

OXFAM AMERICA
RESEARCH BACKGROUNDER

Free, Prior, and Informed Consent in Africa

An emerging standard for
extractive industry projects

Emily Greenspan



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Series editor: Kimberly Pfeifer

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Author information and acknowledgments

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The author would like to thank legal research contributor Augustine Niber of the Center for Public Interest Law in Ghana for his valuable inputs to this report. The author would also like to acknowledge Oxfam colleagues Peter Bofin, Ian Gary, Tara Gingerich, Christina Hill, Nadine Kone, Kimberly Pfeifer, Duncan Pruett, and Keith Slack for their comments and contributions. Finally, the author would like to express gratitude to Valérie Couillard of Forest Peoples Programme, Jessica Evans of Human Rights Watch, and Henk Smith and Wilmien Wicomb of Legal Resources Centre for their insights, which have greatly enriched the report.

Citations of this paper

Please use the following format when citing this paper:

Greenspan, Emily, "Free, Prior, and Informed Consent in Africa: An emerging standard for extractive industry projects," Oxfam America Research Backgrounder series (2014): [www.oxfamamerica.org/publications/fpic-in-africa].

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ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights
CBD	Convention on Biological Diversity
ECOWAS	Economic Community of West African States
EIA	Environmental Impact Assessment
EIR	Extractive Industries Review
FPIC	Free, Prior, and Informed Consent
FSC	Forest Stewardship Council
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICMM	International Council on Mining and Metals
IFC	International Finance Corporation
ILO	International Labour Organization
IPIECA	International Petroleum Industry Environmental Conservation Association
REDD	Reducing Emissions from Deforestation and Forest Degradation
RSPO	Roundtable on Sustainable Palm Oil
UN	United Nations
WCD	World Commission on Dams

EXECUTIVE SUMMARY

As global demand for energy and natural resources continues to grow, extractive industry projects have expanded and moved into increasingly remote areas to keep pace with this demand. These large-scale projects may bring opportunity for citizens of the nations where the resources are being developed. However, the poorest and most marginalized people are often excluded from potential project benefits. Increasingly, indigenous peoples and local communities have called on governments and companies to enable them to give or withhold their free, prior, and informed consent (FPIC) before the start of extractive industry projects that have the potential to affect their lands and natural resources.¹

Although there is no universally accepted definition of FPIC, Oxfam defines it as the principle that indigenous peoples and local communities must be adequately informed about projects in a timely manner and given the opportunity to approve (or reject) a project before operations begin. This includes participation in setting the terms and conditions that address the economic, social, and environmental impacts of all phases of extraction and post-extraction operations.² As noted by the United Nations Expert Mechanism on the Rights of Indigenous Peoples, FPIC processes must be free from manipulation or coercion; allow adequate time for traditional decision-making processes; facilitate the sharing of objective, accurate, and easily understandable information; and ensure community agreement.³

FPIC is a right for indigenous peoples under international law, one that derives primarily from indigenous peoples' right to self-determination.⁴ The practice of identifying communities as "indigenous" is debated in some African countries. However, the African Commission on Human and Peoples' Rights (ACHPR) has identified a few characteristics that embody the concept of indigenous peoples and are applicable in the African context. These include self-identification; a special attachment to and use of traditional land; and a state of subjugation or marginalization resulting from ways of life or modes of production different from the national hegemonic and dominant model.

¹ For an introduction to the principle of FPIC, see Oxfam's "Guide to Free Prior and Informed Consent," available at <http://resources.oxfam.org.au/pages/view.php?ref=528>.

² Marianne Voss and Emily Greenspan, "Community Consent Index: Oil, Gas and Mining Company Positions on Free, Prior, and Informed Consent (FPIC)," Oxfam America Research Backgrounder Series (2012), www.oxfamamerica.org/publications/community-consent-index.

³ United Nations Expert Mechanism on the Rights of Indigenous Peoples, "Expert Mechanism Advice No. 2: Indigenous peoples and the right to participate in decision making" (2011), http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Advice2_Oct2011.pdf.

⁴ See Cathal Doyle and Jill Cariño, "Making Free Prior & Informed Consent a Reality: Indigenous Peoples and the Extractive Sector," Piplinks, Middlesex University School of Law, and the Ecumenical Council for Corporate Responsibility (May 2013), <http://jetzeit.files.wordpress.com/2013/05/fpic-report-long.pdf>.

More broadly, FPIC is emerging as a best practice for safeguarding the human rights of all communities affected by extractive industry projects. These include, for example, the right to food, development, property, culture, and a healthy environment. One multilateral treaty that has been interpreted as requiring FPIC for non-indigenous (in addition to indigenous) communities is the United Nations International Covenant on Economic, Social, and Cultural Rights. Here FPIC applies in situations that threaten the preservation of cultural resources and with regard to community relocation when evictions or displacement occur under exceptional circumstances.

In Africa, regional institutions, civil society organizations, and others have recently begun to call for FPIC processes when natural resource projects have the potential to impact local communities regardless of whether affected communities identify themselves as indigenous peoples. For example, since 2009, the Economic Community of West African States, ACHPR, Pan-African Parliament, and Africa Mining Vision⁵ have all called on States to respect the FPIC of local communities that face potential impacts from mining, hydrocarbon development, or natural resource projects more broadly.

Extractive industry companies and associations, lenders, and investors have also created policies requiring FPIC, which in turn further underscores its growing acceptance globally. This may be due to increasing recognition of the corporate responsibility to respect human rights. It likely also reflects a rising awareness of the business case for FPIC within the context of a growing body of evidence documenting the potential costs generated from social conflict around extractive industry projects. For example, a 2011 study by researchers from Harvard Kennedy School and the University of Queensland found that a world-class mining project (capital expenditure between \$3 billion and \$5 billion) stands to lose approximately \$20 million per week in lost productivity as a result of production delays from social conflict.⁶

Regardless of whether a company or government requires FPIC, all individuals have a right to information and meaningful participation in environmental decision making. National laws in many African countries require some level of public participation in environmental decision making, including engagement in project environmental impact assessment (EIA) processes prior to the implementation of extractive industry projects. Unfortunately, most EIA public participation requirements refer to information provision or consultation and fall short of FPIC. This is true not only across Africa but also globally, and it is not surprising given that governments tend to have considerable discretion in instituting compulsory acquisition of land.

⁵ Through the December 2011 action plan for implementation.

⁶ Rachel Davis and Daniel M. Franks, "The costs of conflict with local communities in the extractive industry," First International Seminar on Social Responsibility in Mining, 3 (October 2011) http://shiftproject.org/sites/default/files/Davis%20&%20Franks_Costs%20of%20Conflict_SRM.pdf.

Although a government may have the legal authority to institute compulsory acquisition of land, it should refrain from doing so for economic development projects that present significant risks to local communities, such as extractive industry projects. These projects should proceed only with the FPIC of the local communities that will be affected by the project. The policies and standards highlighted in this report attest to a growing recognition of FPIC and the importance of local community participation in decision making related to development projects.

ABOUT THIS DOCUMENT

This report provides an overview of global policies and standards pertaining to FPIC relevant to the African context. It aims to reflect the range of existing standards that civil society, local communities, and others concerned about the potential impacts of extractive industries on lands and resources might use to advocate for the inclusion of FPIC in national laws and corporate policies. The report cites selected national legislation and aims to provide a general picture of the status of public participation requirements for extractive industry projects throughout Africa. (A comprehensive review of national laws regulating extractive industry activities and land acquisition in Africa is beyond the scope of this report.)

As readers begin to formulate the FPIC advocacy strategy that will be most effective in their particular national context, they might consider the following questions:

- What is the level of openness of your government to citizen engagement in policy and development decision making broadly (within but also beyond the extractive industries)? For less open or even coercive governments, government engagement in consultation and FPIC processes may actually hinder the effectiveness of these processes, and it may be difficult for communities to receive judicial remedy. In these instances, civil society may choose to focus on other levers of influence, for example by engaging donors, conducting corporate advocacy, or appealing to international or regional institutions.
- What is the relationship between your national government and international or regional institutions like the United Nations, World Bank, African Commission on Human and Peoples' Rights, Pan-African Parliament, or Economic Community of West African States? Would pressure or even a mandate from one of these institutions be likely to influence behavior or policy change in-country?
- Have extractive industry companies operating in your country developed FPIC policies?⁷ If so, has the government been made aware of these commitments and those of other major global companies with FPIC policies? If not, might companies be encouraged to develop such policies?

⁷ See Oxfam America's Community Consent Index for the public positions of 28 oil, gas, and mining companies on FPIC.

- What political opportunities exist for new legislation or for the modification of existing legislation in order to incorporate FPIC? Currently FPIC legislation falls most often under laws that apply in particular to indigenous peoples, but governments might also consider incorporating FPIC into laws on land acquisition, mining or oil laws, environmental impact assessment regulations, or other policies.
- Does the community that will be impacted by the project identify itself as indigenous and meet the basic criteria established by the ACHPR for indigenous peoples? If so, would advocacy messages based on international jurisprudence regarding indigenous rights make sense given the political dynamics of the country?

Although the answers to these questions may not be clear and definitive, thinking through these issues may help to identify the strategies and arguments with the greatest chance of success.

AFRICAN REGIONAL INSTITUTIONS AND FPIC

Since 2009, the Economic Community of West African States (ECOWAS), ACHPR, Pan-African Parliament, and Africa Mining Vision have all called on States to respect the FPIC of local communities that face potential impacts from mining, hydrocarbon development, or natural resource projects more broadly.

ECONOMIC COMMUNITY OF WEST AFRICAN STATES

ECOWAS is a regional group of 15 West African countries⁸ aimed at promoting economic integration. The 2009 ECOWAS Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector (ECOWAS Directive) sets out the guiding principles for harmonizing mining regulatory regimes across member states. The ECOWAS Commission developed the 2009 ECOWAS Directive with input from government officials, civil society organizations, and mining-project-affected communities. It is binding on member states⁹ and for this reason arguably the most significant FPIC policy requirement in Africa. States do, however, have discretion in determining how the objectives of ECOWAS Directives will be met.¹⁰

The ECOWAS Directive calls for FPIC when communities will be affected by mineral or hydrocarbon projects. Specifically, the directive states: “Companies shall obtain free, prior, and informed consent of local communities before exploration begins and prior to each subsequent phase of mining and post-mining operations.”¹¹ It adds that companies are to “maintain consultations and negotiations on important decisions affecting local communities throughout the mining cycle.” Importantly, the ECOWAS Directive applies FPIC throughout the project lifecycle and does not limit its application to indigenous communities. Moreover, the directive’s definition of “mineral” includes not only industrial minerals but also petroleum, so the application is relevant for both mining and petroleum development. The ECOWAS Directive also requires States to provide

⁸ Member countries include Benin, Burkina Faso, Cape Verde, Cote d’Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

⁹ Mayer Brown, “Developments: Recent legal developments in the mining sector of West African states” (2010), http://www.mayerbrown.com/files/Publication/a10390b1-79cb-4dee-b6bb-16bd5af12d96/Presentation/PublicationAttachment/653da675-bc14-439a-bc79-87abeb85ccbb/NEWSL_MINING_JAN10_BULLETIN_WEST_AFRICA.PDF.

¹⁰ “The ECOWAS Commission at a glance,” Economic Community of West African States, accessed June 12, 2013, http://www.comm.ecowas.int/dept/index.php?id=p_p1_commission&lang=en.

¹¹ Economic Community of West African States, *Directive C/DIR. 3/05/09 on the Harmonization of Guiding Principles and Policies in the Mining Sector*, Abudja (May 26-27, 2009), http://www.comm.ecowas.int/sec/en/directives/ECOWAS_Mining_Directives.pdf.

capacity building support to communities when necessary: “Member states shall provide the necessary capacity to local communities in their engagement with mining rights holders in negotiations and in settling mining disputes.”¹² Thus governments must provide some level of support to communities for their engagement with companies as necessary during the life of the project.

The directive calls for the ECOWAS Commission and member states to adopt necessary compliance measures by July 2014.¹³ To comply, states will need to amend relevant laws and regulations or develop new ones that align with the directive’s principles. Some countries—such as Ghana and Senegal—have published the ECOWAS Directive in their national gazette, a statement of a government’s official commitment. ECOWAS will develop a regional mining code that aims to ensure consistency in States’ implementation.¹⁴

AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS

The African Charter on Human and Peoples’ Rights (African Charter) established the ACHPR within the Organization of African Unity (later replaced by the African Union) and charged it with promoting human and peoples’ rights and ensuring their protection in Africa.¹⁵ The African Charter is a binding instrument under international law¹⁶ and has been ratified by 53 states (all African Union member states with the exception of South Sudan).¹⁷ Although the ACHPR does not have the ability to issue binding decisions, an ACHPR decision would become binding if it were adopted by the African Union. The African *Court* of Human and Peoples’ Rights does have the ability to issue legally binding decisions on human rights cases.¹⁸

In May 2012, ACHPR issued a resolution calling on States to ensure local participation in decision making related to natural resource governance. The resolution specifies that States should take all necessary measures “to ensure participation, including the free, prior and informed consent of communities.”¹⁹ The resolution does not limit FPIC application to indigenous peoples but rather links it to natural resource projects. ACHPR notes concern over the “disproportionate impact of human rights abuses upon the rural communities in Africa that continue to struggle to assert their customary rights of access and

¹² Ibid.

¹³ Ibid.

¹⁴ Mayer Brown, “Developments: Recent legal developments in the mining sector of West African states,” 2.

¹⁵ For more information on the history and mandate of the ACHPR see <http://www.achpr.org/about/history/>.

¹⁶ “Africa Human Rights System,” The University of Arizona, UANativeNet, accessed October 15, 2013, <http://www.uanativenet.com/topicitem/Topics%20In%20Brief/330>.

¹⁷ “ACHPR Ratification Map,” African Commission on Human and Peoples’ Rights, accessed October 15, 2013, <http://www.achpr.org/instruments/achpr/>.

¹⁸ “Africa Human Rights System,” The University of Arizona, UANativeNet.

¹⁹ African Commission on Human and Peoples’ Rights, 224: *Resolution on a Human Rights-Based Approach to Natural Resources Governance* (May 2012), <http://www.achpr.org/sessions/51st/resolutions/224/>.

control of various resources, including land, minerals, forestry and fishing.”²⁰ In this context, ACHPR introduces FPIC as a safeguard to counter risks associated with natural resource projects entailing elevated human rights risks.

The African Charter itself contains a number of provisions recognizing the rights of “peoples” but does not define the concept. Provisions include, for example, Article 20 on the right to self-determination; Article 21 on the right to freely dispose of wealth and natural resources (including the right to recovery of property and adequate compensation); Article 22 on the right to economic, social, and cultural development; and Article 24 on the right to a satisfactory environment suitable to development. The African Charter also calls for protection of an individual’s right to property (Article 14), but it allows for encroachment of this right in cases of public need or community interest and “in accordance with the provisions of appropriate laws.”²¹

These rights have begun to be tested in ACHPR case law, which has yielded relevant ACHPR interpretations of the African Charter including, for example, the following cases.

- ***The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria***: ACHPR recognized the Ogoni as a “people” in terms of the African Charter and found that as a result of its involvement in oil production in Ogoniland, the Nigerian government violated the Ogoni people’s right to property (Article 14), natural resources (Article 21), and to a satisfactory environment suitable to their development (Article 24), among other rights. ACHPR also found that the Nigerian government violated of the right to adequate housing; it stated that the African Charter implicitly recognizes this right along with the associated right to protection from forced evictions.

ACHPR found that the Nigerian government failed to conduct independent environmental monitoring and to provide adequate opportunity for community participation in decision making. ACHPR also found that government security forces had attacked, burned, and destroyed Ogoni villages and homes.²² ACHPR’s recommendations to the Nigerian government include ensuring adequate environmental and social impact assessments and independent oversight bodies for the petroleum industry, as well as “providing information on health and environmental risks and meaningful access to regulatory and

²⁰ Ibid.

²¹ *African [Banjul] Charter on Human and Peoples’ Rights*, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986
<http://www1.umn.edu/humanrts/instreet/z1afchar.htm>.

²² African Commission on Human and Peoples’ Rights, *155/96: Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria*, para 53-55 (October 2001), http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf.

decision-making bodies to communities likely to be affected by oil operations.”²³

- **Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya:** In 2009, ACHPR found that by forcibly removing the Endorois people from their ancestral lands around Lake Bogoria to create a game reserve, the government of Kenya violated the Endorois’ right to property (Article 14); natural resources (Article 21); development (Article 22); religion (Article 8); and culture (Article 17). ACHPR noted in particular that the Endorois are “an indigenous community” and a “people,” and that for “any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.”²⁴

ACHPR also considered whether the public interest justified the taking of property in this case. The complainants had argued that both the European Court of Human Rights and the Inter-American Commission on Human Rights had found that limitations on human rights must be “proportionate and reasonable”²⁵ and that the displacement of the Endorois was disproportionate to any public need served by the game reserve created. ACHPR agreed, finding that “the encroachment is not proportionate to any public need and is not in accordance with national and international law.”²⁶

Unfortunately, implementation of ACHPR’s decision has been delayed significantly. In August 2012, the United Nations Human Rights Committee noted in its Concluding Observations that the Kenyan government had yet to implement the decision.²⁷ The Human Rights Committee recommended that the Kenyan government “respect the rights of minority and indigenous groups to their ancestral land and ensure that their traditional livelihood that is inextricably linked to their land is fully respected.”²⁸ Similarly, in November 2013, ACHPR issued a resolution calling on the Kenyan government to implement the Endorois decision.²⁹

²³ Ibid., 9.

²⁴ African Commission on Human and Peoples’ Rights, 276/03 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, para 162 and 291 (May 2009), http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf.

²⁵ Ibid., para 100.

²⁶ Ibid., para 238.

²⁷ United Nations, “Consideration of reports submitted by States parties under Article 40 of the Covenant [International Covenant on Civil and Political Rights],” Concluding observations adopted by the Human Rights Committee at its 105th session, Kenya, 7, CCPR/C/KEN/CO/3 (July 9-27, 2012), http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-KEN-CO-3_en.pdf.

²⁸ Ibid.

²⁹ African Commission on Human and Peoples’ Rights, 257: *Resolution Calling on the Republic of Kenya to Implement the Endorois Decision* (November 5, 2013), <http://www.achpr.org/sessions/54th/resolutions/257/>.

- ***ACHPR v. The Republic of Kenya***: In 2013, the African Court on Human and Peoples' Rights issued an order of provisional measures which stated that the Ogiek community faced the "risk of irreparable harm" if evicted from their traditional lands in the Mau Forest. This followed the ACHPR determination that the Ogiek are an "indigenous minority ethnic group." Specifically, the court's order highlights the risk of violation of the Ogiek's right to culture and protection of traditional values (Article 2 and 17), right to property (Article 14), and right to development (Article 22), among other rights. The order of provisional measures prevents the eviction of the Ogiek community pending the court's final determination on the case.³⁰

These cases offer examples in which ACHPR and the African Court on Human and Peoples' Rights have interpreted the African Charter in ways that establish some limitations on the government power to infringe on property rights. They underscore the necessity of public participation in decision making and FPIC, at least in certain contexts, before the implementation of development projects that will affect communities. These cases also demonstrate an acknowledgement of collective rights and underscore the state's responsibility to protect, for example, a community's right to freely dispose of its natural resources and to freely pursue social, economic, and cultural development.

PAN-AFRICAN PARLIAMENT

The Pan-African Parliament is the African Union's legislative body. It exercises advisory and consultative powers only but it aims to attain full legislative powers.³¹ In its Sixth Ordinary Session, held in Addis Ababa, Ethiopia (January 2012), the Pan-African Parliament noted with deep concern the rise of large-scale land acquisitions and the impact of domestic and foreign investment in land, water, and related natural resources. The Pan-African Parliament called for a moratorium on new large-scale land acquisitions until improved policies on land governance can be implemented and pressed for rules on foreign direct investment on land and related natural resources. It called on states to "ensure effective consultations with local communities and various people affected by investment projects and ensure that any investment is approved through free, prior, and informed consent of affected communities."³² The recommendations also call for enhanced land certification and registration systems that take into account pastoralist, women's, and communal rights in advance of investment.³³

³⁰ African Court on Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. The Republic of Kenya*, Application No. 006/2012, Order of Provisional Measures (March 15, 2013), http://www.african-court.org/en/images/documents/Orders-Files/ORDER_of_Provisional_Measures_African_Union_v_Kenya.pdf.

³¹ "Pan-African Parliament," African Union, accessed November 3, 2013, <http://www.au.int/en/organs/pap>.

³² Sixth Ordinary Session of the Pan-African Parliament, Addis Ababa, Ethiopia, "Recommendations and Resolutions" [Ref: PAP(2)/RECOMS/(VI)] (January 16-20, 2012), http://www.pan-africanparliament.org/DocumentsResources_DisplayDocument.aspx?Type=Docs&ID=1263.

³³ *Ibid.*

AFRICA MINING VISION

Adopted by heads of state in 2009 at an African Union summit, the Africa Mining Vision claims to promote growth through economic and social linkages.³⁴ The Africa Mining Vision report highlights challenges that involve ensuring local community and civil society input into mining decision making and refers to a “new social contract for mining” that would balance local benefits with national poverty-alleviation efforts. The report notes emerging strategies including, for example, new legal instruments to facilitate local community participation; multi-stakeholder partnerships of government, private sector, and local communities; and efforts to promote “public participation to secure consent for government and industry actions.”³⁵

In terms of specific recommendations, the report includes in its framework for action short, medium, and long-term targets for improving public participation in mining projects in the region. In the short term, the framework calls for countries to regulate provisions on public participation. Importantly, the framework describes public participation not just as consultation, information sharing, and dispute resolution but also as “participatory decision making”.³⁶

In December 2011, the African Union Conference of Ministers responsible for mineral resources adopted an action plan for implementing the Africa Mining Vision entitled “Building a sustainable future for Africa’s extractive industry: From vision to action.” Among its activities aiming to promote a well-governed and inclusive mining sector, the plan calls on States to “develop instruments to domesticate the Protocol of Free Prior Informed Consent with respect to communities affected by mining.”³⁷ National-level activities should also aim “to strengthen the capacity of local governments, communities, CSOs and mining companies to make informed decisions on mining projects.”³⁸ This language makes clear to States that the standard for community inclusion in decision making has evolved beyond mere consultation to FPIC.

³⁴ “About AMV,” Africa Mining Vision, accessed on December 3, 2013, <http://www.africaminingvision.org/about.html>.

³⁵ African Union, “Africa Mining Vision,” 11, 12 (February 2009), http://www.africaminingvision.org/amv_resources/AMV/Africa%20Mining%20Vision%20english.pdf.

³⁶ *Ibid.*, 33.

³⁷ African Union Commission, African Development Bank, and United Nations Economic Commission for Africa, “Building a sustainable future for Africa’s extractive industry: From vision to action,” 25 (December 2011), www.africaminingvision.org.

³⁸ *Ibid.*

INTERNATIONAL INSTITUTIONS AND FPIC

FPIC FOR INDIGENOUS PEOPLES

For indigenous peoples, FPIC is established as a basic right under international law. It derives primarily from the right to self-determination, which is affirmed in international human rights treaties such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights.³⁹ FPIC is integral to the exercise of the right to self-determination by indigenous peoples, which includes the right to freely pursue economic, social, and cultural development and to freely dispose of natural wealth and resources.

Identifying indigenous peoples in Africa

There is currently no commonly accepted definition of indigenous peoples. In fact, ACHPR has stated that “a definition is not necessary or useful as there is no universally agreed definition of the term and no single definition can capture the characteristics of indigenous populations.”⁴⁰ In certain country contexts in Africa, questions of ethnicity are particularly sensitive and highly politicized. Few African countries have explicitly recognized indigenous peoples, although this situation is slowly beginning to change.⁴¹

Some have raised concerns that efforts to protect indigenous rights may privilege certain ethnic groups over others or even lead to ethnic conflict. In response to these arguments, ACHPR emphasizes that recognition of indigenous peoples does not aim to privilege a particular ethnic group over another, but rather to protect the rights of groups that have been marginalized and discriminated against because of their particular culture, mode of production, and position within the state. They also note: “conflicts do not arise because people demand their rights but because their rights are violated.”⁴²

³⁹ International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171, 6ILM 368 (entered into force 23 March 1976), see articles 1 and 27; International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3, 6 ILM, see articles 1 and 15.

⁴⁰ African Commission on Human and Peoples' Rights, “Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples,” Adopted by the ACHPR at its 41st Ordinary Session held in May 2007 in Accra, Ghana, 3 (2007), <http://www.achpr.org/mechanisms/indigenous-populations/un-advisory-opinion/>.

⁴¹ “Indigenous peoples in Africa – A general overview,” International Work Group for Indigenous Affairs, accessed on November 10, 2013, <http://www.iwgia.org/regions/africa/indigenous-peoples-in-africa>.

⁴² African Commission on Human and Peoples' Rights and International Work Group for Indigenous Affairs, “Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities,” Adopted by ACHPR at its 28th ordinary session, 88 (2005), http://www.iwgia.org/iwgia_files_publications_files/African_Commission_book.pdf.

In ACHPR's 2007 Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration), ACHPR notes that its interpretation differs from those of other continents where indigenous communities have come close to annihilation. Despite recognizing that "any African can legitimately consider him/herself as indigene to the Continent," ACHPR states that within the African context, "the term indigenous populations does not mean 'first inhabitants' in reference to aboriginality as opposed to non-African communities or those having come from somewhere else."⁴³ ACHPR has identified a few major characteristics that embody the concept of indigenous peoples, including:

- Self-identification;
- A special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples; and
- A state of subjugation, marginalization, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life, or modes of production than the national hegemonic and dominant model.⁴⁴

ACHPR has stated that indigenous African peoples include primarily but not exclusively current and past hunter-gatherer groups and certain pastoralist groups.⁴⁵ Through its Working Group on Indigenous Populations/Communities in Africa, ACHPR has also produced research and trip reports that provide specific examples of groups which meet the key characteristics of indigenous peoples.⁴⁶

United Nations Declaration on the Rights of Indigenous Peoples

The UN Declaration, adopted in 2007, includes several references to FPIC. With regard to development projects in particular, the UN Declaration calls on States to consult with indigenous peoples through their representative institutions in order to secure their FPIC, "prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water, or other resources."⁴⁷ Thirty-six African countries⁴⁸ are among the 143 that voted in favor of the UN

⁴³ African Commission on Human and Peoples' Rights, "Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples," 4.

⁴⁴ *Ibid.*

⁴⁵ African Commission on Human and Peoples' Rights and International Work Group for Indigenous Affairs, "Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities," 89.

⁴⁶ See for example "Research and Information Visit to Kenya" (March 1-19, 2010), "Report on the Country Visit of the Working Group on Indigenous Populations/Communities to the Republic of Congo" (March 15-24, 2010), and "Research and Information Visit to the Central African Republic" (January 15-28, 2007), www.achpr.org.

⁴⁷ *United Nations Declaration on the Rights of the Indigenous Peoples*, Resolution adopted by the General Assembly, Article 32, <http://www2.ohchr.org/english/issues/indigenous/declaration.htm>.

⁴⁸ Algeria, Angola, Benin, Botswana, Burkina Faso, Cameroon, Cape Verde, Central African Republic, Comoros, Congo, Democratic Republic of Congo, Djibouti, Egypt, Gabon, Ghana, Guinea, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritius, Mozambique, Namibia, Niger, Senegal, Sierra Leone, South Africa, Sudan, Swaziland, Syria, Tunisia, Tanzania, Zambia, and Zimbabwe.

Declaration when it was adopted by the UN General Assembly in 2007.⁴⁹ Although the UN Declaration is not legally binding for States, it will likely become more binding as States begin incorporating these standards into their national laws and using the UN Declaration as the foundation for their legal decisions.⁵⁰

At the very least, the adoption of the UN Declaration reflects a commitment of governments to abide by principles enshrined in various international human rights instruments as they pertain to indigenous peoples. These instruments have been interpreted by treaty bodies responsible for their oversight as embodying the requirement to obtain indigenous peoples' FPIC in relation to extractive projects located in their territories.⁵¹ The affirmation of the requirement for indigenous peoples' FPIC emerges from the jurisprudence of United Nations treaty bodies like the Human Rights Committee; the Committee on the Elimination of Racial Discrimination; and the Committee on Economic, Social, and Cultural Rights.⁵²

The UN Permanent Forum on Indigenous Issues has advocated strongly for FPIC. For example, it recently called on international financial institutions (such as multilateral development banks) to include FPIC in their safeguard policies and project-related instruments. It also called on the African Development Bank in particular to establish a stand-alone safeguard policy for indigenous peoples, noting that it is the only multilateral bank that does not yet have such a policy.⁵³

International Labour Organization Convention 169

The International Labour Organization's Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169) establishes indigenous peoples' right to be consulted when development projects would affect them. Importantly, Article 6 of Convention No. 169 notes that consultations must be carried out through appropriate procedures using indigenous peoples' representative institutions "whenever consideration is being given to legislative or administrative measures which may affect them directly." The same article notes that consultations must be carried out in good faith, in an appropriate form, and "with the objective of achieving agreement or consent to the proposed measures."⁵⁴ Convention No. 169 also requires that communities

⁴⁹ Bibliographic Information System, Voting Record Search, A/RES/61/295,

<http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares61295#focus>.

⁵⁰ Amy K. Lehr and Gare A. Smith, "Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges," Foley Hoag LLP (May 4, 2010), <http://www.foleyhoag.com/publications/ebooks-and-white-papers/2010/may/implementing-a-corporate-free-prior-and-informed-consent-policy>.

⁵¹ Doyle and Cariño, "Making Free Prior & Informed Consent a Reality: Indigenous Peoples and the Extractive Sector," 7, 11.

⁵² See Fergus MacKay, "Indigenous Peoples and the United Nations Human Rights Bodies: A Compilation of UN Treaty Body Jurisprudence, the Recommendations of the Human Rights Council and Its Special Procedures, and the Advice of the Expert Mechanism on the Rights of Indigenous Peoples," Volume V, <http://www.forestpeoples.org/sites/fpp/files/publication/2013/01/cos-2011-12.pdf>.

⁵³ United Nations Economic and Social Council, Permanent Forum on Indigenous Issues, "Comprehensive Dialogue with United Nations Agencies and Funds," Twelfth Session, New York, May 28, 2013.

⁵⁴ *C169 – Indigenous and Tribal Peoples Convention*, International Labour Organization, 1989, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C169.

be relocated only under exceptional circumstances and in those rare cases only with their free and informed consent.⁵⁵ Regrettably, to date in Africa only the Central African Republic has ratified the convention (on August 30, 2010).⁵⁶

Convention No. 169 replaces Convention No. 107, the previous indigenous and tribal populations convention (1957), which remains binding on the African States that ratified it. In Africa, these countries include Angola, Egypt, Ghana, Guinea-Bissau, Malawi, Syria, and Tunisia.⁵⁷ Convention No. 107 requires that States ensure the “prior consent” of communities before removing them from their territories but qualifies this requirement with exceptions for the national interest and economic development, and for this and other reasons sets a lower standard than Convention No. 169. Convention No. 107 does call on States to recognize indigenous and tribal peoples’ collective or individual ownership of traditionally occupied lands and require States to provide communities with adequate compensation when, in exceptional circumstances, they relocate communities.⁵⁸

ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

Beyond the indigenous rights context, FPIC can be seen as a tool for safeguarding a number of human rights, such as the right to food, development, property, and a healthy environment, among others. However, outside of the context of indigenous rights, explicit references to FPIC by human rights treaty bodies and mechanisms have been limited. One multilateral treaty that has been interpreted as requiring FPIC for communities that are non-indigenous (in addition to those that are indigenous) is the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR). ICESCR calls on States to recognize rights such as the right to health, to education, to participating in cultural life, and to maintaining an adequate standard of living (including housing).⁵⁹ State parties to ICESCR number 161⁶⁰, including 48 African states.⁶¹ ICESCR has been interpreted as requiring FPIC in situations

⁵⁵ *Ibid.*, Article 16. Also note that Article 16 states if consent cannot be obtained relocation may occur, but “only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.”

⁵⁶ “Ratifications of *C169 – Indigenous and Tribal Peoples Convention*,” International Labour Organization (1989), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO.

⁵⁷ “Ratifications of *C107 – Indigenous and Tribal Populations Convention*,” International Labour Organization (1957), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312252:NO.

⁵⁸ *C107 – Indigenous and Tribal Populations Convention*, International Labour Organization, Articles 11 and 12 (1957), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C107.

⁵⁹ *United Nations International Covenant on Social, Economic, and Cultural Rights*, Adopted by General Assembly Resolution 2200 (XXI) of 16 December 1966, <http://www.un-documents.net/icescr.htm>.

⁶⁰ *International Covenant on Social, Economic, and Cultural Rights* status as of June 2013, United Nations Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-3&chapter=4&lang=en.

⁶¹ These include Algeria, Angola, Benin, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Congo, Democratic Republic of Congo, Côte d’Ivoire, Djibouti, Equatorial Guinea, Eritrea, Egypt, Ethiopia, Guinea, Guinea-Bissau, Gabon, Gambia, Ghana, Kenya, Lesotho, Liberia, Libya, Madagascar,

that threaten the preservation of cultural resources or with regard to community relocation when evictions or displacement occur under exceptional circumstances.

Right to culture

The ICESCR Committee on Economic, Social, and Cultural Rights (Committee) includes 18 independent experts elected by state parties for four-year terms to monitor the implementation of ICESCR.⁶² In 2009, the Committee produced General Comment 21, which provides additional guidance and background on interpreting the right to take part in cultural life (Article 15).⁶³ The Committee outlines the minimum core obligations of States with regard to this right, noting that, “the Covenant entails at least the obligation to create and promote an environment within which a person individually, or in association with others, or within a community or group, can participate in the culture of their choice.” Within this context and with regard to FPIC, the Committee states that the minimum core obligations entailed in ICESCR are:

To allow and encourage the participation of persons belonging to minority groups, indigenous peoples or to other communities in the design and implementation of laws and policies that affect them. In particular, States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.⁶⁴

Here the Covenant calls on States to ensure FPIC in cases that threaten the preservation of cultural resources, regardless of whether individuals belong to minority groups, indigenous peoples, or other communities.

The Committee has urged that particular States implement FPIC. For example, in the Committee’s November 2012 Concluding Observations on Tanzania, it expressed concern over forced evictions of vulnerable communities, such as pastoralist and hunter-gatherer groups, for the purpose of activities like mining and large-scale farming, among others. The Committee called on the State to:

...take legislative and other measures to protect, preserve and promote the cultural heritage and traditional ways of life of vulnerable communities, such

Malawi, Mali, Mauritania, Mauritius, Morocco, Namibia, Niger, Nigeria, Rwanda, Swaziland, Senegal, Seychelles, Sierra Leone, Somalia, Sudan, Tunisia, United Republic of Tanzania, Togo, Uganda, Zambia, Zimbabwe, according to Claiming Human Rights, a joint project of the National Commissions for United Nations Educational, Scientific, and Cultural Organization of France and Germany.

<http://www.claiminghumanrights.org/icesc.html>.

⁶² “The Committee on Economic, Social, and Cultural Rights,” Claiming Human Rights, accessed on November 12, 2013, <http://www.claiminghumanrights.org/icesc.html>.

⁶³ Committee on Economic, Social, and Cultural Rights, “General Comment No. 21: Right of Everyone To Take Part in Cultural Life,” [E/C.12/GC/21] (December 21, 2009),

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11.

⁶⁴ *Ibid.*, Section III, Subsection C (Core obligations).

as hunter-gatherer and pastoralist communities. It recommends that it ensure their meaningful participation in the debates related to nature conservation, commercial hunting, tourism and other uses of the land, based on free, prior and informed consent.⁶⁵

Here the Committee ties its call for FPIC to the importance of protecting cultural rights and preserving cultural heritage.

Right to adequate housing

ICESCR also protects the right to adequate housing, and along these lines the United Nations “Basic Principles and Guidelines on Development-Based Evictions and Displacement” require FPIC with regard to resettlement. The United Nations Special Rapporteur on adequate housing presented these guidelines to the United Nations Human Rights Council in 2007 with the aim of assisting States in developing policies to prevent forced evictions.⁶⁶ The guidelines note that States must ensure the right to adequate housing and protect against forced evictions, and they present several conditions that must be met to justify eviction in unavoidable, “exceptional circumstances.”⁶⁷

Specifically, the guidelines state that evictions in exceptional circumstances must be:

(a) authorized by law; (b) carried out in accordance with international human rights law; (c) undertaken solely for the purpose of promoting the general welfare; (d) reasonable and proportional; (e) regulated so as to ensure full and fair compensation and rehabilitation; and (f) carried out in accordance with the present guidelines.⁶⁸

These requirements apply regardless of whether persons or groups hold title to their home or property under domestic law.⁶⁹ Further, the guidelines state that “The right of affected persons, groups and communities to full and prior informed consent regarding relocation must be guaranteed” and call on States to “provide all necessary amenities, services and economic opportunities at the proposed site.”⁷⁰ Although the guidelines note that States have the obligation to apply

⁶⁵ United Nations Economic and Social Council, “Concluding Observations on the Initial to Third Report of the United Republic of Tanzania, adopted by the Committee at Its 49th session,” Committee on Economic, Social and Cultural Rights, E/C.12/TZA/CO/1-3, 7 (November 30, 2012), http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.TZA.CO.1-3_en.pdf.

⁶⁶ “Forced Evictions,” Office of the High Commissioner of Human Rights, accessed on September 10, 2013, <http://www.ohchr.org/EN/Issues/Housing/Pages/ForcedEvictions.aspx>.

⁶⁷ United Nations, “Basic Principles and Guidelines on Development-based Evictions and Displacement,” 13 and 21 (2007), http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf.

⁶⁸ *Ibid.*, 21.

⁶⁹ *Ibid.*, 21.

⁷⁰ United Nations, “Basic Principles and Guidelines on Development-Based Evictions and Displacement,” 56e.

human rights, they also note that this does not absolve transnational and other corporations or international financial institutions of their responsibilities.⁷¹

Similarly, the 2001 United Nations “Guiding Principles on Internal Displacement” prohibit displacement of communities for large-scale development, except when there are “compelling or overriding” public interests. The guidelines call for certain guarantees when displacement occurs (in non-emergency situations), including seeking the free and informed consent of those that will be displaced; informing communities about the reasons and procedures for displacement, as well as about compensation and relocation; involving communities (especially women) in the planning and management of the relocation; and ensuring access to legal remedy. The guidelines also note that “States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists, and other groups with a special dependency on and attachment to their lands.”⁷²

FPIC FOR ETHNIC GROUPS AND MINORITIES

In addition to ICESCR, other United Nations treaties may be interpreted as providing FPIC protections for non-indigenous communities when these communities have collective tenure systems governed fully or partly by customary law. These would apply to ethnic groups in accordance with the International Convention on the Elimination of All Forms of Racial Discrimination and to minorities (in certain circumstances) as described in the International Covenant on Civil and Political Rights.⁷³

The nongovernmental organization Forest Peoples Programme examines potential land rights protections for non-indigenous communities with collective tenure systems under international human rights law in a recent discussion paper.⁷⁴ Their paper notes the limited international jurisprudence on FPIC pertaining to non-indigenous communities, and provides an overview of FPIC-related human rights law that might be applied to non-indigenous communities with communal tenure systems. It recommends that communities consider bringing reports and cases to international human rights bodies to test this application, noting that “this is possible given the overlapping (and sometimes imprecise) use of the terms ‘minority’, ‘ethnic groups’ and ‘peoples’ as well as the

⁷¹ Ibid., A11.

⁷² United Nations, “Guiding Principles on Internal Displacement,” Principle 6, 7, and 9 (2001) <http://www.unhcr.org/43ce1cff2.html>.

⁷³ Forest Peoples Programme, “The Rights of Non-Indigenous ‘Forest Peoples’ With a focus on Land and Related Rights: Existing International Legal Mechanisms and Strategic Options,” 2, 3 (September 2013), <http://www.forestpeoples.org/topics/rights-land-natural-resources/publication/2013/rights-non-indigenous-forest-peoples-focus-land>.

⁷⁴ Ibid.

rights that vest in those categories (independent of the use of the ‘indigenous’ descriptor).⁷⁵

By bringing cases to international human rights bodies on human rights impacts to non-indigenous communities practicing communal tenure, communities and civil society would begin to test the legal application of FPIC beyond the indigenous rights context and to generate a body of relevant jurisprudence.

INTERNATIONAL ENVIRONMENTAL LAW

Convention on Biological Diversity

Some protections for FPIC also exist in international environmental law, for example in the Convention on Biological Diversity (CBD). Signed by 150 government leaders at the 1992 Rio Earth Summit, the CBD is a multilateral environmental agreement focused on biodiversity conservation and sustainable use, and on equitable benefit sharing as pertains to genetic resources.⁷⁶ The CBD refers to FPIC in the context of genetic resources, specifically requiring that “access to genetic resources shall be subject to prior informed consent of the contracting party providing such resources, unless otherwise determined by that party.”⁷⁷ CBD also calls on States to “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.”⁷⁸

The Conference of the Parties to the CBD⁷⁹ has recognized that the FPIC of indigenous peoples and local communities should be obtained before certain activities that affect them can be undertaken, in particular activities involving access to traditional knowledge, innovations, and practices, and in resettlement as a consequence of the establishment and management of protected areas.⁸⁰ In 2010, the Conference of the Parties adopted 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,” a supplementary agreement to the CBD that also includes several references to prior informed consent regarding accessing genetic resources and traditional knowledge.⁸¹

⁷⁵ Ibid., 39.

⁷⁶ CBD defines genetic resources as any material of plant, animal, microbial, or other origin containing functional units of heredity [genes] of actual or potential value.

⁷⁷ CBD, Article 15.5, <http://www.cbd.int/doc/legal/cbd-en.pdf>.

⁷⁸ CBD, Article 8(j), <http://www.cbd.int/doc/legal/cbd-en.pdf>.

⁷⁹ The CBD’s governing body, made up of all governments that have ratified the CBD.

⁸⁰ United Nations, “Handbook of the Convention on Biological Diversity,” 3rd edition, accessed on December 3, 2013, <http://www.cbd.int/handbook/>.

⁸¹ Secretariat of the CBD, “Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization,” United Nations (2011) <http://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>.

The Secretariat of the CBD also developed the “Akwé: Kon Guidelines” to support CBD implementation. These voluntary guidelines address the implementation of cultural, environmental, and social impact assessments of developments that will likely affect sacred sites, lands, and waters traditionally occupied or used by both indigenous and local communities. Where national law requires prior informed consent, the guidelines recommend that the assessment process consider whether this has been achieved. The guidelines also call for prior informed consent with regard to the use of traditional knowledge, innovations, and practices. It is important to note that the guidelines highlight the ongoing nature of FPIC processes: “Modifications to the initial development proposal will require the additional prior informed consent of the affected indigenous and local communities.”⁸² They also recommend, among other possible measures, “establishment of a process whereby local and indigenous communities may have the option to accept or oppose a proposed development that may impact on their community.”⁸³

In addition, the guidelines call for the participation of local and indigenous communities in all stages of assessment and development processes when a proposed development may affect their land, waters, and sacred sites. The guidelines recommend a formal process of stakeholder identification through consultation and the creation of a committee to advise on impact assessment and support planning processes consisting of representatives of relevant groups (with adequate representation from indigenous and local communities).⁸⁴

African Convention on the Conservation of Nature and Natural Resources

The African Convention on the Conservation of Nature and Natural Resources (African Convention) broadly aims to promote environmental protection, conservation, and the sustainable use of natural resources, and to coordinate policies in these fields. It calls on State parties to ensure the prior informed consent of communities for access to and use of indigenous knowledge and requires parties to take measures to facilitate “active participation of the local communities in the processes of planning and management of natural resources upon which such communities depend with a view to creating local incentives for the conservation and sustainable use of such resources.”⁸⁵ This supports the notion that community engagement in development projects should go far beyond mere consultation, towards participatory decision making.

⁸² CBD, “Akwé: Kon Guidelines,” Secretariat on the Convention on Biological Diversity, Section IV (29) and Section V (53 and 60) (2004), <https://www.cbd.int/doc/publications/akwe-brochure-en.pdf>.

⁸³ Ibid, Section III (8e).

⁸⁴ Ibid, Section III (B12 and B13).

⁸⁵ *African Convention on the Conservation of Nature and Natural Resources*, African Union, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Articles 17.2 and 17.3 (2003), <http://www.africa-union.org/root/au/Documents/Treaties/Text/nature%20and%20natural%20recesource.pdf>.

WORLD BANK GROUP

The World Bank Group first explored the issue of FPIC in its 2004 Extractive Industries Review (EIR), which examined whether extractive industries can be compatible with sustainable development and poverty reduction. The EIR process led to a recommendation that the World Bank Group ensure FPIC for indigenous peoples and other parties at each phase of the project cycle. (See Appendix I.) However, only in 2012 did the International Finance Corporation (the private-sector lending arm of the World Bank Group) institute an FPIC requirement when clients' projects stand to affect indigenous peoples under certain circumstances.⁸⁶ The IFC's policy on indigenous peoples applies to groups possessing four characteristics: self-identification (and recognition by others) as indigenous; collective attachment to land and natural resources; customary institutions separate from mainstream society or culture; and a distinct language or dialect.⁸⁷ IFC plays an important role as a standard setter for companies and banks, including more than 70 Equator Principle Financial Institutions⁸⁸ that have also recognized the requirement for FPIC in their standards, known as the Equator Principles. These consist of voluntary standards for identifying and managing social and environmental risk in project financing.⁸⁹

For projects that are likely to generate potential significant adverse impacts on communities, the IFC requires clients to ensure community support for the project regardless of the type of community that is affected. IFC employs the standard of "Informed Consultation and Participation" and commits to determining whether its client's community engagement process has led to "broad community support."⁹⁰ Broad community support represents a lower standard than FPIC, since it rests on an external determination of community support (in this case by the IFC) rather than through community processes. However, the standard certainly illustrates that current best practices have moved beyond mere consultation and engagement with communities toward recognizing the need to secure local approval.

IFC standards also include requirements for clients when projects will entail community resettlement. IFC's Performance Standard 5 requires that clients:

⁸⁶ International Finance Corporation, "IFC Sustainability Framework," effective January 1, 2012, http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_site/IFC+Sustainability/Sustainability+Framework.

⁸⁷ See International Finance Corporation's Performance Standard 7 on Indigenous Peoples and accompanying guidance note available at: http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Sustainability+Framework/Sustainability+Framework+-+2012/Performance+Standards+and+Guidance+Notes+2012/.

⁸⁸ For a list of members see <http://www.equator-principles.com/index.php/members-reporting/members-and-reporting>.

⁸⁹ Equator Principles, "The Equator Principles III" (2013), <http://www.equator-principles.com/index.php/ep3>.

⁹⁰ International Finance Corporation, "Policy on Environmental and Social Sustainability," 6 (2012) http://www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES.

avoid forced eviction; avoid or minimize displacement by exploring alternative project designs; avoid or minimize adverse impacts through compensation at replacement cost and transparency and community participation in resettlement activities; improve or restore livelihoods of displaced persons; and improve living conditions of physically displaced persons through the provision of adequate housing with security of tenure.⁹¹

⁹¹ International Finance Corporation, "Performance Standard 5: Land Acquisition and Involuntary Resettlement," (2012)
http://www.ifc.org/wps/wcm/connect/3d82c70049a79073b82cfaa8c6a8312a/PS5_English_2012.pdf?MOD=AJPERES.

THE BUSINESS CASE FOR FPIC

In order for consultations with communities to be meaningful, communities must have the option to give or withhold their consent for project development.

Unfortunately, strong and immediate economic and political incentives to launch oil and mining projects quickly often result in rushed consultation processes that fail to engage communities meaningfully. This short-sighted approach may lower short-term costs for project sponsors, but a growing body of evidence suggests that the medium- to long-term costs associated with social conflict may far outweigh possible short-term savings.

Furthermore, increasing attention to FPIC (including several policy commitments) from extractive industry companies and associations, as well as from companies and multi-stakeholder initiatives in other sectors, demonstrates a gradual move to embrace FPIC more broadly within the private sector.

REDUCING THE RISK OF SOCIAL CONFLICT

Extractive industry projects in particular tend to generate social conflict as a result of their complexity, duration (with revenues not flowing until project completion), and potential environmental impacts. These impacts include, for example, oil leakages, spills (of cyanide, for example), gas flaring, water pollution, and soil erosion.⁹² The extensive footprints of many of these projects result in a loss of communities' productive lands. At the same time, land is becoming increasingly scarce in many parts of Africa, because of pressures from population growth, and tensions have increased among various land users, such as farmers, urban elites, and investors.⁹³ Increasing pressure from extractive industries and large-scale investments, and weaknesses in legal frameworks, among other factors, exacerbate these tensions.⁹⁴ In eastern and southern Africa, for example, recent research highlights increasing conflicts over resource governance as governments and elites strengthen their control over lands and resources.⁹⁵ Within this context, the risks associated with social conflict become even more pronounced.

⁹² Lisa J. Laplante and Suzanne A. Spears, "Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector," *Yale Human Rights and Development L.J.*, 72-75 (July 10, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1288105.

⁹³ Lorenzo Cotula, Camilla Boulmin and Ced Hesse, "Land Tenure and Administration in Africa: Lessons of Experience and Emerging Issues," IIED and FAO, 1 (February 2004), <http://pubs.iied.org/pdfs/9305IIED.pdf>.

⁹⁴ Frank F. K. Byamugisha, *Securing Africa's Land for Shared Prosperity: A Program To Scale Up Reforms and Investments*, 98. Africa Development Forum series. Washington, DC: World Bank. doi: 10.1596/978-0-8213-9810-4. License: Creative Commons Attribution CC BY 3.0. (2013), <http://elibrary.worldbank.org/content/book/9780821398104>.

⁹⁵ Fred Nelson, "Conservation and Citizenship: Democratizing Natural Resource Governance in Africa," *Policy Matters*, 233 (2010), http://naturaljustice.org/wp-content/uploads/pdf/conservation_and_citizenship_nelson2010.pdf.

A stable operating environment where community rights are respected is good for business, and local communities affected by extractive industry projects play an important role in determining whether this stability will be achieved. The International Council of Mining and Metals (ICMM) has stated that “if communities benefit greatly from a mining operation, then they have a significant stake in seeing the mine operate successfully and will help to overcome obstacles that could adversely affect the mining operation, and in turn reducing risk for the company.”⁹⁶ FPIC represents a critical tool for evaluating community support for a project early on and for monitoring this support and respecting the decisions of communities throughout the life of the project.

However, if a company fails to secure FPIC, the consequences for that company can be considerable. It increases risks related to community opposition, such as:

- Increased costs from delays and/or legal disputes;
- Potential project stoppages or even company withdrawal;
- Reduced access to critical project inputs (as a result of road or river blockades, for example); and
- Brand and reputational harms and greater difficulty in future projects.⁹⁷

The risks to companies that choose to operate in an environment without community trust and FPIC are further heightened by rapid advances in communication technologies, as even very remote communities are becoming more connected and aware of their rights. A recent report from the International Institute for Environment and Development on FPIC in the extractive industries notes that more companies are beginning to establish levels of community engagement that go beyond legal requirements in order to mitigate risk and increase shareholder value.⁹⁸ This development comes as no surprise, given the potential risks associated with failure to secure FPIC effectively.

The economic consequences of delays or stoppages for companies can be significant. A recent report by the Munden Project evaluating the costs of insecure land tenure estimates that social conflict could increase operating costs to companies as much as 29 times over a normal baseline scenario (with costs increasing as projects grow in size, and withdrawal during operations

⁹⁶ International Council of Metals and Mining, “Community Development Toolkit,” 16-17 (July 20, 2012) <http://www.icmm.com/community-development-toolkit>.

⁹⁷ Steven Herz, Antonio La Vina, and Jonathan Sohn, “Development Without Conflict: The Business Case for Community Consent,” World Resources Institute, 5 (2007), www.wri.org.

⁹⁸ Abbi Buxton and Emma Wilson, “FPIC and the Extractive Industries: A Guide To Applying the Spirit of FPIC in Industrial Projects,” Institute for Environment and Development, 10 (2013), <http://pubs.iied.org/pdfs/16530IIED.pdf>.

representing the most costly scenario).⁹⁹ The report also notes that financial risks are multiple and that escalation of risks can be fast and irreversible.¹⁰⁰

In the oil sector, increasing challenges involving stakeholder engagement have meant increasing costs for companies. In 2008, a Goldman Sachs study of 190 international oil projects found that it took close to twice as long to bring projects online as it had 10 years earlier, a delay that generates significantly higher costs for companies.¹⁰¹ A 2010 report to the Human Rights Council cites an independent and confidential review of a subset of these companies, finding that “non-technical risks accounted for nearly half of all risk factors faced by these companies, with stakeholder-related risks constituting the largest single category.” The report also notes that “one company may have experienced a \$6.5 billion ‘value erosion’ over a two-year period from these sources, amounting to a double-digit fraction of its annual profits.”¹⁰² Increasingly, companies that fail to conduct effective FPIC processes are experiencing significant costs associated with “non-technical” or “above ground” risks.

Not surprisingly, given this trend, a 2010 study commissioned by oil company Talisman Energy Inc. that examined the benefits and challenges associated with implementing an FPIC policy found: “In light of global trends, it would be both timely and wise for Talisman to consider incorporating FPIC principles into its indigenous peoples or community policy.”¹⁰³ Talisman subsequently adopted an FPIC policy.¹⁰⁴

With regard to the mining sector, a 2011 study by researchers from Harvard Kennedy School and the University of Queensland found that a world-class mining project (with capital expenditure between \$3 billion and \$5 billion) stands to lose approximately \$20 million per week in lost productivity as a result of production delays from social conflict.¹⁰⁵ The study highlights staff time, particularly of senior managers, as one of the most frequently overlooked costs associated with social conflict. It notes that in some cases, “senior management were estimating that assets worth 10% or less of the company’s income were demanding more than 80% of senior management time, including in one case, of the Chief Executive Officer’s.”¹⁰⁶ In Peru, mining giant Newmont reported that it

⁹⁹ The Munden Project, “The Financial Risks of Insecure Land Tenure: An Investment View,” 2, 13-14 (September 1, 2012), http://www.rightsandresources.org/publication_details.php?publicationID=5715.

¹⁰⁰ *Ibid.*, 5.

¹⁰¹ Goldman Sachs, “190 Projects To Change the World,” Global Investment Research (April 25, 2008) as cited in Davis and Franks, “The costs of conflict with local communities in the extractive industry,” 3.

¹⁰² John Ruggie, “Business and Human Rights: Further steps toward the operationalization of the ‘protect, respect and remedy’ framework,” Report of the United Nations Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (April 2010) <http://198.170.85.29/Ruggie-report-2010.pdf>.

¹⁰³ Lehr and Smith, “Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges,” 8.

¹⁰⁴ For more information on this policy, see <http://www.talisman-energy.com/>.

¹⁰⁵ Davis and Franks, “The costs of conflict with local communities in the extractive industry,” 3.

¹⁰⁶ *Ibid.*, 4.

lost approximately \$2 million per day in the first few days alone after local protests paralyzed its Conga mining project.¹⁰⁷

Using econometrics, a 2011 study from researchers at the Wharton School at the University of Pennsylvania draws on empirical evidence from 19 publicly traded gold mining firms to examine the relationship between financial market valuation and cooperation or conflict among social and political actors.¹⁰⁸ The study finds that “increasing cooperation and reducing conflict with stakeholders enhances the financial valuation of a firm” and concludes:

In short, the social license to operate is more than rhetoric. It is operationalizable, empirically testable and strategically relevant. For these mining firms, pursuing cooperation from and minimizing conflict with stakeholders is not just corporate social responsibility but enlightened self-interest.¹⁰⁹

This study underscores what seems a relatively common sense argument—that the value of a company is likely to increase when it manages to cooperate effectively with local communities and avoid social conflict. Although the study focuses solely on gold mining projects, the authors note that the argument also applies to other natural resources, such as oil and gas.¹¹⁰

INCREASING CORPORATE COMMITMENTS TO FPIC

In recent years, extractive industry companies and their industry associations have increasingly developed new policies requiring FPIC and other safeguards to ensure community participation in decision making involving development projects. These changing policies suggest a growing awareness of the requirements of international law and emerging good practice standards, as well as recognition of the strong business case for FPIC.

Although the responsibility to ensure FPIC starts with governments, companies also play an important role. States have the duty to protect against human rights abuses by third parties, including businesses, through appropriate policies, regulation, and adjudication. However, companies have the responsibility to respect human rights, act with due diligence to avoid infringing on the rights of others, and address adverse impacts. The Guiding Principles for Business and

¹⁰⁷ “Newmont Mining Re-evaluating Conga Mine,” *Reuters, International Business Times*, March 14, 2012, <http://www.ibtimes.com/articles/314189/20120314/conga-newmont-peru.htm>.

¹⁰⁸ The study uses 50,000 stakeholder events from media reports to index the degree of cooperation or conflict from the mines and uses financial and operating data filed by the company with the Canadian Securities Administrators and stock price information from the Toronto Stock Exchange.

¹⁰⁹ Witold J. Henisz, Sinziana Dorobantu and Lite Nartey, “Spinning Gold: The Financial Returns to External Stakeholder Engagement,” The Wharton School, University of Pennsylvania, 1, 29 (June 30, 2011) <http://www-management.wharton.upenn.edu/henisz/hdn.pdf>.

¹¹⁰ *Ibid.*, 28.

Human Rights—endorsed in 2011 by the United Nations Human Rights Council—highlight the corporate responsibility to respect human rights and provide companies with guidance on how to fulfill this responsibility.¹¹¹ Companies that fail to exercise due diligence in preventing rights violations also compromise their responsibilities under domestic laws.

Extractive industry companies

Company commitments to FPIC have been on the rise. Oxfam America's 2012 Community Consent Index reviews the public commitments made by 28 extractive industry companies on the issue of community consent. The report found that 13 of the companies reviewed have made public commitments to FPIC. Five companies (Inmet,¹¹² Newmont, Rio Tinto, Talisman, and Xstrata) made explicit public commitments to FPIC, up from just two companies in the first iteration of the report in 2009, and an additional eight made indirect or qualified commitments to FPIC.¹¹³ In addition to the companies included in the Oxfam report, mining company De Beers Group also commits to FPIC, and importantly does not appear to limit this commitment to projects that affect indigenous communities. De Beers Group commits to "respecting community governance and always seeking a community's free and informed consent prior to initiating any significant operations that will have a substantial impact on their interests."¹¹⁴

In addition to public corporate policies, some companies maintain confidential implementation guidelines containing a consent requirement.¹¹⁵ Although confidential guidelines are a step in the right direction, it would of course be much more difficult for stakeholders to hold companies accountable for these less binding commitments than for public commitments.

Although extractive industry companies often limit the application of their FPIC policies to projects that have the potential to affect indigenous peoples, they have also increased their commitments to promote public participation in decision making and ensure community acceptance of projects more broadly. For example, many mining and oil companies have made public commitments to ensure a "social license to operate" or "broad community support." Although there is no universally accepted definition of the terms, they suggest that a

¹¹¹ "United Nations 'Protect, Respect, and Remedy' Framework," Business and Human Rights Resource Centre, accessed November 20, 2013, <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework>.

¹¹² Since the publication of Oxfam's report, First Quantum Minerals Ltd. acquired Inmet Mining Corporation. It remains to be seen whether their FPIC policy will be adjusted in light of the takeover. For more information on the takeover, see Firat Kayakiran, "First Quantum to Keep Inmet Mines After Takeover Gets Support," *Bloomberg* (March 22, 2013) <http://www.bloomberg.com/news/2013-03-22/first-quantum-to-keep-inmet-mines-after-takeover-gets-support.html>.

¹¹³ Voss and Greenspan, "Community Consent Index: Oil, Gas and Mining Company Public Positions on Free, Prior, and Informed Consent (FPIC)," 19, 23-24.

¹¹⁴ "Community Policy," DeBeers Group (Version January 2012), accessed on November 12, 2013, http://www.debeersgroup.com/ImageVaultFiles/id_553/cf_5/DBG_Community_Policy.PDF.

¹¹⁵ Lehr and Smith, "Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges," 55.

development project has the ongoing support or acceptance of local communities. A recent journal article concludes that:

In the mining sector, local communities have emerged as particularly important governance actors. Conventional approaches to mineral development no longer suffice for these communities, who have demanded a greater share of benefits and increased involvement in decision making...It is against this backdrop that the need for mineral developers to obtain a social license to operate from local communities has originated and evolved.¹¹⁶

Community expectations are evolving, and this phenomenon is not lost on oil and mining companies. Twenty of the 28 companies reviewed in Oxfam America's Community Consent Index have publicly incorporated, directly or indirectly, general concepts of FPIC, community support, or social license to operate in their positions regarding development activities.

Although social license to operate suggests a positive relationship between a company and its neighbors, it falls short of FPIC in that, when pressed, corporations are rarely willing to equate it with community consent. That is, corporations are not willing to withdraw operations in places where communities are opposed to their presence. FPIC also requires that a company engage holistically and in a participatory and inclusive manner, providing community members access to critical information and allowing them adequate time to assess their needs and interests before making a decision about whether to accept a company's presence. The more vaguely defined social license to operate does not necessarily imply these things. Recent research from the Centre for Social Responsibility at the University of Queensland notes that "the contemporary application of social license is more about reducing overt opposition to industry than it is about engagement for long-term development."¹¹⁷ FPIC represents a much higher standard, given the highly participatory and continuous nature of the process.

Extractive industry associations

In May 2013, ICMM announced its new Indigenous Peoples and Mining Position Statement, which sets out ICMM members' approach to engaging with indigenous peoples and FPIC. The policy states that the outcome of an FPIC process should be that "indigenous peoples can give or withhold their consent to a project, through a process that strives to be consistent with their traditional decision-making processes while respecting internationally recognized human

¹¹⁶ Jason Prno and D. Scott Slocombe, "Exploring the origins of 'social license to operate' in the mining sector: Perspectives from governance and sustainability theories," *Resources Policy*, Volume 37, Issue 3, 346-357 (2012), www.elsevier.com/locate/resourpol.

¹¹⁷ John R. Owen and Deanna Kemp, "Social license and mining: A critical perspective," Centre for Social Responsibility in Mining, Sustainable Minerals Institute, Queensland University, *Resources Policy* 38, no. 1 (2013): 34.

rights and is based on good faith negotiation.”¹¹⁸ With its new position statement, ICMM requires member companies to begin incorporating FPIC into their practices at more than 800 project sites around the world, with commitments coming into full effect by May 2015.

With regard to community participation in decision making more broadly, ICMM highlights as good practice consultation processes that ensure the inclusion of a diversity of community members in all stages of development (including women and vulnerable and/or marginalized groups). Their guidance states that communities should be “enabled to participate fully in the decisions made about the allocation of benefits that flow from projects.”¹¹⁹ ICMM guidance also notes that consultations associated with environmental and social impact assessments should facilitate the participation of affected communities and other stakeholders, explicitly address human rights impacts, and include a transparent and public process.¹²⁰

The International Petroleum Industry Environmental Conservation Association (IPIECA), an oil and gas industry group, recommends that companies conduct “meaningful consultation with communities” about projects and “ongoing two-way communication about project impacts and benefits.” IPIECA also suggests that companies use informed decision making to avoid or reduce the scope of resettlement when possible.¹²¹ With regard to indigenous peoples in particular, IPIECA has released compilations of best practices—most recently in March 2012—which include an overview of the international standards and best practices related to FPIC.¹²² However, the IPIECA compilations fall short of recommending specific policies or practices. Moreover, the company members of IPIECA are not bound to IPIECA recommendations.

Other sectors

Outside of the context of extractive industries, some multi-stakeholder initiatives use FPIC terminology. Multi-stakeholder initiatives bring companies together with civil-society representatives and, in some instances, government. The Forest Stewardship Council, Roundtable on Sustainable Palm Oil, and UN World Commission on Dams each call for FPIC in their requirements or

¹¹⁸ International Council of Metals and Mining, “Indigenous Peoples and Mining Position Statement,” 1 (May 16, 2013), <http://www.icmm.com/publications/icmm-position-statement-on-indigenous-peoples-and-mining/>.

¹¹⁹ International Council of Metals and Mining, “Community Development Toolkit,” 17.

¹²⁰ International Council of Metals and Mining, “Integrating human rights due diligence into corporate risk management processes,” 15 (March 2012), <http://www.icmm.com/page/75929/publications/documents/integrating-human-rights-due-diligence-into-corporate-risk-management-processes>.

¹²¹ International Petroleum Industry Environmental Conservation Association, “Human rights training tool” (3rd edition), slides 14 and 17, (September 2012), <http://www.ipieca.org/publication/human-rights-training-tool-3rd-edition>.

¹²² International Petroleum Industry Environmental Conservation Association, “Indigenous Peoples and the oil and gas industry: context, issues and emerging good practice” (April 2012), <http://www.ipieca.org/publication/indigenous-peoples-and-oil-and-gas-industry-context-issues-and-emerging-good-practice>.

recommendations. The first two extend the application of FPIC beyond indigenous peoples to all project-affected local communities. (See Appendix II.)

In addition and most recently, soft drink manufacturer the Coca Cola Company declared a company commitment to “adhere to the principle of Free, Prior, and Informed Consent across our operations (including bottling partners) and will require our suppliers to adhere to this principle” and to “require respect for and prohibit the violation of the land rights of communities and traditional peoples.”¹²³ The company also committed to publish FPIC guidance and auditable criteria for FPIC which will be implemented in supplier audits.¹²⁴ The commitment is particularly notable both in its application to any affected community (regardless of whether they are indigenous peoples) and throughout the supply chain.

INVESTORS EMBRACING FPIC

Some investment fund managers have also begun to recognize the business case for FPIC and to highlight its importance as a way to ensure that the companies within their clients’ portfolios demonstrate a commitment to sustainability and respect for indigenous peoples’ rights. In fact, Experts in Responsible Investment Solutions (EIRIS)¹²⁵ has stated that according to their methodology for evaluating risks associated with indigenous rights, “companies cannot achieve a good or advanced management response grade without adopting a policy commitment to FPIC.”¹²⁶ Since FPIC can reduce risks to companies, not surprisingly it provides a degree of assurance to investors.

Specific examples of fund managers’ urging companies to comply with FPIC are beginning to emerge. For example, Boston Common Asset Management urged ConocoPhillips to incorporate indigenous rights, including recognition of FPIC, in its human rights policy over several years. Advocacy strategies included, for example, shareholder resolutions in 2007 and 2008 and several meetings with ConocoPhillips between 2008 and 2011. In 2011, ConocoPhillips revised its human rights policy, committing to comply with International Labour Organization Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples. Boston Common Asset Management managing director Steven Heim lauded the development and called on ConocoPhillips “to fully and transparently implement a free, prior, and informed consent policy globally.”¹²⁷

¹²³ The Coca-Cola Company, “The Coca-Cola Company Commitment: Land Rights and Sugar,” <http://assets.coca-colacompany.com/6b/65/7f0d386040fcb4872fa136f05c5c/proposal-to-oxfam-on-land-tenure-and-sugar.pdf>.

¹²⁴ Ibid.

¹²⁵ EIRIS provides investment services to more than 200 clients around the world including banks, asset owners and managers, and stock brokers according to their website (<http://www.eiris.org/>).

¹²⁶ EIRIS and Centre for Australian Ethical Research, “Indigenous rights: risks and opportunities for investors” (June 2009), <http://www.eiris.org/files/research%20publications/indigenousrightsjun09.pdf>.

¹²⁷ “ConocoPhillips commits to indigenous peoples’ rights with support from BBT,” Church of the Brethren Benefit Trust (August 26, 2011), accessed on December 5, 2013,

Calvert Asset Management Company has also embraced FPIC. In fact, in May 2009 it applied the FPIC standard of its indigenous peoples' rights criteria in its decision to remove the forestry products company Weyerhaeuser from the Calvert Social Index. Calvert's decision regarding Weyerhaeuser was influenced by the company's inability to demonstrate FPIC in its relationship with the Grassy Narrows First Nation of Ontario, Canada.¹²⁸

The business case for FPIC is strong, and extractive industry companies and associations, as well as financial institutions, are increasingly beginning to recognize the importance of ensuring social acceptance for their projects and those they finance, and to incorporate this concept into their policies.

<http://www.brethrenbenefittrust.org/news/conocophillips-commits-indigenous-peoples%E2%80%99-rights-support-bbt>.

¹²⁸ "Calvert's Indigenous Peoples' Criteria Factors into Weyerhaeuser Decision," Calvert Asset Management Company (May 22, 2009), accessed on June 5, 2011, <http://www.calvert.com/newsarticle.html?article=14727>.

PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION MAKING

All individuals have a right to gain access to information and participate meaningfully in environmental decision making. The 1992 Rio Declaration on Environment and Development affirms this right, as does the Aarhus Convention adopted by the United Nations Economic Commission for Europe. Some global voluntary guidelines also refer to public participation in environmental decision making, including references to FPIC in certain circumstances. (See Appendix III.)

Many African countries' laws also require some level of public participation in environmental decision making, generally through engagement in project environmental impact assessment (EIA) processes. EIA processes occur prior to the implementation of extractive industry projects. When done well, they incorporate social and human rights issues in addition to environmental issues.

Unfortunately, most EIA public participation requirements refer to information provision or consultation and fall short of FPIC. This is true not only across Africa but also globally, and is not surprising, given the typically high level of government discretion in instituting compulsory acquisition of land, as described in more detail below.

NATIONAL LAWS AND REGULATIONS

Despite emerging regional trends, most African countries have yet to develop legislation regulating FPIC in national law. However, Liberia's community rights law provides a notable exception. (See Box 1.) Another noteworthy precedent can be found in jurisprudence from the South African Constitutional Court, which recognized the right of communal land ownership (including exploitation of subsurface natural resources) in its decision regarding the Richtersveld community, in 2003.¹²⁹

¹²⁹ Wilmien Wicomb and Henk Smith, "Customary communities as 'peoples' and their customary tenure as 'culture': What can we do with the Endorois decision?" Legal Resources Centre, 429-432 (2011), http://procasur.org/extractive-industries/wp-content/uploads/2012/05/South-Africa-Bafokeng-Annexure-3-AHRLJ_Endorois-Wicomb-Smith.pdf.

Box 1: Liberia's community rights law of 2009¹³⁰

In Liberia, a law on community rights with respect to forest lands explicitly establishes FPIC as a guiding principle. The law recognizes local communities as the owners of all forest resources on community forest lands and states that “any decision, agreement, or activity affecting the status or use of community forest resources shall not proceed without prior, free, informed consent of the said community.” The law also calls for the promotion of community-based forest management and for public participation in forest resource regulation, protection, management, and development.

Although governments have largely failed to incorporate FPIC in their policies, the inclusion of public participation as a component of EIAs has become standard practice. In some African countries, EIA regulations require that project sponsors, for example, publish information in local and official languages, provide contact information to respond to inquiries, and/or seek the views of local communities in the EIA process.¹³¹ For example:

- In Uganda, for projects requiring EIA, regulations require developers to seek local community views in the environmental assessment process; publicize the project and its potential effects and benefits in a language understood by communities; and meet with communities to explain the project (ensuring venues and times are convenient for communities and agreed with local leaders). Government must invite the public and project-affected communities to comment on the completed study and may hold public hearings at its discretion.¹³²
- In Botswana, government must notify the public within 60 days of receiving an EIA statement and invite comment or objections from those likely to be affected, and it may hold public hearings at its discretion.¹³³ Botswana's environmental assessment regulations note that public notification must be posted in the *Gazette* and in a newspaper circulated at least once weekly for four weeks in official languages, and that the relevant government agency must, “in its decision making, consider the comments or objections raised by

¹³⁰ Ministry of Foreign Affairs, Liberia, An Act to Establish the Community Rights Law of 2009 with respect to Forest Lands, http://www.growingforestpartnerships.org/sites/growingforestpartnerships.org/files/gfp_Liberia_CRL_October_2009.pdf.

¹³¹ Economic Commission for Africa and African Union, “Minerals and Africa's Development: The International Study Group Report on Africa's Mineral Regime,” 54 (2011), http://www.africaminingvision.org/amv_resources/AMV/ISG%20Report_eng.pdf.

¹³² *Ibid.* and see The Environmental Impact Assessment Regulations, 1998 (Under section 107 of the National Environment Act Cap 153), Part 3, Section 12 and Part 5, Sections 19-22, http://nema-ug.org/regulations/eia_regulations.pdf.

¹³³ Economic Commission for Africa and African Union, “Minerals and Africa's Development: The International Study Group Report on Africa's Mineral Regime,” 198.

persons who are likely to be affected by the proposed activity and other interested persons.”¹³⁴

- Ethiopian law requires publication of EIAs and requires incorporation of the views of local communities into the EIA report and evaluation.¹³⁵
- In Ghana, the government must hold public hearings before issuing environmental permits when it observes an adverse public reaction to the proposed undertaking, when community resettlement will be required, or when there may be potentially extensive environmental impacts.¹³⁶

Although these regulations provide important provisions for public participation in decision making, unfortunately, implementation remains problematic. The 2011 report “Minerals and Africa’s Development: The International Study Group Report on Africa’s Mineral Regime” states that “there is usually a mismatch between the expression of public participation rights in formal instruments and its implementation.”¹³⁷ The report attributes this to challenges such as existing power relations (especially for vulnerable groups) and resource constraints of both public institutions and project-affected communities.

Whether enshrined in national law or not, states have a human rights obligation to ensure public participation in EIA processes. ACHPR has referred to public participation in EIAs as a fundamental measure for safeguarding the right to health and a clean environment. In its description of the merits of *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, ACHPR noted that:

Government compliance with the spirit of Article 16 [right to health] and Article 24 [right to a clean environment] of the African Charter must also include ... publicizing environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.¹³⁸

¹³⁴ Ibid. and see Environmental Assessment Act, 2011, Part III, Section 10.2, *Botswana Government Gazette* (June 30, 2011),

<http://www1.eis.gov.bw/EIS/Policies/Environmental%20Policies/Environmental%20Assessment%20Act.pdf>.

¹³⁵ Economic Commission for Africa and African Union, “Minerals and Africa’s Development: The International Study Group Report on Africa’s Mineral Regime,” 198.

¹³⁶ Ibid. and see Environmental Assessment Regulations, 1999, Part I, Section 12.1,

<http://www.epa.gov.gh/ghanalex/acts/Acts/ENVIRONMENTAL%20ASSESSMENT%20REGULATION,1999.pdf>.

¹³⁷ Economic Commission for Africa and African Union, “Minerals and Africa’s Development: The International Study Group Report on Africa’s Mineral Regime,” 55.

¹³⁸ African Commission of Human and Peoples Rights, 155/96: *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria*, para 53,

http://www.achpr.org/files/sessions/30th/communications/155.96/achpr30_155_96_eng.pdf.

States should recognize that they have an obligation to ensure local communities' full and effective participation in EIA processes in order to fulfill their duty to protect human rights. Given their duty to respect human rights, companies developing EIAs should also take this into account.

Outside of Africa, some national laws require companies to reach agreements with landholders. In Papua New Guinea, for example, the Papua New Guinea Mining Act 1992 requires companies to establish and register agreements with landowners regarding compensation prior to occupying or operating on land.¹³⁹ In addition, some national laws entail provisions for FPIC (either explicitly or indirectly) for projects that will affect indigenous peoples, such as the Indigenous Peoples Rights Act, in the Philippines¹⁴⁰ and its accompanying implementing regulations pertaining to FPIC¹⁴¹ and the Aboriginal Land Rights Act, in Australia's Northern Territory.¹⁴²

COMPULSORY ACQUISITION AND FPIC

African governments have quite expansive powers with regard to the taking of land. In general, they own the country's land and natural resources or hold them in trust for the people.¹⁴³ In addition, like most governments, they control the rights to minerals and subsoil resources. All African governments have the power to institute compulsory acquisition for a public purpose or use (also referred to as eminent domain or land expropriation), generally with the provision of fair compensation.¹⁴⁴ Governments often adopt very broad interpretations of "public purpose," which include mining or oil projects expected to generate considerable revenues but not actually serve the public directly. For example, a report by World Resources Institute that discusses compulsory acquisition in East Africa notes:

In many cases, the process for determining the public interest requirement is informal and unsystematic, and is not an open or participatory process involving the public or even other branches or levels of government. Public

¹³⁹ David Brereton, John Owen, and Julie Kim, "Good Practice Note: Community Development Agreements," Centre for Social Responsibility in Mining, 4 (2011), www.eisourcebook.org.

¹⁴⁰ *The Indigenous Peoples' Rights Act of 1997*, Republic Act No. 8371, Republic of the Philippines (1997), <http://www.gov.ph/1997/10/29/republic-act-no-8371>.

¹⁴¹ Administrative Order No. 03-12 or The Revised Guidelines on Free Prior Informed Consent (FPIC) and Related Processes of 2012, Republic of the Philippines (April 2012), <http://ncip12.wordpress.com/issuances/the-revised-guidelines-on-free-and-prior-informed-consent-fpic-and-related-processes-of-2012/>.

¹⁴² Mark Rumler, "A review of Free Prior Informed Consent in Australia," Oxfam Australia (2011), www.oxfam.org.au.

¹⁴³ Peter G. Veit, Rugemeleza Nhsala, Michael Ochieng' Odhiambo, and Jacob Manyindo, "Protected Areas and Property Rights: Democratizing Eminent Domain in East Africa," World Resources Institute, 8 (June 2008), http://pdf.wri.org/protected_areas_and_property_rights.pdf.

¹⁴⁴ Byamugisha, *Securing Africa's Land for Shared Prosperity: A Program To Scale Up Reforms and Investments*, 103.

purpose is usually defined so broadly that, in practice, it does not serve as a significant limit on the government's power of eminent domain.¹⁴⁵

The report notes that in Tanzania, for example, the law allows land acquisition for any public purpose and expressly notes that these purposes include mining and oil development.¹⁴⁶ In addition, most laws on compulsory acquisition in sub-Saharan Africa fail to recognize the legitimacy of various forms of land tenure, including community-held rights, as described in Box 2.

**Box 2: Outdated Laws—Excerpt from
*Securing Africa's Land for Shared Prosperity*¹⁴⁷**

New thinking about land rights has emerged in recent decades, reflecting a more inclusive and nuanced approach that takes into account various forms of tenure, including rights allocated under customary and indigenous tenure systems, rights over common property such as forests and grazing areas, and community-held rights. In Sub-Saharan Africa, this has found widespread expression in discussions of national land policy. More concretely, it has contributed to innovative national land laws in Burkina Faso, Mali, Mozambique, South Africa, Tanzania, Uganda, and elsewhere. The promise of these new laws has been realized only partially as a result of weak implementation, but they unquestionably represent an important conception shift.

For the most part, national legal frameworks for compulsory acquisition have not kept pace with innovations in land policy and law more generally. African laws tend to define compensable land rights in formal terms, linking eligibility to documentation—or in some cases registration—of ownership, a problem in a context where 90 percent of all rural holdings are estimated to be unrecorded. These laws are typically poorly adapted to recognizing and valuing the multiple layers of secondary and subsidiary rights that may exist in a customary law setting and to identifying, notifying, consulting with, and compensating the holders of such rights.

Some non-governmental organizations and donors contend that governments should provide a narrower scope for their definition of “public purpose.” This might allow for public participation in its determination and preclude its application to private investment or economic development projects. Oxfam has argued that for any project provisionally determined to have a public purpose, its public value should be affirmed through a democratic process, including through consultations with expected beneficiaries, expected affected persons, and other

¹⁴⁵ Veit, Nhsala, Ochieng' Odhiambo, and Manyindo, “Protected Areas and Property Rights: Democratizing Eminent Domain in East Africa,” 10.

¹⁴⁶ Ibid., citing Government of Tanzania 1967 Land Acquisition Act.

¹⁴⁷ Byamugisha, *Securing Africa's Land for Shared Prosperity: A Program To Scale Up Reforms and Investments*, 104.

stakeholders about the development priorities, with an emphasis on poor and marginalized groups.¹⁴⁸ A recent World Bank report on land issues in sub-Saharan Africa notes that “the takings power is an extraordinary one, intended to meet genuine public needs that cannot be met efficiently through market operations or other voluntary arrangements; it is not intended to support primarily private gain.”¹⁴⁹ The report recommends that governments avoid takings of land in the public interest when the land acquisition is for investment purposes and that they recognize multiple land tenure systems, including customary tenure.¹⁵⁰ World Resources Institute states that “[t]o adequately protect property rights and secure tenure, the application of eminent domain must be disciplined and restricted to genuine public purposes, not including ordinary government business or economic development.”¹⁵¹ These statements underscore the idea that “public purpose” should not be interpreted so as to favor private investment or economic development at the expense of local community rights and interests.

Governments should refrain from instituting compulsory acquisition for economic development projects that present significant risks to local communities, such as extractive industry projects. These projects should proceed only with the FPIC of the local communities that will be affected by the project. In particular, it is difficult for governments to demonstrate that extractive industry projects will serve a public purpose, given the potential significant environmental and social impacts associated with these projects, and in light of the well-documented “resource curse” phenomenon whereby developing countries that rely heavily on oil or mineral exports tend to have relatively poor development outcomes.¹⁵²

¹⁴⁸ Oxfam and Inclusive Development International, “A Proposal for New World Bank Safeguards on Tenure of Land, Housing and Natural Resources” (April 2013), available upon request.

¹⁴⁹ Byamugisha, *Securing Africa’s Land for Shared Prosperity: A Program To Scale Up Reforms and Investments*, 105.

¹⁵⁰ *Ibid.*, 107.

¹⁵¹ Veit, Nhsala, Ochieng’ Odhiambo, and Manyindo, “Protected Areas and Property Rights: Democratizing Eminent Domain in East Africa,” 17.

¹⁵² See Michael Ross, “Extractive Sectors and the Poor,” Oxfam America (October 2001), <http://www.oxfamamerica.org/publications/extractive-sectors-and-the-poor/>.

CONCLUSION

FPIC is emerging as a best practice for safeguarding the rights of all communities affected by extractive industry projects. It is a right for indigenous peoples and is recognized in international law. In Africa, regional institutions, civil society organizations, and others have recently begun to call for FPIC processes when extractive industry projects have the potential to affect local communities, regardless of whether the affected communities identify themselves as indigenous peoples. This development reflects a growing recognition of FPIC as a necessary condition for good governance of African natural resources. Companies are also increasingly recognizing the business case for FPIC and beginning to adopt improved policies with regard to public participation in decision making involving extractive industry projects. These trends are encouraging and urgently needed in a context where current legal requirements at the national level generally fall short of FPIC and governments tend to broadly interpret their compulsory acquisition powers.

As the benefits of ensuring FPIC become more widely acknowledged, the discussion should turn increasingly to how, not whether, FPIC processes should be implemented. Although governments and companies both play an important role in creating an adequate space for dialogue with communities, very early government-facilitated public participation processes which include land use planning discussions will be critical to ensuring respect for the true spirit of FPIC. These processes would allow communities to influence decisions about development priorities before major decisions are made. In this way, discussions might address not only particular projects but also how communities envision the use of their land and natural resources over the long term.

In terms of immediate next steps, national laws and regulations will need to be adjusted in order to comply with the FPIC standard. Mining and oil laws, EIA regulations, and relevant land legislation should be adapted to ensure that communities can participate effectively in decision making and ultimately give or withhold their consent before an extractive industry project moves forward. More case study research about how governments and companies currently consult communities would also be helpful as a way to identify existing processes' strengths and weaknesses, and ideally to document positive experiences that may be replicated in other contexts. With this focus, civil society organizations could play a fundamental role in driving positive change in the region and ensuring that international commitments to FPIC translate into effective change on the ground.

APPENDIX I: WORLD BANK GROUP EXTRACTIVE INDUSTRIES REVIEW

The World Bank Group launched its 2004 Extractive Industries Review (EIR) to examine the question of whether extractive industries can be compatible with sustainable development and poverty reduction. The EIR consisted of a comprehensive multi-stakeholder assessment of the World Bank Group's engagement in extractive industries. It included governments, nongovernmental organizations, indigenous peoples' organizations, affected communities and community-based organizations, labor unions, industry, academia, and international organizations.

The final report from the process noted that many communities and indigenous peoples living near extractive industries projects have grievances about participation and control over development initiatives and decisions, and that a failure to involve these communities appropriately may result in conflict.¹⁵³ Despite acknowledging that more work needs to be done to make FPIC clearer and more effective, EIR states that "indigenous peoples and other affected parties have the right to participate in decision making and to give their free, prior, and informed consent throughout each phase of a project cycle."¹⁵⁴ Despite the EIR endorsement of FPIC, at the time, the World Bank Group failed to incorporate FPIC into its standards. Instead, it adopted a diluted version of the principle, which it called Free Prior and Informed *Consultation*. At the time of writing the World Bank—the public sector lending and granting arm of the World Bank Group—was in the process of reviewing its environmental and social safeguards for its lending to governments, and its FPIC standard was one of the key issues under consideration.

¹⁵³ Emil Salim, "Striking a Better Balance: The Final Report of the Extractive Industries Review," Volume I, 18 (December 2003), <http://commdev.org/striking-better-balance-final-report-extractive-industries-review>.

¹⁵⁴ *Ibid.*, 21.

APPENDIX II: MULTI-STAKEHOLDER INITIATIVES

Multi-stakeholder initiatives, such as the Forest Stewardship Council and the Roundtable on Sustainable Palm Oil, bring companies together with representatives of civil society, and in some instances government. These ongoing initiatives, along with past multi-stakeholder bodies like the UN World Commission on Dams, have also promoted community consent standards. Their standards all apply to projects that affect indigenous communities and also to other affected communities in varying degrees, as described below. The most prominent extractive industries multi-stakeholder initiatives—the Extractive Industries Transparency Initiative and Voluntary Principles on Security and Human Rights—do not address community consent issues explicitly.

FOREST STEWARDSHIP COUNCIL

Forest Stewardship Council (FSC) is a nonprofit organization that promotes sustainable forest management through independent third-party certification and labeling of wood, paper, and other forest products. Members include nonprofit and for-profit organizations, as well as individuals. FSC has developed 10 principles (as well as specific criteria) that apply to FSC-certified forests around the world. FSC's standards call for FPIC when indigenous peoples or local communities would lose control over management activities necessary to protect their rights, resources, lands, and territories. In the event that indigenous peoples choose to delegate control, the standards also require binding agreements with provisions for indigenous peoples' monitoring.¹⁵⁵ If companies wish to have their operations FSC-certified then they must comply with FSC principles and criteria, including ensuring that companies have secured the FPIC of local communities.

ROUNDTABLE ON SUSTAINABLE PALM OIL

The Roundtable on Sustainable Palm Oil (RSPO) also brings together nonprofit and for-profit organizations to maintain a certification scheme, in this case to promote sustainability within the palm oil sector. RSPO members must abide by RSPO principles and criterion, which require companies to ensure that their

¹⁵⁵ Forest Stewardship Council (FSC), "FSC International Standard: FSC Principles and Criteria for Forest Stewardship," FSC-STD-01-001 (V5-0) EN, Principles 3 and 4 (February 10, 2012), <https://ic.fsc.org/the-revised-pc.191.htm>.

operations do not “diminish the legal rights, or customary rights, of other users, without their free, prior, and informed consent.”¹⁵⁶ FPIC must be applied before companies’ infringement on land rights, whether legal or customary.

National interpretation working groups come together to create additional guidance to accompany RSPO standards. In Ghana, for example, in 2011 the working group—which included government representatives, non-profit and for-profit organizations, and donors—produced a national interpretation of RSPO principles with specific indicators for the FPIC requirement, including maps documenting customary rights and copies of negotiated agreements detailing the consent process. The national interpretation recommends participatory mapping with affected and neighboring communities in the event of unclear customary rights. Ghanaian guidance also calls for voluntary, non-coercive agreements and open information sharing, “in appropriate forms and languages, including assessments of impacts, proposed benefit sharing and legal arrangements.”¹⁵⁷

WORLD COMMISSION ON DAMS

The World Commission on Dams (WCD) is a global multi-stakeholder body initiated in 1997 by the World Bank and the World Conservation Union in response to growing opposition to large dam projects. It established comprehensive guidelines for dam building in its 2000 report, *Dams and Development: A New Framework for Decision-making*. WCD called for FPIC when projects will affect indigenous or tribal peoples. In addition, WCD called for processes that “enable informed participation by all groups of people, and result in the demonstrable acceptance of key decisions.”¹⁵⁸ Although WCD only employs the FPIC term explicitly for projects that will affect indigenous and tribal peoples, the reference to acceptance of decisions clearly moves beyond a mere consultation standard. WCD’s report also recommends that “adversely affected people need to show acceptance of the dam project by consenting to the process and to the mitigation and development measures. These measures should include a share in project benefits and redress and recourse mechanisms.”¹⁵⁹

¹⁵⁶ Roundtable on Sustainable Palm Oil, “Criterion 2: Compliance with applicable laws and regulations,” [http://www.rspo.org/file/RSPO%20Principles%20&%20Criteria%20for%20Sustainable%20Palm%20Oil%20\(final%20public%20release\).pdf](http://www.rspo.org/file/RSPO%20Principles%20&%20Criteria%20for%20Sustainable%20Palm%20Oil%20(final%20public%20release).pdf).

¹⁵⁷ Roundtable on Sustainable Palm Oil, “Ghana National Interpretation of Principles and Criteria for Sustainable Palm Oil,” 12, 13, (March 2011), http://www.rspo-in-ghana.org/sitescene/custom/data/downloads/110307194308/Approved_NI_March2011.pdf.

¹⁵⁸ World Commission on Dams, “Dams and Development: A New Framework for Decision-making,” xxxiv, Earthscan Publications Ltd: London and Sterling, VA, (November 2000), http://www.internationalrivers.org/files/attached-files/world_commission_on_dams_final_report.pdf.

¹⁵⁹ *Ibid.*, 240.

APPENDIX III: INTERNATIONAL PUBLIC-PARTICIPATION STANDARDS

International standards on public participation in decision making include, for example, the principles established under the Rio Declaration on Environment and Development; the UN Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (known as the Aarhus Convention); and voluntary guidelines from the Committee on World Food Security and United Nations.

RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT

The Rio Declaration on Environment and Development emerged from the United Nations Conference on Environment and Development in 1992 and includes 27 principles upon which nations agreed to base their actions in dealing with environmental and development issues. They state:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided. (Principle 10)

Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.¹⁶⁰ (Principle 22)

¹⁶⁰ Rio Declaration on Environment and Development, United Nations Environment Programme, United Nations Conference on Environment and Development (2012), <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>.

AARHUS CONVENTION

The United Nations Economic Commission for Europe adopted the Aarhus Convention in 1998, and it went into force in 2001. The Aarhus Convention establishes a number of rights of the public relating to the environment, including access to environmental information and participation in decision making when a project may have a significant environmental impact. It specifies that public participation must be early enough that “all options are open” and include reasonable time frames that enable the public “to prepare and participate effectively.”¹⁶¹ The public must have the opportunity to comment and its input must be taken into account in the decision.¹⁶² The Aarhus Convention is legally binding on the countries that have ratified it.¹⁶³

VOLUNTARY GUIDELINES

Guidelines for the Development of National Legislation on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

These guidelines, issued by the United Nations Environment Program in 2010—sometimes referred to as the “Bali Guidelines”—aim to provide general information for States about promoting implementation of their commitment to Principle 10 of the Rio Declaration on Environment and Development within their national legislation and processes. Like the Aarhus Convention, they center on the themes of access to information, public participation in decision making, and access to justice in environmental matters. The Bali Guidelines call on states to ensure early and effective participation, allowing members of the public affected by or with an interest in the decision-making process to have “an adequate opportunity to express their views.” Information must be made available in an “objective, understandable, timely, and effective manner” and the comments of the public must be taken into account in decisions (which must also be made public). The Bali Guidelines also call on States to support capacity building to promote public participation in decision making.¹⁶⁴

¹⁶¹ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Article 6.3, 6.4 (2001), <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>.

¹⁶² *Ibid.* (Article 6.7, 6.8).

¹⁶³ For a list of countries that have ratified the Aarhus Convention, see the United Nations Treaty Collection database at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en.

¹⁶⁴ United Nations Environment Programme, “Guidelines for the Development of National Legislation on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters” (February 26, 2010), http://www.unep.org/civil-society/Portals/24105/documents/Guidelines/GUIDELINES_TO_ACCESS_TO_ENV_INFO_2.pdf.

Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security

These 2012 guidelines from the Committee on World Food Security call for consultation and participation when tenure rights holders stand to be affected by projects. States and others should engage communities in advance of decision making, respond to their inputs, and ensure their “active, free, effective, meaningful and informed participation.” For projects or measures that will affect indigenous peoples’ resources in particular, the voluntary guidelines call on States and other parties to hold good-faith consultations with indigenous peoples to obtain their FPIC.¹⁶⁵ The guidelines also call for multi-stakeholder participation with regard to policy reforms: “States should develop relevant policies, laws and procedures through participatory processes involving all affected parties, ensuring that both men and women are included from the outset.”¹⁶⁶

Reducing Emissions from Deforestation and Forest Degradation Programme Guidelines on FPIC

The UN initiative on Reducing Emissions from Deforestation and Forest Degradation (REDD) Programme Guidelines on FPIC apply to REDD projects affecting indigenous and other forest-dependent communities with territory or resource rights. The FPIC guidelines make clear that communities should have the option to reject projects: “Consent is a freely given decision that may be a ‘Yes’ or a ‘No,’ including the option to reconsider if the proposed activities change or if new information relevant to the proposed activities emerges...”. The guidelines also emphasize that FPIC processes continue throughout the project lifecycle, stating that consent is “given or withheld in phases, over specific periods of time for distinct stages or phases of REDD+. It is not a one-off process.”¹⁶⁷

¹⁶⁵ Committee on World Food Security, “Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security,” 3b.6, 9.9, (May 11, 2012) http://www.fao.org/fileadmin/user_upload/nr/land_tenure/pdf/VG_Final_May_2012.pdf.

¹⁶⁶ *Ibid.*, Section 5.5.

¹⁶⁷ Jennifer Laughlin, Nina Kantcheva, Charles McNeill, and Gayathri Sriskanthan, “UN-REDD Programme Guidelines on Free, Prior and Informed Consent,” United Nations Development Program (January 2013) http://www.un-redd.org/Launch_of_FPIC_Guidelines/tabid/105976/Default.aspx.

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