

**Business and Human Rights
The Right to Free, Prior and Informed Consent**

**CALL FOR EVIDENCE
Business and Human Rights**

**JOINT COMMITTEE ON HUMAN RIGHTS
COMMITTEE OFFICE, HOUSE OF COMMONS
7 MILLBANK, LONDON SW1P 3JA**

To: Dr Mark Egan, Commons Clerk of the Joint Committee on Human Rights, Committee Office,
House of Commons, 7 Millbank, London SW1P 3JA.

**Business, Human Rights and Indigenous Peoples:
The Right to Free, Prior and Informed Consent**

Submitted by

Helen Tugendhat and Valérie Couillard, Forest Peoples Programme*

Jérémie Gilbert and Cathal Doyle, Middlesex University, Business
School – Law Department*

* Contact: Forest Peoples Programme, Moreton-in-Marsh, GL56 9NQ. Tel: 044 (0) 1608 652220,
email: helen@forestpeoples.org and valerie@forestpeoples.org

* Contact: Middlesex University Business School, Law Department, The Burroughs
London, NW4 4BT, Tel: 044 (0) 20 8411 6274, email: j.gilbert@mdx.ac.uk and
doncathal@gmail.com

Business and Human Rights The Right to Free, Prior and Informed Consent

The Right to Free Prior and Informed Consent

Background

It is widely recognised that the expropriation of lands and resources from indigenous peoples directly threatens their survival as peoples and an extant and expanding body of international human rights law exists to protect indigenous peoples from such destructive actions. As recognised by one of the preeminent experts on the rights of indigenous peoples, Ms Erica-Irene Daes:

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.¹

One of the key principles that has been developed in international human rights law to protect indigenous peoples from destruction of their lives and cultures is the principle of 'free, prior and informed consent', a principle well established in law as a responsibility of states in their interaction with indigenous peoples in their territories. However this principle is also increasingly being adopted by non-state entities, notable business groups involved in enterprises that impact on indigenous peoples' lands and resources, including the extraction of sub-soil resources and the alteration of land use practices through the creation of plantations or other agricultural changes.²

Scope and Definition

Free, prior and informed consent ("FPIC") has been widely discussed and debated among international and national fora. The United Nations Permanent Forum on Indigenous Issues, the preeminent body for addressing issues facing indigenous peoples within the UN system, defines FPIC as a process undertaken free of coercion or manipulation, involving self-selected decision-making processes undertaken with sufficient time for effective choices to be understood and made, with all relevant information provided and in an atmosphere of good faith and trust.³ Notably FPIC is defined as a *process* which implies and requires an iterative series of discussions, consultations, meetings and agreements.

¹ *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.

² For non-state entities or business groupings that accept the need for FPIC or formulations similar to FPIC, see the Roundtable on Sustainable Palm Oil, the World Parks Congress, the World Commission on Dams and the Equator Banks (although the EB requirements are limited to a standard lower than true FPIC)

³ See Annex One. For an overview of recent developments in relation to the respect for FPIC see Free Prior Informed Consent (FPIC) – a universal norm and framework for consultation and benefit sharing in relation to indigenous peoples and the extractive sector. Paper prepared for OHCHR Workshop on Extractive Industries, Indigenous Peoples and Human Rights Moscow, 3rd - 4th December 2008 Cathal Doyle, University of Middlesex available at http://www2.ohchr.org/english/issues/indigenous/resource_companies.htm

Business and Human Rights The Right to Free, Prior and Informed Consent

In the context of transnational business, including business enterprises undertaken with funding or investment by British companies or the British state, a requirement for FPIC means that prior to project being undertaken, or a licence for same being issued, which would impact on the lands and resources of indigenous peoples, that the affected indigenous peoples should be involved in the decision making process at all stages, including design and consideration of alternatives, and that any decision to undertake activities impacting on their lands and resources is only undertaken with their express consent and with any preconditions or requirements they may make being met. Any consent achieved or gained should be formalized in a legally binding document and where consent is withheld the company must withdraw its application. This process of decision-making and possible negotiation must ensure that the affected indigenous peoples have sufficient time and information to make a decision according to decision making practices that they chose, whether through traditional authorities or other frameworks.

Legal Content

The principle of FPIC stems from and relates to the right to self-determination, as protected by shared Article 1 of the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights. Both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have found that when a State unilaterally extinguishes indigenous peoples' rights to lands and resources that this act is in contravention of the right to self-determination, thereby acknowledging that indigenous peoples hold this right under international law.⁴

The UN Declaration on the Rights of Indigenous Peoples ("UN DRIP"), passed by the General Assembly with the support of the UK Government in 2007, restates this right to self-determination and contextualises it as requiring FPIC highlighting specific instances in which this right must be respected. These include physical relocation (Article 10), use of cultural, intellectual, religious and spiritual property (Article 11), adoption of any legislative measures impacting on them (Article 19), restitution of lands taken (Article 28), storage of hazardous materials (Article 29) and – key in the context of UK transnational corporations operating overseas – the approval of any project impacting on the lands or resources of indigenous peoples (Article 32).⁵

The main *binding* international instrument that deals explicitly and directly with the rights of indigenous peoples is ILO Convention 169 on the rights of indigenous and tribal peoples in independent countries. The UK has yet to ratify this treaty and we strongly encourage the government to consider its ratification without delay. This instrument requires under Article 16 that where 'the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent'. In contexts other than relocation, ILO 169 requires under Article

⁴ 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.

⁵ UN Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly, September 2007

Business and Human Rights

The Right to Free, Prior and Informed Consent

6(2) that consultation be undertaken 'in good faith ... in a form appropriate to the circumstances, with the objective of achieving agreement or consent.' This is then further supported by Article 7(1) which requires 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.

In addition to the legal obligations established by the two International Covenants, the UN DRIP and ILO Convention 169, there is also extensive jurisprudence from the UN treaty bodies and the Inter American Court examining the obligations of States in regards to indigenous peoples and specifically in regards to the requirement for FPIC. To cite one body of jurisprudence, the Committee on the Elimination of Racial Discrimination ("CERD") has 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.'⁶ 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.⁷

The Convention on Biological Diversity (CBD), 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.⁸ This principle has also found its way into ongoing CBD work on Access and Benefit Sharing,⁹ CBD guidelines on environmental and social impact assessment¹⁰ as well as regional standards on access and benefit sharing adopted by the African Union¹¹ and the Andean Community.¹² Similar language is also found in the Convention to Combat Desertification.¹³

⁶ *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. 4(d).*

⁷ See, for instance, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Botswana. 23/08/200; Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America. 14/08/2001.*

⁸ *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.*

⁹ See *Seventh Conference of Parties to the Convention on Biological Diversity, Decision V/26A, para. 11*

¹⁰ 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* note 70.

¹¹ *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).

¹² *Andean Community, Decision 391, Common Regime of Access to Genetic Resources, of the Commission of the Cartagena Agreement, July 1996.*

¹³ *Convention to Combat Desertification, particularly in Africa 1994, Article 16(g).*

Business and Human Rights The Right to Free, Prior and Informed Consent

FPIC and business enterprises

It is recognized that the experience of indigenous peoples with extractive industries has included many examples where the rights of indigenous peoples have been eroded and the standard of living of affected peoples has been diminished.¹⁴ Indeed the UN Special Rapporteur responsible for addressing threats to the rights of indigenous peoples concludes that it is 'one of the major human rights problems faced by [indigenous peoples] in recent decades'.¹⁵

The UN Centre for Transnational Corporations has undertaken a series of studies examining the investments and activities of multinational corporations on indigenous territories.¹⁶ 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....'¹⁷ Further to the conclusions of UN bodies, multi-sectoral processes and industry-led processes have reached similar conclusions. The World Commission on Dams, a multi-sectoral, multi-year study into the impacts of dams on development hosted by the World Bank and involving the dam construction industry, highlighted the need for inclusive decision making processes for all dam construction and noted that when dams may impact on indigenous peoples "such processes are guided by their free, prior and informed consent".¹⁸ The Roundtable on Sustainable Palm Oil, an industry fora which establishes best practice principles and criteria for the palm oil industry, includes a requirement for FPIC prior to any new plantations being established, prior to any action which may impact on resource use and prior to any action that may impact on the legal status of the land under use.¹⁹

¹⁴ 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).

¹⁵ *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.

¹⁶ 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) ; 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)

¹⁷ *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.

¹⁸ *Dams and Development: A new Framework for Decision-Making*, A Report of the World Commission on Dams, November 2000. at p. 215

¹⁹ *Roundtable on Sustainable Palm Oil (RSPO) Principles and Criteria for Sustainable Palm Oil Production* Public release version, 17 October 2005

Business and Human Rights The Right to Free, Prior and Informed Consent

The International Finance Corporation, the private sector arm of the World Bank Group, established a series of 'performance standards' to guide its investment in the private sector, standards which have since been adopted by the so-called 'Equator Banks' as minimum standards for investment. Performance Standard 7 on Indigenous Peoples requires, where the lands and resources of indigenous peoples may be directly impacted, economic or physical displacement may occur or where cultural resources will be commercially developed, that 'good faith negotiations' be conducted and that these negotiations be 'successfully concluded' prior to investment taking place.²⁰

It is also worth noting that the International Bank for Reconstruction and Development (IBRD), more usually known as the World Bank, is undertaking a review of its Operational Policy 4.10 on Indigenous Peoples and numerous public commitments have been made by Bank staff that recommendations will be presented to the Board that the policy reflect the requirements of UN DRIP and the right to FPIC.

The responsibility of the UK Government

Several of the world's leading companies in the area of extractive industries are headquartered in the UK and many others are listed on the London stock exchange. This includes both small companies (for example those involved in exploration) as well as larger companies involved in resource exploitation. Similarly, the principle of FPIC is also relevant to the work of several British based financial institutions (banks and investment managers) that fund the activities of companies operating in this sector. Likewise, the obligation to respect FPIC is also of relevance to consulting companies and other third parties that do work with or on behalf of these companies.

These companies often find themselves operating in counties where violations of indigenous peoples' rights, including their right to FPIC, are widespread. This is the case even in those countries where the right to FPIC is enshrined in national legislation.²¹ In many cases a climate of impunity and corruption combined with inefficient and discriminatory judicial systems translates into an inability of members of vulnerable groups, such as indigenous peoples, to obtain access to justice. Worst still, the legal systems in many of these countries are being used as a tool to suppress communities and individuals that have raised their concerns in relation to violations of their right to FPIC.

However we recognize that the actions of these companies do not reflect the position of the UK government and that in many cases such violations are unintended consequences of company actions. We believe urgent action is needed to assist companies in recognising the rights of indigenous peoples and in protecting those rights.

We have been pleased to note the UK Government's support for the inclusion of the principle of FPIC in the safeguard policies of the Asian Development Bank ("ADB") (still

²⁰ International Finance Corporation (IFC) Performance Standard 7 at para 9.

²¹ FPIC is a requirement under the Indigenous Peoples Rights Act in the Philippines however CERD has engaged its Early Warning Urgent Action procedure in relation to the failure of transnational corporations operating there to obtain the FPIC of indigenous peoples affected by mining operations there. See <http://www2.ohchr.org/English/bodies/cerd/early-warning.htm>

Business and Human Rights The Right to Free, Prior and Informed Consent

under review) and note that such a safeguard is particularly relevant for the growing private sector portfolio of the ADB.²²

We were further pleased to see the European Bank for Reconstruction and Development ("ERBD") acknowledge in their updated Environmental and Social Policy that the UN DRIP is relevant guidance for development impacting on indigenous peoples and further recognise and seek to uphold the principle of FPIC in certain categories of projects impacting on indigenous peoples.²³ The UK is among the largest shareholders, in terms of capital subscription, in the EBRD.

Recommendations

While the UK is a party to the main international human rights treaties and declarations which impose a duty to respect FPIC, its national framework is not clear enough on the obligations of its corporations to respect human rights when operating overseas. We invite the government and the parliament to provide clearer guidance to UK businesses on the UK commitment to respect the principle and the right of FPIC in government-funded activities and to provide guidance on international best practice for businesses on the protection and realisation of FPIC in relation to their operations in indigenous peoples' lands.

Furthermore, we see the adoption of legislative or administrative measures that provide for extraterritorial regulation of transnational corporations registered in the UK as key in reducing or preventing acts which negatively impact on the realisation of the rights of indigenous peoples in territories outside the UK. We invite the government to draft such measures and stand ready to provide any assistance that may be required.

Moreover the UK government and parliament should put in place mechanisms to monitor the implementation of the right to FPIC by corporations registered in the UK that operate in indigenous peoples' territories and to ensure that these corporations are held accountable for violations of human rights committed overseas.²⁴

Finally, it is clear that UK corporations operate in some host countries where there exists inadequate *de jure* and *de facto* respect for indigenous peoples' rights in the context of development operations in their lands. This is compounded by a lack of access to justice for indigenous peoples in these countries. Given this, if the UK is to adhere to its international human rights obligations, it is important for it to provide adequate and effective grievance mechanisms under which UK companies can be held to account for failures to respect the human rights of indigenous peoples, including their right to FPIC, in the countries in which they are operating.

²² Statement of the Executive Director of Austria Germany, Luxemburg Turkey and the United Kingdom, Asian Development Bank, 23 February 2009 (available on request)

²³ European Bank for Reconstruction and Development (EBRD) Environmental and Social Policy issued May 2008 available at <http://www.ebrd.com/about/policies/enviro/policy/2008policy.pdf>

²⁴ Recently CERD has specifically ruled that states do have an obligation to monitor the action of transnational corporations registered in their own country, see: Concluding observations of the Committee on the Elimination of Racial Discrimination, Canada, CERD/C/CAN/CO/18, 25 May 2007, para. 17

Business and Human Rights The Right to Free, Prior and Informed Consent

Elements of Free, Prior and Informed Consent

What?

- **Free** should imply no coercion, intimidation or manipulation;
- **Prior** should imply consent has been sought sufficiently in advance of any authorization or commencement of activities and respect time requirements of indigenous consultation/consensus processes;
- **Informed** – should imply that information is provided that covers (at least) the following aspects:
 - a. The nature, size, pace, reversibility and scope of any proposed project or activity;
 - b. The reason/s or purpose of the project and/or activity;
 - c. The duration of the above;
 - d. The locality of areas that will be affected;
 - e. A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit sharing in a context that respects the precautionary principle;
 - f. Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others)
 - g. Procedures that the project may entail.

Consent

Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires time and an effective system for communicating among interest holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The inclusion of a gender perspective and the participation of indigenous women is essential, as well as participation of children and youth as appropriate.

This process may include the option of withholding consent. Consent to any agreement should be interpreted as indigenous peoples have reasonably understood it.

When?

FPIC should be sought sufficiently in advance of commencement or authorization of activities, taking into account indigenous peoples' own decision-making processes, in phases of assessment, planning, implementation, monitoring, evaluation and closure of a project.

Who?

Indigenous peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities. In FPIC processes, indigenous peoples, UN Agencies and governments should ensure a gender balance and take into account the views of children and youth as relevant.

How?

Information should be accurate and in a form that is accessible and understandable, including in a language that the indigenous peoples will fully understand. The format in which information is distributed should take into account the oral traditions of indigenous peoples and their languages.

Source: Excerpt from the Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent E/C.19/2005/3, endorsed by the UNPFII at its Fourth Session in 2005.