

A CRITICAL STUDY OF FREE, PRIOR AND INFORMED CONSENT IN THE CONTEXT OF THE RIGHT TO DEVELOPMENT — CAN “CONSENT” BE WITHHELD?

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The principle of Free, Prior and Informed Consent (FPIC) has been gaining a great deal of importance and is a fast emerging principle of international procedural law especially in relation to indigenous rights. The doctrinal understanding of FPIC, however, is not entirely concretised as is evidenced in the different implementations of the principle by State and non-State actors and international law. A stark definitional difference can be seen in the usage of the term by the World Bank and the United Nations Declaration on the Rights of Indigenous Peoples. The World Bank calls for free, prior and informed “consultation” instead of “consent” which essentially indicates the absence of the right of withholding consent. To understand whether consent can be withheld under FPIC, it is important to study the UN Declaration on the Right to Development. Although the right to development is envisaged as a collective right, it is meant to target individuals as the ultimate beneficiaries. This multidimensionality of the right makes it highly cryptic. For the purposes of this paper, the right to development is analysed as containing in itself, as part of the right to develop, the principle of FPIC. Chapter I explains the principle of FPIC in the context of development and the relevant provisions of international law. In chapter II, it is argued that the containment of FPIC within the right to development adds to the murky legal regime of whether consent can ever be normatively withheld. Chapter III illustrates examples of how the courts have interpreted FPIC, development and

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the idea of “consent” and how an indigenous right to development can be a barrier in realizing the doctrinal idea of the ability to withhold consent. The paper intends to view FPIC from a right to development point of view rather than the accepted path of understanding it from a right to self-determination perspective; the relevance of the latter cannot be undermined in the development discourse but is not dealt with in this paper.

I. THE CONCEPT OF FREE, PRIOR AND INFORMED CONSENT

Many lands that are rich in resources are inhabited by indigenous groups¹ who depend on their territories for food and identity and have strong cultural, economic and spiritual links with them. With increasing urbanisation, resource extraction on indigenous lands is an inevitable eventuality. The extraction process leads to displacement and severs all links that the indigenous have with the lands they have traditionally inhabited. To mitigate some of the effects, the international community recognized several rights for indigenous protection. The principle of Free, Prior and Informed Consent (“FPIC” or the “Principle”) is one such mechanism. The concept of FPIC within international development law is most clearly stated in the United Nations Declaration on the Rights of Indigenous Peoples² (“UNDRIP”) in Articles 10, 11, 19, 28 and 29 which explicitly articulate the terms of the Principle. They prescribe situations in which FPIC must be obtained and also provide for instances where compensation may be sought if FPIC has not been obtained for example, for dumping of hazardous wastes, or for the taking of indigenous property³. In the development discourse, FPIC is particularly relevant when discussing large-scale undertakings such as construction projects including mega-hydroelectric dams, resource extraction and the designation of protected areas for conservation.⁴ In this context of “development”, Article 28 of the UNDRIP may be viewed as the main endowment of FPIC which states that indigenous people have a right to redress in the form of restitution or compensation if their lands and/or resources have been used or taken without their prior consent.

¹ Etymologically, the Latin word “indigena” is composed of two words, “indi” meaning “within” and “genere” meaning “root”. Being indigenous means to ‘live within one’s roots’. In India, the indigenous/aboriginals are called “Adivaasi” which comes from Sanskrit, *Aadi* meaning earliest and *Vaasi* meaning inhabitants.

² G.A. Res. 61/295, U.N. Doc. A/RES/61/295 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, 61st Session (December 22, 2006).

³ All property except physical property. Article 11(2) of UNDRIP provides for restitution in case cultural, intellectual, religious and spiritual property is taken from indigenous people without the use of FPIC.

⁴ SAM HICKEY & DIANA MITLIN, *RIGHTS-BASED APPROACHES TO DEVELOPMENT* 79 (1st Edn., 2009).

The United Nations (“UN”), multilateral development banks and international financial institutions such as the World Bank Group (“WBG”) as well as Multi-National Corporations (“MNCs”) have also advocated and backed the need to create local platforms that provide indigenous communities an avenue to participate in decisions that would affect their lives.⁵ The WBG was the first institution to acknowledge the harmful effects of development projects⁶ on the lives of indigenous people which led to the implementation of the operational policy in 1982 providing for indigenous protection measures.⁷ The current policy which lends itself to indigenous protection is Free, Prior and Informed Consultation (“FPICon”) which can be found in the World Bank’s Operational Policy 4.10 (“WBOP”), enforced in 2005.⁸ The World Bank’s adopted policy with respect to protection of indigenous rights takes on additional meaning in lieu of the fact that the Bank’s primary task is funding of development projects to alleviate world poverty. Since the beginning of negotiations leading to the current Policy, indigenous communities demanded the right to “withhold consent” and this was echoed by the World Commission on Dams⁹ (“WCD”) and the Extractive Industries Review.¹⁰ In fact, the Extractive Industries Review, which was commissioned by the World Bank itself pointed out that recognition and implementation of the right of affected people to free, prior and informed *consent* is a necessary condition for extractive projects to be successful in contributing to the World Bank’s mandate of poverty reduction.¹¹ The WBG, however, rejected these recommendations incorporating instead “meaningful and good faith consultation” without a right to veto.¹²

Apart from the problem of terminology in ‘consent vs. consultation’, it must also be noted that the UNDRIP, which uses ‘consent’ instead

⁵ SUZANA SAWYER & EDMUND TERENCE GOMEZ, *THE POLITICS OF RESOURCE EXTRACTION: INDIGENOUS PEOPLES, MULTINATIONAL CORPORATIONS AND THE STATE I* (1st Edn., 2012).

⁶ In its 1982 policy, the Bank acknowledged that ‘tribal peoples are more likely to be harmed than helped by development projects that are intended for beneficiaries other than themselves’.

⁷ Stefania Errico, *The World Bank and Indigenous Peoples: The Operational Policy on Indigenous Peoples between Indigenous Peoples’ Rights to Traditional Lands and to Free, Prior and Informed Consent*, 13 INT’L J. MINORITY & GRP. RTS. 367, 368 (2006).

⁸ Fergus MacKay, *The Draft World Bank Operational Policy 4.10 on Indigenous Peoples: Progress or More of the Same?*, 22 ARIZ. J. INT’L & COMPAR. L. 65, 66 (2005).

⁹ The WCD was formed in 1997 to research the environmental, economic and social impacts of large dams globally. FPIC was one of the principles advocated and recommended by the WCD.

¹⁰ The Extractive Industries Review was commissioned by the WBG in 2001 to analyse the impacts of development projects funded by them in the oil, gas and mining sectors.

¹¹ REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 357 (Stephen Allen & Alexandra Xanthaki eds., 2011).

¹² *World Bank Operational Policy 4.10*, WORLD BANK, ¶ 10, (Jul. 2005), <http://web.worldbank.org/WEBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,contentMD-K:20553653-menuPK:64701637-pagePK:64709096-piPK:64709108-theSitePK:502184,00.html>.

of ‘consultation’ is not a binding legal instrument. The ILO Convention No. 169¹³ (“ILO 169” or “ILO Convention”) on the other hand, is a legally binding international instrument dealing exclusively with indigenous and tribal peoples’ rights.¹⁴ However, only 22 States¹⁵ have thus far ratified this document, a circumstance that raises some doubt as to the legal relevance of the Convention on a global scale.¹⁶ Article 6 of the ILO 169 introduces 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.

The importance of FPIC has also assumed greater significance particularly in the development of the principles of international environmental law since the Convention on Biological Diversity¹⁷ (the “CBD”) and the subsequent Nagoya Protocol¹⁸. The Convention through its Bonn Guidelines and continuing programme of work recognises “prior informed consent”, “prior informed approval” and “mutually agreed terms” particularly under provisions of Article 8 (j) which deals with traditional knowledge and Article 10 (c) which deals with customary sustainable use of traditional knowledge. The expansion of the Principle is extremely important in environmental law discourse since indigenous peoples occupy areas that account for 80 percent of the world’s biodiversity.¹⁹ They are widely considered responsible stewards of their environments through their traditional knowledge and cultural links with nature, which protects the health of the ecosystem. UN’s Agenda 21 acknowledges that over many generations, indigenous people have developed a holistic traditional scientific knowledge of their lands, natural resources and environment.²⁰ It is imperative to understand that international instruments seeking to achieve sustainable development must only support projects that have the approval and

¹³ *Indigenous and Tribal Peoples Convention C 169*, INTERNATIONAL LABOUR ORGANISATION, (September 5, 1981), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C169.

¹⁴ Convention N. 169, INTERNATIONAL LABOUR ORGANISATION, (June 27, 1989), <http://www.ilo.org/indigenous/Conventions/loi169/lang--en/index.htm>.

¹⁵ India is not a signatory to ILO 169. However, the Convention and its relevance have been discussed in the Supreme Court of India in the recent *Vedanta case* discussed later in this paper.

¹⁶ Mauro Barelli, *Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead*, 16 INT’L J. HUM. RTS. 1, 5 (2012).

¹⁷ The Convention on Biological Diversity is an international agreement signed during the 1992 Rio Earth Summit and aims to achieve sustainable development through the protection of biological diversity. As of March 7, 2014, there are 194 Parties to the Convention.

¹⁸ The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity was adopted by the Conference of the Parties to the Convention on Biological Diversity in 2010.

¹⁹ PHYSICAL INFRASTRUCTURE DEVELOPMENT: BALANCING THE GROWTH, EQUITY AND ENVIRONMENTAL IMPERATIVES 231 (William Ascher & Corinne Krupp eds., 2010).

²⁰ AGENDA 21: THE EARTH SUMMIT STRATEGY TO SAVE OUR PLANET 30 (Daniel Sitarz ed., 1st Edn., 1993).

participation of indigenous peoples if meaningful sustainable development is the final goal.²¹

A. FPIC AND ITS INTERFACE WITH THE RIGHT TO DEVELOPMENT

International law is juxtaposed with provisions safeguarding indigenous rights and the UNDRIP is remarkable in the way western, written, individual rights are juxtaposed with the idea of having collective rights for indigenous groups.²² International law has progressed considerably in building upon existing civil and political rights and developing new obligations, which can be seen in the 1998 Aarhus Convention, which provides for FPIC in the form of rights of access to information and participation in decision-making.²³ Although the origins of FPIC are generally traced to civil, political and environmental rights and self-determination, there is an interface of the Principle with the human right to development. Article 7(2) of the ILO Convention states that consultation and participation is a matter of priority for the overall “economic development” of areas they [the indigenous] inhabit. It may be noted here that economic development is put on par, if not above rights of consultation and participation and “development” leading to extraction of resources on indigenous lands may be justified because it is understood that such development is for the improvement of the lives of indigenous communities themselves.

It is in this apposition of rights that the Right to Development (“RTD”) as envisaged by the UN Declaration on the Right to Development²⁴ (“UNDRD”) must be examined. RTD was first proposed in 1972 by Keba Mbaye²⁵, president of the Senegalese Supreme Court and judge with the International Court of Justice.²⁶ Political scientist Peter Uvin, summaries the history of the RTD, in which countries were the right-holders by saying,

“It was the kind of rhetorical victory that diplomats cherish: the Third World got its Right to Development, while the First World ensured that the right could never be interpreted as more of a priority than

²¹ Mauro Barelli, *supra* note 16, at 4.

²² Stephen Allen & Alexandra Xanthaki, *supra* note 11, at 182.

²³ PHILIPPE SANDS & JACQUELINE PEEL, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 780 (3rd Edn., 2012).

²⁴ G.A. Res. 41/128, UN GAOR, 41st Session, app. No. 53, U.N. Doc. A/41/53 (1976).

²⁵ Mbaye formally launched the idea of the ‘right to development’ in 1978 in a paper to the UNESCO Meeting of Experts on Human Rights called “Emergence of the ‘Right to Development’ as a Human Right in the Context of the New International Economic Order”. See also UNESCO document SS-78/CONF.630/8, July 16, 1979.

²⁶ NORMAND & ZAIDI, *supra* note 26, at 313.

civil and political rights, that it was totally non-binding, and that it carried no resource transfer obligations.”²⁷

Although the paper mainly focuses on RTD in how it interacts with FPIC, RTD in cases where countries are right-holders is also discussed briefly to understand its multi-dimensionality. It is argued that having multiple right holders of a cryptic right, makes an already leaden case of FPIC implementation stodgier when RTD is applied to indigenous populations as well as the countries they belong to. Special attention should be drawn to international legal procedures prescribed for RTD because ‘development’ has been used as a grand amorphous goal to cover a policy which, in fact, has caused violations of human rights.²⁸ The weaving of the RTD into the fabric of human rights can be traced to Amartya Sen’s concept of individual empowerment and public accountability with a human-centred approach to development.²⁹ Further, examples can be seen in the UN Development Program’s Human Development Reports in 1990 popularising a people-centric view of development³⁰, and the emergence of the new Sustainable Development Goals that are currently being debated.³¹ This is also adequately reflected in the preamble of the UNDRD, which defines development as,

“a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of their individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.”³²

The African Charter³³ was the first legal instrument to introduce the RTD in 1981. In February 2010, the African Union ratified the African Commission on Human and Peoples’ Rights’ (“ACHPR”) decision on the *Endorois case*³⁴ which held that FPIC including the right to withhold consent is a part of the RTD. It is the first time that the ACHPR has decided on and

²⁷ Sakiko Fukuda-Parr, *The Right to Development: Reframing a New Discourse for the Twenty-First Century*, 79 SOC. RESEARCH: AN INT’L Q. 839, 839 (2012).

²⁸ THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW 41 (Subrata Roy Chowdhury, Erik M.G. Denters & Paul J.I.M. de Waart eds., 1st Edn., 1992).

²⁹ See AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1st Edn., 1999).

³⁰ *Supra* note 26, at 313.

³¹ Sustainable Development Knowledge Platform, Outcome Document-Working Group on Sustainable Development Goals, (July 19, 2014), <http://sustainabledevelopment.un.org/focussdgs.html>.

³² G.A. Res. 41/128, U.N. GAOR, 97th Sess., U.N.Doc. A/RES/41/128 at annexure (December 4, 1986).

³³ *African Charter on Humans and Peoples Rights*, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (October 21, 1986).

³⁴ *Infra* note 71.

extended individual and peoples' rights to indigenous people, and the first time in the world that a RTD had been adjudicated upon.³⁵

The multi-dimensionality of the RTD i.e. it being an individual right, a State right and peoples' right might emphasise the principle character of the basic concern but does not expressly define the differentiated contents of such rights and their mutually complementary relationship³⁶ since the right has been used by both countries as well as peoples. The lack of content differentiation is further accentuated by incorporating elements of meaningful participation and consultation within the realm of RTD.

B. NON-STATE ACTORS AND THEIR CONTRIBUTION TO FPIC

Studies on *governmentality*³⁷ have shown how economic neoliberalism and globalisation have helped fade the State as a concrete form. As a result, power is redistributed and increasingly works through indirect ways such as through non-State financing actors³⁸ such as the World Bank as well as MNCs. It is therefore imperative to understand how FPIC has emerged through practice by such non-State actors.

While FPIC may be traditionally viewed as a concept embedded in the right to self-determination³⁹, within the ambit of international human rights jurisprudence, FPIC is also ensconced in property rights inter alia.⁴⁰ The UN Special Rapporteur on indigenous land rights in 2001 had observed that,

“The legacy of colonialism is probably most acute in the area of expropriation of indigenous lands, territories and resources for national economic and development interests. In every sector of the globe, indigenous peoples are being impeded in every conceivable way from

³⁵ Gabrielle Lynch, *Becoming Indigenous in the Pursuit of Justice: the African Commission on Human and Peoples' Rights and the Endorois* III AFRICAN AFFAIRS 24, 24 (2011).

³⁶ SUBRATA ROY CHOUWDHARY ET AL, *supra* note 28, at 85.

³⁷ *Governmentality* is a concept developed by Michel Foucault as the “art of government” or how governments try to produce the citizen best suited to carry out a government's aims and policies.

³⁸ ELVIRA PULITANO, *INDIGENOUS RIGHTS IN THE AGE OF THE UN DECLARATION* 154 (1st Edn., 2012).

³⁹ While there is no universally accepted definition of self-determination, in our context self-determination by indigenous peoples refers to their entitlement of being free to pursue their economic, social, cultural and political development. See Australian Government Attorney General's Department, *Right of Self Determination*, AUSTRALIAN GOVERNMENT, <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheets/Pages/RighttoSelfdetermination.aspx#iwhat> (Last visited August 2, 2014).

⁴⁰ Tara Ward, *The Right to Free, Prior and Informed Consent: Indigenous Peoples' Participation Rights within International Law*, 10 N.W. J. INT'L HUM. RTS. 54, 56 (2011).

proceeding with their own forms of development, consistent with their own values, perspectives and interests."⁴¹

Since "development" is one of the primary reasons to construct a principle such as FPIC, the main purpose of this paper is to re-adjust the lens through which FPIC is viewed traditionally to widen its ambit to include RTD as well.

II. PERILS OF THE NORMATIVE INFERENCE OF FPIC

When it comes to the question of extraction of resources and development projects, there appears to be a debate as to whether right to participation is the right to be consulted after a decision is made or does it include the right to withhold consent at the outset of a project which might lead to displacement.⁴² Extending the question to RTD, it may be asked that if a community has a right to develop, then can they withhold consent to a project which will potentially realise their right to develop economically?

A. HOW TO CONSULT? LIMITATIONS OF WORLD BANK'S FPICON

Paragraphs 10 and 11 of the WBOP provide the elements of the *process* of consultation which should reflect "broad community support" for a borrower to receive World Bank funding on a development project. The process has to be reflected in a report that must include proof that FPICon was conducted.⁴³ The report, to be produced by the borrower to show FPICon compliance, must document FPICon recommendations made by the borrower to the native communities through Indigenous Peoples Organisations as well as formal agreements with them *inter alia*.⁴⁴

Nigel Cross, who has extensive experience in working with the *Sahel*⁴⁵ in Africa, argues that indigenous and local communities such as the *Sahel* are invariably excluded from major decisions as central government revenues are bolstered by aid programmes such as ones by WBG which promote their own agenda without consulting the people they are supposed to help.⁴⁶ He further says that 'popular participation' is not enough, as although it allows the community a voice in decision-making and in project implementation, it does not

⁴¹ Erica-Irene A. Daes, Special Rapporteur, *Indigenous People and Their Relationship to Land, Final working paper* UN Doc. E/CN.4/Sub.2/2001/21, 49-50 (June 11, 2001).

⁴² Tara Ward, *supra* note 40.

⁴³ WBOP, ¶ 11(b).

⁴⁴ *Id.*, ¶ 11.

⁴⁵ The Sahel are one of the poorest and the most economically and politically oppressed people in the world.

⁴⁶ Nigel Cross, *The Sahel: The Peoples' Right to Development* (Minority Rights Group Report, 1990).

encompass the idea of the community setting the agenda; and asks, “in what sense can people ‘participate’ in their own lives?”⁴⁷ This is why care must be taken that FPIC is used by indigenous communities for their own protection and not as a compliance mechanism by companies (the Rio Tinto example below) serving as a tick-mark in their reports before displacement is carried out.

To expound, in their 2010 shareholder meeting, a senior shareholder of the Rio Tinto Group spoke about the importance of FPIC in the context of UNDRIP by saying that they “upped the space in their annual reports to reflect indigenous concerns” to prove their commitment to get FPIC right.⁴⁸ It must be noted that the Government of Norway has banned Rio Tinto for its flagrant environmental breaches and the company continues to be under the scanner for unethical mining in Mongolia which has resulted in water, ecology and indigenous peoples’ crisis.⁴⁹ The polarised truths of the situation, i.e., documented FPIC compliance by Rio Tinto while angry Mongolian herders’ claim that the company’s mining activity threatens their populace, seem to sum up the problem that looms before international law. To top this is the question of whether there can at all be an overarching standardised international principle that seeks to address the cultural and spiritual bonds an indigenous community might have with their lands. That, however, is a deeper philosophical question of the idea of legal pluralism and whether pluralism can exist in a world of diverse people socialised manifestly and differently.

B. WHO TO CONSULT? WHOSE CONSENT?

In the process of consultation/consent, proponents usually latch onto a certain representative and deal only with them from the outset. Great care must therefore be exercised that the representatives retain broad legitimacy throughout the process.⁵⁰ But how is this broad legitimacy determined in a diverse community? Katsuhiko Masaki eloquently frames the question by asking, “If the identity of an indigenous community is ‘hybrid’, is it feasible to define a clear-cut benchmark of ‘full consent’, drawing on a ‘centered’ image of deliberation-underlying the principle of FPIC- that regards decision making as a set of goal-oriented activities with a definite beginning and end?”⁵¹ To put the question in perspective, Masaki cites the example of a village called *Majuwa* in Western Nepal. *Majuwa* was traditionally inhabited by the

⁴⁷ *Id.*, at 27.

⁴⁸ *Rio Tinto Shareholder Discusses Importance of Free, Prior and Informed Consent*, [Capitalization] YOUTUBE, (22-4-2010), <https://www.youtube.com/watch?v=7vCbK68CKB8>.

⁴⁹ Rupert Neate, *Rio Tinto Accused of Environmental and Human Rights Breaches*, THE GUARDIAN, (April 18, 2013), <http://www.guardian.co.uk/business/2013/apr/18/rio-tinto-environmental-human-rights-breaches>.

⁵⁰ Robert Goodland, *Free, Prior and Informed Consent and the World Bank Group*, 4(2) SUST. DEV. L. & POL’Y 66, 68 (2004).

⁵¹ SAM HICKEY & DIANA MITLIN, RIGHTS-BASED APPROACHES TO DEVELOPMENT 71 (2009).

Tharus who were colonised in the nineteenth century by the *Pahadis*.⁵² In his book⁵³, Homi K. Bhabha provides a working theory on cultural hybridity that can be seen in the example of the *Majuwas* of Nepal as examined by Masaki. According to Bhabha, it is impossible to have a clear-cut divide between the coloniser and the colonised. In light of this assessment, assuming that FPIC/FPICon were to be applied to the village of *Majuwa*, who among the *Tharus*, would be consulted? Masaki's study shows that not all of the *Tharus* were landless or small farmers but a fraction of them were well-off owner cultivators and some of them, with the help of *Pahadis*, suppressed the poor majority.⁵⁴ Further, in *Majuwa*, all the elected representative political posts had been filled by males with the exception of one reserved seat for women. Afflicted by gender discrimination, in the early nineties, a group of women started a mother's group to tackle issues of hygiene, sanitation, alcoholism and domestic violence. The group was a mix of both *Pahadi* and *Tharu* women. After a tree-planting initiative, the mother's group was accused of being strained by policies activated by the Nepal Congress to undercut *Tharu* peasant women of the Communist Party of Nepal-Unified Marxist-Leninist.⁵⁵ Paragraph 10 of the WBOP states that the consultative process must establish "an appropriate gender and inter generationally inclusive framework", so how can this process be realised effectively in the case of *Majuwa*? The purpose of understanding the intricate and deep relationship between *Tharu* and *Pahadi* landowners, poor farmers and women is to understand that consent cannot be universal or even majoritarian because of the lack of homogeneity in indigenous peoples and groups. The process of consultation may not be feasible in the determination of who to consult/whose consent to take when discussing FPIC/FPICon in the absence of one group representing all diversities because of the probable *liminality* of colonial relations and the hybridity of indigenous communities as can be seen in the *Tharu-Pahadi* example.⁵⁶ Also, the ground reality of participation in the experience of Nigel Cross is that development projects involve written contracts that are signed by the representative of the local development association, which is in itself an officially sanctioned body, but they are never really signed and rarely discussed with the so-called 'project beneficiaries'.⁵⁷

C. THE FALLACY OF CONSENT IN LIGHT OF A RIGHT TO DEVELOPMENT: COMPLEX LEGAL REGIME INTERACTION

There is a lot of legal debate surrounding the nature of the RTD. It has been argued that an indelible element of the RTD is the appreciation of the

⁵² *Id.*, at 70.

⁵³ HOMI K. BHABHA, *THE LOCATION OF CULTURE* (1994).

⁵⁴ SAM HICKEY & DIANA MITLIN, *supra* note 51, at 74.

⁵⁵ SAM HICKEY & DIANA MITLIN, *supra* note 51, at 75.

⁵⁶ Another example of the problem of "who to consult" in FPIC implementation is illustrated in a case in Philippines in the next chapter.

⁵⁷ Nigel Cross, *supra* note 46, at 27.

importance of economic growth in the realisation of all human rights. The UN Independent Expert on the RTD, Arjun Sengupta, maintains that,

*“This is precisely why developing countries have always championed the RTD as more than the sum of specific rights and as including economic growth under an international order and social arrangement that enables them to enjoy this right.”*⁵⁸

It is the general drift of understanding that when the RTD was being evolved, the powers of the North and South were divided in the formulation of the right in that the South aimed at retributive measures aimed at rectifying economic disparities in the international economic system because of plunder and pillage.⁵⁹ Consequently, what emerged as the RTD in 1986 was a broad encompass stated in language that was elastic enough to hold not only different but also conflicting interpretations, for example Article 1 of the UNDRD formulates the RTD as one in which all peoples are entitled to participate in and enjoy every kind of development, while realising all fundamental freedoms at the same time. This sort of goal seems to be aiming at too many things at the same time without a structure.

Also, a few maintained that RTD was understood by the global South to aim at economic redistribution primarily; this may not be entirely factual. To elucidate, the example of what development meant for a least-developed country like Kiribati in 1987 can be looked at.⁶⁰ The President, in his speech said,

*“The problem of development is the total responsibility of our people. It is extremely necessary to underline our belief that our success in the endeavour to develop depends critically on the policies we pursue.”*⁶¹

The President's view of development is inward-looking and not seeking monetary help or resource allocation from developed countries. In 1987, fishing and fish stock were the main resources that needed to be exploited for development purposes (fulfilling basic needs of people) in Kiribati. Island States had to face a big problem in negotiating a fair deal for licensing distant-water fishing nations to fish within their economic zone. Even though as a new sovereign Kiribati had treaties and laws in place to prevent illegal fishing

⁵⁸ ISABELLA D. BUNN, *THE RIGHT TO DEVELOPMENT AND INTERNATIONAL ECONOMIC LAW: LEGAL AND MORAL DIMENSIONS* 83 (2012).

⁵⁹ ROGER NORMAND & SARAH ZAIDI, *supra* note 26, at 290.

⁶⁰ Kiribati achieved independence in 1979. It was granted LDC status by the UN. Kiribati had/has geographical problems being an Island State—very small land area, high population growth rate and transport and communications problems.

⁶¹ Jeremiah Tabai, President, Republic of Kiribati, *Speech at the H.V. Evatt Memorial Conference: The Right to Development* 4 (November 14, 1987).

in their economic zone, some of US nationals continued to fish illegally in their unpoliced 200 miles of the sea.⁶² Accepting this, the President said,

*"The clear message for all of us is that being poor or weak will not attract to us fair consideration or sympathy in all these talks. In fact the reverse is true."*⁶³

Kiribati received flak because they got into a commercial deal with Russia with regard to fishing in their territory. Interestingly, this is where the President exercised Kiribati's RTD by saying,

*"We will continue to make commercial deals with the Russians or with anybody else if it is in our national interest. This is our right [to development] if you use the theme and language of this meeting."*⁶⁴

In this case, the RTD exercised by Kiribati does not suggest a plea for wealth distribution, in fact quite the contrary. What it asks for is non-disturbance by heavy powers while Kiribati makes ways to develop through its own policies—development through its own means. If FPIC and RTD are both given to a right-holder thereby giving RTD a human rights turn, then a developing country's RTD may be in direct contravention with the indigenous' rights in that State. For example, if Kiribati wanted to implement a construction project for electricity generation on indigenous land, then how can both Kiribati and the indigenous be right-holders of the same right to development? And whose right will take precedence over whose? Consensus on what constitutes RTD has not been reached yet in the international community. There is dissent on whether a rights-based approach to development would be appropriate; as well as framing the RTD as a process of development. For example, the UNDP⁶⁵, the UNICEF⁶⁶, the UK Department for International Development and the Swedish International Development Agency have all openly acknowledged their support for a human rights based approach to development. In contrast, Aus Aid does not support a rights-based approach claiming that there is no clear understanding as to what it means.⁶⁷ The UNDRD, with its debatable legal status, combination of national, individual and collective rights and its expansive conception of development makes the RTD an inviting subject for legal commentary and interpretation. Some see it as a synthesis of recognised rights, some as an evolving human right while some view it as rhetoric and not law at all.⁶⁸ Interestingly, no one has shown that the UNDRD has

⁶² *Id.*

⁶³ Jeremia Tabai, *supra* note 61, at 6.

⁶⁴ Jeremia Tabai, *supra* note 61, at 8.

⁶⁵ United Nations Development Program.

⁶⁶ United Nations Children's Fund.

⁶⁷ MARGOT E. SALOMON & ARJUN SENGUPTA, *THE RIGHT TO DEVELOPMENT: OBLIGATIONS OF STATES AND THE RIGHTS OF MINORITIES AND INDIGENOUS PEOPLES* 7 (2003).

⁶⁸ *Id.*

made any difference in the behaviour of governments or the improvement of conditions as yet.⁶⁹ Additionally, RTD highlights democracy and effective participation at all levels and in all spheres as essential to true development- both moving towards a just social order.⁷⁰ But taking the example of Kiribati, when a developing State exercises its RTD economically, socially and politically, then utilitarian principles may be adopted and minority rights sacrificed. Should this be the case, a peoples' right to development will essentially clash with a State's and that is why the RTD cannot effectively work at the micro level because there is a high chance of the larger need negating elements of FPIC.

D. WITHHOLDING CONSENT - EXAMPLES IN CASE LAW

A working example of this inconsistency may be seen in the celebrated recent judgment of the *Endorois Welfare Council v. Govt. of Kenya*⁷¹ in Kenya. While the main point in the case was whether the *Endorois* community was "indigenous", the ACHPR defined the contours of the RTD under the African Charter for the very first time in this decision and held that the RTD required not only consultation with indigenous communities, but also for the State to obtain their "free, prior, and informed consent".⁷² The procedural element pertaining to FPIC described by ACHPR was grounded in its view that freedom of choice must be present as part of RTD.⁷³ The Commission, in its decision, found that communities must benefit from development projects and must reasonably share in the benefits made as a result of a restriction or deprivation of their right to the use and enjoyment of their traditional lands and of those natural resources necessary for their survival.⁷⁴ The Commission affirmed the importance and existence of both—RTD and FPIC but failed to shed light on *how* the freedom of choice while exercising these rights might be exercised. If freedom of choice and the right to withhold consent are valid under the RTD, then it should be capable of translating into a right to resist economic development as well. In fact, perhaps by guaranteeing sharing of profits under the RTD, the ACHPR shows that right to withhold consent might not be possible.

An example of the difficulty of withholding consent can also be seen in the case of *The Saramaka People v. Suriname*⁷⁵ before the Inter-American Court of Human Rights. The *Saramaka people* in Suriname in north-eastern South America filed a petition with the Inter-American Court after Chinese logging

⁶⁹ Subrata Roy Chowdhury, et al, *supra* note 28, at 27.

⁷⁰ Subrata Roy Chowdhury, et al, *supra* note 28, at 191.

⁷¹ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v. Kenya*, Comm. 276/2003 (February 4, 2010).

⁷² *Id.* at ¶ 291.

⁷³ Elizabeth Ashamu, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v. Kenya: A Landmark Decision from the African Commission*, 55 J. AFR. L. 300, 310 (2011).

⁷⁴ *Id.*, at 311 (2011).

⁷⁵ *Saramaka People v. Suriname*, Inter-Am. H.R. (ser. C) No. 185 (August 12, 2008).

and mining companies began devastating their lands.⁷⁶ The court affirmed the principle of FPIC under UNDRIP and extended its application to tribal peoples⁷⁷ who have a distinct relationship with their lands thereby assuaging some of the FPIC's criticism of inapplicability to non-indigenous people similar to the *Endorois case* in this regard. The court held,

*"The community should be informed of the risks involved, and where significant development projects are likely to have a major impact on the land, the group's free, prior and informed consent is required."*⁷⁸

It is interesting to note, that in this case too, the court affirmed the use of the term "consent" as opposed to "consultation". While the necessity and importance of "consent" has been established in case laws, such as the ones above, there will exist a normative problem if a community wants to withhold consent. The first is the existence of provisions which talk about benefit-sharing and sharing of profits. A strong example of this can be found in the proposed *American Declaration on the Rights of Indigenous Peoples*, which specifies that when the State owns the rights to mineral or subsoil resources, indigenous communities should be consulted prior to the exploitation of these resources and should share in the profits.⁷⁹ Simultaneously, it appears that indigenous peoples have no rights that can place liability in cases where they do not want to give consent and consecutively, do not want a share in profits. It is in this situation that an RTD confuses more and will continue to do so unless rights are unbundled and separately prioritised.

E. THE INDIAN EXPERIENCE—A VICTORY?

Another example of the consent-consultation nexus emerges from the very recent Indian judgment on bauxite mining in the state of Odisha.⁸⁰ The Supreme Court of India decreed against *Vedanta Resources* to mine in the Niyamgiri Hills in Odisha. In its judgment, the Court referred to ILO 169 as well as UNDRIP to reinforce the importance of indigenous rights in development projects.⁸¹ The Court also said, "The State has got a duty to recognise and duly support their [indigenous peoples] identity, culture and interest so that they can effectively participate in achieving sustainable development."⁸² Like the earlier cases, there is a set goal of development, sustainable

⁷⁶ Richard Price, *Saramaka People v. Suriname, A Human Rights Victory and its Messy Aftermath*, CULTURAL SURVIVAL (July 30, 2012), <http://www.culturalsurvival.org/news/saramaka-people-v-suriname-human-rights-victory-and-its-messy-aftermath>.

⁷⁷ As opposed to "indigenous" peoples.

⁷⁸ *Saramaka case*, *supra* note 75, at 133-134.

⁷⁹ Lisl Brunner, *The Rise of Peoples' Rights in the Americas: The Saramaka People Decision of the Inter-American Court of Human Rights*, 7 CHINESE J. INT'L L. 699, 701 (2008).

⁸⁰ *Orissa Mining Corpon. Ltd. v. Ministry of Environment and Forests*, (2013) 6 SCC 476.

⁸¹ *Id.*, at ¶ 37.

⁸² *Id.* at ¶ 39.

or otherwise, and the Court suggests that indigenous people have the right to participate in reaching that pre-decided goal. Even so, the Supreme Court ultimately left the decision of bauxite mining in the hands of local communities⁸³ and ordered the state government to organize *gram sabhas*⁸⁴ under *The Scheduled Tribes and the Other Traditional Forest Dwellers (Recognition of Forest Rights) Act* of 2006 to determine the views of forest dwellers on whether mining should be allowed or not.⁸⁵ In August 2013, all 12 villages involved in the referendum rejected *Vedanta's* proposed mining activity and in January 2014, the Government of India rejected *Vedanta's* mining plans in accordance with the Supreme Court's ruling and the referendum.⁸⁶

III. FPIC AND THE INEXORABLENESS OF DEVELOPMENT: WHAT EXPERIENCE HAS SHOWN SO FAR

The integrationist approach of development projects aiming at assimilating the indigenous communities into the dominant society has endangered indigenous peoples' identity and survival by imposing paths of pre-conceived notions of development and progress⁸⁷ which is precisely what RTD in the free and informed consent/consultation process does. It may be surmised that the regime interaction between various international and domestic instruments reveals a murky legal system which might not be viable for indigenous rights implementation because of the existing contradictions in the myriad rights. This is especially so when FPIC and RTD are clubbed together making the legal implementation of FPIC implausible.

The reality of the unenforceability of FPIC, even in cases where the legislature has imbibed the concept, can be seen in the widespread phenomenon of imposing projects involving development activities such as mining, logging, dam construction and mono-cropping, which has come to be termed by some indigenous people as 'development aggression'.⁸⁸ In the global society, the 'universal pillars of democratic pluralism,' i.e., the rule of law, a legitimate government and the protection of human rights and freedoms, must be respected so as to prevent globalisation from turning into 'trade sovereignty',

⁸³ Kumar Sambhav Srivastava, *Gram Sabha gets a Boost*, DOWN TO EARTH (May 15, 2013), <http://www.downtoearth.org.in/content/gram-sabha-gets-boost>.

⁸⁴ A Gram Sabha works as a local self-government institution at the village or small town level in India.

⁸⁵ Arunima Mishra, *Rule of Thumb*, BUSINESS TODAY, (September 15, 2013), <http://businesstoday.intoday.in/story/orissa-niyamgiri-rejects-vedanta-entry-impact-reasons/1197972.html>.

⁸⁶ Neha Sethi, *Government rejects Vedanta's Bauxite Mining Plans in Niyamgiri*, LIVEMINT (JANUARY 11, 2014), <http://www.livemint.com/Politics/RfscBlhoFhQDapFA6uU7UK/Government-rejects-Vedantas-bauxite-mining-lans-in-Niyamgi.html>.

⁸⁷ Stefania Errico, *supra* note 7, at 367.

⁸⁸ Stephen Allen & Alexandra Xanthaki *supra* note 11, at 182.

i.e., the priority of economic interests over politics and justice.⁸⁹ If the RTD does not contain the right to “not develop” or develop alternatively according to a community’s own idea of development, there is a strong chance that principle might give way to such trade sovereignty. Similarly, the World Bank’s FPICon, which does not include the right to withhold consent might preempt self-definition and autonomy by disallowing an indigenous community its right to resist. This is especially relevant in light of the fact that while the link between economic growth and poverty reduction is not just uncertain, the claim that infrastructure improves the overall quality of life remains heavily contextual.⁹⁰ More often than not, development projects cause displacement, increased poverty and a wider rich-poor disparity by creating the “newly poor”. Understanding the truth of the failure of the concept of development for minorities, the recognition and realisation of the right to reparation for indigenous peoples for all the injustices committed against them through the ages, if translated into practice, must allow them to regain control of their lives and lands.⁹¹ However, provisions and interpretations of both FPIC and FPICon point in the direction of adequate compensation as a remedial solution and won’t be entirely effective, failing a right to veto in the consultation and participation process.

A. CAN WE LEAVE THE BAUXITE IN THE MOUNTAIN?⁹²

A pre-affected community could pre-empt a possible case of “development aggression” if they have a right to veto following the process of FPIC. In fact, the word ‘consent’ instead of ‘consultation’ must entail the right to veto to make it effective. Although it is still not clear whether the right to veto is part of FPIC, the likelihood of the answer being ‘no’ is strongly suggested by the objections raised by governments during the sixty-first UN General Assembly when the UNDRIP was adopted.⁹³ The majority were either silent⁹⁴-emphasising consultation as the appropriate standard without mentioning FPIC⁹⁵- or were strongly opposed, citing State sovereignty and primacy of national law, State ownership of subsoil resources, and discrimination if

⁸⁹ JANNE ELISABETH NIJMAN, *THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW* 358 (2004).

⁹⁰ William Ascher & Corinne Krupp *supra* note 19, at 130- 131.

⁹¹ REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 622 (Federico Lenzerini ed., 2008).

⁹² Arundhati Roy, *The God of Small Things, Lecture at Harvard University: Can we Leave the Bauxite in the Mountain?* (April 1, 2010).

⁹³ Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. GAOR, 61st Session Supp. No. 49, U.N. Doc. A/61/295 (October 2, 2007), <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>.

⁹⁴ *Id.*, (Against the Declaration Australia, New Zealand, Russia, United States).

⁹⁵ *Supra* note 93. (The Nordic countries, Canada, Italy and Japan).

indigenous peoples were accorded “veto” rights.⁹⁶ Additionally, the former special rapporteur on the situation of human rights and fundamental freedoms of indigenous people also pointed out the ‘implementation gap’ including inconsistencies between laws within States and international law and domestic regulation.⁹⁸

The question of whether the FPIC imposes an obligation on States to obtain consent before a development project is usually answered in the negative. This is primarily because of the claim that indigenous rights ‘must necessarily’ be balanced by the need for Governments to own or regulate resources in the interests of all their citizens.⁹⁹ Although Judge Weeramantry of the International Court of Justice famously said,

*“There is not even the semblance of a suggestion in contemporary international law that [human rights] obligations amount to a derogation of sovereignty.”*¹⁰⁰

State sovereignty over resources and its purported use for the benefit of all cannot be transcended easily. As an example, as per the Australian *Native Title Act* of 1993, native title does not extend to minerals, petroleum and groundwater¹⁰¹, which remain with the Crown.¹⁰² Apart from the problem of ownership of resources in a sovereign, the other issue which makes “consent” completely inoperable is the fact that States strongly oppose the fact that groups within their populations (be they indigenous or non-indigenous) may have the power to veto development projects allegedly of benefit to the entire country, for this would critically impair their ability to control natural resources for the purpose of national development.¹⁰³ Further, if the operating country is developing/under-developed, then they could be initiating development projects as part of their RTD. An example of this dichotomy can be seen in the case of the indigenous people of *Sipicapa*, Guatemala, who voted overwhelmingly against a mining project in a formal referendum and have appealed the decision of the Constitutional Court of Guatemala, which recognised that their referendum was allowable under existing law but undercut its legal significance by ruling that the Ministry of Mines and Energy retained

⁹⁶ *Supra* note 93. (UK, Pakistan, Saudi Arabia, a joint African statement, Venezuela/Spain/Central America, Kuwait, France, and Brazil/Latin America).

⁹⁷ Fergus MacKay, *supra* note 8, at 79.

⁹⁸ Stephen Allen & Alexandra Xanthaki *supra* note 11, at 49.

⁹⁹ Mauro Barelli, *supra* note 16, at 8.

¹⁰⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), Separate Opinion of Judge Weeramantry 647, <http://www.icj-cij.org/docket/files/91/7361.pdf>.

¹⁰¹ S. 225, Existence of Native Title, Native Title Act, 1993.

¹⁰² Micheal Crommelin, *Resources Law and Public Policy*, 1 W. AUS. L. REV. 3 (1983).

¹⁰³ Mauro Barelli, *supra* note 16, at 10.

exclusive authority over the disposition of natural resources.¹⁰⁴ The effect of this, apart from a pending appeal, is violent resistance by the affected peoples for safeguarding rights to their traditional lands. This can be seen in the speech given by one of the community representatives in the Guatemalan case who stated,

*“We believe that community consultations are the use of reason, the use of a people’s word of honour, and a direct manifestation of local peoples’ rejection of the plunder of their territory. When the State does not recognise such consultations as binding, it only leaves the path to widespread disobedience. And such actions only precede other struggles, other uprisings, which are not going to be pacific. We are here to warn: the people are tired of declarations, tired of having their community consultations ignored, tired of dysfunctional dialogue roundtables and high level commissions.”*¹⁰⁵

Most violent uprisings against mines and dams have been due to the lack of power to withhold consent in countless instances throughout the world. In the words of Brant McGee, “among the factors that contribute to the violence is that each situation is a zero-sum conflict—there is one winner and one loser—the mine will either be stopped or it will be developed.”¹⁰⁶

B. INDIGENOUS PEOPLE, NATIONAL DEVELOPMENT AND COURTS

As discussed in this paper, RTD can be held by multiple right-holders. In doing so, there is a danger that rights held by groups will then have to be exercised by the State for enforcement. It is said that this can be remedied by mechanisms that establish correspondence between the States asserting that right and the individual or group enjoying it.¹⁰⁷ However, it is submitted that although FPIC is precisely such a mechanism of correspondence, in the case of States exercising their RTD, FPIC mechanisms might cease to operate. For example, in Peru, the State supported mining activities in areas inhabited by rural communities. The State support was justified by policies that were defined by its determined promotion of economic development.¹⁰⁸ In response to the outrage of the Amazonian Peruvians opposing these policies, President

¹⁰⁴ Brant McGee, *Participation with a Punch: Community Referenda on Dam Projects and the Right to Free, Prior and Informed Consent to Development*, 3 WATER ALT. 162, 181(2010).

¹⁰⁵ James Rodriguez, *Los Encuentros, Solóla to Guatemala City*, http://www.nisgua.org/themes_campaigns/index.asp?id=3124&mode=pf (Last visited October 12, 2013).

¹⁰⁶ Brant McGee, *The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development*, 27 BERKLY. J. INT’L L. 570, 574 (2009).

¹⁰⁷ MARGOT E. SALOMON & ARJUN SENGUPTA, *supra* note 67, at 7.

¹⁰⁸ Elisabeth G. Salmon, *The Struggle for Laws of Free, Prior and Informed Consultation in Peru: Lessons and Ambiguities in the Recognition of Indigenous Peoples*, 22 PACIFIC RIM L. & POL’Y J. 353, 374 (2013).

Alan Garcia said that “these second-class citizens” are like “farmer’s dogs that don’t eat or let anyone else eat.”¹⁰⁹

The interaction between business and human rights had translated into a *Global Compact Plan* launched by the UN Secretary General in 1999 in a bid to correct the negative consequences of globalisation and the free market principle.¹¹⁰ While the FPIC might be viewed as an offshoot of such a plan, the right to economic development seems to be, in theory, in conjunction with the free market principle suggesting that the right-holder of the RTD has the right to operate in the free market which can be seen in Garcia’s vulgar statement.

Despite violent resistance in the forest of *Bagua*¹¹¹, the government passed a free trade treaty and excluded the inhabitants of the place that would be affected from all negotiations.¹¹² Peru is one of the twenty-two States to have ratified the ILO 169, which constrains Peruvian policy to the extent of these international standards and the case at *Bagua* demonstrated an egregious flouting of the FPICon principle. In defence of the government, Garcia said,

*“Four hundred thousand natives cannot say to twenty-eight million Peruvians that you do not have the right to come here. This is a grave error and those who think like this, want us to revert to the irrationality of the past.”*¹¹³

The President’s statement comprehensively endorses what this paper contends. That is, RTD which is exercised by States “for the greater good” cannot and should not be bunched with principles like FPIC especially since the subjectivity and relativity of development is not stressed upon in international law.

On the upside in Peru, after years of conflict between the indigenous communities and the government and a statement by James Anaya¹¹⁴ after his visit to Peru insisting on using FPIC to stop further instances of violence, a new legislative process was created in 2011¹¹⁵ which introduced FPICon formally in accordance with ILO 169. While an expert in the Peruvian case maintains that the legislation¹¹⁶ has brought about some reform to ame-

¹⁰⁹ *Small Farmers, Big Change*, (June 25, 2009), <http://smallfarmersbigchange.coop/2009/06/>.

¹¹⁰ JANNE ELISABETH NIJMAN, *supra* note 89, at 355.

¹¹¹ On June 5, 2009, 33 people died (including 23 police officers) and at least 205 people were injured when the police intervened to end protests by Indigenous groups near the town of Bagua, in the department of Amazonas.

¹¹² MARGOT E. SALOMON & ARJUN SENGUPTA, *supra* note 107, at 375.

¹¹³ SALOMON & ARJUN SENGUPTA, *supra* note 107, at 378.

¹¹⁴ UN Special Rapporteur on the Rights of Indigenous Peoples.

¹¹⁵ Law Decree No. 29785—Law on the Right to Prior Consultations of the Indigenous or Native Peoples in accordance with the International Labour Organisation Convention No. 169.

¹¹⁶ Formalised by the Ministry of Culture in April 2012.

liorate the “second-class” status of the indigenous communities in the Amazon,¹¹⁷ others remain deeply skeptical of the actuality of the success of FPICon considering that new concessions continue to be granted to companies for oil exploration, mining and other developmental projects in the region without FPICon.¹¹⁸ While some opine that the bottom line of FPIC is that the affected communities must understand that they will benefit from the proposed project,¹¹⁹ this line of understanding prohibits the possibility of withholding consent while simultaneously affirming a community’s RTD.

Since the inception and spread of globalisation, MNCs have been powerful players in the international society and are endowed with a ‘kind of derived International Legal Personality’.¹²⁰ The rise of the MNC saw great power, profits as well as tortious side-effects which led to social pressure that they do business ethically with respect to labour standards, human rights and the environment.¹²¹ To understand the ground reality of FPIC, an example of Philippines might be useful. Philippines has an Indigenous Peoples Rights Act which mandates the National Commission on Indigenous Peoples (“NCIP”) in Philippines to ensure implementation of the FPIC. Minter, Brabander *et al* studied a municipality called *Dinapigue* in the Philippines where two corporations operate in areas inhabited by the *Agtas*, an indigenous community.¹²² According to the national legislation, there is a statutory requirement to obtain FPIC from the *Agtas*. While the logging activities were still nascent, the *Agtas* regarded “development” with mixed feelings,

*“The logging operation can help us, we can benefit from it, but at the same time it also affects us. Because as you can see, there are less big trees, less birds, less fish in the rivers. I would prefer if the logging would be totally stopped. [. . .] But if you have cash at least you can buy clothes.”*¹²³

As the years progressed, the study found that more and more *Agtas* were disillusioned and mistrustful of mining and logging activities in their area and refused to participate in further projects. Nonetheless, a corporation produced a hand-written agreement stating that the *Agtas* approved of a mining operation in mid-2004.¹²⁴ On examining FPIC in this context, it was found out

¹¹⁷ MARGOT E. SALOMON & ARJUN SENGUPTA, *supra* note 107, at 382.

¹¹⁸ Amnesty International Submission to the UN Universal Periodic Review, 14th Session, 3 (2012), <http://www.amnesty.org/en/library/info/AMR13/003/2012>.

¹¹⁹ Robert Goodland, *supra* note 50, at 68.

¹²⁰ NIJMAN, *supra* note 89, at 354.

¹²¹ NIJMAN, *supra* note 89, at 355.

¹²² Tessa Minter, Victor De Brabander, Jan Van Der Ploeg et al, *Whose Consent? Hunter-Gatherers and Extractive Industries in the Northeastern Philippines*, 25 SOC. & NATURAL RESOURCES: AN INT’L J. 1241, 1243.

¹²³ *Id.*, at 1246.

¹²⁴ *Supra* note 122, at 1247.

that consent was not free because the NCIP itself was trying to influence some *Agtas* opposed to mining by negotiating with them for full consent.¹²⁵ A similar experience was noted in the case of Peru as well where the chief agency concerned with FPIC implementation was from the Ministry of Culture.¹²⁶ The question that ensues is whether consent can at all be free if it is procured from an agency that is an offshoot of a government with a set agenda. The Philippines study also found that both corporations had started operations years before they obtained consent which raises the frequently asked question of whether FPIC applies to on-going projects as well.¹²⁷

C. UNDERSTANDING “DEVELOPMENT” AS THE PROBLEM FOR FAILURE TO IMPLEMENT FPIC

In *Lansman v. Finland*¹²⁸, the Committee on the Elimination of Racial Discrimination held that the exploration of resources for national development must be exercised consistently with the rights of indigenous and tribal peoples. The question then is how can two different claims to the same land and resources (protection v exploitation) be exercised consistently? Joshua Castellino asks, “Does the concept of ‘development’ offer an adequate vehicle for the furtherance of the rights of indigenous peoples?”¹²⁹ The answer, after a review of the ground reality, is an unequivocal “no”. In fact, there is no value in internationalising the plight of indigenous people in a RTD. According to Mauro Barelli, FPIC has its normative foundations in Article 32 of the UNDRIP¹³⁰, which offers a flexible approach to the principle and this approach is fast gaining international recognition.¹³¹ It is this flexibility (the right of the indigenous to pursue their own idea of development), albeit operating in the discourse of development, which renders withholding consent a distant reality. As Boaventura de Sousa Santos puts it, people do not starve because they are poor and marginal, but are starved because they are impoverished and marginalised.¹³² In the preface to a book on the UN’s Agenda 21¹³³, U.S. Senator Paul Simon (January 8, 1993) acknowledges that “in the blind rush towards economic prosperity, mankind has placed a tremendous strain on our environ-

¹²⁵ *Supra* note 122, at 1249.

¹²⁶ MARGOT E. SALOMON & ARJUN SENGUPTA, *supra* note 107, at 385.

¹²⁷ MARGOT E. SALOMON & ARJUN SENGUPTA, *supra* note 107, at 1250.

¹²⁸ *Ilmari Lansman et al v. Finland*, (2005) Human Rights Court, Comm. 1023/2001, U.N. Doc. A/60/40, Vol. II, 90.

¹²⁹ Stephen Allen & Alexandra Xanthaki *supra* note 11, at 375.

¹³⁰ Art. 32 states that indigenous people have the right to determine and develop strategies for the development of their lands and resources. Consent must be obtained from them prior to any development activity. State shall provide reparation measures for economic, social, environmental, cultural and spiritual side-effect that may ensue from the activity.

¹³¹ Mauro Barelli, *supra* note 16, at 15-16.

¹³² BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE 289 (2d Edn., 2002).

¹³³ Daniel Sitarz *supra* note 20.

ment". However, he also says that, "Given our country's effect on the world economy, the United States should lead the worldwide effort for a better environment." It is this linkage of economics to environment and subsequently to the central purpose of development that makes one rethink the definition of development as we see it. It is said that the concept of FPIC is based on the rights of participation and consultation, self-determination, and indigenous property rights.¹³⁴ The RTD is seldom used as an instrument to understand why it is not possible to withhold consent. It has been suggested that by focusing predominantly, if not exclusively, on norms of international law that relate to public issues such as intervention or self-determination, international lawyers fail to reveal the norms and institutions that facilitate the making of a global market, thereby contributing to the sense that economic liberalisation is natural and inevitable.¹³⁵

IV. CONCLUDING REMARKS

Substantively, the right of FPIC is grounded in, and is a function of indigenous peoples' inherent and prior rights to freely determine their political status and freely pursue their economic, social and cultural development. Procedurally, FPIC requires processes that allow and support meaningful and authoritative choices by indigenous peoples about their development paths.¹³⁶ While this paper has concentrated on the difficulty in withholding consent in the development context, a joint Asian Development Bank and World Bank survey found that low-income rural people in China, India and Thailand typically believe that the expanded transport opportunities are to their benefit (Cook 2004).¹³⁷ This highlights the complexity of indigenous people's relationship with extractive industries. They may be simultaneously attracted to the promise of material benefits and repelled by the environmental damage that companies cause.¹³⁸

The concept of the interdependence and indivisibility of human rights, as originally conceived, refutes any suggestion of a hierarchy of rights but beyond this, the concept escapes precise definition.¹³⁹ While having interdependent and indivisible rights from a human rights perspective may provide the right-holder beneficial enforcement options, the same indivisibility when applied to nation States, collective peoples and individuals, may set a hierarchy

¹³⁴ Brant McGee, *supra* note 106, at 571.

¹³⁵ Anne Orford, in TREVOR REDMOND, PEOPLE, STATES AND HOPE: COSMOPOLITANISM AND THE FUTURE OF INTERNATIONAL LAW 63 (2012).

¹³⁶ Standard Setting: *Legal Commentary on Free, Prior and Informed Consent*, Working group on Indigenous Populations, 23rd Session (2005) E/CN.4/Sub.2/AC.4/2005/WP.1, 15.

¹³⁷ Rosemary Morales Fernholz, in Ascher & Corinne Krupp *supra* note 19, at 227.

¹³⁸ Tessa Minter, et al, *supra* note 122, at 1251.

¹³⁹ Helen Quane, *A Further Dimension to the Interdependence and Indivisibility of Human Rights?: Recent Developments Concerning the Rights of Indigenous Peoples*, 25 Harv. Hum. Rts. J. 49, 49 (2012).

on the rights based on utilitarian principles. In the context of the global development model promoting Foreign Direct Investment and bilateral investment agreements, economic imperatives are the dictators of the legislative protection afforded to indigenous rights which often clash with the interests of transnational corporations.¹⁴⁰ In the case of FPIC and RTD, there are several issues with even the normative foundations of UNDRIP's FPIC. As drawn from the examples in Peru and the Philippines, the fundamental problem of FPIC is the lack of its independence from a political agenda which is strongly pro-mining, and therein lies the fallacy.¹⁴¹ Also, the specific right to FPIC remains tied to indigenous peoples and has been extended to tribal peoples but its application to other populations and communities in similar development contexts is an unsettled legal issue.¹⁴²

Some deem the RTD important because it resulted from demands by developing countries for greater justice in international economic governance. It also remains the only international human rights instrument that addresses the need for joint international action to address the human rights consequences of global economic arrangements.¹⁴³

Indigenous peoples are taught to traditionally apply FPIC by obtaining and asking for permission from animals, plants, minerals and spirits living in places they have traditionally used when they are contemplating any activity ("developmental") that might destroy the equilibrium of the place.¹⁴⁴ Ironically, we the developed, use the FPIC on the indigenous as they do on plants and animals except that our permission is more on the lines of an administrative procedure that must be conducted. One of the reasons for this is the disconnect we, the developed, have with the indigenous. It appears that "we" are talking about "them" while protecting "their" rights. In human history, differences have always been perceived as "better" or "worse" involving competitive overtones, not as "different but of equal value". Non-binding instruments such as Agenda 21 and its urge for broad public participation and the resulting strategy of multi-stakeholder processes demand from us, that "them" becomes "we, as different members of one process".¹⁴⁵ Sadly, this is not reflected in either UNDRIP and ILO 169 or the WBOP.

At the most it may be said that FPIC is perhaps an evolving principle of customary international law which can be seen in the practice of Denmark and Spain, which, along with the European Commission, have incorporated

¹⁴⁰ Stephen Allen & Alexandra Xanthaki *supra* note II, at 320.

¹⁴¹ Tessa Minter, et al, *supra* note 122, at 1252.

¹⁴² Brant McGee, *supra* note 106, at 572.

¹⁴³ Sakiko Fukuda-Parr, *supra* note 27, at 840.

¹⁴⁴ JACKIE HARTLEY, PAUL JOFFE & JENNIFER PRESTON, REALISING THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: TRIUMPH, HOPE AND ACTION 126 (2010).

¹⁴⁵ EARTH SUMMIT 2002: A NEW DEAL 79 (Felix Dodds ed., 2002).

the principle of FPIC of indigenous peoples into their development strategies.¹⁴⁶ Apart from the unworkability of “consent”, read together with the RTD and the lack of strong enforceability provisions, the other problem is that of the structure of international law itself. Sundhya Pahuja attributes the instability of international law to its postcolonial and political qualities.¹⁴⁷ She says that the political quality of international law describes the gap between what the law aspires to be and what the law is, as found in the treaty and custom trying to validate that aspiration.¹⁴⁸ The political reluctance to give a strong, enforceable right to withhold consent or a right to veto can be seen in the execution of international law in that, UNDRIP cannot be enforceable unless it becomes a principle of customary law. Strong aspects of FPIC (withholding consent and right to veto) cannot become customary law failing State practice. So, in effect the ILO is the only relevant, enforceable instrument but it recognises State sovereignty over natural resources and provides the need to “consult” rather than obtain consent in the extraction of these resources.¹⁴⁹ Even then, only 22 States have ratified the Convention not leaving much room for speculation on the political drift of FPIC. What use is rattling the use of the Principle by corporations as part of their annual reports? It has been argued that apart from the appalling greed for extreme power and wealth that certain organisations exhibit unashamedly, there are two more factors that fuel our unsustainable behaviour. First is our capacity of imagination and living in a false reality by shutting out unpleasant truths and the other is strong behavioural patterns becoming strong habits that are difficult to break.¹⁵⁰ If development based on economics can be viewed as a “habit”, then the principle of FPIC certainly doesn’t break away from it as it is understood today. Having elements of FPIC in the RTD and vice-versa worsens the problem and takes away a bigger chunk of the possibility of withholding consent under the principle of free, prior and informed consent.

¹⁴⁶ Stephen Allen & Alexandra Xanthaki *supra* note 11, at 310.

¹⁴⁷ SUNDHYA PAHUJA, *DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY* 25 (2011).

¹⁴⁸ *Id.*, at 91.

¹⁴⁹ Article 15(2) of the ILO 169.

¹⁵⁰ Felix Dodds *supra* note 145, at 81.