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INDIGENOUS RIGHTS ISSUES IN AMERICAS IMPACT ASSESSMENT LAWS AND PRACTICES

By Dr Geraldine Patrick & Mindahi Bastida

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By Dr Geraldine Patrick & Prof. Mindahi Bastida Munoz, UIEM

1. Introduction

This cross-cutting paper tries to answer the question: To what extent were Indigenous/First Nations peoples taken into account in EIA/EIS that pertained to projects which, at first glance, might only impact the environment? A complementary aspect to analyze was whether governments provided an adequate arena for indigenous peoples to negotiate specific aspects in terms of their rights, as prescribed in international agreements.

It has been internationally accepted since the 1970s –when the Economic and Social Council (ECOSOC) of the UN created the Sub-commission on the Prevention of Discrimination and Protection of Minorities– that Indigenous Peoples must be provided with the grounds that enable them to negotiate with government, stakeholders and industry groups interested in exploiting their heritage¹. However, the main bottleneck in processes involving Indigenous Peoples' heritage, keeps being the unwillingness of most governments to uphold rights even when these are recognized in national or international law. The other critical issue even today is that industry stakeholders do not recognize nor respect native heritage and related territorial rights. For them, areas which are attractive for their biological or mineral resources must be made accessible despite them being claimed by native peoples. When this becomes a critical starting point, it requires deciding who must be engaged, at what stage, and at which minor costs. Since negotiating with people of radically different worldviews is far too costly, stakeholders decline to conclude the procedure, and quit soon after a few mandatory meetings have taken place and some light agreements have been achieved. Transaction costs become far too high if they opt for such social-responsibility-track. Since their only goal is the foundation of profitable new business developments, the fastest track is to seek politically acceptable means by which to evade social responsibilities, and to respond to governments only in terms of legal environmental bindings. As a result, industries have accumulated a historical record of bad practices including lack of trust *vis a vis* Indigenous Peoples, and "it is still widely felt that the industry is not yet managing the issues in a way that meets the expectations of Indigenous peoples" (Render, 2005:21 and 51). This considerably reduces the chances of a win-win-win scenario where Indigenous groups, their natural territory and stakeholders may benefit in equal terms.

¹ By heritage Indigenous Peoples understand the interplaying relationships between territory, culture, history and cosmovision, which are ever-evolving for the benefit of generations to come.

This chapter analyses, among the aspects mentioned above, the means by which Indigenous Peoples have managed to be included in negotiations or by which countries have sponsored specific steps regarding civil society's involvement in Environmental Impact Statement or Environmental Impact Assessment (EIS/EIA) processes.

2. The analysis

It has been widely accepted over the last few decades that whenever new enterprise developments may put society or the environment at risk, civil participation processes ought to be carried out before, during and after government-industry negotiations, and not merely in petit committees to legitimate decisions already made. In effect, Indigenous peoples and their organizations emphasize direct engagement in defining initiatives that affect them. As shall be shown, a general response by different groups of actors that are sensible to the Indigenous Peoples 'factor'², has been to promote the realization of diverse fora, meetings, networks and alliances in order to exchange information between native inhabitants and stakeholder parties in a proper lobbying and negotiating environment. But this *per se* does not guarantee that EIAs contemplate natural systems as complex socioecological spheres that cannot be disaggregated.

The Gwich'in peoples of Izhik Gwats'an Gwandaii Goodlit, The Sacred Place Where All Life Beings in the Arctic National Wildlife Refuge (ANWR), was not considered in the Final Legislative Environmental Impact Statement (FLEIS) presented to the US Congress over twenty years ago in order to explore oil and gas in what technically is known as "the 1002 Area". Kaktovik, where 90% of its inhabitants have Inupiat Inuit ancestry, was the only community identified as being nearby and potentially affected. Both communities may, however, be eventually threatened, particularly by Alternative A of the exploration plan. This one, in contrast to Alternatives B, C and D, would impact to a greater extent mainly because it contemplates full leasing of the area. All federal subsurface ownerships would become available for development through a leasing program administered by the Department of the Interior. Despite the fact that current US laws prohibit oil and gas leasing in the ANWR, proponents keep pushing the initiative forward, arguing an increasing interest in the area due to energetic, political and national security reasons.

According to the over two-decade-old EIA, noise and water pollution, as well as permafrost imbalance would directly affect the socio-ecological system. Migratory trends of Porcupine Caribou herds, and also calving areas, would become seriously disrupted, and in turn, hunting activities of both Inupiat Inuit and Gwich'in people would be jeopardized. In mild terms, the report recognizes that less availability and quality of subsistence resources would transform traditional way of life. Reference to such aspects is mandated by the National Environmental Policy Act and the Alaska National Interest Lands Conservation Act, but the report is certainly obsolete considering advances in international laws pertaining Indigenous Peoples' rights.

² The term factor is used here in replacement for 'problem' as a way to dignify the political position of Indigenous or Native Peoples, also self-denominated First Nations.

In the multifaceted, multi-phase James Bay Power Project, begun over a quarter of a century ago, a matter of concern has been how Cree communities are culturally attached to the complex watershed ecosystems of this region. Indeed, as the authors comment, "Any environmental impact in water, vegetation, animals and fish, has a direct impact on a people so closely tied to their natural environment especially when it comes to the harvesting of food" (Koutouki, p.20 in this volume). The side-products of hydroelectric power generators, namely methyl-mercury, will transform chemical conditions in the ecosystem and also provoke changes in the staple diet. In this sense, reports have enhanced the fact that specific environmental and health problems will be derived from the power project. One study that particularly focused on the local perspective regarding specific projects in Cree territories was carried out by the Institut National de la Recherche Scientifique (INRS). The review showed, among other things, to what extent ecological and health concerns of the Cree were addressed by the impact assessment (p. 18). This report states that "les inquietudes les plus vives cependant se canalisent autour des risques environnementaux associés au projet et susceptibles de se répercuter autant sur la santé des animaux que sur la santé des humains: pollution, contamination de la chaîne alimentaire et de l'eau potable, mercure" (p.19).

Chapter II of the Environmental Quality Act, entitled *Provisions Applicable to the James Bay and Northern Québec Region*, stipulates that Environmental Impact Assessments carried out in this region must address social impacts including impact on health and impact on matters such as protection of culture and way of life. Specifically, Cree traditional knowledge should be considered by the proponent in order to warranty protection of hunting, fishing and trapping rights. In spite of co-responsible participation in order to include these requirements in the specific EIA, over the past years native ways of life have been noticeably affected.

The completion of Eastmain-1A and Diversion of the Rupert River project was due for 2010. The draining of the Eastmain River will produce environmental and cultural devastation if local Cree concerns and proposals regarding river resilience was not taken into consideration. Cree peoples hold very acute knowledge on spawning seasons, species habitat stability (of fish, beavers, bears and other waterfowl), navigation conditions, change in water levels of river banks, among other lake-ecology aspects. However, multi-factorial environmental problems have not been addressed by the proponent of the project. For instance, there is uncertainty regarding repercussions of climate change on the seasonality of fish spawning, but the proponent will definitely not become involved in such a complex issue. Prior experience with oil and gas development in another zone has shown that companies directly contribute to permafrost degradation –which in turn is enhanced due to variations in global-local climate–. However, they consider it an "unavoidable impact".

It is certainly positive that the Boumhounan Agreement could be concluded by the three parties involved: the Cree, Hydro-Québec and Société d'énergie de la Baie James. Here, Hydro-Québec promised not only to consult the Cree throughout the draft-design phase but, more importantly,

to enable them to participate directly in related studies and works. The six communities affected by the project (Chisasibi, Eastmain, Mistissini, Nemaska, Waskaganish and Wemindji) are either represented or have a full-time coordinator in the Boumhounan Committee, a Feasibility Study Group.

Independently of how better-informed are the communities today in comparison to when the project began in 2002, it is inevitable that the socio-ecosystem configuration and the health status of its inhabitants will change for the worse. Fish-dependant people and animals will be exposed to undesirable effects of mercury, since Hg levels will increase three to six times in fish, depending on species, their habitat and other factors. Monitoring programs are in place: the proponent, in cooperation with relevant Cree organizations Hydro-Québec shall monitor changes in methyl-mercury concentrations in fish. But this is certainly not part of a remediation plan; rather, it is a means to keep people focused on the effects and keep them away from the causes of the environmental and health problems. Even indirect actors must inject resources in order to create new schemes which may reduce or mitigate effects provoked by this mega power project. For instance, authorities from Health Canada must specifically address vulnerable groups, informing them of risks due to mercury through fish consumption.

Many questions that were made since the very beginning, regarding the energetic needs of the region and the possibility of evaluating alternative power sources, are still unanswered. Most concerning is that, in spite of the fact that the proponent followed the environmental impact assessment procedure, it left Cree people unhappy because no prevention measures were reviewed; no alternative energy projects were considered; no energy demand-offer studies were presented to support the project; and no indigenous rights were taken into consideration (p.22).

The following is a table summarizing information around each of the projects revised in terms of the level of recognition given to First Nations by local governments and proponents interested in exploiting 'resources' within their territory.

As can be seen, the EIS or EIA which the project proponents were obliged to elaborate in each case, did not always pay attention to Indigenous Peoples' rights, and if they did, reference to them was generally very superficial.

The Port construction in Cozumel Island permanently threatens the surrounding coral reefs and all living creatures which depend on it. While local fishermen are also affected, the EIS did not focus on this aspect, since the relative weight of the biodiversity factor outweighed that of the social factor. Organized civil society became involved in the controversy process since the very beginning of the mega-tourist project, in 1990. Local NGOs participated in a collaborative manner in the process for over two-decades, and also national NGOs were invited, including the Centro Mexicano de Derecho Ambiental (CEMDA). The latter eventually played an outstanding role, since it inaugurated the use of the legal resource provided by Article

14 of the North American Agreement for Environmental Cooperation (NAFEC), in order to demand environmental justice. Local inhabitants, mainly of Maya origin, are well aware of the ecological stability needed in the Coral Reef in order to ensure its resilience capacity as well as to preserve biological richness and chemical and physical balance of the sea environment. However, the EIS did not emphasize the cultural value of the coral reef as seen by Maya inhabitants. At the most, local involvement was possible in terms of the Management Plan of the National Park of Coral Reefs in Cozumel, and this proved useful to maintain impact at a reduced level.

The Canadian mining enterprise Barrick is immersed in a gold mining project called Pascua-Lama because it expands across the Chilean-Argentine border. The enterprise apparently assumes a socially responsible discourse while taking advantage of vulnerable local legal frameworks and investment proposals which sound attractive to host countries. In this advantageous position, it has pushed forward mining procedures that would be inadmissible back in its home country. Civil society acting against the mining project has focused on health threats derived from the use and disposal of acid solvents around the mine, including periglacial and glacial areas. Indigenous peoples from Huasco –of Diaguita origin–, are being directly affected by the mining works of the first construction phase, since their sacred areas are being trespassed without prior informed consent. The ideal scenario for Indigenous Peoples to avoid further trouble and in order to solve controversial issues, would be for the Chilean government to set up a negotiation table and to design, with a competent interdisciplinary team, a management plan of the area. It would be necessary to use all geographic resources at hand: maps, aerial photographs, GPS equipment and also community maps which present the Diaguita cultural heritage, duly recording all places important for religious, recreational, economic, market, or socio-ecological reasons.

The Bolivia case around Repsol YPF E&P also concerns indigenous peoples. In spite of the fact that the country ratified the ILO 169 Convention in 1991, it has not adequately applied the mandates in regard to petroleum projects. Guarani peoples were not consulted at the beginning of the project, nor have they been respectfully included in any aspects of the implementation phase. They were not informed about risks on their territories and ecosystems. In this sense, the integrity of their cultural heritage is uncertain and also their health is severely menaced. The Guarani Peoples Assembly Itika Guasu is an active minority of the native peoples acting as a defender agent of a common cause. It is demanding an indemnity of 13 million dollars due to affectations but, of course, the socio-ecological loss due to oil exploration, extraction, refinement and final disposition process, is invaluable.

It can certainly be read 'between the lines' of the mandatory EIA that the enterprise regards Guarani peoples as the least important factor in the oil extraction equation. For instance, it reports native hunting and gathering activities, but it is negligent of ethnoecological implications around such activities.

3. Conclusion

As a result of this cross cutting analysis, it can be said that:

When millions of dollars are in play, the general procedure is for governments to accept the project with some light recommendations, and inform civil society about partial aspects of the project, minimizing potential impacts. Eventually an EIS/EIA is presented and a very limited period of time is given to present comments. If absolutely necessary and demanded, Addenda are produced. Otherwise, even government's requirements are neglected. Upon society's persevering demands, controversy bodies may be set up by the State or by non-governmental organizations –the latter, as a means to warrantee a neutral profile. Nonetheless, negotiations are always biased for the benefit of the enterprise and in terms of what it can offer to society: health assistance, environmental monitoring and reporting, and, at best, participatory planning of some project phases. Sadly enough, it is the opinion of the authors that this only retards socio-ecological degradation processes, making cultural heritage erosion a little less painful but certainly deeply stigmatizing.

Governments only recognize territorial rights and historical privileges of First Nations or Indigenous Peoples in a very superficial manner. In some cases, like in Canada, the government has achieved to obligate First Nations representatives to agree that such rights are, in fact, "perfectly compatible with national interests". Indigenous authorities then sign pacts without dimensioning the fact that such interests will irreversibly transform ethnoecological systems, impacting cultural heritage in unimaginable ways.

In general, no best practices regarding duly attention to First Nations when extractive endeavors are planned in their territories can be detected in the revised cases in the Americas, independently of how economically advanced or deprived the country may be. Neither does the definition of 'territory' of the ILO 169 Convention and its consequential legal applicability for the benefit of Indigenous Peoples happen to be regarded as mandatory. That is to say, governments that have ratified the said document do not necessarily feel they must comply with it.

In the EIA reports there are no detailed recommendations to help government authorities comply international mandates which stress Indigenous Peoples' rights to live in sound ecosystems, or to exercise their right to the 'prior-informed consent principle' regarding natural resource development projects in their territories.

Compulsory reports of project proponents should not merely focus on environmental impacts but on multi-scale impacts on socioecological systems as a whole.

First Nations/Indigenous Peoples must empower their negotiation strategies vis-à-vis project proponents and governments, and therefore, capacity building in this regard should be mandatory.

Project	EIA	Project purpose	Regulatory Framework	Actors	EIS or similar reports	Location	Threats to environment and human health	Population directly impacted
Energy development in the Arctic National Wildlife Refuge	<p>To review the scope and process of environmental impact assessment as outlined by US statutes and regulations</p> <p>To review how such process was applied to the study of the coastal plain of the ANWR</p>	Oil and gas	None of Indigenous Rights Conventions, declarations, or national institutions	Federal Agencies, which shall "encourage and facilitate public involvement in decisions which affect the quality of the human environment"	Federal Legislative Environmental Impact Statement (FLEIS) over 20-years-old, conducted under the Alaska National Interest Lands Conservation Act (ANILCA) in 1980, which is considered "the most comprehensive" study of potential impacts of oil and gas development	On the coastal plain of the Refuge (former Range), with 19 million acres, in Alaska	<p>p. 2 "The EIS paid little attention to health or gender concerns"</p> <p>p. 2 "It drew little attention to any nexus between environmental impacts and human health and welfare"</p> <p>p.12 "No health agency was a lead or cooperating agency in the preparation of the 1002 Area FLEIS"</p> <p>p. 4 "The lack of health analysis in the 1002 Area is entirely in line with the developmental history of EIS processes in the US under National Environmental Policy Act (NEPA)" - that requires full disclosure of the environmental costs of major development ventures (p. 5)</p> <p>Presence of heavy metals in drilling fluids that may leach and contaminated water (p.21)</p>	<p>Inupiat of Kaktovik</p> <p>Around 9,000 Gwich'in people, living in or near the migratory route of the Porcupine River Caribou Herd in communities in Alaska, Yukon, and the Northwest Territories.</p>
James Bay Power Project	To focus on the environmental impact assessment process followed for the recent Eastmain-1A/Diversion of the Rupert River project began in 2002, to be completed in 2010.	Hydroelectricity	<ul style="list-style-type: none"> -Convention on Environmental Impact Assessment in a Transboundary Context (ratified by Canada in 1991) -Espoo Convention (UN Framework Convention on Climate Change, ratified in 1998) -Kiev Protocol on Strategic Environmental Assessment (Canada is not a member) -Canadian Environmental Impact Assessment 	Cree-Hydro-Québec Feasibility Study Group (or Boumhounan Committee) with 12 members: 8 Crees, 2 Hydro-Québec representatives and 2 SEBJ representatives	<p>There has been an enormous progress over the past 30 years regarding environmental impact assessments; particularly in the area of public consultation, concerning the people of the Cree Nation (p.3).</p> <p>An enormous effort was exercised by all parties to successfully complete the statement (p. 21).</p> <p>Conventional science had to incorporate traditional knowledge; political dynamics were</p>		<p>Threats to environment and human health: higher than tolerable daily intake of methylmercury; interference in spawning areas/seasons; exposure to increased organic matter on slow areas flow areas of Rupert River; uncertainty on level of impact on aesthetic and cultural value of the region to be flooded (pp. 19-21). Lack of empowerment to put forward sustainable development projects (p.21)</p>	<p>16,000 people, all Eeyou Tstchee (Cree) from 9 different Communities: Chisasibi, Eastmain, Mistissini, Nemaska Oujé-Bougoumou, Waskaganish, Waswanipi, Wemindji and Whapmagoostui</p>

			<p>Act (1995/2001) -Québec Environmental Quality Act (2000) -Paix des Braves Agreement respecting new relationship between the Cree Nation and the Government of Québec (2002) -Boumhounan Agreement, regarding the EIA structure, signed in connection with the Eastmain 1-A and diversion of the Rupert River project (2002). -James Bay and Northern Québec Agreement.</p>		<p>present at every level from the communities to the provincial and federal levels (p.21).</p>			
<p>Puerta Maya, a implementarse en Cozumel</p>	<p>Mostrar la capacidad de la sociedad civil organizada para exigir elaboración y revisión conjunta del Plan de Maneo del ANP Arrecifes de Cozumel y del Programa de Ordenamiento Ecológico Local, así como para cambiar el plan de la obra portuaria.</p>	<p>Terminal portuaria, club de golf, SPA internacional, hoteles, centro comercial, entre otros.</p>	<p>-Art. 14 del Acuerdo de Cooperación Ambiental de América del Norte (ACAAN); -Ley General del Equilibrio Ecológico y la Protección al Ambiente (LGEEPA) - LGEEPA en materia de Impacto Ambiental -Procuraduría Federal de Protección al Ambiente (PROFEPA)</p>	<p>Secretaría del Medio Ambiente y Recursos Naturales (México)</p>	<p>Programa de Manejo del Parque Marino Nacional Arrecifes de Cozumel (mayo 1998) Decreto del Programa de Ordenamiento Ecológico del Territorio de Cozumel (mayo 2002) Resolutivo de Impacto Ambiental de 1990, con 64 condicionantes Resolutivo de Impacto Ambiental 23QR2008T0014 (15/12/2008)</p>	<p>Isla de Cozumel , zona de arrecifes</p>	<p>Dstrucción del Arrecife de Cozumel</p>	<p>Pescadores y habitantes locales de Cozumel. Arrecifal.</p>

Project	Objective	Project purpose	Regulatory Framework	Actors	EIS or similar reports	Location	Threats to environment and human health	Population directly impacted
Pascua-Lama (Chile-Argentina) Empresa: Canada Barrick	Analizar el costo ambiental y social del proyecto Pascua-lama y la defensa de la actividad apoyada en los niveles de inversión y la oferta laboral generada.	Oro, plata y cobre	-D.F.L . N.S. de 1967 -Ley 19.253 de Protección, Fomento y Desarrollo Indígena (Chile) -Ley de Glaciares -Ley de Inversiones Mineras (Argentina) -Sistema de Evaluación de Impacto Ambiental (SEIA) -Ley 19.300 Bases Generales de Medioambiente (Chile)	Autoridades ambientales Consulta y participación ciudadana	Informe de Impacto Ambiental (IIA) Argentina -Estudio de Impacto Ambiental (EIA) -La SEIA contempla la participación de la comunidad -Resolución de Calif.? Ambiental (RCAI, Chile)	Alta Cordillera, frontera Argentina o-Chilena Provincia San Juan Argentina Provincia Huasco, Chile.	-Glaciares -Drenajes ácidos -Pérdida de suelos y de biodiversidad -Contaminación en aire y aguas -Enfermedades	Pueblo Diaguita (Huascoaltinos) en Chile
Empresa Petrolera Repsol YPF E&P Bolivia	Determinar el cumplimiento de la normativa ambiental vigente con relación a los impactos al ambiente y a la salud de un centro petrolero en Bolivia	Petróleo y gas natural	Among others, the 169 ILO Convention, ratified on July 11 th , 1991, pero es la normativa menos respetada hasta la fecha, en cuanto a los contratos petroleros y a sus actividades en territorios indígenas originarios	CERDET participa en las negociaciones entre la Prefectura, Repsol YPF y la APG Itika Guazu Las consultas públicas son deficientes y se resumen a una explicación que no se redacta en las actas No se respeta la estructura orgánica de la APG IG,	EEIA del Proyecto Desarrollo del Campo Margarita (2002), con un diagnóstico del lugar, con datos de flora y fauna, reportando mayores impactos negativos a la fauna, al agua, al suelo y al aire; plan de tratamiento de lodos, sin especificarse disposición final y plan de restauración; no refiere los medios de subsistencia de los guaraníes -No hay Programa de Prevención y Mitigación -Plan de Aplicación y Seguimiento Ambiental (PASA) no tiene puntos de monitoreo	Megacampo Margarita-Bloque Caipipendi Departamento de Tarija, Provincia Burdet O'Connor, Cantón Chimeo, en Municipio de Entre Ríos	El Convenio 169 OIT no se cumple Tarija se ubica en los primeros lugares con tasas más altas de cáncer (p.56) La empresa no informa en sus actas cuáles impactos ambientales fueron informados a la población (p.50) Repsol no responde adecuadamente a los requerimientos, y no cumplió el convenio Nadie realiza evaluación de los problemas de salud que pueden surgir de la actividad petrolera (p.56)	Tarija, Cantones de Chimeo e Ipaguazú, Comandaroti, Iboca, Villa la Merced, Imbochi, Itika Guazu La población solicita proyectos que no tienen relación con los impactos que va a generar el proyecto

				especialmente en el componente de participación social y de consultas públicas previas				
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