

UNDRIP and FPIC: Getting Beyond the Status Quo

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Today's Info Share

Normative Context

- UN Declaration on the Rights of Indigenous Peoples (UNDRIP)
- BC, Canada, International
- International Finance Corporation (IFC)
- International Council on Mining and Minerals (ICMM)
- Initiative for Responsible Mining Assurance (IRMA)

Free, Prior and Informed Consent (FPIC)

- Emerging strategies
- Emerging best practice
- Expressions of consent
- Example

International Human Rights Framework: UNDRIP

Precursors:

- Universal Declaration of Human Rights (1948)
- International Covenant on Civil and Political Rights (1966)
- International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- ILO Convention 169 on the Rights of Indigenous and Tribal Peoples (1989)
- United Nations Declaration on the Rights of Indigenous Peoples (2007)

Canada and International: UNDRIP

BC: DRIPA (2019)

- Action Plan (2022)
- BC Mineral Tenure legislation (2022)

Canada: UNDRIPA (2021)

- Action Plan (2022/23)

Constitutions: Bolivia, Ecuador, Venezuela

UNDRIP

Collective rights

- Self-determination
- Self-government
- Past, present and future expressions of culture
- Media
- Education
- Language
- Employment
- Health (incl. traditional medicines/plants)

UNDRIP

- **Article 18** -- Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through **representatives chosen by themselves** in accordance with their **own procedures**, as well as to maintain and develop their **own indigenous decision making institutions**.

UNDRIP

Article 19 -- States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

UNDRIP

Article 32(2) --

States will carry out **consultation** and cooperate in good faith with interested indigenous peoples via their own representative institutions, with the goal of obtaining their **free and informed consent prior to approving any project that affects their lands and traditional territories, resources, particularly in relation to development, and the use or exploitation of mineral, water or any other types of resources.**

The 3 Explicit Cases of Consent Outlined in UNDRIP

- Art. 10: Relocation, transfer or displacement of indigenous peoples
- Art. 29: Storage or disposal of toxic materials in indigenous territory/lands
- High social, cultural or environmental impact that puts the very existence of the indigenous peoples at risk.

Consultation and Free, Prior and Informed Consent (FPIC)

- Government (and proponent) consultation/engagement processes should be meaningful, conducted in good faith, and adhere to the principles of free (no coercion), prior (well before the decision is made) and informed (transparent).
- Consent is the objective of the consultation.
- Consent isn't a "one-time deal" – various points
- Acknowledges government as final decision-maker (when seeking authorizations/permits).
- Some key questions:
 - How is consent expressed by the Indigenous community? Is there a spectrum of consent?
 - What happens when consent is not provided?

Former UN Rapporteur on Indigenous Issues on FPIC:

In all instances of proposed extractive projects that might affect indigenous peoples, consultations with them should take place and consent should *at least be sought, even if consent is not strictly required.*

James Anaya, Extractive Industries and Indigenous Peoples, Report to UN Human Rights Council, 2013

Private Sector on FPIC:

- International Finance Corporation (World Bank) Performance Standard 7
- Equator Principles III (adopted by financial institutions in 36 countries)
- International Council on Mining and Metals (ICMM): Indigenous Peoples and Mining
- Initiative for Responsible Mining Assurance (IRMA) Standard for Responsible Mining
- UN Guiding Principles on Business and Human Rights

IFC Performance Standard 7: Indigenous Peoples

“FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree.”

ICMM

“...neither Indigenous Peoples nor any other population group have the right to veto development projects that affect them’, so FPIC should be regarded as a ‘principle to be respected to the greatest degree possible in development planning and implementation.”

IRMA

“...indigenous peoples can fully approve, partially or conditionally approve, or reject a project or activity, and companies will abide by the decision.”

FPIC: Emerging Strategy and Best Practices

Emerging Strategies: Best Practices

- Impact Assessment (IA) either prepared by, or in partnership with Indigenous organizations/communities.
- IA is participatory and inclusive.
- Including Indigenous baseline information at the front end, such as Indigenous Knowledge studies and human rights impact assessments.
- Expanding the identification of impacted Indigenous groups beyond the “proximity” factor.
- Decreasing the focus on rights assessments.
- Extractive sectors developing FPIC position statements, policies and practices, and expanding Indigenous relations focus. Potential for external audit.
- Companies seeking early equity partnerships and multi-phased, long-term agreements (engagement, project, benefit, impact, etc).

Emerging Practice: Consent

- Whole of project is mapped (not just IA)
- Early, meaningful, good faith consultation/engagement, characterized as free, prior and informed (also a number of other principles)
- Consent is the objective – sought by both Crown and proponent
- Engagement is “co-created” and includes an Engagement Agreement
- Engagement Agreement includes appropriate funding
- Determining the scope of consent:
 - What conveys/indicates consent?
 - What are the multiple points of consent and in what timeframes?
 - Who provides consent?
 - What does the process look like to get to consent?
 - What happens when consent is not achieved?
- Other Considerations:
 - Provide clarity on what is being asked/proposed. Why are you asking for consent?
 - What other Agreements are needed?

Possible Expressions of Consent

- Letter of agreement/consent from Indigenous group
- Formalized agreements indicating project can proceed (social value proposition)
- Proxy consent (non-objection)
- Tacit/partial consent
- Consent w conditions (avoidance, mitigation, compensation/benefits):
 - Conditions presented by Indigenous group
 - Conditions provided by government decision
 - Conditions are co-developed
- Proceedings and reports from agreed-upon meetings where agreement has been reached/consent expressed

Snapshot: Peru

- ILO C169 (1994)
- UNDRIP (2007)
- First country to develop consultation law and regulations (2011-12)
- 1st serious court cases in 2016:
 - Hidrovía Amazónica
 - Public participation processes cannot substitute for indigenous consultation
- Ministry of Culture: Vice-Ministry of Interculturality / Prior Consultation Directorate
 - Database of indigenous groups
 - Registry of interpreters
 - Registry of facilitators
 - Methodology guide (w. virtual modules)
 - Training program
 - Registry of consultation results
- 2019: 32 consultations completed / 3 agreements (“full” consent)
 - Hydrocarbons, protected areas, mining, legislation, cultural policy, hidrovía
- Changes to EIA legislation to limit consultation

<http://consultaprevia.cultura.gob.pe/>

El Quipu: Prior Consultation in Peru





Ministry of Energy and Mines and Kichwa Peoples (Iquitos, Peru) conclude consultations (Ministry of Culture as facilitator) and reach agreement (consent) on 21 issues associated with an exploration permit for natural gas Lot 197 in Loreto, Peru (employment by company, environmental monitoring by community, joint community relations plan w company, education, land title, civil registry, emergency measures, basic services, access to credit).

Richard Rubio (indigenous representative): “se ha llegado a acuerdos de buena fe porque con la aplicación del principio de flexibilidad nos han dado el tiempo necesario”.

We have arrived at good faith agreements because the application of the principle of flexibility allowed us the necessary time [to consider the project].

Consulta Previa de las Propuestas que Reglamentan la Ley N° 29763, Ley Forestal y de Fauna Silvestre

ACTA DE CONSULTA

Entidad Promotora



Organizaciones Representativas de los Pueblos Indígenas u Originarios



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proceso de consulta previa sobre las propuestas que reglamentan la Ley Forestal y de Fauna Silvestre, Ley N° 29763, y sus respectivos anexos, los cuales son de carácter obligatorio para ambas partes.

En señal de conformidad con lo anteriormente expresado, suscriben la presente Acta Protocolar las y los titulares de la entidad promotora y las y los Presidentes (as) de las Organizaciones Representativas de los Pueblos Indígenas u Originarios:



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Thank you!

Merci

Wela'lioq

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