



# Free, Prior and Informed Consent in Large-Scale Development Projects in the Arctic

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The Resource Dynamics of the Urbanized Arctic*

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Rachael Lorna Johnstone, Professor of Law  
University of Akureyri, Iceland & Ilisimatusarfik, University  
of Greenland [rlj@unak.is](mailto:rlj@unak.is) / [ralo@uni.gl](mailto:ralo@uni.gl)



- \* Institutional Support for FPIC
- \* Support for FPIC amongst Arctic States
- \* Interpreting FPIC
- \* Standards of *Free, Prior, Informed and Consent*

ILO C169, 1989



## International Labour Organisation, Convention 169 on Indigenous and Tribal Peoples, 169

### Strengths:

- \* Binding on the parties
- \* Dispute resolution mechanism through ILO

### Limitations:

- \* only 22 States parties
- \* Only Norway and Kingdom of Denmark are Arctic parties
- \* Requires consultation, participation and benefit sharing, but not consent

ILO C169, 1989



## International Labour Organisation, Convention 169 on Indigenous and Tribal Peoples, 169

Article 15(1): *The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to **participate in the use, management and conservation** of these resources.*

Participation ≠ FPIC



## UN Declaration on the Rights of Indigenous Peoples, 2007

### Strengths:

- \* Requires FPIC
- \* Wide institutional support

### Limitations:

- \* Non-binding in itself
- \* Institutional support based on text as ‘aspirational’
- \* Ambiguity of text and flexible interpretation



## American Declaration on the Rights of Indigenous Peoples, 2016

### Strengths:

- \* Requires FPIC
- \* Wide institutional support in Latin America (leaders on indigenous rights)

### Limitations:

- \* Non-binding in itself
- \* Regional
- \* No support from US and Canada!
- \* Ambiguity of text and flexible interpretation



## American Declaration on the Rights of Indigenous Peoples, 2016

### Article XXIX(4):

*Indigenous Peoples have the right to maintain and determine their own priorities with respect to their political, economic, social and cultural development in conformity with their own world view. They also have the right to be guaranteed the enjoyment of their own means of subsistence and development, and to engage freely in all their economic activities. ..*

***Indigenous Peoples have the right to be actively involved in development and determining development programmes affecting them...***

***States shall consult and cooperate in good faith... In order to obtain their free and informed consent.***



## International Finance Corporation, World Bank, Environment and Social Performance Standards, 2012

### Strengths:

- \* Requires *consent* (not just a 'good faith' process)
- \* Burden on operator

### Limitations

- \* Only applies if seeking World Bank financing (e.g., in Russian Arctic (Yamal) but probably not elsewhere)





International Finance Corporation, World Bank, Environment and Social Performance Standards, 2012

### Performance Standard 7:

11: Affected Communities of Indigenous Peoples may be particularly vulnerable to the loss of, alienation from or exploitation of their land and access to natural and cultural resources. In recognition of this vulnerability, in addition to the General Requirements of this Performance Standard, **the client will obtain the FPIC of the Affected Communities of Indigenous Peoples** in the circumstances described in paragraphs 13–17 of this Performance Standard. FPIC applies to project design, implementation, and expected outcomes related to impacts affecting the communities of Indigenous Peoples. When any of these circumstances apply, the client will engage external experts to assist in the identification of the project risks and impacts.

UNHRTBs support for FPIC



UN Human Rights Treaty Bodies on FPIC

ICCPR 1966, articles 1 & 27

ICESCR 1966, articles 1 & 15

CERD 1965

- \* Committee on the Elimination of Racial Discrimination:  
General Recommendation No. XXIII (1997),  
Concluding observations on USA (2008), Canada (2012), Russia (2013),  
Sweden (2013)
- \* Committee on Economic, Social and Cultural Rights:  
General Comment No 21 (2009),  
Concluding observations on Russia (2011), Ecuador (2012), Columbia  
(2010).
- \* Human Rights Committee:  
*Poma Poma v Peru* (2009)

## Regional Human Rights Bodies



E.g.,

- \* *Saramaka People v Suriname, Case of the (Preliminary Objections, Merits, Reparation and Costs) Petition 12338, Inter-American Court of Human Rights Series C No 172 (28 November 2007).*
- \* *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Communication 276/2003 (25 November 2009) AHRLR 75*



## UN Declaration on the Rights of Indigenous Peoples, 2007

- \* UNGA Voting record:
  - Affirmative: 143 (including 5 Nordic States)
  - Negative: 4 (including US & Canada)
  - Abstentions: 11 (including Russia)
- \* Canada (2010) and US (2014) endorsement
- \* Russian tentative support (subject to constitution)



United States (President, 2010):

*The United States supports the Declaration, which—while **not legally binding or a statement of current international law**—has both moral and political force.*

Canada (Aboriginal Affairs and Northern Development, 2010):

*The Declaration is an **aspirational document**... Although the Declaration is a **non-legally binding document that does not reflect customary international law nor change Canadian laws**, our endorsement gives us the opportunity to reiterate our commitment to continue working in partnership with Aboriginal peoples in creating a better Canada.*



## UNDRIP 2007

*Article 32(2): States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions **in order to obtain** their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*

***In order to obtain FPIC: with a view to, with the intention of obtaining FPIC (in good faith) (no veto)***

***In order to obtain FPIC: actually to secure FPIC (veto)***



Trudeau: Canadian electoral campaign: ‘no would absolutely mean no’

April 2016: UNDRIP to be implemented *within* current Canadian constitutional framework (esp. s.35) that requires only “consultation” – and does *not* secure a ‘veto’.



- \* **Free:** how is the autonomy of the community ensured?
- \* **Prior:** at what stages are concerned communities consulted?
- \* **Informed:** how is information transferred to and from communities, including traditional knowledge, to ensure that all parties are fully informed?
- \* **Consent:** how is consent measured and confirmed?





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THANK YOU!

Rachael Lorna Johnstone

[rlj@unak.is](mailto:rlj@unak.is) / [ralo@uni.gl](mailto:ralo@uni.gl)