

THE NEED FOR CONCEPTUAL GUIDANCE ON FPIC

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Introduction

Ten years after its codification within the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, the right to free, prior and informed consent has become a mainstay of international Indigenous discourse and gained significant traction as ‘best practice’ for actors engaging with Indigenous peoples. Yet, despite being popularized as ‘FPIC’ and its perceived trendiness within the corporate sphere, a quick scroll through global headlines proves that time and again, the blame for a foundering relationship between Indigenous peoples and companies is placed on failed or botched FPIC processes.²

In spite of its apparent popularity, why is FPIC failing to be mobilized and implemented adequately, in order to successfully create a productive relationship for both parties? Activist Jennifer Franco has commented that as a right, “FPIC is neither self-interpreting nor self-implementing.”³ Franco’s statement highlights a trait inherent to FPIC’s nature as currently articulated within international law; unlike many other rights within the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, FPIC is a positive right, requiring action by all actors engaging with it. Throughout the *UNDRIP*, any articulation of the right to free, prior and informed consent is accompanied by either the phrase “in order to obtain”⁴ or the word “without”⁵ – phrasing that indicates that in order to achieve FPIC, proactive steps must be taken. As a result, any stakeholder engaged in implementing an FPIC process necessarily interprets the right and its parameters, producing a variety of distinct and nuanced understandings of what FPIC is, how it functions, and what its ultimate objective is.

In this analysis, we showcase the spectrum of interpretations of FPIC that exist in policy literature, the differences in approaches, and the latent **similarities that can be regarded as the**

² “Ecuador: Conflict with Shuar indigenous leaders opposing EXSA mining site escalates,” *Business and Human Rights Resource Centre*, 19 December 2016, https://business-humanrights.org/en/ecuador-conflict-with-shuar-indigenous-leaders-opposing-exsa-mining-site-escalates?utm_source=Business+%26+human+rights+-+Weekly+Update&utm_campaign=3b074a5ffe-EMAIL_CAMPAIGN_2016_12_20&utm_medium=email&utm_term=0_3a0b8cd0d0-3b074a5ffe-181912945; “Costa Rica’s Supreme Court stops hydroelectric project for failing to consult indigenous peoples”, *Cultural Survival*, 2 January, 2017, <https://www.culturalsurvival.org/news/costa-ricas-supreme-court-stops-hydroelectric-project-failing-consult-indigenous-peoples>

³ Jennifer Franco, “Reclaiming Free, Prior and Informed Consent (FPIC) in the Context of Local Land Grabs”, 2014. https://www.tni.org/files/download/reclaiming_fpic_0.pdf. 3

⁴ See Articles 19 and 32.2 of the *UN Declaration on the Rights of Indigenous Peoples*

⁵ See Articles 10, 11.2, 28.1, and 29.2, of the *UN Declaration on the Rights of Indigenous Peoples*

foundation for establishing authoritative guidance on FPIC and its parameters. To date, there has been a lack of comprehensive guidance. Before the adoption of the *UNDRIP* in 2005, the United Nations Permanent Forum on Indigenous Issues (UNPFII) adopted the “Elements of a Common Understanding of Free, Prior and Informed Consent” following an expert meeting on the subject in 2005.⁶ This contribution of the UNPFII, valuable as it is, was adopted before the formal appearance of the *UNDRIP* as part of international law. It is not phrased in the form of guidelines, nor could it have taken into account the practice on FPIC that has soared since the adoption of the *Declaration*. As a result, there is a dearth of guidelines for the various actors and stakeholders engaging with FPIC to follow, leaving it all the more subject to interpretation.

This submission presents an argument for the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), in its study on free, prior informed consent, to consider first outlining what FPIC means on a conceptual level, to ensure that all stakeholders involved in FPIC processes begin with the same baseline understanding, and circumscribe FPIC’s meaning and application to mean nothing less than fully realizing the Indigenous right to self-determination.

Methodology

The introduction of the aforementioned *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples* (“*the Report*”) asserts that “the development of institutional policy frameworks [...] operationalized the principle of free, prior and informed consent.”⁷ While this report by the UNPFII and the subsequently endorsed *UNDRIP* form what can be seen as the core of internationally recognized literature on FPIC, it is industry policy, protocols, and guidance that have taken free, prior and informed consent from the realm of theory to practice. As a result, this analysis focuses primarily on interpretations of FPIC based on industry policy and guidance in relation to the private sector, although the conclusions drawn are equally applicable to any operationalization of free, prior and informed consent.

⁶ UN Economic and Social Council (ECOSOC). *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*. 17 February 2005, E/C.19/2005/3.

https://www.humanrights.gov.au/sites/default/files/content/social_justice/conference/engaging_communities/report_of_the_international_workshop_on_fpic.pdf

⁷ *Ibid.*, 7

Using the *Report* produced in 2005 by the UNPFII and the *UNDRIP* as the departure points for current authoritative understandings of FPIC, we interrogate the good practice and guidance notes issued by stakeholders involved in implementing FPIC processes, in order to set the baseline for what the industry is extrapolating and interpreting. These texts include guidance produced by the UN Global Compact, the International Council for Mining and Metals (ICMM), and the International Finance Corporation (IFC). As a counterpoint, we analyze the training manual produced by the Asian Indigenous Peoples Pact (AIPP), to demonstrate the effort Indigenous organizations have made in proactively responding to industry interpretations, and providing further specificity on interpretations of FPIC, based on the existing UN documents.

In this paper, we use the analytical literary tool of close-reading to expose the interpretations at play in these documents. Close-reading in this context involves critically deconstructing the words and structure of the text to analyze the use of the term “FPIC” or “free, prior and informed consent”, and parse out the latent biases present.⁸ By paying attention to the nuances of word choice, syntax, tone, and pattern, this technique questions what the author’s choices in lexicon imply about their own perspectives and understanding of the concept at hand. Since the act of close-reading is in itself an act of interpretation and understanding, it provides a unique and ideal foil for extrapolating meaning from these guiding documents, in the same fashion a user of the text might.

In close-reading these texts, we seek to isolate the interrelated interpretations of the nature, objective, and function of FPIC, and use the following questions to guide our inquiry:

1. The **Nature** of FPIC: *What is free, prior and informed consent?*

This question is aimed at understanding what the text, and its author, assume the basic qualities of FPIC to be on a conceptual level. Going beyond the answer of consent that is free from coercion, informed, and attained before the project commences, the **nature** of FPIC involves understanding whether it is seen as a principle, a right, a procedure, or something else. Probing the nature of FPIC is important because its nuances reveal how the author fits free, prior and informed consent into their own value and knowledge systems.

⁸ For more information on close-reading, please refer to Frank Lentricchia and Andrew DuBois, eds. *Close Reading: The Reader*, Durham: Duke University Press, 2003

2. The **Objective or Goal** of FPIC: *What is free, prior and informed consent meant to do?*
Identifying what the text, and its author, assume the desired result of the FPIC process to be is important in understanding the impetus behind engaging with FPIC, and the perspective the stakeholder brings. Pinning down a single objective is difficult as there are varying levels of goals. For the purposes of this analysis, we distinguish between a micro-level objective (pertinent to the immediate relationship between Indigenous peoples and the company), and a macro-level goal (applying to a more holistic view of the Indigenous rights regime, or corporate engagement policy worldwide).
3. The **Function** of FPIC: *How does free, prior and informed consent work to stay true to its nature and achieve its intended goal?*

More implicit than the previous two questions, the text's understanding of how FPIC functions is gleaned from the relationship between **nature** and **goal**. Identifying each interpretation of FPIC's nature and goal, our close-reading for **function** examines how free, prior and informed consent stays true to these elements contained within.

To help illustrate this methodology, consider the following statement made by AIPP in their *Training Manual for Indigenous Peoples on Free, Prior and Informed Consent (FPIC)*, produced in 2014:

“FPIC is a mechanism whereby indigenous peoples and indigenous communities are able to conduct their own independent collective decision-making on matters affecting them.”

In this sentence, AIPP clearly states that “FPIC is a mechanism”, clarifying its nature from their perspective, through which Indigenous peoples “conduct their own independent collective decision-making on matters affecting them”, highlighting FPIC's objective. In this situation, FPIC's nature as a mechanism provides the means through which it can function to achieve the macro-goal of upholding the Indigenous right to self-determination. Using this model, the following section summarizes our analysis based on the close-readings conducted.⁹

⁹ For more detailed versions of the close-readings, see Annex.

Summary of Analysis

i) **FPIC in the Work of the UNPFII, the Special Rapporteur on the Rights of Indigenous Peoples, and the *UNDRIP***

Our analysis begins with a close-reading of the *UNDRIP*. Reading the “Preamble” in conjunction with the various articles explicitly naming “free, prior informed consent”, two distinct understandings of FPIC’s nature emerge: FPIC as control by Indigenous peoples over all forms of their development, and FPIC as meaningful consent itself. However, as a legislative document, the *UNDRIP* does not offer much more detail as to other facets of FPIC’s nature, instead focusing on outlining its various macro-objectives:

- To maintain and strengthen institutions, cultures and traditions¹⁰
- To promote development in accordance with aspirations and needs¹¹
- To practice and revitalize cultural traditions and customs¹²
- To participate in decision-making matters affecting Indigenous rights¹³
- To determine and develop priorities and strategies for all forms of development¹⁴
- To not be subjected to forced assimilation or destruction of culture¹⁵
- To not be forcibly removed from lands or territories¹⁶

Throughout the *UNDRIP*, FPIC has been conceptualized as functioning like a safeguard, enabling Indigenous peoples to ensure that their rights are positively fulfilled, and preventing the negative violations of their rights. This reading aligns with former UN Special Rapporteur James Anaya’s observation in his 2012 report to the Human Rights Council: “*consultation and free, prior and informed consent standards are best conceptualized as safeguards against measures that may affect indigenous peoples’ rights.*”¹⁷

¹⁰ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, available at: <http://www.refworld.org/docid/471355a82.html>. Preamble.

¹¹ Ibid.

¹² Ibid., Article 11

¹³ Ibid., Article 18

¹⁴ Ibid., Article 32

¹⁵ Ibid., Article 8

¹⁶ Ibid., Article 10

¹⁷ UN Human Rights Council. *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*. 6 July 2012, A/HRC/21/47. http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-47_en.pdf

This portrait of FPIC produced by the *UNDRIP*, while expansive, is firmly situated in the realm of the macro-Indigenous rights regime, highlighting the necessity of other supplementary texts delineating FPIC’s specifications. To add to this reading of the *UNDRIP*, we next examined the *Report* produced in 2005 – the result of a workshop outlining the various ‘methodologies’ in relation to FPIC, subsequently endorsed by the UNPFII. Bringing together the varied views of Indigenous participants, the workshop’s *Report* identifies thirteen different ideas for the nature of FPIC, including FPIC as a principle,¹⁸ a right,¹⁹ a practice,²⁰ a substantive framework,²¹ and a process.²² In organizing these different interpretations, our analysis revealed two branches of conceptualizations that are best understood by characterizing FPIC as two different types of rights: the first, as a stand-alone right, existing for the sake of its own fulfillment (i.e. for the achievement of consent that is meaningful); and the second, as a procedural right, the fulfillment of which guarantees the realization of the rest of the rights embedded within the international Indigenous rights framework.²³ While more generous in its interpretations, the UNPFII’s *Report* affirms and characterizes the two articulations of FPIC’s nature, as present within the *UNDRIP*, in the language of rights: FPIC as meaningful consent itself, and FPIC as enabling control over the realization of Indigenous rights. Finally, the *Report* echoes the *UNDRIP* in only articulating macro-objectives concerned with the fulfillment of Indigenous rights, but also chooses to see FPIC as “an evolutionary process” – with every iteration of FPIC building on exercising the right to self-determination more comprehensively, and with more reach.

These two close-readings of FPIC’s nature, objective, and function within the *UNDRIP* and the UNPFII’s *Report* serve to form the core of the UN’s authoritative guidance on FPIC. However, despite the foundational nature of the *Report*, its articulation of FPIC results in a blurry understanding of its nature, objective, and how it functions. By characterizing FPIC as a procedural right synonymous with control, the *Report* conceptualizes FPIC as, a) control for Indigenous peoples over their rights through the FPIC process itself; and b) functioning to fulfill the overall macro-objective of the right to self-determination, by providing a means for control.

¹⁸ ECOSOC, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, 4

¹⁹ *Ibid.*, 5

²⁰ *Ibid.*

²¹ *Ibid.*, 10

²² *Ibid.*, 5

²³ *Ibid.*

As we'll see in subsequent texts, this blurring results in conceptual confusion over free, prior and informed consent.

ii) Interpretations of FPIC at the Level of Industry

Using the *UNDRIP* and the UNPFII's *Report* as the baseline for how FPIC is being conceptualized at the global level, we now turn to interpretations of FPIC at the level of industry, beginning with the UN Global Compact's document *Indigenous Peoples' Rights and the Role of Free, Prior and Informed Consent: A Good Practice Note*, produced in 2014. As of February 2018, 9,704 companies across 161 countries have voluntarily committed to adhering to the Global Compact's principles, giving extraordinary reach to this Good Practice Note's practical application in operationalizing FPIC.²⁴ At its base, the Global Compact's *Good Practice Note* grounds FPIC within the understanding and interpretation gleaned from both the *UNDRIP* and the UNPFII's *Report*: FPIC's nature is articulated as a right, with the macro-objective of realizing the ensuing spectrum of Indigenous rights. In particular, the Global Compact sees FPIC as functioning as a "special protection"²⁵ – echoing Anaya's assertion of FPIC as a safeguard. However, despite this foundation, the text is rife with contradictions. For example, albeit insisting that FPIC's nature is "a process", and that consent is "not an end in and of itself", the majority of the Good Practice Note fixates on the micro-objective of achieving consent, without focusing on its iterative processes, or its dual nature as a procedural right. There is a nuance within the understanding presented by the *UNDRIP* and the UNPFII's *Report* regarding FPIC's nature that is missing from the Global Compact's vision – where the UN documents see FPIC's nature as both meaningful consent and control itself, enabling the fulfillment of self-determination, the Global Compact simply sees FPIC's nature as embodying consent and the process of achieving it, without the crucial function of control. This lays the groundwork for further confusion, as the Global Compact continues on to equate FPIC's nature as both an indicator for whether or not a company possesses a "social license to operate", and the

²⁴ "Homepage", *United Nations Global Compact*, <https://www.unglobalcompact.org/>

²⁵ UN Global Compact. "Indigenous Peoples' Rights and the Role of Free, Prior and Informed Consent: A Good Practice Note endorsed by the United Nations Global Compact Human Rights and Labour Working Group." 20 February 2014.

https://www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/FPIC_Indigenous_Peoples_GPN.pdf

achievement of FPIC as the social license itself.²⁶ By doing so, the *Good Practice Note* dilutes the strong grounding it had endorsed for FPIC by equating the fulfillment of Indigenous rights with a general ‘social license to operate’, further blurring the boundaries between “consent” and general approval.

The discrepancies evident within the Global Compact’s *Good Practice Note* are evidence of the difficulty of translating the concept of FPIC from an enactment of the Indigenous right to self-determination, to a form that is understandable to the private sector. In relying on the term “social license to operate”, the Global Compact attempts to mobilize a pre-existing (and accepted) understanding of a prerequisite for corporate activity – “ongoing approval or broad social acceptance” of a company’s endeavors.²⁷ Our next text, the International Council for Mining and Metals’ (ICMM) 2013 *Position Statement on Indigenous Peoples and Mining*, grapples with the same struggle of translation, with a different result.²⁸

The ICMM is an industry standard-setting body that is at the forefront of strengthening environmental and social performance of the mining and metals industry, with each of its member companies required to enforce the ICMM’s principles, and position statements.²⁹ While their *Position Statement on Indigenous Peoples and Mining* is brief, a distinct interpretation of FPIC emerges that also conflates the terminology used for FPIC’s various components. For example, the ICMM states that FPIC’s nature “comprises a process, and an outcome” – the outcome being that “Indigenous peoples can give or withhold their consent to a project”, and the process referring to the procedure utilized in achieving the outcome.³⁰ Like the Global Compact and even the UNFPII’s *Report*, it is evident that FPIC’s nature and objective are conceptually converging for the ICMM. To add to this, throughout the *Position Statement*, FPIC is used interchangeably to refer to both the practice of achieving consent, consent itself, and the overall concept of FPIC encapsulating the former two. Where the Global Compact’s *Good Practice Note* started with clarity in grounding FPIC’s nature and objective within the Indigenous rights regime, the ICMM places FPIC as a “principle to be respected to the greatest degree possible”,

²⁶ Ibid., 9-10

²⁷ “What is the Social License?”, *Social License.com*. <http://sociallicense.com/definition.html>

²⁸ International Council on Mining and Metals (ICMM). “Indigenous Peoples and Mining: Position Statement.” May 2013. <https://www.icmm.com/en-gb/members/member-commitments/position-statements/indigenous-peoples-and-mining-position-statement>

²⁹ “About Us”, *International Council on Mining and Metals*, <https://www.icmm.com/en-gb/about-us>

³⁰ ICMM, “Indigenous Peoples and Mining: Position Statement”, 1

diminishing its nature as a right and opening space for further interpretation in its application.³¹ Finally, whereas the Global Compact aligned with the UN documents in at least acknowledging FPIC's macro-objective as the fulfillment of Indigenous rights, the ICMM eschews any analysis of the macro for a focus on the micro-objectives of FPIC – “constructive relationships” with Indigenous peoples, that ultimately fixate on consent itself as the singular aspect of FPIC's nature, without the nuance of the procedural.³² When considered with the ICMM's framing of free, prior and informed consent as not a requirement but a principle, this micro-objective itself appears discretionary and dependent on context.

For the ICMM, the connotations and inconsistencies evident in their interpretation of FPIC can be understood again through the lens of translation. Where the Global Compact relies on “the social license to operate”, the ICMM uses the acronym of “FPIC” itself to obfuscate, with many instances where the words ‘free, prior and informed consent’ could have been used to emphasize consent, and not just broad approval or a respectful relationship, as the micro-objective. Both the Global Compact and the ICMM focus on the relationship between a given company and Indigenous peoples to a greater degree than the macro-objectives of fulfilling Indigenous rights, a trend that is echoed in our final industry text.

The International Finance Corporation (IFC) is the private sector lending arm of the World Bank Group, with their Performance Standards defining client responsibilities for managing environmental and social risks. Globally recognized as a benchmark for safeguards applying to the private sector,³³ its 2012 *Performance Standard 7: Indigenous Peoples* and its accompanying *Guidance Note* outline the IFC's understanding of FPIC.³⁴ In comparison to the ICMM and the Global Compact, the IFC presents a compact and circumscribed view of FPIC's nature by separating it into parts: “a process of informed consultation and participation (ICP)”, and “Free, Prior and Informed Consent (‘FPIC’).”³⁵ Leaving aside the fact that while ICP applies to all situations involving Indigenous peoples, the IFC's ‘FPIC’ is only required in specific and

³¹ Ibid., 2

³² Ibid., 1

³³ “IFC Sustainability Framework”, *International Finance Corporation (IFC)*, http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability+and+disclosure/environmental-social-governance/sustainability+framework

³⁴ International Finance Corporation (IFC), “Guidance Note 7: Indigenous Peoples.” http://www.ifc.org/wps/wcm/connect/50eed180498009f9a89bfa336b93d75f/Updated_GN7-2012%20pdf?MOD=AJPERES

³⁵ Ibid., 2

serious circumstances, conceptually, the IFC echoes both of the previous texts by distinguishing between the process utilized to achieve FPIC, and FPIC as consent itself. The IFC makes this explicit by establishing that FPIC builds on ICP, taking it one step further to ensure that consent itself is obtained. Naming these two facets of FPIC’s nature helps to clarify the language, and throughout its *Guidance Note*, the IFC appears aware of the profusion of existing interpretations, even stating that there is “no universally accepted definition of FPIC.”³⁶ Unlike the Global Compact and the ICMM, the IFC approaches this head-on by defining FPIC for itself, without purporting to present a standardized definition, resulting in a distinct framework for FPIC’s operationalization. In practice, the result of this is an understanding of FPIC that is rooted in the micro-relationship between client company and Indigenous peoples, without identifying macro-goals connecting FPIC with the fulfillment of the broader Indigenous rights regime. While the Global Compact’s *Good Practice Note* and the ICMM’s *Position Statement* were rife with inconsistencies and contradictions, the IFC’s *Performance Standard* and *Guidance Note* tightly defines FPIC in relation to its own activities, ostensibly overcoming the slippages present in translating between knowledge systems. However, despite the coherency of the IFC’s document, their *Guidance Note* also demonstrates the real risk in leaving FPIC conceptually open to interpretation – in taking it upon themselves to define FPIC for their clients, the IFC has circumscribed FPIC’s application and theoretical foundation, decoupling it from its emancipatory potential in enacting the right to self-determination. Without authoritative guidance on FPIC’s nature, function, and objective, the plethora of interpretations existing in the realm of practice present understandings that are confused at best, and constrained at worst.

iii) FPIC in the Asia Indigenous Peoples Pact’s *Training Manual for Indigenous Peoples on Free, Prior and Informed Consent (FPIC)*

Our final text operationalizing FPIC in practice is the *Training Manual for Indigenous Peoples on Free, Prior and Informed Consent (FPIC)* produced by the Asia Indigenous Peoples Pact (AIPP) in 2014. As a counterpoint to the materials produced by and for industry, AIPP’s *Training Manual* actively takes the core presented by the *UNDRIP* and UNPFII’s *Report* and builds on it with further specificities on the practical use of FPIC for Indigenous communities.

³⁶ Ibid., 7

Firmly grounded in the right to self-determination, AIPP first defines FPIC as a right, and echoing both UN documents, affirms FPIC’s dual nature as both consent and “a manifestation of control” for Indigenous peoples over the development of their communities, territories, and resources.³⁷ However, AIPP continues on to further outline FPIC’s nature with twelve other characterizations, including:

- “the concept, framework, elements, and principles of FPIC”³⁸
- “FPIC is a mechanism”³⁹
- “FPIC is a set of principles that defines the process and mechanisms”⁴⁰
- “FPIC as set of operation principles”⁴¹
- “FPIC serves as a safeguard”⁴²
- “FPIC is not merely a procedural process”⁴³
- “FPIC should be viewed as an Indigenous governance process”⁴⁴

Without explicit delineation, this profusion of terms does not clarify the nature of FPIC. Echoing the pitfalls of all the previous texts – including the UNPFII’s *Report* – AIPP also conflates the process and outcome of FPIC, with consent forming both nature and objective. However, despite the multitude of terms, there is a discernible logic present, showcasing an understanding that FPIC is a collective right, within which specific principles are embedded in line with the *UNDRIP*, shaping the ultimate process of meaningfully realizing FPIC. Of note is that all of AIPP’s terms for FPIC’s nature, while not de-emphasizing the importance of FPIC as consent, focus more on how FPIC functions to achieve its objectives. Like the UN documents, the AIPP focuses on the macro-objectives of FPIC in ensuring that Indigenous peoples have control and the agency to own the FPIC process, ensure the exercise of their collective decision-making power, and safeguard their communities, lands, territories, and resources.

³⁷ Asian Indigenous Peoples Pact (AIPP). “Training Manual for Indigenous Peoples on Free, Prior and Informed Consent (FPIC).” <http://aippnet.org/training-manual-for-indigenous-peoples-on-free-prior-and-informed-consent-fpic/>. 84 - 85

³⁸ Ibid., 7

³⁹ Ibid., 10

⁴⁰ Ibid., 11

⁴¹ Ibid., 11

⁴² Ibid., 15

⁴³ Ibid., 15

⁴⁴ Ibid., 84 - 85

Conclusions

The summary analysis presented above reveals many differences in how FPIC is understood by the various stakeholders engaging in its operationalization, with noted divergence between its conceptualization by Indigenous peoples and by the private sector. However, despite the disorientation evident on FPIC's conceptual level, **there are some clear similarities in approach which could serve as a starting point for future guidance.**

Primarily, deconstructing the language used by both industry and Indigenous actors reveals that the words 'free, prior and informed consent' – or increasingly, solely the acronym FPIC – are used to stand in or signify many different aspects of the processes involved or related to the right, and of the conceptual foundation of the right itself. On a basic level, 'FPIC' is used to describe both process and outcome – the process of engaging in a meaningful relationship with Indigenous peoples, and the outcome of reaching a point of consent. Conceptually, this intermingles elements of FPIC's nature and objective, as consent is inherent to both. Both Indigenous and industry documents are aligned in this conflation, with industry documents particularly prone to digging deeper into this pitfall given their overall focus on the micro-objective of consent within the relationship between company and Indigenous community.

For the texts produced by Indigenous actors, there is an acceptance of a duality to FPIC – its nature as a "procedural right" in the words of the UNPFII's *Report*. This second layer sees FPIC as both control itself (through the act of giving consent), and enabling control over the fulfillment of Indigenous rights (or realizing the right to self-determination). Again, fusing nature and objective, simply using the word 'FPIC' or 'free, prior and informed consent' to describe these layers blurs FPIC's conceptual foundation, making it all the more difficult to operationalize. This second layer connects FPIC with the all-important macro-objectives of realizing the entire spectrum of rights encoded within the *UNDRIP* – a conceptual understanding largely missing from the industry texts.

While the terminology chosen for this study of 'nature', 'function', and 'objective' is imprecise in itself and subject to many of the same critiques stated above, it nevertheless serves the task of identifying three broad conceptual facets of FPIC, as interpreted by these actors. Although isolating how FPIC functions is less easily identifiable, the conflation of nature and objective demonstrates that often, the conceptual blurring witnessed in the texts in fact points to two understandings of how FPIC functions – FPIC functions by ensuring Indigenous peoples are

able to freely give their self-determined consent, and by enabling Indigenous peoples to control their lives, the essence of the right to self-determination. If we understand these findings as describing how FPIC primarily functions, the question at hand remains: what is the nature and objective of FPIC?

Through our analysis, we have sought to expose the conceptual discords evident within free, prior and informed consent as it currently exists within industry and Indigenous literature. In closing, we would like to share some thoughts on the reasoning behind these discords, and a potential way forward for EMRIP's study.

Indisputably, the heart and foundation of the *UNDRIP* is the Indigenous right to self-determination. Its drafting and negotiation period saw a co-optation of the colonial-era right to self-determination, where it “developed in the specific context of indigenous peoples,” and underwent a significant expansion as the *UNDRIP* began to excavate rights deriving from it.⁴⁵ Even though Article 3 of the final *UNDRIP* retains the same language from international human rights law, the rights accorded to Indigenous peoples under the name of self-determination expand their reach from the realm of the purely political, to cover participation in economic and cultural affairs in line with their own aspirations, and include rights to land, resources, and spirituality.⁴⁶

With the adoption of the *UNDRIP* in 2007, the newly expanded right to self-determination became an established precept within international law – a distinctly Indigenous right to self-determination. Acknowledging this evolution in the substantive definition of the right to self-determination, it is evident that while malleable, an enduring precept remains at the right's root. Distilling self-determination to its universal essence, a host of prominent scholars on Indigenous rights agree that at its core, the right to self-determination is simply the right to pursue a path of development, in all forms and sectors, in line with a peoples' own vision for themselves.⁴⁷ Operating from this perspective, it becomes evident that at its base, the right to

⁴⁵ James Anaya, *Indigenous Peoples in International Law*, US: Oxford University Press, 2000. 74

⁴⁶ Erica-Irene Daes, “The Contribution of the Working Group on Indigenous Populations to the Genesis and Evolution of the UN Declaration on the Rights of Indigenous Peoples.” In *Making the Declaration Work*, ed. Claire Charters and Rodolfo Stavenhagen, 48-76. Copenhagen: IWGIA, 2009. 69

⁴⁷ See Anaya, *Indigenous Peoples in International Law*, 75: “Self-determination...is grounded in the idea that all are equally entitled to control their own destinies.”; Observer from New Zealand in Daes, *Making the Declaration Work*, 69: “the right of a people to participate in the political, economic and cultural affairs of a state on terms which meet their aspirations and which enable them to take control of their own lives.”;

self-determination is also inherently interpretive – substantively subject to a peoples’ nuanced understanding of themselves. Former Special Rapporteur James Anaya has stated that,

“the *concept* underlying the term [self-determination] entails a certain nexus of widely shared values...a configurative principle or framework complemented by the more specific human rights norms...”⁴⁸

As Anaya hints, it is this underlying web of ‘values’ which, while certainly influenced by context, takes the lead in dictating the direction and substance of the right to self-determination – a principle which gives birth to a set of complementary rights, elucidating specific aspects of this fundamental structure.⁴⁹ These ‘values’ then, or worldviews, are the variable which determine the substance of the right to self-determination. Thus, the content of the right to self-determination – the ensuing body of ‘specific human rights norms’ referenced by Anaya – can effectively be seen as a translation of Indigenous worldviews into a body of coherent rights.

In this sense, the operative definition of self-determination during the era of decolonization can be regarded as based on the emerging system of values embedded within the *Universal Declaration on Human Rights*. In parallel, the Indigenous right to self-determination can be understood as growing out of the existing network of human rights-based norms, but interpreted through an Indigenous worldview. Critically examining this move made by the international Indigenous movement, there are two consequences which emerge on the macro level: The first, that by co-opting the right to self-determination and interpreting it to produce a body of rights in line with Indigenous worldviews, Indigenous peoples can be seen as changing the normative content of the dominant legal paradigm, by introducing substantive cultural and spiritual rights, and introducing an alternate perspective from the one embodied by the hegemony. The second, that although Indigenous peoples have succeeded in changing the content of the legal paradigm, they have also chosen to interpret their worldviews and value systems through the hegemonic form of law itself. As a result, ‘co-opting’ the right to self-determination has also entailed a translation of Indigenous worldviews and value systems into a form that is legible to the dominant paradigm – the law.

⁴⁸ Anaya, *Indigenous Peoples in International Law*, 75-77

⁴⁹ See *Ibid.*, 75: “Self-determination is identified as a universe of human rights precepts concerned broadly with peoples, including indigenous peoples...”

Functioning off the premise that the *UNDRIP* thus embodies the right to self-determination as interpreted through an Indigenous worldview, the right to free, prior and informed consent can then be conceptualized as a translation of Indigenous understandings of self-determination in relation to various property rights. The *UNDRIP* refers to FPIC as applicable to spiritual, cultural, intellectual, and territorial property rights, and draws a parallel between FPIC and the violation of traditional laws and customs – the first act, or layer, of interpretation, subsequently subject to the worldviews and interpretations of various stakeholders. However, staying true to the nature of any translation, what was lost in translating these concepts into law?

Our analysis begins to provide an answer by showcasing the rich interpretations present within operational literature, which play a crucial role in fleshing out FPIC on a conceptual level, articulating, and reaching a consensus, about its intended nature, function and goal. The *UNDRIP*, significant and emancipatory as it is, is innately limited by the fact that it is a piece of law, written in legal language that has been the product of extensive negotiation and compromise. Language, unstable and imprecise, is exceptionally important when ensuring that both parties come to the negotiating table with the same understanding of FPIC. While this analysis is only the beginning of the inquiry, it is evident that the discordant interpretations of FPIC's conceptual layer play a contributing factor to its repeated failure in implementation and require explicit delineation in any future guidance issued on free, prior and informed consent.

Works Cited

- Anaya, James. *Indigenous Peoples in International Law*. US: Oxford University Press, 2000.
- Asia Indigenous Peoples Pact. "Training Manual for Indigenous Peoples on Free, Prior and Informed Consent (FPIC)." Accessed February 27, 2018. <http://aippnet.org/training-manual-for-indigenous-peoples-on-free-prior-and-informed-consent-fpic/>
- Daes, Erica-Irene A. "The Contribution of the Working Group on Indigenous Populations to the Genesis and Evolution of the UN Declaration on the Rights of Indigenous Peoples." In *Making the Declaration Work*, ed. Claire Charters and Rodolfo Stavenhagen, 48-76. Copenhagen: IWGIA, 2009.
- Franco, Jennifer. "Reclaiming Free Prior and Informed Consent (FPIC) in the context of global land grabs." 2014. Accessed February 27, 2018. https://www.tni.org/files/download/reclaiming_fpic_0.pdf
- International Council on Mining & Metals (ICMM). "Indigenous Peoples and Mining: Position Statement." May 2013. Accessed February 27, 2018. <http://hub.icmm.com/document/5433>.
- International Finance Corporation (IFC). "Guidance Note 7: Indigenous Peoples." 1 January 2012. Accessed February 27, 2018. http://www.ifc.org/wps/wcm/connect/50eed180498009f9a89bfa336b93d75f/Updated_GN7-2012%20pdf?MOD=AJPERES
- UN Global Compact. "Indigenous Peoples' Rights and the Role of Free, Prior and Informed Consent: A Good Practice Note endorsed by the United Nations Global Compact Human Rights and Labour Working Group." 20 February 2014. Accessed February 27, 2018. https://www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/FPIC_Indigenous_Peoples_GPN.pdf
- UN General Assembly. *United Nations Declaration on the Rights of Indigenous Peoples: Resolution/Adopted by the General Assembly*. October 2, 2007, A/RES/61/295. Accessed February 27, 2018. <http://www.refworld.org/docid/471355a82.html>
- UN Human Rights Council. *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*. 6 July 2012, A/HRC/21/47. Accessed February 27, 2018. http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-47_en.pdf

Annex: Close-Readings

1) Close-Read of the UNDRIP

CITATION	NATURE	FUNCTION	OBJECTIVE
<i>Preamble</i>	“control by indigenous peoples over developments affecting them and their lands, territories, and resources”	“enable”	“to maintain and strengthen their institutions, cultures and traditions” “to promote their development in accordance with their aspirations and needs.”
<i>Preamble</i>	--	“Partnership and mutual respect”	--
<i>Articles 8 & 10</i>	“consent”	--	“not to be subjected to forced assimilation or destruction of their culture” “not be forcibly removed from their lands or territories”
<i>Article 11</i>	--	<i>Upholding “laws traditions and customs”</i>	“to practice and revitalize their cultural traditions and customs”
<i>Article 18</i>	--	“consulting and cooperating in good faith... through their own representative institutions”	“to participate in decision-making in matters which would affect their rights”
<i>Article 32</i>	--	--	“to determine and develop priorities and strategies for the development or use of their lands or territories and other resources” “obtain...consent prior to the approval of any project”

2) Close-Read of the UNPFII Report

CITATION	NATURE	FUNCTION	OBJECTIVE
p.4	“Principle”	<i>“methodologies”</i>	--
p.4	“Principle”	<i>“based on the human rights approach to development”</i>	--
p.14	“a rights-based approach to development”	--	--
p.5	--	<i>“cover all matters connected with the life of Indigenous peoples”</i>	“the improvement of the living conditions of Indigenous peoples”
p.5	“principle” “not only a procedure... but also a right”	--	--
p.5	“stand-alone right” “procedural right”	--	“the exercise or implementation of the right to self-determination, treaties and other human rights”
p.5	“an evolutionary process”	<i>“leads to”</i>	“co-management and decision-making by indigenous peoples on programmes and projects affecting them” “prevention of conflict” “peacebuilding”
p.5	“a principle and a practice”	--	“advocates tolerance, respect for nature, fundamental human rights, and democracy”
p.10	“a substantive framework” “an integral component of their rights to lands, territories and resources”	--	“the exercise of the right to self-determination”
p.11	“an important methodology” “an evolving principle”	--	--
p.11	“a process”	<i>“leads”</i>	“to equitable solutions and evolutionary development” “co-management and decision-making”

3) Close-Read of the UN Global Compact's Good Practice Note

CITATION	NATURE	FUNCTION	OBJECTIVE
p.3	“the right of Indigenous peoples to give or withhold” FPIC	“ <i>special protection</i> ”	--
p.3	“consent” “a process”	“ <i>protects</i> ”	“obtain FPIC” “not an end in and of itself” To protect “a broad spectrum of internationally recognized human rights”
p.5	“one process”	--	“obtaining FPIC” “to avoid complicity in violations of human rights”
p.7	“concept”	--	--
p.7	--	--	“to gain a social license to operate”
p.7	--	--	“develop closer relationships with and benefit from improved understanding of communities” “better partnership in the long run”
p.9	“a strong indicator”	--	“to possess a social license to operate”
p.10	“a formal, documented social license to operate”	“a mutually agreed upon process”	

4) Close-Read of ICMM's Position Statement

CITATION	NATURE	FUNCTION	OBJECTIVE
p.1	"the key challenge facing the industry"	--	--
p.1	--	<i>"mutual respect, meaningful engagement, trust and mutual benefit"</i>	"constructive relationships"
p.1	"engagement and consultation processes"	<i>"ensure"</i>	"meaningful participation of Indigenous communities in decision-making"
p.1	--	<i>"work"</i>	"obtain the consent"
p.1	"FPIC comprises a process, and an outcome"	--	--
p.1	"the outcome is"	<i>"through a process"</i>	"Indigenous peoples can give or withhold their consent to a project"
p.1	"a process"	<i>"that strives to be"</i>	"consistent with their traditional decision-making processes while respecting internationally recognized human rights and is based on good faith negotiation.
p.2	"a principle to be respected to the greatest degree possible"	--	--
p.2	"processes"	--	"for achieving FPIC" "in the pursuit of FPIC"

5) Close-Read of IFC’s Guidance Note 7

CITATION	NATURE	FUNCTION	OBJECTIVE
p.2	“a process of informed consultation and participation (ICP)” “Free, Prior and Informed Consent (FPIC)”	<i>“engagement process will ensure”</i>	“ongoing relationship”
p.13	--	--	“recognition of this vulnerability” “obtain the FPIC”
p.7	“no universally accepted definition of FPIC”	<i>“builds on and expands the process of informed consultation and participation”</i> <i>“established through good faith negotiation”</i>	--
p.9	“FPIC comprises a process and an outcome” “requires Good Faith Negotiation”	--	“the outcome is...an agreement and evidence thereof”
p.11	“FPIC should be viewed as a process”	<i>“that both allows and facilitates”</i>	“to build and agree upon a collective position with regard to the proposed development” “an FPIC agreement captures the...broad agreement on the legitimacy of the engagement process and the decisions made”

6) Close-Read of AIPP's Training Manual

CITATION	NATURE	FUNCTION	OBJECTIVE
p.2	“right to FPIC” “the concept, framework, elements and principles of FPIC”	<i>Information and knowledge</i>	FPIC “is respected”
p.9	“consent and control” “consent is the freedom of a people to say yes or no, to accept or reject any proposal, project, program or policy, any activity or action that has any sort of implication on their individual lives and their life as a community, and on their lands, territory, and resources”	--	--
p.10	“FPIC is a mechanism”	--	“to conduct their own independent collective decision-making on matters affecting them”
p.11	“FPIC is a set of principles that defines the process and mechanisms”	“to ensure” “to protect”	“that they are treated as peoples with their own decision-making power” “their collective rights”
p.11	“FPIC is a collective right” “FPIC as set of operation principles”	--	“to rectify [that FPIC has been violated throughout history” “the respect and protection of their collective rights”
p.15	“FPIC serves as a safeguard”	“to ensure”	“that the potential social and environmental impacts on indigenous peoples will be considered in the decision-making process regarding any project affecting them”
p.15	“FPIC is not merely a procedural process but a substantive mechanism”	--	--
p. 84 - 85	“FPIC is... a principle” “a manifestation of that control”	“which provides for”	“their control over the future development of their territories”
p. 84 - 85	“FPIC is a process” “FPIC should be viewed as an Indigenous governance process”	--	“to be defined and managed by the Indigenous authorities and communities”