



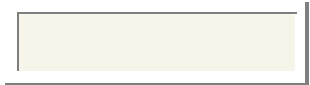
# Forest Peoples Programme

supporting forest peoples' rights

## Indigenous peoples' right to free prior and informed consent & the World Bank's Extractive Industries Review

An overview

March 2004



Indigenous peoples' right to free, prior and informed consent (FPIC) has been recognized and accepted by a number of intergovernmental organizations and international bodies (see [Box 1](#)) and increasingly in the laws of states. The Report of the World Bank's Extractive Industries Review (EIR) recommends that the World Bank Group recognize and respect this right. Why is this right important and what does it mean?

### Importance of FPIC

Threats to indigenous peoples' rights and well-being are particularly acute in relation to resource development projects, be they state- or corporate-directed. These projects and operations have had and continue to have a devastating impact on indigenous peoples, undermining their ability to sustain themselves physically and culturally. Numerous reports confirm that this experience is not confined to the past and is "one of the major human rights problems faced by [indigenous peoples] in recent decades."

For indigenous peoples, secure, effective collective rights to traditional lands, territories and resources are fundamental to their economic and social development, to their physical and cultural integrity, 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 communities.

This multifaceted nature of indigenous peoples' relationship to land was emphasized by former United Nations High Commissioner for Human Rights, Mary Robinson, in her 2001 Presidential Fellow's Lecture at the World Bank. She states 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.

The EIR Report concurs with this conclusion and observes that “Failure to recognize and respect [their] rights undermines efforts to alleviate indigenous peoples’ poverty and to achieve sustainable development.”

Decisions about when, where 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; conflict often ensues and the rights of indigenous peoples are often disregarded.

As the EIR Report observes, “when a company is granted the legal right by a government to exploit resources in certain territories, locals and indigenous peoples may be evicted from their traditional lands or lose access to land that may hold cultural and survival significance to them. When this happens without talking to and receiving the consent of those who live there, it can result in a breakdown of communities and cultural norms, as well as cutting people off from their livelihood.”

FPIC guarantees that the rights and interests of indigenous peoples will be accounted for and respected. It also provides the basis for ensuring that indigenous peoples will benefit from any extractive projects on their lands and that negative impacts will be properly assessed, avoided and mitigated. FPIC is also integral to industry’s stated need to obtain a ‘social license’ to operate. Without substantial agreement by affected persons, communities and indigenous peoples, social license cannot be obtained and industry will be operating in contravention of its own principles.

FPIC -- an internationally guaranteed right

The 1993 Vienna World Conference on Human Rights declared that, “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.” 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 lands, territories and resources or rights in general.

Consent must be freely given, obtained prior to 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.

Observing that indigenous peoples have and continue to suffer from discrimination, and “in particular that they have lost their land and resources to colonists, commercial companies and State enterprises,” 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.”

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.” 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 ....”

The Inter-American Commission on Human Rights (IACHR) has 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.” The IACHR stated that this right is part of a number of “general international legal principles applicable in the context of indigenous human rights.”

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. 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.

<p>Indigenous peoples’ right to free and informed consent is also embraced in the draft declarations on the rights of indigenous peoples now 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</p> <p>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.</p> <p>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</p>	<p><b>International Acceptance of Indigenous Peoples’ Right to FPIC</b></p> <ul style="list-style-type: none"> <li>UN Committee on the Elimination of Racial Discrimination</li> <li>UN Committee on Economic, Social and Cultural Rights</li> <li>UN Sub-Commission on Promotion and Protection of Human Rights</li> <li>UN Permanent Forum on Indigenous Issues</li> <li>UN Working Group on Indigenous Populations</li> <li>UN Development Programme</li> <li>UN Centre for Transnational Corporations</li> <li>UN Commission on Human Rights, Special Rapporteur on situation of the rights and fundamental freedoms of indigenous people</li> <li>Convention on Biological Diversity</li> <li>Convention to Combat Desertification, particularly in Africa</li> <li>Inter-American Commission on Human</li> </ul>
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corporations on indigenous territories. 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....”

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:

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.

Rights  
 Inter-American Development Bank  
 Andean Community  
 European Council of Ministers  
 European Commission  
 Organization of African Unity  
 World Commission on Dams  
 World Bank Extractive Industries Review  
 IUCN Vth World Parks Congress  
 World Wildlife Fund  
 International Petroleum Industry  
 Environmental Conservation Association  
 and the International Association of Oil &  
 Gas Producers

The recent UN Sub-Commission on the Promotion and Protection of Human Rights’ *Norms on Transnational Corporations* similarly state that:

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.

Finally, both general and treaty-based international law require indigenous peoples’ free, prior and informed consent in connection with resettlement. In other words, resettlement may not be involuntary. This was also recommended by the EIR.

#### EIR Recommendations and the Draft Management Response

The EIR 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. For indigenous peoples this is an internationally guaranteed right; for local communities it is an essential part of obtaining social license and demonstrable public acceptance for the project.” It further recommends that the World Bank Group “should ensure that indigenous peoples’ right to give their free prior and informed

consent is incorporated and respected in its Safeguard Policies and project-related instruments.”

The Management Response however rejects this, stating that “Governments and industry do not support free prior informed consent, where this would represent a veto on development.” and “[t]he WBG will continue to aim for broad community acceptance of developments that impact them....” It also states that “Discussions with communities need to take place in the context of local law which may or may not give rights [of] prior informed consent ....”

None of these three arguments is tenable. First, some governments and some industry groups do in fact support free, prior and informed consent. A number of governments have included the right in their domestic legislation and have supported it in international fora. Industry groups such as the International Petroleum Industry Environmental Conservation Association and the International Association of Oil & Gas Producers have stated, as cited in Dr. Salim’s report, that “it is important for communities to be able to give free and informed consent.”

Second, the WBG cannot hope to gain community acceptance if communities are from the outset told that their agreement is not an issue. FPIC should be seen as the principal determinant of whether there is a social license to operate, and hence is a principal tool in deciding whether to support the operation.

As to the third argument, it is ironic that Bank management justifies rejection of free, prior and informed consent on the basis of compliance with the law. FPIC is an internationally guaranteed right of indigenous peoples that is a source of obligations for the vast majority of the Bank’s borrowers, obligations the Bank is bound by international law not to undermine. International law protects the rights of indigenous peoples to their traditionally used and occupied lands, regardless of whether a state’s domestic law recognizes those rights. Bank Management, industry, and state governments can hardly object to the right of indigenous peoples to determine whether or not to allow development projects on or affecting their lands.

Furthermore, Bank 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 Bank’s present policy requires such participation in Bank-financed operations. Also, while national law may not address child labour standards, WBG policy is not to support a project that uses child labor.

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.” OP 4.36 on Forestry also states that “The Bank does not finance projects that contravene applicable international environmental agreements.” If this is possible with regard to environmental obligations, is there a compelling reason why human rights obligations should not be accorded equal status?

*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.*

*Id.*, at paras. 39-40.

*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.*

*Striking a Better Balance. The World Bank Group and Extractive Industries. The Final Report of the Extractive Industries Review, Vol. I, December 2003, at 41 (hereinafter "EIR Report").*

*Id.*, at p. 18-9.

*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, 12 July 1993.*

*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.*

*Id.*, at para. 4(d).

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

*Id.*, at para. 33.

Mary and Carrie Dann Case, at para. 131.

*Id.*, at para. 130. (footnotes omitted).

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

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)

*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.*

*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, 17 June 2002, at 3.

‘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.

*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, 2003, para. 10(c).

Among others, International Labour Organization 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.

Draft Management Response, para. 41.

*Id.*, para. 1m

See, for example, the Constitution of Ecuador 2000 and the Philippines’ Indigenous Peoples’ Rights Act of 1997.

IPIECA and 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.

This same condition was also contained in Operational Manual Statement 2.36 on Environmental Aspects of Bank Work issued in 1984.

During a meeting with human rights NGOs in Prague in September 2000, the Bank’s President, James Wolfensohn, committed to “making explicit reference to human rights in Bank documents,” and “to work with Bank staff to include human rights in their policy documents ....” Human Rights Watch, Press Release, 22 September 2000, ‘NGOs Urge Implementation of Wolfensohn Commitment to Human Rights’. <http://www.hrw.org/press/2000/09/prague.htm>