ABHANDLUNGEN / ARTICLES

Indigenous Peoples' Free, Prior and Informed Consent (FPIC) and the World Bank Safeguards: Between Norm Emergence and Concept Appropriation

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Abstract: The question of the consent of indigenous peoples is at least as old as colonization. Indeed, the consent of indigenous peoples was already an issue at the heart of treaty-making between colonial settlers and indigenous peoples. The issue of indigenous peoples' consent, understood as their Free, Prior and Informed Consent (FPIC), has been re-emerging and gaining acceptance internationally in international Human Rights law over the last 30 years. When the new World Bank[1] safeguards were adopted in 2016, one of the most discussed topics during the consultation rounds had been the integration in the safeguards of the concept of the FPIC of indigenous peoples, as it had been notoriously absent from the previous safeguards. Finally, FPIC was made part of the new safeguards. This paper first maps the concept of FPIC under international law from a postcolonial perspective. Then, it attempts to analyze the processes of operationalization of the concept by the World Bank in the new safeguards, drawing on Human Rights and on law and development literature. The paper argues that there is a tension between the re-emergence of FPIC as a customary norm and the fragmentation of the interpretations of the concept of consent by different actors. The operationalization of the concept of FPIC, understood as a negotiated process rather than a process of self-determina-

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1 The World Bank Group's International Bank for Reconstruction and Development and International Development Association are together referred to here as the World Bank.

tion, may in fact limit its remedial objective and diminish its quality as a resistance tool.

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"The reporting member is usually the [Ranquel people's] chief. The speech is prepared, the tone and the forms are similar to the tone and forms of the conversations in parliament, with the difference that interruptions, whistles, shouts, mockery of all kinds are admitted in the meeting. There are very noisy meetings but all, except some memorable ones that have turned into a rift, have the same outcome. After much talking, the majority triumphs even if they are not right."
Major Lucio V. Mansilla, describing the decision-making process of the Ranquel people in La Pampa, Argentina in 1870.[2]

A. Introduction

The question of the Free, Prior and Informed Consent (hereinafter also FPIC) of indigenous peoples is at least as old as colonization. Indeed, the consent of indigenous peoples was already an issue at the heart of treaty-making between colonial settlers and indigenous peoples.[3] One can observe that the concept has re-emerged in international Human Rights law in the last 30 years, in instruments such as the International Labour Organization's Convention No. 169 in 1989 and the United Nations Declaration on the Rights of Indigenous Peoples in 2007.[4] As part of an explicit effort of harmonization amongst institutions, the requirement of FPIC is now retaken by development actors such as the Word Bank Group's International Bank for Reconstruction and Development (hereinafter IBRD) and International Finance Corporation (hereinafter IFC) and integrated into their operational safeguards.[5]

2 *Lucio Victorio Mansilla*, Una excursión a los indios ranqueles, Chapter XXI, Buenos Aires 1989, pp.155-156. Translation by the author. On the topic of this meeting, see for instance *Hernán Horacio Schiaffini*, Intriga política y performance ritual en una *junta* de los "indios ranqueles", Estudios de Teoría Literaria, Revista Digital 2(3) (2013). This meeting took place eight years before the genocide against indigenous peoples, including the Ranqueles, in Central and Southern Argentina by Argentine troops, known as the "Conquest of the desert".

3 *Cathal M. Doyle*, Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free, Prior and Informed Consent, Oxon 2015, see for instance pp. 13-25.

4 *International Labour Organization*, Indigenous and Tribal Peoples Convention, No. 169 (adopted 27 June 1989); *United Nations*, UNDRIP, UN Doc. A/RES/61/295 (13 September 2007).

5 *World Bank*, Environmental and Social Framework (2017), ESS 7, in particular paras. 24-27, http://pubdocs.worldbank.org/en/837721522762050108/Environmental-and-Social-Framework.pdf. *IFC*; Performance Standards on Environmental and Social Sustainability (2012), Performance Standard 7, paras. 2, 11, 12, 15-17, 21, https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards.

The paper analyzes this harmonization effort. The aim of this analysis is to establish whether the integration of the FPIC by the World Bank Group is a step forward in the recognition of FPIC as a centuries old resistance tool and a Human Rights standard.[6] First, it will present the concepts of FPIC according to international law and then according to the World Bank Group safeguards. Subsequently, it attempts to analyze the processes of operationalization of the concept of consent by the World Bank in the new safeguards, drawing on Human Rights and law and development literature. The paper concludes that there is a tension between the re-emergence of indigenous peoples' FPIC as a customary norm and the fragmentation of the interpretations of consent by different actors such as the World Bank. Adopting a postcolonial perspective, it concludes that the objective of FPIC as an internal self-determination tool, which emerges from Human Rights instruments, may be obliterated by the operationalization of FPIC as a negotiated consultation process.

B. The FPIC of indigenous peoples under international law

At the time of colonization, the FPIC of indigenous peoples was under permanent tension. Indeed, as explained by postcolonial scholars, colonization was undertaken through wars and occupation, but also through the law.[7] Indigenous peoples and colonial settlers signed many peace agreements and treaties, and the question of the consent of indigenous peoples was at the heart of these negotiations. Generally, as time passed, indigenous peoples' ability to negotiate, decide or resist legally-binding agreements over their territories with colonial settlers diminished, and the terms of these agreements became more and more detrimental to indigenous peoples.[8] The agreements were also regularly violated or unilaterally cancelled by the colonizer.[9]

6 On whether Human Rights instruments cited in this section constitute hard or soft law and whether they should apply to Multilateral Development Banks, see *Philipp Dann*, The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany, United Kingdom and New York 2013, pp. 282-283. See also *Stephen James Anaya*, Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources, Arizona Journal of International and Comparative Law 22(1) (2005), pp. 7-17.

7 *Doyle*, note 3, p.18 ff., citing *Robert A. Williams Jr.*, The American Indian in Western Legal Thought: The Discourses of Conquest, Oxford 1990, p.6.

8 This is apparent for instance when reading the treaties between indigenous peoples and Spaniards and then Argentines in La Pampa, Argentina. With time, the indigenous peoples appear to have less and less power in negotiations. See *Wiñoy Xipantu*, Reino del Mapu, http://www.reinodelmapu.net/web/menu/tratados/argentina/. See also *Graciana Pérez Zavala*, Tratados de Paz en las Pampas: Los Ranqueles y su Devenir Político, 1850-1880, Ciudad Autónoma de Buenos Aires 2014. See on the United States for instance *Richard B. Collins*, Indian Consent to American Government, Arizona Law Review 31 (1989), p. 376.

9 See for instance *J. S. Thomson*, Federal Indian Policy: A Violation of International Treaty Law, Western State University Law Review 4(2) (1977), pp. 229-272 or *Pérez Zavala*, note 8.

About thirty years ago the question of consent of indigenous peoples re-emerged in international law. It now focuses mostly on indigenous peoples' land rights. It is the International Labour Organization's (hereinafter ILO) Convention No. 169 that first mentioned the consent of indigenous peoples in 1989.[10] The Convention states that "consultations (...) shall be undertaken, in good faith (...), with the objective of achieving agreement or consent".[11] It requires indigenous peoples' "free and informed consent"[12] for resettlement. However, where their consent cannot be obtained, the Convention allows for the resettlement to take place according to national laws, including public inquiries where appropriate, which should provide the opportunity for effective representation of the affected people.[13] The United Nations Declaration on the Rights of Indigenous Peoples (hereinafter UNDRIP) is the first Human Rights instrument spelling out the FPIC requirement, demanding for instance that "No relocation shall take place without the free, prior and informed consent of the indigenous peoples (...)."[14] Because territory[15] has been at the center of disputes between indigenous peoples and colonial settlers, forced eviction is a centuries-old scourge of indigenous peoples. Therefore, obtaining their FPIC for resettlement represents a crucial, although overdue, answer to the colonial – and following extractive – enterprises. The International Law Association's 2012 Conference concluded that no projects significantly impacting indigenous peoples' rights and ways of life shall be carried out without their FPIC.[16]

FPIC was also adopted and developed by several treaty supervisory bodies. The High Commissioner for Human Rights (hereinafter OHCHR) provided a definition of FPIC, where: "free" signifies that there is no coercion or manipulation; "prior" implies that consent is to be sought sufficiently in advance; "informed" signifies that information is provided that covers a wide range of aspects, the purpose and duration of the project, the areas

10 *International Labour Organization*, Indigenous and Tribal Peoples Convention, No. 169 (adopted June 27, 1989), art. 6.2. On the concept, see for instance *Ricarda Roesch*, The Story of a Legal Transplant: The Right to Free, Prior and Informed Consent in sub-Saharan Africa, African Human Rights Law Journal 16 (2016), pp. 507-508; *Hans Morten Haugen*, The Right to Veto or Emphasising the Adequate Decision-making Processes? Clarifying the Scope of the Free, Prior and Informed Consent (FPIC) Requirement, Netherlands Quarterly of Human Rights 34(3) (2016), pp. 250-273.

11 *ILO*, Indigenous and Tribal Peoples Convention, note 4, art. 6.2.

12 *Ibid*., art. 16.2. See also art. 6.2.

13 *Id*.

14 UNDRIP, note 4, 11(ii) 19, 28(i), 29(ii), 32(ii).

15 On indigenous peoples' vulnerability in relation to land, see for instance *Jessika Eichler*, Indigenous Peoples' Land Rights in the Bolivian Lowlands, International Human Rights Law Review 5 (2016), pp. 124-130. See also in general *Kinnari I. Bhatt*, Concessionaires, Financiers and Communities: Implementing Indigenous Peoples' Rights to Land in Transnational Development Projects, Cambridge 2020.

16 *International Law Association*, Rights of Indigenous Peoples, Resolution No. 5/2012 (Bulgaria 26-30 August 2012).

affected as well as the likely impact and risks; and "consent" should be determined in accordance with indigenous peoples' customary laws and practices, where indigenous peoples should specify which institutions are entitled to express consent.[17] Treaty supervisory bodies developed their understanding of the concept in several areas, regarding for instance the threshold for requiring consent, the geographical scope of FPIC and the adoption of national legislation. The Human Rights Committee stated that indigenous peoples' participation must be effective, which requires not "mere consultation" but the FPIC of the community.[18] The Committee on the Elimination of Racial Discrimination (hereinafter CERD) recommended that Canada implement in good faith the right to FPIC of indigenous peoples "whenever their rights may be affected by projects carried out on their lands".[19] The Committee on Economic, Social and Cultural Rights recommended that Colombia "adopt legislation" in consultation with the participation of indigenous people that clearly establishes the right to FPIC in conformity with the ILO Convention No. 169.[20]

Regarding regional Human Rights systems, both the Inter-American system and the African system recognize the right of indigenous peoples to FPIC and regularly cite the ILO Convention or the UNDRIP.[21] The Inter-American Court of Human Rights (hereinafter the Inter-American Court) held in its 2007 landmark ruling, *Saramaka v. Suriname*, that

17 See *Office of the United Nations High Commissioner for Human Rights*, Free, Prior and Informed Consent of Indigenous Peoples (September 2013), p. 2, http://www.ohchr.org/Documents/Issues/IPeoples/FreePriorandInformedConsent.pdf.

18 *Human Rights Committee*, Angela Poma Poma v. Peru, para. 7.6, Communication No. 1457/2006 CCPR/C/95/D/1457/2009 (24 April 2009); see also *ibid.*, Concluding Observations – Chile, CCPR/C/CHL/CO/6 (2014), para. 10(c). See *Haugen*, note 10, pp. 254-256, 259-260.

19 CERD, Report of the Committee on the Elimination of Racial Discrimination, Eightieth session, para. 25 p.7, para. 20c p.13 -see also para. 17 p. 44-45, para. 17 p. 71, para. 15 p. 73-, A/67/18 (2012). See also *ibid.,* Report of the Committee on the Elimination of Racial Discrimination: General Recommendation XXIII Indigenous Peoples, art. 4(d) and 5, A/52/18, Annex V (1997) or Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada, para. 20, CERD/C/CAN/CO/21-23 (2017).

20 *United Nations Committee on Economic, Social and Cultural Rights*, Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant, para. 9, UN Doc. E/C.12/COL/CO/5 (21 May 2010). See also *ibid.*, General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights), paras. 36-37 pp. 9-10, para. 55(e) p. 15, UN Doc E/C.12/GC/21 (21 December 2009).

21 See for instance *Inter-American Commission of Human Rights*, Mary and Carrie Dann v. United States of America, Case 11.140, Report No. 75/02, Doc. 5 Rev. 1 (27 December 2002); *ibid.*, Maya Indigenous Communities of Toledo District v. Belize, Case 12.053, Report No. 40/04 (12 October 2004); *Inter-American Court of Human Rights*, Awas Tingni v. Nicaragua (31 August 2001); *ibid.*, Saramaka People v. Suriname (Preliminary Objections, Merits, Reparations, and Costs) (28 November 2007). See on that *C. Ignacio de Casas*, The Corporate Responsibility to Respect Consultation Rights in the Americas: How the Inter-American System Can Better Promote Free, Prior, and Informed Consent, in: Isabel Feichtner, Markus Krajewski and Ricarda Roesch (eds.), Human Rights in Extractive Industries, Interdisciplinary Studies in Human Rights 3, Springer online 2019, pp. 249-262. FPIC was also mentioned in the African system, see *African Commission on Human and Peoples' Rights*, Centre for Minority Rights Development (Kenya) and Minority Rights Group

when projects are likely to have a major impact within indigenous or "tribal" peoples' territory,[22] the State has a duty, not only to consult, but also to obtain their FPIC according to their customs and traditions.[23] The African Commission on Human and Peoples Rights (hereinafter the African Commission), in its 2009 *Endorois v. Kenya* judgement, cited the *Saramaka v. Suriname* decision and held that, in terms of consultation, the threshold is especially high in favor of indigenous peoples, as it also requires that consent be accorded.[24] Still, the specific details regarding when either consultation or consent should be applied are yet to be clarified by their regional courts. The respective recent decisions *Lhaka Honhat v. Argentina*[25] and *Ogiek v. Kenya*[26] can be considered missed opportunities to clarify this issue.[27] As Brunner and Quintana put forward regarding the *Sarayaku v. Ecuador* case,[28] the courts may also have considered that, where there is no prior and informed consultation, it is unnecessary to reach the issue of consent.[29]

The question of the exploitation of natural resources on indigenous peoples' territory has always been related to their land rights.[30] After all, it is the quest for natural resources[31] that has driven the colonial endeavor and resulted in the forced eviction of indigenous peo-

International on behalf of Endorois Welfare Council v. Kenya, 276/03 (November 2009) (here *the Enderois v. Kenya* case).

22 The issue of indigenous versus "tribal" peoples exceeds the scope of this work. On this, see *Kinnari I. Bhatt*, A post-colonial legal approach to the Chagos case and the (dis)application of land rights norms, International Journal of Law in Context 15 (2019), pp. 1–19.

23 *Inter-American Court,* note , para. 134.

24 *African Commission*, note , paras. 226-228.

25 *Inter-American Court*, Indigenous Communities of the Lhaka Honhat (our land) Association v. Argentina, for instance para. 328 (6 February 2020) (here the *Lhaka Honhat v. Argentina* case).

26 *African Court on Human and Peoples Rights*, African Commission on Human and Peoples' Rights v. Kenya, 006/2012, for instance para. 131 (May 2017) (here the *Ogiek v. Kenya* case).

27 *See Stéphanie de Moerloose/C. Ignacio de Casas*, The Lhaka Honhat Case of the Inter-American Court of Human Rights: The Long-Awaited Granting of 400,000 Hectares under Communal Property Rights, EJIL: Talk! (16 July 2020) https://www.ejiltalk.org/the-lhaka-honhat-case-of-the-inter-american-court-of-human-rights-the-long-awaited-granting-of-400000-hectares-under-communal-property-rights; *Ricarda Roesch*, The Ogiek Case of the African Court on Human and Peoples' Rights: Not So Much News After All?, EJIL: Talk! (16 June 2017), https://www.ejiltalk.org/the-ogiek-case-of-the-african-court-on-human-and-peoples-rights-not-so-much-news-after-all/.

28 *Inter-American Court,* Case of the Kichwa Indigenous People of Sarayaku v. Ecuador (27 June 2102).

29 *Lisl Brunner/Karla Quintana,* The Duty to Consult in the Inter-American System: Legal Standards after Sarayaku, American Society of International Law Insights 16(35) (2012), https://www.asil.org/insights/volume/16/issue/35/duty-consult-inter-american-system-legal-standards-after-sarayaku#_edn27. See *de Moerloose/de Casas*, note 27.

30 Although the requirement of indigenous peoples' FPIC in order to dispose of hazardous waste on their territory also seems to gather strong support, this will not be analyzed in this paper.

31 On mining, see for instance *Angus MacInnes, Marcus Colchester, Andrew Whitmore*, Free, prior and informed consent: how to rectify the devastating consequences of harmful mining for indigenous peoples', Perspectives in Ecology and Conservation 15(3) (2017), pp.152-160.

ples from their lands, amongst many tragic consequences. With time, traditional knowledge and genetic resources have become part of the haul. In that context, the requirement of FPIC has also been progressively developed in international law.[32] The 1992 Convention on Biological Diversity (hereinafter CBD) states that each contracting party, subject to its national legislation, should respect the knowledge and practices of indigenous peoples and promote their wider application with the approval of "the holders of such knowledge".[33] The CBD's article 15 states that access to genetic resources shall be subject to the "prior informed consent" of the Contracting Party providing such resources.[34] The 2010 Nagoya Protocol to the CBD on Access to Genetic Resources also states that, in accordance with domestic law, each Party shall take measures to ensure that the prior informed consent of indigenous peoples is obtained for access to genetic resources where they have the established right to grant access to such resources.[35]

Despite its increasing importance, the debate remains open as to FPIC's binding character under international law.[36] Indeed, the instruments mentioning FPIC have different weights in international law. The CBD and its Nagoya Protocol are binding on States Parties and widely ratified, but their language is flexible and grants a large margin of appreciation to States Parties. The ILO Convention, also binding on States Parties, has only been ratified by a limited number of States.[37] The remaining instruments, commentaries and decisions cited here are generally considered non-binding, except for decisions of the Inter-American Court and the African Court on Human and Peoples' Rights (hereinafter the African Court) which only bind States Parties. Furthermore, State practice still differs wide-

32 See *Sumudu Atapattu*, The Significance of International Environmental Law Principles in Reinforcing or Dismantling the North-South Divide, in: Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, Jona Razzaque (eds.), International Environmental Law and the Global South, Cambridge 2015, pp. 74-108, 98-103. See also *Margherita Brunori*, Protecting access to land for indigenous and non-indigenous communities: A new page for the World Bank?, Leiden Journal of International Law 32(2) (2019), pp. 514-515.

33 Convention on Biological Diversity (adopted 22 May 1992), article 8j.

34 *Ibid*., art. 15. The CBD provisions, especially article 15's, were operationalized in the 2002 Bonn Guidelines, which determine that the basic principles of a prior informed consent system should include the consent of relevant stakeholders, such as indigenous and local communities, "as appropriate to the circumstances and subject to domestic law". *Secretariat of the Convention on Biological Diversity*, Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization, art. 22, 2002.

35 *Ibid.,* Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, art. 6, 2011.

36 On the debates over the binding quality of FPIC, see *Anaya*, note 6, pp. 7-17; *Shalanda H. Baker*, Why the IFC's Free, Prior, and Informed Consent Policy Does Not Matter (Yet) to Indigenous Communities Affected by Development Projects, Wisconsin International Law Journal 30(3) (2013), pp. 673-678. See also in general *Doyle*, note 3.

37 *ILO*, Indigenous and Tribal Peoples Convention, No. 169, note 4.

ly on the participation of indigenous peoples, rarely requiring their FPIC.[38] In sum, while there seems to be a consensus that the right of indigenous peoples to be consulted in good faith is recognized by international law, there is no consensus yet requiring their FPIC.[39] At the least, the need to obtain FPIC can be regarded as an emerging customary norm, especially in certain cases such as resettlement and access to natural resources on their territory.[40] Evidence of the emergence of this norm could be found in the integration of this requirement in the instruments cited here as well as in the investment standards, such as the new World Bank safeguards. Indeed, in the new World Bank safeguards, the FPIC of indigenous peoples has now replaced the mere requirement for "consultation."

C. The FPIC in the World Bank Group safeguards

Multilateral Development Bank (hereinafter MDB) safeguards,[41] and, especially, the World Bank environmental and social safeguards, are a cornerstone of sustainable development finance.[42] MDB safeguards first delimit the eligibility of a State or company (hereinafter a "Borrower") for funding, and then, during project implementation, define the Borrower's obligations regarding social and environmental matters.[43] These safeguards therefore trans-

38 See for instance *Doyle*, note 3; *Tara Ward*, The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law, Northwestern Journal of International Human Rights 10(2) (2011), pp. 66-84; see also *George K. Foster*, Community Participation in Development, Vanderbilt Journal of Transnational Law 51 (2018), pp. 92-95.

39 *Ward*, note 38, pp. 54-84; *Dann*, note 6, pp. 282-283; *Anaya*, note 6, pp. 7-17.

40 See in general *Doyle*, note 3. Arguing that in certain cases "obtaining consent appears to have become a mandatory requirement. This is the case when indigenous peoples are to be relocated, when hazardous materials are stored on (or in) their territories, and when large-scale development or investment projects may have a significant impact on them", see *S. J. Rombouts*, The Evolution of Indigenous Peoples' Consultation Rights under the ILO and U.N. Regimes, Stanford Journal of International Law 53(2) (2017), p. 224. See also *Foster*, note 38, p. 69.

41 The term MDB includes here the World Bank and the IFC, the Asian Development Bank, the African Development Bank, the European Bank for Reconstruction and Development, the European Investment Bank and the Inter-American Development Bank.

42 On the safeguards, see in general *Laurence Boisson de Chazournes*, Partnerships, Emulation, and Coordination: Towards the Emergence of a Droit Commun in the Field of Development Finance, in: Hassane Cissé, Daniel Bradlow/Benedict Kingsbury (eds.), The World Bank Legal Review, Vol. 3: International Financial Institutions and Global Legal Governance, Washington 2011, pp. 174-175, 178-179; *Philipp Dann/Michael Riegner*, The World Bank's Environmental and Social Safeguards and the evolution of global order, Leiden Journal of International Law 32(2) (2019), pp. 1-23; *Stéphanie de Moerloose*, World Bank environmental and social conditionality as a vector of sustainable development, Zürich 2020.

43 *Laurence Boisson de Chazournes*, Policy Guidance and Compliance: the World Bank Operational Standards, in: Dinah Shelton (ed.), Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System, Oxford 2000, pp. 282–285; *Stéphanie de Moerloose*, The World Bank's Sustainable Development Approach and the Need for a Unified Field of Law and Development Studies in Argentina, Law and Development Review 8(2) (2015), pp. 365-366.

late into MDB conditionality in grant and loan agreements.[44] The World Bank environmental and social safeguards apply to projects supported by the World Bank in Borrowing countries, in addition to applicable national law. There are ongoing discrepancies between the safeguards and Borrowers' national systems. Indeed, the protection of the affected communities including indigenous peoples is often weaker[45] in a Borrowers' national law than in the World Bank safeguards. The World Bank safeguards protect informal occupants, while most Borrowers' regulations do not contemplate this category of affected people.[46] Safeguards therefore essentially supersede national law, although Borrowers often report on the implementation of both systems.

After a revision of the World Bank's previous safeguards, the Operational Policies on Environmental and Social Safeguards,[47] the new Environmental and Social Framework (hereinafter also ESF or the new safeguards) came into effect on October 1, 2018.[48] FPIC was one of the issues most discussed during the process of revising the World Bank's safeguards[49] and was formally adopted in the new safeguards under ESS 7, "Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities."[50] Therefore, the inclusion of the requirement of "consent" – instead of merely "consultation" – for indigenous peoples[51] is one of the main changes brought by the ESF after decades of discussion at the World Bank.[52] The ESF foresees that the Borrower shall obtain FPIC if the

44 Hereinafter together referred to as loan agreements. See also in general on the safeguards *Andria Naudé Fourie*, World Bank Accountability in Theory and in Practice, The Hague 2016, pp. 132-147; *Giedre Jokubauskaite*, The Legal Nature of the World Bank Safeguards, Verfassung und Recht in Übersee 51 (2018).

45 *World Bank*, Review and Update of the World Bank's Safeguards Policies, Environmental and Social Safeguards (proposed Third Draft, 4.08.2016), para. 23, p. 11, https://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies. See also *IEG*, Safeguards and Sustainability Policies in a Changing World. An Independent Evaluation of the World Bank Group Experience, Washington DC 2010, p. 43, on file with author.

46 See note 44.

47 See *World Bank*, Review and Update, note 45, para. 11, p. 8.

48 *World Bank*, Environmental and Social Framework, note 5. Now, after the launch of the ESF, the previous safeguard policies run in parallel to the ESF until all projects approved under the previous safeguard policies have closed, which should be around 2025. *World Bank*, Review and Update, note 45, para. 12, p. 4.

49 *Ibid.,* Review and Update, note 45, para. 16, p. 9 and paras. 52-54, pp. 19-20.

50 *Ibid.,* Environmental and Social Framework, note 5, ESS 7, in particular paras. 24-25.

51 *Ibid.*, for instance ESS 7, para. 5. *Philipp Dann/Michael Riegner*, Safeguard–Review der Weltbankgruppe: Ein neuer Goldstandard für das globale Umwelt- und Sozialrecht?, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH (2017), http://star-www.giz.de/starweb/giz/pub/servlet.starweb?path=giz/pub/pfm.web&r=42871.

52 *World Bank*, Environmental and Social Framework, note 5, ESS 7, in particular paras. 24-25. *Olivier W. MacLaren/Julie-Anne Pariseau*, The New World Bank Standard for Indigenous Peoples: Where Do We Start? (2017 World Bank Conference on Land and Poverty, Washington DC,

project entails resettlement of indigenous peoples.[53] If the World Bank cannot ascertain that FPIC has been obtained, it will not proceed further with these aspects of the project.[54]

An important objective of this revision process was the harmonization of safeguards and the facilitation of co-financing between several financing institutions.[55] The World Bank declared that the ESF brings the World Bank's safeguards into "close functional alignment" with the IFC – the private arm of the World Bank Group – with regard to the safeguards' structure and the areas covered.[56] The World Bank underlined that the ESF is now more aligned with the Equator Principles,[57] a framework for the management of environmental and social risks adopted by 108 financial institutions, such as BNP Paribas and JPMorgan Chase & Co., in 38 countries to date, allegedly covering "over 70 percent of international project finance debt in emerging markets,"[58] which incorporates the IFC Performance Standards.[59] As one result of this harmonization, the requirement for FPIC must now be complied with for evictions to be lawful, according to the ESF, the IFC's Performance Standards and the Equator Principles.[60]

D. The interpretations of the FPIC requirement's concept of consent

Consent can be understood to entail both the decision-making process leading to the consent, and the granting or withholding of consent. To assess the difference between the FPIC originating in Human Rights instruments on the one hand, and in the World Bank / IFC / Equator Principles on the other, one can analyze their respective interpretations of the concept of consent.

20-24 March 2017); *World Bank*, Review and Update, note 45, para. 16, p. 9 and paras. 52-54, pp. 19-20; *Robert Goodland*, Free, Prior and Informed Consent and the World Bank Group, Sustainable Development Law & Policy 2(4) (2004), pp. 65-74.

53 *World Bank*, Environmental and Social Framework, note 5, ESS 7 para. 24b.

54 *Ibid.,* ESS 7 para. 27.

55 *Id*.

56 *Ibid.*, Review and Update, note 45, para. 77, p. 22.

57 *Id*.

58 *Equator Principles*, The Equator Principles, http://equator-principles.com/about.

59 *Ibid*., The Equator Principles June 2013, http://equator-principles.com/wp-content/uploads/2017/03/equator_principles_III.pdf. On the Equator Principles see for instance *Michael Riegner*, The Equator Principles on Sustainable Finance Assessed from a Critical Development and Third World Perspective, Transnational Legal Theory 5(3) (2014), pp. 489-510.

60 *World Bank*, Environmental and Social Framework, note 5, ESS 5 para. 17; *IFC*, Performance Standards on Environmental and Social Sustainability (2012), note 5, Performance Standard 5, para. 10, p. 6. ESS 5 on "Land Acquisition, Restrictions on Land Use and Involuntary Resettlement" now prohibits forced eviction. *World Bank*, Environmental and Social Framework, note 5, para. 31; *World Bank*, Review and Update, note 45, para. 106. This standard on forced eviction is now shared by the IFC (Performance Standard 5) and the Equator Principles.

I. The interpretation of consent pursuant to Human Rights instruments

The Charter of the United Nations (hereinafter the Charter) declares that one purpose of the organization is "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."[61] The right of all people to self-determination is also recognized in the Charter's Article 55 and the first articles of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.[62] This includes indigenous peoples, as affirmed several times in the UNDRIP.[63]

It is important to note that self-determination does not necessarily mean the right to claim sovereignty and secession, which can be understood as "external self-determination".[64] Indeed, self-determination also entails "internal self-determination", which is the right for a degree of political autonomy within the existing State, which includes the right to elect a group's own representatives according to its traditions.[65] FPIC is interpreted as grounded in the right to internal self-determination.[66] As explained by Stephen James Anaya, the former Special Rapporteur on the Rights of Indigenous Peoples, "[u]nderstood as a human right, the essential idea of self-determination is that human beings (...) are equally entitled to be in control of their own destinies, and to live within governing institutional orders that are devised accordingly."[67] The UNDRIP recognizes indigenous peoples' right to self-government in matters relating to their internal and local affairs as well as their right to maintain their own political institutions.[68] It also demands that States consult with the indigenous peoples concerned through their own representative institutions in order to obtain their FPIC for the approval of any project affecting their lands.[69] The FPIC as part of indigenous peoples' right to internal self-determination supports indigenous peoples' equal

61 Charter of the United Nations, art. 1(2).

62 *Ibid.*, art. 55; International Covenant on Civil and Political Rights, art. 1(1), (General Assembly Resolution 2200A (XXI) of 16 December 1966) and United Nations, International Covenant on Economic, Social and Cultural Rights, art. 1(1), (General Assembly Resolution 2200A (XXI) of 16 December 1966).

63 UNDRIP, note 4, preamble, 3, 4.

64 *Milena Sterio*, On the Right to External Self-Determination: 'Selfistans,' Secession, and the Great Powers' Rule, Minnesota Journal of International Law 19 (2010); *Philippe Hanna/Frank Vanclay*, Human rights, Indigenous peoples and the concept of Free, Prior and Informed Consent, Impact Assessment and Project Appraisal 31(2) (2013), p.148.

65 *Id.*

66 *Karen Engle*, On fragile architecture: The UN Declaration on the Rights of Indigenous Peoples in the context of human rights, European Journal of International Law 22(1) (2011), pp. 141–163.

67 *Stephen James Anaya*, The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era, in: Claire Charters/Rodolfo Stavenhagen (eds.), Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples, Copenhagen 2009, p. 187, http://www.internationalfunders.org/documents/MakingtheDeclarationWork.pdf.

68 UNDRIP, note 4, art. 4 and 5.

69 *Ibid.*, note 4, 11(ii) 19, 28(i), 29(ii), 32(ii).

access to human rights in a context of global and ongoing power asymmetries.[70] In addition, the requirement of FPIC can be understood as a remedial tool for the equal participation of indigenous peoples. Indeed, since the colonial encounter, indigenous peoples have been constantly denied self-government and forcibly subjected to institutions they have not themselves created.[71]

Internal self-determination is reflected in numerous instruments. Before the adoption of the UNDRIP in 2007, the United Nations' Permanent Forum on Indigenous Issues' 2005 report on methodologies regarding FPIC already stated that indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions, and that this process may include the option of withholding consent.[72] The 2014 Good Practice Note endorsed by the United Nations Global Compact Human Rights and Labour Working Group recommends that even companies should obtain consent through a process that incorporates traditional decision-making structures.[73] The grounding of consent as internal self-determination can also be found in the work of the Conference of the Parties to the CBD. Its "Mo'otz Kutzal Voluntary Guidelines" published in 2016 on FPIC recommend, as procedural considerations for FPIC, the recognition of the competent authorities of indigenous peoples and local communities and the respect of community protocols and customary law.[74]

Treaty supervisory bodies have also associated FPIC with internal self-determination.[75] The OHCHR linked FPIC to self-determination and declared that consent of indigenous peoples should be determined in accordance with their customary laws and practices, determined by indigenous peoples themselves.[76] While the CERD has less expressly linked FPIC to self-determination, it routinely demands and evaluates information on indigenous peoples' effective participation and FPIC processes related to their right to life, land or lifestyle. This approach is therefore grounded in a quest for internal self-determination re-

70 See for instance *Hanna/Vanclay*, note 64; *César Rodríguez-Garavito*, Human rights -- Latin America, Indigenous peoples -- Latin America, Neoliberalism -- Latin America, Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields, Indiana Journal of Global Legal Studies 18(1) (2011), pp. 279-280, 298-301.

71 *Anaya*, note 67, pp. 191-192; *Rodríguez-Garavito*, note 70, pp. 298-301.

72 *Economic and Social Council*, Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples, section 3 para. 46 (New York, 17–19 January 2005), UN Doc. E/C.19/2005.

73 *United Nations Global Compact Human Rights and Labour Working Group*, Indigenous Peoples' Rights and the Role of Free, Prior and Informed Consent, for instance IV D (20 February 2014), https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2Fhuman_rights%2FHuman_Rights_Working_Group%2FFPIC_Indigenous_Peoples_GPN.pdf.

74 Conference of the Parties to the Convention on Biological Diversity, Mo'otz Kutzal Voluntary Guidelines, art. 8, 18, CBD/COP/DEC/XIII/18 (17 December 2016), https://www.cbd.int/doc/decisions/cop-13/cop-13-dec-18-en.pdf.

75 *Doyle*, note 3, pp.126-128.

76 See OHCHR, note 17, p. 1.

garding these rights.[77] The Committee on Economic, Social and Cultural Rights has also affirmed the FPIC requirement in light of internal self-determination, by stating that State parties have the obligation to "recognize and protect the rights of indigenous peoples to own, *develop, control and use* their lands and resources".[78]

Regional Human Rights systems recognize internal self-determination as a ground for the FPIC. In *Saramaka v. Suriname*, the Inter-American Court held that the State shall ensure the right of the Saramaka people to be effectively consulted, in accordance with their traditions and customs, and recognized the right to give or withhold their FPIC.[79] The Court also established a three prong-requirement in order to allow restrictions to property rights of indigenous peoples: first, ensure the effective participation of the community members, in conformity with their customs and traditions, regarding any development plan within their territory; second, guarantee that the community will receive a benefit from any such plan; and third, ensure that no concession will be issued until an independent environmental and social impact assessment is performed.[80] The recognized importance of the communities' traditions and customs, according to which the consultation should be undertaken, as well as the possibility to grant or withhold consent, reveals the degree of political autonomy the Court acknowledges that the communities possess.[81] Again, it anchors FPIC to internal self-determination. This requirement has been repeated in other cases. For instance, in *Lhaka Honhat v. Argentina*[82] the Court recalled *Yakye Axa Indigenous Community v. Paraguay*[83] as well as *Saramaka v. Suriname*, declaring that matters such as transfer of land or fair compensation are not subject to a discretionary criteria of the State, "but rather, pursuant to a comprehensive interpretation of ILO Convention No. 169 and of the American Convention, a consensual agreement must be reached with the peoples involved, *in accordance with their own consultation mechanisms, values, customs and customary law*".[84]

In the *Enderois v. Kenya* case, the African Commission cited the three-prong requirement of the Saramaka decision.[85] The complainants stated that their representative body

77 For instance: *CERD*, Concluding Observations, Ethiopia, CERD/C/ETH/CO/15 (2007); *CERD*, Concluding Observations, India, CERD/C/IND/CO/19 (2007); *CERD*, Concluding observations on the twenty third and twenty fourth periodic reports of the Russian Federation, CERD/ C/RUS/CO/ 23-24 (2017).

78 *United Nations Committee on Economic, Social and Cultural Rights*, General comment no. 21, note 20, para. 36 (emphasis added).

79 *Inter-American Court,* Saramaka People v. Suriname, note 21, para. IX.214.8; see also for instance para. 127.

80 *Ibid.*, Saramaka People v. Suriname, para. 129; see also for instance para. 133.

81 *Id*.

82 *Ibid.*, Indigenous Communities of the Lhaka Honhat, note 25.

83 *Ibid.*, the Yakye Axa Indigenous Community v. Paraguay (17 June 2005).

84 *Ibid.*, Indigenous Communities of the Lhaka Honhat, note 25, fn. 102, citing *the Yakye Axa Indigenous Community v. Paraguay*, paras. 144, 145, 146, 148 and 151, and *Saramaka People v. Suriname,* para. 127 (emphasis added). See Saramaka People v. Suriname, note 21.

85 *African Commission*, *the Enderois v. Kenya*, note , para. 227.

had been refused registration and that the authorities had selected particular individuals to grant their consent 'on behalf' of the Enderois.[86] The Commission agreed that these consultations were inadequate and cannot be considered effective participation.[87] The Commission also insisted on the importance of the freedom of the community to choose where to live.[88] In the *Ogiek v. Kenya* case, the African Court held that by expelling the community from their lands against their will, without prior consultation, the State violated their rights to land.[89] Again, through the obligation to respect the "choice" and "will" of the communities, the Court views FPIC as closely intertwined with internal self-determination.

Over the span of two decades, indigenous peoples' FPIC, granted by the community's own authorities and according to a process devised by the community itself has been consolidating in Human Rights instruments and beyond. This supports the interpretation that the decision-making process and the determination of what constitutes consent is key to the notion of FPIC and shall be decided in each case by the indigenous peoples themselves, according to their own representative institutions. It represents an eminently political and mobilizing self-government process.[90]

II. The interpretation of consent in the World Bank's new safeguards and the IFC's Performance Standards

Both the World Bank ESF and the IFC's Performance Standards declare that there is no universally accepted definition of FPIC.[91] The ESF states that consent refers to the collective support for the project activities reached through a culturally appropriate process[92] and declares that consent may be achieved even when individuals or groups explicitly disagree.[93] The terms "collective support" and "culturally appropriate process" are rather vague, and the declaration that consent can be granted although some individuals or groups disagree

86 *Ibid.*, para. 280.

87 *Ibid.*, para. 280.

88 *Ibid.*, para. 278.

89 *Ibid.*, African Commission on Human and Peoples' Rights v. Kenya, note 26, para. 131.

90 *David Szablowski*, Operationalizing Free, Prior, and Informed Consent in the Extractive Industry Sector? Examining the Challenges of a Negotiated Model of Justice, Canadian Journal of Development Studies/Revue canadienne d'études du développement 30(1-2) (2010), p. 119; See also in general *Dorothée Cambou*, The UNDRIP and the Legal Significance of the Right of Indigenous Peoples to Self-Determination: A Human Rights Approach with a Multidimensional Perspective, The International Journal of Human Rights 23(1-2) (2019), pp. 34-50.

91 *World Bank*, Environmental and Social Framework, note 5, ESS 7 para. 25; *IFC*, Performance Standards on Environmental and Social Sustainability, note 5, Performance Standard 7, para. 12. On that topic, see for instance *Kathryn Tomlinson*, Indigenous Rights and Extractive Resource Projects: Negotiations over the Policy and Implementation of FPIC, The International Journal of Human Rights 23(5) (2019), pp. 880-897.

92 *World Bank*, Environmental and Social Framework, note 5, ESS 7 para. 26.

93 *Ibid.,* para. 25d.

seems to leave a margin of appreciation to the World Bank as to what constitutes consent. The ESF also states that "the Borrower will document: (i) the mutually accepted process to carry out good faith negotiations that has been agreed by the Borrower and Indigenous Peoples (...); and (ii) the outcome of the good faith negotiations between the [parties], including all agreements reached as well as dissenting views."[94] The IFC's Performance Standards and the Equator Principles include very similar and sometimes word-for-word provisions on FPIC and the resettlement of indigenous peoples.[95]

III. Indications from the IFC's Guidance Note on indigenous peoples on the concept of consent

Given the recent adoption of the safeguards by the World Bank, the IFC's guidance documents could provide an indication of how the World Bank will interpret the concept of consent, assuming that it continues to pursue the harmonization of its safeguards with the IFC's when interpreting the ESF. It is very clear from the IFC's current Guidance Note for Borrowers and staff on Performance Standard 7 "Indigenous Peoples" (hereinafter IFC Guidance Note) that the process of FPIC must be agreed between the indigenous peoples and the Borrower.[96] The requirement of "Good Faith Negotiation" included in the IFC's FPIC definition is described as involving the willingness of both parties to engage in a process and the use of "mutually acceptable procedures for negotiation", the outcome of which should be an agreement.[97] It stresses that the process shall take into account existing social structures, leadership and decision-making processes but that attention should be paid to the need to protect the legal rights of indigenous women, the potential division between indigenous peoples and "inadequate capacity and experience."[98] The IFC Guidance Note recommends a framework be drafted which identifies representatives of the indigenous peoples, reciprocal responsibilities, the consultation process, agreed avenues of recourse and, "when appropriate", what would constitute consent for the indigenous peoples.[99] Thus, the IFC Guidance Note is rather geared towards a negotiation in view of an agreement instead of the quest for an expression of self-determination. It does not allow for indigenous peoples to

94 *Ibid.,* ESS 7 para. 25c.

95 *IFC*, Performance Standards on Environmental and Social Sustainability, note 5, Performance Standards 1, para. 32; 7, paras.12, 15.

96 *Ibid.*, International Finance Corporation's Guidance Notes: Performance Standards on Environmental and Social Sustainability, Guidance Note 7 Indigenous Peoples (1 January 2012), GN25 p. 9, https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/publications_policy_gn-2012.

97 *Id*.

98 *Ibid.,* GN17 and 18.

99 *Ibid.,* GN232.

exercise dissent up front[100] nor to determine alone their decision-making process and their expression of consent. As well put by Shalanda Baker, the IFC's FPIC really means "consultation-plus" rather than consent.[101]

IV. The analysis of the ESF and the ESF Guidance Note: towards a "consultation-plus" concept instead of consent?

There are some differences between the World Bank ESF and IFC Performance Standards on FPIC. Notably, the ESF may extend the cases in which the relevant part of the project may only proceed if FPIC has been granted.[102] The World Bank ESF also seems to open the door for some disagreement. Indeed, to document the outcome of negotiation, the IFC foresees that the Borrower shall document the "evidence of *agreement*",[103] while the ESF mentions "the outcome of the (...) negotiations (...) including all agreements reached *as well as dissenting views.*"[104]

However, consultations before and reactions to the adoption of the ESF give the impression that the World Bank's interpretation of FPIC[105] may be closer to the IFC's than to the Human Rights proponents'. It appears that the World Bank officers foresaw defining FPIC in the third draft of the ESF as "free, prior and informed *consultation* leading to broad community support."[106] This was vigorously rejected by representatives of indigenous peoples, who demanded that the consent refer "to a collective expression by the affected Indigenous Peoples, through their *freely chosen representatives*, of agreement [which] must be obtained through Indigenous Peoples' *own decision-making process* (...)".[107] Neither the reference to consultation nor to indigenous peoples' own decision-making were finally adopted in the ESF. The final provisions were criticized by civil society as a top-down de-

100 Noting that the World Bank framework is pro-development, see *MacLaren/Pariseau*, note 52, p. 8.

101 *Baker*, note 36, for instance p. 688.

102 *World Bank*, Environmental and Social Framework, note 5, World Bank Environmental and Social Policy for Investment Project Financing, para. 55; ESS 7, para. 31; *IFC*, Performance Standards on Environmental and Social Sustainability, note 5, Performance Standard 7, para. 15.

103 *Ibid.,* para.12 (emphasis added).

104 *Ibid.*, Environmental and Social Framework, note 5, ESS 7, para. 25c (emphasis added).

105 Taking a similar perspective without analyzing consent as a self-determination and remedial tool, see *María Victoria Cabrera Ormaza*, *Franz Christian Ebert*, The World Bank, Human Rights, and Organizational Legitimacy Strategies: The Case of the 2016 Environmental and Social Framework, Leiden Journal of International Law 32 (2019), pp. 491-495.

106 *Victoria Tauli-Corpuz, Alexey Tsykarev, Alvaro Esteban Pop*, Letter to World Bank President Kim of 20 May 2016 (emphasis added), http://rightsindevelopment.org/wp-content/uploads/2016/05/IP-mechanisms-letter.pdf.

107 *Ibid* (emphasis added).

termination of the existence of collective support instead of a decision on consent as an expression of self-determination.[108]

The ESF Guidance Note for Borrowers on ESS 7[109] does provide an interesting insight. Indeed, its Guidance Note 25.1 reads that appropriate representatives of indigenous peoples:

> *"(...) are the individuals who are considered by the majority of the affected [indigenous peoples] to be the legitimate authorities to make decisions on collective support on their behalf. The representatives may be chosen through a process that is culturally appropriate to the respective [indigenous peoples], such as through referendum or an assembly format, or they may be tribal chiefs or a council of elders, among others."*[110]

This interpretation of consent seems to correspond to the internal self-determination of Human Rights standards.[111] However, Guidance Note 25.2 also recommends that:

> *"Particular attention should be given to groups within affected [indigenous peoples] that may be disadvantaged or vulnerable, such as women, youth, the poor, and persons with disabilities. Addressing any limitations on their participation in the FPIC process helps to ensure that their interests and concerns are adequately considered and addressed as part of the process to establish FPIC."*[112]

The traditional representatives of the affected communities do not necessarily encompass the vulnerable groups cited here.[113] Therefore, although it upholds norms of Human Rights law, such as non-discrimination, Guidance Note 25.2 implies that the identification of representation of indigenous peoples will not be auto-determined but supervised, in order to comply with the Guidance Note 25.2 itself, and, if necessary, negotiated between the Borrower and the indigenous peoples. Answering the question of the practical compatibility of Guidance Note 25.1 and Guidance Note 25.2 during the consultation phase on the ESF

108 *Amnesty International*, World Bank: Draft Environmental and Social Safeguards Fail to Uphold Rights of Indigenous Peoples (2 August 2016), https://www.amnesty.org/en/documents/ior30/4599/2016/en/. One can wonder when the process and outcome become too determined by the Borrower for consent to be considered "free".

109 *World Bank*, Guidance Note ESS7 Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities, GN 25.1 (June 2018), http://documents1.worldbank.org/curated/en/972151530217132480/ESF-Guidance-Note-7-Indigenous-Peoples-English.pdf.

110 *Ibid*. (emphasis added).

111 See UNDRIP, note 4, art. 32.II.; *OHCHR*, Free, Prior and Informed Consent of Indigenous Peoples, note 61, p. 2.

112 *World Bank*, "Guidance Note ESS7", note 109, GN 25.2.

113 See on that matter *World Bank Inspection Panel*, Report Kenya Electricity Expansion Project (2 July 2015), paras. 74-76, http://documents.worldbank.org/curated/en/302011468001152301/pdf/100392-INVR-P103037-INSP-R2015-0005-1-Box393222B-PUBLIC-disclosed-10-21-15.pdf.

Guidance Note, Maninder Gill, Director of Social, Urban, Rural and Resilience Global Practice at the World Bank affirmed that:

> *"Legitimate authorities here are not necessarily meant to be government authorities. They can be elders, for instance, or tribal chiefs. But even in that case (...) when choosing legitimate representatives of Indigenous Peoples, we need to have a particularly close look at whether these representatives also speak for vulnerable groups. If not, we need to find other ways, and perhaps other representatives, to speak for them. This is where the Bank will work closely with Borrowers, and with other stakeholders, to help ensure voice for those who may not have one."*[114]

This statement confirms the interpretation of consent as a negotiated process rather than one of internal self-determination.

Most importantly, one should note that these divergent interpretations of consent imply that what constitutes forced eviction is also interpreted differently. Human Rights instruments shall be interpreted as demanding, for an eviction to be lawful, that indigenous peoples have given their consent, through their own decision-making process, as an expression of internal self-determination. According to the World Bank, the IFC and the Equator Principles, an eviction can take place if there has been some sort of "consultation-plus", meaning the consent of the indigenous peoples after a negotiated process and a documented agreement between the Borrower and the indigenous peoples. The more the process and expression of consent are negotiated between the Borrower and the indigenous peoples, the less it constitutes a political process of self-governance[115] and thus of internal self-determination. This may well mean that FPIC according to Human Rights represents a greater protection against forced eviction than FPIC pursuant to financial institutions' standards.

E. The FPIC as an example of the product of the harmonization process

I. Environmental and social safeguards from a postcolonial perspective

The integration of the FPIC in the World Bank Group is an example of a process of emulation[116] between institutions, by which concepts are dynamically retaken by different types of international instruments and, through the safeguards, inserted into national jurisdictions.

114 Answering my question: *Maninder Gill*, Director of Social, Urban, Rural and Resilience, World Bank Group, Environmental and Social Framework. Draft Guidance Notes for Borrowers LiveChat (20 November 2017), http://live.worldbank.org/environmental-and-social-framework-live-chat.

115 *Szablowski*, note 90, pp. 114, 118-119; *Michael M. Gunter*, Self-determination or Territorial Integrity: The United Nations in Confusion, World Affairs 14(3) (1979), pp. 203–216; *Stephen James Anaya*, The Capacity of International Law to Advance Ethnic or Nationality Rights Claims, Iowa Law Review 75 (1990), pp. 837- 844.

116 On the concept of emulation between institutions, see *Boisson de Chazournes*, note 42 ; *Makane M. Mbengue/Stéphanie de Moerloose*, Multilateral Development Banks and Sustainable Develop-

This corresponds also to a dynamic of norms' harmonization. The emulation process can be seen as a step forward towards the gradual integration of both emergent and consolidated international Human Rights standards in World Bank activities. As explained by Laurence Boisson de Chazournes, the safeguards may play an instrumental role in facilitating respect for international legal instruments adopted in other arenas."[117] Margherita Brunori also argued that the safeguards have a significant influence in terms of consolidation of the emerging international standards, by confirming their relevance.[118] But, taking a closer look, the emulation phenomenon can also be labeled a transnational legal process, as analyzed by postcolonial scholars.[119] From this angle, the transplantation of a legal concept and the regulation of local behaviors by the Bank corresponds to what has been labeled by Celine Tan the "tentacular reach" of international economic law into the jurisdiction of nation States.[120] Indeed, because this tentacular reach foregoes the classical democratic adoption of domestic law and traditional international law sources, except for loan agreements as treaties, it constrains the domestic policy space. Tan argues that, historically, the "norm-makers" are the geopolitically and socially powerful States, while third world countries are part of the "norm-takers."[121]

However, the specific case of the Bank environmental and social safeguards may slightly qualify here the postcolonial perspective. The situation of the Bank as an international organization rather than a powerful national jurisdiction does add a layer of complexity to the dynamic. The power of dominant Member States in the Bank is accompanied by a certain degree of autonomy of the institution in the adoption of the safeguards.[122] Clearly, Borrowers are in general minority voters,[123] in that sense traditionally marginalized and there-

ment: On Emulation, Fragmentation and a Common Law of Sustainable Development, Law and Development Review 10 (2017), pp. 389-424.

117 *Boisson de Chazournes*, note 43, p. 282.

118 *Brunori*, note 32, p. 516.

119 *Galit A. Sarfaty*, The World Bank and the Internalization of Indigenous Rights Norms, The Yale Law Journal 114 (2005), p. 1793, citing *inter alia Harold Hongju Koh*, Transnational Legal Process, Nebraska Law Review 75 (1996), pp. 183-184.

120 *Celine Tan*, Navigating New Landscapes, Socio-Legal Mapping of Plurality and Power in International Economic Law, in: A. Perry-Kessaris (ed.), Socio-Legal Approaches to International Economic Law, Text, Context, Subtext, Abingdon 2013, p. 21.

121 *Ibid.,* p. 30.

122 See for instance *Tamar Gutner*, Explaining the Gaps between Mandate and Performance: Agency Theory and World Bank Environmental Reform, Global Environmental Politics 5(2) (2005), pp. 10-37.

123 *Devesh Kapur*, Do As I Say Not As I Do: A Critique of G-7 Proposals on Reforming the Multilateral Development Banks, G-24 Discussion Paper Series no. 20 (2003), pp. 7-10; *Chris Humphrey*, Time for a New Approach to Environmental and Social Protection at Multilateral Development Banks, ODI Shaping Policy for Development (April 2016), p. 3, https://www.odi.org/sites/odi.org.uk/files/resource-documents/10419.pdf.

fore "norm-takers" rather than "norm-makers" in the decision-making of the Bank.[124] However, environmental and social safeguards are not *per se* part of the capitalist agenda criticized by Third World Approaches to International Law (often referred to as TWAIL) scholars *inter alia*, who have contended that international financial institutions such as the Bank are agents of neo-colonialist hegemonic forces, promoting globalization values such as capitalism.[125] Although the safeguards are sometimes criticized as validating a certain form of development adopted by the neo-liberal forces,[126] they are also often rather seen as a support for sustainable development and fiercely opposed as an obstacle to economic growth.[127] It could be said that environmental and social safeguards have a counter-hegemonic potential. Balakrishnan Rajagopal has stated that, to build a counter-hegemonic international law, it would be of interest to uncover the goals of development, namely the control of the masses and controlled modernization.[128] The requirement of FPIC in the case of resettlement is a good example of this perspective; it can ensure that indigenous peoples can choose over their affairs, potentially limiting extractive endeavors and "modernization" projects. As such, safeguards can be a tool of resistance.

II. Two interpretations of FPIC: the dangers of fragmentation and operationalization

Conflicting interpretations of FPIC, as a process of internal self-determination[129] versus a negotiated process, trigger important challenges regarding the fragmentation and the operationalization of the concept.

The transplantation through the safeguards and into national law of a different interpretation of FPIC may in fact fragment the interpretation of the concept. The Bank's safeguards and the Equator Principles, adopted by so many financial institutions as voluntary standards, can have a very broad impact on the interpretation of FPIC. There is therefore a risk of competition with and even weakening of the emerging Human Rights norm. One could of course contend that international treaties, such as the ILO Convention No. 169, fit

124 *B.S. Chimni*, IFIs and International Law: a Third World Perspective, in: Daniel Bradlow/David Hunter (eds.), International Financial Institutions and International Law, Alphen aan den Rijn 2010, p. 62.

125 *Ibid.*, IFIs and International Law, pp. 31-62; see also *Tan*, note 120, p. 30.

126 *Ibid.*, International Institutions: An Imperial Global State in the Making, European Journal of International Law 15(1) (2004), pp. 9ff.; *Riegner*, note 59, p. 499.

127 See for instance *John Braithwaite, Peter Drahos*, Global Business Regulation, Cambridge 2000, p. 284 stating that "the most central clash of principles in debates over environmental regulation is between the principle of (ecologically) sustainable development (...) versus economic growth". On debates between Donor States versus Borrowers regarding the drafting of the new safeguards, see *de Moerloose*, note 42, pp. 166-167.

128 *Balakrishnan Rajagopal*, Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy, Third World Quarterly 27(2) (2006), pp. 767-783, 780.

129 UNDRIP, note 4, art. 32.II; *OHCHR*, Free, Prior and Informed Consent of Indigenous Peoples, note 61, p. 2.

in the traditional sources of international law, while the Bank's safeguards and the Equator Principles do not,[130] which would mean that they cannot fragment international law. However, the safeguards do also appear in treaties, namely the loan agreements[131] signed by the World Bank and Borrowing countries. As explained by Campbell McLachlahn, treaties can expressly develop the law gradually beyond the solutions arrived at by custom.[132] Through the ongoing emulation process in international law, the Bank can in fact influence how FPIC is interpreted worldwide; international institutions have an important impact, both on international practice and on the maintenance of norms.[133] The Equator Principles could also have a wide influence on the practical understanding of FPIC by financial institutions and their co-financers.

Moreover, such interpretation dynamics could result in a fragmentation of international concepts between, on one side, a "theoretical" Human Rights interpretation and an "operational"[134] investment interpretation. The practice of integrating Human Rights standards and adapting them to MDB operations can be assimilated to an appropriation mechanism, or even a distortion mechanism, criticized by certain postcolonial scholars.[135] As explained by Anthony Anghie:

> *"(...) the principal danger is that important economic actors who are primarily concerned with profit and promotion of a problematic form of economic development are increasingly appropriating and distorting the language of rights to justify and legitimize their own actions. These actions often produce results completely contrary to the human rights goals of preserving and protecting human dignity."*[136]

130 *Benedict Kingsbury*, Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples, in: Guy S. Goodwin-Gill/Stefan Talmon (eds.), The Reality of International Law: Essays in Honour of Ian Brownlie, Oxford 1999, p. 339.

131 On MDBs' loan agreement as treaties, see *Boisson de Chazournes*, note 43, p. 288. See also *de Moerloose*, note 42, pp. 12-13, 28-29.

132 *Campbell McLachlahn*, The Principle of Systemic Integration and Article 31 (3) (c) of the Vienna Convention on the Law of Treaties, International and Comparative Law Quarterly 54(2) (2005), p. 313.

133 *Mbengue/de Moerloose*, note 115; *Kingsbury*, note 130, p. 339. Stating that "The Operational Standards also may play a crucial role in fostering the emergence of new international practices that seek to promote sustainable development" see *Boisson de Chazournes*, note 43, p. 282. See on this also *Sarfaty*, note 119, p. 1792.

134 *Szablowski*, note 90, for instance p. 127.

135 *Anthony Anghie*, Time Present and Time Past, New York University Journal of International Law and Politics 32 (2000), p. 254. Analyzing law in the context of hegemonic and counter-hegemonic globalization, see for instance *Boaventura De Sousa Santos/César Rodríguez-Garavito* (eds.), Law and Globalization from Below, New York 2005; *Joe Willis*, The World Turned Upside Down? Neo-Liberalism, Socioeconomic Rights, and Hegemony, Leiden Journal of International Law 27(1) (2014), pp. 11-35.

136 *Anghie*, note 135, p. 254.

Indeed, this potential operational appropriation of Human Rights by MDBs may function as a legitimization of certain development projects, while in fact subordinating rights to the development logic.[137] This would cause a departure from FPIC's internal self-determination quality as it would deprive indigenous peoples of an important resistance tool, especially regarding the conservation of territory, *in fine* facilitating evictions. Thus, the operational appropriation of the safeguards places into jeopardy their counter-hegemonic character. The MDBs should therefore refrain from interpreting FPIC in an operational way, facilitating project implementation, and follow Human Rights based interpretation of the FPIC, grounded in internal self-determination.

Only time will tell if the MDBs' interpretation of the new FPIC safeguard in practice can be considered a "race-to-the-top" because it integrates Human Rights norms. A "race-to-the-bottom", which could operationalize, appropriate and *in fine* water down the level of protection of certain Human Rights norms, such as the FPIC, is a particularly dangerous alternative.

F. Conclusion

The World Bank new safeguards are an important step in the harmonization of standards across the World Bank Group and the signatories of the Equator Principles. The FPIC of indigenous peoples, an issue originating in the colonial encounter which re-emerged in Human Rights instruments, has been integrated in the new safeguards in the wake of this harmonization process. However, we may witness two conflicting interpretations of FPIC, as a process of self-determination according to the UNDRIP[138] versus a negotiated process for the World Bank Group and the companies who are signatories of the Equator Principles. There is therefore a tension between the emergence of indigenous peoples' FPIC as a customary norm in the case of resettlement, and the fragmentation of the interpretations of consent by different actors. Indeed, understanding consent as a negotiated process rather than a process of internal self-determination may obliterate the very remedial objective of FPIC and lower its quality as a resistance tool to protect indigenous peoples' territory from forced eviction. It would also jeopardize the safeguards' counter-hegemonic character. Practice will tell whether, with the implementation of the new safeguards, we are witnessing a harmonization with, or rather an operational appropriation of, Human Rights standards.

137 *Sundhya Pahuja*, Rights as Regulation: Integrating Human Rights and Development, in: Bronwen Morgan (ed.), The Intersection of Rights and Regulation, Aldershot 2007, for instance p. 182. *Doyle*, note 3, for instance p. 16.

138 UNDRIP, note 4, art. 32.II; *OHCHR*, Free, Prior and Informed Consent of Indigenous Peoples, note 61, p. 2.