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Review article

A comparative account of indigenous participation in extractive projects: The challenge of achieving Free, Prior and Informed Consent.

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ABSTRACT

Indigenous peoples' right to Free, Prior, and Informed Consent (FPIC) has been recognised as an important principle to ensure their meaningful participation in decision-making processes related to extractive projects. Yet, many companies grapple with their duty to engage in good faith consultations with indigenous peoples implied by the standard of human rights due diligence. Instead of understanding project impacts from the perspective of these peoples, companies generally conduct one-off environmental or social impact assessments or sign private agreements with communities that look at project impacts merely in terms of the reputational, operational, legal, and financial costs they represent to them. Human Rights Impact Assessments recognise that human rights conditions evolve and that companies need to consult with affected rights-holders throughout the project cycle to renew community consent on a regular basis. Indigenous peoples are also taking matters into their own hands by conducting Community-Controlled Impact Assessments or community consultations to move consent-based processes to the centre of negotiations with companies. By comparing local experiences of corporate-indigenous engagement in Canada, Guatemala, and Peru, we aim to determine if and how companies currently contribute to the implementation of FPIC in order to suggest a way forward towards greater corporate commitment to FPIC.

1. Introduction

Communities living on or nearby extractive project sites have gradually moved to the centre of 'the transnational natural resource governance policy discourse', resulting in a range of efforts by states and companies to ensure a more effective community participation in resource management (Kurniawan et al., 2022: 1). As extractive companies have come under heightened inspection globally concerning their negative social, environmental, human rights and health impacts on local populations and are now perfectly aware of the potential reputational and financial losses connected to these adverse impacts (Mulhern et al., 2022), they have started to view community participation or engagement[1] not only as an opportunity to reduce and manage the risks connected to their operations, but also to build trust amongst local communities in order to avoid resistance against current and future corporate ventures (Conde and Le Billon, 2017). But 'corporate driven community participation' (Kurniawan et al., 2022; Conde and Le Billon, 2017) is generally motivated by 'corporate self-interest' (Kemp and Owen, 2018) and defined by companies' 'deep attachment to business risk' (Owen and Kemp, 2013: 32) and fixation on rapid project implementation (Conde and Le Billon, 2017). Instead of trying to understand the social context in which their projects unfold, most companies 'respond' to community concerns by *managing* them (Esteves and Moreira, 2021: 2), a business attitude that can quickly escalate into 'major social incidents' (Kemp and Owen, 2021: 836), when local communities do not see their concerns and priorities taken seriously. What is more, the corporate obsession with gaining a Social Licence to Operate (SLO) from communities to guarantee 'social acceptance and access to land'

Abbreviations: FPIC, Free, prior, and informed consent; ESIA, Environmental and social impact assessments; IBA, Impact and benefit agreements; CCIA, Community-controlled impact assessments; HRIA, Human rights impact assessments.

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[1] We prefer the term 'engagement' as it implies a stronger focus on dialogue, joint problem-solving and respect for local decision-making processes. But we also use the term 'participation', as it has been employed in many of the articles reviewed for this paper.

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(Owen and Kemp, 2023: 3) 'evades the need for companies to think about their social responsibilities' (Owen and Kemp, 2023: 4). While the 'rhetorical shift on community acceptance' is a positive step, it is high time that companies 'move beyond vague commitments to the 'social licence' and adopt the more clearly defined principle of free, prior and informed consent' (Slack, 2012: 182).

Unfortunately, there is not one clear definition of the meaning of 'consent' and this is what makes most companies introduce mere window dressing policies to their codes of conduct and keeps them from fully integrating the principle of Free, Prior, and Informed Consent (FPIC) into their corporate culture. FPIC has been identified as the 'gold standard' of community engagement because it requires 'the highest form of participation of local stakeholders in development projects' (FAO, 2016: 50). FPIC provides a means to indigenous peoples to put their right to self-determination into practice and 'goes beyond consultation', a participatory right that is traditionally regarded 'an individual right of each citizen' (Cambou, 2019: 40). Consultation, as it applies to indigenous peoples, forms part of their collective rights as distinct polities and requires both states and companies to rethink current governance mechanisms around community participation. Self-determination implies that indigenous peoples can autonomously govern their 'internal and local affairs',[2] define 'their economic, social and cultural development' (Cambou, 2019: 34) and regain control over the lands, territories, and natural resources they have traditionally occupied and managed (Szablowski, 2010; Barelli, 2012; Cambou, 2019). 'FPIC is not only a question of process, but also of outcome' (Anaya et al., 2017: 5) and must include the option of withholding consent and withdrawing consent at any stage of the project cycle (FAO, 2016; UNPFII, 2005).

While companies 'are beginning to recognize that consultations are not optional' (Anaya and Puig, 2017: 447), it is precisely because of its connection to the right to self-determination and the right to give or withhold consent, that FPIC is often interpreted as a sort of 'veto power' held by indigenous peoples, prompting concerns connected to national sovereignty, state control over natural resources, and corporate economic objectives (Cambou, 2019; Leydet, 2019; Tomlinson, 2019; Szablowski, 2010). Concerning Article 32.2. on FPIC and the exploitation of natural resources in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007), indigenous peoples apply a 'purposive' interpretation, which sees 'consent as a mandatory requirement' of the FPIC process, while companies and states generally take a 'textual approach' to the article, which identifies FPIC 'as an extension of consultation processes' (Papillon et al., 2020: 225). In operational terms this means that companies tend to apply an 'instrumentalist approach' to consultation, which they identify as a 'participatory mechanism' analogical to a 'notice-and-comment' procedure, thus overshadowing 'concern for any substantive rights (Anaya and Puig, 2017: 448). At worse, companies take a 'minimalist approach' to consultation, converting it into a 'check-the-box' activity with consultations constituting 'a sizeable bureaucratic obstacle that hinders productive activity' (Anaya and Puig, 2017: 450). Both approaches clash with indigenous peoples' view of prior consultation, as entailing the possibility to say 'yes' or 'no' to a project affecting them.

Thus, even though many companies now 'profess to understand the proper role of consultations' (Anaya and Puig, 2017: 451) as evidenced by the increasing number of companies publicly committing to FPIC (Oxfam, 2015), the purposive reading of FPIC is still not applied in most countries, except for the cases where FPIC is required.[3] The point is that even if companies embrace the 'business case for FPIC' (WRI, 2007) and FPIC is slowly but surely becoming the 'new benchmark of responsible business practice' (Oxfam, 2015), this principle requires more than just avoiding risks and infringing upon rights. Instead, its implementation requires companies to proactively contribute to the realisation of indigenous rights and to become 'political actors' in arguably 'complex political dynamics' (Tomlinson, 2019: 882). As companies increasingly engage with indigenous peoples directly, without much state supervision or intervention, they will have to come to terms with the political responsibilities (Wettstein, 2010) and human rights obligations (Arnold, 2016; Wettstein, 2012) that follow such engagement. At the same time, scholars will have to adapt to a new world order (Scherer and Palazzo, 2011; Kobrin, 2009) in which states are no longer 'responsible for everything' (Bernaz, 2021)[4] and cannot be expected to regulate entities that are often more powerful than them (Joseph and Kyriakakis, 2023: 1). When applied to FPIC, this means that it is high time that academia and practitioners lead the way towards addressing the question of *how* FPIC should be applied, instead of focusing on *why* it should be applied and making a case for FPIC's recognition as a 'customary international legal principle' instead of a 'mere norm in development' (Ward, 2011: 56).

In view of the substantial environmental, economic, social and cultural impacts caused by extractive activities, many states have passed national laws requiring companies to conduct Environmental and Social Impact Assessments (ESIA) and to ensure engagement with indigenous peoples in decision-making processes regarding extractive projects based on their right to Prior Consultation (ILO, 1989) and FPIC (UNGA, 2007),[5] as well as the development of mutual agreements to offer local communities adequate compensation packages (Meadows et al., 2019: 1). Companies also practice a wide range of 'innovative participatory institutions' (Torres-Wong and Jimenez-Sandoval, 2022: 1), such as Impact and Benefit Agreements (IBA), Corporate Social Responsibility (CSR) programmes and SLO frameworks that all require some sort of prior consultation with indigenous peoples. While the literature on extractive industries generally identifies indigenous peoples as 'either victims of extraction or resistors to extractive industries' (Lorca et al., 2022: 2), several authors have asserted that indigenous peoples should be seen 'as agents in their own right' (Iversen Wanvik and Caine, 2017: 596), as they respond proactively to corporate developments, using their growing political and social agency. As will be established, participation in public and corporate decision-making processes, direct negotiations with companies and mobilisation against extractive projects are not mutually exclusive strategies and can be employed successively or simultaneously by indigenous peoples with the objective of strengthening their position in the negotiation of development projects (Horowitz et al., 2018).

That said, the implementation of resource governance-related participatory procedures has been largely insufficient, as 'the main decisions over extractive projects are made by state and corporate actors long before consultations take place' (Torres-Wong and Jimenez-Sandoval, 2022: 1). As a result, such processes have become spaces of exclusion rather than inclusion (Aguilar-Støen and Hirsch, 2015). This has contributed to indigenous peoples' 'disenchantment' with the proposed forms of engagement (Schilling-Vacaflor, 2016: 12) and obstructed FPIC's potential democratising effects on resource governance (Schilling-Vacaflor, 2012) and its norm-shifting potential at the policy level (Eisenberg, 2019). Flawed engagement also weakens indigenous institutions (Schillling-Vacaflor and Eichler, 2017) and diminishes indigenous claims that go beyond, but are nevertheless closely connected to corporate activities, such as control over their lands, territories, and resources (Leifsen et al., 2017b). At the same time, indigenous peoples have capitalised on their political agency

[2] Article 4 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007), United Nations General Assembly (UNGA).

[3] Forced relocation, disposal of hazardous materials and non-mitigatable impacts on their culture and traditional livelihoods.

[4] Bernaz, N., 24 March 2021. Treaty-Making in Business and Human Rights: Models for a Binding Instrument, minutes 17 to 19 (accessed May 09, 2023). https://www.youtube.com/watch?v=buQxscXDp0k&t = 1031s.

[5] International Labour Organisation (ILO) Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries (1989); UNDRIP, 2007.

(Schilling-Vacaflor and Flemmer, 2020; Merino, 2018), local contestation power (Schilling-Vacaflor et al., 2018; Curran, 2017) and strategies of resistance (Eisenberg, 2019; Aguilar-Støen and Hirsch, 2015) to pressure companies and states into seeking their consent for projects and measures affecting them. They have also proposed alternatives to current participation channels in the form of Community-Controlled Impact Assessments (CCIA) and 'community consultations' during which consent-based deliberations have moved to the forefront of local decision-making processes.

While project-level impact assessments (IA) are still the 'go-to' procedure for companies needing to identify potential project impacts on local communities and the environment, they do not include a specific focus on human rights, nor do they consider the necessity to measure and monitor impacts through 'longitudinal analysis' (Salcito et al., 2014: 37). This assessment approach ignores the fact that 'neither companies nor human rights exist in a vacuum' (Salcito, 2015: xvi), but evolve over time because they are connected to wider political, economic, and social factors that go beyond the immediate effects of corporate actions (Salcito et al., 2014). The need for establishing a 'benchmark for ongoing, periodic analysis of changing contexts and impacts' (Salcito, 2015: xvi) has brought the practice of Human Rights Impact Assessments (HRIA) to the forefront of discussions on human rights due diligence (HRDD), a core requirement of the United Nations Guiding Principles on Business and Human Rights (UNGP, 2011), which established that companies ought to identify, prevent, mitigate and account for how they address their adverse human rights impacts (Guiding Principle 17). Even though the UNGP do not refer to HRIA explicitly, 'they lay out procedural elements of HRIA' (Salcito et al., 2014: 36) and clearly represent the most appropriate tool for companies seeking compliance with the mandatory HRDD requirement (McNabb, 2018). Since HRIA methodologies include local perspectives on the design and implementation of the assessment process and employ a human rights-based approach to IA, some authors now argue that they constitute a remarkable corporate instrument to increase respect for FPIC during business activities (Doyle, 2019; McNabb, 2018). This is an emerging scientific discussion we aim to contribute to.

Also, research on indigenous participation in IA based on 'evolving indigenous norms' is somehow scarce (Kløcker Larsen, 2017: 3) and there is an urgent need for scholars to make propositions towards ensuring that 'substantive changes' (Szablowski and Campbell, 2019: 636) are applied to the current resource governance discourse. Against this background, the current article pursues both a conceptual and an empirical objective. At the conceptual level, we examine the legal and academic challenges obstructing the development of a proper understanding on FPIC because of the practical implications that these have for its operationalisation by companies. We then examine some of the literature sustaining the practice of ESIA, HRIA, IBA and CCIA to identify what is needed to introduce the 'substantive changes' required by the FPIC principle. At the empirical level, we aim to investigate social phenomena in real-life contexts (Yin, 2003), which leads us to studying if and how the participatory procedures studied in the conceptual section contribute to the implementation of FPIC in diverse national contexts. By purposely compiling different case studies from Canada, Guatemala and Peru that are defined by local circumstances and circumspect to the employment of various community engagement strategies, we intend to demonstrate that the challenges connected to guaranteeing indigenous participation in resource governance are similar everywhere and highly dependant on the institutional and organisational capacities of companies, indigenous peoples, and states. While our primary focus is on how to improve extractive industries' human rights footprint in indigenous communities, we cannot omit the fact that states are still the primary duty bearers and define the regulatory environment in which corporate-indigenous engagement takes place.

Data collection encompassed a variety of methods including an extensive literature review and contend analysis of national legislation and regulatory frameworks guiding indigenous participation in resource governance, as well as the compilation of case studies based on a meta-analysis of previous scientific case studies. The two research questions that guide this article in both its conceptual and empirical section are: 1) In which ways can indigenous peoples shape decision-making processes regarding extractive projects; 2) What are the main global corporate and public procedures currently used to guarantee indigenous participation in resource governance and how effective are they? Originally, several other countries (Ecuador, Bolivia, Colombia, Australia) were considered as possible contenders for our case studies, but after a preliminary assessment, the three countries and projects were selected based on three criteria: (1) they are representative of the participatory tools discussed in the theoretical section; (2) they cover a variety of extractive projects taking place on or near indigenous lands in both developed and developing countries; (3) they give insights into how institutional arrangements and capacities at the state, corporate and indigenous levels influence the outcome of corporate-indigenous engagement processes.

2. Theoretical framework

Globalisation and the dismantlement of the Westphalian world order 'has marked an apparent retreat of the state - not only from community affairs but significantly, also from its duties and obligations' (Kuokkanen, 2019: 19). This has caused a 'rise of direct private sector involvement in delivering community development goals' (Franco and Ali, 2017: 111) and ensuring the realisation of human rights, for better or for worse. While states have created the legal frameworks for community participation in the governance of extractive industries, the related 'mechanisms typically put the onus on firms to carry out the primary work of consultation, participation or negotiation' and states are oftentimes 'selectively absent from the governance of corporate and community relations' (Szablowski, 2019: 725). At the same time, globalisation has provided indigenous peoples 'with myriad legal options for protecting themselves from the threat of exploitation by multinational corporations' (Fulmer et al., 2008: 113). Based on their growing social and political agency, indigenous peoples 'employ both state and non-state strategies to assert their self-determination' (Reed et al., 2020: 1284), thus moving away from conventional stakeholder narratives that often afford them few opportunities to participate in resource management as self-governing peoples.

It is within this context, that the idea of the corporate responsibility to ensure 'citizen engagement in environmental decision-making' (Ocampo-Melgar et al., 2019: 43) has become widely accepted. IA enable companies to predict and mitigate the impacts of natural resource exploitation and are meant to ensure 'that decisions to approve or reject a project are made on solid factual grounds' (Kløcker Larsen, 2022: 3). However, standard IA leave little room for inputs based on indigenous knowledge and concerns. With companies being 'left to fill the normative vacuum left by the state with their own forms of private ordering' (Szablowski, 2019: 725), they usually engage with local communities as they see fit and mostly with the objective of advancing their economic objectives. As a result, companies conduct IA that employ a routine of mechanisms and processes that 'are entirely predictive' and oftentimes controlled by project proponents (Kløcker Larsen, 2022: 3). This is of course very controversial because what could be a natural instrument for delivering on sustainable development results and heightened respect for human rights has been turned into an instrument that serves the economic objectives of companies.

Table 1
Overview of participatory tools and mechanisms relevant to indigenous peoples and natural resource governance.

FPIC	EIA	SIA	HRIA	IBA	CCIA
Based on international human rights instruments, FPIC allows indigenous peoples to give or withhold consent to proposed development projects affecting their lands, territories, and resources. Controversies surrounding the meaning of consent, interpreted as an absolute veto power, prevent its implementation on the ground, with both states and companies not fully committing to its true nature as a principle of self-determination.	A self-regulatory corporate tool, even though often mandated by national legislation, EIA aim to assess and mitigate the environmental impacts of a proposed development project, but community participation is usually a mechanical one-off event to obtain the go-ahead for project implementation, with no true commitment to engaging with indigenous peoples throughout the project cycle.	A self-regulatory corporate tool, even though increasingly required by national laws, SIA aim to assess and mitigate the social impacts of a proposed development project. They seek to understand the social context in which projects take place and to develop a relationship of trust with local communities. They can potentially inform FPIC processes but are usually only conducted once during the project cycle.	A self-regulatory tool that is based on international human rights norms, HRIA contribute to greater corporate human rights compliance. The starting point are usually community-based consultations, including FPIC, to reflect human rights concerns of affected rights-holders throughout the project cycle. HRIA ensure that monitoring of human rights impacts and engagement with rights-holders is ongoing throughout the project cycle.	Private agreements that allow indigenous peoples to directly engage with companies to negotiate benefits from development projects. IBA offer a reduced version of FPIC because they do not consider impacts beyond the contractual agreement. Indigenous peoples often agree to sign IBA because they know that projects go ahead anyway, and they want to at least ensure that they are duly compensated	CCIA are community-based economic, social, and cultural impact assessments. They offer an alternative negotiation-based and community-controlled approach to ESIA, as indigenous peoples can prepare solid inputs reflecting their aspirations and concerns based on community consent. But they are highly dependant on indigenous organisational capacities and access to financial resources.

Source: authors.

2.1. Prior consultation and FPIC

FPIC has been defined by the United Nations Permanent Forum on Indigenous Issues (UNPFII) in the following way and with respect to development projects affecting them: 'Free' refers to ensuring intercultural dialogues with indigenous peoples and respecting their self-governance systems without coercing, intimidating, or manipulating them; 'Prior' implies engaging meaningfully with indigenous peoples and valuing their traditional decision-making processes before a verdict on a development project is given; 'Informed' suggests giving indigenous peoples clear, transparent, and comprehensive information on the content of a project in a timely manner; 'Consent' is a process based on consultation and participation by way of indigenous peoples' freely chosen representatives and may include the option of withholding consent (UNPFII, 2005). In this sense, consent is not an unconnected device of legitimisation because the principle of FPIC does not envision consent as a simple 'yes' to a predetermined decision. Instead, it can only be obtained when it accomplishes the three basic criteria of having been free, prior, and informed and is then evidenced by an explicit statement of agreement (A/HRC/24/41, 2013: para. 30) by indigenous peoples' representative institutions, essentially shifting 'decision making power in some instances from the states [and companies, we may add] to the indigenous peoples' (Scheinin and Åhren, 2017: 67).

The International Labour Organisation's (ILO) Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries (C169, 1989) is to this date the only legally binding international instrument regulating the prior consultation and participatory rights of indigenous peoples. While these rights have been denominated the 'cornerstone' of the C169 (Barelli, 2012: 6) because they seek to 'empower indigenous peoples' to become the protagonists of their own destinies, its critics claim that they represent a 'weak version' of the right to FPIC (Merino, 2018: 76), as they do not include an obligation to obtain consent from indigenous peoples, except in cases of forced relocation (Article 16). In 2007, a two decade-long strenuous negotiation process between states and the global indigenous movement culminated in the approval of the UNDRIP and arguably enshrined the right to FPIC within international human rights law (IHRL). Even though the UNDRIP is technically considered a soft law instrument, national and regional courts, especially in Latin America, have consistently referred to the Declaration and the right to FPIC in their verdicts, especially as they relate to resource extraction,[6] on account of which it is argued that the UNDRIP, and by extension, FPIC have become 'a part of customary international law' (Philipps, 2015: 120). The problem is that most national legislation is governed by state ratifications of the C169 and only on rare occasions do states adopt the UNDRIP into national law and indigenous peoples depend on national and regional jurisprudence to have their right to FPIC recognised.[7]

That is why the question of the legal nature of FPIC is still at the centre of the controversies surrounding its implementation in national contexts. While some scholars have defined FPIC, sometimes interchangeably, as a principle (Szablowski, 2010; Barelli, 2012), a concept (Barelli, 2012), a standard (Boutilier, 2017) and a right (Ward, 2011), international human rights bodies have referred to FPIC as a 'human rights norm' (A/HRC/39/62, 2018: para. 3) because it is anchored in the right to self-determination of peoples, a fundamental and peremptory principle of IHRL.[8] It follows that FPIC needs to be interpreted in connection to the right to self-determination because it is an 'integral element of that right' (A/HRC/18/42, 2011: para. 20). The rights to autonomy, self-governance and the extensive rights of political participation all contribute to the principal objective and purpose of the UNDRIP, which is 'to establish the necessary conditions to give effect to the right of self-determination' (Wheatley, 2014: 377). It is exactly because of its connection to self-determination, often interpreted as a sort of 'veto right' held by indigenous peoples (Leydet, 2019; Tomlinson, 2019; Szablowski, 2010), and the 'broader normative agenda' (Yaffe, 2018: 704) this opens up, that FPIC is constantly being re-characterised and re-interpreted into a construct that better fits public and corporate economic agendas (Rodhouse and Vanclay, 2016;

[6] Inter-American Court of Human Rights, 31 August 2001. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, IACHR, Costa Rica; Inter-American Court of Human Rights, 28 November 2007. Case of the Saramaka People v Suriname, IACHR, Costa Rica.

[7] Only Bolivia's and Ecuador's National Constitutions refer to the UNDRIP explicitly.

[8] The principle of self-determination is prominently embodied in Article I of the Charter of the United Nations (1945) and is recognised in the first article common to the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966).

Szablowski, 2010).

While many scholars and the UN system claim that the notion of a 'right to veto' suggests an 'absolute power, with no balancing of rights', which was certainly not the intent of the UNDRIP (Joffe, 2018: 18), and that disputes over veto rights 'largely detract from and undermine the legitimacy' of the FPIC principle (A/HRC/39/62, 2018: para. 16.a), the Working Group on the issue of human rights and transnational corporations and other business enterprises has emphasised that consent 'must include the option of withholding consent' (A/71/291, 2016: para. 71). In the case of development projects, it has been established that indigenous peoples can exercise their right to withhold consent if they consider that IA processes were poorly managed and its findings do not reflect their priorities, to put the project on hold while deficiencies regarding the FPIC process and the mitigation of negative impacts are being revised or to communicate to project proponents that there has been a lack of meaningful engagement with the community (A/HRC/39/62, 2018: para. 26).

If not a legal standard, at the very least, FPIC must be regarded 'a principle of best practice for sustainable development' and a mechanism to 'increase the legitimacy' of projects affecting indigenous peoples (Oxfam, 2015: 6). As a result, many companies have created policies that deal with the impacts of their activities on indigenous rights, including policy commitments to FPIC and prior consultation, that can certainly be considered a contribution to a larger 'norm-building' framework (Lawrence and Moritz, 2018: 42). But the 'veritable explosion' in the number of guidelines and ethical standards that refer to FPIC or good faith consultations with indigenous peoples and now govern the performance of multinational companies and international finance institutions stands in 'stark contrast to the reality on the ground' (Lawrence and Moritz, 2018: 41), where 'there is a lot of good practice', but 'still a lot of poor practice' (Tomlinson, 2019: 90). While some companies certainly aspire to operationalise FPIC, they mostly still implement this principle based on their technical understanding of community participation, undermining the nature of FPIC as a principle of self-determination. Thus, FPIC challenges the very way in which companies currently relate to affected communities and requires them to make fundamental changes to their risk management systems and social performance standards, changes they may not be willing to make.

Upon closer analysis of the different guidelines and standards developed by international financial institutions and consortia of companies, these oftentimes encourage companies to practice 'a watered-down version' of FPIC (Conde and Le Billon, 2017: 692). The WB's Operational Procedure 4.10. on Indigenous peoples (2013) requires companies wanting to access loans to ensure a 'free, prior, and informed *consultation* (our emphasis) process' with affected communities so that they are informed of their rights, understand the scope of the proposed project and the effect it can have on their livelihoods (para. 18). The International Finance Corporation's (IFC) Performance Standard 7 on Indigenous Peoples (2012) on the other hand requires companies to obtain the FPIC of indigenous peoples when there are significant impacts on their lands and natural resources subject to traditional ownership or customary use (para.13), when indigenous peoples need to be relocated (para. 15), and when projects have significant impacts on their cultural heritage (para. 16). The IFC Performance Standard has played a crucial role in establishing FPIC as the condition to be met by corporate and financial actors before accessing a loan, but 'effective implementation and verification of compliance with this IFC FPIC standard remain lacking' (MacInnes et al., 2017: 153), as will be demonstrated by the Marlin mine case study.

The International Petroleum Industry Environmental Conservation Association (IPIECA)[9] and the International Council on Mining and Metals (ICMM) have also developed good practice notes and statements on indigenous peoples. In its Position Statement on Indigenous Peoples and Mining (2013), the ICMM establishes that 'Indigenous Peoples can give or withhold their consent to a project' (p. 2), but it is not difficult to find documented examples of where ICMM members have not complied with this policy, raising 'the question of the prospect for the effectiveness' of voluntary CSR initiatives 'to uphold human rights on the ground' (MacInnes et al., 2017: 154). In addition, the OECD Due Diligence Guidance for Responsible Business Conduct recognises indigenous peoples' collective human rights and identifies them as 'rightsholders' (OECD, 2018: 48), with whom companies should establish a rapport based on an interactive, two-way, good faith, responsive and ongoing engagement process to establish actual or potential adverse impacts derived from corporate activities based on their own assessment of these (OECD, 2018: 49–50), but does not refer to FPIC explicitly. The OECD Guidelines for Multinational Enterprises (the Guidelines, 2011) focus on broad corporate governance features an establish standards for responsible business conduct across a range of issues, including human rights. While they recommend companies to pay special attention to the human rights of indigenous peoples (p. 32) and recognise that 'stakeholder engagement' should be a 'two-way communication' process and involve 'good faith […] on both sides (p. 25), they do not mention FPIC.

In addition, the Guidelines require each member country to establish a National Contact Point (NCP), which represent state-based, non-judicial remedy institutions with 'extraterritorial reach that courts rarely enjoy' (Buhmann, 2018: 392) as they handle complaints arising from the alleged non-observance of the Guidelines 'outside the home country of the company that a complaint concerns' (Buhmann, 2016: 702). While NCPs do not have legal enforcement powers, their extraterritorial competence allows them to 'fill a remedy gap for transnational business operations and their social impacts' (Buhmann, 2018: 392). In our analysis of the OECD Watch Complaints Database,[10] we identified 36 complaints made to NCPs that involve indigenous peoples. By examining the content of these complaints, we got an inside view into companies' readiness to make changes to their policy or management systems to respond to indigenous peoples' complaints, especially those connected to companies' failure to meaningfully consult with indigenous peoples and seek their FPIC as part of their IA processes. Most NCP resolutions were either dismissed by the concerned company or they did not require companies to take effective actions concerning such deficiencies. The only positive example that stands out is the complaint 'Society for Threatened Peoples Switzerland vs. BKW Group' filed with the NCP of Switzerland, which ended with BKW's acceptance of the need to revise its current codes of conduct to introduce heightened HRDD and guarantee FPIC throughout its projects' life cycles.

It becomes obvious that most companies still find it hard to live up to the operational consequences supposed by the FPIC principle. What is at stake here 'are the deeper critical issues' underpinning FPIC (Weitzner, 2017: 1199), such as indigenous self-determination, autonomy, and meaningful participation in resource management. These issues are highly political and mobilise whole communities. They also challenge the technical concept of 'broad community support' advocated for by the World Bank, amongst others, which limits indigenous peoples' 'bargaining power' because it is at the disposal of project proponents (Szablowski, 2010: 119). While engaging in good faith consultations to obtain indigenous peoples' FPIC certainly makes sense from a 'pragmatic perspective', it should not be seen as a mere 'compliance exercise' (A/71/291, 2016: para. 73), but rather as the ethically right thing to do.

The pressure that multinational financial entities and other multinational institutions can exercise over companies to implement their duties as they relate to HRDD and FPIC may be a step in the right direction, but one cannot help but wonder if the 'business case for FPIC', the most important driver behind companies' policy commitments to

[9] IPIECA Indigenous Peoples and the oil and gas industry. Context, issues and emerging good practice, 2012.

[10] OECD Watch Complaints Data Base. https://www.oecdwatch.org/complaints-database/ (accessed on 05 May 2023).

FPIC, is the right way forward, given that companies have a tendency to adapt the human rights agenda to better fit their economic interests. One could say that companies practice in one approach and aspire to another. In the meantime, FPIC has yet to realise its potential of becoming 'an instrument for reforming the way' in which companies see and value their relationships with indigenous peoples (Owen and Kemp, 2014: 94), a discussion we aim to contribute to by analysing the participatory and impact management tools currently at their disposal.

2.2. Environmental and Social Impact Assessments

EIA were designed 'as a system for the early identification of useful information to help make better decisions regarding the potential effects of a future project' (Ocampo-Melgar et al., 2019: 44). In theory, participation in EIA allow companies to operationalise FPIC, if it is early, continuous, informed, inclusive, timely, transparent, context-sensitive and non-coercive (André et al., 2006). 'Early participation' in EIA, understood as 'any type of organized citizen engagement' that occurs before the EIA report is handed in, remains voluntary and is generally not included in standard public consultations connected to EIA (Ocampo-Melgar et al., 2019: 44). Where early participation is attempted to allow affected stakeholders to convey their concerns regarding project impacts (Hurst and Ihlen, 2018), most companies still apply a 'paternalistic' approach, as they 'listen and engage while retaining power over what would be done with the final results' (Ocampo-Melgar et al., 2019: 49).

Participation potentially allows indigenous peoples to introduce solutions to environmental problems based on their traditional knowledge that 'has been built over generations in a specific ecosystem' (Hanna et al., 2014: 60), but instead of considering local cultural, social, and political elements in project decisions (Esteves, 2008), EIA are mostly used to press forward corporate agendas (Ocampo-Melgar, et al., 2019). Additionally, participation in EIA is based on 'a discourse of science-based management of risk' (Leifsen et al., 2017a: 1045) and the 'technical solutions' proposed to manage these risks tend to 'depoliticize' the project under development (Aguilar-Støen and Hirsch, 2015: 473). However, decisions related to development projects are highly political, especially where indigenous peoples are concerned, as they are taken amidst unequal power distribution and resource disputes, leading these peoples to challenge the outcomes and legitimacy of EIA. Evidence suggests that EIA do not realise their intended impact partially because they omit the importance of politics on EIA results, which in some cases keeps 'findings from having an impact on decision-making' (McCullough, 2017: 448).

Indigenous peoples have asserted that their perspectives on project impacts should be the starting point for any assessment, when 'technical alternatives' can still be introduced (Hanna et al., 2014: 65). The need for IA to become community-driven processes is largely a response to their request to become active partners in project development and to benefit from the proceeds of projects they have given their explicit consent to (Vanclay, 2006). A shift from an 'organization-centric process' to a 'social-process approach' (Johnston and Lane, 2018: 108) enables companies to consider the effects their activities have on communities, something that is disregarded in most risk management literature (Esteves et al., 2017). SIA, even though generally conducted as one-off analytical studies in the context of EIA, are now used in various circumstances in which interactions between companies and local communities take place (Joyce et al., 2018) to improve upon 'development outcomes' connected to corporate activities (Esteves et al., 2012: 34).

SIA also focus on the most vulnerable groups likely to be negatively impacted by projects (Climent-Gil et al., 2018) and usually include concerns and insights connected to the 'social impacts' of their activities 'at a collective level' (Johnston and Lane, 2018: 108). It is argued that SIA represent prospective instruments for carrying out more effective FPIC processes (Vanclay and Esteves, 2011), as they provide evidence-based information for informed consent. In sum, 'FPIC is a philosophy; SIA is a process to build knowledge and understanding and manage change; and agreements are the outputs of these processes' (Esteves et al., 2012: 38). But, as SIA are typically funded by companies and can easily be turned 'into a public-relations exercise masquerading as an unbiased assessment' (Parsons and Luke, 2021: 3), there is no guarantee that indigenous peoples' demands will be included in risk and impact mitigation mechanisms (O'Faircheallaigh, 1999).

Overall, indigenous peoples' limited participation in the initial stages of EIA and SIA raises important questions concerning the timing of the 'prior' and 'informed' features of FPIC (O'Faircheallaigh, 2007). SIA and EIA need to be carried out so that FPIC processes are fully informed, implying that indigenous peoples cannot give their explicit consent before the process starts. 'If you participate in consultation before the contract, you have a real capacity to influence but you make decisions blind. If you participate in consultation after the EIA, you find that everything has already been decided' for you (Merino, 2018: 80). By recognising FPIC as a 'process of continuous engagement and approval' (Hanna et al., 2014: 62), which implies deciding on whether EIA and SIA proceed in the first place and ensuring that consent is attained for every stage of the process, which includes the possibility that consent may be withdrawn at any stage of the process, the timing issue may be resolved.

Though 'international standards and practice' oblige EIA and SIA to be directed as a 'specific guarantee for the protection of indigenous rights' (A/HRC/15/37, 2010: para. 72), harmful impacts on human rights have rarely been the reason for abandoning a project and companies generally only identify those impacts they 'can convincingly promise to manage' (O'Faircheallaigh, 2017: 1183). That is why we argue that HRIA present a more appropriate methodology for measuring project impacts on indigenous peoples, as they are firmly enshrined within IHRL and have a strong focus on inclusive participation, equality, and non-discrimination, as well as on transparency and accountability. HRIA 'are, by definition, related to the consultation process' (A/HRC/15/37, 2010: para. 71) and companies are expected to do everything possible to seek technically feasible solutions to mitigate or limit impacts on the environment and on the social, economic, cultural, and spiritual life of indigenous peoples (UNDRIP, 2007: art. 32.3). The shift from technical and project-related EIA and SIA to 'broader collective rights-based' assessments is essentially a turnaround 'to what indigenous rights standards and jurisprudence have long prescribed' (Doyle, 2019: 143).

2.3. Human Rights Impact Assessments

HRIAs contribute to 'greater corporate human rights compliance' (Graetz and Franks, 2013: 101) because they use human rights principles as a benchmark for framing and conducting the IA process. A HRIA is a 'systematic process' (Bakker et al., 2009: 436) that provides 'evidence-based analysis' on the human rights impacts of policies, programmes, projects and interventions (Götzmann, 2019: 4). Specifically, HRIA seek to understand human rights impacts, from the perspectives of affected rights-holders, to contribute to effective HRDD, to facilitate meaningful dialogue between the different stakeholders, including communities, and corporate and public actors, to support capacity building and awareness raising of the stakeholders involved in the IA, to enhance the accountability of states and companies by documenting impacts and empowering rights-holders and to strengthen the relationships between the different stakeholders (Götzmann, 2019: 4).

The UNGP have been crucial in establishing that businesses ought to assess their human rights footprint by implementing effective HRDD processes and present some 'basic recommendations for assessing human rights impacts' (Götzmann, 2019: 11), though they do not directly refer to HRIA (Götzmann, 2017), nor FPIC. Building on the HRDD concept, the UN Special Rapporteur for Indigenous Peoples (A/HRC/15/37, 2010) and the Working Group on Business and Human

Rights (A/68/279, 2013) have however established that companies ought to recognise indigenous peoples' rights, irrespective of state recognition of these, to consult in order to obtain FPIC, to not become complicit in state violations of human rights, to conduct independent IAs to address impacts on indigenous rights and to establish compensation and fair benefit sharing packages based on negotiations with indigenous peoples.

Engagement with rights-holders and the creation of dialogue amongst different stakeholders are a 'core cross-cutting component' of HRIA (Götzmann, 2019: 4). FPIC provides a framework for the meaningful engagement with indigenous peoples during the HRIA process, as it ensures that consultations take place at the initial and subsequent stages of the project to determine together with the concerned peoples how projects impact them and how these can be mitigated. 'Just as FPIC is an ongoing process to be conducted at each project decision-making stage, so too is HRIA' (Doyle, 2019: 145). Their substance and extent will be determined in reaction to the information available regarding the impacts on indigenous rights at each stage of the project. What is more, the outcome of FPIC-based HRIA 'cannot be assumed and may lead to a project being significantly altered or not proceeding' in line with indigenous peoples' rights to consent and self-determination (Doyle, 2019: 142).

Despite being an emerging assessment tool, an increasing body of HRIA methodologies has been published in recent years (Götzmann, 2017; Graetz and Franks, 2013; Kemp and Vanclay, 2013; Salcito et al., 2013; Boele and Crispin, 2013; Harrison, 2011; de Beco, 2009; Bakker et al., 2009; Massarani et al., 2007). On the one hand, the great divergence of opinions regarding HRIA may restrain the reinforcement of corporate human rights policies, but on the other hand, establishing one HRIA methodology may be counter-productive as the connected processes are highly context-dependant (Graetz and Franks, 2013: 97). The appropriate methodology should instead be adapted to 'the nature of what is being assessed, who is undertaking the assessment, and when the assessment is taking place' (Harrison, 2011: 165). At the same time, research on the practical aspects of HRIA is limited due to the lack of publicly accessible HRIA, a situation that seems to insinuate that 'confidentiality, rather than transparency, is standard practice' (Kemp and Vanclay, 2013: 93). The lack of access to HRIA makes it difficult for academia to grasp whether they contribute to greater enjoyment of human rights during project activities.

While we recognise that context-specific toolkits and methodologies need to be established for different fields of practice and groups of rights-holders, we have looked at the key criteria and technical elements and clustered them together in the following way:

1) screening to decide if the HRIA proceeds (Harrison, 2011);
2) scoping to construct a common conception of the human rights context and identify key rights-holders (Harrison, 2011; Salcito et al., 2013; Boele and Crispin, 2013; Götzmann, 2017);
3) evidence gathering (Harrison, 2011; Salcito et al., 2013) and employing a human rights-based approach (HRBA) (Götzmann, 2017) to consult with all rights-holders (Harrison, 2011);
4) analysing impacts by ranking (Boele and Crispin, 2013), cataloguing or rating them (Salcito et al., 2013), assessing impacts according to severity (Götzmann, 2017) and codifying human rights obligations into measurable indicators (Salcito et al., 2013);
5) impact mitigation and management measures (Götzmann, 2019) and guarantee capacity development opportunities for corporate staff and indigenous peoples (Boele and Crispin, 2013);
6) produce recommendations and conclusions and publish them (Harrison, 2011) to ensure accountability (Götzmann, 2017);
7) monitoring (Harrison, 2011; Salcito et al., 2013), review/reporting (Harrison, 2011) and evaluation (Götzmann, 2019).

To look at the different assessment phases is beyond the scope of this paper, so we have just selected a few, as they are especially relevant for indigenous peoples. The screening (1) and scoping phases (2) are in line with indigenous peoples' right to decide whether a HRIA should be conducted in the first place and to be involved in the design of the assessment process (consent). The evidence-compiling and HRBA to consultation phase (3) involves ensuring that the grievances concerning project impacts and the traditional knowledge of indigenous peoples are included in the HRIA process (informed). In operational terms this means that multidisciplinary teams should conduct consultations and interviews in indigenous languages, ensuring respect for indigenous customs and they should spend time with communities to gain their trust and understand IHRL in the local context (Salcito et al., 2013). The three principles inherent to adopting a HRBA - inclusive participation, equality and non-discrimination, and transparency and accountability - are of great importance when dealing with indigenous peoples.

'Inclusive participation' refers to the ability of indigenous peoples to shape and influence the assessment process (free), which involves inviting them to scope and develop its terms of reference and including them in 'the design, implementation and monitoring of impact mitigation measures' (prior), rather than having a one-off consultation phase (Götzmann, 2017: 101). The principle of 'equality and non-discrimination' involves understanding the internal dynamics of the local context and each community that can lead to discrimination and becoming aware of the disproportional distribution of projects-related impacts and benefits. The 'transparency and accountability' principle relates to indigenous peoples' capability to understand and have full access to information about the project's potential impacts and the HRIA process in a timely manner to actively participate in all the stages of the decision-making process (informed).

In this sense, it is important to ensure indigenous peoples have access to capacity building activities, leading to the creation of a pool of indigenous experts capable of transmitting their knowledge to strengthen the community's ability to engage with future corporate processes (Salcito et al., 2013). At the same time, capacity building activities on the human rights of indigenous peoples should also be directed at corporate staff to transform local assessment processes and move towards 'genuine consent-based and rights-compliant engagement in practice' (Doyle, 2019: 149). By disseminating the results of the HRIA for public scrutiny, companies can be held accountable by rights-holders and stakeholders (Harrison, 2011) and 'the accuracy, independence and legitimacy of the entire exercise' can be guaranteed (Götzmann, 2017: 104). HRIA should also include clear conclusions and recommendations directed at the respective decision-makers to have a positive impact on policy-making and corporate practices regarding indigenous rights.

The degree to which HRIA contribute to managing or preventing human rights impacts is largely unknown, given that they do not yet form part of standard corporate practices and that positive experiences with HRIA are hard to come by. As FPIC is an emerging topic within current debates on HRIA (Götzmann et al., 2015: 4), only a few authors (Doyle, 2019; McNabb, 2018) have started to look at the connection between HRIA and FPIC and the benefits of using collaborative HRIA (Szoke-Burke et al., 2019) to operationalise indigenous peoples' right to FPIC. Our research aims to contribute to this rather under-developed scientific discussion by extracting some lessons learned from the Marlin mine HRIA. Based on our review of relevant literature, we assert that HRIA constitute the most adequate methodology for engaging with indigenous peoples, as the FPIC principle and HRIA are mutually reinforcing: the results of HRIA inform the FPIC process and FPIC legitimises HRIA findings. If connected to their right to self-determination, HRIA present indigenous peoples with a potentially efficient platform to choose their own development path and to reclaim control over their lands, territories, and natural resources, while negotiating with companies and states 'on the basis of equality and respect' (Doyle, 2019: 149).

2.4. Community-Controlled Impact Assessments

In the 1990s, indigenous peoples in Australia and Canada started to promote their own 'community-based economic, social and cultural impact assessments' in the form of CCIA (O'Faircheallaigh, 2017: 1185). By applying a negotiation-based and community-controlled approach to ESIAs, indigenous peoples can prepare solid inputs reflecting their aspirations and concerns based on community consent. CCIA are usually organised independently of public or corporate IA and are used as a source for settling on legally binding agreements with companies or governments regarding the terms on which indigenous peoples would support development projects on their lands and territories. In other instances, indigenous peoples negotiate an arrangement with the government, whereby the indigenous component of an IA is taken out of the public project approval process and replaced by a CCIA, which is then imported into the company's IA report (O'Faircheallaigh, 2017). In addition, indigenous peoples sometimes build coalitions with scholars and Non-Governmental Organisations (NGOs) to construct a more robust foundation for 'local political mobilisation' and pressure (O'Faircheallaigh, 2017: 1191).

Based on O'Faircheallaigh (2017), CCIA are generally supervised by an elected council endorsed by the community, which is comprised of indigenous IA specialists, researchers, and informants. IA specialists advise the community on assessment methodologies, provide training, secure funds, give technical advice on ESIA requirements imposed by companies and draft CCIA reports. Information about the assessment process is transmitted to the community in a comprehensive and culturally appropriate manner and opinions on its content are collected. Consultation is divided into various phases and constitutes a roundtable for consensus-building to broaden the local understanding and acceptance of a project, with each phase leading to further questions as community members may have different opinions on project benefits and impacts. The community IA team drafts reports documenting the impacts visualised by the community, formulates strategies to deal with these impacts, envisions benefits and documents the variety in opinions on projects. Feedback is given on the reports by the community which are then presented to the indigenous governing board for its approval.

2.5. Impact and Benefit Agreements

Another approach to participation frequently used by indigenous peoples in Canada, Australia, and New Zealand, 'which includes consent but bypasses state-led processes' (Eisenberg, 2020: 283), is the negotiation of binding agreements with companies, commonly referred to as IBA. These 'private contracts' have the potential to realise indigenous rights: they are generally the outcome of a process of consent; they aim to minimise potential conflicts that may arise from negative project impacts; they strive to ensure that communities obtain benefits from development projects by making them legally binding; they establish means to reduce adverse cultural and environmental project impacts, and; they usually include employment, business and revenue opportunities for indigenous peoples. Since IBA tend to cover the whole project cycle, they usually foresee the human and financial resources necessary for indigenous peoples to participate in monitoring activities throughout the project life cycle, are unrestricted in terms of what priorities are to be included by the negotiating parties and represent an overall opportunity for indigenous peoples to participate meaningfully in determining monitoring structures (O'Faircheallaigh, 2017).

In reality, IBA often do not contain vital clauses to facilitate their effective implementation (St-Laurent and Le Billon, 2015) and mostly remain vague regarding their potential as monitoring tools (O'Faircheallaigh, 2020). While indigenous community-based monitoring (ICBM) represents an effective way to empower indigenous peoples because they directly collect, analyse, and verify data locally and contribute to creating 'a more holistic understanding of impacts' and move 'decision-making regarding land and water' to communities, inadequate funding, inconsistent local capacities to assume monitoring efforts, the lack of formal power sharing structures and the use of scientific indicators are challenges that ICBM initiatives face (Brunet et al., 2020: 1320). Also, IBA do not usually deal with broader social, economic, cultural, and environmental project impacts, making it complicated to tackle issues surrounding project closure (O'Faircheallaigh, 2020). Unless they are used as part of a national strategy to address inequalities and power asymmetries affecting indigenous peoples, IBA do not take into consideration implications beyond the contractual relationship and do not contribute to public policymaking on indigenous rights, including FPIC (Craik et al., 2017). IBA are commonly concluded without public supervision, and allow states 'to govern at a distance' and delegate some of its obligations to companies (St-Laurent and Le Billon, 2015: 592).

Hence, IBA offer 'a truncated version of FPIC' because they undermine the deliberative philosophy behind the consent process (Papillon and Rodon, 2017: 216). Essentially, with 'few alternative ways to exercise influence' over development projects, indigenous representatives put the right to FPIC of their communities on the bargaining table and trade off the possibility to withhold consent in exchange for concrete benefits. During the IBA process, a referendum is organised, during which the community is offered a package of benefits it can either support or oppose with 'little room for community deliberations' (Papillon and Rodon, 2017: 220), causing legitimacy concerns regarding the issue of consent. These legitimacy problems are further aggravated by confidentiality clauses that limit the possibility of free and informed community deliberations (O'Faircheallaigh, 2010). We argue that IBA are more effective where they are linked to CCIA or HRIA, as these processes place communities and human rights at the centre of the negotiating table, empowering indigenous peoples to voice their priorities and providing a united front regarding objectives and strategies.

3. Comparative case studies

3.1. Comparative case studies methodology

Academic studies on indigenous participation in corporate and public engagement processes connected to development projects are becoming increasingly available and facilitate comparative analysis. A comparative case study analysis investigates 'similarities revealed in different situations or cases sharing some common element(s) while differing in others' (Knight, 2001: 7040). Bearing this in mind, we aim to compare a diversity of case studies to establish common patterns and differences that emerge from local experiences with prior consultation and FPIC and to test the scope, applicability, and transferability of these experiences in other contexts (Yin, 2003).

Based on practices that took place under very dissimilar circumstances, we aim to extract some lessons learned for mutual learning with the final objective of improving upon current corporate practices, policies, and strategies (Kløcker Larsen, 2017: 2). Following Rice (2019), who compares 'politics of consent in the context of relations between Indigenous peoples, states, and extractive industries' (p. 336) in Canada and Ecuador, we apply a 'most different systems design' (MDSD) to 'study similarities across structurally different cases' in Canada, Guatemala, and Peru (p. 338). By applying an 'institutionalist approach', we can further underline how institutional arrangements and capacities at the corporate, public, and indigenous level influence the outcome of the national experiences we examine (Rice, 2019: 338). In terms of data collection, we conducted a meta-analysis of previous scientific case studies that provide a thorough narrative description of each case study and examined additional resources to elaborate on the country experiences and cross-reference the information available. Such detailed accounts of the national and local context of each country experience are essential to draw comparisons and find similarities across the different cases (Yin, 2003).

3.2. Canada

3.2.1. Legal framework

Canada has not ratified the C169 and initially opposed the UNDRIP, on the basis that its national legal framework and bilateral treaties with indigenous peoples already provide for due recognition of their right to prior consultation and FPIC. Because of this 'nation-to-nation relation' that is based on the historical negotiation of treaties and other agreements with indigenous peoples, 'the principle of mutual consent still shapes to this day how Indigenous Peoples define their status in relation to the Canadian federation' (M. Papillon and Rodon, 2019b.: 264). While its laws and national jurisprudence afford indigenous peoples a voice in decision-making processes related to resource extraction, through consultative mechanisms and negotiated agreements with companies, these also constrain the interpretation and practice of FPIC, as it 'is interpreted as an aspirational goal rather than as a firm obligation' (M. Papillon and Rodon, 2019b.: 263). Importantly, federal, and provincial governments approach the role of FPIC in land and natural resource management differently and its implementation needs to be studied on a case-to-case basis.

National jurisprudence obliges the State to consult with indigenous peoples, accommodate their priorities, and protect their rights, where measures or projects are likely to impact them (Papillon and Rodon, 2017). However, the Supreme Court[11] does not confer an indigenous veto right on public decision-making processes, although it recognises that when impacts on indigenous rights are major, the State should consult with indigenous peoples to seek their consent before moving on to a decision (Papillon and Rodon, 2017). In line with the UNDRIP (art. 46(2)), the State can only move forward with a project after consent was withheld, if it can demonstrate that substantive engagement with the concerned communities was ensured, and a convincing public argument that justifies infringing upon indigenous land titles was given. The Court has further established that, while the duty to consult is ultimately the responsibility of the state, it can entrust some 'procedural aspects' to third parties, such as companies (Papillon and Rodon, 2017: 219).

The negotiation of IBA has become 'a core mechanism' - for strategic purposes mainly - for companies to seek indigenous peoples' support for a project, in exchange for some benefits and impact mitigation measures in Canada (Papillon and Rodon, 2017: 217). But 'IBA negotiations are generally premised on the assumption that the project will be approved', taking away the FPI features of consent (M. Papillon and Rodon, 2019b.: 267). In the absence of a regulatory framework for indigenous consultation for the most part, indigenous peoples participate in existing public engagement mechanisms under ESIA, which hardy implement indigenous participatory rights because, as IBA, they serve to inform and legitimise decisions, not to 'share decision-making authority' (M. Papillon and Rodon, 2019b.: 266). Indigenous peoples have also developed their own decision-making procedures, oftentimes 'parallel to state-sponsored regulatory processes' (M. Papillon and Rodon, 2019a.: 316), in the form of CCIA or local policies in addition to adopting confrontational strategies to question the legitimacy of existing participatory channels through legal actions and civil disobedience (M. Papillon and Rodon, 2019b.).

Hence, FPIC is 'at a critical juncture' in Canada, with different actors rallying around this principle, but using digressing interpretations to implement it (M. Papillon and Rodon, 2019a: 325). Based on two case studies, one from the Squamish Nation of British Columbia and one from the Cree Nation of Northern Quebec, we establish that indigenous peoples can succeed in redefining FPIC from a public procedural duty to an issue of indigenous power over the project. Setting out from different starting points and using dissimilar practices, these peoples changed 'the institutional site for operationalising FPIC from a state-driven to a community-driven process' (M. Papillon and Rodon, 2019a.: 317). A third case study from the Cree Nation of Northern Ontario exposes the negative side of IBA as an artificial attempt to implement FPIC and a complex technical exercise highly dependant on indigenous peoples' organisational and financial capacities.

3.2.2. Squamish nation of British Columbia – CCIA and IBA

The Woodfibre Liquefied Natural Gas Project (WLNG Project) submitted its application to the British Columbia Environmental Assessment Office (BCEAO) in 2014. Located in Howe Sound, a few kilometres southwest of the Squamish Nation's (SN) territory, the WLNG Project and related Eagle Mountain Fortis BC Pipeline Project were expected to operate for 25 years, exporting 2.1 million metric tons of LNG annually.[12] The BCEAO conducted an EIA in 2014, and in 2015 opened up a period to receive comments from the public. Even though the SN was involved in the EIA by participating in the BCEAO's open houses and Working Group meetings, the SN Council criticised the EIA for not attending to the SN's concerns regarding the project's impacts on fisheries and marine environments and for not foreseeing appropriate mitigation measures for upstream Green House Gas Emissions.[13] In its response submitted to the BCEAO in 2015,[14] the Council referred to a CCIA conducted in the form of a project review through a Community Committee and of a community engagement process regarding the two projects. In its response, the SN also stated that until their concerns were not addressed, it would not endorse the projects at hand.

As the Council did not have the resources to carry out an evidence based CCIA, it turned to the company, which, faced with legal uncertainty and possible delays and costs, agreed to finance the CCIA and eventually signed a framework agreement with the SN in July 2014. For the company the agreement generated legal certainty and for indigenous peoples it was a solid tool to practise its authority over their territories beyond prevailing public procedures (M. Papillon and Rodon, 2019a.). The IA methodology and scope were established in community meetings, direct dialogue and focus groups. In its final report, the SN proposed 18 measures to mitigate the project's impacts on Squamish lands and water resources and on the transmission of culture and history, amongst others.[15]

The SN leadership eventually endorsed the project and signed a legally binding IBA in 2018. An Environmental Working Group was set up to monitor the implementation of the proposed measures and provide updates to the community via monthly newsletters.[16] Even though public authorities were initially reluctant to recognise the IBA, the BCEAO ended up endorsing it formally. And although the SN was not successful in establishing a binding agreement with public authorities, it generated a precedent that public authorities could not overlook, allowing the SN to define FPIC according to its local needs and concerns (M. Papillon and Rodon, 2019a.) and to establish 'the first legally-binding Indigenous-led environmental assessment of a project in Canada', setting a nation-wide example.[17]

3.2.3. Eeyou Istchee Cree nation of James Bay in Northern Quebec – mining policy

The Cree Nation's (CN) relationship with the Government is greatly defined by the James Bay and Northern Quebec Agreement (JBNQA) it signed in 1975 after fighting a hydroelectric megaproject. The

[11] https://www.lib.sfu.ca/help/research-assistance/subject/criminology/legal-information/indigenous-scc-cases (accessed on 23 January 2023).

[12] Background - District of Squamish - Hardwired for Adventure (accessed on 23 January 2023).

[13] KMBT_C754_98014356-20160301223314 (squamish.ca) (accessed on 23 January 2023).

[14] DOS-Council-EAO-Response-Apr30-2015-combined.pdf (squamish.ca) (accessed on 23 January 2023).

[15] Ibid.

[16] https://www.squamish.net/woodfibre-lng/ (accessed on 23 January 2023).

[17] Ibid.

agreement establishes that the CN cedes all rights they may have over their territories, including land titles, in exchange for monetary compensations and a land regime that protects their hunting and trapping rights. The CN does not have the same legal stance as the SN with regards to control over their lands, but they have financial resources, institutional strength, and a certain level of political power. Even though the JBNQA does not stipulate the establishment of an indigenous autonomous government, several Cree-controlled local and administrative institutions were merged under the Cree Nation Government (CNG). Additionally, the CN has an important political domain in the Grand Council of the Crees of Eeyou Istchee (GCCEI), which signed the JBNQA on behalf of the CN. The GCCEI chooses half the associates of the federal and provincial project assessment boards, but the boards only have recommendation authority, with the ultimate decision-making power lying with federal or provincial institutions (M. Papillon and Rodon, 2019a).

Since the signing of the JBNQA, which does not include the right to consent to projects, the CN has effectively opposed a great number of development projects by using the financial and political powers of the GCCEI and CNG. In 2010, the CN adopted a Mining Policy, to establish a 'standardized, consistent and effective approach for Cree involvement in all mining related activities occurring on the Territory'.[18] The Policy is based on three pillars: 1) the Cree's support and promotion of mining projects coherent with their approach to natural resource management; 2) the establishment of sustainable mining practices based on social and economic agreements, and; 3) the collaboration and transparency around mining projects. The political power of the CN makes it difficult for the Government and corporate actors to ignore the Mining Policy, as this would entail facing costly and lengthy legal processes, potential social mobilisations, and negative public scrutiny.

In 2011, the CN signed an IBA with Goldcorp concerning a gold mine project and affecting the community of Wemindji. Based on community consultations and public hearings, the CN acceded to aligning their interests and concerns with those of the company for the economic success of the project. The IBA ensures that indigenous peoples will receive financial benefits through a number of fixed payment mechanisms and participation in the future profitability of the mine.[19] In 2009, Strateco Resources applied for a licence to operate the Matoush Uranium Exploration Project, and in 2012 a public hearing was organised with affected indigenous communities, after which the Canadian Nuclear Safety Commission announced its decision to grant the company the license, but the CN insisted that it had not co-authorised the project. The CN used its Mining Policy to force the Government to enact a permanent moratorium on all uranium activities in its territories[20] and in 2013, public authorities finally refused to issue a permit for uranium exploration. The Supreme Court upheld the freeze on all uranium activities as recently as 2020, when it refused Strateco Resources' request to appeal the Government's decision to side with the CN.[21]

3.2.4. *Mushkegowuk Cree nation of James Bay in Northern Ontario – IBA*

The Fort Albany First Nation (FAFN) and the Kashechewan First Nation (KFN), which jointly hold and occupy indigenous lands situated in the Western James Bay area that form part of the Mushkegowuk territories,[22] signed an IBA with the DeBeers Canada Inc. (DBC) concerning the Victor Diamond Mine (VDM) in 2009. The Attawapiskat First Nation (AttFN) and the Moose Cree First Nation (MCFN), which also form part of the Mushkegowuk Council,[23] had previously signed two separate IBA with the DBC in 2005 and 2007 respectively, before the mine became operational in 2008. The FAFN and KFN had long been accusing the DBC and Government to primarily consult with the AttFN concerning the EIA for the project. Since both the FAFN and KFN only signed an IBA after the mine became operational (until its decommissioning in 2019[24]), they did not have any influence on the project design. The IBA requires the FAFN and KFN to give unhindered access to and undisturbed enjoyment of the mine and contains a provision establishing that indigenous peoples revoke any future claims based on their constitutional rights (Craik et al., 2017).

The IBA is embedded within the indigenous concept of 'Shabotowan' (in harmony with nature) and comprises a mitigation package to circumvent negative environmental impacts, a one-time compensation payment, different annual payments for the use of indigenous lands and breach of treaty rights, as well as contributions to upgrade and maintain the winter road and annual benefits divided into minimum payments (Craik et al., 2017). In charge of renewing the initial consent given by the communities was an Implementation Committee (IC) made up of indigenous and company representatives. But the functioning of the IC was criticised for being unclear and unpractical and the profit-sharing model generated concerns regarding its fairness. The complex conditions inherent to the IBA and its administrative stipulations requiring indigenous peoples to come up with important financial resources, as well as the lack of influence on the project design greatly damaged its accountability and confidence building goals. Indigenous peoples repeatedly condemned the company's lack of effort to seek their meaningful consent, to consider their concerns over project impacts and to build in their values and knowledge into the project design (Craik et al., 2017).

3.3. *Guatemala*

3.3.1. *Legal framework*

Guatemala ratified C169 in 1996 and endorsed the UNDRIP in 2007 but has not ratified these international instruments into law. The Guatemalan Constitution (1993),[25] in its article 67 announces that the State recognises indigenous peoples' collective ownership over their territories and grants them special protection, but in practice the State has shown little support for indigenous peoples' struggle to regain control over their lands, territories and resources. The Municipal Code (the Code, 2002)[26] and the Law on Rural and Urban Development Councils (the Law, 2002)[27] recognise the presence of 'indigenous authorities at

[18] https://www.cngov.ca/wp-content/uploads/2018/03/cree_nation_mining_policy-1.pdf (accessed on 23 January 2023).

[19] https://www.canadianminingjournal.com/news/agreement-goldcorp-wemindji-sign-deal-covering-ʟ-onore-project/ (accessed on 23 January 2023).

[20] https://uranium-network.org/2012/08/13/the-james-bay-cree-nation-enacts-permanent-uranium-moratorium-in-james-bay-territory/ (accessed on 23 January 2023).

[21] https://www.cngov.ca/the-cree-nation-applauds-the-supreme-court-of-canadas-refusal-to-consider-stratecos-appeal/ (accessed on 23 January 2023).

[22] https://www.oceans5.org/project/western-st-james-bay-national-marine-conservation-area/ (accessed on 23 January 2023).

[23] https://www.mrhha.ca/content/mushkegowuk-council (accessed on 23 January 2023).

[24] https://canada.debeersgroup.com/operations/mining/victor-mine (accessed on 23 January 2023).

[25] Asamblea Nacional Constituyente de Guatemala, 17 November 1993. Constitución Política de la República de Guatemala (reformada por acuerdo legislativo No. 18-93), Asamblea Nacional Constituyente, Guatemala. https://www.cijc.org/es/NuestrasConstituciones/GUATEMALA-Constitucion.pdf (accessed on 23 January 2023).

[26] Congreso de la República de Guatemala, 2 April 2002, Código Municipal Decreto 12-2002, Congreso de la República, Guatemala. https://gobernacionprogreso.gob.gt/wp-content/uploads/2021/09/CODIGO-MUNICIPAL-DECRETO-12-2002.pdf (accessed on 23 January 2023).

[27] Congreso de la República de Guatemala, 12 March 2002, Ley de los Consejos de Desarrollo Urbano y Rural Decreto 11-2002, Congreso de la República, Guatemala.http://www.infom.gob.gt/archivos/normativos/leyconsejodesarrollo.pdf (accessed on 23 January 2023).

the local and municipal level' (Dueholm, 2012: 167) and require municipal governments to consult with indigenous and non-indigenous communities affected by projects, programmes, and policies. The Code establishes that during such consultations, communities are allowed to apply their own 'criteria of the juridical system' and the Law has created Community Development Councils (COCODE), which are also integrated by indigenous leaders and function as 'participatory spaces' for indigenous peoples to discuss their development priorities (Constanza, 2015: 270).

The Law on Mining (1997)[28] however fails to recognise indigenous consultation rights and curtails 'exploration and mineral title access' by eliminating 'foreign ownership limits' (Laplante and Nolin, 2014: 234). The final approval of a license for mining exploitation or concessions for hydropower projects depends on the endorsement of previously conducted ESIA by the Ministry of Environment and Natural Resources (MARN). Even though the MARN is responsible for guiding ESIA, only the Ministry of Energy and Mining (MEM) can grant or deny mining licences and referral to the MARN is only necessary when companies request exploitation licenses and does not go beyond approving ESIA. The MARN is under considerable pressure to approve mining-related projects and tends to manipulate the rules of environmental evaluation, control, and monitoring. Additionally, even though the MARN established public participation in ESIA as a norm, companies finance most ESIA and remain in charge of stakeholder engagement (Aguilar-Støen and Hirsch, 2015).

Since there is 'a high degree of ambiguity or even confusion regarding the content and scope of the State's duty to consult' (A/HRC/15/37/Add.8, 2010: para. 15), companies usually shape ESIA to their advantage. One corporate practice used is the organisation of 'tactical meetings' with only a few indigenous residents during which companies share information about projects impacts and benefits (Aguilar-Støen and Hirsch, 2015: 475). These meetings have caused internal divisions within communities and even violent outbreaks after concessions to projects were granted without the consent of the whole community. Another common procedure involves the corporate hiring of local intermediaries with the necessary language skills to hold meetings with representatives from municipalities, who are then supposed to inform their citizens about the project, but generally get caught up 'in larger political struggles', and national economic agendas (Aguilar-Støen and Hirsch, 2015: 476). Thirdly, companies oftentimes manipulate information sharing sessions and 'buy' community leaders' consent by offering them jobs, money, or local investments in exchange for persuading their communities to agree with a project (Aguilar-Støen and Hirsch, 2015: 476).

3.3.2. Community consultations

Faced with exclusionary public and corporate ESIA processes that offer few opportunities to operationalise their right to FPIC, indigenous peoples have used the vague language of the Code to conduct their own 'community consultations'. Participation in this kind of 'organised resistance' is a particularly effective tool to regain some control over decision-making processes that concern them and allows indigenous peoples to reject any involvement 'in relations on the terms offered by the state' or the company (Eisenberg, 2019: 285). Even though community consultations have been declared illegal by different court rulings, they have contributed to the practice of 'a new form of contentious politics' (Constanza, 2015: 261), as they allow indigenous peoples to 'negotiate the regulation of natural resources on the basis of their ethnic identity' (Dueholm, 2012: 159) and to build 'a platform to express their voice in a way that allows them to play a meaningful role in the decision-making processes of mining projects' (McNabb, 2018: 30)

When the Canadian company Goldcorp started the construction of the Marlin mine in San Miguel Ixtahuacán and Sipakapa in the San Marcos province in 2003, this prompted the Sipakapa indigenous peoples to carry out the first ever public consultation about mining that became 'a milestone in the history of contemporary Guatemalan social movements' (Urkidi, 2011: 557) and is now identified as one of Guatemala's most defiant organising processes that has shaped the social movement in the country in an irreversible way (Fulmer et al., 2008). Starting from 2006, a wave of community consultations interrupted the status quo of mining licensing in the country, when the twelve indigenous communities of the San Juan de Sacatepéquez region held a community consultation to protest the Cementos Progreso mine. The Government had approved three mining licences for the projects proposed by Cementos Progreso without the consent of the affected indigenous peoples, who then consulted on its potential impacts and submitted a report with their arguments and votes against the project to the Government in 2007. Opposition to Cementos Progreso is the longest-standing indigenous struggle against a mine in the country and triggered a visit by the UN Special Rapporteur on the Rights of Indigenous Peoples in 2010 (A/HRC/15/37/Add.8, 2010) and has been mentioned in numerous human rights reports elaborated by the United Nations (A/HRC/21/47/Add.3, 2012; A/HRC/39/17/Add.3, 2018).

3.3.3. Goldcorp Marlin mine HRIA

In 2010, Goldcorp commissioned one of the most eminent and extensively scrutinised HRIA to this day. Goldcorp operated the Marlin mine from 2005 until 2017 through its subsidiaries, Montana Exploradora and Entre Mares, with the IFC having a 5% share in the operations. The open-pit metal mine is situated on what are mostly Mayan Mam and Mayan Sipakapan territories. The IFC played a crucial role in the history and governance of the Marlin mine, not only because it provided important capital, but also because of its symbolic role as an institution that holds its borrowers accountable for their actions. But in this case, the IFC's safeguard policies, even 'if well intentioned, proved to be vague and subject to interpretation' and demonstrated that to be meaningful, they need to be enforced with political will and oversight (Fulmer et al., 2008: 109). In fact, the IFC did not guarantee good faith consultations with indigenous peoples and disclosure and did not ensure an adequate ESIA process.

Indigenous opposition to the mine and their collective agency materialised in road blockades, demonstrations and public rallying that gained international traction (Coumans, 2012). In 2005, the eleven communities affected by the mine's operations held a community consultation, with nine voting against it, one abstaining and one voting in favour of its continuation. Even though the Constitutional Court recognised the consultation in 2007, the MEM ruled that it was non-binding and mining activities continued. In 2010, the ILO requested the Government to suspend its activities at the mine until studies to assess its impacts and a consultation process with the affected peoples could take place. The same year, responding to an appeal from 18 indigenous communities affected by the mine, the Inter-American Commission on Human Rights (IACHR) approved precautionary measures requiring the State to suspend all mining operations (Coumans, 2012). Documented negative impacts caused by the mine include 'intimidation and assassinations of mine critics', 'fraudulent land acquisitions and evictions', 'skin irritation', 'damaged homes' from mine explosions, 'the depletion and contamination of scarce water resources', and 'high levels of heavy metals' in the blood of indigenous peoples (Laplante and Nolin, 2014: 234).

In 2008, a group of Socially Responsible Investment (SRI) firms and pension funds (the SRI group)[29] requested Goldcorp to conduct a HRIA

[28] Congreso de la República de Guatemala, 1998. Decreto Nº 48/97, Ley de Minería, Congreso de la República, Guatemala. http://www.sice.oas.org/investment/natleg/gtm/mineria_s.pdf (accessed on 23 January 2023).

[29] Consisting of Ethical Funds, First Swedish National Pension Fund, Fourth Swedish National Pension Fund, Public Service Alliance of Canada Staff Pension Fund, and SHARE.

of the Marlin mine a request to which the company acceded (Coumans, 2012). But shortly into the process, some SRI group members became worried that the 'clear and authoritative recommendations' (Coumans, 2012: 51) indigenous peoples had vocalised in their community consultations and referendum were being ignored. They were also troubled by the failure to obtain indigenous communities' consent regarding the assessment process itself, noting that the interests of the company preceded those of the affected peoples. The SRI group members' concerns were echoed by the consultancy firm (On Common Ground) hired to conduct the HRIA, which resolved that the prerequisites to engage with indigenous peoples in good faith consultations did not exist, prompting an important 'shift in methodology and focus' of the assessment and the change in name, from HRIA to Human Rights Assessment (HRA) (Coumans, 2012: 45).

A Memorandum of Understanding (MOU) signed between the SRI group and a Steering Committee established that the objective of the HRA was to expand Goldcorp's prospects regarding its continued operations in the country by putting in place effective policies and processes in line with IHRL (Coumans, 2012). Since the Steering Committee did not include representatives of the affected communities, the members of important indigenous organisations decided not to participate in the HRA. The HRA report, released in May 2010, established that the assessment process had further intensified tensions with and divisions within the affected communities and that Goldcorp should aim to implement a meaningful FPIC process before increasing its activities and buying new land (Coumans, 2012). The report further acknowledged that the recommendations for the company reflected the opinions of the assessment team and not those of indigenous peoples. Even though the report discusses some of the issues raised by these peoples over the years, the recommendation to stop expanding the mine's activities has not been respected.

The Government of Guatemala finally responded to the IACHR precautionary measures and the HRA by setting up a dialogue process with Goldcorp to address concerns over alleged water-related contamination and human health impacts attributed to the Marlin Mine. Goldcorp further committed to implementing eleven water projects for communities and in 2011, the Government declared that the Marlin mine was in full compliance with all legal requirements, prompting the IACHR to revoke its precautionary measures. In 2017, Goldcorp announced the mine was entering into a closure and reclamation phase, and when its operations finally ceased in May 2017, indigenous peoples blocked the mine entrance since the company refused to take any responsibility concerning the list of grievances they had presented.[30] The Governor of San Marcos eventually established a formal dialogue process in August 2017 to mediate the conflict and evaluate the twelve grievances connected to harms and losses caused by the mine's operations and Goldcorp committed to finding solutions to all grievances until 2020, which the company has partially lived up to.[31]

3.4. Peru

3.4.1. Legal framework

Peru ratified the C169 in 1994 and is the only country in Latin America to have a law on Prior Consultation, Law No. 29,785 (the Law).[32] The Law was approved in September 2011, in the aftermath of a deadly conflict in the northern Amazon region known as the 'Baguazo', which constitutes 'a point of rupture in the history of Indigenous peoples in Peru', with its starting point being the legal recognition of prior consultation rights (Merino, 2018: 79). The 'Baguazo' arose following the signature of a free-trade agreement with the United States of America in 2007[33] and the issuance of over 100 Presidential Decrees to exploit natural resources on indigenous peoples' lands and territories without their consent. In the five years preceding the Law, 'social conflicts had tripled in number and frequency', affecting all 24 regions of Peru and drastically intensifying over time, with thousands of indigenous peoples being removed from their Andean and Amazonian territories (Ilizarbe, 2019: 144).

But many indigenous organisations have already withdrawn 'their formal support' of the Law, accusing it of being a weak version of internationally recognised indigenous rights (Schilling-Vacaflor and Flemmer, 2015). One source of dispute is the limited recognition of the right to consent and the use of intercultural dialogue to overcome differences and share information on project impacts. Furthermore, the institutional setting in which the Law is to be operationalised is weak and confusing. The Vice-Ministry of Interculturality within the Ministry of Culture and its Department for the Rights of Indigenous Peoples, through the Office of Prior Consultation (OPC), oversees the coordination of prior consultation processes with other public entities. The OPC is responsible for building the capacities of public servants and indigenous peoples to implement prior consultation processes. But the Ministry of Culture's mission is obstructed by the lack of public funding, the constant changes in personnel and its status as a lower ranking Ministry in comparison to the Ministry of Energy and Mines (MINEM). The advisory role of the Vice-Ministry has been criticised by indigenous organisations, who favour its active role during consultations, as the entity specialised in indigenous issues (Schilling-Vacaflor and Flemmer, 2015).

While indigenous peoples initially viewed the consultations as their 'claimed spaces', they have since been turned into 'invited spaces' that have not 'been shaped by them' (Flemmer and Schilling-Vacaflor, 2015: 6). The presence of relatively weak indigenous organisations on the negotiating table, in terms of financial, educational, representational, and institutional strength, implies that they cannot take ownership of the processes and 'reveals one of the inherent challenges of the consultation approach' (Flemmer and Schilling-Vacaflor, 2015: 6). Many national indigenous organisations that have the necessary accreditations to participate in consultation processes do not entertain close links to their communities. Also, because of the highly technical nature of the discussions with companies and the State, indigenous peoples' influence on its outcomes has greatly depended on the assistance of 'technical advisors to help them formulate and substantiate claims' (Flemmer and Schilling-Vacaflor, 2015: 9), further disempowering them.

3.4.2. Conga mine – EIA

In July 2011, a very mediatic and violent conflict flared up in Northern Peru, following the approval of an EIA for the Conga mine in late 2010, without having received the consent of the affected communities, who did not have enough time to examine the countless pages of technical information in the three months allowed. The EIA allowed the Yanacocha Mining Company, a subsidiary of the US-based Newmont Mining Corporation and partially owned by the Peruvian Buenaventura Mining Company, as well as the International Finance Corporation (5% ownership) ,[34] to operate the largest open-pit copper-gold mine in the country and South America, representing an investment of $4.8 billion over 19 years. To make way for the mine's infrastructure, the company had to drain four important lagoons located in Celendín, Cajamarca and Hualgayoc, affecting peasants' and indigenous peoples' access to safe

[30] https://s24.q4cdn.com/382246808/files/doc_downloads/2020/07/MSCI-Response-Marlin-Mine-January-2020.pdf (accessed on 23 January 2023).
[31] Ibid.
[32] Congreso de la República de Perú, 7 de septiembre de 2011. Ley N° 29785. Ley del derecho a la consulta previa a los pueblos indígenas u originarios, reconocido en el Convenio 169 de la Organización Internacional del Trabajo. https://leyes.congreso.gob.pe/Documentos/ExpVirPal/Normas_Legales/29785-LEY.pdf (accessed on 23 January 2023).
[33] https://ustr.gov/archive/assets/Document_Library/Fact_Sheets/2007/asset_upload_file585_13067.pdf (accessed on 23 January 2023).
[34] https://disclosures.ifc.org/project-detail/SPI/9502/yanacocha-iii (accessed on 23 January 2023).

water. But some human rights organisations questioned the evaluation of environmental impacts (Merino, 2018), as the EIA lacked hydrological and geochemical data, underestimating the impact of the mine on rivers and wetlands (Paredes-Peñafiel and Li, 2017).

As part of the compensation package for the affected communities, the company planned to construct four artificial water reservoirs to better store the abundant rainwater reserves, defending the idea that 'engineering could improve nature' (Paredes-Peñafiel and Li, 2017: 308). This technical explanation was contrary to indigenous peoples' belief that humans can guide the water, but they cannot stop it. Also, the EIA had not identified a fifth lagoon, the Mamacocha, located close to the provincial border between Hualgayoc and Celendín, as being under the area of influence of the mine. This omission was heavily criticised by indigenous peoples, who maintain that all five lagoons are connected and that the negative environmental impacts sustained by one lagoon would affect the rest of the lagoons and hence, indigenous livelihoods (Paredes-Peñafiel and Li, 2017).

With the lagoons as the protagonists of the conflict and amongst mounting human rights concerns, indigenous peoples and peasants took to the streets in November 2011, producing an indefinite strike on the Conga Project in Cajamarca, prompting the President to declare the state of emergency in the region. This public disturbance extended to the rest of the country soon afterwards and in 2012, led to the 'Great Water March' that assembled more than twenty thousand people in a walk from Cajamarca to Lima (Millones, 2016). Operations at the mine were finally paralysed in 2012 and in 2016, Newmont announced that it would close the mine, but has since continued to lay the groundwork for the project.[35] As recently as 2022, the company has voiced plans to move ahead with the Conga project, having bought out the Peruvian Buenaventura company.[36]

The Conga mine conflict raised serious issues concerning the participatory stages of EIA and finally 'triggered a profound institutional change' (Merino, 2018: 78) with the creation of the National Service for Environmental Certification of Sustainable Investments (SENACE), a technical and independent office in charge of evaluating EIA that is ascribed to the Ministry of Environment. Unfortunately, the SENACE has limited institutional capacities, as its senior management is made up of six ministers, each with their own political agenda, and the Ministry of Environment is in charge of endorsing EIA. Even though the SENACE was created in response to the need for a more inclusive approach to local participation, the entity was quickly 'co-opted' because of the pressure exercised by companies to simplify EIA-related approvals (Merino, 2018: 78).

4. Comparative analysis

Establishing patterns that emerge from corporate experiences with FPIC and testing their scope, applicability and transferability in other contexts is an inherently challenging project due to the historical, legal, social, economic, and political circumstances of each country and locality. The utility and generalisation of a comparative analysis are further complicated by the fact that we compare case studies from a high-income country with strong public institutions and well-established indigenous organisations with significant political agency with case studies from two low-income countries with unreliable public institutions and rather weak indigenous organisations, at least in terms of their power on corporate and public decision-making processes. Nonetheless, indigenous peoples in all three countries continue to face

Table 2
Emerging patterns from case studies.

Patterns (P) and Differences (D)	C.	G.	P.
P1. Flawed national frameworks regulating community participation, prior consultation and FPIC, as well as ESIA processes that are often financed by project proponents, especially regarding natural resource governance, and the inconsistent presence of the state at the local level, leave companies to their own devices to engage with indigenous peoples as they see fit, allowing them to pay mere lip service to international human rights standards.	x	x	x
P2. Collective action in the form of social mobilisation and resistance, and the reappropriation of decision-making processes through the creation of their own parallel mechanisms to express consent, or lack thereof (community consultations, CCIA, local indigenous policies) are important sources of community bargaining power and support the development of alternative approaches to corporate-community relations.	x	x	x
P3. The long-term effects of such strategies on the operationalisation of FPIC are yet to be determined and are highly dependant on local circumstances, including indigenous peoples' organisational strength, corporate support to indigenous peoples and public responses to their protests and demands.	x	x	x
P4. Indigenous peoples' defiant organisational processes have shaped the social movement in an irreversible way and have contributed to their growing political and social agency, especially in Canada, but also in countries like Guatemala and Peru, where indigenous peoples, in alliance with national, regional, or international organisations, have clearly demonstrated that there is no escaping the need for engagement.	x	x	x
P5. IBA's contribution to the operationalisation of FPIC remains questionable, as the parties to the agreement are still unequal and legitimacy concerns regarding the regular renewal of consent and the functioning of the agreement constitute serious threats. When IBA are negotiated based on previously conducted CCIA, they become more FPIC-compliant.	x		
D1. In Canada, indigenous peoples have a long-standing practice of interacting and negotiating with companies without the interference of the state, while in Guatemala and Peru, indigenous peoples prefer to interact with the state and look towards NGOs, national, regional, and international indigenous organisations, as well as regional courts, to find legal and social responses to their plights.			
D2. While indigenous peoples in Canada conduct CCIA and sign IBA on a regular basis, this is not a widespread practice in Latin America. That said, indigenous peoples in Guatemala and Peru could certainly learn from the Canadian experience, as this would allow them to construct technically sound and consent-based counterproposals to exclusionary ESIA.			
P6. The Goldcorp HRA exemplifies that most companies still prioritise economic benefits over respect for human rights. Even when they attempt to include indigenous peoples in decision-making processes, they go about it half-heartedly, showing no genuine commitment to implementing their right to FPIC and not listening to their concerns and demands.		x	
P7. The preconditions to guarantee the success of prior consultation or FPIC processes or any other corporate-driven community participation process are not yet in place at the local level and rather contribute to the escalation of historical frustrations felt by indigenous peoples.	x	x	x
P8. The result of any corporate-led participatory process or FPIC process is greatly dependant on indigenous peoples' organisational and institutional capacities and their technical know-how on how these processes work. Capacity-building activities directed at indigenous peoples and to be financed by companies or states are therefore essential.	x	x	x
P9. Vital questions remain unresolved as to who should be consulted. IHRL refers to the 'legitimate representatives' of the community, suggesting that traditional leaders should participate in engagement processes with companies and states. Oftentimes, only those representatives and organisations that have the necessary legal accreditations can participate in such processes, but these do not necessarily represent all community interests and concerns.		x	x
P10. Companies need to understand the local context, including traditional decision-making processes and internal power struggles, to make sure they do not contribute to the escalation of	x	x	x

(*continued on next page*)

[35] https://earthworks.org/blog/dear-newmont-shareholders-its-time-to-end-the-conga-mine-travesty/ (accessed on 23 January 2023).

[36] https://www.business-humanrights.org/en/latest-news/peru-mining-conflict-between-communities-and-chinese-mmg-las-bambas-project-continues-while-newmont-announces-plans-to-move-ahead-with-its-conga-project/ (accessed on 23 January 2023).

Table 2 (*continued*)

Patterns (P) and Differences (D)	C.	G.	P.
lingering local conflicts. Capacity building activities directed at corporate staff at all levels is crucial for companies to be able to identify risks and impacts, but also to change the corporate culture towards a more FPIC-compliant one.			
P11. Public and corporate authorities have already established firm institutional frameworks, with a focus on technicalities rather than on human rights, to involve indigenous peoples in decision-making processes connected to resource governance, eliminating the need for structural changes at the policy level. As a result, those demands that go beyond these frameworks, such as territorial recognition, are either rejected, manipulated, or end up lost in institutional voids.	x	x	x
P12. Only by re-politicising these institutional settings, can companies and states truly engage with indigenous peoples based on their right to FPIC and self-determination and can long-outstanding power asymmetries and socioeconomic inequalities that indigenous peoples are still subject to be tackled and structural changes to environmental governance systems be introduced.	x	x	x

similar economic and social inequalities, as well as political hurdles, with governments passing legislation in favour of consultation rights, only to constrain the practice of these rights when deemed in corporate or national interests (Doyle, 2019). This important commonality provides a constructive basis for our comparative analysis.

Some additional thoughts on the comparative case study analysis include:

Pattern 2: In Canada, indigenous peoples mostly resort to political agency and policy making to force companies and the government to give into their demands. In Guatemala, indigenous peoples use self-organised referenda based on community consultations to raise their voices against exclusive decision-making processes on extractive projects. In Peru, indigenous peoples generally resort to social mobilisation and national protests with international outreach to object against the violation of their consultation rights in the context of development projects. Having said that, indigenous peoples do not usually use one single strategy and social mobilisation is commonly used in all three countries.

Pattern 3: While community consultations in Guatemala have had a snowball effect in the country, the lack of legal recognition of the connected results obstruct their norm-creating potential to further indigenous consultation rights. Indigenous protest and disobedience, including outright conflict, have had an enormous impact on policymaking in Peru, leading to the approval of the Law on Prior Consultation and the creation of the SENACE, two measures that have not had visible impacts on the ground due to political manipulation and institutional voids. Indigenous peoples in Canada have been able to halt projects by not endorsing EIA based on technically sound objections developed during CCIA.

Pattern 6: The Marlin mine case demonstrates the risks of relying on a superficial appearance of participation without robust and legitimate engagement in decision-making procedures. For Goldcorp, they have done everything in their power to get exposure to public scrutiny, going further than many other companies, whereas for indigenous peoples, the HRA has done little to realise their rights. Aside from underscoring the utility of ex-ante HRIA when it comes to assessing a company's impacts on human rights, Goldcorp's HRA reveals that HRIA can do more harm than good if they are not conducted in the right environment. As demonstrated, once a company has breached the trust of the community, any effort to mitigate previous abuses will likely be viewed with apprehension and business activities must be suspended until a formal consultation process can be guaranteed, which was not the case of the Marlin mine.

Pattern 7: Implementing these preconditions involves tackling long-standing power asymmetries and deep-rooted inequalities, as well as addressing the chronic violation of human rights, otherwise FPIC may introduce new forms of inequalities, especially within divided communities.

Pattern 8: Therefore, ensuring that capacity building activities directed at indigenous peoples go hand in hand with engagement processes is primordial, if companies and states want to guarantee that negotiations take place on an equal knowledge and power basis.

5. Conclusion

Politics of exclusion are recurrent everywhere, with indigenous peoples being granted several human rights only for them to be delimited when they arguably threaten national sovereignty or corporate economic interests (Doyle, 2019). Concerning FPIC, disagreements over its meaning and scope illustrate the complexities connected to the translation of international norms into national contexts (Boutilier, 2017; Philips, 2015; Barelli, 2012; Ward 2011; Szablowski, 2010). While indigenous peoples see FPIC as an integral part of their right to self-determination (Cambou, 2019; Tomlinson, 2019; Leydet, 2019; Yaffe, 2018; Scheinin and Åhren, 2017; Wheatley, 2014) and interpret this principle as a decision-making right that necessarily includes the option of withholding consent (FAO, 2016; UNPFII, 2005), states and companies tend to limit the principle to an obligation to consult in order to *seek*, but not necessarily *obtain*, consent (Papillon et al., 2020; Leydet, 2019; Anaya and Puig, 2017). The shortcomings of FPIC processes in law and in practice have added to indigenous peoples' disillusionment with current public and corporate participation channels and their original aspirations (Schilling-Vacaflor, 2016), that FPIC would constitute an empowering engagement mechanism that would necessarily lead to their inclusion in important political and economic processes, have been mostly unfulfilled. Despite these limitations, indigenous peoples still view FPIC as an asset rather than a constraint for their collective rights.

In their struggle for self-determination, indigenous peoples are increasingly contesting the dominant discourse of states and companies, but it remains to be seen if the *politisation* and *ethnicisation* of the different participation practices will have long-term effects on indigenous peoples' political agency and their historical struggle to regain control over their lands, territories, and resources. Without a doubt, indigenous peoples globally have become unavoidable actors in controversies and socioenvironmental conflicts around extractive projects. Their ability to self-organise and build alliances with extra-local actors is crucial in gaining knowledge, activating resources for action and organising resistance at different levels, to elevate their struggle to an international arena, to cause awareness about the plights of indigenous peoples within the broader commodity chain and political economy granting them the possibility to frame these 'in terms of global demands for environmental justice, climate or democratic rights, and to improve their negotiating positions (Conde and Le Billon, 2017: 688).

Without a doubt, public, corporate, and academic interest in FPIC, as an effort to achieve a more bottom-up participation in the management of natural resources, has increased in the past years and is a sign that indigenous peoples' rights are climbing up the international agenda. The utmost expression of their right to self-determination, FPIC allows indigenous peoples to voice historical and ethnically defined claims that transcend project-related consultation processes and question the traditional idea of participatory governance, which has oftentimes served to legitimise decisions connected to development projects and not as a means to challenge them. But the implementation of FPIC will not automatically lead to more democratic and inclusive environmental governance models, unless it is connected to wider indigenous political, social, economic, territorial, and cultural demands that address the power asymmetries embedded in the relationships between indigenous peoples and states, and indigenous peoples and companies.

While getting the theory right on how to introduce FPIC into corporate policies and practices is certainly crucial in regulating FPIC at the national level, the same as national legal frameworks and jurisprudence greatly influence the outcome of corporate and public

engagement processes with indigenous peoples, their organisational and institutional capacities are equally imperative in moving the FPIC principle from paper to practice and real change for people on the ground. That is why local capacity development needs to be included in any engagement process with indigenous peoples, as this allows all members of the community, not just the elites, to acquire the technical know-how to contribute to all the phases of the project and to participate in any future project affecting them. At the same time, capacity building activities on indigenous peoples' rights directed at corporate staff at all levels must also intensify to expand upon the corporate understanding on the implications of operationalising FPIC and on the local context to comprehend how indigenous institutions work. This would also impede companies from replacing local interpretations of FPIC with corporate notions of engagement.

We clearly support the idea of corporate human rights obligations, which companies must fulfil irrespective of their implementation by states, including indigenous peoples' right to FPIC. Having said this, we recognise that there are still doubts concerning whether companies can be requested to act ethically and be purely motivated by the fact that furthering human rights is the right thing to do, due to its focus on corporate self-interest and discourse around self-regulation, that is voluntary and not legally binding. As we have seen, the business case for FPIC clearly clashes with the need for a true commitment to the nature of FPIC as a principle of self-determination. But the HRDD paradigm promoted by the UNGP, and which implies that companies must conduct good faith consultations with local communities, leaves room for hope. Of course, our view is highly controversial, and it may throw up more questions than answers, but we consider it to be the most appropriate view in light of the disappearing separation between the public and private domains and companies' growing influence on global economic and political decision-making processes.

And even if companies find their new role challenging, it only represents the next logical step in IHRL's adaptation to a new reality, in which states can no longer be the sole guarantors of human rights. At the same time, states cannot be side-lined altogether, as the realisation of indigenous peoples' rights should always be a nation-to-nation process first and FPIC can only fulfil its deep norm-shifting potential if it becomes part of the public agenda. How indigenous peoples choose to partake in public and corporate engagement processes depends on their internal decision-making structures that can vary from community to community. It follows that if indigenous peoples cannot shape and influence such processes according to their norms and traditions, the sustainability of their results cannot be assured (Tables 1, and 2). Guidelines on how to conduct assessments are therefore useful, but need to be adapted to every situation, as a one-size-fits-all approach is generally inadequate.

Those who say that companies cannot by themselves understand the social context in which they operate only have to look toward HRIA to realise that they represent an ideal tool for doing this, along with identifying the human rights impacts caused by their activities. In this article, we have made a case for HRIA becoming the operational arm of indigenous peoples' right to FPIC. Even though our case study is not an example of a successful HRIA, it still illustrates an important challenge: the preparation of the basic conditions to ensure that indigenous peoples are included in the assessment process from beginning to end and based on their explicit consent. In arguing in favour of indigenous rights-based HRIA, we also imply that FPIC processes are probably more successful, if they are connected to a knowledge-based HRIA. This does not take away from the value of FPIC as a stand-alone principle for corporate engagement with indigenous peoples. But given FPIC's implementation challenges at the national level, we consider combining the rights inherent to the FPIC principle and the methodologies connected to HRIA to be the best possible solution. Since the adoption of the UNGP, HRDD is increasingly finding its way into legally binding standards, with mandatory HRDD guidelines and national HRDD laws multiplying in recent years, especially in Europe. Building on this momentum, our further research will focus on identifying successful experiences with HRIA in Latin America to demonstrate that the potential behind HRIA can indeed be realised.

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Declaration of Competing Interest

The authors report there are no competing interests to declare.

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