assert the right to give or withhold consent in regard to what may or may not take place within their territory.

In this regard, states must recognize that human rights are not absolute and that there is a constant tension between the rights and interests of Indigenous peoples and all others. And, in some cases, this constant tension is manifested amongst and between the Indigenous peoples concerned.

The right of Indigenous peoples to free, prior, and informed consent and its actual practice and implementation must be the focus in order to determine its full content. The contours of and procedural

operations or implementation of the right to FPIC must be sorted out by those who are the "self" in self-determination and addressed on a case by case basis according to the conditions and "situation" of the Indigenous peoples concerned.[17] The overarching principles of negotiation, dialogue, partnership, consultation and cooperation in order to achieve consent is the overall framework that must be recognized and respected. This requires a demonstration of good faith by all parties concerned the government, industry, and Indigenous peoples. This is especially significant in relation to extractive industries.

International Finance Corporation Performance Standard 7 – Indigenous Peoples

The World Bank Group and the International Finance Corporation Performance Standards are a good first step toward minimizing impacts of extractive industries. Regarding the eight Performance Standards [PS], one should note that every Performance Standard is relevant to BC First Nations and not solely PS 7, which is specific to "Indigenous peoples". Each PS deserves the critical analysis of Indigenous peoples, especially considering the history of mining activities and other extractive industries impacting Indigenous peoples, nations, and communities.

The following is not an exhaustive, detailed, or comprehensive analysis of the overall World Bank Group Performance Standard from an Indigenous human rights perspective. However, this minimal review suggests the need for a more thorough analysis of the weaknesses underlined herein.

Furthermore, from an Indigenous perspective as well as the nature of human rights, all of the diverse dimensions of the profound relationship that Indigenous peoples have to their environment are interrelated and seen from a holistic perspective. This cultural context has to be thoroughly understood in relation to *Environmental and Social Sustainability* by all other actors, from States to third parties to "clients" to members of civil society. This element or characteristic is at the heart of the distinct status of Indigenous peoples and in particular, their collective rights to their lands, territories, and resources. Therefore, every *Environmental and Social Management System* [ESMS] developed must take this into account.

Potentially more significant is the fact that the PS 1 makes clear that it applies to all projects that "have environmental and social risks and impacts" and then goes on to note that "A number of cross-cutting topics such as climate change, gender, *human rights*, and water, are addressed across multiple Performance Standards." This statement is followed by greater specificity as to human rights:

> In addition to meeting the requirements under the Performance Standards, *clients must comply with applicable national law, including those laws implementing host country obligations under international law*. [emphasis added]

The PS also indicate that in relation to *Environmental, Health and Safety Guidelines* [EHS Guidelines] where regulatory measures differ, that "projects are expected to achieve whichever is more stringent". Regarding PS 7, there is explicit recognition of Indigenous peoples as peoples "distinct from mainstream groups in national societies", elaborating upon the conditions that many may face due to

[17] UN Declaration, preambular paragraph 24: *Recognizing* that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration

their "economic, social, and legal status" as well as vulnerability due to a host of issues. Here it is important to underscore the right of Indigenous peoples to self-determination.

Performance Standard 7 immediately points to the role of government and directs the "clients" to collaborate with the responsible authorities in managing the risks and impacts of the activities". However, the language does not specify that such "responsible authorities" may be *Indigenous governments* or other provincial, territorial, or federal government; the assumption appears to identify the national government as the "responsible authority." These provisions are especially important in the Canadian context where the constitutional protection of existing and future rights of First Nations, Metis, and Inuit are afforded under section 35 of the Constitution Act.

The Objectives of PS 7 do not immediately nor explicitly state that Indigenous peoples are rights holders. The overall language states

- To ensure that the development process fosters *full respect for the human rights*, dignity, aspirations, culture, and natural resource-based livelihoods of Indigenous Peoples.

- To anticipate and *avoid adverse impacts* of projects on communities of Indigenous Peoples, or *when avoidance is not possible*, to minimize and/or compensate for such impacts.

- To promote sustainable development benefits and opportunities for Indigenous Peoples in a culturally appropriate manner.

- To establish and maintain *an ongoing relationship* based on Informed Consultation and Participation (ICP) with the Indigenous Peoples affected by a project throughout the project's life-cycle.

- To ensure the Free, Prior, and Informed Consent (FPIC) of the Affected Communities of Indigenous Peoples *when the circumstances described in this Performance Standard are present*.

- To respect and preserve the culture, knowledge, and practices of Indigenous Peoples.

Immediately, if the objectives of PS 7 is to foster "full respect for the human rights, dignity, aspirations, culture, and natural resource-based livelihoods of Indigenous peoples", the section on "Informed Consultation and Participation" has not engaged all of the relevant instruments. There is an inadequate framing of engagement of Indigenous peoples, especially in light of the human rights affirmed in international instruments such as the ILO C169; the *UN Declaration*; and the American Declaration, where there is an affirmative right to free, prior, and informed consent. To invite conditions "when avoidance is not possible" in relation to adverse impacts is contradictory. The reference to "sustainable development" is unclear as well as "benefits and opportunities". The recognition of the need for "an ongoing relationship" is relevant. However, the actual process for "consultation and participation" remains undefined and inadequate. And, though FPIC is included, it is triggered only "when the circumstances described in this Performance Standard are present."

The PS 7 outlines elements for *Participation and Consent*, including a definition of *consensus* in relation to internal decision-making. Though such commentary is understandable, it may be

objectionable in light of the traditions, membership, protocol, and legal traditions of the Indigenous peoples concerned.

Another concern is the subjective nature of the whole of the PS 7 – there is no specificity as to who; what; where; when; and how the rights of Indigenous peoples are to be implemented or operationalized. In contrast, FPIC must be applied from the outset to the conclusion of a project – it is a right that must be exercised in an ongoing, relevant, meaningful fashion. The "client" cannot move to gain consent and leave the Indigenous peoples concerned out of all other elements of a project.

The effort to identify the term "Indigenous Peoples" appears adequate and makes explicit reference to "first nations" and the important element of "self-identification" is present. However, PS 7 goes on to indicate that "[t]he client may be required to seek inputs from competent professionals to ascertain whether a particular group is considered by Indigenous Peoples for the purpose of this Performance Standard." This language may invite incompetent "professionals" and would require vigilance on the part of potential Indigenous peoples concerned. Naturally, this becomes all important for the Indigenous peoples concerned and those potentially impacted the actions of the *client*.

The *General Requirements* and *Avoidance of Adverse Impacts* language of PS 7 appears to invite sole reliance on the Bank's *client* to identify and determine who may be impacted – this is wholly insufficient in relation to the avoidance of adverse impacts. A more thorough going and comprehensive approach must be employed, especially in light of potential indirect impacts. For example, mining activities near watersheds critical to numerous First Nation communities.

The text goes on to indicate that

> Adverse impacts on Affected Communities of Indigenous Peoples *should be avoided* where possible. Where alternatives have been explored and *adverse impacts are unavoidable*, the client will minimize, restore, and/or compensate for these impacts in a culturally appropriate manner commensurate with the nature and scale of such impacts and the vulnerability of the Affected Communities of Indigenous Peoples.

This language is far from the rights affirmed in the *UN Declaration Peoples* and specifically article 29, which affirms that Indigenous peoples "have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources", among other provisions. The notion that adverse impacts should simply be avoided is unacceptable. The matter must be framed within the context of the Indigenous peoples concerned and fully defined by them, including what is considered "adverse impacts".

The PS 7 references to the *Circumstances Requiring Free, Prior, and Informed Consent* [at a minimum] recognizes that Indigenous peoples may have been disenfranchised in terms of right and title to their lands under national law but that it "can often be substantiated and documented." Given the many outstanding claims by Indigenous peoples and the lack of concrete action by States to adjudicate or legally resolve such claims despite the explicit obligations to do so, does not dispense with the interrelated human rights of the Indigenous peoples concerned, including FPIC. The overall circumstances requiring FPIC must be defined and determined on a case by case basis by the Indigenous peoples concerned or more directly the "self" in self-determination as noted above.

The provisions addressing natural resources and lands and territories, must be enhanced consistent with the rights affirmed in international law. Specifically, this section must be informed by and seen through an Indigenous lens and in the context of Indigenous peoples' rights to lands, territories, and resources and certainly not confined to the context of "property interests".

Fortunately, in relation to the *Critical Cultural Heritage* there is specific reference to free, prior, and informed consent. However, it is minimal and subjective in regard to "avoidance of such impacts" and not couched within the affirmative rights protection of cultural sites according to the perspectives of Indigenous peoples. Furthermore, national law is insufficient in many cases and the rights affirmed in the Indigenous specific and other international human rights instruments must be invoked and applied.

Regarding the matter of *Mitigation and Development Benefits*, here again the crucial, multiple elements of FPIC must be directly interjected and wholly defined by the Indigenous peoples concerned. The cultural context of the Indigenous peoples is vital to every aspect of mitigation. And, like every other dimension of Indigenous peoples and their interrelated rights, the concept of benefits has to be understood outside of what mainstream society understands as benefits – they are not solely monetary.

Finally, the notion of a wholesale guardian/ward relationship as well as a potential direct role for the Bank's *client* undergirds PS 7 under the heading of *Private Sector Responsibilities Where Government is Responsible for Managing Indigenous Peoples Issues.* The opening sentence of this section

> 21. *Where the government has a defined role in the management of Indigenous Peoples issues in relation to the project, the client will collaborate with the responsible government agency*, to the extent feasible and permitted by the agency, to achieve outcomes that are consistent with the objectives of this Performance Standard. *In addition, where government capacity is limited*, the client will play an active role during planning, implementation, and monitoring of activities to the extent permitted by the agency.
>
> 22. The *client* will prepare a plan that, together with the documents prepared by the responsible government agency, will address the relevant requirements of this Performance Standard. The client may need to include (i) the plan, implementation, and documentation of the process of ICP and engagement and FPIC where relevant; (ii) a description of the government-provided entitlements of affected Indigenous Peoples; (iii) the measures proposed to bridge any gaps between such entitlements, and the requirements of this Performance Standard; and (iv) the financial and implementation responsibilities of the government agency and/or the client.

This is unacceptable, not to mention the question of how all of these elements may be solely determined by those third party or States driven by their own agenda and interests in completion of a project that may have devastating impacts upon Indigenous peoples and their communities.

Conclusion

Indigenous peoples must remain vigilant about the rights that have been affirmed in their favor. Indigenous peoples are subjects and beneficiaries of these cutting-edge international human rights instruments. As such, they are the ones that must be present to define the content and the contours of

their individual and collective human rights in order to fully exercise and enjoy them. They must pay constant attention to developments taking place within our communities and impacting the lands, territories, and resources of Indigenous peoples.

Though governments have significant obligations, they will not act in favor of Indigenous peoples. Indigenous peoples, nations and communities must constantly emphasize their voices as well as the clear linkages between their right of self-determination and their right to free, prior, and informed consent. The stakes are high for Indigenous peoples. There is extraordinary, accumulated knowledge, skills, and resources within the hands of well-practiced extractive industry professionals. However, because of the sacrifice, knowledge, and capacity of Indigenous peoples, they have forged a solid foundation upon which to build genuine opportunities consistent with both their legal status as distinct peoples, their human rights, and their distinct aspirations.

In relation to British Columbia as a province and political subdivision within Canada, it is significant that the adoption of legislation to give life to the *UN Declaration on the Rights of Indigenous Peoples* has taken place. Presently, there appears an urgent need for both the province as a party and the diverse Indigenous peoples concerned to give fuller context specific meaning to the content of the *UN Declaration* based on the *self* in self-determination.