The Operationalization of the Principle of Free, Prior and Informed Consent: A Duty to Obtain Consent or Simply a Duty to Consult?

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Abstract

The principle of free, prior and informed consent (FPIC) was introduced as a way of safeguarding indigenous peoples' right to self-determination and their right to freely determine their own economic, social and cultural development. This Article explores how FPIC has been operationalized in the context of natural resource extraction on indigenous land by taking a closer look at the operationalization of this principle in Colombia. The Article also aims to showcase the difference between FPIC and the duty to consult, and explains to what extent the former one is more preferable to the latter one.

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INTRODUCTION

"Oil is the blood of Mother Earth, . . . it belongs in the ground, where it sustains the world below. Up here, it only causes violence and death."[1] This statement was made by Luis Caballero, the vice-president of the Traditional U'wa Authority, an indigenous community that is located in northeastern Colombia.[2] Since the 1990s, the community has been fighting continued attempts of conducting oil exploration in the Siriri oil block (formerly called Samore), an area that is part of their traditional lands, because they are worried that the explorations will result in increased violence.[3] Their fight has become one of the most well-known examples of indigenous communities defending their rights against big multinational oil corporations and the State.

The aim of this Article is to take a closer look at the principle of free, prior and informed consent (hereinafter FPIC) and the obligation to consult that exists in the context of natural resource extraction from indigenous lands. More specifically, this Article will analyze how—in the context of natural resource extraction from indigenous territories—FPIC has been operationalized, how this operationalization could be improved, and to what extent FPIC is preferable to the duty to consult. The Article argues that despite FPIC gaining in popularity, there has not been a correct and successful implementation of FPIC. A correct implementation of FPIC is crucial to the respect of indigenous peoples' right to self-determination and therefore, preferable to the principle of prior consultation. As a consequence, the author urges States to improve their operationalization of the principle.

For this purpose, we will take a closer look at Colombia's implementation of FPIC. Part I of this Article will give an overview of both the relationship between indigenous communities and the extractive industry in Colombia, and the concept of FPIC. Part II will discuss the legal bases for FPIC in both international law and in the Colombian legal system. Part III will analyze the development of FPIC in Colombia, other national jurisdictions, and institutions; it will explain the importance and strengths, but also the limits and weaknesses of FPIC. Lastly, the Article explores how the operationalization of the principle could be enhanced by, for example, improving the respect for the

1. PROJECT UNDERGROUND, BLOOD OF OUR MOTHER: THE U'WA PEOPLE, OCCIDENTAL PETROLEUM AND THE COLOMBIAN OIL INDUSTRY 9 (1998) (on file with author).

2. *Id.* at 3.

3. Al Gedicks, *Resource Wars against Native Peoples in Colombia*, 14 CAPITALISM NATURE SOCIALISM 85, 96 (2003).

right to express opposition, by mitigating power imbalances, and by ensuring that the consent is really informed.

I. Background: Indigenous Communities, the Extractive Industry, and the Principle of Free, Prior and Informed Consent

A. *The Relationship Between Indigenous Communities and the Extractive Industry in Colombia*

Latin American States have increasingly turned towards resource extraction and export as a source of revenue as a reaction to debt and diminished income from agricultural exports due to the competition from U.S. heavily subsidized agricultural exports.[4] As a result, crude and refined petroleum accounts for around 33 percent of Colombia's exports.[5] Multinational resource extraction corporations have taken advantage of technological advances to find natural resources in the most remote corners of the planet, which are often areas that are part of the traditional lands of indigenous communities.[6] According to the National Indigenous Organization of Colombia, around 25 percent of the national territory is legally recognized indigenous territory and a big part of that constitutes the nation's oil reserves.[7]

Indigenous peoples are heavily impacted by natural resource extraction because they are especially dependent on and attached to their traditional lands. This dependency is exacerbated by the fact that they already experience a high level of social and economic disadvantage due to the marginalization and discrimination they have been subjected to for generations.[8] In addition, the National Indigenous Organization of Colombia has found that the oil industry is particularly harmful for indigenous communities since exploration and extraction projects often lead to a breakdown of the native economy and culture.[9] In Colombia the aforementioned impact on indigenous peoples is accompanied by the dangers of the civil conflict in the country. The left-wing

4. César A. Rodríguez-Garavito & Luis Carlos Arenas, *Indigenous rights, transnational activism, and legal mobilization: the struggle of the U'wa people in Colombia*, *in* Law and Globalization from Below 241, 244–45, (César A. Rodríguez-Garavito & Boaventura de Sousa Santos eds., 2005).

5. The Observatory of Econ. Complexity (OEC), *International Trade Visualization Tool*, *Colombia Country Profile*, https://oec.world/en/profile/country/col [https://perma.cc/D3ZM-B6MF].

6. Gedicks, *supra* note 3, at 85.

7. *Id.* at 87 (citing Organización Nacional Indígena de Colombia et al., Desecrated land: large projects and their impact on indigenous territories and the environment in Colombia 298 (López Dominguez & Luis Horacio eds. 1996)).

8. Kathryn Tomlinson, *Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC*, 23 Int'l J. of Hum. Rts. 880, 883 (2019).

9. Gedicks, *supra* note 3, at 87.

guerrillas and the right-wing paramilitary groups[10] are both attracted by the extra revenue they can earn from terrorizing or cooperating with the local officials or the oil company itself.[11] As a result, oil companies in Colombia receive military protection by paying $1 to the government for every barrel of oil that is produced, or they directly negotiate with either the military, paramilitary, or private security firms to protect them.[12] This increased militarization in oil exploring regions has exacerbated the armed conflict, increased human rights abuses, and forced displacements of indigenous peoples in Colombia.[13] It is therefore not surprising that indigenous communities like the U'wa are worried about the oil explorations in their traditional territories.[14] But how do indigenous peoples voice their concerns, and do they have the opportunity to participate in the decisionmaking process of something that affects them in such a profound way? The principle of free, prior and informed consent attempts to give indigenous communities a meaningful way to participate in this decisionmaking process.

B. *The Principle of Free, Prior and Informed Consent*

In order to protect indigenous peoples' rights and to ensure they have a say and can determine their own development priorities when faced with projects and decisions that might affect them and their territories, international policy and civil society circles have introduced the principle of free, prior and informed consent.[15] FPIC "recognizes indigenous peoples' inherent and prior rights to their lands and resources and respects their legitimate authority to require that third parties enter into an equal and respectful relationship with them based on the principle of informed consent. Procedurally, free, prior and informed consent requires processes that allow and support meaningful choices by indigenous peoples about their development path."[16]

FPIC sets forth four interrelated elements which must be satisfied in order for an agreement between indigenous communities and the State or the

10. Aila M. Matanock & Miguel García-Sánchez, *The Colombian Paradox: Peace Processes, Elite Divisions & Popular Plebiscites*, 146 Dædalus, Journal of the American Academy of Arts and Sciences 152, 153 (2017).

11. *Civil Conflict and Indigenous Peoples in Colombia*, Amazon Watch (Mar. 1, 2002) https://amazonwatch.org/news/2002/0301-civil-conflict-and-indigenous-peoples-in-colombia [https://perma.cc/42WL-ZRVV].

12. Al Gedicks, Resource Rebels: Native Challenges to Mining and Oil Corporations 59, (Cambridge, MA: South End Press, 1st ed. 2001).

13. Amazon Watch, *supra* note 11.

14. Project Underground, *supra* note 1, at 1.

15. Tomlinson, *supra* note 8, at 881.

16. Working Group on Indigenous Populations, *Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources that would serve as a framework for the drafting of a legal commentary by the Working Group on this*, Commission on Human Rights, U.N. Doc. E/CN.4/Sub.2/AC.4/2004/4, at ¶ 13 (July 8, 2004) (by Iulia Antoanella Motoc & Tebtebba Foundation).

extractive company to be legitimate and valid.[17] The element "free" requires that there be no coercion or intimidation. "Prior" requires that the relevant authorities need to obtain consent before any activities are commenced and that indigenous communities should be given sufficient time for their decisionmaking process.[18] The term "informed" means indigenous communities need to not only have received all necessary information, but also that this information is accurate, objective, and understandable.[19] Finally, "consent" requires that indigenous communities have agreed to the project in question.[20] Although FPIC is increasingly accepted and even endorsed by international policy and law, questions remain with regard to its proper implementation, the exact meaning of "consent," and whether that means that indigenous communities have veto rights.[21] Chapter IV revisits these questions by discussing operationalization of FPIC, and ways to improve it.

II. The Principle of Free, Prior and Informed Consent in Law

In order to be able to analyze the operationalization of FPIC it is necessary to first explain the principle by presenting its origins and where it can be found in law. We will start by looking at treaty law, followed by a soft law instrument that lacks binding force, and finally we will look at how this international law principle has been integrated into national systems, specifically the Colombian legal system.

A. *Treaty Law: Indigenous and Tribal Peoples Convention (No. 169)*

In 1989, the International Labour Organization (ILO) adopted the Indigenous and Tribal Peoples Convention (No. 169) (hereinafter ILO Convention No. 169),[22] the first and only multilateral treaty that specifically focuses on the rights of indigenous peoples.[23] Article 6(1)(a) states that governments have the obligation to consult the concerned indigenous communities "through appropriate procedures" and "through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly." Article 6(2) further clarifies that "[t]he consultations carried out . . . shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the

17. Expert Mechanism on the Rights of Indigenous Peoples, *Final report of the study on indigenous peoples and the right to participate in decision-making*, Human Rights Council, U.N. Doc. A/HRC/18/42, at 27 ¶ 24 (Aug. 17, 2001).

18. *Id.* at ¶ 25.

19. *Id.*

20. *Id.*

21. Tomlinson, *supra* note 8, at 881.

22. International Labor Organization, *Indigenous and Tribal Peoples Convention*, C169 (June 27, 1989).

23. *30th anniversary of the Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, International Labour Organization, https://www.ilo.org/global/topics/indigenous-tribal/WCMS_666555/lang-en/index.htm [https://perma.cc/4MNR-9GAS].

proposed measures." Last but not least, Article 7 explains that indigenous peoples "have the right to decide their own priorities for the process of development as it affects . . . the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development."

This obligation to consult in order to seek consent, which is mentioned in Article 6(1)(a), Article 6(2), and Article 7 of ILO Convention No. 169, is seen by many as the precursor of today's FPIC.[24] The Convention mentions the obligation to consult with regard to the use of the natural resources found on indigenous communities' land (Article 15(2)), the transfer of their land (Article 17), the development and implementation of special training programs (Article 22), and in relation to education and language (Article 27 and Article 28). It is however important to underline that ILO Convention No. 169 introduces an obligation on the States to consult and not a right of consultation for indigenous peoples.[25] Furthermore, the imposed obligation requires States to consult in order to seek consent, however, achieving consent is not a necessary requirement for States to act.[26] As a result, the obligation stated in ILO Convention No. 169 can be classified as an obligation to free and prior *consultation*, but not as an obligation to obtain free, prior and informed *consent*.

B. *Soft Law: United Nations Declaration on the Rights of Indigenous Peoples*

In September 2007, the United Nations (UN) General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples (hereinafter UNDRIP).[27] The Declaration affirms that indigenous peoples have a right to self-determination and that as a result of this right, they can freely determine how to pursue their own economic, social, and cultural development.[28] Article 32 UNDRIP reiterates this by focusing specifically on the right to develop and determine their own strategies when it comes to the use of indigenous peoples' traditional lands and the resources that can be found within them. Indigenous peoples' right to self-determination requires States and governments to recognize that indigenous peoples have an effective "sphere of indigenous governance" which must be respected by other actors.[29] Indigenous peoples' right

24. Philippe Hanna & Frank Vanclay, *Human rights, Indigenous peoples and the concept of Free, Prior and Informed Consent*, *in* 31 Impact Assessment and Project Appraisal 146, 150–51 (2013).

25. Xiomara Lorena Romero-Pérez & Alejandro Rosas-Martínez, *Implementación de la consulta previa en Colombia y su debate actual. A propósito de los pueblos indígenas y tribales*, 681 Estudios en homenaje a don José Emilio Rolando Ordóñez Cifuentes 25, 26 (2013).

26. Special Rapporteur on the Rights of Indigenous Peoples, *Extractive industries and indigenous peoples*, U.N. Doc. A/HRC/24/41, at 9 ¶ 27 (July 1, 2013) (by James Anaya).

27. G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples, 1 (Sep. 13, 2007).

28. *Id.* at art. 3.

29. David Szablowski, *Operationalizing Free, Prior, and Informed Consent in the Extractive Industry Sector? Examining the Challenges of a Negotiated Model of Justice*, 30

to self-determination is, therefore, in most cases not a pathway to secession from the State.[30]

The right to determine whether and how indigenous land can be used, which flows from their right to self-determination, acts as the basis for the development of FPIC.[31] Article 19 UNDRIP introduces FPIC in a more general manner; namely, before adopting and implementing any administrative or legislative measure that could affect indigenous peoples. Furthermore, governments also need to obtain the FPIC of indigenous peoples with regard to their relocation (Article 10 UNDRIP), the use and appropriation of indigenous communities' cultural and intellectual property (Article 11(2) UNDRIP), the confiscation of their lands (Article 28(1) UNDRIP), and also in relation to the storage or disposal of toxic and hazardous waste (Article 29(2) UNDRIP). It is, however, Article 32(2) that interests us the most, since it links FPIC to natural resources extraction. The article obliges States to "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."[32]

Therefore, the only "real" FPIC is arguably found in the UN Declaration on the Rights of Indigenous Peoples, while the obligation that was introduced by the ILO Convention No. 169 should rather be seen as a (crucial) aspect of FPIC. However, UNDRIP is soft law instrument that lacks binding force, while the ILO Convention No. 169 is a binding treaty and therefore enforceable. Thus, only the obligation to consult and seek consent deriving from the ILO Convention No. 169 is strictly enforceable. Nonetheless, this does not preclude the possibility of FPIC becoming enforceable either through the development of customary international law or through the codification in a binding treaty at a later point.

C. *National Law: The 1991 Colombian Constitution*

Within the Colombian national legal system, the basis for securing and protecting indigenous peoples' rights can be found both in the Colombian Constitution and in ILO Convention No. 169, which was ratified by Colombia in August 1991 with the adoption of Law 21.[33] The Colombian Constitution of 1991

Canadian J. of Dev. Stud. 111, 114–115 (2010).

30. *Id.*

31. Hanna and Vanclay, *supra* note 24, at 150.

32. G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sep. 13, 2007).

33. International Labor Organization, *Ratifications of C169—Indigenous and Tribal Peoples Convention* (Sept. 5, 1991); Yadira Castillo Meneses, *El Rol de la Empresa Transnacional Extractiva de Petróleo en la consulta previa con las Comunidades Indígenas: La Experiencia en Colombia*, 37 Revista de Derecho: División de Ciencias Jurídicas de la Universidad del Norte 1, 5 (2012).

mandates that "[i]n the decisions adopted with respect to [exploitation of the natural resources in the indigenous territories], the Government will encourage the participation of the representatives of the respective communities."[34] The Constitution does not expressly mention that indigenous communities have a fundamental right to consultation and to give consent on projects that might affect them.[35] The Colombian Constitutional Court, however, has been instrumental in developing the duty of the State government to consult with indigenous communities when developing administrative or legal measures which might affect the communities directly, a duty which it bases on the ILO Convention No. 169.[36]

One of the most important decisions in this context is decision *SU-039*[37] from 1997 (*Sentencia SU-039/97*), since it introduced indigenous peoples' fundamental right to a prior consultation (*consulta previa*) and clarified its principal characteristics and objectives.[38] In 1992, Occidental Petroleum (Oxy) applied for a license to explore oil on a site that partially overlapped with the U'wa's tribal territory and commenced geological testing of the grounds.[39] This was followed by a declaration from the U'wa stating that they oppose any kind of oil exploration on their territories.[40] Invoking Article 330 of the new Colombian Constitution from 1991, the U'wa convinced the National Office for Indigenous Affairs to organize a meeting in January 1995 with Oxy, Ecopetrol, the Ministry of the Environment, and the Ministry of Mining and Energy.[41] However, mere weeks after the meeting, the Ministry of the Environment granted the license, leading the U'wa to announce that they would commit collective suicide if the explorations were to begin.[42] In response to the granting of license, the Colombian Ombudsman submitted two distinct claims against the government for violating the U'wa's constitutional right to effectively participate in the process.[43] Following both the Colombian Constitution and the ILO Convention No. 169, the Constitutional Court recognized the importance and necessity of both individual human rights and the collective

34. CONSTITUCION POLITICA DE COLOMBIA [C.P] paragraph of art 330, https://www.constituteproject.org/constitution/Colombia_2005.pdf [https://perma.cc/G9SE-89AX].

35. Romero-Pérez & Rosas-Martínez, *supra* note 25, at 28.

36. *Id.* at 25.

37. Constitutional Court of Colombia, *Sentencia SU-039/97*, M.P. Antonio Barrera Carbonell (February 3, 1997), https://www.informea.org/sites/default/files/court-decisions/sentencia-su-039-97.pdf [https://perma.cc/SE8G-CRBD].

38. *Id.* at 1–2; Comisión Colombiana de Juristas, *Boletín No. 2: Serie sobre el derecho a la consulta previa de pueblos indígenas y comunidades afrodescendientes*, September 16, 2008, https://www.coljuristas.org/documentos/boletines/bol_n2_consulta_previa.pdf [https://perma.cc/5XTT-3YN4]

39. Rodríguez-Garavito & Arenas, *supra* note 4, at 249.

40. *Id.* at 249–50.

41. *Id.* at 250.

42. *Id.*

43. *Id.* at 251.

rights of indigenous peoples.[44] As a result of this, the Court held that the interest of the State and the corporations had to be balanced against the U'wa's right to cultural survival and respect for their territory, and that this balancing had to be done via an *effective consultation* that includes the *active participation* of the indigenous community.[45] It further clarified that the community had to have full knowledge of the project, that it should be informed as to how the implementation of such a project may affect their social, cultural, and economic integrity, and that it should have the opportunity to assess the advantages and disadvantages of the project, be heard in relation to its concerns and claims, and be able to pronounce itself on the viability of the project.[46] The Court concluded that the 1995 meeting did not fulfill those criteria.[47]

With this decision, the Constitutional Court introduced indigenous peoples' fundamental right to a prior consultation. The objective of this right to a prior consultation was to ensure the community's full knowledge regarding projects aimed at exploring or exploiting natural resources in their territories. This was to be achieved through an active and effective participation of the community in the decisionmaking process of the authorities with the aim to reach an agreement insofar possible.[48] The Constitutional Court therefore imposed a duty on the Colombian State to consult with indigenous communities, a duty that derived from Article 330 of the Colombian Constitution from 1991, read in conjunction with the duty to consult deriving from ILO Convention No. 169. This duty resembles the duty to consult in order to seek consent introduced by the ILO Convention No. 169 more so than it does the "real" FPIC as introduced by UNDRIP. As stated above, however, it is possible to argue that this obligation to consult is a crucial and necessary part of FPIC.

III. The Principle of Free, Prior and Informed Consent

Let us now turn toward a more in-depth analysis of FPIC and see whether, and if so how, this principle has been operationalized. Moreover, the below analysis will examine the principle's importance and strengths, its shortcomings and challenges, and lastly, how the operationalization of the principle can be improved.

A. *The Operationalization of FPIC in Colombia, Other States, and Institutions*

After the Colombian Constitutional Court introduced indigenous peoples' fundamental right to a prior consultation in its decision *SU-039* from 1997, the Court expanded and clarified the requirements of this fundamental right,

44. *Id.* at 252 (citing *Sentencia SU-039/97*, *supra* note 37, at 22–24).

45. *Id.* (citing *Sentencia SU-039/97*, *supra* note 37, at 24–29).

46. *Sentencia SU-039/97*, *supra* note 37, at 2.

47. Rodríguez-Garavito & Arenas, *supra* note 4, at 252 (citing *Sentencia SU-039/97*, *supra* note 37, at 5 and 52-53).

48. *Sentencia SU-039/97*, *supra* note 37, at 2.

which it also derived from the ILO Convention No. 169.[49] This expansion was done through a series of decisions. For example, in *Sentencia C-187/11,* the Court clarified that the consultation had to be done in advance if legislative measures directly impacted indigenous communities.[50] In addition, in *Sentencia C-030/08*, the Court reaffirmed that the consultation must be fulfilled in good faith, that the proceedings must be appropriate to the specific circumstances, per Article 6 of the ILO Convention No. 169,[51] and that the consent must be clear, free, and informed.[52] The Court also clarified the required process. The first stage comprises the preconsultation stage, during which information is exchanged between the different stakeholders, and decisions are made regarding the structure and organization of the "official" consultation process.[53] In the second stage, the actual consultation takes place, a process that has to be carried out in good faith, without influencing the decisionmaking process of the community, and with the goal of achieving an agreement.[54]

The Court left the question of whether the indigenous community's decision is binding upon the authorities unanswered. However, according to Decree 1320, the competent environmental authority has the last word regarding the project.[55] In Colombia, indigenous communities therefore do not have a "veto power" with regard to projects affecting their traditional lands or affecting them in another way directly. In other words, even if they withhold consent, the State can still go ahead with the project.

When looking around the world, we can see that FPIC has been operationalized in similar ways. Following large waves of criticism with regard to the extractive industry around the world, in 2001 the World Bank (hereinafter WB) put in place the Extractive Industries Review (hereinafter EIR), a two-year research and consultation process.[56] The aim of EIR was to analyze whether the WB's extractive industry projects were consistent with the "overall objective of achieving poverty alleviation through sustainable development."[57]

49. Romero-Pérez & Rosas-Martínez, *supra* note 25, at 31–32.

50. *Id.* at 32; Constitutional Court of Colombia, *Sentencia C-187/11*, M.P. Humberto Antonio Sierra Porto (March 16, 2011).

51. Romero-Pérez & Rosas-Martínez, *supra* note 25, at 32; Constitutional Court of Colombia, *Sentencia C-030/08*, M.P. Rodrigo Escobar Gil (January 1, 2008).

52. Romero-Pérez & Rosas-Martínez, *supra* note 25, at 32; Constitutional Court of Colombia, *Sentencia T-382/06*, M.P. Clara Inés Vargas Hernández (May 22, 2006).

53. Romero-Pérez & Rosas-Martínez, *supra* note 25, at 41; *Sentencia C-187/11*, *supra* note 50; Constitutional Court of Colombia, *Sentencia C-366/11*, M.P. Luis Ernesto Vargas Silva (May 11, 2011).

54. *Id.*

55. L.1320/1998, julio 13, 1998, [43340] DIARIO OFICIAL [D.O.] (Colom.).

56. Tomlinson, *supra* note 8, at 885.

57. Emil Salim, The Extractive Industries Review, *Striking a Better Balance: The Final Report of the Extractive Industries Review*, The World Bank Group and Extractive Industries, vol. 1, vii (Dec. 2003), https://www.ifc.org/wps/wcm/connect/34056136-73ad-4a7c-a60e-e8dd4c2e1682/01.0+Volume+I+-+The+World+Bank+and+Extractive+Industries%2C+EI+Review+Report%2C+ENG.pdf?MOD=AJPERES&CVID=lbnoZA2 [https://

The final EIR recommended that the WB "integrate and mainstream human rights into all areas of [WB] policy and practice,"[58] and stated that indigenous peoples had a "right to participate in decision-making and to give their free prior and informed consent throughout each phase of a project cycle."[59] The WB responded by revising its operational policy on indigenous peoples in recognition of indigenous peoples' right to land and territories.[60] The WB stated that it would only support projects which had the broad support of the affected communities, but that the duty required free, prior and informed *consultation* rather than *consent* from indigenous peoples.[61] In other words, the WB clarified that indigenous peoples do not have a veto power.[62]

In addition to Colombia and the World Bank, other States have also reinterpreted the notion of "free, prior and informed consent" when operationalizing it.[63] As an example, Canada has invoked its constitutional duty to consult with indigenous communities as a model to follow when implementing FPIC.[64] However, even though the Canadian government's duty to consult includes a duty to accommodate the affected communities, the First Nations definitely do not have a right to veto any projects and their consent is not strictly required.[65] In other countries there have also been operationalizations that can only be qualified as partial implementations of FPIC. Ecuador,[66] Peru,[67] and Bolivia[68] each have introduced laws imposing a duty to consult when projects affect indigenous communities and their lands.[69] But once again,

perma.cc/ZC95-JNBN].

58. *Id.* at xi.

59. *Id.* at 21.

60. The World Bank Group, *World Bank Group Management Response to the Final Report of the Extractive Industries Review*, 9 ¶¶ 31–32 (Sept. 17, 2004), http://siteresources.worldbank.org/INTOGMC/Resources/finaleirmanagementresponse.pdf [https://perma.cc/KG5C-6UPS].

61. *Id.* at 21 (emphasis added).

62. *Id.*

63. Szablowski, *supra* note 29, at 116.

64. *Id.*

65. *Id.*

66. L. 1247, julio 19, 2012, Presidente Constitucional de la República de Ecuador, *El reglamento para la ejecución de la consulta previa libre e informada en los procesos de licitación y asignación de áreas y bloques hidrocarburíferos* (Ecuador), https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=98181&p_country=ECU&p_count=383 [https://perma.cc/QFM5-M28W].

67. L. 29785, agosto 11, 2011, *Ley del derecho a la consulta previa a los pueblos indígenas u originarios, reconocido en el convenio 169 de la organización internacional del trabajo* (OIT) (Peru), https://sinia.minam.gob.pe/download/file/fid/37868 [https://perma.cc/48UJ-MNNV].

68. L. 29.033, febrero 16, 2007, *Reglamento de consulta y participación para actividades hidrocarburíferas de los pueblos indígenas, originarios y comunidades campesinas* (Bolivia), http://www.fao.org/faolex/results/details/en/c/LEX-FAOC072083 [https://perma.cc/ZF2V-WCKL].

69. Tomlinson, *supra* note 8, at 891.

these laws do not confer a right to indigenous peoples to veto the project by withholding consent.[70] Nevertheless, Dr. Kathryn Tomlinson argues that these developments can be seen as "part of an emerging process to give indigenous peoples more control over and benefits from extractive projects."[71]

We can therefore conclude that despite a clear theoretical distinction between consent and consultation regimes, it is not always easy to distinguish the two in practice.[72] Most FPIC regimes actually only impose a duty to consult and not a duty to achieve consent. While Tomlinson notes that the aforementioned laws and regulations have contributed to a regime that includes indigenous communities more in the decisionmaking process, indigenous representatives have stated that FPIC has never been operationalized to actually *include* their input in the decision.[73] One can therefore argue that indeed FPIC has been developed and operationalized on a global scale, meaning free, prior and informed *consultation* rather than free, prior and informed *consent*.

B. *The Importance and Strengths of FPIC*

FPIC is a crucial principle since its correct implementation is necessary for the full respect of indigenous peoples' rights and their right to self-determination as described in UNDRIP and Article 1 of the International Covenant on Civil and Political Rights (ICCPR).[74] In addition to the right to self-determination, "[th]e primary substantive rights of indigenous peoples that may be implicated in natural resource development and extraction, . . . include, in particular, rights to property, culture, religion, and non-discrimination in relation to lands, territories and natural resources, including sacred places and objects; rights to health and physical well-being in relation to a clean and healthy environment; and rights to set and pursue their own priorities for development, including development of natural resources, as part of their fundamental right to self-determination."[75] The Special Rapporteur on the Rights of Indigenous Peoples argues that these rights, by their very nature, require autonomy with regard to decisionmaking, and that the principle of consultation and FPIC are therefore means of achieving respect for these rights.[76]

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70. *Id.*

71. *Id.* Dr. Kathryn Tomlinson holds a PhD in Anthropology from the University of Sussex and has experience working on projects with extractive companies that involve the intersection between customary and indigenous land rights and private sector project development. *See id.* at 897.

72. Szablowski, *supra* note 29, at 117.

73. *Id.* at 116.

74. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 1 (Dec. 19, 1966).

75. Special Rapporteur on the Rights of Indigenous Peoples, *Report of the Special Rapporteur on the rights of indigenous peoples*, at ¶ 50, U.N. Doc. A/HRC/21/47 (July 6, 2012) (by James Anaya).

76. *Id.* at ¶ 51.

Respecting FPIC benefits both indigenous communities and the corporations themselves.[77] Apart from having their right to self-determination respected as mentioned above, participation and consultation privileges can increase a community's confidence. Through active participation, indigenous communities are transformed into important stakeholders of the project as they can voice their opinion and even propose changes and options to improve the project's efficacy or lower costs.[78] At the same time, corporations can benefit from respecting FPIC since it improves their public image and because they end up obtaining a better social license to operate.[79] In a similar way, Special Rapporteur Anaya argues that respecting and fully implementing FPIC "is simply good practice for the States or companies that promote the projects."[80] Receiving consent for the project will make sure that a good relationship between the corporation and the indigenous community is established from the beginning, which in turn will lend stability to the project.[81] By respecting and addressing the concerns of the indigenous populations, corporations can reduce certain risks that might arise when the concerned communities are in opposition to these projects, such as blockades, protests or legal suits.[82] Reducing the occurrence of these types of risks can in turn help lower the costs that potential opposition can generate, thereby lowering costs for corporations altogether.[83]

We can therefore conclude that it is not only the indigenous communities affected by the project that benefit from the respect for and a correct implementation of the principle of free, prior and informed consent. Corporations themselves have an incentive to respect FPIC since it can help them not only to lower risks and costs related to unpopular projects, but also to benefit from an improved public image. The growing concern regarding multinational corporations' environmental and human rights impact—in addition to the greater ability to communicate such knowledge through social media platforms—has made public image more important for corporations, and may make it even more influential in the future. This could result in corporations having greater care and respect for FPIC.

C. *FPIC's Shortcomings and Challenges*

Despite the aforementioned importance and strength of FPIC, the principle is faced with a wide array of challenges which impede its operationalization.

77. Hanna & Vanclay, *supra* note 24, at 153.
78. *Id.*
79. *Id.*
80. Anaya, *supra* note 26, at ¶ 29.
81. *Id.*
82. Rachel Davis & Daniel M. Franks, *The costs of conflict with local communities in the extractive industry*, in Ctr. for Soc. Responsibility in Mining, SR Mining 9 (2011) (presented at the First International Seminar on Social Responsibility in Mining).
83. *Id.*

According to Tomlinson, these challenges can be organized into four different categories.[84] The first category addresses the question of whether the company or the State has to seek consent.[85] In international human rights law, States are the traditional and principal duty bearers.[86] However, where indigenous communities' rights are not properly respected and implemented by the local government to begin with, the correct implementation of FPIC may only be possible if corporations take an active role, which then turns them into political actors in often difficult and delicate political situations.[87] A second challenge concerns the issue of representation and legitimacy with regard to the consultation and consent process.[88] In other words, who has the legitimacy to give or withhold consent in the name of a specific indigenous community? Indigenous communities' political dynamics can be extremely complex and ambiguous so it is not always clear whether a specific group of people actually represents the communities' opinion on the matter.[89] Thirdly, challenges might arise where a State does not recognize a group as indigenous, even though they self-identify as indigenous.[90] By engaging in FPIC with unrecognized indigenous groups, the corporation makes a political statement that might not be welcome by the State and might exacerbate ethnic and political conflicts.[91] Last but not least, Tomlinson argues that one of the biggest challenges is that FPIC gives "special benefits" to one specific group, the indigenous communities, over another group, nonindigenous communities living in the same area, which in turn could lead to conflict.[92] All of these aspects make a correct implementation of FPIC more difficult.

Although these aforementioned aspects may pose challenges for a successful operationalization of FPIC, there are additional challenges that have an even greater impact on the implementation of the principle. One of the biggest problems with regard to FPIC is the controversy about what exactly the term "consent" means in practice.[93] Many States and corporations argue that a strict implementation of FPIC would confer on indigenous communities a right to veto projects that might "serve the national interest."[94] This is exacerbated by the fact that conferring the right to "veto" to one particular group undermines the State's democratic foundation.[95] Even in cases where this is

84. Tomlinson, *supra* note 8, at 888.
85. *Id.*
86. Christian Tomuschat, *Right Holders and Duty Bearers*, *in* Human Rights: Between Idealism and Realism 112 (3d ed., 2014).
87. Tomlinson, *supra* note 8, at 881–82.
88. *Id.* at 888.
89. *Id.* at 881.
90. *Id.* at 889.
91. *Id.*
92. *Id.*
93. Tomlinson, *supra* note 8, at 886–87.
94. Szablowski, *supra* note 29, at 114.
95. Tomlinson, *supra* note 8, at 885–86.

not a strict veto, States criticize the fact that giving a group of people control over the development process goes against States' claims of "exclusive and 'permanent sovereignty' over natural resources."[96] These arguments clearly show why States are critical about the correct implementation of FPIC and also explain the operationalization of FPIC in the aforementioned States.

Another major concern is the imbalance of power that exists between different participants.[97] On one side of the table sits the extractive industry corporation, which not only possesses vast economic resources—that provide it with access to the best legal and technical assistance—but also often has the host country's government on its side.[98] Across the table are the indigenous communities located in remote areas of the country, which are not only poor but have also been marginalized for generations.[99] It is not hard to see that there is a stark imbalance of power between the different participants. This in turn leads to an imbalance during the negotiation process since the corporation will not only have the capacity to dominate the negotiation itself, but will also be in a position to exercise undue influence over the implementation of FPIC in that specific context.[100]

Last but not least, there are countries, such as the Philippines, where FPIC has been directly integrated into national law. In those situations, a danger exists that the procedure required to implement FPIC becomes a sort of "box-ticking procedure," or in the words of Cariño and Colchester an "engineering of consent"[101] that is carried out to comply with national laws without any real commitment to actually obtain consent.[102]

When examining the different challenges mentioned above, it is not surprising that despite the major advantages that the principle possesses, both for indigenous communities and for corporations and States, there has been no successful and correct implementation of FPIC, as stated by indigenous representatives.[103] Considering however that a successful and correct implementation of FPIC is necessary to respect indigenous communities' right to self-determination, it is crucial to continuously improve the operationalization of FPIC in order to eventually achieve a correct implementation.

D. *How Could the Operationalization of FPIC Be Improved?*

In his report on extractive industries and indigenous peoples, Special Rapporteur James Anaya highlighted a number of challenges that the

96. Szablowski, *supra* note 29, at 114.
97. *Id.* at 125.
98. *Id.*
99. *Id.*
100. *Id.*
101. Joji Cariño & Marcus Colchester, *From Dams to Development Justice: Progress with 'Free, Prior and Informed Consent' Since the World Commission on Dams*, 3 Water Alternatives 423, 433–34 (2010).
102. Hanna & Vanclay, *supra* note 24, at 152.
103. Szablowski, *supra* note 29, at 116.

correct operationalization of FPIC has faced and how these challenges could be addressed.

First, because of the widely recognized right to freedom of expression and the right to participation, indigenous communities have a right to oppose extractive industry projects on their territories and as such States should adopt measures that protect the expression of opposition to ensure that indigenous communities and other individuals are not subject to intimidation, violence, or other forms of reprisals.[104] Second, to protect the expression of opposition, States should also refrain from criminally prosecuting indigenous protesters, unless evidence of genuine criminal acts exists.[105] Furthermore, Anaya adds, when a consultation process is underway, the State should not condition basic services, such as education and health care, upon the acceptance of the project. Lastly, indigenous communities should be free from other types of manipulation and intimidation.[106]

Often, the State delegates its duty to consult to the extractive company, such that the company will negotiate directly with the indigenous community.[107] Despite this delegation, the State remains responsible and should apply measures to oversee and evaluate the negotiation process, and to mitigate any existing power imbalances in the negotiation process.[108] This could be done by "employing independent facilitators for consultations or negotiations, establishing funding mechanisms that would allow indigenous peoples to have access to independent technical assistance and advice, and developing standardized procedures for the flow of information to indigenous peoples regarding both the risks and potential benefits of extractive projects."[109] In a similar way, Tomlinson argues that expanding support for indigenous communities, such as providing funding for legal and technical support for the community or funding for administrative expenses like traveling, will contribute to FPIC's operationalization.[110]

In order to ensure that consent is fully informed, States should subject impact assessments to independent review or, if this is not possible, ensure the impact assessments are not under the influence of the same corporation that is proposing the project.[111] Furthermore, the consultation should be carried out and consent should be given before any explorations start, and not only once the license for the extraction is granted.[112] Finally, in situations where the State decides to proceed with a project despite the affected community not having

104. Anaya, *supra* note 26, at ¶ 19; *id.* at ¶ 21.
105. *Id.*
106. Anaya, *supra* note 26, at ¶ 24.
107. *Id.* at ¶ 61.
108. *Id.* at ¶ 62.
109. *Id.* at ¶ 64.
110. Tomlinson, *supra* note 8, at 891.
111. Anaya, *supra* note 26, at ¶ 65.
112. *Id.* at ¶ 68.

given their consent, Anaya argues an impartial judicial authority should review the project and the State's decision.[113] The aim of this review is to ensure that the international standards regarding indigenous peoples' rights are respected and to analyze whether the State has reasonably justified the limitation of the communities' rights.[114]

All of these suggestions make it clear that even if one does not agree with indigenous communities having a veto power over the implementation of extractive projects, a panoply of alternatives still exist for States to improve the operationalization of the FPIC. By including some of these suggestions into their own operationalization process, States would not only work towards a better implementation of FPIC, but they would also work towards a greater respect for indigenous peoples' rights, especially their right to self-determination.

Conclusion

In this Article, the author has sought to analyze the operationalization of the principle of free, prior and informed consent, how this operationalization could be improved, and to what extent FPIC is preferable to the duty to consult. The Article argues that even though FPIC has become more accepted around the world, implementation of FPIC has been unsuccessful thus far. Instead, when examining how FPIC has been operationalized, FPIC can be thought to stand for the principle of free, prior and informed *consultation*. The duty to consult is a crucial aspect of FPIC, and the growing body of consultation laws represent a move toward further inclusion of indigenous peoples in the processes surrounding measures that might affect them.[115] However, a correct implementation of FPIC is necessary for the full respect of indigenous peoples' right to self-determination. Because of this, the author believes that FPIC is preferable to the principle of free, prior and informed consultation. As a consequence, States should improve their operationalization of the principle in order to fully respect FPIC and indigenous peoples' right to self-determination.

113. *Id.* at ¶ 39.
114. *Id.*
115. Tomlinson, *supra* note 8, at 891.