City Research Online

City St George's, University of London

Citation: Barelli, M. (2015). Development projects and indigenous peoples' land: Defining the scope of free, prior and informed consent. In: Handbook of Indigenous Peoples' Rights. (pp. 69-82). Oxford, UK: Routledge. ISBN 9781136313851 doi: 10.4324/9780203119235

This is the accepted version of the paper.

This version of the publication may differ from the final published version. To cite this item please consult the publisher's version.

Permanent repository link: https://openaccess.city.ac.uk/id/eprint/15804/

Link to published version: https://doi.org/10.4324/9780203119235

Copyright and Reuse: Copyright and Moral Rights remain with the author(s) and/or copyright holders. Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge, unless otherwise indicated, provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way. For full details of reuse please refer to City Research Online policy.

City Research Online: http://openaccess.city.ac.uk/ publications@citystgeorges.ac.uk

Development projects and indigenous peoples' land Defining the scope of free, prior and informed consent

Mauro Barelli

Introduction

Indigenous peoples have a special relationship with their traditional territories and resources, which not only represent their main means of subsistence but also form an integral part of their cultural identity.[2] For indigenous peoples, the land is the home of the ancestors, the provider of everyday material needs and the future held in trust for coming generations (Zhora Ksentini 1991, para. 25). It follows that respecting the lands, territories and resources of indigenous peoples is vital for the survival of these groups as distinct societies.[3] The indigenous approach to lands and resources, however, is at odds with a global economic model that promotes the constant exploitation of natural resources and expansion of supportive infrastructures. Since many of these resources are found on lands traditionally owned and controlled by indigenous peoples, an inevitable conflict between competing claims and interests erupts (Tauli-Corpuz 2006, 20). Given the disparity of power of the parties to the dispute, economic and industrial development has traditionally taken place without recognition of and respect for indigenous peoples' cultural attachment to their lands (Daes 2001, para. 132). The criticality of this 'conflict' has been recently highlighted by the UN Special Rapporteur on the Rights of Indigenous Peoples (Special Rapporteur), who noted that the question of development projects affecting indigenous lands 'has become one of the foremost concerns of indigenous peoples worldwide, and possibly also the most pervasive source of the challenges to the full exercise of their rights'. (Anaya 2011, para. 57).

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) has the merit of directly addressing this important issue. In particular, Article 32(2) establishes that states shall consult and co-operate in good faith with the indigenous peoples concerned in order to obtain their free and informed consent prior to the approval of any project affecting their lands.[4] The broad and uncontroversial principle recognized by Article 32(2) is that indigenous peoples' views and interests should be taken into account by the relevant governments before taking on the Rights of Indigenous Peoples decision concerning their lands. That said, the elusive wording of the provision leaves a fundamental question unanswered: are states required to obtain the consent of indigenous peoples before authorizing or launching development projects on their lands, or simply seek, and, therefore, not necessarily obtain, such consent?

This chapter seeks to provide an answer to this important question by examining the legal significance and implications of the flexible approach to free, prior and informed consent (FPIC) that has recently gained increasing recognition at the international level (Barelli 2012). First, the chapter will clarify the meaning of the first three components of FPIC, namely 'free', 'prior' and 'informed'. Following on that, it will discuss the meaning of 'consent', examining the drafting history of Article 32(2) and placing it within the normative context of the Declaration.[5]The chapter will then proceed to highlight the way in which other international instruments and bodies have tackled the question of FPIC and development projects on indigenous lands. Finally, it will draw some conclusions as to the scope and value of FPIC in the context of the indigenous rights regime.

The meaning of free, prior and informed consent

The recognition of the principle of FPIC in Article 32(2) reinforces significantly the right of indigenous peoples to be consulted with regard to projects affecting their lands. At a minimum, FPIC requires that the relevant consultations should not be a mere formality, but, rather, should be conducted in good faith and with the objective of finding a common agreement. As noted in the previous section, however, FPIC may also be understood in a more radical manner, namely one requesting that all, or certain, projects should not be implemented in the absence of the consent of indigenous peoples. It is, therefore, crucial to clarify the meaning and scope of FPIC in order to determine the extent and limits of the relevant rights enjoyed by indigenous peoples.

As is often the case with concepts and principles, there is no universally agreed definition of FPIC in international law. Against this background, the 'common practical understanding' of FPIC elaborated by the UN Permanent Forum on Indigenous Issues (Forum)[6] represents a valuable reference point.[7] According to this understanding, the term 'free' implies that consultations should be conducted in the absence of any form of coercion, intimidation or manipulation. The term 'prior', instead, implies that consent must be sought sufficiently in advance of any authorization or commencement of activities and that the relevant agents should guarantee enough time for indigenous consultation processes to take place. Finally, the term 'informed' implies that indigenous peoples should receive satisfactory information in relation to certain key elements, including the nature, size, pace, reversibility and scope of the proposed project, the reasons for launching it, its duration and a preliminary assessment of its economic, social, cultural and environmental impact. Crucially, this information should be accurate and in a form that is accessible, meaning that indigenous peoples should fully understand the relevant language. In more general terms, consultations should be undertaken in good faith, and the full and equitable participation of indigenous peoples should be guaranteed. Indigenous peoples should also have equal access to financial, human and material resources in order to engage constructively in the process. Finally, they should be able to participate through their own freely chosen representatives and according to their customs.

The above description identifies the various phases and components of FPIC intended as a process of consultation and participation. More precisely, it indicates the manner in which states should conduct the relevant consultations in order for these to be lawful and meaningful.[8]What remains to be established is the actual meaning of the term 'consent', that is to say, whether consultations should necessarily lead to an agreement between states and indigenous peoples, or whether the former could act even in the absence of such consent. This is not to suggest that discussions regarding FPIC should only be framed in terms of whether or not indigenous peoples have a right to veto (Anaya 2009, para. 48). As explained above, FPIC refers to a much broader process of which 'consent' is only one (important) component. That said, the question as to whether indigenous peoples may have the right 'to say no' must be specifically addressed, because the recognition of this right may have important implications for the manner in which the broader process of consultation is conducted (Laplante and Spears 2008).[9] In particular, taking part in consultations knowing that one will hardly be able to oppose the outcome of the process is one thing; doing so with the awareness that the final decision might be successfully affected, or even rejected, is quite another. It follows that, by virtue of a right 'to say no', indigenous peoples could exercise more effective control over the various stages of the consultation process. It is also vital to shed some light on this question in order to prevent states, or any other interested actor, from

justifying non-compliance with the UNDRIP on the basis of obscurity (or alleged obscurity) of the relevant legal standards (Anaya 2009, para. 66).

FPIC and Article 32(2) of the United Nations Declaration on the Rights of Indigenous Peoples

Article 32(2) of the Declaration establishes that:

> states shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

As was noted in the introductory section, this provision suffers from a lack of clarity. At the centre of the controversy lies the interpretation of the expression 'consult in order to obtain': Do states have the stringent obligation to obtain the consent of indigenous peoples, or do they simply have to seek such consent? In order to clarify this important question, it is useful to consider the drafting history of Article 32(2) and subsequently try to interpret the latter in the context of the broader normative framework of the Declaration.

The original version of the provision, contained in the 1993 draft declaration that was adopted by the Working Group on Indigenous Populations (WGIP),[10] affirmed that:

> Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that states obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

This provision clearly provided that no project affecting the lands of indigenous peoples could take place without their free, prior and informed consent. In fact this amounted to recognizing a wide right to veto for indigenous peoples. The important point to make here is that the 1993 draft declaration was essentially the product of the five independent members of the WGIP and indigenous representatives, because states' delegates did not actively participate in the sessions of this body. This is so because, in their view, their interests would be better protected at the level of the (then) UN Commission on Human Rights, where, in the words of the then Australian minister for Aboriginal Affairs, 'indigenous voices were not expected to be heard with such strength and determination and where governments had in the past dictated the agenda free of non-governmental … interference' (Tickner 2001, 303). Accordingly, when the draft declaration reached the Commission on Human Rights, states expressed significant reservations with respect to a number of key provisions. As a result, the Commission on Human Rights set up the Working Group on the Draft Declaration (WGDD) with the sole purpose of further elaborating the text of the draft declaration.[11]

Over the sessions of the WGDD it became clear that several states opposed the fact that indigenous peoples could have the power to veto development projects allegedly of benefit to the entire country, because this would critically impair their ability to control natural resources for the purpose of national development. Accordingly, they sought to modify the wording of Article 32(2) with a view to softening their obligations towards indigenous peoples. For example, it was proposed that states should 'take account of the free and

informed consent of indigenous peoples in the approval of any project affecting their lands and resources'.[12] Other proposals were even weaker than those just mentioned as they used expressions such as 'states shall use their best efforts to obtain', or 'where possible, states shall undertake effective consultations'.[13]

Ultimately, states' objections to the original wording of Article 32(2) were partially successful, as the final version of the provision now requests that they consult indigenous peoples in order to obtain their consent rather than actually obtaining it. A number of considerations can be made in respect of the final wording of Article 32(2). On the one hand, it seems fairly clear that the expression 'consult in order to obtain' should not be interpreted as requesting states to obtain the consent of indigenous peoples before implementing any project affecting their lands. Had this been the case, the original version of the article, which de facto recognized a general right to veto, would have been preserved. That Article 32(2) should be interpreted more restrictively is further supported by various declarations made by states' representatives following the adoption of the UNDRIP by the General Assembly.[14]

On the other hand, there exist strong arguments against an interpretation of FPIC that would confer on indigenous peoples a mere right to consultation. First, most provisions of the Declaration are the product of difficult compromises between two competing views, and should, therefore, be interpreted in accordance with their nature. With respect to Article 32(2), it is particularly telling that the rather weak versions of the provision supported by several states (mentioned above) were ultimately abandoned. This suggests that overly restrictive interpretations of FPIC cannot be validly upheld. Second, and more importantly, FPIC should be read in conjunction with the broader normative framework of the UNDRIP. In particular, the Declaration fully recognizes the special attachment of indigenous peoples with their ancestral lands. Amongst others, Article 25 establishes that indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their ancestral lands, while Article 26 affirms that indigenous peoples have the right to own, use, develop and control their lands, territories and resources.

It should also be highlighted that Article 3 of the Declaration recognizes that indigenous peoples have the right to self-determination and that, by virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development. In light of the above, to allow that development projects could take place on the lands of indigenous peoples without their consent and regardless of the consequences that the concerned activities could have on their cultures and lives would seem incompatible with both the spirit and normative framework of the Declaration. This would also seem to frustrate the very purpose of creating a special legal regime for indigenous peoples' rights, as the latter are aimed at protecting not only the physical but also cultural integrity of these peoples.

It is, therefore, clear that Article 32(2) must necessarily be approached with a certain degree of flexibility. With this in mind, the next sections will highlight how the jurisprudence and practice of various judicial and quasi-judicial bodies have contributed to define the legal contours of a flexible understanding of FPIC that promises to address in a constructive manner the important problems highlighted above.

The Inter-American Court of Human Rights

The Inter-American Court of Human Rights (IACtHR or Court) has developed a significant jurisprudence in relation to indigenous land rights since the early 2000s (Pasqualucci 2008). The IACtHR has approached these rights in the context of Article 21 of the Inter-American Convention on Human Rights (Inter-American Convention) on the right to property.[15] Taking into account the most recent international normative developments in the sphere of indigenous peoples' rights, the IACtHR has established that Article 21 also protects the right

of the members of indigenous groups to collectively own their ancestral lands. This ground-breaking interpretation, introduced for the first time in the 2001 *Mayagna (Sumo) Awas Tingni Community vs. Nicaragua* case,[16] and later confirmed in a number of equally significant cases,[17]essentially stems from the preliminary recognition of the special relationship existing between indigenous peoples and their lands.

In the case of *Saramaka People vs. Suriname*,[18] the Court also dealt with the issue of natural resources pertaining to indigenous lands, making express references to both FPIC and Article 32(2) of the UNDRIP.[19] In this case the Court had to determine, among other things, whether logging and mining concessions awarded by Suriname to third parties on the ancestral lands of the Saramaka people amounted to a violation of their property rights under Article 21 of the Inter-American Convention. The Court first acknowledged that Article 21 also protects the rights of indigenous peoples to own and enjoy the natural resources found within their ancestral lands.[20] After establishing this general principle, it specified that the resources protected under Article 21 are only those *necessary* for the survival of indigenous peoples, that is to say, resources associated to agricultural, hunting and fishing activities. Having said that, the Court observed that exploiting natural resources that are not necessary for the survival of indigenous peoples, e.g. subsoil resources, may nevertheless have important consequences on the cultures and lives of these peoples, for they may impact on the resources necessary for their survival. Accordingly, Article 21 may also impose limits on what states can and cannot do in relation to the exploitation of these (unnecessary) resources. This, however, must not be read as an affirmation of absolute protection of indigenous peoples' rights. As the IACtHR noted, Article 21 'should not be interpreted in a way that prevents the state from granting any type of concession for the exploration and extraction of natural recourses' within a territory owned by an indigenous community.[21] Instead, limitations and restrictions to the rights of indigenous peoples to their natural resources are possible, but only under specific circumstances. Following the same principles elaborated in the context of land rights generally (Barelli *et al*. 2011), the Court found that restrictions are possible only if they are established by law, are necessary and proportional, and have the aim of achieving a legitimate objective in a democratic society.[22] Further safeguards are nevertheless needed in order 'to preserve, protect and guarantee the special relationship that [indigenous peoples] have with their territory, which in turn ensures their survival'.[23] Accordingly, a state which intends to launch or authorize a project affecting the natural resources found within indigenous lands will have to respect the following obligations: first, ensure the effective participation of the members of the community in any development, or investment, plan; second, ensure that the concerned people have a reasonable share of the benefits; third, perform or supervise prior environmental and social impact assessments; and, fourth, implement adequate safeguards and mechanisms so as to avoid that the concerned activities significantly affect the conditions of the traditional lands and natural resources at stake.[24]

For the purpose of this chapter, special attention should be paid to the first obligation listed above, namely the obligation to ensure the effective participation of indigenous peoples. As a general rule the Court noted that states have a duty to consult with the indigenous peoples concerned. Indeed, in the Court's view, this duty should now be regarded as a general principle of international law.[25] In carrying out this duty, states must act in good faith, provide sufficient information and respect the indigenous customs and traditions. Crucially, the objective of the consultation should be the reaching of an agreement among the parties. This clearly means that states must not necessarily obtain the consent of indigenous peoples before a project may take place on their lands.

After establishing this general principle, however, the Court introduced a crucial distinction between small-scale and large-scale development projects, endorsing the view that under certain circumstances indigenous peoples should be entitled to more rigorous

protection. More precisely, it held that, in the case of large-scale development projects that would have a major impact within indigenous peoples' territories, states have a duty not only to consult with indigenous peoples, but also to obtain their free, prior and informed consent.[26] The same degree of protection must be guaranteed when the cumulative effects of a number of small-scale projects would resemble that of a large-scale project.[27]

By establishing different legal regimes with regard to small-scale and large-scale development projects, the IACtHR has provided an answer to the difficult questions concerning the interpretation of Article 32(2) that were highlighted in the previous section. It did so by promoting a 'sliding scale approach' to the question of indigenous participatory rights that is based on the key assumption that the 'level of effective participation [that must be guaranteed to indigenous peoples] is essentially a function of the nature and content of the rights and activities in question' (Pentassuglia 2009, 116). This means that, when a project is likely to have a major (negative) impact on the territories, lives or cultures of indigenous peoples, states have a duty not only to consult them, but, also, to obtain their FPIC.

Human rights treaty bodies

International human rights treaties do not refer expressly to FPIC. They also lack any expressed reference to indigenous peoples' rights. However, the bodies entrusted to monitor and promote their implementation have gradually developed extensive interpretations of their generic provisions in order to protect, *inter alia*, the special cultural attachment of indigenous peoples to their lands (Thornberry 2002). This is particularly true with regard to the Human Rights Committee (HRC), which contributed prominently to the elaboration of international legal standards concerning indigenous peoples. The HRC did so by promoting a progressive interpretation of the right to culture included in Article 27 of the International Covenant on Civil and Political Rights (ICCPR) so as to secure, among others, the right of indigenous peoples to conduct traditional economic activities and to live in harmony with their lands and resources.[28]

The HRC has dealt with FPIC in a number of pronouncements on individual communications. In this respect, the case of *Ilmari Länsman et al. vs. Finland* is particularly instructive.[29] This case dealt with the decision of the Finnish Central Forestry Board to pass a contract with a private company to allow stone quarrying in a reindeer-herding area, home to a Sami community. The applicant claimed that this agreement violated the Sami right to enjoy their own culture, traditionally based on reindeer husbandry, as established by Article 27 of the ICCPR. Acknowledging that the authors of the communication were consulted and their interests were considered during the proceedings leading to the delivery of the quarrying permit by the state, the HRC found that Finland had not violated Article 27. Crucially, the main reason behind the HRC's finding that no violation of Article 27 had occurred was that quarrying, in the amount that had taken place at the time, had only a limited impact on the way of life of the concerned communities and thus did not amount to a denial of their rights. Accordingly, in the eventuality of a more substantial impact on the way of life of the indigenous communities concerned, it is plausible that the HRC would have demanded more than mere consultation before deciding in favour of the state.[30] These considerations suggest that the HRC privileges a dynamic approach to FPIC, whose meaning may vary in accordance with the impact that a particular project or activity will have on indigenous peoples.

This perception was confirmed by a recent pronouncement, in which the HRC noted that, when measures substantially compromise or interfere with the rights of indigenous peoples, states must guarantee their effective participation in the decision-making process.[31] Crucially, the HRC emphasized that this would require not only mere consultation but, also, their free,

prior and informed consent.[32] Accordingly, it can be said that, despite avoiding any express reference to the distinction between small and large-scale development projects, the HRC supports the so-called 'sliding scale approach' to indigenous participatory rights in connection to projects affecting their lands.

The Committee on Economic, Social and Cultural Rights (CESCR) may be in the process of developing a similar approach to the one employed by the HRC. In the general comment on the right to culture included in Article 15 of the International Covenant on Economic, Social and Cultural Rights, the CESCR listed the obligations that states parties have to respect in order to ensure the satisfaction of that provision.[33] Among other things, it noted that states should 'allow and encourage the participation of … indigenous peoples … in the design and implementation of laws and policies that affect them'.[34] Significantly, the CESCR also specified that 'states parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk'.[35] Without expressly elaborating on this point, the general comment seems to introduce two different levels of protection in relation to measures affecting indigenous peoples. Accordingly, laws and policies that threaten the preservation of the cultural distinctiveness of these peoples could only be adopted with their free, prior and informed consent. In a more radical way, the Committee on the Elimination of Racial Discrimination (CERD) stressed in a general comment that no decisions directly relating to the rights and interests of indigenous peoples should be taken without their informed consent.[36] This straightforward position, which seems to contrast with the sliding scale approach promoted by other human rights bodies, has been confirmed in various concluding observations.[37] On other occasions, however, CERD has taken a more nuanced approach to FPIC, indicating, for example, that states should consult indigenous peoples in order to obtain their consent, or that they should endeavour to obtain, or seek, such consent.[38]

The above considerations indicate that a coherent uniform practice on FPIC among human rights treaty bodies has yet to emerge clearly. That said, there is evidence to suggest that the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have validated the importance of a sliding scale approach to indigenous peoples' participatory rights, linking the issue of FPIC with the nature of a proposed initiative and the effects that it will have on their fundamental human rights, in line with the more elaborated and detailed jurisprudence of the Inter-American Court of Human Rights.

The African Commission on Human and Peoples' Rights

In February 2010 the African Commission on Human and Peoples' Rights (ACHPR) issued an important decision in the *Centre for Minority Rights Development (Kenya) vs. Kenya* case.[39] The case dealt with the Endorois' claim that the Government had removed them from their ancestral lands without prior consultation and adequate compensation, thus violating, *inter alia*, their right to property, natural resources and development as recognized respectively by Articles 14, 21 and 22 of the African Charter on Human and Peoples' Rights (1981) (Charter). With respect to FPIC, the main finding of the case refers to the alleged violation of Article 22 on the right to development. The ACHPR specified that states have a duty

> not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions [in relation to] any development or investment projects that would have a major impact within [their] territory.[40]

Applying this general principle to the case in question, it noted that Kenya 'did not obtain the prior, informed consent of all the Endorois before designating their land as a Game Reserve and commencing their eviction.'[41]

While this reasoning fully upholds the IACtHR's jurisprudence on FPIC that was discussed above, another passage of the judgment raises some doubts as to the overall position of the ACHPR. In addressing the circumstances under which the land rights of indigenous peoples could be restricted in accordance with Article 14 of the Charter,[42] the ACHPR found that, among other things, states must consult the peoples concerned before encroaching on their property rights and provide, if necessary, adequate compensation. At that point, the ACHPR sought to clarify the meaning and scope of this consultative process. In doing so, and without expressly referring to it, the ACHPR endorsed a radical interpretation of FPIC by saying that '[i]n terms of consultation, the threshold is especially stringent in favour of indigenous peoples, as it also requires that consent be accorded'.[43] In the subsequent passage, however, the ACHPR noted that 'failure to observe the obligations to consult and seek consent … ultimately results in a violation of the right to property'. Whether in the ACHPR's view states should obtain or merely seek the consent of the indigenous peoples concerned remains, therefore, unclear. While future engagement with the issue of FPIC will certainly shed light on the above questions, the decision seems in line with the emerging flexible understanding of FPIC that is discussed in this chapter. In this sense, it is important to highlight that the ACHPR's findings draw almost entirely on the jurisprudence of the Inter-American Court of Human Rights, confirming a fundamental alignment between the reasoning and approach of the two bodies (Pentassuglia 2011, 187).

UN bodies dealing specifically with indigenous peoples' rights

The Special Rapporteur on the Rights of Indigenous Peoples and the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) have each dedicated particular attention to the issue of FPIC in relation to development projects on indigenous lands. The interpretation promoted by these two bodies is particularly important in order to clarify the meaning and scope of FPIC in Article 32(2) of the Declaration because their activities are carried out precisely in accordance with the normative framework of that instrument.

With this in mind, it is interesting to observe that it was the former Special Rapporteur on the Rights of Indigenous Peoples, Rodolfo Stavenhagen, who, in 2003, introduced the distinction between small and large-scale development projects (Stavenhagen 2003). In his report, which was referred to by the IACtHR in the *Saramaka* case, major developments were described as:

> process[es] of investment of public and/or private, national or international capital for the purpose of building or improving the physical infrastructure of a specified region, the transformation over the long run of productive activities involving changes in the use of and property rights to land, the large-scale exploitation of natural resources including subsoil resources, the building of urban centres, manufacturing and/or mining, power, extraction and refining plants, tourist developments, port facilities, military bases and similar undertakings.
>
> *(Stavenhagen 2003, para. 6)*

Stavenhagen was particularly concerned about the profound social and economic changes that these projects are likely to cause in the territories and lives of the indigenous peoples concerned. The subsequent Special Rapporteur, James Anaya, followed this path, highlighting that 'the strength or importance of the objective of achieving consent [should

vary] according to the circumstances and the indigenous interests involved' (Anaya 2009, para. 47). This means that a 'direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent' and that, 'in certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent' (Anaya 2009, para. 47).

The EMRIP has taken a similar approach to that developed by the Special Rapporteur. In a recent study on the right of indigenous peoples to participate in decision-making, the EMRIP noted that special attention should be paid to the issue of FPIC in relation to 'projects or measures that have a substantial impact on indigenous communities, such as those resulting from large-scale natural resource extraction on their territories or the creation of natural parks, or forest and game reserves on their lands and territories'.[44] The advisory paper which followed the study highlighted that, in accordance with the normative framework of the UNDRIP, FPIC should be obtained 'in matters of fundamental importance for [the] rights, survival, dignity and well-being [of indigenous peoples]'.[45] The paper further specified that

> in assessing whether a matter is of importance to the indigenous peoples concerned, relevant factors include the perspective and priorities of the indigenous peoples concerned, the nature of the matter or proposed activity and its potential impact on the indigenous peoples concerned.[46]

Crucially, the paper also highlighted that states' duty to obtain the FPIC of indigenous peoples implies that the latter have the prerogative to 'withhold consent and to establish terms and conditions for their consent'.[47]

The International Labour Organization

The International Labour Organization Indigenous and Tribal Peoples Convention, 1989 (No. 169) (Convention 169) is the only international treaty concerning indigenous rights still open to ratification.[48] More importantly, it is widely regarded as 'a central feature of international law's contemporary treatment of indigenous peoples' demands' (Anaya 2004, 58). For these reasons, an analysis of FPIC would not be complete without a discussion of this important convention.

At the outset, it should be highlighted that the rights to consultation and participation represent the cornerstone of Convention 169.[49] In this respect, Article 6 affirms the right of indigenous peoples to be consulted and to freely participate at all levels of decision-making when policies and programmes might affect them. Furthermore, the convention fully acknowledges and protects the special relationship between indigenous peoples and their lands. Article 13, in particular, establishes that governments shall respect the special importance for the cultures and spiritual values of indigenous peoples of their relationship with their lands, while Article 7 recognizes the right of indigenous peoples to own their lands and to 'exercise control, to the extent possible, over their own economic, social and cultural development'. Within this normative context, Article 15 establishes that indigenous peoples' rights to the natural resources pertaining to their lands shall be specially safeguarded. Crucially, these rights include the right to participate in the use, management and conservation of these resources. At the same time, Article 15 recognizes that states may retain the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands. In such cases, Convention 169 requires that governments consult indigenous peoples 'with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such

resources pertaining to their lands'. While this passage could be read as introducing a link between the level of protection to be accorded to indigenous peoples and the seriousness of the impact of a particular project, the ILO governing body has clarified that under no circumstances should Article 15 be interpreted as requesting that consultations necessarily lead to agreement or consent.[50] Rather, consultations should be conducted with a view to finding 'appropriate solutions in an atmosphere of mutual respect and full participation',[51] so that indigenous peoples could have 'a realistic chance of affecting the outcome'[52] of the relevant process.

This suggests that Convention 169 endorses a pragmatic approach to FPIC, seeking to empower indigenous peoples without, however, going as far as granting them the right to oppose unwanted projects which could have a serious negative impact on their rights and lives. While this prudent approach is not in line with the growing international consensus on FPIC that is discussed in this chapter, it should be noted that Article 35 of Convention 169 establishes that the provisions of the convention should not prevent indigenous peoples from enjoying more favourable rights pursuant to, *inter alia*, other international instruments, thus acknowledging that certain provisions of the convention could fall below existing international legal standards.[53] In this sense, the emergence of a clear, coherent and uniform practice on FPIC could lead gradually to a more progressive interpretation of the relevant provisions of Convention 169.

Conclusions

Article 32(2) of the UNDRIP recognizes that indigenous peoples should be consulted before states may launch or authorize development projects on their lands. Crucially, the principle of free, prior and informed consent sets out the manner in which the relevant process of consultation should be carried out. FPIC may have significantly different implications depending on the way in which one understands it. At a minimum, it requires that states should consult indigenous peoples in good faith and with a view to reaching an agreement; in a more radical manner, it could mean that states should obtain the consent of the indigenous peoples concerned before moving forward with their proposed plan. The language of Article 32(2) does not in itself provide a definitive answer to this fundamental question. However, by placing this provision within the normative framework of the UNDRIP and analysing the practice of judicial and quasi-judicial bodies, this chapter has highlighted the emergence of a flexible approach to FPIC that is gaining increasing recognition at the international level. On the basis of this model, indigenous peoples do not enjoy a right to veto in relation to all matters affecting their lands. That said, when a development project is likely to have a serious (negative) impact on their cultures and, ultimately, lives, states should obtain their consent before implementing it. Although it is clear that further judicial elaboration is needed to add clarity to this complex regime, this approach to FPIC promises to tackle the question of 'consent' in a constructive manner, focusing on the need adequately to protect the fundamental human rights of indigenous peoples. In doing so, it contributes to reverse a tradition of injustice and discrimination by seeking to prevent that states' interests systematically and indiscriminately prevail over those of indigenous peoples.

Notes

1 The author would like to thank the editors of the present collection for their comments on an earlier draft of this chapter. The usual disclaimer applies.

2 Inter-American Court of Human Rights, *Case of the Yakye Axa Indigenous Community vs. Paraguay* (Merits, Reparations and Costs) Judgment of 17 June 2005. Series C No. 125, para. 135.

3 See, amongst others, Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, adopted by the African Commission on Human and Peoples' Rights by Resolution 65 (XXXIV) 03 (20 November 2003) paras. 89 and 90; and *Mayagna (Sumo) Awas Tingni Community vs. Nicaragua*, Inter-American Court of Human Rights, Series C 79 (2001) para. 149. See also, Daes (2001, para. 12).

4 Article 32 of the Declaration reads as follows: '(1) Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. (2) States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. (3) States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.'

5 It should be noted that other provisions of the Declaration, namely Articles 10, 19, 29(2) and 28(1) refer to FPIC. However, this chapter will only focus on the question of FPIC in connection with projects affecting indigenous lands as established by Article 32(2).

6 The Forum is an advisory body to the UN Economic and Social Council (Council). It provides expert advice and recommendations on indigenous issues to
the Council, as well as to programmes, funds and agencies of the United Nations (through the Council). Furthermore, it raises awareness and promotes the integration and co-ordination of activities related to indigenous issues within the UN system, and prepares and disseminates information on indigenous issues more generally.

7 Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples (New York, 17–19 January 2005), UN Doc. E/C.19/2005/3, para. 45.

8 The models and procedures used to carry out specific consultations may vary depending on the 'national circumstances and those of indigenous peoples, as well as the nature of the measures under consultation'. See, for example, ILO, Report of the Committee set up to examine a claim alleging non-compliance by Brazil with the Indigenous and Tribal Peoples Convention, 1989 (No. 169), presented on the grounds of Article 24 of the ILO Constitution by the Union of Engineers of the Federal District (SENGE/DF), GB.295/17; GB.304/14/7 (2006), para. 42. See also Anaya (2009, Appendix A, para. 28).

9 See also the Report of the Working Group on Indigenous Populations in its seventh session, UN Doc. E/CN.4/Sub.2/1989/36, para. 62.

10 The WGIP was a subsidiary body of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. It was created in 1982 with the task of reviewing developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations, giving special attention to the evolution of standards concerning those rights. See UN Economic and Social Council Resolution 1982/34 of 7 May 1982.

11 See Commission on Human Rights Resolution 1995/32 and Economic and Social Council Resolution 1995/32.

12 Report of the Working Group on the Draft Declaration in its 2nd session, UN Doc. E/CN.4/1997/102, para. 280.

13 Free, Prior and Informed Consent, document presented at the Expert Seminar on Indigenous Peoples' Permanent Sovereignty over Natural Resources and on their Relationship to Land, 25–27 January 2006, Geneva, HR/GENEVA/IP/SEM/2006/BP.7.

14 UN General Assembly, 'General Assembly Adopts Declaration on Rights of Indigenous Peoples; "Major Step Forward" Towards Human Rights for All, Says President', UN Press Release, 13 September 2007. At www.un.org/News/Press/docs/2007/ga10612.doc.htm (accessed 10 January 2015).

15 Article 21 reads as follow: '(1) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society; (2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law; (3) Usury and any other form of exploitation of man by man shall be prohibited by law.'

16 *Mayagna (Sumo) Awas Tingni Community vs. Nicaragua*.

17 *Comunidad Indigena Yakye Axa vs. Paraguay*, Inter-American Court of Human Rights, Series C 125 (2005), paras. 124 and 137; *Sawhoyamaxa Indigenous Community vs. Paraguay*, Inter-American Court of Human Rights, Series C 146 (2006), paras. 118–121; *Saramaka People vs. Suriname*, Inter-American Court of Human Rights, Series C 172 (2007), paras. 87–96.

18 *Saramaka People vs. Suriname*. For an overview of the case, see Orellana (2008).

19 *Saramaka People vs. Suriname*, para. 131.

20 Indigenous peoples' right 'to use and enjoy their territory would be meaningless … if said right were not connected to the natural resources that lie on and within the land'. *Saramaka People vs. Suriname*, para. 122.

21 *Saramaka People vs. Suriname*, para. 126.

22 *Saramaka People vs. Suriname*, para. 127.

23 *Saramaka People vs. Suriname*, para. 129.

24 *Saramaka People vs. Suriname*, para. 158.

25 Case of the *Kichwa Indigenous Peoples of Sarayaku vs. Ecuador*, Judgment of 27 July 2012 (Judgment on Merits and Reparations) para. 164.

26 *Sarayaku vs. Ecuador*, para. 134.

27 Inter-American Court of Human Rights, Case of the *Saramaka People vs. Suriname*, Judgment of 12 August 2008 (Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs), para. 41.

28 Article 27 protects, among others, the right of persons belonging to ethnic, religious or linguistic minorities to enjoy, in community with the other members of their group, their own culture. The HRC has promoted an extensive reading of 'culture', noting that 'culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples'. See HRC, *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, UN Doc. CCPR/C/21/Rev.1/Add.5 (8 April 1994).

29 Communication No. 511/1992, UN Doc. CCPR/C/52/D/511/1992 (8 November 1994).

30 In a similar vein, in a follow-up of a previous individual communication, the HRC first recommended that Canada 'consult with the [Lubicon Lake] Band before granting licences for economic exploitation of the disputed land'. However, by further noting that 'in no case such exploitation [should] jeopardize the rights recognized under the Covenant', the HRC was suggesting that, under the above circumstances, mere consultation would not suffice to guarantee the legality of the exploitation. UN Doc. CCPR/C/CAN/CO/5 (20 April 2006) para. 9.

31 Communication No.1457/2006, UN Doc. CCPR/C/95/D/1457/2006 (24 April 2009).

32 Ibid., para. 7.4.

33 CESCR, *General Comment No. 21, Right of Everyone to Take Part in Cultural Life*, UN Doc. E/C.12/GC/21 (21 December 2009).

34 Ibid.

35 Ibid.

36 CERD, *General Recommendation No. 23 on Indigenous Peoples*, UN Doc. A/52/18 (18 August 1997) Annex V at 122, para. 5.

37 For example, CERD demanded that Chile 'hold effective consultations with indigenous peoples on all projects related to their ancestral lands' and 'obtain their consent prior to implementation of projects for the extraction of natural resources, in accordance with international standards', UN Doc. CERD/C/CHL/CO/15–18 (7 September 2009) para. 22. Similarly, it urged Guatemala to 'consult the indigenous population groups concerned at each stage of the process' and 'to obtain their consent before executing projects involving the extraction of natural resources', UN Doc. CERD/C/GTM/CO/12–13 (19 May 2010) para. 11. On another occasion, CERD condemned the fact that the 'right of indigenous peoples to be consulted and to give their

informed consent prior to the exploitation of natural resources in their territories is not fully respected'. UN Doc. CERD/C/PER/CO/14–17 (3 September 2009) Peru, para. 14.

38 For example, UN Doc. CERD/C/GTM/CO/11 (15 May 2006) Guatemala, para. 19; UN Doc. CERD/C/GUY/CO/14 (4 April 2006) Guyana, para. 14; UN Doc. CERD/C/COL/CO/14 (28 August 2009) Colombia, para. 20; UN Doc. CERD/C/ARG/CO/19–20 (29 March 2010) Argentina, para. 26; UN Doc. CERD/C/BOL/CO/17–20 (8 April 2011), Bolivia, para. 20; and UN Doc. CERD/C/CMR/CO/15–18 (30 March 2010) Cameroon, para. 18(b).

39 *Centre for Minority Rights Development (Kenya) vs. Kenya*, African Commission on Human and Peoples' Rights 276/2003 (4 February 2010), at www.unhcr.org/refworld/docid/4b8275a12.html (accessed 25 November 2014).

40 *Centre for Minority Rights Development (Kenya) vs. Kenya*, para. 291.

41 Ibid., para. 290.

42 The latter part of Article 14 of the African Charter on the right to property establishes that this right 'may be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws'.

43 *Centre for Minority Rights Development (Kenya) vs. Kenya*, para. 226.

44 Progress report on the study on indigenous peoples and the right to participate in decision-making, Report of the Expert Mechanism on the Rights of Indigenous Peoples, UN Doc. A/HRC/15/35 (23 August 2010) para. 34.

45 Expert Mechanism Advice No. 2 (2011): Indigenous Peoples and the Right to Participate in Decision-making, para. 22, A at www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Advice2_Oct2011.pdf (accessed 10 January 2015).

46 Ibid.

47 Ibid., para. 23.

48 The 1957 International Labour Organization Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries was closed to ratification following the establishment of Convention 169. However, it remains valid for those 17 states, which, having previously ratified it, decided not to become parties to Convention 169.

49 'The spirit of consultation and participation constitutes the cornerstone of Convention ILO No. 169 on which all its provisions are based.' Report of the Committee set up to examine the representation alleging non observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederacion Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), para. 31.

50 Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 100th Session (2011), ILC.100/III/1A, p. 787.

51 GB.282/14/2, para. 36.

52 '[ILO 169] requires that procedures be in place whereby indigenous and tribal peoples have a realistic chance of affecting the outcome.' Contribution of the ILO to the Workshop on Free, Prior and Informed Consent organized by the UN Permanent Forum on Indigenous Issues, New York, 17–19 January 2005, available at http://social.un.org/index/IndigenousPeoples/MeetingsandWorkshops/InternationalWorkshoponFPIC.aspx (accessed 20 November 2014).

53 Article 35 reads as follows: 'The application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.'