



**Forest Peoples  
Programme**

# **Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review**



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Indigenous Peoples' Right to Free, Prior and Informed Consent  
and the World Bank's Extractive Industries Review

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Cover  
photograph: The Akawaio community of Isseneru in Guyana is  
completely surrounded by mining concessions  
imposed with no consultation whatsoever.  
Marcus Colchester

## Contents

<b>I</b>	<b>Introduction</b>	<b>1</b>
<b>II</b>	<b>The Extractive Industries Review</b>	<b>3</b>
A	The EIR's Recommendations	3
B	The Draft Management Response to the EIR	11
C	The June 2004 Management Response	13
<b>III</b>	<b>Free, Prior and Informed Consent</b>	<b>15</b>
A	What is FPIC?	15
B	Why is FPIC important?	15
C	International Law and Indigenous Peoples' Rights to FPIC	19
D	FPIC in Development Standards	26
E	'Operationalization'	29
F	Components of FPIC	32
<b>IV</b>	<b>Conclusion</b>	<b>39</b>



## I Introduction

Indigenous peoples' right to free, prior and informed consent (FPIC) is gaining increasing currency in international law, particularly in the jurisprudence of international human rights bodies and pursuant to the Convention on Biological Diversity. In some areas, such as use of traditional knowledge, resettlement and certain development-related activities affecting indigenous peoples' traditional lands, the law is clear: indigenous peoples have the right to give or withhold their consent. FPIC has also been recognized and accepted by a number of intergovernmental organizations and international bodies (see box 1) and increasingly in domestic laws and jurisprudence.

The World Bank Group (WBG) is a notable exception despite two major reviews, both commissioned by the WBG, which recommend incorporation of FPIC in to WBG policy and practice with special reference to indigenous peoples. The first was the World Commission on Dams, which made detailed recommendations in relation to FPIC,<sup>1</sup> all of which were rejected by the WBG.<sup>2</sup> The second, and focus of this article, the World Bank's Extractive Industries Review (EIR), is presently under consideration by WBG management prior to submission to the Board of Directors.<sup>3</sup> In a leaked January 2004 WBG management response to the EIR's Final Report, the WBG again rejected FPIC. The WBG has also stated its opposition to FPIC on a number of occasions in the past eight years in response to indigenous peoples' long-standing demands that FPIC must be a fundamental component of WBG safeguard policies. This short article provides an overview of the EIR and its implications for the WBG, and takes a closer look at FPIC, its components and its bases in international law.

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<sup>1</sup> *Dams and Development: A new framework for decision-making. The Report of the World Commission on Dams*. Earthscan: London, 2000, 112 (see, also, 267, 271, 278) – “In a context of increasing recognition of the self-determination of indigenous peoples, the principle of free, prior, and informed consent to development plans and projects affecting these groups has emerged as the standard to be applied in protecting and promoting their rights in the development process.” It added that “The manner of expressing consent will be guided by customary laws and practices of the indigenous and tribal peoples and by national laws.” *Id.* at 281.

<sup>2</sup> WBG refusal to implement the WCD's recommendations was heavily criticized by NGOs and others. See, [http://www.evb.ch/index.cfm?page\\_id=551&yy=2001](http://www.evb.ch/index.cfm?page_id=551&yy=2001)

<sup>3</sup> *Striking a Better Balance. The World Bank Group and Extractive Industries. The Final Report of the Extractive Industries Review*, Vol. I, December 2003 (hereinafter “EIR Report”). Available at: <http://www.eireview.org/eir/eirhome.nsf/be65a087e9e6b48085256acd005508f7/75971F6A8E5111385256DE80028BEE2?OpenDocument>



## II The Extractive Industries Review

The EIR was commissioned in 2001 by the President of the WBG, James Wolfensohn, to examine what role, if any, the WBG has in the oil, gas and mining sectors, generically known as extractive industries (EI). This was done largely in response to a concerted campaign by non-governmental organizations, Friends of the Earth in particular, who rallied around the slogan 'World Bank Get Your Ass out of Oil and Gas'. President Wolfensohn appointed Dr. Emil Salim, former Indonesian minister for the environment, as the 'Eminent Person' charged with conducting the EIR in July 2001.

The EIR comprised a two year-long process of regional 'stakeholder' meetings, project site visits, commissioned research on particular issues, consideration of two internal WBG evaluations relating to extractive industries<sup>4</sup> and dialogue with World Bank staff.<sup>5</sup> The EIR's Final Report, presented to the WBG in January 2004, was authored by Dr. Salim and contains a number of potentially far reaching recommendations about how the WBG conducts business and how human rights, including indigenous peoples' rights and FPIC, should be accounted for and respected in WBG policies and operations.<sup>6</sup> While restricted to EI, these recommendations affect a wide range of WBG operations in other sectors as well as cross-cutting policy issues.

### A The EIR's Recommendations

#### ***Poverty Alleviation and Sustainable Development***

The WBG's professed mission and mandate is poverty alleviation through sustainable development.<sup>7</sup> The EIR assessed WBG involvement in EI primarily along these lines: can EI projects be compatible with the WBG's goals of sustainable development and poverty reduction? The Final Report defines poverty from a human rights perspective, adopting the views of the UN Committee on Economic, Social and Cultural Rights,<sup>8</sup> and centres sustainable development on human beings, communities and societies rather than on purely economic grounds (various forms of capital).<sup>9</sup> It also recognizes that for indigenous peoples, poverty alleviation and sustainable development may have additional or nuanced

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<sup>4</sup> *Extractive Industries and Sustainable Development. An Evaluation of World Bank Group Experience.* OED/OEG/OEU, World Bank: Washington DC, 2003 and; *Extracting Sustainable Advantage? A review of how sustainability issues have been dealt with in recent IFC & MIGA extractive industries projects. Final Report.* Compliance Advisor Ombudsman, World Bank: Washington DC, April 2003.

<sup>5</sup> Reports on these meetings and results of commissioned research are contained in annexes to the EIR Final Report. *Supra*, note 3.

<sup>6</sup> Dr. Salim was assisted by an Advisory Panel comprised of persons from industry, indigenous peoples, civil society, governments and academia. The Final Report's conclusions and recommendations were entirely determined by Dr. Salim.

<sup>7</sup> *Working for a World Free of Poverty.* World Bank: Washington DC, 2003. Available at: <http://siteresources.worldbank.org/EXTABOUTUS/Resources/wbgroupbrochure.pdf>

<sup>8</sup> EIR Report, 3, citing, *Poverty and the International Covenant on Economic, Social and Cultural Rights: 10/05/2001.* Statement Adopted by the Committee on Economic, Social and Cultural Rights on 4 May 2001. UN Doc. E/C.12/2001/10.

<sup>9</sup> EIR Report, 3.

interpretations and requirements and must include effective guarantees for territorial rights and the right to self-determination.<sup>10</sup>

Noting that EI projects do not necessarily contribute to poverty alleviation,<sup>11</sup> the Final Report recommends that the WBG should not increase its involvement in EI projects without addressing a series of prior conditions.<sup>12</sup> These conditions relate both to borrower and corporate governance and institutional reforms within the WBG. The three main “enabling conditions” for EI to contribute to poverty alleviation are defined as: 1) pro-poor public and corporate governance, including proactive planning and management to maximize poverty alleviation through sustainable development; 2) respect for human rights; and 3) much more effective WBG social and environmental policies.<sup>13</sup>

### **Governance Criteria**

The Final Report asserts that, if the WBG is to comply with its poverty alleviation mandate, strict conditions must be applied to EI projects. One of these (pre)conditions is the need to assess and strengthen governance. In addition to issues such as revenue sharing and corruption, specified governance criteria include (at the macro level): the quality of the rule of law; the absence of armed conflict or a high risk of such conflict; the government's respect for labour standards and human rights, as indicated by its ratification of and adherence to international human rights treaties; and recognition of and willingness to protect the internationally guaranteed rights of indigenous peoples.<sup>14</sup>

### **Human Rights**

Quoting from the Final Declaration of the 1993 Vienna World Conference on Human Rights, the Final Report concludes, “while development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights.”<sup>15</sup> It further concludes that that the “WBG must internalize and respect this principle, both in terms of its operating policies and in its relations with borrowers and clients;”<sup>16</sup> and, highlighting labour rights, indigenous peoples' rights and women's rights, this “must reflect and be consistent with the WBG's obligations as a subject of international law and account for the obligations incumbent upon its borrowers by virtue of ratified human rights instruments and customary international law.”<sup>17</sup>

Following these conclusions, the Final Report recommends that, among others, the WBG:

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<sup>10</sup> *Id.* at 4.

<sup>11</sup> *Id.* at 2-3.

<sup>12</sup> *Id.* at 45.

<sup>13</sup> *Id.* at 45-6.

<sup>14</sup> *Id.* at 46.

<sup>15</sup> *Id.* at 38-9, quoting, *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights on 25 June 1993. UN Doc. A/CONF.157/23, 12 July 1993, Part I, at para. 10.

<sup>16</sup> *Id.* at 39.

<sup>17</sup> *Id.* at 43.



- develops a system-wide policy that integrates and mainstreams human rights into all areas of WBG policy and practice and ensures that its policies and operations are, at a minimum, consistent with its obligations, as a subject of international law, in relation to international human rights law;
- ensures that it does not undermine the ability of its member countries to faithfully fulfil their international obligations or facilitate or assist violation of those obligations. ... At a minimum, the WBG should assess state obligations and ensure that its operations, including macro-level intervention such as structural adjustment, do not violate those obligations;
- systematically incorporates experienced, independent, and reputable third parties to verify the status of human rights in all relevant projects;
- establishes a central human rights unit, with regional counterparts, with a clear policy and a mandate for monitoring, verification, and transparent annual audits;
- particularly the International Finance Corporation and the Multilateral Investment Guarantee Agency, should assess the human rights records of companies, including their policies on human rights and indigenous peoples, and should ensure that funded projects are designed and implemented in a manner consistent with applicable international human rights standards.<sup>18</sup> Adoption of and demonstrated compliance with human rights principles should be a prerequisite for companies seeking IFC and MIGA support for extractive industries; and,
- ideally, should adopt a rights-based approach to development and ensure that its support for projects is directed toward fulfilling internationally guaranteed human rights, and, in particular, it should address power imbalances that affect the full exercise and enjoyment of all human rights by the poor and most vulnerable.<sup>19</sup>

These recommendations partly coincide with the findings of the WBG's Compliance Advisor Ombudsman in a report on IFC and MIGA involvement with EI done for the EIR. Observing that neither IFC nor MIGA systematically consider human rights and labour rights in relation to EI projects, the report stated that:

This is not to suggest that wider human rights concerns in individual countries should serve as a barrier to entry of IFC or MIGA (unless this is the stated policy of the World Bank group). Instead, IFC and MIGA should more systematically consider potential risks to human rights at the project level, take appropriate steps to mitigate them, and provide clear guidance to clients on both of these aspects. Where relevant, these aspects should be reported on at the project level.<sup>20</sup>

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<sup>18</sup> A rights-based approach to development is one that explicitly ties development policies, objectives, projects and outputs to international human rights standards requiring, among others, that development be directed towards fulfilling human rights. Conversely, it is a proactive strategy for converting rights into development goals and standards. See, among others, A. SEN, *DEVELOPMENT AS FREEDOM*. (Knopf 1998) and; *The Right to Development. Report of the Independent Expert on the Right to Development, Dr. Arjun Sengupta, pursuant to General Assembly resolution 54/175 and Commission on Human Rights resolution E/CN.4/RES/2000/5*. UN Doc. E/CN.4/2000/WG.18/CRP.1, 11 September, para. 19.

<sup>19</sup> *Id.* at 59-60.

<sup>20</sup> *Extracting Sustainable Advantage? A review of how sustainability issues have been dealt with in recent IFC & MIGA extractive industries projects. Final Report*. Compliance Advisor Ombudsman, World Bank: Washington DC, April 2003, at 36.

Another internal evaluation also recommended increased attention to human rights in the context of WBG safeguard and other policies, particularly where these policies lag behind industry best practice.<sup>21</sup>

### ***Indigenous Peoples' Rights***

The Final Report acknowledges indigenous peoples' largely negative experiences with EI and observes that "Failure to recognize and respect [their] rights undermines efforts to alleviate indigenous peoples' poverty and to achieve sustainable development."<sup>22</sup> Recommendations are made on a number of issues including the right to free, prior and informed consent; the right to be free from involuntary resettlement; prior recognition of and respect for indigenous peoples' rights to own and control their traditional lands, territories and resources; and the revision of the current World Bank safeguard policy on indigenous peoples.

### ***Free, Prior and Informed Consent***

The Final Report concludes that "indigenous peoples and other affected parties do have the right to participate in decision-making and to give their free, prior and informed consent throughout each phase of a project cycle. FPIC should be seen as the principal determinant of whether there is a 'social license to operate' and hence is a major tool for deciding whether to support an operation."<sup>23</sup> Accordingly, the Final Report recommends that the "WBG should ensure that borrowers and clients engage in consent processes with indigenous peoples and local communities directly affected by oil, gas, and mining projects, to obtain their free, prior and informed consent."<sup>24</sup> It specifies that FPIC is an internationally guaranteed right for indigenous peoples and part of "obtaining social license and demonstrable public acceptance for the project" in the case of (non-indigenous) local communities.<sup>25</sup> The Final Report further recommends that "the WBG should ensure that indigenous peoples' right to FPIC is incorporated and respected in its Safeguard Policies and project related instruments;"<sup>26</sup> and "[r]esettlement should only be allowed if the indigenous community has given free and prior informed consent, there are guarantees of a right to return once the reason for resettlement ceases to exist, and subsequent to agreement on resettlement benefits."<sup>27</sup>

With regard to the nature of FPIC, the Final Report states

Free prior and informed consent should not be understood as a one-off, yes-no vote or as a veto power for a single person or group. Rather, it is a process by which indigenous peoples, local communities, government, and companies may come to mutual agreements in a forum that gives affected communities enough leverage to negotiate conditions under which they may proceed and an outcome leaving the community clearly better off. Companies have to make the offer attractive enough for host

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<sup>21</sup> *Extractive Industries and Sustainable Development. An Evaluation of World Bank Group Experience.* OED/OEG/OEU, World Bank: Washington DC, 2003, 15.

<sup>22</sup> EIR Report, at 41.

<sup>23</sup> *Id.* at 21.

<sup>24</sup> *Id.* at 50.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 60.

communities to prefer that the project happen and negotiate agreements on how the project can take place and therefore give the company a “social license” to operate. Clearly, such consent processes ought to take different forms in different cultural settings. However, they should always be undertaken in a way that incorporates and requires the FPIC of affected indigenous peoples and local communities.<sup>28</sup>

Finally, the Final Report recommends that it is “necessary to include covenants in project agreements that provide for multiparty negotiated and enforceable agreements that govern various project activities, should indigenous peoples and local communities consent to the project.”<sup>29</sup> This is an interesting idea that deserves consideration, particularly given the documented deficiencies in the WBG’s implementation of its safeguard policies.<sup>30</sup> The project agreement is the primary legal document pertaining to a project and would presumably accord indigenous peoples standing to challenge (further) implementation of the project in cases of alleged breach.

### ***Prior Recognition of Rights to Lands, Territories, and Resources***

The Final Report emphasizes the importance to indigenous peoples of secure and effective territorial rights and concludes that failure to recognize these rights “undermines efforts to alleviate indigenous peoples’ poverty and to achieve sustainable development” and; “jeopardize[s] the potential for development and poverty alleviation from the extractives sector.”<sup>31</sup> It further concludes that “Structural reforms and legal codes that provide for automatic approval of exploration and development concessions on indigenous lands, territories, and resources without the participation and the free prior and informed consent of these peoples and communities only exacerbate the problem.”<sup>32</sup>

The corresponding recommendations state that “the WBG should not support extractive industry projects that affect indigenous peoples without prior recognition of and effective guarantees for indigenous peoples’ rights to own, control, and manage their lands, territories, and resources” and, “the WBG should promote only those ‘sector reforms’ that concomitantly recognize and guarantee indigenous peoples’ rights to lands, territories, and resources traditionally owned or otherwise occupied and used by them.”<sup>33</sup>

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<sup>28</sup> *Id.* at 50.

<sup>29</sup> *Id.*

<sup>30</sup> The WBG’s internal review of performance in EI projects found that only “Three out of seven projects for which the indigenous peoples policy applied met the requirement for preparation of an Indigenous Peoples Development Plan (IPDP).” *Supra* note 21, at 43. The 2003 World Bank Operations Evaluation Department review of implementation of Operational Directive 4.20 on Indigenous Peoples found that it was only applied, fully or partially, in 50 percent of projects affecting indigenous peoples and of those only 14 percent had the required Indigenous Peoples Development Plan. It also found that the participation of indigenous peoples in decision-making in WBG projects affecting them was “low” and that just 20 percent of projects had included clear benchmarks to measure impacts on indigenous communities. *Implementation of Operational Directive 4.20 on Indigenous Peoples: An independent desk review* January 10, 2003, Country Evaluation and Regional Relations (OEDCR), OED Report No. 25332, World Bank: Washington, D.C. 2003. Available at: [http://lnweb18.worldbank.org/oed/oeddoelib.nsf/DocUNIDViewForJavaSearch/472DE0AEA1BA73A085256CAD005CF102/\\$file/IP\\_evaluation.pdf](http://lnweb18.worldbank.org/oed/oeddoelib.nsf/DocUNIDViewForJavaSearch/472DE0AEA1BA73A085256CAD005CF102/$file/IP_evaluation.pdf)

<sup>31</sup> EIR Report, at 41.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 60.

The WBG's own internal review of its safeguard policy on indigenous peoples reached the same conclusion in April 2003:

It is important to consider the customary rights of IP to land when determining adverse effects, especially where such land is not yet legally titled. This is important even in technical assistance projects that involve institutional and regulatory changes to facilitate increased investment in exploitation of natural resources. In such cases there may be need for [Indigenous Peoples Development Plans] that ensure adequate measures or regulatory frameworks are in place to protect legitimate IP interests, should such commercial exploitation materialize.<sup>34</sup>

### **Compensatory Off-sets**

Compensatory offsets are required under the World Bank's safeguard policy on Natural Habitats for projects that cause a significant conversion of natural habitat.<sup>35</sup> Should this occur, borrowers are required to establish 'off-sets', such as national parks and other protected areas to compensate for habitat loss. Indigenous peoples have complained that in some cases they are negatively affected by an extractive project and that their rights are further infringed on by the establishment of an off-set.<sup>36</sup> The Final Report therefore recommends that "Special attention must always be paid to ensuring that the rights of indigenous peoples to their lands, territories, and resources traditionally owned or otherwise occupied and used are respected when choosing and designing an offset."<sup>37</sup>

### **Submarine and Riverine Tailings Disposal**

The EIR Report notes that submarine and riverine disposal of mining wastes has had a, sometimes severe, negative impact on indigenous peoples and local communities. Consequently, it "recommends that submarine and riverine tailings disposal not be used in areas such as coral reefs that have important ecological functions or cultural significance or in coastal waters used by indigenous peoples and local communities for subsistence purposes."<sup>38</sup>

### **Draft Operational Policy 4.10 on Indigenous Peoples**

The Final Report notes that Operational Directive 4.20 on Indigenous Peoples 1991, the WBG's current safeguard policy, is presently being converted to a new format known as draft Operational Policy/Best Practice 4.10 on Indigenous Peoples.<sup>39</sup> It also observes that

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<sup>34</sup> *Implementation of Operational Directive 4.20 on Indigenous Peoples: An Evaluation of Results*. OED Report No. 25754, 10 April 2003, World Bank: Washington DC, at 2. Available at: [http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/05/01/000160016\\_20030501182633/additional/862317580\\_200306204005416.pdf](http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/05/01/000160016_20030501182633/additional/862317580_200306204005416.pdf)

<sup>35</sup> OP 4.04 2001. Available at: <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/o/71432937FA0B753F8525672C007D07AA?OpenDocument>

<sup>36</sup> Nelson and Tchoumba, *Pipelines, Parks and People: Bagyeli Document Land Use near Campo Ma'an National Park*, 28(1) Cultural Survival Quarterly 47 (2004).

<sup>37</sup> EIR Report, at 55.

<sup>38</sup> *Id.* at 57.

<sup>39</sup> OD 4.20 1991. Available at: <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/o/0F7D6F3F04DD70398525672C007D08ED?OpenDocument> Draft OP 4.10, March 2001. Available at:

the present draft has been “repeatedly repudiated by indigenous peoples” and concludes that “[t]o be legitimate and effective, a Safeguard Policy must be seen by the intended beneficiaries to provide adequate safeguards and must be consistent with their internationally guaranteed rights. This is presently not the case [with draft OP 4.10].”<sup>40</sup> It recommends that:

- with the meaningful participation of indigenous people, the WBG should revise its safeguard policy on indigenous peoples and ensure that it is consistent with indigenous peoples’ rights in international law;
- the WBG must also ensure that there is consensus among indigenous peoples about the contents of the policy – the policy’s beneficiaries must consider that it provides adequate safeguards; and
- the WBG should refrain from approving the current draft OP 4.10 before high-level discussions with indigenous peoples, including a legal roundtable discussion between WBG lawyers, indigenous representatives, and legal experts on the consistency of the policy with internationally guaranteed human rights.<sup>41</sup>

Highlighting the importance of attention to indigenous peoples’ rights in relation to OP 4.10, Dr. Salim’s letter to President Wolfensohn submitted with the Final Report in January 2004 states that “the revision of the safeguard policy on indigenous peoples is a fundamental test of the World Bank’s commitment to poverty alleviation through sustainable development.”<sup>42</sup>

#### **‘Phase Out’ of Oil and Coal by 2008**

The EIR recommends that the WBG ‘phases out’ investment in oil production and maintains its current freeze on new coal projects, and, instead, focuses on investment in and promotion of renewable energy sources.<sup>43</sup> For many indigenous peoples, especially those in the Arctic and small island states, climate change is a pressing and very real concern.<sup>44</sup> Therefore, this recommendation is seen as a valuable step in assisting states to meet the targets set by the Kyoto Protocol, particularly as the WBG has a strong influence on policy development and legislative reform initiatives in many of its borrower

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<http://lnweb18.worldbank.org/ESSD/sdvext.nsf/63ByDocName/PoliciesDraftOP410March232001> For an extensive discussion of this Operational Policy, see, F. MacKay, *Universal Rights or a Universe Unto Itself? Indigenous Peoples’ Human Rights and the World Bank’s Draft Operational Policy 4.10 on Indigenous Peoples*, 17 AM. U. INT’L L. REV. 527, 568-70 (2002).

<sup>40</sup> EIR Report, at 41.

<sup>41</sup> *Id.* at 61.

<sup>42</sup> Letter of Dr. Emil Salim to J. Wolfensohn, President of the World Bank, 12 January 2004. Available at: <http://www.eireview.org/doc/Letter%20to%20Wolfensohn%2012%20Jan%202004-final.doc>

<sup>43</sup> EIR Report at 65.

<sup>44</sup> Sheila Watt-Cloutier, the Chair of the Inuit Circumpolar Conference (ICC), shared the following message with the Conference of Parties to United Nations Framework Convention on Climate Change: “The human rights of Inuit are under threat as a result of human-induced climate change. ICC will defend the human rights of Inuit. We are exploring how best to do this, likely through the Inter-American system invoking the 1948 American Declaration on the Rights and Duties of Man.” Press Release, Climate Change in the Arctic: Human Rights of Inuit Interconnected with the World (10 December 2003). See also, Second International Indigenous Forum on Climate Change, *Declaration of Indigenous Peoples on Climate Change*, The Hague, November 11-12, 2000. Available at: <http://bocs.hu/eco-a-1.htm>

countries.<sup>45</sup> It has been correctly noted that this recommendation will not affect some of the major producers of greenhouse gasses, such as the United States.

### **WBG Accountability/Institutional Issues**

The preceding issues are all in some way related to larger issues about the role of the WBG, particularly in light of its mandate of poverty alleviation through sustainable development, its institutional standards and procedures and its accountability to not only its member states, but also to those affected by its operations. In the Final Report, particular attention is given to the WBG's safeguard policies as these are held up by the WBG as front line protection for persons, communities and peoples who may be affected by its operations.

On safeguard policies, the Final Report concludes that "The reality in the field suggests that the current Safeguard Policies have been unable to ensure that 'no harm is done' and that this is due to both poor implementation rates and deficiencies in the policies themselves."<sup>46</sup> In so concluding, it quotes a 2002 World Bank Operations Evaluation Department report, which states that "performance in the area of safeguards has been only partially satisfactory. Fundamental reform of implementation and accountability processes is crucial. ... The current system does not provide the appropriate accountability structure to meet the WBG's commitments to incorporate environmental sustainability into its core objectives and to mainstream the environment into its operations."<sup>47</sup>

Concerning safeguard policies and human rights, the Final Report recommends that the "WBG should make explicit the human rights basis for each Safeguard Policy; where a policy may lie outside international human rights law, it should be brought into line with current thinking and standards. The Safeguard Policies should become an explicit tool for ensuring that the WBG respects human rights, and the staff in extractive industries should receive adequate training to be able to implement the human rights dimensions of these policies."<sup>48</sup> It adds that "Compliance rates with existing Safeguard Policies are often far below acceptable and, in some cases, the substance of the policies is inconsistent with internationally recognized rights. Much greater emphasis needs to be placed on ensuring compliance with Safeguard Policies and the consistency of these policies with human rights."<sup>49</sup>

Discussing institutional issues in general the Final Report concludes that "crucially, WBG does not appear to be set up to effectively facilitate and promote poverty alleviation through sustainable development;"<sup>50</sup> and, "the institution itself needs to implement a number of serious reforms—changes in the composition of its portfolio, improvements and reinforced implementation of its Safeguard Policies, increased coordination across the arms of the WBG, and changes in WBG staff incentives."<sup>51</sup>

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<sup>45</sup> EIR Report, 10. The EIR found that WBG involvement in EI has led to some 100 countries 'reforming' their mining codes and investment regimes.

<sup>46</sup> *Id.* at 37.

<sup>47</sup> *Id.* quoting, A. Liebenenthal, *Promoting Environmental Sustainability in Development: An Evaluation of World Bank Performance*. Washington DC: World Bank 2002, at 21, 24.

<sup>48</sup> *Id.* at 61.

<sup>49</sup> *Id.* at 64.

<sup>50</sup> *Id.* at 41.

<sup>51</sup> *Id.* at 45.

## B The Draft Management Response to the EIR

As part of the terms of reference for the EIR, WBG management committed to providing a response to the recommendations developed by Dr. Salim prior to submitting the Final Report to its Board of Executive Directors. A draft Management Response (dMR) was 'leaked' in January 2004.<sup>52</sup> The dMR is not encouraging for those who believe that respect for human rights, including indigenous peoples' rights, is fundamental to poverty alleviation and sustainable development and requires much greater attention by the WBG. For the most part there is no substantive response to EIR recommendations on human rights and indigenous peoples' rights; the dMR repeatedly says that these are under consideration as part of other ongoing internal reviews and that a formal response or position is dependent on their outcomes. On certain specific issues, however, a response is proffered. The dMR, for instance, rejects FPIC stating that "Governments and industry do not support free prior informed consent, where this would represent a veto on development."<sup>53</sup> Instead, "The WBG will continue to aim for broad community acceptance of developments that impact them..."<sup>54</sup> and; "[d]iscussions with communities need to take place in the context of local law which may or may not give rights [of] prior informed consent ...."<sup>55</sup>

None of these three arguments is tenable. First, some governments and some industry groups do in fact support FPIC. A number of governments have included the right in their domestic legislation and have supported it in international fora.<sup>56</sup> Industry groups such as the International Petroleum Industry Environmental Conservation Association and the International Association of Oil & Gas Producers have stated, as quoted in the Final Report, that "it is important for communities to be able to give free and informed consent."<sup>57</sup> While a number of governments and EI companies are vociferously opposed to FPIC, the WBG should be questioned about whether the EI companies and governments should be allowed to veto indigenous peoples' human rights.

<sup>52</sup> *Draft Management Response, EIR Report, OED/OEG/OEU, CAO Review*, 26 January 2004. Available at: [http://www.bankwatch.org/issues/wb-imf/eir/downloads/response\\_wbg\\_eir\\_draft\\_01-04.pdf](http://www.bankwatch.org/issues/wb-imf/eir/downloads/response_wbg_eir_draft_01-04.pdf)

<sup>53</sup> *Draft Management Response*, para. 41.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at para. 1m

<sup>56</sup> See, for example, the Constitution of Ecuador 2000 and the *Philippines' Mining Code 1995, sec. 16 and Indigenous Peoples' Rights Act 1997, sec. 59*. For a judicial decision holding that FPIC is required in relation to oil concessions on indigenous lands in Colombia, see, Constitutional Court, Ruling SU-039/97, Proponent Magistrate, Antonio Barrera Carbonel. In this case, brought by the U'wa people, the Court observed that:

... the information or notification that is given to the indigenous community in connection with a project of exploration or exploitation of natural resources does not have the same value as consultation. It is necessary ... that formulas for concerted action or agreement with the community are put forward, and, finally, that the community declares, through their authorized representatives, either their consent or their dissatisfaction in relation with the project, and the way in which their ethnic, cultural, social, and economic identity is affected. *Id.* Translated in: R. Roldán, *Indigenous Peoples of Colombia and the Law. A Critical Approach to the Study of Past and Present Situations*. Gaia Foundation/COAMA/ILO: Colombia, 2000, at 104.

<sup>57</sup> IPIECA/OGP, *Key Questions in Managing Social Issues in Oil and Gas Projects*. Report No. 2.85/332, 2002. See also, IPIECA and OGP, *The Oil and Gas Industry: From Rio to Johannesburg and Beyond, Contributing to Sustainable Development*. Oxford: Words and Publications, 2002.

Second, the WBG cannot hope to gain 'broad community acceptance' if indigenous peoples and communities are from the outset told that their agreement is not an issue. As the Final Report concludes, FPIC should be seen as the principal determinant of whether there is community acceptance, or in industry terms, a social license to operate, and hence is a principal tool to be used in deciding whether to support the operation. This is all the more important given that the WBG's own performance evaluations have found that indigenous peoples' participation in WBG projects is typically "low;"<sup>58</sup> and that only 38 percent of a sample of WBG projects which applied the safeguard policy on indigenous peoples satisfactorily mitigated adverse impacts and ensured benefits for indigenous peoples.<sup>59</sup> Moreover, one review found that "Project results for [indigenous peoples'] were not as satisfactory in the energy and mining, transportation, and environment sectors, which comprised 65 percent of Bank commitments evaluated for this second phase, and include projects with significant potential to harm IP. The majority of these projects neither mitigated adverse effects on [indigenous peoples] nor ensured that they received an equitable share of benefits."<sup>60</sup> Sustainability of results for indigenous peoples in all project types was also generally much lower than overall project sustainability indicators.<sup>61</sup>

As to the third argument, it is ironic that WBG management justifies rejection of FPIC on the basis of compliance with the law. As discussed below, FPIC is an internationally guaranteed right for indigenous peoples that is a source of obligation for the vast majority of the Bank's borrowers, obligations the Bank is bound by international law not to undermine.<sup>62</sup> International law protects the rights of indigenous peoples to their traditionally used and occupied lands. These rights include FPIC, regardless of whether a state's domestic law recognizes those rights. Furthermore, existing WBG policies rightfully require borrowers to comply with conditions not established by domestic law. Indigenous peoples' right to participate, for instance, is not recognized in the laws of a number of countries, yet the WBG's present policy requires such participation in WBG-financed operations. Also, WBG policy is not to support a project that employs forced or child labour irrespective of whether national law prohibits these practices.

Finally, it is relevant in this context to note that the Bank's Operational Policy 4.01 on Environmental Assessment clearly states that "the Bank takes into account ... the obligations of the country, pertaining to project activities, under relevant international environmental treaties and agreements. The Bank does not finance project activities that would contravene such country obligations, as identified during the EA."<sup>63</sup> OP 4.36 on

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<sup>58</sup> *Implementation of Operational Directive 4.20 on Indigenous Peoples: An independent desk review* January 10, 2003, *supra* note 30.

<sup>59</sup> *Implementation of Operational Directive 4.20 on Indigenous Peoples: An Evaluation of Results* *supra* note 34, 2.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 36.

<sup>62</sup> See, *infra*, Sec. III(c).

<sup>63</sup> OP 4.10 Environmental Assessment 1999, at para. 3. Available at: <http://wblno018.worldbank.org/Institutional/Manuals/OpManual.nsf/OPolw/9367A2A9D9DAEED38525672C007D0972?OpenDocument> See also, C. Di Leva, *International Environmental Law and Development*, 10 *GEO. INT'L ENVTL. L. REV.* 501 1998; I. Shihata, *Implementation, Enforcement and Compliance with International Environmental Agreements - Practical Suggestions in Light of the World Bank's Experience*, 9 *GEO. INT'L ENVTL. L. REV.* 1996; and M.A. Bekhechi, *Some Observations Regarding Environmental Covenants and Conditionalities in World Bank Lending Activities*, in, *Max Planck*



Forestry similarly states that “The Bank does not finance projects that contravene applicable international environmental agreements.”<sup>64</sup> If this is possible with regard to environmental obligations, is there a compelling reason why human rights obligations should not be accorded equal status?

### **C The June 2004 Management Response**

On 17 June 2004, the WBG released its formal Management Response (MR) to the EIR along with a notice that its Board of Executive Directors had delayed consideration of the Final Report and Management Response pending conclusion of a 30 day long period of public comment.<sup>65</sup> While the MR as a whole deserves consideration, particularly as much of it fails to adequately address the EIR's recommendations, I will focus here only on how it addresses FPIC.

As discussed above, the EIR clearly recommends that the Bank should not fund projects unless indigenous peoples' free, prior and informed consent has been obtained. The standard proposed in the MR, however, can be boiled down to: free, prior and informed consultation resulting in informed participation that leads to “broad community acceptance” of the project. The MR adds that the “Bank Group will only support extractive industry projects that have the broad support of affected communities (including Indigenous Peoples communities). This does not mean a veto power for individuals or any group, but it does mean that the Bank Group requires a process of free, prior, and informed consultation with affected communities that leads to broad acceptance by them of the project.”<sup>66</sup> This point is repeated in the Annex, which says that “Discussions with communities should provide meaningful consultation and result in informed participation. (b) The Bank Group will support only those extractive industry projects that have the broad support of affected communities. ... Our Indigenous Peoples policy is being revised to reflect this principle, and will be discussed by the Board of Executive Directors shortly.”<sup>67</sup>

The only language in the draft Indigenous Peoples Policy (OP) that could be construed to be consistent with the above statements in the MR is in paragraph 15 (‘Disclosure and Bank Review’). Paragraph 15 reads: “Throughout this review, the Bank pays particular attention to the record and outcomes of consultations with the affected Indigenous Peoples and the social assessment as a basis for determining whether the Bank proceeds

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*Yearbook on United Nations Law*, Vol. 3, (J.A. Frowstein & R. Wolfrum eds., Kluwer Law International 1999).

<sup>64</sup> OP 4.36 Forestry 2002, at para. 6. Available at: <http://wbIn0018.worldbank.org/institutional/manuals/opmanual.nsf/o/C972D5438F4D1FB78525672C007D077A?OpenDocument> See, also, *The World Bank's New Forests Policy: An NGO Guide*. Forest Peoples Programme, April 2003. Available at: [http://forestpeoples.gn.apc.org/Briefings/World%20Bank/wb\\_forest\\_policy\\_ngo\\_guide\\_apro3\\_eng.htm](http://forestpeoples.gn.apc.org/Briefings/World%20Bank/wb_forest_policy_ngo_guide_apro3_eng.htm)

<sup>65</sup> Striking a Better Balance – The World Bank Group and Extractive Industries: The Final Report of the Extractive Industries Review. Draft World Bank Group Management Response, 4 June 2004. Available at: <http://www.worldbank.org/ogmc> WBG Management Responses to the OED/OEG/OEU and CAO reports on WBG involvement in extractive industries, supra note 4, are also located on the same page.

<sup>66</sup> *Id.* at para. 34. See, also, para. 24

<sup>67</sup> *Id.* at Annex, Part I, para. 13.

with project processing. In making this determination, the Bank also pays particular attention to the degree to which Indigenous Peoples support the project.”<sup>68</sup>

Moreover, with regard to commercial exploitation of natural resources – defined in the OP as “minerals, hydrocarbon resources, forests, water, and hunting/fishing grounds” – in indigenous peoples’ territories, paragraph 18 of the OP merely requires that “the borrower ensures that as part of the consultation process these indigenous peoples are informed of (a) their rights to such resources under statutory and customary law; (b) the scope and nature of such proposed commercial development and the parties involved or interested in such development; and (c) the potential effects of such development on their livelihoods, environments, and use of natural resources.” Indigenous peoples should also share equitably in the benefits in a culturally appropriate manner and the “benefits, compensation and rights to due process are at least equivalent to what any landowner would be entitled to in the case of commercial development on their land.”

Whether this language (“broad acceptance” or “broad support”) could amount to FPIC is dependent on how it will be operationalized in the OP itself and whether a negative formulation – ‘will support only’ or ‘will not support’ – is employed. It is equally dependent on interpreting the language ‘broad acceptance’ to include decisions reached pursuant to indigenous peoples’ customary decision making processes and whether demonstrable acceptance or support is the decisive factor in determining whether the project moves forward. The language in the OP does not presently allow for such an interpretation insofar as it requires only that the Bank “also pays particular attention to the degree to which Indigenous Peoples support the project,” thereby implying that their acceptance is one of a number of factors that will be evaluated. That this appears to be the position adopted in the MR is further illustrated in the language on involuntary resettlement, which states that “The WBG will commit to taking the community’s views on the project into account in determining whether to proceed with project processing.”<sup>69</sup>

While the MR may be viewed as an improvement over the outright rejection of FPIC in the dMR, particularly the latter’s reference to domestic law, the WBG’s seemingly cynical misappropriation and manipulation of FPIC as free, prior and informed consultation will undoubtedly be condemned by indigenous peoples. Concerns will also be raised that applying a (as yet undefined) ‘broad community acceptance’ standard undermines indigenous peoples’ internationally guaranteed right to consent to activities that affect them and equates indigenous peoples and their rights to those of any local community. In effect, this negates indigenous peoples’ self-determining status and rights by casting indigenous peoples as no more than a sub-set of local communities, a term that has little meaning and few attendant rights in international law. As discussed below, this is also contrary to a large body of jurisprudence and international practice that holds that FPIC is the standard that applies to activities affecting indigenous peoples and their territories, particularly in the context of extractive industries.

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<sup>68</sup> *Draft Operational Policy 4.10 Indigenous Peoples, 17 May 2004, Revised Consultation Draft.* Available at: [www.bicusa.org](http://www.bicusa.org)

<sup>69</sup> *Supra* note 65, at Annex, Part II, para. 8.

### III Free, Prior and Informed Consent

#### A What is FPIC?

FPIC means the consensus/consent of indigenous peoples determined in accordance with their customary laws and practices. This does not necessarily mean that every single member must agree, but rather that consensus will be determined pursuant to customary law and practice. In some cases, indigenous peoples may choose to express their consent through procedures and institutions that are not formally or entirely based on customary law and practice, such as statutory councils or tribal governments. Regardless of the nature of the process, the affected indigenous people(s) retain the right to refuse consent or to withhold consent until certain conditions are met. Consent must be obtained without coercion, prior to commencement of activities, and after the project proponent's full disclosure of the intent and scope of the activity, in language and process understandable to the affected indigenous peoples and communities.

In its procedural form, FPIC is an administrative process which enables both the affected indigenous people(s) and the project proponent(s) to put all their concerns on the table and identify solutions to problems before the affected people(s) decides on whether to give consent. It may be required in a number of project stages, i.e., options assessment, social, cultural and environmental impact assessment, exploration, exploitation or closure.<sup>70</sup>

#### B Why is FPIC important?

Threats to indigenous peoples' rights and well-being are particularly acute in relation to resource exploitation projects, regardless of whether the projects are state- or corporate-directed. Many of these projects and operations have had and continue to have a devastating impact on indigenous peoples, undermining their ability to sustain themselves physically, spiritually and culturally.<sup>71</sup> Numerous reports confirm that this experience with EI is not confined to the past and is "one of the major human rights problems faced by [indigenous peoples] in recent decades."<sup>72</sup>

The WBG has also recognized that indigenous peoples "have often been on the losing end of the development process" and that the vast majority of development benefits go to

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<sup>70</sup> See Seventh Conference of Parties to the Convention on Biological Diversity, *Decision VII/16F, Annex: The Akwe:kon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment Regarding Developments Proposed to Take Place on, or Which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*.

<sup>71</sup> Among others, T. Downing, *Indigenous Peoples and Mining Encounters: Strategies and Tactics*, Minerals Mining and Sustainable Development Project: International Institute for Environment and Development and World Business Council: London 2002. (concluding that indigenous peoples experiences with the mining industry have largely resulted in a loss of sovereignty for traditional landholders; the creation of new forms of poverty due to a failure to avoid or mitigate impoverishment risks that accompany mining development; a loss of land; short and long-term health risks; loss of access to common resources; homelessness; loss of income; social disarticulation; food insecurity; loss of civil and human rights; and spiritual uncertainty). *Id.* at 3.

<sup>72</sup> *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted pursuant to Commission resolution 2001/57*. UN Doc. E/CN.4/2002/97, at para. 56.

others.<sup>73</sup> Indeed, the WBG's first policy on indigenous peoples - *Operational Manual Statement 2.34 Tribal People in Bank-Financed Projects* – was adopted in response to “internal and external condemnation of the disastrous experiences of indigenous groups in Bank-financed projects in the Amazon region.”<sup>74</sup> Specifically on EI projects, an internal WBG review observes that mining and energy projects “risk and endanger the lives, assets, and livelihoods of [indigenous peoples]. Moreover, modern technology allows interventions in hitherto remote areas, causing significant displacement and irreparable damage to IP land and assets. In this context, IP living on these remote and resource rich lands are particularly vulnerable, because of their weaker bargaining capacity, and because their customary rights are not recognized in several countries.”<sup>75</sup>

Writing as UN Special Rapporteur on indigenous land rights, Daes observes that

The legacy of colonialism is probably most acute in the area of expropriation of indigenous lands, territories and resources for national economic and development interests. In every sector of the globe, indigenous peoples are being impeded in every conceivable way from proceeding with their own forms of development, consistent with their own values, perspectives and interests.

Much large-scale economic and industrial development has taken place without recognition of and respect for indigenous peoples' rights to lands, territories and resources. Economic development has been largely imposed from outside, with complete disregard for the right of indigenous peoples to participate in the control, implementation and benefits of development.<sup>76</sup>

For indigenous peoples, secure and effective collective property rights are fundamental to their economic and social development, to their physical and cultural integrity, and to their livelihoods and sustenance. Secure land and resource rights are also essential for the maintenance of their worldviews and spirituality and, in short, to their very survival as viable territorial and distinct cultural collectivities.<sup>77</sup> The Inter-American Court of Human Rights recognized this in 2001, stating that:

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<sup>73</sup> *The World Bank Participation Source Book*. World Bank: Washington DC 1996, at 251.

<sup>74</sup> B. Kingsbury, Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples, in, *The Reality Of International Law: Essays In Honour Of Ian Brownlie* 324 (G.S. Goodwin-Gill & S. Talmon eds., Clarendon Press 1999).

<sup>75</sup> *Supra* note 34, at 26.

<sup>76</sup> *Indigenous people and their relationship to land. Final working paper prepared by Mrs. Erica-Irene A. Daes, Special Rapporteur*. UN Doc. E/CN.4/Sub.2/2001/21. at paras. 49-50.

<sup>77</sup> *Supra* note 72, para. 39 -- “From time immemorial indigenous peoples have maintained a special relationship with the land, their source of livelihood and sustenance and the basis of their very existence as identifiable territorial communities.” – and “land, territory and resources together constitute an essential human rights issue for the survival of indigenous peoples...”, at para. 57. According to the UN Rapporteur on indigenous land rights: “(i) a profound relationship exists between indigenous peoples and their lands, territories and resources; (ii) this relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities; (iii) the collective dimension of this relationship is significant; and (iv) the intergenerational aspect of such a relationship is also crucial to indigenous peoples' identity, survival and cultural viability.” *Indigenous people and their relationship to land. Final working paper prepared by Mrs. Erica-Irene A. Daes, Special Rapporteur*. UN Doc. E/CN.4/Sub.2/2001/21. at para. 20.

the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element that they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.<sup>78</sup>

This multifaceted nature of indigenous peoples' relationship to land, as well as the relationship between development and territorial rights, was emphasized by Mary Robinson in her December 2001 Presidential Fellow's Lecture at the World Bank. She opines that, for indigenous peoples:

economic improvements cannot be envisaged without protection of land and resource rights. Rights over land need to include recognition of the spiritual relation indigenous peoples have with their ancestral territories. And the economic base that land provides needs to be accompanied by a recognition of indigenous peoples' own political and legal institutions, cultural traditions and social organizations. Land and culture, development, spiritual values and knowledge are as one. To fail to recognize one is to fail on all.<sup>79</sup>

In short, without secure and enforceable rights to lands, territories and resources, including the right to control activities affecting them, indigenous peoples' means of subsistence, their identity and survival, and their socio-cultural integrity and economic security are permanently threatened. There is therefore a complex of interdependent human rights all converging on and inherent to indigenous peoples' various relationships with their traditional lands and territories – lands and territories that form “the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival”<sup>80</sup> – as well as their status as self-determining entities that necessitates a very high standard of affirmative protection.<sup>81</sup> That standard is FPIC, which is all the more

<sup>78</sup> *The Mayagna (Sumo) Awas Tingni Community Case*, Inter-Am. C.H.R. Series C No. 79, at para. 149 (August 31, 2001). See, also, *Report on the Situation of Human Rights in Ecuador*, Inter-Am. C.H.R. 114-115, OEA/Ser.L/V/II.96, doc. 10 rev. 1 (1997) “For many indigenous cultures, continued utilization of traditional collective systems for the control and use of territory are essential to their survival, as well as to their individual and collective well-being; *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, Doc 59 rev., (2000), at Ch. X, para. 16 – “Land, for the indigenous peoples, is a condition of individual security and liaison with the group. The recovery, recognition, demarcation and registration of the lands represents essential rights for cultural survival and for maintaining the community's integrity.” See also, *in accord*, *Third Report on the Human Rights Situation of Human Rights in Paraguay*, Inter-Am. C.H.R., OEA/Ser.L/V/II.110 Doc.52 (2001), Ch. IX, para. 47

<sup>79</sup> *Bridging the Gap Between Human Rights and Development: From Normative Principles to Operational Relevance*. Lecture by Mary Robinson, United Nations High Commissioner for Human Rights, World Bank, Washington D.C., Preston Auditorium, 3 December 2001.

<sup>80</sup> *Provisional Measures Requested by the Representatives of the Victims with Respect to the Republic of Nicaragua*, Inter-Am. C.H.R. para. 7 (6 September 2002).

<sup>81</sup> Among others, *Report No. 96/03, Maya Indigenous Communities and their Members (Case 12.053 (Belize))*, 24 October 2003, paras. 111-19, 141. G. Handl, *Indigenous Peoples' Subsistence Lifestyle as an Environmental Valuation Problem*, in *Environmental Damage in International and Comparative Law. Problems of Definition and Valuation* 85-110, at 95 (footnotes omitted) (M. Bowman and A. Boyle eds., OUP 2002)(arguing “there can be little room for doubt that there exists today a general consensus among states that the cultural identity of traditional indigenous peoples and local communities warrants affirmative protective measures by states, and that such measures be extended to all those elements of the natural environment whose preservation or protection is essential for the groups' survival as culturally distinct peoples and communities”). See also Ruling SU-039/97 [Colombian Constitutional Court]. Proponent Magistrate, Antonio Barrera Carbonel, states that:

necessary in relation to EI that have proved in most cases to be highly prejudicial to indigenous peoples' rights and well being.

In addition to respect for human rights guarantees, there are also a number of practical reasons why FPIC is necessary for indigenous peoples that are clearly related to human rights guarantees and the underlying rationale for protection. For example, decisions about whether and how to exploit natural resources are normally justified in the national interest, which is generally interpreted as the interest of the majority. The result is that the rights and interests of unrepresented groups, such as indigenous peoples and others, will often be subordinated to the majority interest and conflict, sometimes violent, often ensues.<sup>82</sup> FPIC (in theory at least) guarantees that the rights and interests of indigenous peoples will be accounted for and respected and minimizes potential for conflict. It also provides the basis for ensuring that indigenous peoples will benefit from any extractive project on their lands and that negative impacts will be properly assessed, avoided and mitigated.

Finally, it may be argued that FPIC makes economic sense given the costs often incurred in forcing indigenous peoples (and others) to accept EI projects (police and military expenditures, for instance), and related to litigation. According to some estimates, restarting the Panguna copper mine in Bougainville, "where corporate practices were directly implicated in provoking civil war, allegedly cost [the mining company,] Rio Tinto, \$3 billion."<sup>83</sup> WBG studies, as well as other studies, have recognised the economic costs of discrimination against indigenous peoples.<sup>84</sup> Companies also often place an economic value on their reputation, i.e. reputational costs, which may be severely damaged in conflicts with indigenous peoples. None of these costs are factored into cost-benefit analyses of WBG investments in EI.

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In the Court's view, the participation of indigenous communities in decisions that affect them in relation with the exploitation of natural resources, presents a peculiarity, the observed fact or circumstance that the participation referred to acquires, through the consultation mechanism, the connotation of a fundamental right, since it sets itself as an instrument essential for the preservation of the ethnic, social, economic and cultural integrity of indigenous communities, and therefore for ensuring their survival as a social group. Consequently, participation is not restricted to merely an intervention in administrative actions aimed at ensuring the right of defense of those who will be affected by the granting of an environmental license .... It has in fact a much greater significance on account of the superior interests which it aims to protect, as those are relating to the definition of the fate and security of the subsistence of the communities in question. *Id.* Translated in: R. Roldán, *Indigenous Peoples of Colombia and the Law. A Critical Approach to the Study of Past and Present Situations*. Gaia Foundation/COAMA/ILO: Colombia, 2000, at 103.

<sup>82</sup> For an extreme example, see, A. Regan, *Causes and Course of the Bougainville Conflict*, 33 *Journal of Pacific History* 269 (1998).

<sup>83</sup> J. Sherman, *Private Sector Actors in Zones of Conflict: Research Challenges and Policy Responses*, 2001. Available at: [http://www.stanford.edu/~dusan/IPA\\_Fafo.doc](http://www.stanford.edu/~dusan/IPA_Fafo.doc) For the history of the Bougainville conflict, see, *Id.*

<sup>84</sup> H.A. Patrinos, *The Costs of Discrimination in Latin America*. Human Capital Development and Operations Policy, HCO Discussion Papers. Washington DC: World Bank. See also, G. Psacharopoulos & H.A. Patrinos (eds.), *Indigenous People and Poverty in Latin America: An Empirical Analysis*. Washington, DC: World Bank, 1994.

## C International Law and Indigenous Peoples' Rights to FPIC

International human rights law places clear and substantial obligations on states in connection with resource exploitation on indigenous lands and territories. Consistent with the Final Declaration of the 1993 Vienna World Conference on Human Rights,<sup>85</sup> the UN Human Rights Committee has stated that a state's freedom to encourage economic development is limited by the obligations it has assumed under international human rights law.<sup>86</sup> The Inter-American Commission on Human Rights has observed that state policy and practice concerning resource exploitation cannot take place in a vacuum that ignores its human rights obligations,<sup>87</sup> as have the African Commission on Human and Peoples' Rights<sup>88</sup> and other intergovernmental human rights bodies.<sup>89</sup>

In contemporary international law, indigenous peoples' have the right to participate in decision making and to give or withhold their consent to activities affecting their traditional lands, territories and resources. Consent must be freely given, obtained prior to final authorization and implementation of activities and be founded upon an understanding of the full range of issues implicated by the activity or decision in question: hence the formulation, free, prior and informed consent or prior informed consent.

### **Textual Expressions**

Very few international instruments, expressly or impliedly, contain language detailing the right of indigenous peoples to FPIC. Although not spelled out, FPIC is certainly required pursuant to the right to self-determination as set forth in common article 1 of the International Covenants on Human Rights as part of indigenous peoples' right to freely determine their political status, freely pursue the economic, social and cultural development and freely dispose of their natural wealth and resources.

While the draft UN Declaration on the Rights of Indigenous Peoples, which restates the right to self-determination and specifies that this is also a right of indigenous peoples, has yet to be approved, both the UN Human Rights Committee and the Committee on

<sup>85</sup> Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, Part I, at para. 10. UN Doc. A/CONF.157/23, (1993).

<sup>86</sup> *Id.*

<sup>87</sup> *Report on the Situation of Human Rights in Ecuador*. OEA/Ser.L/V/II.96, Doc. 10 rev. 1 1997, 89. *See also, Report No. 96/03, Maya Indigenous Communities and their Members (Case 12.053 (Belize))*, 24 October 2003, at para. 149 – “development activities must be accompanied by appropriate and effective measures to ensure that do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities and the environment upon which they depend for their physical, cultural and spiritual well-being.”

<sup>88</sup> *The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria, (Communication No. 155/96)*, at para. 58 and 69 (stating that “The intervention of multinational corporations may be a potentially positive force for development if the State and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities.”)

<sup>89</sup> Among others, see, UN Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples*. Adopted at the Committee's 1235th meeting, 18 August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4.; and, UN Committee on Economic, Social and Cultural Rights, General Comment No. 7, The Right to Adequate Housing (Art. 11(1) of the Covenant): forced evictions (1997). In, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*. UN Doc. HRI/GEN/1/Rev.5, 26 April 2001, pp. 49-54, at para. 18; and *Day of General Discussion on the Rights of Indigenous Children, Recommendations*. Committee on the Rights of the Child, 34<sup>th</sup> Session, 15 Sept. – 3 Oct., 2003, at para.4.

Economic, Social and Cultural Rights have applied the right to indigenous peoples with a particular emphasis on resource rights. They have both found, for instance, that *unilateral* extinguishment of indigenous peoples' rights to lands and resources contravenes article 1(2).<sup>90</sup> The African Commission on Human and Peoples' Rights also found a violation of this right, as expressed in Article 21 of the African Charter, in the 2002 *Ogoni Case*.<sup>91</sup> In its complaints-based jurisprudence, the HRC has also related the right to self-determination to the right of indigenous peoples (minorities) to enjoy their culture under Article 27 of the ICCPR.<sup>92</sup>

International Labour Organization Convention No. 169, presently the only binding instrument exclusively concerned with indigenous peoples' rights, employs different standards ranging from consultation to participation and, in the case of relocation, informed consent. Article 6(2) requires that consultation be undertaken "in good faith ... in a form appropriate to the circumstances, with the objective of achieving agreement or consent." This does not require consent, but does require that it be the objective of consultations. This is an often overlooked, including by the ILO when examining complaints filed by indigenous peoples,<sup>93</sup> but it is an important requirement of the Convention that establishes, at a minimum, a moral obligation to seek and obtain consent.<sup>94</sup> This provision must be read in connection with article 7(1), which provides that "[t]he people concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development."

The Convention on Biological Diversity, article 8(j), requires that the traditional knowledge of indigenous and local communities may only be used with their 'approval', which has subsequently been interpreted to mean with their prior informed consent or their FPIC.<sup>95</sup> This principle has also found its way into ongoing CBD work on Access and

<sup>90</sup> Among others, *Concluding observations of the Human Rights Committee: Canada. 07/04/99*, para. 8. UN Doc. CCPR/C/79/Add.105. (Concluding Observations/Comments) (1999) and *Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada. 10/12/98*. E/C.12/1/Add.31, para. 18.

<sup>91</sup> *Supra* note 88, para. 58. The Ogoni self-identify as indigenous and are active participants in indigenous peoples meetings and events.

<sup>92</sup> *Apirana Mahuika et al. vs. New Zealand (Communication No. 547/1993, 15/11/2000)*, UN Doc. CCPR/C/70/D/547/1993 (2000), at para. 9.2.

<sup>93</sup> See, for instance, *Report of the Committee set up to examine the representation alleging non-observance by Bolivia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Bolivian Central of Workers (COB)*. Doc. GB.272/8/1; GB.274/16/7.

<sup>94</sup> See *Report of the Committee of Experts set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL)*. Doc. GB.277/18/4, GB.282/14/2, submitted 2000, at para. 38 – "The Committee considers that the concept of consulting the indigenous communities that could be affected by the exploration or exploitation of natural resources includes establishing a genuine dialogue between both parties characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord."

<sup>95</sup> Report of the Second Meeting of the Ad Hoc, Open-Ended, Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity. UNEP/CBD/WG8J/2/6/Add.1, 27 November 2001, at 11.



Benefit Sharing,<sup>96</sup> CBD guidelines on environmental and social impact assessment<sup>97</sup> as well as regional standards on access and benefit sharing adopted by the African Union<sup>98</sup> and the Andean Community.<sup>99</sup> Similar language is also found in the Convention to Combat Desertification.<sup>100</sup>

### **Jurisprudence**

There is considerably more jurisprudence on FPIC than there is text in international instruments. For example, observing that indigenous peoples “have lost their land and resources to colonists, commercial companies and State enterprises,”<sup>101</sup> the Committee on the Elimination of Racial Discrimination called upon states-parties to “ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent.”<sup>102</sup> It relates the right to informed consent to the right to participate found in article 5(c) of the Convention and has made repeated reference to the preceding language in its decisions and concluding observations.<sup>103</sup>

In 2001, the UN Committee on Economic, Social and Cultural Rights noted “with regret that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem.”<sup>104</sup> It then recommended that the state “ensure the participation of indigenous peoples in decisions affecting their lives. The Committee particularly urges the State party to consult and seek the consent of the indigenous peoples concerned ....”<sup>105</sup>

The Inter-American Commission on Human Rights (IACHR) has developed considerable jurisprudence on FPIC. In 1999, finding that Nicaragua had violated, among others, the right to property by granting logging concessions on indigenous lands in Nicaragua, the Commission held that the State “is actively responsible for violations of the right to property ... by granting a concession ... without the consent of the Awas Tingni indigenous community.”<sup>106</sup>

<sup>96</sup> See CBD Conference of Parties Decision V/26A, para. 11

<sup>97</sup> *Supra*, note 70.

<sup>98</sup> Organization of African Unity / Scientific, Technical and Research Commission, *Declaration and Draft Legislation on Community Rights and Access to Biological Resources* (Addis Ababa, Ethiopia, 1998).

<sup>99</sup> Andean Community, *Decision 391, Common Regime of Access to Genetic Resources, of the Commission of the Cartagena Agreement*, July 1996.

<sup>100</sup> *Convention to Combat Desertification, particularly in Africa* 1994, Article 16(g).

<sup>101</sup> *General Recommendation XXIII (51) concerning Indigenous Peoples*. Adopted at the Committee's 1235th meeting, 18 August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4, at para. 3.

<sup>102</sup> *Id.* at para. 4(d).

<sup>103</sup> See, for instance, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Botswana. 23/08/2002* and, *Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America. 14/08/2001*.

<sup>104</sup> *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia. 30/11/2001. E/C.12/Add. 1/74*, at para. 12

<sup>105</sup> *Id.* at para. 33.

<sup>106</sup> Inter-Am. C.H.R., Report No. 27/98 (Nicaragua), at para. 142, *cited in*, The Mayagna (Sumo) Awas Tingni Community Case, Judgment on the Preliminary Objections of February 1, 2000; Inter-Am. C.H.R. Ser. C, No. 66 (2000). See also Case 11.577 Inter-Am. C.H.R., (Awas Tingni Indigenous Community -

In the 2002 *Mary and Carrie Dann Case*, the IACHR found that Inter-American human rights law requires “special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation.”<sup>107</sup> In this case, the IACHR also declared the existence of a number of “general international legal principles applicable in the context of indigenous human rights,” including:

where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property.<sup>108</sup>

Most recently, the IACHR stated that:

Articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed consent on the part of the indigenous community as a whole.<sup>[109]</sup> This requires, at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives. In the Commission’s view, these requirements are equally applicable to decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories.<sup>110</sup>

Indigenous peoples’ right to free and informed consent is also embraced in the draft declarations on the rights of indigenous peoples pending at the UN and OAS. Though still preliminary, these declarations are increasingly cited as expressions of principles of customary international law. Article 30 of the UN draft Declaration provides that:

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that states obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

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Nicaragua), *Annual report of the IACHR*. OEA/Ser.L/V/II.102, Doc.6 rev., (Vol. II), 1067, para. 108 (April 16, 1999).

<sup>107</sup> Inter-Am. C.H.R., *Report N° 75/02*, Case N° 11.140, *Mary and Carrie Dann (United States)*, Dec. 27, 2002. OEA/Ser.L/V/II.116, Doc. 46, at para. 131.

<sup>108</sup> *Id.* at para. 130. (footnotes omitted). General principles of international law refer to “rules of customary law, to general principles of law as in Article 38(1)(c) [of the Statute of the International Court of Justice], or to logical propositions resulting from judicial reasoning on the basis of existing pieces of international law and municipal analogies.” I. Brownlie, *Principles of Public International Law* 19 (4th ed. 1990)

<sup>109</sup> *In accord, Id.* at para. 140.

<sup>110</sup> *Report No. 96/03, Maya Indigenous Communities and their Members (Case 12.053 (Belize))*, 24 October 2003, at para. 141 (footnotes omitted).

While the obligations incumbent on states have traditionally been the focus of international human rights law, there is strong evidence in contemporary law that obligations to respect human rights can apply to non-state actors including multinational corporations.<sup>111</sup> This issue is very relevant in relation to the private sector arm of the WBG, the IFC and the MIGA. It is also very relevant for indigenous peoples as most of the EI projects affecting them are conducted by private corporate entities authorized by the state.

The approach adopted by the respective instruments above is consistent with the observations of the UN Centre for Transnational Corporations in a series of reports that examine the investments and activities of multinational corporations on indigenous territories.<sup>112</sup> The final report concluded that multinational companies' "performance was chiefly determined by the quantity and quality of indigenous peoples' participation in decision making" and "the extent to which the laws of the host country gave indigenous peoples the right to withhold consent to development...."<sup>113</sup>

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<sup>111</sup> The Universal Declaration of Human Rights for instance, speaks of the obligations of individuals and 'every organ of society' and Article 30 provides that "Nothing in this Declaration may be interpreted as implying for any [s]tate, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein." See, also, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. 1), 1992; *Copenhagen Declaration and Programme of Action*, UN Doc. A/CONF. 166/9, 1995; M. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*. The Hague: Kluwer Law International (1999); J.R. Paul, Holding Multinational Corporations Responsible Under International Law 24 *Hastings Int'l. & Comp. Law Rev.* 285 (2001); Patrick Macklem, Indigenous Rights and Multinational Corporations at International Law, 24 *Hastings Int'l. and Comp. Law Rev.* 475 (2001); and, B. Frey, The Legal and Ethical Responsibilities of Transnational Corporations in the Protections of International Human Rights, 6 *Minn. J. Global Trade* 153 (1996)

<sup>112</sup> The CTC reported to the Working Group four times: proposing methodology, and a draft questionnaire for distribution to Indigenous Peoples ( UN Doc. E/CN.4/Sub.2/AC.4/1990/6); a preliminary report (UN Doc. E/CN.4/Sub.2/1991/49); a report focusing on the Americas (UN Doc. E/CN.4/Sub.2/1992/54) and; a report focusing on Asia and Africa, summarizing the findings of all reports and making recommendations "to mitigate the adverse impacts of TNCs on indigenous peoples' lands, and increase indigenous peoples' participation in relevant government and TNC decision-making." (UN Doc. E/CN.4/Sub.2/1994/40)

<sup>113</sup> *Report of the Commission on Transnational Corporations to the Working Group on Indigenous Populations*. UN Doc. E/CN.4/Sub.2/1994/40, at para. 20.

<p>A 2001 UN workshop on indigenous peoples and natural resources development reiterated and elaborated upon this conclusion, stating in its conclusions that the participants, which included industry representatives:</p> <p>recognized the link between indigenous peoples' exercise of their right to self determination and rights over their lands and resources and their capacity to enter into equitable relationships with the private sector. It was noted that indigenous peoples with recognized land and resource rights and peoples with treaties, agreements or other constructive arrangements with States, were better able to enter into fruitful relations with private sector natural resource companies on the basis of free, prior, informed consent than peoples without such recognized rights.<sup>114</sup></p> <p>The recent UN Sub-Commission on the Promotion and Protection of Human Rights' <i>Norms on Transnational Corporations</i> are more direct:</p> <p>Transnational corporations and other business enterprises shall respect the rights of local communities affected by their activities and the rights of indigenous peoples and communities consistent with international human rights standards.... They shall also respect the principle of free, prior and informed consent of the indigenous peoples and communities to be affected by their development projects.<sup>115</sup></p> <p>Similar statements on FPIC have been made by UN Special Rapporteurs on indigenous land rights, treaties concluded between states and indigenous peoples, and indigenous peoples' intellectual and cultural heritage, as well as by the Commission on Human Rights' Special Rapporteur on situation of the rights and fundamental freedoms of indigenous people.<sup>116</sup> The UN Working Group on Indigenous</p>	<p><b>International Acceptance of Indigenous Peoples' Right to FPIC<sup>119</sup></b></p> <p>UN Committee on the Elimination of Racial Discrimination</p> <p>UN Committee on Economic, Social and Cultural Rights</p> <p>UN Sub-Commission on Promotion and Protection of Human Rights</p> <p>UN Permanent Forum on Indigenous Issues</p> <p>UN Working Group on Indigenous Populations</p> <p>UN Development Programme</p> <p>UN Centre for Transnational Corporations</p> <p>UN Commission on Human Rights, Special Rapporteur on situation of the rights and fundamental freedoms of indigenous people</p> <p>Convention on Biological Diversity</p> <p>Convention to Combat Desertification, particularly in Africa</p> <p>Inter-American Commission on Human Rights</p> <p>Inter-American Development Bank</p> <p>Andean Community</p> <p>European Council of Ministers</p> <p>European Commission</p> <p>Organization of African Unity</p> <p>World Commission on Dams</p>
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<sup>114</sup> *Report of the Workshop on Indigenous Peoples, Private Sector Natural Resource, Energy, Mining Companies and Human Rights*. Geneva, 5-7 December 2001. E/CN.4/Sub.2/AC.4/2002/3, 3 (2002).

<sup>115</sup> *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/38/Rev.2, para. 10(e) (2003).

<sup>116</sup> *See, Indigenous people and their relationship to land. Final working paper prepared by Mrs. Erica-Irene A. Daes, Special Rapporteur*. UN Doc. E/CN.4/Sub.2/2001/21; *Study on treaties, agreements and other constructive arrangements between States and indigenous populations. Final report prepared by Miguel Alfonso Martínez, Special Rapporteur*. UN Doc. E/CN.4/Sub.2/AC.4/1998/CRP.1 (1998); *Study on the protection of the cultural and intellectual property of indigenous peoples, by Erica-Irene Daes,*

<p>Populations, pursuant to its standard setting mandate, is commencing the elaboration of a legal commentary on FPIC in relation to development activities affecting indigenous peoples' lands and natural resources.<sup>117</sup> A working paper will be submitted by one of its members and discussed at the 22<sup>nd</sup> session in July 2004. The UN Permanent Forum on Indigenous Issues has also supported the right and has proposed that a Working Group be established to provide guidance on its implementation.<sup>118</sup></p>	<p>World Bank Extractive Industries Review IUCN Vth World Parks Congress Forest Stewardship Council World Wildlife Fund International Petroleum Industry Environmental Conservation Association and the International Association of Oil &amp; Gas Producers</p>
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Finally, both general and treaty-based international law requires indigenous peoples' FPIC in connection with resettlement.<sup>120</sup> As early as 1984, the IACHR found that "The preponderant doctrine" holds that the principle of consent is of general application to cases involving relocation.<sup>121</sup> Involuntary resettlement of indigenous peoples is not however prohibited by WBG policy. OP 4.12 on Involuntary Resettlement provides that the WBG will finance activities involving resettlement, even resulting in "significant adverse impacts on [indigenous peoples'] cultural survival," if it is satisfied that the borrower has explored all feasible project design alternatives.<sup>122</sup>

From the preceding it can be seen that FPIC is an established feature of international human rights norms and standard setting activities pertaining to indigenous peoples. Opponents of FPIC argue that it conflicts with States' powers of eminent domain and is therefore unacceptable. However, eminent domain is subject to human rights law in the same way as any other prerogative of state and, therefore, should not be granted any special status or exemption, in this case, to justify denial of the right of FPIC.<sup>123</sup> The same

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*Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities and Chairperson of the Working Group on Indigenous Populations.* UN Doc. E/CN.4/Sub.2/1993/28; *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted pursuant to Commission resolution 2001/57.* UN Doc. E/CN.4/2002/97.

<sup>117</sup> *Report of the Working Group on Indigenous Populations on its twenty-first session.* UN Doc. E/CN.4/Sub.2/2003/22, para. 111 (2003).

<sup>118</sup> *Report of the Permanent Forum on Indigenous Issues on its Second Session.* UN Doc. E/2003/43; E/C.19/2003/22, at para. 36.

<sup>119</sup> 'Acceptance' here does not imply that these institutions have accepted the right across the board, but rather, that in at least one official instrument or policy, general and/or sectoral, the right is recognized. The Inter-American Development Bank, for instance, has accepted the right in its 'Strategies and Procedures on Socio-Cultural Issues as Related to the Environment' and its policy on involuntary resettlement, but not yet otherwise. It has also included FPIC in its Profile paper on an Operational Policy on Indigenous Peoples, see, *infra*, note 128.

<sup>120</sup> Among others, ILO Convention 107, art. 12, ILO Convention No. 169, art. 16(2), draft UN Declaration, art. 10, Proposed American Declaration, art. XVIII(6), and Committee on the Elimination of Racial Discrimination, General Recommendation XXIII.

<sup>121</sup> *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser.L/V/II.62, doc. 26. (1984), 120.

<sup>122</sup> OP 4.12 Involuntary Resettlement 2001 at para. 9. Available at: <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/o/CA2D01A4D1BDF58085256B19008197F6?OpenDocument>

<sup>123</sup> See, *supra*, notes 85-89 and accompanying text.

may also be said of the argument that FPIC contravenes state sovereignty in general, including state sovereignty over natural resources. As stated by Judge Weeramantry of the International Court of Justice, “In its ongoing development, the concept of human rights has long passed the stage when it was a narrow parochial concern between sovereign and subject. ... [T]here is not even the semblance of a suggestion in contemporary international law that [human rights] obligations amount to a derogation of sovereignty.”<sup>124</sup>

## D FPIC in Development Standards

A number of intergovernmental development agencies and international financial institutions have incorporated FPIC language into their policies and programmes on indigenous peoples. I have included these here as they represent evidence of state practice.

The United Nations Development Programme's official policy on indigenous peoples states unequivocally that the “UNDP promotes and supports the right of indigenous peoples to free, prior informed consent with regard to development planning and programming that may affect them.”<sup>125</sup> The policy grounds UNDP's support for FPIC in international human rights law. The Inter-American Development Bank's 1990 *Strategies and Procedures on Socio-Cultural Issues as Related to the Environment* provides that “In general the IDB will not support ... projects affecting tribal lands, unless the tribal society is in agreement....”<sup>126</sup> The IDB is presently formulating a binding operational policy on indigenous peoples. Preliminary strategy papers on this policy include FPIC.<sup>127</sup> FPIC is already included in the IDB's policy on Involuntary Resettlement.<sup>128</sup>

<sup>124</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Separate Opinion of Judge Weeramantry, § 2 (1996) at <http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyframe.htm>. The Committee on the Elimination of Racial Discrimination, recently concluded that “development objectives are no justification for encroachments on human rights, and that along with the right to exploit natural resources there are specific, concomitant obligations towards the local population....” *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname*. CERD/C/64/CO/9/Rev.2, para. 15 (2004). The Committee also stated that “While noting the principle set forth in article 41 of the Constitution that natural resources are the property of the nation and must be used to promote economic, social and cultural development, the Committee points out that this principle must be exercised consistently with the rights of indigenous and tribal peoples.” *Id.* at para. 11.

<sup>125</sup> *UNDP and Indigenous Peoples: A Policy of Engagement*, paras. 26-30 (2001).

<sup>126</sup> Inter-American Development Bank, *IDB Resource Book On Participation*, Annex, Strategies and Procedures on Socio-Cultural Issues as Related to the Environment. (1990)

<sup>127</sup> Inter-American Development Bank, *Profile on an Operational Policy for Indigenous Peoples*, 13 February 2004. Available at: <http://www.iadb.org/sds/doc/ind-GN2296E.pdf> The profile states: “*Meaningful Consultation and Participation of Indigenous Stakeholders*. The policy would provide that indigenous peoples should participate meaningfully in pertinent decisions that affect them throughout the project cycle, and should not intentionally or inadvertently be excluded from projects that have the potential to benefit them. The policy would also address consultation and participation requirements, consensus building and conflict resolution mechanisms, and will consider the principle of free, prior and informed consent of indigenous stakeholders, in a manner consistent with international agreements in this area.

<sup>128</sup> Inter-American Development Bank, *Operational Policy 710 on Involuntary Resettlement* (1998), Section IV, para. 4

The European Union Council of Ministers' 1998 Resolution entitled, *Indigenous Peoples within the framework of the development cooperation of the Community and Member States* provides that "indigenous peoples have the right to choose their own development paths, which includes the right to object to projects, in particular in their traditional areas."<sup>129</sup> The EU interprets this language to be the equivalent of FPIC.<sup>130</sup> Additionally, in October 2003, the European Council and Commission approved, as part of the *Second Northern Dimension Action Plan*, the following language: "Strengthened attention to be paid by all Northern Dimension partners to indigenous interests in relation to economic activities, and in particular extractive industry, with a view to protecting inherited rights of self-determination, land rights and cultural rights of indigenous peoples of the region."<sup>131</sup> As noted above, FPIC is implicit in and fundamental to the right to self-determination.

The UN Permanent Forum on Indigenous Issues, established in 2001 is mandated to coordinate system-wide attention to indigenous peoples' issues within the United Nations. It has taken a strong interest in FPIC, which it says "has emerged as the desired standard to be applied in protecting and promoting [indigenous peoples'] rights in the development process."<sup>132</sup> The PFII has also taken an interest in WBG policies as they relate to indigenous peoples, recommending in 2003, reiterated verbatim in 2004, that the WBG

Continue to address issues currently outstanding, including Bank implementation of international customary laws and standards, in particular human rights instruments, full recognition of customary land and resource rights of indigenous peoples, recognition of the right of free, prior informed consent of indigenous peoples regarding development projects that affect them, and prohibition of the involuntary resettlement of indigenous peoples.<sup>133</sup>

The EIR specifically proposed that the WBG collaborate with the PFII to operationalize and incorporate FPIC into its policies and practice.<sup>134</sup>

In preparation for its 3rd session, the PFII distributed a questionnaire to all UN system 'Indigenous Peoples Focal Points' in order to gather information about "how the principle of FPIC is understood and applied by United Nations programmes, funds, agencies."<sup>135</sup> Of the 18 UN organs that received the questionnaire, 10 replied. The WBG was conspicuously absent, especially considering its membership in the PFII's Inter-Agency Support

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<sup>129</sup> European Union, Council of Ministers Resolution, *Indigenous Peoples within the framework of the development cooperation of the Community and Member States* (1998).

<sup>130</sup> T. Griffiths, *A Failure of Accountability. Indigenous peoples, human rights and development agency standards: A reference tool and comparative review*. Forest Peoples Programme, Moreton-in-Marsh 2003, 28, 29, 46, 62. Available at: [www.forestpeoples.org/](http://www.forestpeoples.org/)

<sup>131</sup> European Union, *Second Northern Dimension Action Plan 2004-06*, 18 October 2003, at 21 Available at: [http://europa.eu.int/comm/external\\_relations/north\\_dim/ndap/ap2.htm](http://europa.eu.int/comm/external_relations/north_dim/ndap/ap2.htm)

<sup>132</sup> UN Permanent Forum on Indigenous Issues, *Inter-agency Support Group on Indigenous Issues Report on Free Prior and Informed Consent\* Advanced Version*, 3rd Session, 2004, at para. 1. Available at: <http://www.un.org/esa/socdev/pfii/documents/other%20docs/Doc%20Report%2001%20FPIC.htm>

<sup>133</sup> *Report of the Permanent Forum on Indigenous Issues on its Second Session*. UN Doc. E/2003/43; E/C.19/2003/22, at para. 33.

<sup>134</sup> EIR Report, 50.

<sup>135</sup> *Id.* at para. 3.

Group.<sup>136</sup> While none of the responding organs had an official, working definition of FPIC, all recognized it as being embedded in the human rights framework and most maintained, while not without challenges, that they “to a large extent implemented [FPIC] on an ad-hoc basis in line with the general guidelines, legal instruments and principles through which they work.”<sup>137</sup> A cursory reading of some of the responses however shows that some of the organs confuse FPIC with consultation and participation.

### **Concluding Remarks**

The preceding discussion of FPIC should be read in light of the failure of most states to recognize the rights of indigenous peoples to subsoil minerals and other resources pertaining to their traditional lands and territories, particularly as FPIC is viewed by some as a mechanism to avoid much more sensitive and politically charged discussions about indigenous ownership of the subsoil. As discussed below, international human rights bodies and tribunals have consistently held that the collective rights of indigenous peoples to their traditional lands and resources must be recognized and protected. These rights exist absent formal recognition by the state, are in large measure determined by indigenous peoples' laws, customs and usages, and unilateral extinguishment has been determined to violate, among others, the right to self-determination and the prohibition of racial discrimination.<sup>138</sup> These norms have been developed in part to address the legacy of historic injustices dating back to the early days of colonialism.

In the language employed in the various international instruments and jurisprudence the term ‘resources’ is used without qualification or explanation. Without evidence to the contrary – see, ILO 169, article 15(2), for instance, which provides for “cases in which the State retains the ownership of mineral or sub-surface resources” – ‘resources’ should presumptively be understood to include subsoil resources, particularly as these resources were unilaterally expropriated by colonial powers and their successors in the same manner that surface rights were deemed vested in the sovereign in the colonial era.<sup>139</sup> International law has rejected this unilateral expropriation with regard to surface rights; the same analysis should be applied to subsoil rights. The South African Constitutional Court, among others, reached this conclusion in 2003, holding that under indigenous law and by virtue of traditional occupation and use ownership of subsoil minerals may also vest collectively in indigenous peoples.<sup>140</sup>

<sup>136</sup> The following organs gave substantive responses to the questionnaire (two others responded that FPIC was not relevant to their operations): UNDP, UNFPA, FAO, ILO, UNITAR, IFAD, OHCHR, WHO

<sup>137</sup> *Supra* note 132, at 7.

<sup>138</sup> Among others, see, *Concluding observations of the Human Rights Committee: Canada*, *supra* note 85 and; Committee on the Elimination of Racial Discrimination, *Decision (2) 54 on Australia*, UN Doc. A/54/18, para. 21 (1999).

<sup>139</sup> A leading scholar on permanent sovereignty over natural resources concludes that the “rights of indigenous peoples to the natural resources of their lands are at first glance similar to those of States (to be) derived from the principle of permanent sovereignty.... Yet, the essential difference is that indigenous peoples are still an object rather than a subject of international law; at best they can be identified as an emerging subject of international law.” N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*. Cambridge Studies in International Law. Cambridge: Cambridge University Press (1997), at 318.

<sup>140</sup> *Alexkor Ltd and the Republic of South Africa v. The Richtersveld Community and Others* CCT 19/03, para. 64 (2003).



In the absence of statutory or other arrangements providing otherwise, recognition of indigenous ownership of subsoil minerals obviates any right of the state to issue concessions on indigenous lands and the need for FPIC in relation thereto.<sup>141</sup> Instead, indigenous peoples, should they so choose, would be free to consent to arrangements with third parties, including the state, for the exploitation of *their* resources through mutually acceptable agreements. Reviews and analyses of examples of such agreements in the United States, Canada and elsewhere would be useful for fully understanding the nature and functioning of FPIC generally.

## E 'Operationalization'

While there is a need to ensure that FPIC is further entrenched in human rights law, and in turn that human rights law is better integrated into other areas of international law, particularly trade law, there is equally a need to develop international standards on its implementation or 'operationalization'. It has sometimes been argued that the World Bank Group cannot incorporate FPIC into its policies and projects because it cannot be operationalized. This is a dubious assertion at best given the numerous examples of where the right has been operationalized by international organizations and in national laws.<sup>142</sup> The IDB, for instance, requires indigenous peoples' consent to resettlement as do, among others, the domestic laws of most states that have ratified ILO 169. With regard to access and benefit sharing and protection of indigenous knowledge, the Secretariat of the Convention on Biological Diversity reported that as of December 2000, FPIC was incorporated into the law, either draft or existing, and practice of 62 countries.<sup>143</sup>

In the Philippines, indigenous peoples' FPIC is required by law for the following activities: exploration, development and use of natural resources; research-biopropecting; displacement and relocation; archaeological explorations; policies affecting indigenous peoples; and, entry of military personnel.<sup>144</sup> FPIC is defined in the Indigenous Peoples'

<sup>141</sup> See, for instance, the scheme adopted in the United States under the Indian Mineral Leasing Act 1938, which offered tribes little control over mineral exploitation despite the recognition of their ownership of mineral pertaining to reservations. On ownership rights, see, among others, *United States v. Shoshone Tribe of Indians* 304 US 111 (1938). Contrast this with the *Indian Mineral Development Act 1982*, which provides for tribes, subject to secretarial approval, to "enter into any joint venture, operating, production sharing, service, managerial, lease or other agreement" for mining activities.

<sup>142</sup> On national laws, see, among others, *infra*, notes 144-157 and accompanying text. See also, Aotearoa-New Zealand, Crown Minerals Act 1991 (N.Z.), which provides special protection for Maori land, as defined by the *Te Ture Whenua Maori Act 1993*: 1) if the Maori land is regarded as *waahi tapu* (sacred areas) by the affected tribe or sub-tribe, access even for minimum impact activities can only be obtained if the Maori landowners give their consent (sec. 51) and; for activities other than minimum impact activities, the owners of Maori land also have a right to consent (secs. 53-4) even where there may be public interest grounds that would require arbitration in the case of non-Maori land owners.

<sup>143</sup> *Compilation and overview of existing instruments, guidelines, codes and other activities relevant to the programme of work for the implementation of Article 8(j) and related provisions. Note by the Executive Secretary.* UNEP/CBD/WG8J/2/INF/1 27, para. 11 (2001, para. 11)

<sup>144</sup> Among others, Indigenous Peoples Rights Act 1997, sec. 59 (Phil.) and Mining Code 1995, sec. 16. (Phil.) See also, National Commission on Indigenous Peoples, Administrative Order No. 1 Series of 1998. Rules and Regulations Implementing Republic Act No. 8371, Otherwise Known as "The Indigenous Peoples' Rights Act of 1997", Rule III, Pt. II, sec. 2(b)(2) – "The rights of ICCs/IPs to develop their territories including all the natural resources therein shall further include, but not limited to, the following: ... (2) The right of ICCs/IPs through their Council of Elders/ Leaders, subject to the principle of Free and Prior Informed Consent provided in these Rules and Regulations, to enter into agreement with any legal entity, for the utilization, extraction or development of natural resources, subject to a limited

Rights Act 1997 as “the consensus of all members of the [Indigenous Cultural Communities/Indigenous Peoples] to: be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community.”<sup>145</sup>

IPRA's consent provisions are operationalized in its *Implementing Rules and Regulations 1998*.<sup>146</sup> The “basic elements” of the process for seeking FPIC include, at a minimum, information dissemination to all members of the affected indigenous peoples, assessment of their concerns or issues in accordance with their customs and traditions, an initial decision by the recognized council of elders, and affirmation of the decision of the Elders by the members of the community.<sup>147</sup>

Should consent be granted, a written memorandum of agreement, signed by the proponent, affected indigenous people(s)/community(ies), and the National Commission on Indigenous Peoples, is required. This agreement must be in the relevant indigenous language(s), and stipulate, among others: (1) the benefits due to the affected indigenous people/community; (2) measures to protect indigenous peoples' rights and value systems;<sup>148</sup> (3) the responsibilities of the proponent, the indigenous people/community and the NCIP; (4) that the agreement applies *mutatis mutandis* to any new parties as a

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term of 25 years, renewable at the option of the ICCs/IPs for another 25 years, and to visitorial and monitoring powers of the ICCs/IPs and the NCIP for purposes of ensuring that the ICCs'/IPs' rights and interests are adequately safeguarded and protected.”

<sup>145</sup> IPRA, *id.* at sec. 3(g).

<sup>146</sup> National Commission on Indigenous Peoples, Administrative Order No. 1 Series of 1998. Rules and Regulations Implementing Republic Act No. 8371 (Phil.), Otherwise Known as “The Indigenous Peoples' Rights Act of 1997”, Rule IV, Pt. III, secs. 1-9 (Phil.)

<sup>147</sup> *Id.* at sec. 5. Section 5 also provides that:

The following minimum requirements shall be strictly complied with:

- a) For every meeting, notices thereof written in English or Pilipino and in the IP language and authorized by community elders/leaders shall be delivered and posted in conspicuous places or announced in the area where the meeting shall be conducted at least two (2) weeks before the scheduled meeting;
- b) All meetings and proceedings where the proponent shall submit and discuss all the necessary information on the proposed policy, program, project or plan shall be conducted in a process and language spoken and understood by the ICCs/IPs concerned;
- c) The minutes of meetings or proceedings conducted shall be written in English or Pilipino and in the language of the concerned ICCs/IPs and shall be validated with those who attended the meeting or assembly before the finalization and distribution of the minutes;
- d) Consent or rejection by the ICC/IP community shall be signified by affixing signatures or thumb marks in a document written in their own language or dialect with corresponding English or Pilipino translation. Signatures or thumb marks shall be considered valid, only when it is affixed on each and every page of the document signifying consent or rejection. In case of rejection, the ICCs/IPs shall state in the document of rejection whether or not they shall entertain alternative proposals of similar nature; and
- e) Any alternative proposal shall be subject to the Free and Prior Informed Consent of the ICCs/IPs in accordance with the foregoing procedures and requirements.

<sup>148</sup> The rights and value systems referred to in point 2 are defined as: “a) Ancestral domains/lands as the ICCs/IPs' fundamental source of life; b) Traditional support system of kinship, friendship, neighbourhood clusters, tribal and inter-tribal relationships rooted in cooperation, sharing and caring; c) Sustainable and traditional agricultural cycles, community life, village economy and livelihood activities such as swidden farming, communal forests, hunting grounds, watersheds, irrigation systems and other indigenous management systems and practices; and d) Houses, properties, sacred and burial grounds.” *Id.* at sec. 3.

result of partnership, joint venture, merger, transfer of rights, etc.; and (5) penalties for non-compliance and or violation of the agreement.<sup>149</sup>

FPIC also has been part of the law applying to mining in Australia's Northern Territory for almost 30 years<sup>150</sup> and is present in legislation applicable in New South Wales,<sup>151</sup> Queensland,<sup>152</sup> and other states.<sup>153</sup> Under the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA), consent is obtained through statutory, indigenous-controlled Land Councils, which may not consent to a mining license unless: they are satisfied that the traditional Aboriginal owners of the land in question understand the nature of the activity and any terms or conditions. As a group they must give consent after they are satisfied that the terms and conditions are reasonable and have agreed upon these terms and conditions with the miner.<sup>154</sup> With regard to the traditional land owners, consent is considered obtained if:

(a) in a case where there is a particular process of decision making that, under the Aboriginal tradition of those traditional Aboriginal owners or of the group to which they belong, must be complied with in relation to decisions of that kind – the decision was made in accordance with that process; or

(b) in a case where there is no such process of decision making – the decision was made in accordance with a process of decision making agreed to and adopted by those traditional Aboriginal owners in relation to the decision or in relation to decisions of that kind.<sup>155</sup>

The procedure applied under the ALRA is roughly as follows: an application is made to the Department of Business, Industry and Resource Development (DBIRD) for an exploration license; the DBIRD Minister approves the applicant to enter into negotiations with a Land Council; the Land Council has 12 months to complete its responsibilities under the ALRA, (among others, consultation with affected traditional Aboriginal land owners); and ultimately, if traditional owners agree, a negotiated agreement for an exploration license.<sup>156</sup>

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<sup>149</sup> *Id.* at sec. 8.

<sup>150</sup> *Aboriginal Lands Rights (Northern Territory) Act 1976, Pt. IV (Austl.)* Prior to 1987 the Act provided for FPIC by traditional aboriginal land owners as well as statutory Land Councils in relation to both mineral exploration permits and mining permits. In 1987, the Act was amended to remove the FPIC by traditional aboriginal landowners requirement for mining permits; aboriginal land owner consent to mineral exploration permits was maintained and the agreement of the relevant Land Council is still required for the mining stage.

<sup>151</sup> *Aboriginal Lands Rights Act 1983 (NSW), sec. 45(5) (Austl.)*

<sup>152</sup> *Aboriginal Land Act 1991 (Qld), sec. 42 (Austl.)*, and *Torres Strait Islander Land Act 1991 (Qld), sec. 80 (Austl.)* See, also, *Mineral Resources Act 1989 (Qld), sec. 54 (Austl.)*

<sup>153</sup> See, *Mineral Resources Development Act 1995 (Tas), Pt. 7*, and; *Aboriginal Land (Jervis Bay Territory) Act 1986 (Cth), sec. 43, 52A(1), (2) (Austl.)*

<sup>154</sup> *Aboriginal Lands Rights (Northern Territory) Act 1976, at sec. 42(6) (Austl.)*

<sup>155</sup> *Id.* at sec. 77A.

<sup>156</sup> For a detailed treatment of the workings of the ALRA, including in the case of mining, see, *Northern Territory Land Councils and the Aboriginal Benefits Account. Performance Audit, Audit Report No. 28, 2002-03 (Austl.)* Available at: <http://www.anao.gov.au/WebSite.nsf/Publications/6F305A0E51814A79CA256CC2000CAB4E>

These procedures were reviewed by the National Institute of Economic and Industry Research in 1999,<sup>157</sup> which, according to the Aboriginal and Torres Strait Islander Commission, found that the ALRA “has been successful in safeguarding Aboriginal control over Aboriginal land ... [and] has also provided a process of negotiation by which an increasing proportion of Aboriginal land in the Territory has been made available for mineral exploration.”<sup>158</sup> Aboriginal land has not only been made available for exploration; in 1991, there were 12 producing mines on Aboriginal land in the Northern Territory, which together produced more than A\$1 billion of minerals or 80% of the total value of the NT's mineral production.<sup>159</sup>

Finally, it is important to note that the IFC's Social and Environmental Review Procedure (“Micro-Finance Exclusion List”) already contains the requirement of ‘informed consent’ in relation to indigenous peoples stating that IFC funds may not be used to finance “Production or activities that impinge on the lands owned, or claimed under adjudication, by indigenous peoples, without full documented consent of such peoples.”<sup>160</sup> Therefore, there would seem to be no valid reason that FPIC cannot be operationalized in other World Bank Group settings and projects.

## F Components of FPIC

FPIC has a number of elements that need to be accounted for in its operationalization: 1) free; 2) prior; 3) informed and; 4) consent. To this obvious list, I would add a fifth component: adequate recognition of indigenous peoples' rights to their lands, territories and resources traditionally owned or otherwise occupied and used. The following are examples of what may be required under each component.

### 1) Free

It is a general principle of law that consent is not valid if obtained through coercion or manipulation. While no legislative or regulatory measure is foolproof, mechanisms need to be established to verify that consent has been freely obtained. In the Philippines, for instance, the National Commission of Indigenous Peoples is charged with certifying the consent of indigenous peoples/communities. Nonetheless, studies demonstrate that in the Philippines, indigenous peoples' consent is still often manipulated and coerced.<sup>161</sup> Similar complaints have also been raised in Australia.<sup>162</sup>

<sup>157</sup> The National Competition Policy Review of Part IV (the mining provisions) of the Aboriginal Land Rights (Northern Territory) Act 1976. NIEIR, 1999 (Austl).

<sup>158</sup> Aboriginal and Torres Strait Islander Commission, *Annual Report 1998-99*, at 149.

<sup>159</sup> P. Boyle, *Behind the Mining Companies Hysteria about Mabo* 1993. Available at: <http://www.greenleft.org.au/back/1993/111/111p3.htm>

<sup>160</sup> *Procedure for Environmental and Social Review of Projects*. International Finance Corporation, December 1998, at p. 36. Available at: [http://www.ifc.org/ifcext/enviro.nsf/e11ffa331b366c54ca2569210006982f/ESRP/\\$FILE/Env&SocReviewProc.pdf](http://www.ifc.org/ifcext/enviro.nsf/e11ffa331b366c54ca2569210006982f/ESRP/$FILE/Env&SocReviewProc.pdf)

<sup>161</sup> See, among others, *Implementation of the Indigenous Peoples Rights Act (IPRA) in the Philippines: Challenges and Opportunities. Background paper prepared by Ms. Ruth Sidchogan-Batani Research coordinator, Tebtebba (Indigenous Peoples' International Centre for Policy Research and Education)*. Expert Seminar on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples, Organized by the Office of the United Nations High Commissioner for Human Rights Geneva, 15-17 December 2003. UN Doc. HR/GENEVA/TSIP/SEM/2003/BP.4; and, *Rovillos, Ramo and Corpuz* When the ‘Isles of Gold’ turn into Isles of Dissent: A Case Study on the Philippine Mining Act of

Goldzimer proposes that one way of ensuring that FPIC is 'freely' obtained is to ensure that the project proponent is not the entity responsible for obtaining consent.<sup>163</sup> Rather, the responsibility should be vested in Constitutionally recognized, independent (politically and financially), centralized or regionalized bodies directly elected by indigenous peoples and, additionally, indigenous peoples' must have access to effective judicial remedies to further safeguard against misconduct in the FPIC process.<sup>164</sup>

The Land Councils established in the Northern Territory and elsewhere in Australia work largely along these lines. Despite some initial problems – and allegations of co-optation, not to mention that they derive part of their income from mining royalties and are government-funded – they seem to have worked well, at least in terms of providing a mechanism for seeking FPIC and minimizing possibilities for coercion or manipulation. Indigenous peoples in Guyana – whose right to FPIC is contained in a policy on mining rather than legislation – have also proposed that their National Toshias Council (a body representing all of the elected village chiefs) is involved in either certifying or obtaining FPIC given allegations that companies have manipulated or 'bought off' members of their Village Councils, the bodies designated to provide consent at present.<sup>165</sup>

Whether such a system would work everywhere however is debatable and presents particular challenges for countries and regions where the rule of law is weak, corruption prevalent and where indigenous peoples' institutions and organizations are weak or suppressed. Moreover, great care is required, unless they decide otherwise, to ensure that indigenous peoples' traditional institutions and customary laws are fully respected and not supplanted in such a system. The potential for this to occur was noted in a WBG evaluation of its indigenous peoples policy, which concluded that "Participation in the majority of projects took place through modern state structures, such as village level health or education committees; field assessments indicate that these project structures created new power relations, weakening traditional IP communities."<sup>166</sup>

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1995. Presented to the EIR's Eminent Person and participants at the meeting on *Indigenous Peoples, Extractive Industries and the World Bank* Oxford, England, 15th April 2003. Available at: [http://forestpeoples.gn.apc.org/Briefings/Private%20sector/eir\\_internat\\_wshop\\_philippine\\_case\\_eng.pdf](http://forestpeoples.gn.apc.org/Briefings/Private%20sector/eir_internat_wshop_philippine_case_eng.pdf)

<sup>162</sup> See, G. Triggs, *The Rights of Indigenous Peoples to Participate in Resource Development: An International Legal Perspective*. In, *Human Rights in Natural Resource Development. Public Participation in the Sustainable Development of Mining and Energy Resources*. (Zillman, Lucas and Pring eds. 2002); and, A. Goldzimer, *Prior Informed Consent of Project Affected Indigenous Peoples*, 1 *Kennedy School Review* 2000. Available at: [http://www.ksg.harvard.edu/ksr/article\\_AG.htm](http://www.ksg.harvard.edu/ksr/article_AG.htm)

<sup>163</sup> *Id.* "In the Philippines, project sponsors are responsible for obtaining prior informed consent from affected communities, which NCIP then certifies. The long history of deceit, manipulation, and abuse involved in agreements between indigenous peoples and interested parties—in the Philippines and elsewhere—suggest that this approach is doomed to failure."

<sup>164</sup> *Id.*

<sup>165</sup> *Government's Policy for Exploration and Development of Minerals and Petroleum of Guyana*. Georgetown: Government of Guyana, 12 (1997). "There have been criticisms of the [Guyana Geology and Mines Commission (GGMC)] entering into agreements for mineral prospecting and other development over Amerindian lands without reference to the Amerindians living there. Government has decided that recognized Amerindian lands would stand exempted from any survey, prospecting or mineral agreements unless the agreement of the Captain and Council for the proposal is obtained by the GGMC in writing."

<sup>166</sup> *Supra* note 34, at 34.

## 2) *Prior*

To be meaningful, informed consent must be sought sufficiently in advance of any final authorization by the State or 3<sup>rd</sup> parties or commencement of activities by a company that affects indigenous peoples and their lands, territories and resources. The consent process should also be time bound so as to ensure that the affected people(s)/communities have enough time to understand the information received, to request additional information or clarification, to seek advice, and to determine or negotiate conditions, as well as to ensure that the process does not serve as an undue impediment for the proponent seeking consent. In Australia, for example, a 12 month period has been legislated. The appropriate amount of time needed, however, may vary depending on, among others, the number of affected persons, communities or peoples, the complexity of the proposed activity, the amount of information provided or requested. Whatever the amount of time needed, a pre-determined and clearly understood deadline is important.

## 3) *Informed*

An FPIC procedure must involve consultation and participation by affected indigenous peoples, which includes the full and legally accurate disclosure of information concerning proposed developments in a form which is both accessible and understandable to them. Consultation, participation and access to information rights are well established in international human rights law<sup>167</sup> and international environmental law.<sup>168</sup>

A report done for the Convention on Biological Diversity's *ad hoc*, inter-sessional Working Group on Article 8j and related provisions includes the following list of information that must be disclosed as part of an FPIC process:

- the nature, size and scope of the proposed development or activity;
- the duration of the development (including the construction phase) or the activity;
- the locality of areas that will be affected;
- a preliminary assessment of the likely impact of the development;
- the reasons/purpose for the development;
- personnel likely to be involved in both construction and operational phases (including local people, research institutes, sponsors, commercial interests, and partners - as possible third parties and beneficiaries) of the development process;
- specific procedures the development or activity would entail;
- potential risks involved (e.g., entry into sacred areas, environmental pollution, partial destruction of a significant site, disturbance of a breeding ground);
- the full implications that can realistically be foreseen (e.g., commercial, economic environmental, cultural);

<sup>167</sup> Among others, *Report on the Situation of Human Rights in Ecuador*. OEA/Ser.L/V/II.96, Doc. 10 rev. 1 1997, 92-5. According to the IACHR, these rights are guaranteed by articles of the American Convention: access to information, article 13 (right to freedom of thought and expression), article 23 (right to take part in the conduct of public affairs) and article 25 (right to judicial remedies) read in conjunction with article 8 (right to due process) and generic obligations under articles 1 and 2 (implementation without discrimination and effective remedies for violations of rights recognized in the Convention). See, also, *General Comment No. 23 (50) (art. 27)*, adopted by the Human Rights Committee at its 1314th meeting (fiftieth session), 6 April 1994. UN Doc. CCPR/C/21/Rev.1/Add.5, para. 3; ILO 169, arts. 4(1), 7 and 15; and *Ogoni Case*, at para. 67.

<sup>168</sup> Among others, Pring and Noe, *The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resources Development*. In, Zillman, Lucas and Pring (eds.), *Human Rights in Natural Resource Development. Public Participation in the Sustainable Development of Mining and Energy Resources*. Oxford: OUP, 2002

- conditions for third party involvement.<sup>169</sup>

The 1998 *IPRA Implementing Rules and Regulations* adopted in the Philippines require that project proponents shall:

- submit to the IP community an undertaking written in a language spoken and understood by the community concerned that it shall commit itself to full disclosure of records and information relevant to the policy, program, project or activity, and allow full access to records, documents, material information and facilities pertinent to the same;
- submit to the IP community and the NCIP in a language understandable to the concerned community an Environmental and Socio-cultural Impact Statement, detailing all the possible impact of the policy, program, project or activity upon the ecological, economic, social and cultural aspect of the community as a whole. Such document shall clearly indicate how adverse impacts can be avoided or mitigated;
- submit an undertaking in writing to answer for damages which the ICCs/IPs may suffer on account of the policy, program, project, plan or activity and deposit a cash bond or post a surety bond with the NCIP when required by the community equivalent to a percentage of its investments, subject to progressive increase, depending upon the impact of the project. The amount of bond shall be determined by the NCIP with the concurrence of the ICCs/IPs concerned; and
- Underwrite all expenses attendant to securing the free and prior informed consent of ICCs/IPs.<sup>170</sup>

In all cases, provision of misleading or false information can result in a penalty or denial of consent for the proposed development to proceed or revocation of consent if the activity has commenced.

#### **4) Consent**

The process of arriving at a consent decision involves consultation and meaningful participation in all aspects of the assessment, planning, implementation, monitoring and closure of a project. As such, consultation and meaningful participation are also fundamental components of a consent process. Negotiation may also be involved to reach agreement on the proposal as a whole, certain components thereof, or conditions that may be attached to the granting of FPIC. At all times, indigenous peoples have the right to participate through their own freely chosen representatives and to identify the persons, communities or other entities that may require special measures in relation to consultation and participation. They also have the right to secure and use the services of any advisors they may require, including legal counsel of their choice.

Indigenous peoples should specify which entity will express consent on their behalf. This may vary depending on the activity in question. For example, the traditional authorities of a particular landholding clan may, under the relevant customary law, be the entity to give or withhold consent. In other cases, it may be the indigenous people(s) as a whole or a combination of entities. As with the Land Councils in Australia, this may also be done

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<sup>169</sup> Report of the Second Meeting of the Ad Hoc, Open-Ended, Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity. UNEP/CBD/WG8J/2/6/Add.1, 27 paras. 14-5 (2001).

<sup>170</sup> *Supra* note 146, Rule IV, Pt. III, sec. 6.

through an extra-community/people institution. The *IPRA Implementing Rules and Regulations* contain specific rules on this issue:

The scope of the ICCs/IPs whose free and prior informed consent is required shall depend upon the impact area of the proposed policy, program, projects and plans, such that:

- a) When the policy, program, project or plan affects only the particular community within the ancestral domain, only such community shall give their free and prior informed consent;
- b) When the policy, program, project or plan affects the entire ancestral domain, the consent of the concerned ICCs/IPs within the ancestral domain shall be secured; and
- c) When the policy, program, project or plan affects a whole range of territories covering two or more ancestral domains, the consent of all affected ICCs/IP communities shall be secured.<sup>171</sup>

FPIC should be documented in legally binding and enforceable agreements that set forth any associated terms and conditions as well as the enforcement and reparations mechanisms to address and remedy violations. Finally, FPIC must be based on specific activities for which consent has been granted. While consent may initially be granted for one set of activities, any intended change of activities will require a new application for FPIC.

#### **5) Recognition and Regularization of Rights to Lands, Territories and Resources**

FPIC is dependent on clear recognition and protection of indigenous peoples' rights, particularly to lands, territories and resources traditionally owned or otherwise occupied and used. Without full recognition of indigenous peoples' territorial rights, FPIC will not fully provide the protection it is designed to provide. In this sense, it is important to note that under international law indigenous peoples' territorial rights arise from and are grounded in indigenous custom and practice and exist independently of formal recognition by the states.<sup>172</sup> States are obligated to delimit, demarcate and title indigenous lands and territories, in accordance with their customary laws and values.

While this may seem an obvious point, it is not uncommon for states to limit FPIC to lands that are legally recognized by their own legal systems rather than the lands and territories traditionally owned by indigenous peoples. In many cases, there is a large disparity between the two categories and requiring FPIC only in connection with the former potentially exempts large areas of indigenous lands from the FPIC requirement. In Guyana, for instance, FPIC applies only to 'recognized' or titled lands. Under this scheme, approximately three-quarters of the lands traditionally owned and presently claimed by indigenous people are excluded. The same also applies in the case of the Northern Territory, where FPIC applies to aboriginal lands recognized under the ALRA, but not to lands that they may own pursuant to the 1993 Native Title Act (Cth), as amended in 1998.

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<sup>171</sup> *Id.* Rule IV, Pt. III, sec. 4.

<sup>172</sup> Among others, Inter-Am. CH.R., *Report N° 96/03*, Case No. 12.053 *Maya Indigenous Communities and their Members* (Belize), at para. 116 (2003).



With regard to the latter, a 'right to negotiate', subject to arbitration if agreement cannot be reached, applies, not FPIC.<sup>173</sup>

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<sup>173</sup> Native Title Act (Cth) 1993, sec. 25-44. The right to negotiate was substantially limited by the Native Title Amendment Act (Cth) 1998, which exempted entire categories of lands from the right to negotiate and, in some situations, authorised States and Territories to substitute reduced procedural rights. See, G Nettheim, *The Search for Certainty and the Native Title Amendment Act 1998 (Cth)*, 22 U. of New South Wales L. J. 564 (1999). For CERD's finding that the 1998 amendments contravened Australia's obligations under the Convention, among others, because of the "restrictions concerning the right of indigenous title holders to negotiate non-indigenous land uses," see, CERD/C/54/Misc. 40/Rev 2 (1 1999) and, CERD/C/56/Misc.42/Rev 3 (2000).



## IV Conclusion

The EIR is the most recent review of the WBG to raise fundamental questions about the role, operations, and impact of the institution. Its conclusion that the WBG is not “set up to effectively facilitate and promote poverty alleviation through sustainable development” is sobering in light of the WBG’s professed mandate and indicates that major institutional changes are required.<sup>174</sup> While the issues raised by the EIR centre around the WBG’s involvement in EI, they could apply equally to other sectors as many of the EIR’s main recommendations, respect for human rights, for instance, are cross-cutting, affecting most if not all areas of WBG activity.

The EIR also raises serious questions about the mining and oil industries’ claims that their operations are sustainable and contribute to poverty alleviation, rather than primarily the well-being of company shareholders, who are usually located far away from the extraction sites, and urban elites in the source country.<sup>175</sup> As the EIR concludes in relation to the WBG, but applying equally to industry, EI may contribute to poverty alleviation through sustainable development but only if certain conditions are met and strictly adhered to and enforced. These conditions include respect for human rights broadly and indigenous peoples’ rights specifically.

The EIR is also the second major review of the WBG in the past few years to have highlighted the need for the WBG to incorporate and adhere to indigenous peoples’ right to FPIC in its policies, programmes and projects. This is framed by both a general need to address human rights – something the WBG has been unwilling to do to date, citing the prohibition of interference in political affairs contained in its Articles of Agreement – and a specific recognition of the need to ensure that indigenous peoples’ rights to lands, territories and resources are guaranteed and respected, not only in specific WBG projects, but also in relation to technical assistance loans and structural adjustment programmes.<sup>176</sup> The latter are arguably more important than project conditionality given the WBG’s role in promoting and assisting with the liberalization of mining, investment and other laws across the world.

FPIC is both an internationally recognized right of indigenous peoples and a mechanism to ensure that their other rights and interests will be respected. It is an indispensable guarantee for indigenous peoples in connection with EI given the devastating impact that most EI operations have had and in some cases continue to have for their well being, territories and cultural survival. It is also increasingly being incorporated into development-related policies and standards and should be considered a fundamental

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<sup>174</sup> EIR Report, at 41.

<sup>175</sup> The WBG’s review of EIs, for instance, notes that EI dependent countries were less likely to achieve all but one of the Millennium Development Goals than other developing countries. *Extractive Industries and Sustainable Development. An Evaluation of World Bank Group Experience*. OED/OEG/OEU, World Bank: Washington DC, 2003, 86.

<sup>176</sup> The World Bank, International Bank for Reconstruction and Development, *Articles of Agreement*, art. IV, sec.10. Available at: <http://www.worldbank.org/html/extdr/backgrd/ibrd/arttoc.htm> See also, *Development and Human Rights: The Role of the World Bank*. World Bank: Washington D.C.,(1998), the Bank’s submission to the 1993 Vienna World Conference on Human Rights, *The World Bank and the Promotion of Human Rights*. UN Doc. A/CONF.157/PC/61/Add.19 (1993), I. Shihata, *Human Rights, Development and International Financial Institutions*, 8 *AM. U. J. INT’L L. & POL’Y* 27, 28 (1992) and I. Shihata, *The World Bank and Human Rights: An Analysis of the Legal Issues and the Record*, 17 *Denver J Int’l Law & Policy* 39 (1988).

component of development effectiveness in much the same way that consultation and participation are considered fundamental to development effectiveness. The WBG MR appears to accept this as true, stating that "Projects that are accepted by communities are going to be more effective both for communities and for developers."<sup>177</sup> Examples from Australia, the Philippines and elsewhere show that FPIC can be operationalized and work in practice. This is not to say that there have not been and will not continue to be problems with implementation of FPIC processes, but the same can also be said for consultation and participation in general and this should not excuse failure to comply with and implement the right.

As the author of UNDP's 2004 Human Development Report observes in a letter responding to criticism of the EIR's recommendations sent by a prominent industry representative,<sup>178</sup> FPIC is both "practical and necessary."<sup>179</sup> She continues that:

Success stories exist in Alaska, Australia and Canada, where local communities were brought into decision-making processes - they were able to preserve their way of life even while sharing the profits from mining projects. Why should similar initiatives not be adopted for developing countries?

As the Human Development Report 2004 (which is due in July 2004) will demonstrate, ignoring demands of indigenous people may have worked in earlier decades but cannot in today's political realities. There would be a high cost if local communities were left out. Much of future investments in extractive industries are expected to be in indigenous people's territories. Investments that take away the economic basis of their livelihoods threaten their very existence. The Lihir gold mine's operations in Papua New Guinea destroyed sacred sites and led to environmental degradation. Not surprisingly, many communities increasingly oppose any further activity in their territories because of their past experience of misinformation and inadequate compensation. ...

In the interest of long-term sustainability and profitability of investments, empowering communities requires explicitly recognising their rights, consulting them on project design and creating incentives for increasing mutual benefits. This is a matter of respecting human rights as well as a practical necessity.<sup>180</sup>

On the last point, the UN Millennium Declaration, which laid the foundation for the Millennium Development Goals, one of the primary focal points of development efforts and targets today, proclaims that the world's leaders "will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally

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<sup>177</sup> *Supra* note 65.

<sup>178</sup> Mark Moody-Stuart, "A warning for the World Bank", *The Financial Times*, 3 May 2004. Moody-Stuart, Chairman of Anglo-American mining company and a member of Dr. Salim's EIR Advisory Panel, argues that:

Another potentially counter-productive proposal is that extractive projects should require the "free prior and informed consent" of local communities. Without doubt, the rights of local and indigenous peoples need to be carefully protected. But requiring that all elements of a community are able to show benefit raises the bar to a level that, if observed in developed countries, would mean no road or major development would ever happen. Wholly accountable governments may thereby be prevented from undertaking projects key to their national development.

<sup>179</sup> Sakiko Fukuda-Parr, "Prior consent of indigenous communities vital if developing nation projects are to succeed", *The Financial Times*, 7 May 2004.

<sup>180</sup> *Id.*

recognized human rights and fundamental freedoms, including the right to development.”<sup>181</sup> One place they can do this is as shareholders in and board members of the WBG.

Finally, the EIR Report raises the important issue of whether the World Bank, as a subject of international law, has international legal obligations to promote and respect human rights rather than simply moral or policy-based obligations. Much has been written on this issue in recent years and many scholars have concluded that the WBG does indeed have legal obligations with regard to human rights.<sup>182</sup> For example, *Bowett's Law of International Institutions*, states that “It has been suggested, for example, that the World Bank is not subject to general international norms for the protection of fundamental human rights. In our view that conclusion is without merit, on legal or policy grounds ....”<sup>183</sup>

A number of UN studies have also looked this issue and concluded that the WBG has obligations with respect to human rights law and that it has not paid sufficient attention to human rights.<sup>184</sup> One of these studies concluded with respect to the WBG that “No entity that claims international legal personality can claim exemption from that [human rights] regime. ... If such a claim were to be considered legitimate, it would seriously erode the international rule of law.”<sup>185</sup>

Irrespective of how the WBG eventually addresses the conclusions and recommendations made by Dr. Salim in the EIR, the issue of WBG human rights obligations and the implications thereof for its operations and policies does require further attention. This is

<sup>181</sup> *G.A. Res. 55/2, UN Millennium Declaration 2000*, at para. 24. *See also, Id.*, at para. 8 – “We rededicate ourselves to support all efforts to uphold the sovereign equality of all States, respect for their territorial integrity and political independence, resolution of disputes by peaceful means and in conformity with the principles of justice and international law, the right to self-determination of peoples which remain under colonial domination and foreign occupation, non-interference in the internal affairs of States, respect for human rights and fundamental freedoms, respect for the equal rights of all without distinction as to race, sex, language or religion and international cooperation in solving international problems of an economic, social, cultural or humanitarian character.”

<sup>182</sup> Among others, C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (1996); H.G. Schermers and N.M. Blokker, *International Institutional Law: Unity within Diversity* (3d rev. ed.) Martinus Nijhoff: The Hague (1995); S. Skogly, *The Human Rights Obligations of the World Bank and IMF 84-87*(2001), P. Sands & P. Klein (eds.), *Bowett's Law of International Institutions* (5th ed.), London: Sweet & Maxwell (2001), 458-59; and, M. Darrow, *Between Light and Shadow. The World Bank, The International Monetary Fund and International Human Rights Law* (2003).

<sup>183</sup> *Id.*

<sup>184</sup> Among others, *Human rights as the primary objective of international trade, investment and finance policy and practice. Working paper submitted by J. Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission resolution 1998/12*. UN Doc. E/CN.4/Sub.2/1999/11, para. 37; *Globalisation and its impact on the full enjoyment of human rights. Preliminary report submitted by J. Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission resolution 1999/8*. UN Doc. E/CN.4/sub.2/2000/13 and; *The Highly Indebted Poor Countries (HIPC) Initiative: a human rights assessment of the Poverty Reduction Strategy Papers (PRSP). Report submitted by Mr. Fantu Cheru, independent expert on the effects of structural adjustment policies and foreign debt on the full enjoyment of all human rights, particularly economic, social and cultural rights*. UN Doc. E/CN.4/2001/56.

<sup>185</sup> *Globalization and its full impact on human rights. Final report submitted by J. Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission decision 2000/105\**. UN Doc. E/CN.4/Sub.2/2003/14, at para. 37.

not to say that WBG practice cannot or should not exceed any obligations it may have under international law, clearly there are important policy and other reasons for addressing human rights issues, not the least of which is improving development effectiveness and poverty alleviation efforts. As the UN General Assembly resolved in 1997: “democracy, respect for all human rights and fundamental freedoms, including the right to development, transparent and accountable governance in all sectors of society, as well as effective participation by civil society, are ... an essential part of the necessary foundations for the realization of social and people-centred sustainable development.”<sup>186</sup>

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<sup>186</sup> *Programme for the Further Implementation of Agenda 21, GA Res. S-19/2, Annex* (June 28, 1997).



Free prior and informed consent (FPIC) has been recognised and accepted by a number of intergovernmental organizations and international bodies. The World Bank Group (WBG), however, is a notable exception despite two major reviews which recommend incorporation of FPIC into WBG policy and practice with special reference to indigenous peoples.

This article provides an overview of the Extractive Industries Review and its implications for the WBG, and takes a closer look at FPIC, its components and its bases in international law.

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