FPIC protocols – rebalancing power by changing the rules of the game?

In order to operationalise their internationally recognised right to free, prior and informed consent (FPIC), many Indigenous Peoples are developing FPIC protocols. Our author explains what is behind these instruments and gives an overview of community experience with them so far.

By Cathal Doyle

Indigenous Peoples' protocols governing engagement with third parties are embedded in their customs and laws transmitted through oral traditions and occasionally reflected in treaties and agreements with states and other actors. Contemporary international human rights law recognises them as peoples vested with the rights to self-determination and to lands, territories and resources, free to determine their social, economic and cultural development. To safeguard these rights, it requires their free, prior and informed consent (FPIC) whenever external activities may impact on them. Despite this, experience with FPIC implementation is disappointing. Control over FPIC recognition and definition remains in the hands of states and corporations, and is divorced from Indigenous Peoples' self-governance, territorial and cultural rights. Instead of protecting Indigenous Peoples' rights, consultation and "FPIC" become box-ticking exercises used by outsiders to coercively legitimise the unprecedented scale of extractive, agribusiness, energy and infrastructure projects in indigenous lands with profound impacts on their well-being and survival.

Community members participating in a meeting of the Autonomous Territorial Government of the Wampis Nation (GTANW), Peru.

Photo: Elena Campos-Cea / GTANW

A growing response of Indigenous Peoples is to codify their laws and governance rules in the form of consultation and FPIC protocols, laws and polices (henceforth FPIC protocols), in which they define how they are to be consulted and their FPIC is to be sought. They capture Indigenous Peoples' conception of FPIC as a manifestation of their control over the development of their territories and as inseparable from their diverse decision-making practices, laws and customs. This practice emerged in the early 2000s when Canadian First Nations developed protocols, templates and policies to negotiate directly with mining companies. A second wave of "bio-cultural protocols" emerged in the late 2000s in the context of access and benefit sharing agreements under the Convention on Biological Diversity, but tend to have a limited focus on state duties in relation to FPIC. The third wave of FPIC protocols followed the adoption of the UN Declaration on the Rights of Indigenous Peoples, and these are self-governance instruments that address state and corporate obligations and Indigenous Peoples' rights under international, national and indigenous customary law. They are most common in the Americas, and communities in Argentina, Belize, Brazil, Canada, Colombia, Costa Rica, Chile, Ecuador, Guatemala, Guyana, Honduras, Paraguay, Peru, Suriname and the United States have developed or are developing them.

Growing recognition

These FPIC protocols are increasingly recognised by national, regional and international judicial and quasi-judicial bodies, such as Federal Prosecutors in Brazil, the Argentinian Ombudsman, Constitutional and Federal Courts in Brazil and Colombia, the Inter-American Commission on Human Rights, the Committee on Economic, Social and Cultural Rights, the UN Special Rapporteur on the Rights of Indigenous Peoples, the Expert Mechanism on the Rights of Indigenous Peoples, the UN Working Group on Business and Human Rights, and by international bodies such as the Office of the High Commissioner on Human Rights, the United Nations Development Programme and the Green Climate Fund.

Implementation is at an early stage but there are several positive examples. Canadian First Nations protocols draw on land claim agreements to regulate if and how consent is granted to mining companies, and some have been used to negotiate impact-benefit agreements and establish contractual commitments for consent for mineral exploitation or invoked

when seeking injunctions against mining. The Afro-Descendant Palenke people's FPIC protocol was affirmed in a Colombian Constitutional Court decision and used post-facto to regulate the conduct of impact assessments for a large-scale hydroelectric dam. In Honduras, the Miskitu Indigenous people used their protocol in a consultation with the State and the BG Group to agree certain conditions prior to the commencement of oil exploitation. Communities in Brazil, Suriname, Belize, Costa Rica and Ecuador are developing, using or considering developing protocols in the context of REDD+ projects. In the Philippines, the Subanon FPIC protocol helped catalyse reform of national FPIC consultation guidelines to be more culturally appropriate and consistent with customary laws. The Khoikhoi and San peoples' 2019 benefit-sharing agreement with the South African Rooibos industry requires FPIC for access to their traditional knowledge, while Indigenous Peoples in Kenya, Zimbabwe, Nepal and the USA have invoked their protocols in engagements with governments, corporations, financial institutions and international organisations.

Emblematic examples in Brazil and Colombia

The Juruna, one of the peoples of the Xingu River in the State of Pará in Brazil, finalised their protocol in 2017 when faced with the Belo Sun mining project in the absence of prior consultation or FPIC, following a profoundly negative experience with the Belo Monte Dam. A notable feature is its emphasis on their role in designing participatory environmental impact assessments. In 2018, the Juruna won a case in the Federal Court suspending the Belo Sun mining project and affirming the need to respect their FPIC Protocol, which led to an environmental approval for the mine being declared invalid. The case also provided the basis for the Indigenous Peoples of Xingu to insist that State agencies comply with their protocol in the context of the proposed construction of a highway and the development of the Central West Integration Railway, and that international investors ensure FPIC is verified by agreements that are not repudiated by Indigenous Peoples.

In 2012, after mining concessions were issued without consultation in the Resguardo Indígena Cañamomo Lomaprieta, Caldas, Colombia, the Embera Chamí developed an FPIC protocol as part of their regulatory framework governing mining in their territory. In 2016, the Colombian Constitutional Court affirmed that the State must respect the Embera Chamí protocols. In March 2024, the Resguardo launched a revised FPIC Law that serves as a model for Indigenous Peoples in Colombia and beyond. It addresses developments in international, national and regional jurisprudence and standards, and places indigenous law at the centre of decision-making, identifying its relevance to new threats, such as nature markets. The FPIC protocol had a deterrent effect, as no company has managed to commence large-scale mining activities in the Resguardo since its adoption. However, widespread intimidation, death threats, attacks and killings of community leaders is a huge challenge to the implementation of FPIC protocols by Indigenous Peoples in Colombia and elsewhere.

Opportunities and challenges

A core feature of FPIC protocol development is its contribution to strengthening Indigenous Peoples' representative structures and internal consultation mechanisms, building community unity and enhancing networks with regional indigenous organisations and improving access to technical, political and financial resources – all key determinants of successful outcomes in consultations with external actors. Another benefit of developing them is that by defining what FPIC means in their particular context, Indigenous Peoples can infuse international law with their customary laws and perspectives. This in turn incentivises and empowers international and government bodies, including Courts, that recognise indigenous rights to insist on such interpretations and to reject state actors as the only legitimate interpreters of Indigenous Peoples' collective human rights at national level. As legal instruments grounded in distinct international, national and indigenous law bodies, they serve as vehicles for legal plurality and offer pragmatic and constructive responses to questions of why and under what conditions the requirement for FPIC exists and how and by whom it should be obtained.

Significant challenges remain for the full potential of FPIC protocols to be realised. The unwillingness of many states to recognise indigenous peoples' rights and to reform legislative and policy frameworks continues to constrain autonomy and territorial rights. This lack of rights recognition is compounded by discrimination against and misunderstanding of indigenous cultures and legal systems and the enormous influence extractive, energy and agribusiness corporations wield over decision-making processes impacting on Indigenous Peoples' rights. The presence of both armed and illegal actors and the failure to address on-going harms of externally imposed development activities are major obstacles to the development and implementation of FPIC protocols.

Outlook

Indigenous Peoples are developing FPIC protocols in good faith as a proactive means of operationalising their internationally recognised right to FPIC. However, the failure of states and businesses to respect the collective rights that FPIC aims to safeguard means that instead of being used to regulate consultations, FPIC protocols primarily serve as tools for strengthening self-governance and political mobilisation, for education, and as a means of resisting rights-denying projects.

The growing recognition of the authority of FPIC protocols by regional and international human rights, international developmental bodies and funders, and by some national actors, is encouraging. Developed in specific local contexts, FPIC protocols are more than the sum of their parts. As more Indigenous Peoples develop and demand respect for them, their impact will be magnified. The emergence of a body of practice in this area by Indigenous Peoples could, in time, establish a de-facto regulation of consultation and FPIC processes in accordance with international human rights law and indigenous customary law that states, corporations and international organisations cannot ignore.

International community legal, technical and financial assistance that empowers communities to assert their protocols through judicial and quasi-judicial processes and enables them to learn from each other's experiences through people-to-people exchanges at national, regional and international levels could help catalyse this much needed transformative change and better position Indigenous Peoples to realise their self-government and territorial rights.

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