

The spirit of FPIC: lessons from Canada and the Philippines

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by **ABBI BUXTON**

The spirit of FPIC is that development should become accountable to peoples' distinctive cultures, priorities and unique paths to self-determination, not endanger their very survival.

Joji Carino and Marcus Colchester
(2010).¹

Embracing the 'spirit of FPIC' means enabling genuine inclusion of indigenous peoples' perspectives and values and recognising their rights to self-determination. In this article, I look at two case studies in which indigenous peoples participate in FPIC or FPIC-type processes. Both case studies are in the context of mineral mining, an industry which brings into stark contrast competing interests and views. Processes that allow for a diversity of views to be incorporated into mutually beneficial decision-making are therefore of the utmost importance.

I begin the article by discussing each of the case studies in turn, first the Philippines

and then Canada. In each case I explore the institutions supporting FPIC, and how they work in practice. Building on this analysis, I then draw out some lessons from the two case studies, reflecting on how institutions may be designed or redesigned to reflect the true spirit of FPIC.

Legal recognition of FPIC: a case from the Philippines

The Philippines is a country that suffers huge poverty (ranked 97th out of 169 countries in the 2010 Human Development Report) but also has enormous mineral wealth (estimated at US\$3 trillion) – only 2% of which is currently explored. However, it is estimated that half of the area identified for mining development in the Philippines is subject to indigenous land claims (Holden, 2005).

Institutions for FPIC

The Philippines is one of the few countries in the world to have written FPIC into

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Photo: Andy Whitmore, PIPLinks

Barricade set up to protest against the Didipio Mine, northern Luzan, the Philippines.

national laws (others include Australia and Bolivia). FPIC is regarded as 'essentially the heart and soul' (ESSC, 1999) of the Indigenous Peoples' Rights Act (IPRA) 1997, which requires consent to be determined by 'the consensus of all members of the Indigenous Cultural Communities/ Indigenous Peoples... in accordance with their respective laws and practices' (Section 3g).

The body charged with implementing the IPRA is the National Commission on Indigenous Peoples (NCIP). The NCIP's implementing rules and regulations make clear the process for achieving FPIC, including who should be present, the period in which elders/ leaders should hold consultative meetings with the members (a 15-day period), and how decisions should be arrived at. Further to that, it states that these practices should reflect the customary practices of indigenous communities.

FPIC in practice

The NCIP is not independent from political processes: commissioners are selected by the President's office rather than the communities themselves. This has resulted

in widespread reports of the NCIP having bribed village leaders, created new 'leaders' where consent from the true leaders was not forthcoming, purposefully misled communities and falsified documents (Colchester and Ferrari, 2007).

The requirement to ensure FPIC is achieved in accordance with customary systems is arguably the most progressive part of the IPRA. However, it is often seen as 'a technical obstacle to be overcome as quickly as possible' (UNHCR, 2008). Meetings are not organised on the basis of the traditional customs of indigenous communities, rarely follow community procedures to reach consensus, and the timeframe allowed (a total of 55 days for the whole process) does not usually give sufficient time to complete traditional decision-making processes.

Guidelines issued in 2006 weakened the right to FPIC as the government wanted to further streamline the consultation processes. The guidelines are regarded as hurried and mechanical. They provide limited information to communities, with local communities in one case being told

Photo: DIOPIIM Committee on Mining Issues (DCMI)



House belonging to Manolita and Loloy Galvez, who refused to sell to a mining company, so the company constructed the mine around them.

that they would become millionaires and be able to buy Mercedes Benz cars if they were directly affected by the mining operations (Goodland and Wicks, 2009). They also prescribe the establishment of indigenous authorities even where these are not in accordance with customary laws and practices.

Indigenous peoples' efforts to uphold their right to FPIC have brought them into direct, and often violent, conflict with both mining companies and the government – as experiences at Dipido mine in the Nueva Vizcaya and Quirino provinces, mining exploration in the ancestral lands in Bakun, Benguet, and many others show.² According to one group of indigenous peoples (Salamat, 2011):

A pattern has been established each time: mining exploration permits, mineral sharing and production applications, and coal mining contracts were granted by the government to private mining corporations before the onset of military operations.

The situation has got so bad that indigenous groups are now campaigning for the IPRA to be scrapped, as FPIC has been 'debased and debauched by the self-serving interests of companies and the NCIP' (KAMP National Alliance of Indigenous Peoples Organisations, 2011).

The Philippine experience demonstrates

a failure to implement the spirit of FPIC, instead engineering consent and complying only with the letter of the law. Mineral investments promoted by both the government and mining companies are given priority without considering conflicting or alternative views. As Joji Carino says:

While we must muster all of the economic, developmental, environmental and technical arguments in support of FPIC, ultimately it will require a political process that prioritises cultural and natural diversity as core values in our lives and our survival.

Understanding the 'spirit of FPIC' – a case from Canada

Canada is a country which benefits from its rich resource endowments: mining contributed \$53.9 billion (over 4%) to Canada's GDP in 2010 (Industry Canada 2011). However, Canada has a large indigenous population and an estimated 1200 aboriginal communities are located within 200 kilometres of a mining operation.

Institutions for deliberative processes

In contrast to the Philippines, Canada's constitution and case law does not allow for FPIC where consent is equated with a right to veto. In effect, the government prioritises benefits to the wider population over the impacts on local communities near or on the mining site.

The law does protect the right of indigenous peoples to be consulted through deliberative processes (i.e. 'meaningful consultation' ensuring all parties are better informed in decision-making), but it does not **require** that decisions accommodate feedback given in participation processes (UN Observer Delegation of Canada, 2005). Aboriginal groups continue to petition against this and for the right to 'consent'.

² For more information, see: www.minesandcommunities.org

Despite this, Canada's institutional structures for participation and decision-making on natural resource and mining projects (in particular in environmental assessment practices) go a long way to reflecting the **spirit** of FPIC. Indeed, the Supreme Court's ruling in *Delgamuukw v British Columbia* (1997: 3 SCR 1010) stated that, in the case of titled lands, the government's duty to consult is often 'significantly deeper than mere consultation' and on a spectrum that includes the right to 'full consent'.

Under Comprehensive Land Claims Agreements (CLCs) provisions are made for self-governance, the protection of traditional resource use and co-management by aboriginal communities to manage resources and plan development through a number of 'boards'— a result of Canada's indigenous land claims process.³ The boards are allowed to create their own rules and policies, giving them greater flexibility in institutional design. They are co-managed with equal representation of government and aboriginals and clear processes for incorporating different knowledge types. The water and land boards, for example, have adopted traditional knowledge polices for use within environmental assessments (see Box 1).

Implementing the 'spirit of FPIC'

In Canada's North West Territories, where both minerals and aboriginal communities are prominent, the Mackenzie Valley Resource Management Act (MVRMA) is charged with implementing the CLCs and holds responsibility for reviewing and approving land-use permits. The structures it adopts aims to decentralise decision-making and allow for cooperation between aboriginals, governments and private actors.

Applications for mineral investments are submitted to the board, who then distribute them to the potentially affected

Box 1: Examples of how traditional knowledge is incorporated into environmental assessments

Climate – time/dates as to when the project will occur, and what condition might be expected (e.g. when creeks and lakes freeze up, when the ground is frozen enough to support equipment).

Vegetation – lists types of vegetation in the area. What is the vegetation used for? Is it a local berry-picking area?

Water use – potential impacts of changes in quality or quantity (e.g. in small lakes used for camp water, the drawdown might be such that there will not be enough water left for plant or fish life).

Stream flow – affects stream crossings, freeze-up and spawning areas (e.g. will the stream flow be affected by ice bridges, or permanent bridges?)

Importance of site-specific areas – why land is important, sacred sites, legends, beliefs, need for respect (e.g. Red Dog Mountain in Tulita District is considered a sacred site by the Mountain Dene).

Traditional use – how might fishing, trapping and cabins be affected?

Source: Armitage (2005).

communities. These communities are given 30 to 45 days to provide comments and recommendations, much of which is supported by traditional knowledge. The applications are reviewed by the board based on these inputs, as well as information from technical experts looking at environmental and economic considerations. As the board has equal representation of aboriginal communities and government, these evaluations take place on the basis of values, information and experiences that come from traditional practices (see Box 1).

Projects with significant environmental impacts undergo further assessment by the Environmental Impact Review Board, which is government led but has equal representation from both government and indigenous peoples, who also approve the Chair. Projects with impacts for the wider population go to public hearings to get broader inputs. Final decisions are, however, made by the Minister of Aboriginal Affairs and Northern Development

³ Canada's land claims process aims to enable the Indians, Inuit and Métis to obtain full recognition of their rights under treaties or as the original inhabitants of what is now Canada.

Canada (AANDC – a federal government agency), who retains the ultimate authority on land and resource use.

There are cases where this process has led to the prevention of a mining project, for example, a proposed uranium mine at Screech Lake. To date, there has not been a case where the minister has overturned a decision by the boards.

By no means are these institutions perfect. Critics point to the continuance of Euro-Canadian, bureaucratic decision-making structures, heavily reliant on written rules, complex documentation (all in English) and hierarchal structures. These conflict with the informal processes, oral communication and egalitarian structures that are more common in aboriginal communities. As one First Nations participant commented (Fitzpatrick *et al.*, 2008):

The opportunity is provided to participate ... but that participation is conditional on people being able to act like western bureaucrats, and that is the real problem.

However, what these institutions seem able to embrace is a flexibility that allows them to evolve and better reflect indigenous perspectives – and thereby challenge these Euro-Canadian structures. For example, in a review of consultations under the Snap Lake Diamond project, unplanned technical sessions were organised to orally discuss specific issues coming out of the consultations (with each issue given two days and overseen by an independent moderator). These were found to be the best way to achieve consultation leading to a joint decision with face-to-face dialogues and open discussions between the mine proponent's experts and the aboriginal government representatives, civil society and federal government (Fitzpatrick *et al.*, 2008):

...when you get to the technical sessions where you have the proper people there to discuss issues you get resolution so much quicker, and you can see where people stand

on the issues, and as a whole, you can get all the parties involved, and I see that as being much more effective (Interview 6).

These sessions were not part of the legislation but simply adopted by the MVRMA Board, reflecting the values of that representative board and the flexibility of the institutions to achieve effective participation.

Analysis and recommendations

Canada is not a case of FPIC but provides important lessons as to how it might be possible to achieve the 'spirit of FPIC'. Implementing FPIC requires flexibility of institutions rather than legislative definition. To implement the 'spirit of FPIC' institutions need to be flexible to incorporate bottom-up design, dynamic cultural processes and political pressures.

Both the NCIP in the Philippines and the MVRMA in Canada are examples of top-down institutional design that prioritise efficiency and risk disempowering local communities. The Philippines case shows clearly that a legal right to FPIC is not sufficient and can in fact have negative impacts where the government feels the need to engineer consent in order to comply with the law.

On the other hand, the creation of new bodies for participation in Canada has in itself been a process of empowering civil society and local indigenous groups in decisions affecting their land. The structures themselves, such as the MVRMA, represent a change in power relations in which indigenous groups, and their knowledge and values, are equally represented.

Flexibility is integral to allowing the dynamic processes of FPIC to empower local communities through 'social learning' – whereby people reflect the behaviours of the social context they operate in. There remain difficulties with the Canadian system in cases where decision-making practices continue to be based on western framings that focus on efficiency and ration-

ality, limiting real empowerment. However, where decision-making processes have been more flexible, allowing processes to adapt to reflect different values, they have been more successful in reaching joint decisions.

Creating a space where all positions can be considered equally is crucial to achieving the spirit of FPIC. Legal frameworks are often necessary to force the start of a conversation. But they should look to codify existing practices and norms and be flexible in allowing new norms to develop, based on new partnerships between government, civil society and the private sector. Local communities and governments need to work together to identify shared values – based on both cultural and technical knowledge – and practices for implementing FPIC in a way that empowers local communities. This is seen in the Canada case study. By contrast, the strong anti-mining sentiment seen in the Philippines – which has followed from the many environmental disasters and violent conflicts surrounding mining operations – together with the government’s prioritisation of mining’s contribution to economic growth, has prevented government and civil society from coming together to identify shared values and institutions for upholding those values.

Institutions should be set up to give access to different perspectives. The MVRMA boards include indigenous knowledge not as a technical requirement but as part of a process of representing and incorporating different worldviews (Armitage,

2005). The boards are allowed to create their own rules and policies, which enable them to reflect the social and cultural values that they hold. This flexibility is in part the result of the political and social context in which these boards were designed, specifically aimed at enabling aboriginal communities to decide on the use of their land under Comprehensive Land Claims Agreements.

Conclusion

There is no blueprint for the institutions for implementing FPIC. Research into flexible systems for participation and deliberation will, however, provide governments, civil society and the private sector with guidance on how to achieve the ‘spirit of FPIC’. This requires deliberative and participatory decision-making processes which reflect the knowledge, values, practices and norms of local communities. Deliberative processes are institutions that share information from all participants, consider all views equally based on the evidence shared and give conscientious consideration to a discussion in which all values and positions are relevant. Institutions for FPIC should incorporate customary practices that allow indigenous communities to properly reflect their values and consider indigenous knowledge alongside ‘western scientific’ knowledge. This will allow indigenous peoples’ perspectives to be considered more equally alongside those of governments and companies, which are conventionally dominant. This is the spirit of FPIC.

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