



Review

Is free, prior and informed consent a form of corporate social responsibility?



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ABSTRACT

International organizations are increasingly including Indigenous peoples' rights and the concept of Free, Prior and Informed Consent (FPIC) in their guidance documents, codes of conduct, and performance standards. Leading companies are adjusting their Corporate Social Responsibility (CSR) and Social Performance frameworks to include a human rights based approach for engaging with Indigenous communities. Arguably, insufficient attention has been given to the normative, conceptual and practical differences between CSR and FPIC. The voluntary and instrumentalist character of CSR is not readily compatible with the basic tenets of human rights. While CSR is primarily applied by companies to reduce risk associated with societal opposition and reputational harm, FPIC is a mechanism to ensure respect for Indigenous rights relating to land, use of resources, and self-determination. CSR and FPIC thus serve different purposes, as reflected in their positions on issues such as: economic development; stakeholder management; the role of the corporation vis-à-vis the state; and the responsibilities and accountabilities of corporations.

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1. Introduction

Multinational corporations, especially in the extractive industries, are increasingly encountering Indigenous and tribal peoples in their on-the-ground business activities (Graetz, 2014; Owen and Kemp, 2015; Hanna et al., 2016a, 2016b). These encounters significantly affect the lives of these peoples (Anaya,

2005; McGee, 2010; Hansen et al., 2016). Because of their dependence on the natural resources where they live and their strong spiritual attachment to their lands (Anaya, 2004; Vanclay et al., 2015), any change in the environments on which these peoples depend or to the social, cultural and historical relationships they have with each other or to the lands they inhabit can have severe social consequences (United Nations, 2009; Northcott, 2012). However, corporations frequently fail to respect Indigenous peoples' rights, especially their right to occupy, use and control their traditional lands and natural resources (Jenkins and Yakovleva, 2006; Miranda, 2007; Richardson, 2007). This is worrisome, because respecting Indigenous rights is inextricably connected to

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the preservation of Indigenous cultures, their livelihoods and future survival (Daes, 2001; Hanna et al., 2014).

The concept of free, prior and informed consent (FPIC) arose in the Indigenous rights discourse as a mechanism to ensure respect for Indigenous peoples, and protection by the state of Indigenous peoples and their rights in development projects (APFNHRI & OUNHCHR, 2013; Szablowski, 2010; Ward, 2011). Corporations are being stimulated to adopt and implement FPIC by international organisations (e.g. United Nations, 2013; FAO, 2014), human rights organisations [e.g. Oxfam (Hill et al., 2010)], and industry associations (e.g. ICMM, 2013). This has led to many corporations, especially in the extractive industries, publicly committing to FPIC (see Hill et al., 2013; Oxfam, 2015), potentially without being fully aware of the consequences of this commitment. We argue that community engagement practices based on FPIC are founded on different values and imply different types of activity than those engagement practices based on the stakeholder management practices traditionally applied in the field of corporate social responsibility (CSR). It has been commented (e.g. Franco, 2014, p. 7) that FPIC is being deployed by companies to do whatever they want “while making this seem more socially acceptable”. FPIC is being applied as the new tool in the CSR toolbox, however, various interpretations of FPIC are being used, often at variance to the interpretation in international law (Buxton and Wilson, 2013).

This paper is written by a CSR scholar/practitioner with internship and other experience in the extractive and other industries together with an applied, industry-engaged academic who is a specialist in the field of social performance and social impact assessment (e.g. Vanclay, 2002, 2003, 2012, 2014; Vanclay et al., 2015). We conceptually examine the compatibility of FPIC with CSR and stakeholder management theory by critically reviewing their respective theoretical and normative foundations. We also examine whether the stakeholder engagement practices and strategies are materially different depending on whether they are underpinned by CSR or FPIC philosophies. Finally, we consider whether the evident differences between CSR and FPIC can be reconciled. We note that there are varying understandings of CSR (Gariga and Mele, 2004; Matten and Moon, 2008), especially in the academic CSR discourse, however we have used what we believe to be the dominant understanding of CSR in corporate CSR departments, based on our interactions with social performance and CSR staff in several major companies in the extractives sector, and on the literature dealing with CSR in the extractive industries (e.g. Haalboom, 2012; Hilson, 2012; Slack, 2012).

As FPIC is a relatively new discourse, its literature base is quite small. Searches on this term were performed using Google Scholar and relevant articles in the published and grey literature were skim-read, with interesting items read in detail. A domino process of following-up on key references was also followed. CSR, however, is a long-established field with a very large literature base. Here, we tended to use Scopus to identify the most cited references and relevant literature, particularly focussing on review articles. We also considered recent articles in the CSR journals. We also searched for combinations of terms including: CSR and Indigenous peoples; CSR and extractive industries; CSR and FPIC. In this paper, we cite what we consider to be the key articles in the FPIC and CSR discourses. However, we note that this is not a review essay, rather it is an analytical comparison of the FPIC discourse with the CSR discourse as it is implemented within industry.

2. The evolution of corporate social responsibility

Early CSR literature implicitly or explicitly assumed that CSR had its basis in liberalism (Boele et al., 2001). Since the mid twentieth century, the debate about the responsibilities of

corporations developed alongside unease that advancing neoliberalism was overshadowing concern about the social issues in business (Richter, 2010). This unease was amplified by growing awareness of the increasing power of corporations (Gariga and Mele, 2004). Questions were raised about the purpose and scope of corporations, and whether they could or should accept responsibility for social issues (Richter, 2010). Early CSR theory considered that the social responsibilities accepted by corporations were of a voluntary character, underpinned by a neoliberal philosophy of minimalist state interference. Social responsibilities were envisaged to be opportunities to improve corporate performance and competitive advantage. To quote Drucker (1982, p. 54): “The proper ‘social responsibility’ of business is to tame the dragon, that is, to turn a social problem into economic opportunity and economic benefit, into productive capacity, into human competence, into well paid jobs, and into wealth”.

The neoliberal basis led to instrumentalist reasoning. CSR was seen as a tool useful for the enhancement of a business's position vis-à-vis its competitors, with the overall purpose to increase business profits (Scherer and Palazzo, 2007). An example of such reasoning is Wartick and Cochran (1985). Rather than arguing that social responsibility was incompatible or inconsistent with a company's economic responsibilities (Friedman, 1970), they developed a model that integrated these responsibilities with corporate performance. Wood (1991) continued their work taking an explicit focus not only on the CSR process, but also on the outcomes or performance. By the beginning of the 1990s, the increased focus on the use of CSR as an instrument to improve corporate performance resulted in the emergence of a sub-field based on evaluating the financial value creation of CSR practices (Griffin and Mahon, 1997; McGuire et al., 1988; Waddock and Graves, 1997). Elkington (1997) extended and/or challenged this by proposing that businesses needed to consider their social and environmental performance as well as their economic performance and is credited with coining the concept of the triple bottom line (see also Vanclay, 2004).

The growth and maturation of the CSR field in the 1990s led to it becoming fragmented, with Carroll (1999) identifying three themes – stakeholder theory; business ethics theory; and corporate citizenship – and Dahlsrud (2008) identifying five dimensions: environmental, social, economic, stakeholder, and voluntariness. Corporate social performance and stakeholder theory developed from the abovementioned instrumentalist point of view. However, some stakeholder theorists applied descriptive, normative or narrative approaches to explain the processes by which corporations engage their stakeholders (Donaldson and Preston, 1995; Quinn and Jones, 1995; Waddock and Graves, 1997; Hillman and Keim, 2001). While stakeholder theory and engagement tools are the traditional mechanisms through which corporations engage with external communities and are discussed below, it is necessary to mention developments that have questioned the adequacy of the traditional liberal economic model underpinning CSR.

Some scholars criticized the traditional liberal conceptualization of CSR as being apolitical, suggesting this to be untenable in a world of decaying nation states, emerging corporate power and transnational politics involving multiple actors (Richter, 2010; Waddock, 2004). In an attempt to legitimize the dominant position of corporations within society and justify the role of corporate community engagement practices, participative and deliberative theories from the social sciences have been used. Moon et al. (2005), for example, introduced the notion of ‘corporate citizenship’. This supported a shift in views about the role of companies towards paradigms which accepted that corporations should have (or at least could have) an active role in the political field. When

viewed as 'corporate citizens', corporations are increasingly included in global governance processes and multi-stakeholder dialogues on global issues (Moon et al., 2005; Richter, 2010). Nevertheless, the extent to which corporations see themselves as political actors and corporate citizens is questionable – in corporate practice, corporate citizenship typically refers to corporate philanthropy activities rather than to corporations acknowledging their responsibility to provide certain services (Palazzo and Scherer, 2008). In the CSR literature, the traditional economic and instrumentalist view of CSR remains dominant and emphasizes the need for the 'business case' for CSR (Carroll and Shabana, 2010). Therefore, this view of CSR is used in this paper.

3. Traditional CSR tools for community engagement

The foundation of community engagement theory is the realization that stakeholder perceptions of business are likely to impact the firm's interests, activities and profitability (Freeman, 1984; O'Riordan and Fairbrass, 2008; Gordon et al., 2012). Stakeholder theory developed in response to the increasing recognition of the importance of engaging stakeholders in long-term value creation (Andriof et al., 2002) requiring long-term mutual relationships rather than a simple focus on immediate profit generation (Morsing and Schultz, 2006).

The community engagement strategies used by companies can be ordered on a continuum from least to most engaged (e.g. Dare et al., 2011, 2012, 2014; Gordon et al., 2013a, 2013b). Morsing and Schultz (2006) construct a continuum with three positions: stakeholder information strategies; stakeholder response strategies; and stakeholder involvement strategies. At one end, information dissemination practices are the one-way flow of information from the business to stakeholders, with the latter being influential only when they change their purchasing habits or express their positive or negative opinions about the firm to others. In this context, CSR is conceived as being employee volunteer time, philanthropic donations, and other forms of 'giving back' to society (all of which have minimal community input), what Bowen et al. (2010) call 'transactional engagement'.

In the middle position, stakeholder response strategies comprise dialogue based on systems of two-way, asymmetric communication in which stakeholders have the opportunity to comment on business practices through feedback tools such as surveys. Imbalances in power and inadequate information sharing lead to the company attempting to change public attitudes and behaviour, rather than itself being influenced by the communication (Morsing and Schultz, 2006). Bowen et al. (2010) characterize stakeholder-responsive strategies as 'transitional engagement' in that firms move beyond one-way communication towards dialogue, but fail to accept shared sense-making and problem framing.

At the other end of the spectrum, engagement occurs through dialogue, community leadership practices (Bowen et al., 2010) and community involvement strategies (Morsing and Schultz, 2006). While asymmetric information sharing is still used, it is insufficient to develop and promote the positive support and shared understanding based on sense-giving and sense-making that is expected (Hart and Sharma, 2004; Payne and Gallon, 2004). Engagement strategies here assume that stakeholders should be involved in decision-making processes in order for the company to continuously adapt to their concerns and improve its CSR initiatives. Frequent and systematic dialogue creates mutually-beneficial agreements (Morsing and Schultz, 2006). Bowen et al. (2010) call this 'transformational engagement', suggesting that business should take a leadership role in the community. The primary benefits of transformational engagement for

the corporation are: (i) building social legitimacy (Morsing and Schultz, 2006), or social licence to operate (Dare et al., 2014); (ii) strengthening reputation (Wood, 2002); and (iii) increased ability to do business because of a better understanding of community issues and impacts of the corporation upon these issues (Esteves and Vanclay, 2009; Vanclay, 2014; Vanclay et al., 2015).

Although there are clear company benefits of applying a transformational model of community engagement, there are also considerable implementation challenges. For example, the identification of stakeholders is often problematic (van der Ploeg and Vanclay, 2013). O'Riordan and Fairbrass (2008, p.747) contend that "the main challenge for businesses is the task of identifying to whom they are responsible, and how far that responsibility extends". Other difficulties occur where divergent and conflicting expectations exist between stakeholders, which is often complicated by geographical, regional and cultural differences (Bomann-Larsen and Wiggen, 2004; Epstein and Roy, 2001; Murray and Vogel, 1997; Prenzel and Vanclay, 2014).

O'Riordan and Fairbrass (2008) model the interconnections between CSR and stakeholder dialogue to establish what best practice should look like. They identify their assumptions: (i) the environment of a corporation consists of context, events, stakeholders and management responses; (ii) before engaging with stakeholders, a corporation must assure itself that it fully comprehends the contextual domain; (iii) to understand the power of stakeholders, a corporation must identify and prioritize its stakeholders, their interests and their needs; and (iv) to effectively understand all aspects of CSR and stakeholder dialogue, the implications of all events likely to occur must be known. In short, they highlight the importance of a proper assessment of the contextual environment in which firms operate, the significance of particular events, and the nature of the stakeholders themselves. The O'Riordan and Fairbrass model is typical of the many potential and actual CSR strategies and management responses.

In contemporary stakeholder engagement practices, the traditional instrumental focus of CSR is still applied. Boele et al. (2001, p.124) elaborate this by maintaining that "typically, there is both a risk management and an 'opportunity driven' dimension to corporate interests in maintaining or improving stakeholder relations – both of which are usually instrumental to creating economic value". In general, stakeholder engagement is seen as a way of managing business risks – dialogue with stakeholders helps to identify material environmental and social risks that need to be mitigated (Kytle and Ruggie, 2005).

Stakeholder dialogue is conceived as being a tool for achieving two-way, symmetric information-sharing. Starting a dialogue about the potential social, economic, and environmental obligations of corporations creates opportunities for the identification and evaluation of stakeholder needs, concerns and interests. Identification and evaluation, in turn, are the basis by which CSR management can appropriately address these needs, concerns and interests within the boundaries of the corporate need for profit. Thus, stakeholder engagement theory has taken a corporate perspective – looking at engagement from the point of view of business. Other academic fields, e.g. anthropology, sociology, public administration, and human rights, have tended to describe stakeholder engagement practices from the perspective of communities, eventually evolving into the concept of Free, Prior and Informed Consent (Hanna and Vanclay, 2013).

4. The emergence of free, prior and informed consent

It is difficult to determine exactly when the term, 'Free, Prior and Informed Consent', was first used, although the concept likely emerged in the 1980s as part of the Indigenous peoples' struggle

for self-determination (Charters and Stavenhagen, 2009). Essentially, through the 1980s and 1990s, Indigenous claims relating to land and resources were supported by contemporary understandings of Indigenous land rights, which recognized that current and historical use of land constituted customary land rights. Arguably, respect for Indigenous claims to land, livelihood and subsistence led to Indigenous rights and to FPIC as a way of enacting or accessing those rights. The notions that individuals cannot exercise their culture alone (Anaya, 2004) and that access to traditional land and resources is crucial for Indigenous peoples to maintain their cultures (Daes, 2001) provide a strong underpinning basis to FPIC. FPIC thus revolves around: (i) Indigenous peoples' claims to the inherent and prior rights to their lands and resources; (ii) the individual and collective human rights that derive from their indigeneity; (iii) Indigenous peoples' freedom to choose their own culturally-appropriate development path; and (iv) the need to establish equal and respectful relationships with Indigenous peoples (Hanna and Vanclay, 2013).

FPIC, in one form or another, is mentioned in various international documents (Ward, 2011). 'Free and Informed Consent' was introduced in Article 6 of International Labour Organization's Convention 169 (ILO, 1989). This article specifically addressed the relocation of Indigenous peoples from their land. Prior to ILO C169, communities that were potentially harmed by projects were rarely acknowledged by the state or company (Goodland, 2004). Although ILO C169 has been ratified by only 20 countries, it has influenced the perceptions of international actors and it set a first standard for appropriate community engagement.

FPIC was much mentioned in the discussions around the World Commission on Dams (Cariño, 2005) and is very evident in its report (World Commission on Dams, 2000). The World Bank's Extractive Industries Review (EIR, 2004) recommended adoption of 'consent' (MacKay, 2004). However, the Board of the World Bank seemed uncomfortable with the potential legal implications of consent and instead decided to adopt the lower standard of "Free, Prior and Informed Consultation resulting in broad community support" (Cariño and Colchester, 2010, p. 425). Various forms of 'consent' or 'agreement' were adopted in other international instruments. For example, Article 8(j) in the *Convention on Biological Diversity* (United Nations, 1992) calls on states "to respect, preserve and maintain knowledge, innovations, and practices of indigenous and local communities ... and promote their wider applications with the approval and involvement of the holders of such knowledge, innovation and practices". Agenda 21 (UNCED, 1992), one of the major outcomes of the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, noted in its Article 22 that "States should recognize and duly support their [Indigenous peoples and their communities] identity, culture and interests and enable their effective participation in the achievement of sustainable development". At a regional level, the Inter-American Development Bank's 1990 *Strategies and Procedures on Socio-Cultural Issues as Related to the Environment* provided that "in general the IDB will not support projects that involve unnecessary or avoidable encroachment onto territories used or occupied by tribal groups or projects affecting tribal lands, unless the tribal society is in agreement with the objectives of the project" (IDB, 1990, p. 3). The EU *Resolution on Indigenous Peoples within the Framework of the Development Cooperation of the Community and Member States* proclaimed that "indigenous have the right to choose their own development paths, which includes the right to object, in particular in their traditional areas" (European Council, 1998, Article 5).

The International Finance Cooperation (IFC) Performance Standards, which are predominantly looked to by companies as guidelines for their business behaviour and form the basis of the

Equator Principles, initially held (2006 version) that community consultations were not required to lead to 'broad community support'. The IFC suggested that consultations needed to be "good faith negotiations with and informed participation of Indigenous peoples" (Cariño and Colchester, 2010, p. 425; IFC, 2006). However, in 2012, in response to much stakeholder pressure, the IFC updated its Performance Standards to require consent rather than consultation (IFC, 2012). Nevertheless, what this actually implies remains unclear.

The United Nations has highlighted the rights of Indigenous peoples in many declarations (see Hanna and Vanclay, 2013). It embedded FPIC in the 2007 *Declaration of the Rights of Indigenous Peoples* (United Nations General Assembly, 2007). In this declaration, governments need to consult Indigenous Peoples in order to obtain their consent about: (i) relocation (Article 10); (ii) administrative measures that impact them (Article 19); (iii) the storage of hazardous materials inside the Indigenous land (Article 29); and (iv) the utilization of their resources (Article 32).

Although the intended subjects of most documents mentioned in this brief review of FPIC are nation states, there is increasing pressure on corporations to also comply with FPIC, particularly because corporations are typically involved in project developments that create land use change and often the dislocation and resettlement of Indigenous communities (Lehr and Smith, 2010; BSR, 2012; ICMM, 2013; Lehr, 2014; FAO, 2014).

The exact legal status of FPIC varies between states depending on whether they are signatories to ILO Convention 169 and/or the United Nations Declaration of the Rights of Indigenous Peoples, and depending on their own legislation (Hanna and Vanclay, 2013; Lightfoot, 2012). Although somewhat disputed (Barelli, 2012), there is a considerable body of scholars who advocate for seeing FPIC as a right, including Cariño (2005), Hanna and Vanclay (2013), MacKay (2004), Miranda (2007), and Ward (2011). Arguably, the United Nations considers that FPIC is a right of Indigenous peoples (APFHNHRI & OUNHCHR, 2013).

5. FPIC-compliant community engagement processes

With the normative foundation of FPIC as described above, it is also evident that the stakeholder engagement practices necessary to ensure genuine FPIC are different to those expected by CSR stakeholder management theory. FPIC requires that certain standards must be met when a company or other entity is involved in community engagement – standards that relate to the rights and interests of communities rather than to the profits of corporations. As Vanclay and Esteves (2011, pp.6–7) describe, engagement should be:

- (i) free – meaning that there must be no coercion, intimidation or manipulation by companies or governments, and that should a community say 'no' there must be no retaliation; (ii) Prior – meaning that consent should be sought and received before any activity on community land is commenced and that sufficient time is provided for adequate consideration by any affected communities; (iii) Informed – meaning that there is full disclosure by project developers of their plans in the language acceptable to the affected communities, and that each community has enough information to have a reasonable understanding of what those plans will likely mean for them, including of the social impact they will experience; and (iv) Consent – meaning that communities have a real choice, that they can say yes if there is a good flow of benefits and development opportunities to them, or they can say no if they are not satisfied with the deal, and that there is widespread consent in

the community as a whole and not just a small elite group within the community.

A distinction is made between FPIC and a Social Licence to Operate (SLO) (Owen and Kemp, 2014). Several scholars (e.g. Owen and Kemp, 2013; Prno and Slocumbe, 2012; Thomson and Boutilier, 2011) suggest that the goal of FPIC is to ensure consent is obtained prior to the start of a project, and thus it is a once-off formalization or agreement, while a SLO takes a longer-term perspective indicating the need to maintain community support throughout the life of the project. Others, however, have stated that FPIC (like SLO) must be an ongoing and multi-phase process (Hanna and Vanclay, 2013). FPIC can be the formalization of a community engagement process with the purpose of obtaining a social licence, a formalization that needs to be renewed for any activity that might significantly alter the impacts on Indigenous peoples and their territories. Lehr and Smith (2010, p. 7) do not specifically highlight the differences between SLO and FPIC, but consider that FPIC is “best understood as a formalized, documented and verifiable social license to operate”, and that “after an Indigenous community provides its consent, a company must continue to engage with the community in order to maintain that consent”. As such, FPIC can be seen as an ongoing process.

FPIC implies certain expectations about the process of community engagement and the actors involved in the operationalization of engagement activities. Even before negotiations commence, state and corporate responsibilities can be identified. For example, the engagement process must be fully and formally agreed upon by the community and recorded by the company. Where a community is unable to prepare properly for the engagement process, a company must provide the resources and assistance to enable the community to prepare itself to ensure meaningful engagement. If it can be determined from preliminary community profiling that decision-making systems in the community are not adequate to enable them to effectively participate in a FPIC process, the corporation or state should first assist in strengthening the capacity of those communities to engage (Colchester and Ferrari, 2007; Lehr and Smith, 2010).

Corporations need to gain a full understanding of local decision-making institutions, customary law, community leadership structures, and the position of marginalized groups within the community by conducting a thorough Social Impact Assessment (Esteves et al., 2012; Vanclay et al., 2015). It is preferable to involve the Indigenous community early in such a process (Colchester and Ferrari, 2007; Hanna et al., 2014). To guarantee that the subsequent engagement with the community emerges on the basis of respectful, equal, informed and balanced negotiation, Indigenous communities must be knowledgeable about their rights and responsibilities, eliminating any informational asymmetries or power imbalances that might exist. Thus, it could be necessary for the state or corporation to provide financial support so that the Indigenous people can engage lawyers, facilitators and technical assistance. There should also be financial support to enable inclusive participation of a wide range of diverse groups (Vanclay et al., 2015).

These responsibilities continue to exist while the negotiation process is ongoing. The necessity to ensure an equal involvement of the community in the decision-making process also remains during the whole process. An important point that is often overlooked is whether the Indigenous community has the capacity to fully understand the potential impacts they are likely to experience. A truly genuine FPIC cannot be obtained if the Indigenous community has little or no comprehension of the potential impacts, or are unable to grasp the full extent of the changes likely to

be upon them. Allowing them to gain a proper understanding might entail showing them similar projects elsewhere (Goodland, 2004).

The negotiation process culminates either in the community's clearly-worded confirmation of consent, or its explicit withholding of consent. If consent is given, it should be articulated in a formal written agreement (Lehr and Smith, 2010). However, such an agreement on its own may not be sufficient proof of the genuine granting of FPIC by the community, because a proper FPIC entails documenting all relevant details about the engagement process and the conditions under which the community permits use of its land and resources. Arguably, a company should also be able to substantiate that the criteria comprising FPIC were met. Verification could be provided by an appropriate government agency or by an independent third party auditor (Colchester and Ferrari, 2007).

6. Are we talking about the same thing here?: FPIC as a possible dimension of CSR

Past attempts of human rights advocates to link CSR with human rights concepts such as FPIC have focused on reinterpreting and redesigning the international human rights regime so it could include and address corporations and the responsibilities corporations possibly have (Wettstein, 2012). Till now, there has not been concern about the different normative foundations of these two lines of thought. In contrast, attempts from the CSR community to grasp human rights responsibilities and tackle related issues have focused on the position of the corporation in the ‘post-national constellation’ – a form of society in which governments are no longer the only or most-powerful actors (Richter, 2010). Current CSR research revolves around the concepts of ‘global citizenship’ (Moon et al., 2005; Scherer and Palazzo, 2011) and ‘shared value’ (Porter and Kramer, 2011). However, these bodies of literature are unclear about how to achieve a corporate human rights-based approach, what such an approach would look like, and what the business case to adopt FPIC would be (Kemp and Vanclay, 2013; Wilburn and Wilburn, 2014). For the dominant liberal CSR paradigm, adopting a cause without a proper business case or internal motivation is not justifiable. Therefore, till recently human rights have not played a prominent role in the CSR discourse and, similarly, CSR has had little influence on the norms, standards and rights established in international law (Wettstein, 2012).

Table 1 compares the dominant CSR perspective in business with FPIC. It shows that the two constructs are disconnected in terms of their origins and normative constructions. Even though FPIC is being increasingly introduced into CSR performance standards and codes of conduct, neither international society nor CSR practitioners know how to effectively combine them. This creates difficulties regarding the roles and responsibilities of the corporation and the state, and how FPIC is actually implemented.

One difficulty is that the company and its responsibilities are traditionally located in the private domain in which apolitical decision-making and the economic incentives underlying business activities are perceived to be central. The integration of human rights and FPIC obligations into the corporate domain challenges the separation of the private and public, creating an overlap between the two realms and offering “space for the conceptualization of positive human rights obligations for corporations” (Wettstein, 2012, p. 752). However, such politicized positions do not seem something that corporations are ready to accept. There is reluctance by companies to implement human rights due diligence procedures and fully embrace the corporate responsibility to respect human rights, even if lip service is given to the United Nations Guiding Principles on Business and Human Rights (United Nations, 2011). Most companies can be described as ‘followers’

Table 1
Comparison of FPIC with the dominant understanding of CSR.

| Issue | Corporate social responsibility (dominant understanding) | Free, prior and informed consent |
|--|---|--|
| <i>Theoretical and normative foundations</i> | | |
| Development perspective | Economic view of development | Human rights-based approach to development |
| State involvement | Minimalist interference | Regulation |
| Character of implementation | Voluntary through guidance | Mandatory through standards and law |
| Goals/objectives | Improvement of performance and competitive advantage | Upholding and respecting Indigenous rights |
| Approach | Instrumentalist approach | Participatory approach |
| Actors | Shareholders, stakeholders and civil society | Rights holders, Indigenous communities and civil society |
| Type of relationship | Long-term mutual relationship | Long-term equal relationship |
| <i>Implications for community engagement</i> | | |
| Communication | One-way, two-way asymmetric or two-way symmetric communication | Inclusive two-way symmetric communication |
| Mechanisms of influence for community | Consultation and involvement | Opportunity to be engaged; co-learning; ability to withhold consent |
| Type of engagement | Transactional/transitional/transformational stakeholder engagement | Rights-based engagement |
| Actor prioritization | Prioritization based on interests, needs and power of stakeholders | Authority to participate in FPIC discussions tied to recognition of land rights over territory |
| Outcomes | Reduced reputational risks and costs associated with reduced societal opposition; and increased (local) social licence to operate | Formal community consent (or veto); mutually-beneficial agreements |

rather than ‘transformational leaders’, particularly on the right to FPIC, which they argue is still highly-contested given the unresolved issues of sovereignty (that nation states must surrender decision making power to Indigenous communities) and consent (how defined and/or established). The absence of corporate willingness to embrace FPIC may also be partly due to the fear many companies have about the perceived threat to their economic interests if they were to recognize an Indigenous community’s right to withhold consent (Hanna and Vanclay, 2013).

The different characters of these two constructs reveal other issues. The non-compulsory nature of CSR, which derives from its neoliberal origins, generates what Wettstein (2012) calls ‘the problem of voluntariness’, i.e. the CSR tenet of voluntary corporate response clashes with human rights obligations, which are ‘imperative and overriding’ rather than ‘advisory and defeasible’ (Campbell, 2006). In other words, “the economics of globalization emphasizes (not surprisingly) competition, capital investment, free trade, growth and the transformation of markets. These do not sit easily alongside the priorities for activists keen to promote the rights of people including women, minority groups, Indigenous populations and children” (Welford, 2002, p. 2). Questions arise on both sides: does FPIC implementation mean that CSR loses its voluntary character? Or, on the other side, does the integration of FPIC into CSR frameworks mean that certain inalienable and indivisible human rights become part of a voluntary framework? Would it be acceptable that these human rights are classified as ‘imperfect obligations’ subject to the corporation’s assessment of how, when, and to what extent they ought to be fulfilled?

Some scholars have identified some risks that might arise when FPIC is integrated into CSR frameworks. Carino and Colchester (2010, p.434), for example, suggest that FPIC will be “reduced to a simplified, mechanical sequence of actions, set out in boiler plate protocols, which end up merely reaffirming the status quo ante”. They warn of the danger of ‘box ticking exercises’ that do little more than assert that consultations were held, some sort of an agreement was reached, and someone from within the community with some authority or standing signed it. Weitzner (2012) considered that one of the limitations of CSR mechanisms – that they fail to ensure the implementation of compliance and complaints processes enabling sanction or remedy – was a major

threat to the accountability of companies. Weitzner (2012) asserted that where FPIC is implemented in voluntary CSR instruments, the requirements of the United Nations Guiding Principles will not be met.

In addition to the theoretical and normative foundations of CSR and FPIC being different, the discourses applied by corporations and community engagement practitioners also differ. Even though similar terminology tends to be used by CSR practitioners, those involved in Indigenous engagement, and Indigenous peoples themselves, the terms are interpreted in different ways. Basic concepts that perhaps ought to be mutually understood – such as development, land, livelihood, wellbeing, Indigeneity, industry, money, and quality of life – are construed very differently by company employees, Indigenous community members, activists, and perhaps by CSR and human rights scholars (Götzmann et al., 2016; Hanna et al., 2014; Kemp and Vanclay, 2013; Parsons, 2012). The threat is that, with the discourse of business and management being more influential in constructing corporate worldviews, the concept of FPIC will become redefined with its rights-based perceptions being replaced by corporate notions of community engagement, leaving FPIC marginalized and weakened in meaning and scope.

When comparing the different community engagement processes associated with CSR and FPIC, the differences are likely to be less striking when a corporation employs two-way symmetric communication with the aim of reaching a state of transformational stakeholder engagement. The corporate approach to community engagement is then organized around the necessity to obtain a genuine social licence to operate (Donaldson and Dunfee, 1994, 1995; Jijelava and Vanclay, 2014a, 2014b). Potential similarities between SLO and FPIC have been recognized (e.g. Lehr and Smith, 2010), however some authors have highlighted differences. Thomson and Boutilier (2011); see also Prno and Slocumbe (2012), argue that: (i) FPIC is a state duty, while SLO is something corporations can obtain without state involvement; (ii) the goal of FPIC is to ensure consent is obtained prior to a project, whereas SLO takes a longer-term view and considers the need for community support throughout the project lifecycle; (iii) FPIC is focused on the relationship with Indigenous peoples and, unlike SLO, not with non-Indigenous communities; and (iv) FPIC is more formal than SLO,

as represented in the necessity for a formal contractual agreement at the conclusion of the FPIC process.

Many of these differences have been addressed in the literature, and it is claimed that FPIC could also be useful in non-Indigenous communities (e.g. Hill et al., 2010; Lehr and Smith, 2010); that FPIC will become obligatory for corporations in the future; and that consent gained through FPIC needs to be continuously renewed (Goodland, 2004; Hanna and Vanclay, 2013). Instead of emphasizing the differences, some authors therefore define FPIC as a more-formalized process of gaining a social licence (Lehr and Smith, 2010). In this sense, FPIC is potentially a useful tool for CSR practitioners, increasing transparency and coherency for the corporation.

The process of FPIC can be helpful in defining procedures for on-the-ground engagement, as it sets out clear and applicable community engagement responsibilities. Comparative case studies employing similar methodologies to examine how one corporation's CSR initiatives influence communities in different contexts scarcely exist in the CSR literature (Prieto-Carrón et al., 2006). CSR scholars have been wrestling with how to systematically assess the applicability and effects of CSR on local communities primarily because much of the previous literature focused on the consequences of CSR for the corporation, its reputation and social performance. In short, the literature is lacking a well-developed systematic methodology to research CSR tools for community engagement (Prieto-Carrón et al., 2006). Part of this can be explained by CSR's focus on theoretical models, whereas FPIC is an instrument for engagement and together with Social Impact Assessment (Vanclay et al., 2015) offers detailed practical guidance on how to identify and manage the effects of development projects on Indigenous communities. Impacts and Benefits Agreements, for example, record the community engagement processes and outcomes (Nish and Bice, 2011). A comparison of agreements signed by a range of Indigenous communities would reveal insights into how FPIC contributes to a coherent and transparent corporate approach to community engagement.

Even though in theory the constructs of CSR and FPIC are dissimilar, in practice the implied community engagement processes are moving towards each other, with corporations increasingly applying two-way symmetric communication and transformational community engagement to gain a social licence to operate. For a corporation, applying FPIC could enhance the transparency and coherency of its community engagement strategies, and thereby decrease its reputational risks and costs associated with community opposition. Furthermore, introducing FPIC into the academic CSR paradigm could increase our understanding of a corporation's effect on local communities, shifting the research focus away from the corporation itself towards its social environment.

It would not be appropriate to adopt FPIC as a tool for CSR without thinking about the differing theoretical paradigms, normative approaches and discourses used by practitioners in these two traditions. Although CSR practices and literature can gain much from the implementation of FPIC, it is the *right to FPIC* that is likely to be infringed. Corporate implementation of FPIC will likely change this human rights-based concept into one that is more compatible with a commercial context. The question therefore is whether it is appropriate and/or desirable to create the business case for FPIC. The risk here is that Indigenous rights will likely only be upheld insofar as they align with a corporation's economic incentives.

At present, the international CSR standards that have implemented guidance on FPIC have not taken this discussion into account. Leaving FPIC open for voluntary implementation has led to inadequate mechanisms for ensuring compliance or installing

grievance mechanisms. Before the implementation of FPIC in corporate codes of conduct proceeds further, more research should be undertaken to establish what is lost when moving away from the essentiality of human rights and considering the added value of non-mandatory FPIC-like engagement processes. Some authors have already pointed out that FPIC cannot be upheld if consent is not accepted as meaning the community's right to veto a specific project (e.g. Colchester and Ferrari, 2007; Lehr and Smith, 2010; Vanclay and Esteves, 2011). However, it is exactly this right to veto that is difficult for corporations to accept. What would it mean if FPIC engagement processes were adopted without such a prerogative? And what would define the *right to FPIC* if its normative value was rooted in economic profitability and competitive advantage? The need to answer these questions becomes more critical where states have adopted FPIC in their national legislation. Unless these states create mechanisms in which it can be guaranteed that corporations will observe the *right to FPIC*, rather than only implementing mechanisms in which corporations are obligated to apply FPIC-like engagement processes, the right to FPIC will likely be breached or watered-down.

From the narrow economic interests of a company, it might be argued that recognizing Indigenous rights to land and resources would only be appropriate where the state has accepted the legitimacy of Indigenous claims, and the corporation would otherwise be noncompliant with national legislation. In such a situation, engaging in beyond-compliant, equal and respectful relationships with Indigenous communities would be for the purposes of decreasing non-technical risks and reducing costs associated with societal opposition or loss of reputation. The intentions of FPIC as a community engagement process are strongly connected with the necessity for communities to create a culturally-appropriate development path that meets their desire for self-determination. While the reframing of FPIC in an economic context is intended to initiate a corporate awareness of this necessity, the risk is that Indigenous peoples will be placed in a culturally-inappropriate position within the corporation's vision of the region's development path. The right to FPIC could be upheld by corporations in theory; however in practice, FPIC community engagement processes will not be in keeping with a rights perspective, and the inalienable and indivisible Indigenous rights Indigenous peoples of the world have struggled hard for decades to obtain would be discarded.

7. Conclusion

Aspects of Free, Prior and Informed Consent have been implemented by international organizations in their guidance documents and performance standards. These organizations have increasingly stimulated corporations to adjust their CSR strategies and include a rights-based approach for engaging with Indigenous communities. The *United Nations Guiding Principles on Business and Human Rights* has been progressive in assigning rights-based responsibilities to business actors. However, little analytical attention has been paid to the differing normative foundations of the concepts of FPIC and CSR, nor to how the underlying norms are manifested in the community engagement processes implied by FPIC and CSR. We considered the extent to which FPIC could be brought into the dominant, traditional CSR framework by focussing on the differences in the theoretical and normative foundations and the subsequent community engagement processes. These differences suggest that FPIC is not fully compatible with CSR. Difficulties in implementing FPIC in CSR arise because the theoretical and normative foundations of the dominant form of CSR and FPIC have developed independently of each other and are disconnected. The perspectives by which practitioners of CSR and FPIC look upon

community engagement differ substantially, with CSR practitioners having a neo-liberal, economic development view, and FPIC advocates holding a human rights-based approach to development. CSR is driven by the need to improve competitive advantage and to decrease costs associated with community opposition. In contrast, the concept of FPIC is externally-oriented, centred on the needs, desires and rights of communities, and the necessity to uphold these rights. Thus, different approaches are applied, and different types of relationships are identified and developed.

This incompatibility does not mean that experiences cannot be shared or compared. CSR practices and literature can gain much if more research would be done on the possibility of a corporate FPIC, applying aspects of the concept in corporate community engagement strategies. Using FPIC engagement processes to develop qualitative mechanisms for measurement could increase CSR practitioner understanding of grass-roots issues that arise when engaging with communities. Because FPIC requires a high level of formalization of engagement, applying the process of FPIC would offer possibilities for evaluating the actual effects of business activities on local communities.

In practice, the different community engagement processes derived from stakeholder theory and FPIC are moving towards each other, with corporations increasingly applying two-way symmetric communication and transformational community engagement to gain a social licence to operate. However, an issue that arises here is how to ensure that the outcomes of the community engagement process aligns with the economic incentives of the corporation, as well as with the desires, needs and rights of the Indigenous community. The right to FPIC – and the cultural and land rights associated with it – are likely to be infringed if corporate points of view are to be the basis of the FPIC process. Corporate implementation of FPIC will change the human rights-based concept of FPIC into a construct that fits more easily in an economic sustainability paradigm. The question that remains is whether it is appropriate to construct the business case for FPIC, creating the risk that Indigenous rights will only be safeguarded insofar as they are compatible with a corporation's economic incentives. Thus, there is a need to be cautious when blending CSR norms and strategies with FPIC rights and processes.

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