

# **Free Prior Informed Consent For Indigenous Peoples and Local Communities: A briefing for World Bank Executive Directors**

Hosted by the Office of the Executive Director for  
Canada, Ireland, and the Caribbean  
Monday, June 14, 10:30- 12:30 a.m. World Bank board room, MC 13-301  
For further information contact Melina Selverston on [melinas@igc.org](mailto:melinas@igc.org)

The World Bank Extractive Industries Review calls for recognition of the right to free prior informed consent (FPIC) for indigenous peoples and local communities. Why is FPIC important? How has it been put into practice and what is its relevance to development? How can the World Bank implement FPIC? We invite you to discuss these issues with some of the foremost experts on the subject.

## **Moderator: Introductory and Closing Remarks**

### **Armstrong Wiggins, Indian Law Resource Center**

Armstrong Wiggins is the Director of the Central and South America Program at the Indian Law Resource Center in Washington, DC. He has advocated for indigenous rights in the international arena since the 1970's, including a leading role brokering the peace process in Nicaragua. He supports indigenous peoples through-out the Americas, and assisted the community of Awas Tigni in Nicaragua to win their landmark case in the Inter American Court of Human Rights.

## **FPIC in International and Domestic Law**

### **Fergus MacKay, Forest Peoples Program**

Fergus MacKay is a human rights lawyer primarily focusing on the rights of indigenous peoples. He has worked as an attorney for indigenous peoples in Alaska and was legal adviser to the World Council of Indigenous Peoples for five years. He is presently Coordinator of the Three Guyanas Programme, working with indigenous and tribal peoples in Guyana, Suriname and French Guiana, and Coordinator of the Human Rights and Legal Programme of UK-based NGO, the Forest Peoples Programme. In 2003, he served as a member of the advisory panel of the Eminent Person conducting the World Bank's Extractive Industries Review.

## **FPIC in Practice -- the Philippines Indigenous Peoples Rights Act**

### **Dr. Antonio La Vina, Senior Fellow, World Resources Institute**

Dr. La Vina was the Undersecretary of Environment and Natural Resources of the Philippines, 1996-1998. He was responsible for enforcing mining, forestry, and environmental impact assessment laws in the Philippines during that period. He helped to draft the FPIC legislation in the Philippines. He has been a Senior Fellow at the World Resources Institute since 1999.

## **FPIC in Practice – Local Communities and Mining in Peru**

### **Miguel Palacin Quispe**

Miguel Palacin is the Coordinator of the South America Network of Communities Affected by Mining. He is the President of the National Confederation of Communities affected by Mining, and President of the Coordinating Body of Indigenous Peoples of Peru. He works to defend the rights of people affected by the extractive industries in 1,600 communities.

## **Implementing FPIC at the World Bank**

### **Anne Perrault, Center for International Environmental Law**

Anne Perrault is a Senior Attorney at the Center for International Environmental Law, which is based in Washington DC. She manages the biodiversity program and works on international financial institution, human rights and trade issues. One of her primary areas of research focuses on issues related to recognition and implementation of free, prior, and informed consent in the context of access to genetic resources and other development activities.

# **Presentation of Fergus MacKay at the ED Briefing on FPIC 14 June 2004**

## **FPIC in International and Domestic Law**

My presentation provides an overview of indigenous peoples' right to free, prior and informed consent in international law. It will also touch upon the right as expressed in the policies of intergovernmental development organizations and the European Union. Finally, I will make some brief remarks about implementation of the right in domestic laws, highlighting the case of Australia.

### **Preliminary Remarks**

To start, I would like to highlight three reasons why FPIC is important. First, as I will outline shortly, FPIC is an internationally guaranteed human right of indigenous peoples. In the context of resettlement of indigenous peoples, there is strong evidence that the right has attained the status of customary international law. As early as 1984, for instance, the Inter-American Commission on Human Rights stated that the "preponderant doctrine" holds that the principle of consent is of general application to cases involving relocation of indigenous peoples.<sup>i</sup>

The main principle I would like to emphasize is contained in the Final Declaration of the Vienna World Conference on Human Rights which provides 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."<sup>ii</sup> This principle has been repeatedly reaffirmed by all the major intergovernmental human rights bodies, especially in cases involving indigenous peoples. The Programme of Action of the 1994 International Conference on Population and Development, adopted by consensus, contains similar language and provides that indigenous peoples' perspectives on population and development should be respected and that "[a]ll human rights violations and discrimination, especially all forms of coercion, must be eliminated."<sup>iii</sup>

In this context, I would also like to stress that the World Bank is a subject of international law and has certain obligations with respect to human rights. At a minimum, the Bank is

required to respect norms of customary international law and to ensure that it does not facilitate or be complicit in violations of the international obligations assumed by its borrowers. This necessitates some form of screening and assessment and policy measures concerning both the obligations of the Bank and its Borrowers in relation to projects and other operations.

As the Bank own internal reviews of its involvement in extractive industries and the EIR found, much greater attention is needed for human rights. This even more so the case for indigenous peoples as numerous UN and other bodies and studies have found that impact of extractive industries is, to quote the UN Commission on Human Rights Special Rapporteur on indigenous peoples' rights, "one of the major human rights problems faced by [indigenous peoples] in recent decades."<sup>iv</sup>

Development effectiveness – Second, respect for the indigenous peoples' right to FPIC is fundamentally related to development effectiveness and poverty alleviation efforts. As I will discuss later, this conclusion is widely accepted by multilateral development organizations. This is also the case for the EU. In 1998, the Council of Ministers adopted a Resolution entitled, *Indigenous Peoples within the framework of the development cooperation of the Community and Member States*, which 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>v</sup> This was reaffirmed in 2002 by the European Commission, which stated that the EU interprets this language to be the equivalent of FPIC.<sup>vi</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>vii</sup> FPIC is implicit in and fundamental to the right to self-determination.

Economic Sense – the last reason is related to economics. In particular, it may be argued that FPIC makes economic sense given the costs often incurred in forcing indigenous

peoples to accept EI projects (police and military expenditures, for instance), and related to litigation (direct costs, judicial resources, etc). 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>viii</sup> Litigation concerning the OK Tedi mine in PNG is estimated to have cost the company and governments involved some A\$2.3 billion. Presently, none of these costs are factored into cost-benefit analyses of WBG investments in EI.

### **International Law**

Indigenous peoples’ right to FPIC is clearly recognized under a range of universal and regional human rights instruments as well as under the Convention on Biological Diversity. 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 of 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.

For example, observing that indigenous peoples “have lost their land and resources to colonists, commercial companies and State enterprises,”<sup>ix</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>x</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>xi</sup> The Convention has been ratified by 169 states, including the vast majority of Bank member states.

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>xii</sup> It then recommended that states “ensure the participation of indigenous peoples in decisions affecting their lives, ... and seek the consent of the indigenous peoples concerned ....”<sup>xiii</sup>

The Inter-American Commission on Human Rights (IACHR) has developed considerable jurisprudence on FPIC. The Commission has stated 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....”<sup>xiv</sup> Most recently, in 2003, the IACHR stated that FPIC is generally 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>xv</sup>

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 activities of multinational corporations on indigenous territories.<sup>xvi</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>xvii</sup>

Similarly, the recent UN Sub-Commission on the Promotion and Protection of Human Rights’ *Norms on Transnational Corporations* 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.<sup>xviii</sup>

Finally, FPIC is recognized for both indigenous peoples and local communities in the Convention on Biological Diversity in relation to exploitation of traditional knowledge.

This principle has also found its way into ongoing CBD work on Access and Benefit Sharing, CBD standards on environmental and social impact assessment as well as regional standards on access and benefit sharing adopted by the African Union and the Andean Community. Similar language is also found in the Convention to Combat Desertification. 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>xxix</sup> In March 2004, the 7<sup>th</sup> COP to the CBD decided that involuntary resettlement of indigenous peoples should be prohibited in relation to protected areas.

### **Domestic law**

In addition to recognition in international law, FPIC is also increasingly recognized in the domestic law. Others will also talk about this, so I will confine my remarks to the case of Australia. FPIC also has been part of the law applying to mining in Australia's Northern Territory for almost 30 years and is also found in the legislation of at least five other Australian states. 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 and, as a group, consent; they are satisfied that the terms and conditions are reasonable; and they have agreed the terms and conditions with the miner.<sup>xx</sup>

These consent procedures were reviewed by the National Institute of Economic and Industry Research in 1999,<sup>xxi</sup> which found that they had "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>xxii</sup> Aboriginal land has not only been made available for exploration however; 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>xxiii</sup> Similar numbers could also be produced for mining on Aboriginal lands in Canada, where indigenous peoples have negotiated agreements giving their consent.

## Development Standards

A number of intergovernmental development agencies and international financial institutions have incorporated FPIC language into their policies and programmes on indigenous peoples.

In preparation for its 3rd session, the UNPFII distributed a questionnaire to 18 UN agencies and programmes in order to gather information about “how the principle of FPIC is understood and applied by United Nations programmes, funds, agencies.”<sup>xxiv</sup> All of the 10 UN agencies that replied recognized that FPIC is embedded in the human rights framework and maintained that they implemented FPIC in their policies and practice. The United Nations Development Programme’s official policy on indigenous peoples, for instance, 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>xxv</sup>

The PFII has also taken an interest in WBG policies as they relate to indigenous peoples, recommending in 2003 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>xxvi</sup>

At the regional level, 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>xxvii</sup> The IDB is presently formulating a binding operational policy on indigenous peoples. Preliminary strategy papers on this policy include FPIC.<sup>xxviii</sup> FPIC is already included in the IDB’s policy on Involuntary Resettlement.<sup>xxix</sup>

The Asian Development Bank, while not including the right in a policy, has repeatedly stated that obtaining the prior informed consent of indigenous peoples is important for project sustainability and poverty alleviation.

I have already mentioned the policy of the EU.

Last but not least, the International Finance Corporation's Social and Environmental Review Procedure ("Micro-Finance Exclusion List") already contains the requirement of 'informed consent' in relation to indigenous peoples affected by micro-finance projects. It states 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>xxx</sup>

### **Concluding Remarks**

From the preceding it can be seen that FPIC is an established feature of international human rights norms and development policies 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. The same may also be said of the argument that FPIC contravenes state sovereignty in general, including state sovereignty over natural resources. As stated by the International Court of Justice in 1996, "there is not even the semblance of a suggestion in contemporary international law that [human rights] obligations amount to a derogation of sovereignty."<sup>xxxi</sup>

<sup>1</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>1</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, 12 July 1993.

<sup>1</sup> The Programme of Action of the 1994 International Conference on Population and Development, Cairo, 5-13 September 1994, A/CONF. 171/13 (1994), at para. 6.25.

<sup>1</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.

<sup>1</sup> European Union, Council of Ministers Resolution, *Indigenous Peoples within the framework of the development cooperation of the Community and Member States* (1998).

<sup>1</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>1</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>1</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) On the history of the Bougainville conflict, see, *id.*

<sup>1</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>1</sup> *Id.*, at para. 4(d).

<sup>1</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>1</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>1</sup> *Id.*, at para. 33.

<sup>1</sup> *Mary and Carrie Dann Case*, at para. 131.

<sup>1</sup> *Report No. 96/03, Maya Indigenous Communities and their Members (Case 12.053 (Belize))*, 24 October 2003, at para. 141 (footnotes omitted).

<sup>1</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>1</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.

<sup>1</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, 2003, para. 10(c).

<sup>1</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 November 2001, para. 11.

<sup>1</sup> *Aboriginal Lands Rights (Northern Territory) Act 1976*, at sec. 42(6).

<sup>1</sup> *The National Competition Policy Review of Part IV (the mining provisions) of the Aboriginal Land Rights (Northern Territory) Act 1976.* NIEIR, 1999.

<sup>1</sup> Aboriginal and Torres Strait Islander Commission, *Annual Report 1998-99*, at 149.

<sup>1</sup> P. Boyle, 'Behind the Mining Companies Hysteria about Mabou' 1993. Available at: <http://www.greenleft.org.au/back/1993/111/111p3.htm>

<sup>1</sup> *Id.*, at para. 3.

<sup>1</sup> *UNDP and Indigenous Peoples: A Policy of Engagement*, August 2001, paras. 26-30.

<sup>1</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>1</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>1</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>1</sup> Inter-American Development Bank, *Operational Policy 710 on Involuntary Resettlement* (1998), Section IV, para. 4

<sup>1</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>1</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, July 11,

1996, § 2 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, 12 March 2004, at para. 15. 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.

# Implementing Free Prior and Informed Consent: The Experience of the Philippines

Outline of Presentation: NOT FOR CITATION

Dr. Antonio La Vina

World Resources Institute

## I. Introduction: FPIC in the Philippines

### 1. *What FPIC covers*

- i. All activities in IP areas
- ii. For other local communities, FCIP is required in all projects requiring environmental impact assessments through the concept of “social acceptability”.

### 2. *Why FPIC?*

- i. Human Rights Norms in 1987 constitution of the Philippines; incorporated strong provisions on indigenous peoples’ rights, due process, transparency and public participation
- ii. Acceptance by the government of international law on indigenous peoples’ rights and environmental governance (Principle 10 of the Rio Declaration)
- iii. Peace and National Security reasons – FPIC an instrument tool to avoid conflict (e.g. Mapping of conflict areas in 1996 Peace negotiations with Moro National Liberation Front and National Democratic Front showed a convergence between big projects which were socially unacceptable and the presence of insurgent groups)
- iv. Economic reasons (cost of delay, legal/political repercussions)

### 3. *History of FPIC – 10 years of experience*

- i. 1990-94: Administrative rules beginning with rules on delineating ancestral claims (DAO 2) EIA, and Bio-prospecting (EO 247 issued by then President Ramos was the first administrative issuance that used the phrase “prior informed consent”)
- ii. 1995: Mining act required FPIC for IPs, Local government consent also required.

Note: This law was industry-driven and there was no objection from industry on the concept of prior consent by indigenous peoples.

- iii. 1996 : Mining and Forestry (logging) Rules were revised to incorporate and provide details on how FPIC to be implemented
- iv. 1997: Indigenous Peoples Rights Act (IPRA) – Congress passed this law which enshrines the principle of FPIC and provides the administrative system that will oversee its implementation ((The National Commission on Indigenous Peoples – NCIP).

**Note:** The significance of the Indigenous Peoples Rights Act (IPRA) of the Philippines is primarily in the policy and rights framework that it establishes for the recognition of territorial, land and resource rights of Indigenous Peoples and the requirement for FPIC for all developments affecting them. This clearly defines their rights, not as individual rights, but collective rights, with attendant rights to self-governance and self-directed development.

## II. Implementation Experience

1. *General Comment:* This is doable, it is not rocket science, and what works is to take common sense approach. It is not easy but neither is it very difficult either. Certainly, it is not impossible.

2. *Examples of FPIC in many areas.* Dams (Bakun), Dairy Farms (Mindanao), Bio-prospecting (Philippine-wide), Tourism Projects (Coron Island)

\*February 2004 Workshop on Community Experiences of FPIC: There was united support for increased understanding and improved implementation of FPIC as embodied in national and customary law. Efforts are underway to document case studies from around the country, in order to learn lessons and to engage with the NCIP to review its implementing rules and regulations. Thus FPIC is a major contributing factor in the empowerment of indigenous peoples for sustainable development. The situation has moved on from a debate about the feasibility of FPIC to its implementation.

### 3. Key implementation issues and how addressed in the Philippines

a. *What is FPIC?*

**Free** - from any external manipulation, interference coercion

**Prior** – before project is approved either through EIA process or other licensing process

**Informed** - obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community

**Consent** - to be determined in accordance with their respective customary laws and practices; For other communities, under Philippine law, consent is expressed through local governments (debate about this)

b. *When should a project proponent start working to obtain FPIC?*

As early as possible before deciding to proceed with the project: while doing feasibility study, before even exploration, certainly while scoping the EIA study.

c. *Examples of what should be avoided?*

Sacred sites, disruption of traditional livelihoods, relocation.

d. *What can provide incentives for FPIC to be facilitated?*

Benefit sharing and direct compensation are important but more important is a voice in the decision and in the design of the project, the management of the resource, and the continuing involvement of the affected community in implementing and monitoring the project.

e. *How should information be given?*

In the language of the community, through media that reaches them, in a timely manner and without cost to the community; full disclosure (especially of impacts) should be the rule.

f. *What kind of consultative process should be required?*

Due process, such as timely notice, and public hearings where appropriate. In the Philippines, informal and consensus building approaches are encouraged.

*g. Who gives consent?*

- Indigenous Peoples, in accordance with their customary law
- Local Communities, usually through local governments although there is debate about the adequacy of this
- In both cases, especially in large projects, this is supplemented by formal democratic and legal processes, such as referendums and written agreements.

*h. Who says that consent has been given?*

The appropriate government agency (NCIP), but through a transparent process of verification. Third party verification might also be necessary.

### **III. Conclusion – Moving Forward**

- It is not an option to retreat for the Philippines; we have had three presidential transitions and administrations since IPRA was enacted and, while some grumbling persists, there has been no serious effort to overturn the FPIC requirement. Aside from being an important strategy for peace and security. FPIC is nothing really but “best development practice” and “best governance practice” rolled into one, in a word, sustainable development in practice.
- Adoption by the World Bank of this principle through its incorporation into its policies will be a very good signal for the Philippines and other countries that have adopted this ‘best’ development and governance practice. Non-adoption send the wrong signal, in effect “punishing” those who have gone ahead with this
- A priority task in making FPIC work is the development of indicators of meeting FPIC commitment by governments, the bank, and companies. Such indicators can be used to independently assessed future performance on meeting this commitment
- The Bank is a member of the Partnership for Principle 10 and is hosting a meeting of the partnership next week. FPIC is an implementation mechanism of Principle 10 of the Rio Declaration.

**El caso de la Minería en el Peru**  
**Presentacion de: Miguel Palacin Quispe**

He viajado 3 días para estar presente en esta reunión, luego de la reunión pasada, y ver mayor interés hoy, empiezo creer que el Banco esta interesado en adoptar el Consentimiento previo ,libre e informado.

En mi pueblo, no enamoramos tirando piedritas, y si eso no funciona, puedes tirar una roca y te puedes ir, aquí puede pasar algo parecido o no lo se.

He venido hablar sobre la necesidad que se adopten el Consentimiento, previo e informado, desde el lado de las comunidades afectadas, y quiero partir explicando: Que un pueblo indígena es superior a una comunidad: una comunidad es producto de fragmentación del Pueblo propiciada por la colonia, así como por la implementación de políticas del estado colonial, que dividió al Pueblo en pequeñas comunidades para establecer un mejor control, pero estas comunidades son formas de organización, que cuentan con territorios propios y sus practicas culturales son las mismas del pueblo mayor, como es el Pueblo indígena , en el Perú existen 5660 comunidades campesinas, denominación inconsulta echa por el estado en los anos 60, todas descendientes del Pueblo Quechua y Aymara, así como 1,700 Comunidades Nativas, ubicados en la amazonia que conservan todas sus raíces culturales, Y muchas comunidades rurales organizadas bajo sistemas de producción, etc. y que todos son descendientes el imperio del Tawantinsuyo, por tanto todos tiene derecho a la autodeterminación, en virtud a ello establecen su condición política y prevean su desarrollo. Caso parecido es en muchos países de Latinoamérica, y creemos en diversas partes del Mundo, impactadas por las políticas del Banco Mundial y las Industrias extractivas.

También debo manifestar el interés que el Banco Mundial ha venido teniendo sobre los Pueblos Indígenas y comunidades locales, tal como puedo apreciar en la publicación " Exclusión Social y estrategias de Vida de los indígenas urbanos en el Perú, México y Ecuador", realizado por Jorge Uquillas- Coordinador del Programa de Pueblos indígenas, Desarrollo ambiental y socialmente sostenible, Región América latina y El Caribe, del Banco Mundial, documento que les puede esclarecer mejor el tema de los migrantes de los pueblos indígenas a comunidades urbanas.

Por otro lado he venido para presentarles muy concretamente algunos casos donde la practica de relacionamiento tiene diversos matiz, y confrontación, que si se hubiera establecido un relacionamiento como el consentimiento previo, libre e Informado, no hubiera llegado en la situaciones que se encuentran:

1.- Minera Yanacocha , en Cajamarca ( Perú ) , accionista el Banco Mundial, que desde hace 4 anos , pretende explotar el Cerro Quilish, a pesar que mas de 70,000 pobladores de Cajamarca se oponen, porque el Quillish , es el colchón acuífero de Cajamarca, caso que llevo hasta los tribunales, donde

la población y las autoridades no ha otorgado la licencia social. ( Mala relación de la Mina con la comunidades de Cajamarca )

2.-Minera Quellaveco, en Moquegua ( Peru) B.M. es accionista, que luego de 4 años , no puede explotar la Minera y el IFC no otorga el crédito, el conflicto es por la mala información inicial sobre el uso de las aguas subterráneas de una cabecera de cuenca, que afectaría a 25 comunidades y agricultores del Valle de Moquegua.

3.- Tambogrande, caso conocido en el Mundo, donde el Banco Mundial ha invertido en la construcción de un reservorio, para desarrollar una agricultura de exportación, con 40,000 has de tierras dedicadas a la agricultura: una empresa Minera quiso explotar un yacimiento Minero ubicado en medio de la ciudad, las relaciones entre la comunidad , la empresa y el estado no fueron de las mejores que se produjo un conflicto grande, donde la población ha tenido que implementar un propio mecanismo de consulta, donde le 98% dijo no a la minería, al final el estado ha tenido que retirar la empresa minera , que indica que ha invertido 60 millones de dólares.

4.- Sarayacu ( Ecuador) Donde una empresa , sin realizar los mecanismos de consentimiento de la población ingreso a territorio indígena, el caso se encuentra con medida cautelar en la Comisión Interamericana de los Derechos Humanos

5.- Minera BHP- Tintaya ( Peru) que luego de 20 años , demandamos a la compañía , ante el ombudsman de Australia , sobre la violación de los derechos humanos y territoriales de las comunidades, para luego instalar una mesa de dialogo y buscar la solución al desplazamiento de 5 comunidades, un proceso interesante , pero muy difícil, cuyo costo que asumen la empresa, los aliados y las propias comunidades, por no haber tenido una buena relación desde un inicio.

6.-Otras compañías y por incumplimiento de la legislación nacional y por afectar a las comunidades, hemos denunciado al estado Peruano ante la CIDHH, 15 casos sobre conflictos con las empresas mineras.

Frente a estos hechos, la sociedad civil, las comunidades organizadas hemos colocado el Tema minero en la agenda Nacional ,y con ello la inclusión y/o modificación de algunas normas legales , como son la de la participación ciudadana, Hoy las compañías hablan de la licencia social, y para nosotros la licencia social , pasa por el consentimiento del ingreso al territorio, mediante procedimientos de dialogo y llegando a un acuerdo, no hacerlo es inmoral, jamás podemos pretender ingresar a vivienda ajena sin su consentimiento, y nuestros territorios es la casa grande , la casa de todos.

El consentimiento previo e Informado es Paz y Seguridad, el consentimiento, es real y existente como los propios derechos humanos, es solo reconocerlo como lo hacen mucho, de caso contero estamos haciendo que las agendas

locales generen conflictos y con ello, llevamos a la agenda Nacional y un conflicto generalizado como el ocurrido en Bolivia, que el pueblo en su conjunto hoy exigen la realización de un referéndum sobre el gas, y el conflicto llegó a mayores como fue la salida de su presidente y luego se descubrió que la mina Don Mario, financiado por el Banco Mundial, carecía de una licencia social de la población, y ello tenemos que evitar.

Finalmente el consentimiento previo e informado, debe implementarse para todas las comunidades organizadas que deben ser cientos de miles en el Mundo, que sufren los mayores impactos de estos procesos implementados con la idea de aliviar la pobreza, que al fin esta ha significado todo lo contrario. y sus acuerdos de ellos funcionan según sus usos y costumbres, que están bien establecidas, y ahí se ejerce la democracia

Por eso los líderes y responsables de nuestras organizaciones tenemos que hacer esfuerzos, para evitar más enfrentamientos., porque la sociedad civil ahora cumple un rol importante en la gobernabilidad de nuestros países, frente a los gobiernos débiles con que contamos.

# FREE, PRIOR AND INFORMED CONSENT AND THE WORLD BANK GROUP

Anne Perrault, Center for International Environmental law  
June 14, 2004

**1) Introduction and objectives.** Implementing free, prior and informed consent (FPIC) is not only central to protecting the rights of affected peoples and communities, but is central *also* to enhancing the World Bank's ability to achieve its goals of poverty alleviation and sustainable development, and to improving development effectiveness.

**2) What does FPIC mean for the World Bank?** To effectively implement FPIC, all relevant World Bank policies and procedures need to reflect the principles of FPIC. *The framework in which to do this already exists.* We need to build on this existing framework to ensure that policies and procedures support the abilities of affected peoples and communities to meaningfully participate in decision-making throughout the development process—in a dialogue, if you will, with developers, governments and project sponsors. This includes upstream processes that influence: which projects are selected and funded by the World Bank Group, and what these projects look like.

**3) Why FPIC helps poverty alleviation and sustainable development.** FPIC promotes poverty alleviation and sustainable development because:

- The transparency and opportunities for participation associated with FPIC serve to ensure that the needs of the entire population are considered, and that projects are shaped in order to meet these needs.
- Second, it ensures that development options—those considered initially and well as those ultimately chosen—will better reflect the needs of these communities and will not harm them.
- Additionally, all participants in the development process benefit from the unique knowledge of affected peoples that is brought to the table early on through such participatory processes.

**4) Why FPIC improves development effectiveness.**

- FPIC institutionalizes a process of meaningfully integrating input from affected peoples early in the development process—and, most significantly, at a time when integrating this input is easiest and most cost-effective. Incorporating this input through FPIC influences project outcomes in ways that are deeply in touch with local needs, priorities and concerns. Addressing these local needs and concerns—which so often determine project success—is critical to do early on; addressing these needs and concerns at the *end* of the process becomes increasingly difficult, costly, and time-consuming to do.
- As a *policy instrument*, FPIC signals to all affected and interested parties that indigenous peoples and local communities have rights and interests that will be protected in extractive industry projects, where communities often are left in worse positions.

**5) Why FPIC is feasible at the Bank.** FPIC is more than mere consultation. Additionally, it involves more than just ensuring that at some point—after options for development have been considered, and a project has been conceptualized, designed and identified for funding—that affected peoples and communities have a right to some form of consent to a project. *It requires meaningful participation throughout the development process.*

- FPIC is largely not being implemented meaningfully at the World Bank, although, as mentioned earlier, frameworks for implementation already exist. Feasible changes that build on the existing framework can make it happen. Free prior and informed consent simply *makes more robust* a system that already provides some recognition of the importance of providing communities with information and engaging them.

**6) Common goals.** All of us in this room share the common goal of making World Bank projects work better for the poor—a system more responsive to the poor.

- As the World Bank has widely acknowledged and emphasized, *improved governance and transparency* are essential to this goal, and that this requires *inclusive mechanisms* for those peoples and communities most affected by World Bank projects. The implementation of FPIC is perhaps the most effective inclusive mechanism and tool available through which to meaningfully include affected peoples and communities in World Bank processes, procedures and activities, and thus to ensure better and more successful projects.

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<sup>i</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>ii</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, 12 July 1993.

<sup>iii</sup> The Programme of Action of the 1994 International Conference on Population and Development, Cairo, 5-13 September 1994, A/CONF. 171/13 (1994), at para. 6.25.

<sup>iv</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.

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

<sup>vi</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>vii</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>viii</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) On the history of the Bougainville conflict, see, *id.*

<sup>ix</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>x</sup> *Id.*, at para. 4(d).

<sup>xi</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>xii</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>xiii</sup> *Id.*, at para. 33.

<sup>xiv</sup> *Mary and Carrie Dann Case*, at para. 131.

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

<sup>xvi</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

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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>xvii</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.

<sup>xviii</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, 2003, para. 10(c).

<sup>xix</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 November 2001, para. 11.

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

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

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

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

<sup>xxiv</sup> *Id.*, at para. 3.

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

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

<sup>xxx</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>xxxi</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, July 11, 1996, § 2 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, 12 March 2004, at para. 15. 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.