

ARTÍCULO DE INVESTIGACIÓN

Free prior and informed consent in the Green Climate Fund: the implementation of a project in the Datém del Marañón, Peru¹

El derecho al consentimiento libre, previo e informado en el Fondo Verde para el Clima: el caso de la implementación de un proyecto en el Datém del Marañón, Perú

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ABSTRACT In the context of implementation of climate change adaptation and resilience projects, Indigenous communities' right to Free, Prior and Informed Consent (FPIC) is becoming a mandatory requirement. The present paper, after giving an overview of the requirement of FPIC in international law, addresses the issue of a climate resilience project financed by the Green Climate Fund (GCF) in Peru. Such project is being implemented in Indigenous territories in the Datém del Marañón region. At the time of approval by the GCF Board, the proposed project raised protests from Indigenous communities as they claimed they were not properly consulted before the disbursement of funding. This episode evidenced how the GCF needed to adopt an ad hoc policy to engage with Indigenous peoples respecting the FPIC requirement as prescribed by international law. The present paper demonstrates that the Indigenous Peoples Policy, adopted in February 2018 by the GCF, is an example of harmonization with international law requirements for FPIC such as those prescribed by the United Nations Declaration on Indigenous Peoples Rights. Finally, the paper aims at evidencing the challenge represented by the excessive state-centred structure of the GCF, which needs to be overcome to facilitate a true participatory dialogue with Indigenous peoples.

KEYWORDS Free prior and informed consent; Indigenous peoples; Green Climate Fund; climate policies.

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RESUMEN En el contexto de la implementación de los proyectos de adaptación y mitigación del cambio climático, el respeto del derecho al consentimiento libre, previo e informado de los pueblos indígenas es un requerimiento fundamental. El presente artículo, después de haber dado una panorámica desde el punto de vista del derecho internacional sobre el derecho al consentimiento de los pueblos indígenas, se ocupa de las cuestiones generadas desde la implementación de un proyecto del Fondo Verde para el Clima en Perú. Este proyecto viene implementándose en territorios ancestrales indígenas en la región Datém del Marañón. Cuando fue aprobado por la Directiva del Fondo Verde, el proyecto causó unas protestas por parte de algunas organizaciones indígenas que lamentaron que el requerimiento del consentimiento libre, previo e informado no fue respetado de manera integral antes del otorgamiento de los fondos. Este acontecimiento subrayó la importancia de la adopción, por parte del Fondo Verde, de una política ad hoc sobre los derechos de los pueblos indígenas, en particular el derecho al consentimiento como prescrito por el Derecho internacional. El artículo demuestra que la Política de Pueblos Indígenas del Fondo Verde, adoptada en febrero 2018, es un ejemplo de armonización con el Derecho internacional, en particular con el derecho de los pueblos indígenas al consentimiento libre, previo e informado como prescrito en la Declaración de las Naciones Unidas sobre los Derechos de los Pueblos Indígenas. Finalmente, este artículo tiene el objetivo de cuestionar los desafíos puestos por la estructura excesivamente estado-céntrica del Fondo Verde, que necesitaría superarse a fin de realizar un auténtico proceso participativo de los pueblos indígenas en la toma de decisiones.

PALABRAS CLAVE Consentimiento libre previo e informado; pueblos indígenas; Fondo Verde para el Clima; políticas climáticas.

Introduction

Indigenous peoples' right to express their FPIC is one of the most relevant legal requirements for extractive concessions in Indigenous territories, and for the implementation of environmental conservation and climate change initiatives.

This paper, which is part of a broader research project entitled *Indigenous peoples and climate change: addressing environmental injustice*, aims at awarding relevance to FPIC in climate change-related projects through the presentation of a case study concerning the GCF and its project in Peru. Consent-seeking procedures should indeed be put into practice not only in the case of resource exploitation concessions in ancestral lands, but also, for example, in the case of creation of protected areas that

would modify the conditions of Indigenous peoples' access to a certain territory and its natural resources. These kinds of projects might have a negative impact on Indigenous peoples' traditional livelihoods, undermining their right to food, water, housing and culture.

The methodology selected for this paper consists in the analysis of legal developments in international law on Indigenous peoples' rights, material gathered by NGOs witnessing Indigenous views on the topics and relevant publications regarding the GCF, including sources produced by the fund itself. This legal analytical approach involves a comparative study between the different sources aimed at evaluating the pertinence and harmonization of the GCF Indigenous Peoples Policy with current developments in international law regarding FPIC and with IPOs (Indigenous peoples organizations) requests. This analysis is fostered by the presentation of a case study, which evidences the critical points of the GCF's issues around the actualization of consultation procedures for its climate resilience projects in Peru.

Section one is dedicated to outlining the characteristics of Indigenous peoples' consent requirements prescribed by international law. This general legal framework is fundamental to understanding the problems revolving around the case study presented in section two. The Peruvian wetland project, approved in 2015, raised a series of critiques by IPOs claiming that consultations had not been carried out in an appropriate manner. This led to the creation of the Policy, the provisions of which are highly harmonized with highest international law standards discussed in section one. However, the paper will underline the necessity to move beyond the state-centred governance model typical of the GCF in order to facilitate proper engagement and contributions of Indigenous peoples in a multi-stakeholder engagement process.

Free Prior and Informed Consent in International Law

Indigenous peoples' right to FPIC has a pivotal role when applied to climate change and environmental conservation projects. This section explores the normative framework of FPIC, considered as a mean to rightfully engage with Indigenous peoples, providing a basis to understand the contents of the GCF Indigenous Peoples' Policy.

In the past decades, Indigenous peoples worldwide have been subject to violations of human rights in the name of development projects (Atapattu, Sumudu & Dawsonera, 2016). Such episodes could be easily repeated in the case of environmental conservation and climate change initiatives (Lewis, 2008) if not supported by an actual application and enforcement of international norms aimed at empowering Indigenous peoples within a framework of meaningful participation and decision-making power. However, FPIC, as explained later in the paper, is not aimed at granting a *tour court* veto power to Indigenous peoples. Rather, it entails a process of early-stage involvement of Indigenous peoples in decision-making with States and third-party

actors (Ahrén, 2016). By contrast, the case represented by the management of forests under the REDD (Reducing emission from deforestation and forest degradation in developing countries) and REDD+ (Reducing Emissions from Deforestation and Forest Degradation, including enhancement of forest carbon stocks, sustainable management of forests and conservation) programmes, implemented without seeking consent, constitutes an outstanding example of how conservation projects can have extremely negative impacts on Indigenous peoples and their traditional livelihoods. Preservation of forests and avoiding deforestation are indeed key elements of global climate change governance since they would contribute to the lowering of GHGs (Green House Gases) emissions deriving from forest degradation, which accounts for the 17 per cent of global emissions (IPCC, 2014).

Unfortunately, in certain cases governments have supposed that forcibly evicting Indigenous peoples from their ancestral lands was a key step to achieve forest conservation, such as in Kenya² and Uganda³ (Atapattu et al., 2016 and Vedeld et al. 2016). Forests are not only important for conservation and climate change reasons, but they are also fundamental for the enjoyment of numerous Indigenous peoples' human rights, including right to life, right to family life, right to property and also religious and cultural rights (Savaresi, 2012). Indigenous peoples' culture and livelihoods are deeply connected to the ancestral lands they have traditionally inhabited since time immemorial (Stevens, 1997). It is fundamental that their right to inhabit and enjoy those territories is protected, respected and fulfilled by governments and non-state entities.

REDD programmes have evidenced that conservation activities improperly implemented can damage Indigenous peoples rather than provide benefits (ISA, 2010). If we assume that Indigenous peoples are particularly related to their land and this relation is a unique form of interdependence, subsequently their territories should not be the object of negotiations: any activity that endangers this special connection should be considered an "attack to their ecological integrity" (Westra, 2008, p. 30). Thus, it is fundamental that climate governance instruments, among them the GCF, respect Indigenous peoples' rights through their active participation in the decision-making and implementation of FPIC. Involving peoples affected by the implementation of a

2. In January 2014, the government violently evicted Indigenous inhabitants from the Embobut forest in order to preserve biodiversity. See also: Kenya Forest Peoples Programme, available at <http://www.forestpeoples.org/en/topics/rights-land-natural-resources/news/2014/02/kenyan-government-s-forced-evictions-threaten-cult>, last accessed April 2019.

3. In Uganda, since the 1990s, the government evicted Indigenous peoples living in the area of Mount Elgon National Park in order to implement a reforestation project. See also: Vedeld P, Cavanagh C, Petursson JG, Nakakaawa C, Moll R, Sjaastad E. *The Political Economy of Conservation at Mount Elgon, Uganda: Between Local Deprivation, Regional Sustainability, and Global Public Goods*. *Conservat Soc* 2016;14, pp. 183-94.

development project should be considered mandatory, as required by international law instruments analysed further. The requirement for consent – and the respect for Indigenous peoples’ right to their land and resources, and their right to self-determination – should be the ultimate scope of such participatory involvement of affected communities. The tension between States’ interests for the development of the nation and Indigenous nations often gives rise to a legal and political dilemma, that necessarily has to be addressed through consultation and consent-seeking procedures in order to avoid the violation of Indigenous peoples’ human rights (Cittadino, 2019).

International human rights law and biodiversity law deliver guidance on how consent should be sought and obtained in cases where legislative or administrative measures would have an impact on Indigenous peoples’ rights, territory and resources. However, international law provides two different standards in this sense, namely consultation and FPIC. Understanding the difference between these two approaches and their legal underpinnings is fundamental to assure the maximum level of protection to Indigenous peoples’ rights. The highest standards for FPIC are enshrined in the UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples), in the Convention on Biological Diversity and in the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity. C169, conversely, offers a lower protection standard when it comes to consent.

UNDRIP is an instrument of soft law which supposedly has no binding power on its ratifying states, although it is the most referred text concerning Indigenous peoples’ rights (Hanna and Vanclay, 2013). Overall, the drafting process of the UNDRIP was unquestionably lengthy – it lasted more than 20 years - because of States’ concerns over important Indigenous rights that would have undermined the principle of territorial sovereignty – namely, the right to self-determination and the right to FPIC (Thornberry, 2002). Peru had a strong role in the drafting of the text, as it sponsored the revised declaration in 2006⁴. However, a counter initiative led by Namibia and other African states aimed at amending the final text requesting “time for further consultations thereon”⁵. At the time of the adoption, 143 countries voted in favour, including Peru, which was the first Latin American country that adopted a law on the right to consultation (Arévalo, 2019). Australia, New Zealand, Canada and the United States voted against also in virtue of the need for clarification around the FPIC requirement. Between 2009 and 2010 the opposing countries switched to a more open position and signed the UNDRIP, specifying that they did not considered

4. UN, Department of Social and Economic Affairs website: <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

5. UN General Assembly, A/C.3/61/L.57/Rev.1, at <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

it as a binding document but rather a useful instrument to set an “aspirational goal” (Hanna et al., 2013).

The self-determination element in the UNDRIP is highly relevant. The issues revolving around the right to self-determination have been extensively debated in the academic literature. In the years of UN decolonization projects and under the “blue water thesis”, the self-determination discourse was strictly linked to the right of a people that had been subject to colonization to constitute itself as a nation and as an independent state. After decolonization, Indigenous communities were not considered as “peoples” for the purposes of the right to self-determination, given the fact that the principle of territorial sovereignty could not be overridden. In fact, self-determination allowed for independence only for people whose territory is under the control of a foreign entity. The scope of the right to self-determination has progressively expanded in the following decades, shifting from a minimalist approach (self-determination intended as independence from the state, applied in the context of colonisation) to a maximalist approach. For this latter, self-determination is seen as an umbrella right, linked to the capacity of the full enjoyment of other fundamental human rights. For indigenous peoples, the right to self-determination means to be in control of their lives and their future, it means the right to fully and effectively participate in the political and civil life of their country and also the right not to be placed under coercion or subjugation (Anaya, 2004; Tobin, 2014; Xanthaki, 2007).

UNDRIP’s article 3 implies that the relative norm enshrined in the 1966 Human Rights Covenants (“all peoples have the right to self-determination”) is applicable to Indigenous peoples. Thus, interpretations of UNDRIP should be done in the light of this affirmation, which entails *jus cogens* and *erga omnes* obligations, although the non-binding nature of the document might diminish the legal meaning of its dispositions. However, it has been argued that the UNDRIP offers an ambiguous approach to the right to self-determination. It seems it refers only to the right to internal self-determination, since Article 46 is aimed at excluding any right of secession. This appears in contrast with the recognition of indigenous peoples as “peoples” as a right to secession would still subsist when self-determination cannot be assured (Tobin, 2014). For Indigenous peoples, self-determination is a right and a principle, which is relevant for the fair redress of the many historical injustices which they have been victim of, and it is also the prerequisite for the enjoyment of many fundamental rights (Anaya, 2004; Hannum, 1996; Thornberry, 2002; Xhantaki, 2005, 2007). In Indigenous peoples’ perspectives, FPIC is an instrument for the implementation of the right to self-determination, since it would allow participation and determination of their future and means of development, together with the respect of rights to lands, territories and natural resources (Doyle, 2015).

UNDRIP entitles Indigenous peoples with the right to FPIC drawing upon the circumstances for its requirement: relocation, impact on culture and intellectual property, adoption and implementation of legislative or administrative measures, exploitation of lands, territories and natural resources, disposal of hazardous waste, and development planning. In addition, UNDRIP orders States to provide reparations in case of damage or loss for any Indigenous peoples' intellectual, spiritual or material good in cases where consent had not been expressed.

The application of UNDRIP's FPIC standards in development and resource extraction has been prescribed by the UN Permanent Forum on Indigenous Issues⁶, by the REDD Programme (UN-REDD, 2013) and by Inter-American human rights system (De Casas, 2016). According to the UN Permanent Forum, Free is intended as "the absence of coercion, intimidation or manipulation. It also refers to a process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, expectations or timelines that are externally imposed", while Prior means that "consent is sought sufficiently in advance of any authorization or commencement of activities, at the early stages of a development or investment plan, and not only when the need arises to obtain approval from the community", Informed denotes "the nature of the engagement and type of information that should be provided prior to seeking consent and also as part of the ongoing consent process", and, Consent, finally, "refers to the collective decision made by the rights-holders and reached through the customary decision-making processes of the affected Indigenous Peoples or communities" (FAO, 2016). UNDRIP's FPIC provisions have been subject to recommendations of the UN Human Rights bodies⁷, decisions of the Inter-American Human Rights system⁸ and also recommendations of the UN Special Rapporteur on the Rights of Indigenous Peoples (UN Commission on Human Rights, 2003).

Indigenous peoples' right to consent is also considered essential in biodiversity law, namely in the 1992 CBD and the 2010 Nagoya Protocol. The CBD addresses the vital importance of conserving worldwide biodiversity for economic and socially sustainable development, for the benefits of all humanity. Its preamble recognizes

6. UNPFII Recommendations database, at https://esa.un.org/unpfii/UNPFII_Recommendations_Database_list.asp?TargetPageNumber=1&action=Search&lang=&orderby=&dir=&PageSize=20&masterkey=&SearchField=AnyField&SearchOption=Contains&SearchFor=free+prior+informed+consent&PageSizeSelect=20.

7. See generally: UN Human Rights Committee: *Anni Äärelä y Jouni Näkkäläjärvi v. Finlandia*, U.N. Doc. CCPR/C/73/D/779/1997 (2001); *Länsmann et al. v. Finlandia*, U.N. Doc. CCPR/C/52/D/511/1992 (1994); *Apirana Mahuika et al. v. Nueva Zelanda*, U.N. Doc. CCPR/C/70/D/547/1993 (2000); Committee on the Elimination of Racial Discrimination, Final Observation on Surinam, *cedr/C/64/CO/9*, 28 April 2004, par. 11-12; Decision 1 (67) on Surinam, *cedr/C/DEC/SUR/4*, November 2005; UN Committee on Economic, Social and Cultural Rights Final Observation to Ecuador, par.12, 2004 and Final Observation to Colombia, par. 33, 2001.

8. See generally *Mayagna Awas Tingni v. Nicaragua* (2011); *Maya v. Belize* (2004); *Saramaka v. Suriname* (2007).

Indigenous peoples' close relationship with biological resources, acknowledging the role of traditional knowledge for conservation purposes. It expressly governs States' access to genetic resources after having obtained both PIC (Prior Informed Consent) and Mutually Agreed Terms (Tobin, 2013). The international regime for access to benefit sharing of genetic resources includes the establishment of minimum procedural requirements for PIC (Teran, 2016). There are two main reasons why consent is essential when accessing traditional knowledge on genetic resources: the first draws upon consideration of monetary advantages (Kate and Laird, 1999) and respect for Indigenous peoples' self-determination rights to the pursuit of economic and cultural development; the second regards the respect for the fairness principle outlined in the CBD, which requires permission from owners and benefit-sharing arrangements (Schroeder, 2009). To meet such requirements, Indigenous views and claims on access to benefit sharing and consent were integrated in various CBD implementation guidelines⁹.

The Nagoya Protocol establishes specific PIC standards although its minimum procedural requirements leave considerable discretionary power to States: Parties have to specify in their domestic legislation how to apply PIC providing a transparent written decision by the competent national authority. It seems that States' procedural requirements will vary significantly from one national legislation to another. Nevertheless, the Protocol requires the full and effective participation of the interested communities while ensuring appropriate consideration of their customary laws (Morgera and Tsioumani, 2015).

Finally, consultation "with the objective of achieving agreement or consent" is prescribed by C169. Differently from the previous ILO (International Labour Organization) instrument dedicated to Indigenous peoples, the Convention n. 107 (1959), which established that native communities could be removed from their ancestral lands "in the interest of national economic development", C169 provides quite strong provisions in relation to participatory rights of Indigenous peoples. They should be consulted in good faith for matters directly affecting them, such as the adoption of legislative and administrative measures, the formulation, application and evaluation of national development programs and the authorization to any exploration or exploitation concession about natural resources in Indigenous territories.

However, the consultation procedures envisaged in C169 suggest a more truncated approach compared to FPIC (Doyle, 2015). In contrast, consent is a stronger concept which might imply that an Indigenous group should be able to veto a project, when it has the potential to affect fundamental human rights, resulting in an actual empowerment of Indigenous communities. This strong interpretation of consent was

9. 2002 Bonn Guidelines, 2004 Ake:kon Guidelines, 2011 Tkarihwaieri Code of Ethical Conduct, 2016 Mo'otz Guidelines.

somehow suggested by the same States that objected some of the provisions contained in C169 and UNDRIP, namely New Zealand, Canada, Australia and US. Their joint observations submitted to the UNPFII and to the UN Human Rights Council, evidenced their opposition to an “absolute right” to FPIC, which would enable Indigenous peoples to hold an exclusive veto right that would not be in a compatible position with democratic values¹⁰.

In order to clarify this aspect, ILO in 2013 published the Handbook *Understanding the Indigenous and Tribal Peoples Convention*, where it affirmed that Indigenous peoples must be vested with the right to be consulted without providing them with veto power: certainly, imbuing Indigenous peoples with the right to say no would likely constitute a menace for corporations, governments and other entities interested in implementing projects in Indigenous territories, restraining possibilities for new endeavours (ILO, 2013). Notwithstanding this clarification, C169 has been ratified by 23 States only, the great majority from the South American region¹¹.

The nonappearance of a substantive consent requirement relates directly to the great weakness of C169: the absence of any reference to Indigenous peoples’ right to self-determination. C169 falls short when it comes to the actual empowerment of Indigenous peoples and their autonomy in decision-making procedures, as any of their decisions could be easily re-interpreted and adapted to the State’s considerations. In fact, it has been argued that C169 did not meet the expectations and claims of Indigenous peoples and it has failed in properly addressing the protection of Indigenous peoples’ rights (Niezen, 2003). On the contrary, a self-determined right to FPIC is the appropriate means by which Indigenous peoples accord their consent to measures impacting them, enabling them to compete on equal terms with powerful actors such as States and corporations (Szablowski, 2010).

The application of the highest standards of protection for Indigenous peoples, which include FPIC as interpreted in the UNDRIP, should rightfully be adopted by those governmental entities that aim at implementing conservation and climate change projects in native lands. The GCF project in Peru and the subsequent adop-

10. Statement of Peter Vaughn to the UNPFII, Representative of Australia, on behalf of Australia, New Zealand and the US, on FPIC, 22 May 2006, New Zealand Ministry of Foreign Affairs and Trade, at www.austliianun.org/unny/soc_220506.html, and Note verbale dated 2 August 2006 from the Permanent Mission of Australia to the United Nations Office at Geneva addressed to the Office of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/2G/1, 24 August 2006; US Department of State, announcement of US support for the United Nations Declaration on the Rights of Indigenous Peoples, 16 Dec. 2010, at www.state.gov/documents/organization/153223; International Labour Conference Proceedings, 75th Session (1988) at <https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/indigenous-and-tribal-peoples/lang--en/index.htm>, last accessed May 2020.

11. ILO C169 Ratification status, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312314:NO.

tion of the Policy constitute an example of how the provisions of international law can be harmonized within climate change governance.

The Green Climate Fund and the right to FPIC: lessons from the Peruvian Case

The GCF was established in 2010 by the United Nations Framework Convention on Climate Change to disburse funds for the implementation of low emission and climate resilient projects developed by public and private sectors mainly in developing countries. The GCF was created during the 16th meeting of the COP in Cancun, Mexico, and it was envisaged to spend half of its fund for adaptation projects, half of which on Least Developed Countries, African states and Small Islands Developing States, and the other half on mitigation measures. The funding target was set to reach US\$100 billion by 2020 and the first proposals were approved at the Board Meeting in Zambia in November 2015. At the moment of writing, the Fund has disbursed a total of \$12.6 billion spread among 76 projects¹².

The GCF provides financial funding in terms of loans, grants, equity or guarantees to its AEs (Accredited Entity) which are responsible for implementing projects. It also pursues a country-ownership policy, which means that it recognizes the need to ensure that developing country partners exercise ownership of climate change funding and integrate it within their own national action plans¹³. In order to do so, countries appoint a NDA (National Designed Authority) which must interface between their government and GCF and approve its activities within the country, ensuring that GCF operates in harmony with existing national policy. This country-ownership approach has raised a series of critiques by IPOs that are considered later on in the paper.

The GCF projects are very relevant to Indigenous peoples since climate change adaptation and mitigation plans might have an impact on ancestral lands and Indigenous peoples' fundamental rights, like in the case of REDD. Moreover, Indigenous peoples are highly vulnerable to the effects of climate change, since the increase in the global temperature, extreme weather events and desertification are likely to impact their traditionally inhabited territories, resulting in an alteration of their livelihoods and customary lifestyle (Maldonado et al., 2014). For these reasons, Indigenous peoples might be involved in many GCF projects as direct beneficiaries, whereas such initiatives are aimed at reducing the impact of climate change on vulnerable communities.

But Indigenous peoples are not to be considered mere victims of climate change effects, as their traditional ecological knowledge could be useful in adaptation stra-

12. GCF Portfolio, at: <https://www.greenclimate.fund/sectors>.

13. GCF Guidelines for enhanced country ownership and country drivenness, at <https://www.greenclimate.fund/document/guidelines-enhanced-country-ownership-and-country-drivenness>.

tegies, as recognized in the Paris Agreement in Article 7 (2015) and in the Cancun Agreement, part II, para. 12. (2010). Contributions of Indigenous peoples to GCF projects and respect of their rights are a matter of crucial importance: they should be supported and protected as owners of valuable traditional knowledge in relation to climate change adaptation and sustainable resource management. Then, FPIC (Free Prior and Informed Consent) should be regarded as an essential safeguard to achieve not only consent, but also inclusion of Indigenous peoples in climate governance through the creation of a multi-stakeholder dialogue that fosters respect of their right to freely determine their future.

Before the adoption of the Policy in February 2018, the GCF had been disbursing huge amounts of money without the necessary safeguards and rules prescribing a full engagement with Indigenous peoples through consent-seeking procedures. This lack of appropriate rules could have led the GCF to becoming just another multilateral agency implementing projects that could impact on Indigenous communities negatively, without respecting their right to FPIC as prescribed by international human rights instruments (Tebtebba, 2017). For example, it should be avoided to follow the instances of the 2004 World Bank's Operational Policy 4.10, which has recently been replaced by the 2018 Environmental and Social Framework. The OP represented the application of a lower standard of FPIC, defined as FPICon (Free prior and informed consultation) (MacKay, 2005). This last was defined by the WBG (World Bank Group) as "free prior and informed consultation resulting in broad community support". In previous negotiations, Indigenous peoples had demanded the establishment of their right to FPIC, expressing serious concern for its lack in the OP draft, but their proposals were not included in the outcome (WBG, 2002).

The GCF Wetland project in Peru, which was the first-ever to be approved by the Board, provides interesting insights about the issue of FPIC in relation to Indigenous peoples and the implementation of climate change adaptation projects. Peru's territory is characterized by its highly diversified Indigenous groups inhabiting different provinces. There are 4 million Indigenous peoples in Peru, who are comprised of 55 groups speaking 47 languages. 83 percent are Quechua, 10.9 percent Aymara, 1.6 percent Ashaninka, and 4 percent belong to Amazonian Indigenous peoples, including Yanesha and Ashaninka¹⁴.

The AE chosen by the government is PROFONANPE (Peruvian Trust Fund for National Parks and Protected Areas), a NGO of public interest, specialized in raising and managing financial resources aimed at implementing projects that contribute to

14. International Work Group for Indigenous Affairs website: <https://www.iwgia.org/en/peru.html>.

biodiversity conservation, mitigation and adaptation to climate change¹⁵. Their proposal regarded wetland management with the participation of Indigenous peoples in the province of Loreto in the eastern Amazon region and it is considered the first GCF project relevant to Indigenous communities¹⁶. The Indigenous groups involved are members of the Achuar, Achuar, Awajún, Chapra, Kandozi, Quechua, Wampis and Shawi communities, each characterized as having its own territory, culture and language. The project constitutes an important case study in relation to the need for the GCF to develop strong monitoring, compliance and grievance mechanisms in relation to the respect of Indigenous peoples' rights and FPIC as provided by international human rights instruments such as the UNDRIP. The project aims at reducing deforestation and carbon emissions in the Datém del Marañón region, through work with local governments and 120 communities. It also has the objective of strengthening existing protected areas while creating new ones, together with support strategies for developing land use plans and ecological zoning. Thus, the project is implemented in an area which is home to several Indigenous communities and it clearly will have impacts on their access to land and resources: for this it should have rightfully been subject to prior consultation (Tebtebba, 2017). Indeed, it raised a series of immediate questions about its consistency with the obligation of the GCF and the State toward Indigenous peoples (Tebtebba, 2017).

These concerns on the consultation procedures were raised by various NGOs, among them AIDSESP (Interethnic Association for the Development of the Peruvian Rainforest) and FENAP (Council of the Federation of Achuar Nationality in Peru). The first wrote a letter to the GCF in June 2015, expressing their general opposition to PROFONANPE, as a recipient of funds. AIDSESP argued that PROFONANPE, in past experiences, had not complied with Indigenous peoples claims since it focused mainly on the conservation of natural parks (AIDSESP, 2015). Also, it contended that actions aimed at the conservation of forests in Indigenous territories should be implemented by an Indigenous-lead organization and, therefore, PROFONANPE was not the ideal candidate for such a task. In the same period, FENAP rejected the invitation by PROFONANPE to attend a meeting in the Achuar territory, since they traditionally disallowed any project which was in contrast with their "Plan de Vida", which refers to the Achuar aspirations to their "collective rights to own, manage and control an integral territory" (Tebtebba, 2017). FENAP also stated that it disagreed with any project that could undermine Indigenous rights or imply the State's control over native resources (FPP and Tebtebba, 2015).

15. PROFONANPE website: <http://www.profonanpe.org.pe/en/fvc/the-green-climate-fund>.

16. Building the resilience of wetlands in the province of Datem del Marañón, Peru, <https://www.greenclimate.fund/document/building-resilience-wetlands-province-datem-del-mara-n-peru>.

In addition, the project raised a series of claims regarding the respect of consultation procedures and Indigenous peoples' participatory rights. PROFONANPE declared that it had the support from all affected communities and organizations. But there was no clear evidence that they had discussed with affected communities the details of the project and its potential impacts (Tebtebba, 2017). Effective compliance with FPIC requirements was considered questionable in this case (as a matter of fact, the proposal was made available only in English, making it difficult to understand for native communities). It seemed that there was no evidence that the full scope and nature of the project, together with its positive and negative impacts, had been explained to native communities or their consent obtained. But, according to the report of the Independent Technical Advisory Panel of the GCF, PROFONANPE had consulted with 80 communities and 21 organizations. However, these consultations were realized in only two weeks and it seemed there were inconsistencies with the real number of communities consulted, while other concerns regarded the lack of grievance mechanisms and institutional role for the Indigenous peoples involved (Tebtebba, 2017).

During the 2015 Zambia meeting the project was eventually approved, even though attending NGOs and IPOs argued that Indigenous peoples had to give their FPIC before implementation¹⁷. The Secretariat stressed that,

“extensive consultation had been conducted by the AE, that the letter referred to a different project, and showed evidence of a letter submitted by that organization [PROFONANPE] clarifying this point. The representative also explained the inclusive consultation process undertaken by Profonanpe. It further argued that the documentation provided was sufficient to understand that meaningful consultations had been carried out with Indigenous peoples affected. [...] they noted strong general support and that the concerns raised about the consultation process had been well answered but warranted clearer explanation in the proposal.”

However, arguably this position was in contrast with the highest human rights standards and best practices requiring that all affected communities are consulted, with appropriate timing and on the basis of full information and in a culturally appropriate manner. NGOs are obliged, as any other entity is, to comply with GCF Interim Standards that reflect international human rights norms including FPIC¹⁷. This means that PROFONANPE, as an entity receiving funding from the GFC, is required to respect FPIC requirements in implementing its project. The very fact that the Secretariat

17. GCF Interim environmental and social safeguards of the Fund (Performance standards of the International Finance Corporation), at <https://www.greenclimate.fund/document/interim-environmental-and-social-safeguards-fund-performance-standards-international>.

did not insist and verify the accomplishment of this requirement was the symptom of an urgent need for the GCF to adopt an *ad hoc* policy to ensure full respect of Indigenous peoples' rights.

Moreover, in Peru the level of recognition and engagement with Indigenous peoples had been problematic in the past, especially regarding FPIC and participatory rights (Salmón, 2013). Following the dramatic events of the Bagua massacre in 2009, the Peruvian Consultation Law was promulgated in 2011. In fact, even though Peru had ratified C169 (Indigenous and Tribal Peoples Convention, 1989, No. 169) in 1994, many obstacles persisted in the realization in practice of the right to consultation (Bustamante Rivera, 2015). The law, in article 2, established that the State only is the entity obliged to consult with Indigenous peoples before the implementation of any legislative or administrative measure that directly affects Indigenous peoples. However, the implementation of the consultation law has not been a straightforward process, for example for issues concerning the creation of the database of Indigenous communities to be consulted and for challenges relating to the non-acceptance of the Consultation Law by influential Indigenous organizations (Sanborn and Paredes, 2015).

In addition, according to the report *The Green Climate Fund Readiness and Indigenous Peoples* (Martone, 2017) it emerged that the institutional framework for the implementation of GCF projects in Peru was still incomplete. At that time, MINAM (Peruvian Ministry of Environment), the former NDA, adopted the Green Growth document that envisages engagement with the GCF only for private sector projects without taking into consideration Indigenous peoples. Similarly, the current NDA, the MEF (Peruvian Ministry of Finance), has not adopted any engagement policy concerning native communities. It must be noted that the ministries Indigenous peoples have dialogue with – such as the Ministry of Culture – are not relevant for GCF projects since they are not competent on financial matters. During a workshop held by CHIRAPAQ (Peruvian Indigenous Cultural Centre), IPOs argued for the need for the MEF to adopt intercultural approaches to finance policies. Native communities also criticised the excessive state-centred design of GCF programs and their bias toward the private sector, with the risk of implementing projects in the absence of effective guarantees on Indigenous peoples' rights (Martone, 2017).

The case of the PROFONANPE project has demonstrated how the GCF Secretariat did not understand comprehensively the operative implications of FPIC and the relative issues concerning participatory rights for Indigenous peoples affected by the project. The way the IE conducted the consultations fuelled conflicts among IPOs, highlighting the need to clarify the nature and effectiveness of stake-holder consultation processes. But, eventually, it provided an opportunity for the GCF to develop and adopt rigorous environmental and social safeguards together with an *ad hoc* policy specifically aimed at the protection of Indigenous peoples' rights, where FPIC is one of the leading principles.

The GCF Indigenous Peoples Policy

As demonstrated with the analysis of the main issues that emerged with the implementation of the PROFONANPE project in Peru, the need for the adoption of an Indigenous peoples' policy in the GCF was urgent especially in terms of compliance with FPIC requirements.

IPOs accredited with the GCF stated their claims in a letter to the Board in June 2016 (FPP, 2015). They argued that the development and adoption of the policy was urgent, and it had to be done in line with the highest human rights standards existing in international law. Also, they expressed concern that the provisions of the Fund Interim Performance Standards did not offer an adequate system of safeguard for Indigenous peoples. The Standards did not provide an integral FPIC requirement and lacked consideration of the positive contributions Indigenous peoples could offer in adaptation and mitigation strategies. According to the IPOs, the GCF had to recognize the importance of the link between the recognition of Indigenous peoples' rights to land, territories and resources and the effective conservation of forests, in order to ensure a mitigation action: securing land rights is not only crucial for the survival of Indigenous populations, but also fosters the sustainable reduction of emissions and climate change mitigation. In order to do so, "effective and high-level safeguards need to be accompanied by a robust Indigenous Peoples' Policy that not only spell out the 'preconditions,' such as the recognition and respect of the rights to land, territories and resource, but also the positive actions and enablers to ensure that Indigenous peoples' contribution by means of traditional knowledge and livelihoods, including upholding and advancing the status and rights of Indigenous women, is fully respected and ensured" (FPP, 2015).

The subsequent letter to the Board dated November 2016 reiterated the urgency of the adoption of an Indigenous peoples' policy and called explicitly for adherence to the highest existing standards for FPIC and also that "it should be meant as an iterative process whereby consent is sought and obtained at every stage and at all levels (local to global) of a project cycle. Full and effective participation, engagement and representation of Indigenous peoples [...] must be ensured at all stages of GCF activities". In order to achieve such inclusive governance, it would be necessary to appoint an Indigenous Peoples' Advisory Body, together with the provision of tailored oversight and consultative mechanisms. The Indigenous representatives of affected communities should also have the possibility to address directly the Secretariat, the Board and the Independent Redress Mechanism.

The Policy¹⁸ was eventually adopted in the Meeting of the Board in February 2018, together with the Environmental and Social Management System¹⁹. The Policy recognizes the role of Indigenous peoples' contribution to climate change adaptation and mitigation, and therefore calls for their engagement in the design, development and implementation of the strategies and activities to be financed by GCF, while respecting their rights. It also states that the contents of the Policy had been guided by principles enshrined in main international law instruments. It could be considered one of the most advanced tools regarding FPIC as it recognizes the importance of consent-seeking procedures and Indigenous peoples' participatory rights.

The scope applies to private and public entities, to approved GCF-financed activities to the extent reasonably possible, where Indigenous peoples are present in, have, or had a collective attachment or right to areas where such activities will be implemented. The Policy applies regardless of negative or positive effects on Indigenous peoples and the application will not be limited by the absence of their legal recognition or identification by a State.

The Policy is based on a total of eight Guiding Principles that must be applied on existing and proposed activities:

- i) Develop and implement FPIC;
- ii) Respect the rights of Indigenous peoples to their lands, territories and resources;
- iii) Recognize key international human rights;
- iv) Respect the right of Indigenous peoples under voluntary isolation;
- v) Recognize the role of traditional knowledge and traditional livelihood systems;
- vi) Enhance the capacity of Indigenous peoples' claims within GCF;
- vii) Facilitate access to GCF resources for Indigenous peoples;
- viii) Respecting the system of self-government.

In the Policy, the GCF has given its own definition of FPIC, the "key purpose", which is considered as an

"iterative process, requiring Indigenous peoples' consent before a proposal for GCF financing is considered by the Board, on the basis of their own independent deliberations and decision-making process, based on adequate information to be provided in a timely manner, in a culturally appropriate manner, in a local language that is understood by them, and through a process of transparent and inclusive consultations, including with women and youth, and free of coercion or intimidation. Free, prior and informed consent does not require unanimity and may be achieved even when indi-

18. GCF Indigenous peoples policy, at <https://www.greenclimate.fund/projects/safeguards/ip>.

19. GCF Indigenous peoples policy, at <https://www.greenclimate.fund/projects/safeguards/ip>.

viduals or groups within or among affected Indigenous peoples explicitly disagree”.

This last requirement is harmonized with the highest international law standards, making the Policy a unique instrument for the protection of Indigenous rights. However, it can be noted that the last part of the requirement necessitates a careful application, as it seems that the consent of a majority is enough to proceed with a project even though other marginalized people might have not agreed. Thus, the Policy, as a general framework, does not address issues of internal diversity, imbalances of power and issues on under-representation that might arise in consultation procedures. It looks like such aspects should be addressed on an *ad hoc* basis, whereas the GCF will have to ensure that risk is adequately managed and that AEs fulfil obligations under the GCF Policies, as well as a system of management that guarantees that FPIC is properly sought together with a clear identification and assessment of the risks associated to the project. If this does not happen the GCF will have to work with the AE to ensure that they fulfil this requirement, but if the AE fail, then the GCF can even consider taking legal measures in accordance to the agreement it previously concluded has with the entity. According to the Accreditation Master Agreement, in case of a registered lack of compliance the AE will have to notify the Fund and take action to ensure compliance. If this is not happening, the Fund’s Secretariat can consider downgrading, suspension or revocation of accreditation²⁰.

On a positive note, it can be remarked that third parties are subject to a certain amount of conditionality in the approval of their projects, in the sense that the financing is disbursed only when AE meet specific requirements, among them FPIC: as established in the Policy, GCF is responsible for “recommending to the Board for financing only those proposed activities with free, prior and informed consent and satisfactory approaches to managing risks and impacts, consistent with this Policy” and for requiring any gaps or weaknesses to be addressed properly before project approval. This obligation is also reiterated in the section “Overview of roles and responsibilities of the accredited entities”.

Turning to the circumstances requiring FPIC, they are comprehensive of the main impacts that could affect Indigenous peoples in the implementation of GCF-financed projects. The first circumstance applies to impacts on lands and natural resources subject to traditional ownership or under customary use or occupation. The Policy aims at securing Indigenous peoples legal rights to their ancestral lands, through the preparation of a plan to “to ensure the legal recognition of such property rights in accordance with applicable law and obligations of the state”. This provision is very

20. GCF Accreditation Master Agreement, at <https://www.greenclimate.fund/document/accreditation-master-agreement>.

meaningful since States might be reluctant in recognizing Indigenous peoples' ownership to territories and natural resources, especially when such ownership is characterized by informal and collective property rights. Also, the GCF called on the accredited entities to seek FPIC when the activities proposed will impact natural resources or land subject to traditional ownership.

The second circumstance requiring FPIC concerns the relocation of Indigenous peoples from lands and resources subject to traditional ownership or under customary use or occupation. GCF will not consider projects that would result in the resettlement of Indigenous peoples, with the exception of some particular circumstances pointed out in section 61. When resettlement or displacement is unavoidable to achieve the programme objective, there are some criteria to be followed, among which: FPIC must be obtained, there must be an authorization by national law, full and fair compensation and rehabilitation as well as right of return, if applicable, must be ensured.

Finally, FPIC must be obtained where the proposed activities may potentially impact cultural heritage, which includes natural areas with cultural/spiritual value and non-physical expressions of culture. When significant impacts on cultural heritage are unavoidable, the AEs will seek to obtain FPIC from the affected communities, informing them in a culturally appropriate manner and through means that ensure the full understanding of the project about their rights, scope and nature of the proposed activity and the potential consequences for such development.

The Policy can be considered innovative since it sets specific grievance redress mechanism standards for Indigenous peoples' complaints. The GRM (Grievance Redress Mechanism) could work as a safeguard to enforce the right to FPIC and to report and solve problems raised by the implementation of any project. IPOs (Indigenous People Organization) for the establishment of an Independent Redress Mechanism in order to ensure compliance, accountability and quality of GCF project and programs²¹. In answering their request, the current GRMs will be established for any GCF-financed activity, at the project level to address Indigenous peoples' related concerns. GRMs will be designed in consultation with Indigenous peoples, facilitating "the resolution of grievances promptly through an accessible, fair, transparent and constructive process", and they will be proportionate to the nature and scale of potential risks and impacts of the activity.

The Policy and its acknowledgement of the importance of FPIC might constitute the basis, at least partially, for the resolution of the country-ownership problem, intended as a high level of discretion for States and NDAs when deciding upon the

21. FPP, Indigenous peoples submissions to the TOR of IRM, [http://www.forestpeoples.org/sites/default/files/news/2017/01/Indigenous Peoples Submission on the TOR of IRM_final.pdf](http://www.forestpeoples.org/sites/default/files/news/2017/01/Indigenous%20Peoples%20Submission%20on%20the%20TOR%20of%20IRM_final.pdf), last accessed May 2020.

implementation of projects and relative consultation procedures. Country-ownership and country-driven approach are core principles of the fund and they have been criticized as exclusively state-centred, whereas the NDAs or focal points are the entities in charge of recommending funding proposals to the Board. It is then the task of governments to ensure full consultation with stakeholders and the full implementation of GCF safeguards. For this reason, several IPOs have criticized the country-ownership approach, because it does not guarantee the effective participation of Indigenous peoples²². IPOs denounced the risk that if only governments and their AEs (and not Indigenous representatives) would be responsible to ensure that Indigenous peoples had been effectively consulted, this would result in non-compliance with highest international human rights standards. They called on the GCF to discard the country-ownership approach, in favour of a new governance model which takes into account Indigenous views in the multi-stakeholder engagements and in which Indigenous peoples' customary law and legal pluralism is truly recognised as having the same importance as the country's AE²³.

The Policy can be considered a first, meaningful step in addressing claims raised by IPOs, whereas before its adoption, the procedures to verify that Indigenous peoples were fully and effectively consulted were left to the discretion of the NDAs. The binding requirements established in the Policy regarding FPIC and the recognition of the positive contributions of Indigenous peoples' traditional knowledge in the struggle against climate change, denote a new course to be followed by States, NDAs and AEs, where Indigenous peoples must be engaged as bearers of rights and interests. The Policy can be considered a good example in terms of harmonization with UNDRIP's provisions. It also represents a positive contribution to the emergence of a new body of financial regulation which takes into due consideration the impacts on Indigenous peoples of development projects and empowers them with meaningful participatory rights and decisional power. In fact, the Policy reads: "When the FPIC of Indigenous peoples cannot be ascertained, the aspects of the project relevant to those Indigenous peoples for which the FPIC cannot be ascertained will not be processed further. Where GCF has made the decision to continue processing the project [...] the accredited

22. "[...] ensuring 'country ownership' would be the sole task of NDAs or focal points, notably governments that in many cases do not even recognize our existence as Indigenous peoples and our rights as defined by international standards and instruments. It would be up to governments and implementing agencies to ensure the full consultation with stakeholders at various levels [...]"; in Tebtebba Foundation, Forest Peoples Programme, Letter to the Green Climate Fund Board, 22nd October 2015.

23. 24. International Biodiversity law provides with outstanding practices in this sense - the "community protocols". These contracts aim at incorporating customary law and rules for conducting research, enabling indigenous peoples themselves to define their own conditions for FPIC Cittadino (2019).

entity will ensure that no adverse impacts result on such indigenous peoples during the implementation of the project”.

Even if the outlined consent-seeking procedures might be limited to the GCF projects, they could still be relevant for the creation of best practices and for the effectiveness and enforcement of FPIC in countries characterized by high rates of socio-environmental conflicts. The Policy can be considered functional to achieve better inclusion of Indigenous peoples in decision-making regarding mitigation and adaptation projects, and a way to ensure their awareness in terms of the consequences, positive and negative, of the implementation of such programs in their territories.

Conclusions

Indigenous peoples are relevant stakeholders in climate change resilience and adaptation initiatives, since they are not only victims of the effects of climate change, but also important contributors to adaptation strategies thanks to their traditional knowledge. FPIC has a fundamental role in the implementation of environmental and climate change projects. The non-compliance with FPIC provisions, as demonstrated by the problems caused by REDD and REDD+, may lead to serious violations of Indigenous peoples' rights.

The case study presented – the GCF project in the Datém region in Peru – has raised a series of critiques by IPOs regarding the lack of compliance with the FPIC provisions enshrined in international law instruments. The Policy came as an answer to Indigenous peoples' claims, in particular regarding issues of participation, inclusion in the development of the project and the right to FPIC. The consent procedures and the inclusive participation of Indigenous peoples are indeed key elements of the policy, which aims at establishing a continued and iterative dialogue with Indigenous representatives at the early stages of project drafting. The Policy goes beyond the prescription of international law, for example in applying the principle of conditionality to the disclosure of any funding by the GCF, in the sense that such disbursement is given only if affected Indigenous communities have expressed their approval to the implementation of projects. The policy also considers the importance of intercultural dialogue with Indigenous groups, which means that the information should be disclosed in a timely appropriate manner and in a language that is fully understood by the Indigenous peoples involved. Thus, FPIC does not only imply obtaining consent, but relates to the institution of an inclusive dialogue and the establishment of participation procedures that enable Indigenous peoples to actively decide their destiny.

However, authentic participation of Indigenous peoples requires the resolution of State-centred governance that characterise the GCF and other financial mechanisms alike. Indigenous authorities and customary law should be recognised as having equal dignity and importance as governmental bodies – and this is particularly true in the

Peruvian case, where the Ministry of Finance, as NDA, does not have an Indigenous peoples engagement policy itself.

The acknowledgment of FPIC along with other substantive participatory rights would lead to a possible paradigm shift from the consideration of Indigenous peoples as mere objects of law to their recognition as active subjects in the drafting of policies and at the early stages of project design. In this light, FPIC should be considered essential in re-shaping the existing power relations and asymmetries between Indigenous groups, states and private entities: conducting negotiations and consultation without providing communities with a substantive FPIC right would crystallize such imbalances and leave Indigenous peoples without real power to influence decision-making processes. Therefore, granting Indigenous peoples right to FPIC - also intended as an iterative process of dialogue - is one of the powerful tools to achieve actual inclusion at the national and international level.

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