BC First Nations Energy and Mining Council
IMPLEMENTATION OF CONSENT FOR THE EXPLOITATION OF MINES ON INDIGENOUS LANDS AND TERRITORIES
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3. What international standards exist for FPIC at the moment and how do they work in practice? Using existing international human rights and self-determination instruments (such as IFC Performance Standard 7 or ILO Standard 169), we discuss how these and other international tools and conventions support the development and implementation of consent, and how they can be applied to mining. in BC.

In the last 20 years, Indigenous Peoples have gained ground in making themselves subjects of discussion, subjects of social struggles, subjects of regional and international diplomacy, as well as subjects of rights. The growing awareness of self-identification, of who they are they themselves, of their identity, of their history, of their languages, of their beliefs, of their philosophy and worldview, inalienable rights begin to be a motive for organization, daily struggle and resistance. to defend themselves from violations of their rights and to demand full respect as individuals and communities that occupy strategic territories, lands and the habitat where they develop their lives, their families, their generations.

There is opposition and defense of their own, without being fooled, they unite to avoid the dispossession of their life, of what life generates, for example, rivers, mountains, forests, mines, wetlands, forests, healing stones, plants of all kinds but especially medicinal plants; They do not let their knowledge be taken away, they demand each time a code of respect for their intellectual property, their ceremonial rites, their languages and they communicate to the young generations about their struggles.

The current States that have been formed on the expropriation, exploitation, dispossession and genocide against indigenous peoples, they issued laws in their favor and became accustomed to the imposition of laws and the adjudication of extensive lands, making use of the colonial legal insecurity, have begun a new stage of "conquest" , "oppression" and "dispossession" especially in the forced implementation of mining projects of exploration and exploitation in the open, construction of dams or sources of electricity that does not favor the ancestral owners or entire communities of said lands and territories.

Especially in the 2000s the “legal” adjudication in the law of the colonial and illegal State intensified because there have been so many maneuvers not to pass through the laws of the State to the adjudication of mining projects. Faced with the violence used for these practices, the authorities, organizations and Indigenous Peoples have increasingly organized to prevent the secession of their territories or the disappearance of themselves or their future generations.

For this reason, in the concert of Nations at the level of the United Nations, Regional Organizations such as the Organization of American States -OAS- instruments recently

adopted by the member states were created, such as the United Nations Declaration on the Rights of Indigenous Peoples. , the American Declaration on the Rights of Indigenous Peoples, the International Convention 169 on Indigenous and Tribal Peoples in Independent Countries of the International Labor Organization –OIT- demand the respect, recognition and implementation of measures to guarantee the rights of Indigenous Peoples .

As an external legal defense to the communities, several articles of the aforementioned instruments of international law have come to strengthen struggle of Indigenous Peoples to the exercise of their rights, specifically what is stated in this presentation of the exercise of the right to Free, Prior and Informed Consent -FPIC-.

Along with the aforementioned international instruments, a new legal process and struggle of Indigenous Peoples have arrived, in addition to becoming challenges for the legal institutions or the administration of justice of the States, especially because they can circumvent the commitments accepted through the adoption of the said instruments. On the other hand, it pushes the States to modify their internal norms and laws, incorporating, albeit slowly, the new treatment practices for Indigenous Peoples.

The aforementioned instruments, in several of their articles are intertwined and make individual and collective rights interdependent, which makes them comprehensive, because it is not possible to speak of the FPIC, without the guarantee of the right to life, to existence, to the identity, the history of Indigenous Peoples. Nor can one speak of rights to the Territory, Natural Resources, and Lands, without drawing attention to the rights to Autonomy, Self-government and Self Determination of Indigenous Peoples, protected by other instruments such as the International Covenant on Civil Rights. and Political, the Covenant on Economic and Social Rights.

In relation to the right to FPIC, it is a process and a new issue for colonial states, especially those from Latin America because its essence is of imposition, hiding behind the figure of representativeness and/or delegation to government agencies. executive, legislative and judicial, because according to them, they were delegated the representation of the People in the electoral ballot boxes, for the same reason they do not have or refuse to consult the people and with them they harm the interests of the Indigenous Peoples who cohabit in those States .

But the Consultation for Indigenous Peoples is not only a right, but it is part of their norm, of their good practice, of their political and social organization because most of the authorities of the indigenous governments submit to consultation, what to do daily of its governance. For this reason, in the historical present, FPIC is a serious problem and a cause of conflict in this dichotomy, this philosophy of life.

Despite this situation of contradictions, because they are different logics in space, time and action, in Latin America it is the region in which the right to prior, free and informed consultation and consent of indigenous peoples has had the greatest legal and political development. This is not accidental, considering that the indigenous population in the region is equivalent to more than 8% of the total population and reaches 45 million people, belonging to more than 800 different peoples. It is also the region with the largest number

of States party to ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries of 1989, currently the only international instrument, of a conventional nature, that contains specific obligations regarding participation and prior consultation, among other fundamental areas for indigenous peoples.[1]

Most of the constitutional courts have adhered to the doctrine of the constitutionality bloc and have extensively discussed the international instruments that protect the right to prior consultation. It should be noted that the reference to the constitutionality block is applicable to the rights of indigenous peoples in general, and not only to the right to consultation. Said doctrine is understood in general terms as the set of norms that together with the Constitution make up the parameter for evaluating the substantive validity of the laws.[2]

High courts in some countries have used the United Nations Declaration on the Rights of Indigenous Peoples to give content to the constitutional text. In particular, the Constitutional Court of Colombia has used the Declaration as a source of rights for indigenous peoples. Similarly, the Peruvian Constitutional Court has used this Declaration to recognize the rights of indigenous peoples, although it has indicated that it is not strictly binding. Likewise, the Guatemalan Constitutional Court has established, based on the aforementioned Declaration, obligations that Guatemala has with respect to indigenous peoples.[3]

The scope of the provisions of Convention 169 is determined by the interpretation made of them by the ILO's supervisory mechanisms, especially the Committee of Experts on the Application of Conventions and Recommendations (CEARC) and the Committee on the Application of Standards the Conference (CANC). Likewise, and based on the principle of interconnection of human rights, enshrined in Convention 169 (Article 35) and in the American Convention on Human Rights (Article 29), the jurisprudence of the international courts to which States have been decisive is decisive. recognized jurisdiction, such as the Inter-American Court. In this way, the courts of justice must apply the norms of international human rights law, respecting the decisions emanating from supranational bodies.[4]

The Inter-American Court has indicated that, although it recognizes these special safeguards, "said property rights, like many other rights recognized in the Convention, are subject to certain limits and restrictions", in such a way that they cannot be interpreted as a general prohibition of granting concessions or authorizations to carry out economic activities in the territories of indigenous peoples. The Inter-American Court has established that, in addition to the requirements commonly applied in the restriction of individual property (legality, necessity and proportionality), the restrictions derived from the concession of economic activities that affect indigenous peoples must not endanger the

[1] PRIMERA PARTE. La consulta y el consentimiento en el ordenamiento jurídico de los países. Pág. 2
[2] idem Pág. 10
[3] idem Pág. 13
[4] Idem Pág. 13

integrity culture of the indigenous community and, ultimately, their physical and cultural subsistence as a people.[5]

The jurisprudence of the Inter-American System has also established that the consultation must be carried out "in accordance with the customs and traditions" of the indigenous peoples. In addition, as established by the Inter-American Court, the States must guarantee that the members of the indigenous and tribal communities reasonably benefit from these activities and that no concession is granted until an independent and technically capable entity acting under the supervision of the State has carried out a prior evaluation of the social and environmental impact of the project. In addition, the Court has considered that when it comes to large-scale development or investment plans that would have a greater impact within the [indigenous] territory, the State has the obligation, not only to consult the indigenous people, but must also obtain the prior, free and informed consent of the latter, according to their customs and traditions.[6]

Although the normative implementation processes undertaken in the countries of the region are very different, it is possible to identify some premises, applicable to the different realities. The first is that the absence of legislation or inconsistencies in current regulations in no way free the State from complying with an international obligation. This affirmation is based on the principles of pacta sunt servanda and the primacy of international law, set forth respectively in Articles 26 and 27 of the Vienna Convention on the Law of Treaties. Although from a legal point of view there is clarity regarding the self-applicable nature of the consultation, in practice one of the most frequent arguments by which state authorities and officials evade said obligation is the lack of a specific legal body.[7]

The Inter-American Court of Human Rights has noted that the consultation regulated in Convention 169 on Indigenous and Tribal Peoples of the International Labor Organization has been consolidated as a general principle of International Law, many member countries of the Organization of States Americans, through reforms in their internal regulations and the pronouncements emanating from their high courts of justice, have supported their protection.[8]

The important thing about what has been read above is that only the Right to FPIC has generated a new dynamic in the legal analysis and implementation of national norms, the vision of some jurists is beginning to change and new language is introduced in the national legal construction and international.

The immediate future challenge for the States is to understand that the commitments assumed by their Governments when adopting and / or ratifying said instruments are assuming that they must substantially change their national policies, propose new public policies that must guarantee the full existence of the Peoples. , to create spaces for integral

[5] Idem Pág. 15

[6] Idem Pág. 16

[7] Idem Pág. 17

[8] Constitución Política de la República de Guatemala con notas de jurisprudencia. Guatemala 2018. Pág. 181.

Development in accordance with the vision and philosophy of Indigenous Peoples, in addition to compliance with the right to Territory, Land, Natural Resources and their very life, as a community, the right to live as Peoples Indigenous people with their knowledge, vision, worldview and forms of organization, systems, languages, among other substantial or fundamental rights.

Although the right to Self-Determination, Self-Government and Autonomy is claimed, the States also have the responsibility of guaranteeing the historical continuity of the Indigenous Peoples on their Territories, respecting the priority in time, regarding the occupation and use of certain Territory, they must reinforce their national laws and policies, harmonizing domestic legislation with international legislation directly related to the rights of indigenous peoples.

For the exercise of the Free, Prior and Informed Consent of Indigenous Peoples, it continues to be a matter of great concern, given that most of the important decisions about mining extraction and open-pit mining projects, as well as a large-scale "development" project scale in the Indigenous Territories are imposed and article 6 of Convention No. 169 of the ILO is flagrantly violated, which stipulates that governments must:
"a) Consult the interested peoples, through appropriate procedures and in particular through their representative institutions, whenever legislative or administrative measures that may directly affect them are envisaged;
b) Establish the means through which the peoples concerned may participate freely, at least to the same extent as other sectors of the population, and at all levels in decision-making in elective institutions and administrative and other bodies. responsible for policies and programs that concern them ... "

They also violate most of the principles contained in the articles of the declarations on the rights of Indigenous Peoples, the International Covenant on Civil and Political Rights, the Covenant on Economic and Social Rights.

Some Latin American countries have made efforts to pass laws to put consultation into practice, but it is limited, because they fall into the regulation like a straitjacket, which is rejected by the subjects of the right to consultation, since the issuance of the content of the law is done without the consent, prior, free and informed of the Indigenous Peoples, turning the regulation into a limitation and not a guarantee for the full exercise of the right to FPIC.

Another important section that is worth analyzing is that although it is true that the State is responsible for carrying out the consultation processes, as stipulated in ILO Convention 169 and the United Nations Declaration on Rights of Indigenous Peoples, companies also have obligations to respect rights as established by the Ruggie Framework (General Distr. A / HRC / 8/5 / April / 2008), whose Guiding Principles were enshrined as the standard of conduct worldwide that is expected of all companies in relation to human rights.

The Framework is founded on three pillars: 1) The duty of the State to protect human rights; 2) the responsibility of companies to respect human rights and; 3) the need to improve access to remedies for victims of business-related abuses. The three pillars of Marco: Protect, Respect and Repair are developed in 31 guiding principles that companies

must follow to respect human rights (United Nations - Guide for the interpretation of Marco Ruggie, 2012)[9]

Companies' respect for human rights means that they must "refrain from infringing the human rights of third parties and face negative consequences on human rights in which they have any involvement."

The responsibility to respect human rights requires that companies:
a) Prevent their own activities from causing or contributing to negative consequences on human rights and address those consequences when they occur; b) Try to prevent or mitigate negative consequences on human rights directly related to operations, products or services provided by their business relationships, even when they have not contributed to generating them (Principle 13). Principle 18 indicates that "In order to gauge human rights risks, companies must identify and assess the actual or potential negative consequences on human rights in which they may be involved, either through their own activities or as result of your business relationships. This process must: a) make use of internal / independent human rights experts; b) include substantive consultations with potential affected groups and other interested parties, depending on the size of the company and the nature and context of the operation.[10]

Most of the incidents between indigenous peoples, the extractive industries, and the State are due to non-observance and violation of the right to FPIC. The companies are set up without the State complying with its commitment to serve the affected Indigenous Peoples' communities.[11]

The issue of the exploitation of extractive resources and human rights is a fundamental basis of relationship between indigenous peoples, governments and the private sector that must be based on the full recognition of the rights of indigenous peoples to their Lands, Territories and Resources. Natural, which in turn implies the exercise of their Right to Self-Determination.

Another important point in 2020 to take into account, as an unfavorable element for Indigenous Peoples is the appearance of the COVID 19 Pandemic. Everyone knows the dire results of this disease that has affected the lives of millions of human beings, including lives of communities and Indigenous Peoples.

Many governments as well as companies of all kinds were affected in their business, production, trade and profits. The economy of the poorest countries was totally decimated, coupled with this, corruption and impunity have created serious problems in the misnamed post-COVID 19 economic "recovery".

In terms of promoting Economic Recovery, many businessmen engaged in the Extraction and Exploitation of Natural Resources and mining are convincing governments to give

[9] Cited in the Manual between good and bad practices in the Prior Consultation, cases from Latin America. Pag. 94.
[10] Idem
[11] Manual between good and bad practices in the Prior Consultation, cases from Latin America. Pag. 87.

carte blanche to enter indigenous territories, without fulfilling any responsibility under the international instruments and less those related to those that concern Indigenous Peoples.

Another issue that hinders the implementation and fulfillment of the right to FPIC is the militarization or State of Prevention practices in various geographic areas, mainly where Indigenous Peoples live. This situation of military control in indigenous territories, instead of encouraging the practice of consultation, is greatly affecting organization, mobilization, and also instills fear, fear and mistrust in the population.

For the rights of Indigenous Peoples to be widely known in accordance with the principles and statements of the United Nations Declaration, it is essential to massify or expand the content of said declaration, carry out training and education processes to society and its segments. , in addition to educate those who administer justice, those who make decisions in the States and those who formulate public policies. From this account, it will be avoided to criminalize the indigenous authorities, the leaders, women, children and others who fight resisting to avoid the dispossession of their lives through their Lands, Territories and Natural Resources.

In conclusion, the right to FPIC for Indigenous Peoples requires the good will of the Governments, Businessmen, and other actors that are involved when promoting actions when conducting the Consultation. The FPIC is not a simple requirement to fulfill, it has no economic price, it is not a commercial value, it is not a legal matter for companies or the States, the FPIC is the essence of the integral life of Indigenous Peoples. It is this right that strengthens the exercise of autonomy, self-government and Self-Determination that States and governments must fully respect.