

# FPIC: Legal Requirements and Practical Realities

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# Introduction

- What does Free, Prior, and Informed Consent (FPIC) mean?
  - Sources of FPIC
  - Uncertainty in interpretation
- Relevance to Companies
  - Impact of State action
  - Evolving responsibilities for companies

# What is FPIC?

- The concept of FPIC is one of a number of indigenous rights specifically enumerated in international documents.
- FPIC is something ‘more than’ the right of indigenous peoples to be consulted and involved in decisions regarding development projects that will impact them.
  - More formalized, documented and verifiable engagement where a project has substantial impacts on indigenous groups
  - Consultation should be undertaken in good faith
  - Sufficient time must be provided for proper consultation
  - Process may include the option for indigenous peoples of withholding their consent in certain circumstances

# What is FPIC?

- "Free" = no coercion, intimidation or manipulation from the State
- "Prior" = consent has been sought sufficiently in advance of any authorization or commencement of activities. Must respect time requirements of indigenous consultation processes
- "Informed" = must provide accurate and understandable, easily accessible information
- "Consent" = controversial as to meaning and when required

# Sources of FPIC – ILO 169

- International Labor Organization Indigenous and Tribal Peoples Convention, 1989 (No. 169)
  - “right to decide their own priorities for the process of development” and “to exercise control, to the extent possible, over their own economic, social and cultural development.” (article 7)
    - Not a consent requirement
  - refers to the principle of FPIC in the context of relocation of indigenous peoples from their land (article 16).
    - obtain FPIC of indigenous peoples before resettlement
      - Application is conditional
        - In absence of consent, re-settle in accordance with national law

# Sources of FPIC – ILO 169

- States must fully consult with indigenous peoples and ensure their informed participation in the context of development, national institutions and programs, and lands and resources (articles 2, 6 and 15)
- Consultation must be undertaken in good faith, in a form appropriate to the circumstances and with the objective of achieving consent (article 6)

# Sources of FPIC- UN Declaration

- United Nations Declaration on the Rights of Indigenous Peoples (adopted by the General Assembly in September 2007)
  - Soft law, not a treaty
  - States are to gain FPIC from indigenous communities “prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources”
  - Not clear what interests of indigenous peoples are protected
    - Deep divisions between indigenous peoples and States on meaning of parts of UN Declaration

# Sources of FPIC – UN Declaration

- The United States, Canada, Australia and New Zealand refused to sign when the UN Declaration was adopted in 2007
  - Conflict with their constitutions
- The US endorsed the UN Declaration in December 2010; however it described FPIC as requiring meaningful consultation, not necessarily agreement
- Canada signs UN Declaration in 2010, with certain qualifications
  - Concern that ‘consent’ will be interpreted as a veto

# Uncertainty of Meaning and Application

- As an evolving concept, FPIC produces uncertainty in content and application.
  - When is consent requirement triggered? What interests of indigenous peoples are protected?
  - Does “consent” imply a “veto” right?
  - What constitutes adequate process for FPIC?
  - Does it apply to companies?

# Obligations of Companies

- None of these international legal documents apply directly to companies, only States
- Ongoing uncertainty whether it is the responsibility of companies to obtain consent
  - Do companies have a role in obtaining consent even if concession has been granted by State?
  - Incorporation of FPIC principle in company process through international pressure and incorporation of aspects of FPIC by international financial institutions

# Obligations of Companies

- New standards incorporate principles of FPIC
  - IFC Performance Standard 7: Indigenous Peoples
  - IADB Operational Policy on Indigenous Peoples
    - Informed consent of indigenous peoples to resettlement
  - European Bank for Reconstruction and Development
    - Obtain consent for activities that are on traditionally used land that would affect livelihoods or cultural, ceremonial, or spiritual uses that define identity and community of indigenous peoples; relocation; impact on cultural resources (Environmental and Social Policy 2008)

# Obligations of Companies - IFC

- Pursuant to World Bank Extractive Industries Review, IFC's Performance Standards and the World Bank's Safeguard Policies updated to include requirement of FPIC for IFC and World Bank-supported projects (2006)
  - FPIC then described as:
    - not 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 groups, local communities, governments 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.”*
  - Required that a company engage in *“free, prior, informed consultation”* with indigenous peoples.

# Obligations of Companies - IFC

- IFC Performance Standard 7 to incorporate FPIC (effective January 1, 2012)
- FPIC required in cases of (i) relocation; (ii) lands and resources subject to traditional ownership or customary use; and (iii) and impact on critical cultural heritage
- Performance Standard 7 notes that consent does not always require unanimity.

# Obligations of Companies - IFC

- A company must document:
  - that it has agreed upon a process with the affected community of indigenous peoples; and
  - evidence of an agreement between the company and affected indigenous communities.

# Practical Realities for Companies

- If companies do have (or accept) an obligation to incorporate the principle of FPIC:
  - What are the benefits?
  - What are the challenges?

# Practical Realities - Benefits

- Enhance ability to obtain and maintain social license
  - May not add much in some jurisdictions where indigenous rights already well-entrenched and well-protected
- Reputational gains: Civil Society; Investors; Governments; Indigenous groups
- Mitigate risks: Reputational; Operational (greater project certainty, reduced delays)

# Practical Realities - Challenges

- Identifying relevant indigenous groups – which groups have the power to give consent to extractive industry projects? Which decision-making bodies are the legitimate representatives?
- Potential for heightened tensions between indigenous and non-indigenous if treated differently.
- Ensuring consent is ‘free’, particularly when government has already granted license for activity.

# Practical Realities - Challenges

- When are different consultation or consent requirements triggered?
- Is the obligation limited to meaningful engagement and consultation with indigenous communities, i.e. what does 'consent' mean?
  - Consultation versus FPIC – false distinction?
- What negotiation processes are adequate to fulfill them, i.e. what does a workable consent process look like in practice?
- What constitutes “prior” in case of companies?
  - FPIC must be re-interpreted to guide companies

# Practical Realities – Risks of Incorporating FPIC

- The indigenous peoples might say ‘no’ to a project.
- Governments focused on speedy development of resources may turn to those companies not seeking consent.
- May negatively impact relationships with governments (state sovereignty).
- Adds additional steps not legally mandated, impacting regulatory processes.
- FPIC policy may conflict with national laws, depending on jurisdiction.

# Conclusion

- As an evolving principle, there remains ongoing uncertainty as to application and interpretation.
- No direct, legally binding requirement under international law for companies to obtain FPIC.
  - There is, however, increased momentum behind principle of FPIC
  - May provide companies with stronger social license to operate
- Significant challenges for companies to incorporate FPIC, limited legal guidance and few company experiences.

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