



JEREMY HARTLEY, PANOS PICTURES

## THE PRINCIPLE OF FREE, PRIOR, AND INFORMED CONSENT

While sometimes controversial, the principle that host communities should have the opportunity to grant or withhold their free, prior, and informed consent (FPIC) to projects located on their lands or that impact the resources upon which they depend is now widely considered to be an internationally guaranteed human right of indigenous peoples, and is increasingly being recognized in national law, international norms, and voluntary best practice standards and guidelines.<sup>2</sup> FPIC is also increasingly seen as critical to ensuring that all communities have the opportunity to control their own development destinies. This section defines the FPIC principle, and provides an overview of the ways in which it has been recognized in various international conventions and guidelines, and in the national law of a growing number of countries.

The International Labour Organization (ILO) defines FPIC as the right of communities “to exercise control, to the extent possible, over their own economic, social and cultural development.”<sup>3</sup> This right is held collectively by the community and does not give individuals the power to veto a project. FPIC requires that consent be freely given, obtained prior to final authorization and implementation of activities, and founded upon an understanding of the full range of issues implicated by the activity or decision in question.<sup>4</sup> It is more than a one-time event: “it involves a continuous, iterative process of communication and negotiation spanning the entire planning and project cycles....”<sup>5</sup> While this does not mean that all decisions are provisional or nonbinding, it does require that information be provided, and consent be obtained, with respect to:

- undertaking prefeasibility and feasibility assessments;
- conclusions reached by studies undertaken regarding community support;
- any negotiated resettlement plan and compensation settlement;
- any development plans associated with the project;
- means of benefit sharing;
- allocation of liabilities;
- means of redress;
- oversight mechanisms; and
- project closure and decommissioning issues.<sup>6</sup>

FPIC differs importantly from mere consultation in the way decision-making authority is exercised and legitimated. Consultation requires only an exchange of information among project sponsors, regulators, and affected communities. It therefore provides only a limited mechanism for the public to provide information to project decision makers, or to be apprised of decisions that have already been made elsewhere. Consultations do not involve sharing or transferring decision-making authority to those who will be directly affected. Furthermore, they do not necessarily facilitate more inclusive and collaborative decision making, and are rarely an empowering form of public engagement.<sup>7</sup>

On the other hand, FPIC processes allow host communities to meaningfully participate in decision-making processes, negotiate fair and enforceable outcomes, and withhold their consent to a project if

their needs, priorities, and concerns are not adequately addressed. By requiring consent, FPIC processes can give affected communities the leverage to negotiate mutually acceptable agreements under which the project may proceed, thereby ensuring that the projects stand a better chance of producing results that benefit them. In doing so, FPIC processes empower host communities by changing the basic terms of engagement, and can thereby help ensure that the poorest and most marginalized or disenfranchised groups are included in the decision making and receive an equitable share of project benefits.<sup>8</sup>

The legitimacy and practical benefits of the community right to FPIC have been recognized in a number of international conventions and standard-setting exercises, voluntary sectoral guidelines, and national laws. For the most part, these focus on the rights of indigenous communities—due to those communities’ unique circumstances and special status in international law. For example, ILO Convention 169 (1989) provides that indigenous and tribal peoples “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.”<sup>9</sup> Similarly, the United Nations (UN) draft Declaration on the Rights of Indigenous Peoples provides:

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.<sup>10</sup>

Other human rights conventions, such as the Convention on the Elimination of Racial Discrimination, the International Covenant on Civil and Political Rights, and the Convention on Biological Diversity, have been interpreted to require that the rights of communities to FPIC be recognized and implemented.<sup>11</sup> In addition, the UN Sub-Commission on the Promotion and Protection of Human Rights’ Norms on Transnational Corporations states 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>12</sup>

Regional human rights systems have also supported the rights of indigenous communities to FPIC over the uses of their lands and resources. The Inter-American Commission on Human Rights has concluded that inter-American human rights law requires “special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation.”<sup>13</sup> Similarly, the Organization of American States draft American Declaration on the Rights of Indigenous Peoples declares that states should obtain consent prior to the approval of any project affecting indigenous peoples’ lands, territories, and resources, particularly in connection with the development, utilization, or exploration of mineral, water, or other resources.<sup>14</sup> And the European Commission has recognized the right of indigenous peoples to “object to projects,” which includes the principle of free and informed consent.<sup>15</sup>

The principle of FPIC for indigenous peoples has also been recognized in several global standard-setting processes that have articulated “best practices” for specific high-impact industries. For example, the Forest Stewardship Council, a multi-stakeholder collaboration to establish norms for the forestry industry, recognizes that indigenous peoples have the right to control the forest resources on their lands, unless they delegate control with free and informed consent to other entities.<sup>16</sup> The World Commission on Dams similarly recognized the importance of respecting the rights of indigenous communities to consent to activities that impact their lands and resources.<sup>17</sup> And the World Bank’s Extractive Industries Review, an independent review of the development impacts of the World Bank’s oil, mining, and gas lending, also endorsed FPIC for indigenous communities, although the Bank ultimately adopted a slightly different standard (see Box 1).<sup>18</sup>

Some countries have incorporated community consent provisions in domestic law. In the Philippines, community consent is required by the general law applicable to

## BOX 1

## EMERGING STANDARDS OF CONSENT AND CONSULTATION IN THE PROJECT FINANCE SECTOR

The World Bank has begun to incorporate a community consent principle into its policy framework—at least for some of its highest-risk projects. In 2004, after an extensive independent review of its extractive industries portfolio (the Extractive Industries Review, or EIR), the Bank revised its policies to require that an extractive industry project must secure the “broad support” of affected communities through a process of “free, prior, and informed consultation” in order to be eligible for Bank financing.<sup>1</sup> The next year, the Bank revised its Indigenous Peoples policy to apply the same broad community support standard to projects that affect indigenous peoples.<sup>2</sup> The Bank has argued that this new standard not only will help to ensure that communities are better able to assert their interests in the planning process, but will also benefit project sponsors, since projects that are endorsed by their host communities tend to be more productive and less vulnerable to disruption, and often enhance the reputations of their sponsors.<sup>3</sup>

In March 2006, after a comprehensive review of its own environmental and social policies, the World Bank’s private-sector lending arm, the International Finance Corporation (IFC), extended the application of the broad community support standard to all projects that will have “significant adverse impacts” on affected communities. For projects that affect the lands of indigenous peoples, the IFC replaced the broad community support standard with a requirement that the project sponsor engage in “good faith negotiations” with the affected communities, and demonstrate the “successful outcome” of the negotiation.<sup>4</sup>

Both the World Bank and the IFC received substantial public criticism for failing to adopt the standard FPIC formulation. But it remains to be seen whether in practice the “broad

community support” or “good faith negotiation” requirements will prove to be any less protective of community preferences than FPIC. Each of these standards incorporates an element of community acceptance or approval into project decision making that should, if conscientiously applied, functionally approximate an FPIC requirement.

The approach recently taken by the Equator Principle banks—a coalition of more than 40 of the world’s largest private-sector project financiers that have agreed to harmonize their environmental and social policies with the IFC’s performance standards—does not fully incorporate the principles noted in the above paragraph. While the Equator Principle banks have adopted the “good faith negotiation” requirement for projects that affect indigenous peoples, they require only free, prior, and informed *consultation* with other adversely affected communities. They have not adopted IFC’s requirement that such consultations lead to broad community support. Without such a minimum standard for consultation outcomes, the Equator Principle does not require that public inputs actually influence project decision making, and does not ensure that individual projects and stakeholders of these projects can realize the benefits of consent-based decision making. Thus, there is opportunity for enhancing these new principles in practice by encouraging borrowers to seek the support of nonindigenous communities in high-risk, high-impact projects.

## Notes

1. World Bank 2004, p. 7.
2. World Bank, Operational Policy 4.10: Indigenous Peoples (July 2005).
3. World Bank 2004, p. 5.
4. IFC 2006, p. 30.

indigenous peoples (Indigenous Peoples Rights Act, 1997) and more specific laws, such as those that regulate mining and protected areas (Philippine Mining Act of 1995; National Integrated Protected Areas System Act of 1992). Similarly, community consent of local communities (other than indigenous peoples) is also required for bioprospecting and forestry, and is implied in all projects requiring an environmental impact assessment (EIA). For projects requiring EIAs, the principle of community consent is supposed to guide decision makers in approving or rejecting a project.<sup>19</sup> In the United States, federal law allows for a streamlined relicensing process

for operators of hydroelectric plants that can demonstrate they have the consent of affected stakeholders (see Box 2). FPIC has also been incorporated in the mining law in Australia’s Northern Territory for almost 30 years, and in the legislation of at least five other Australian states.<sup>20</sup> Russian law also recognizes FPIC as a right of indigenous people.<sup>21</sup>

Although the right to FPIC is more firmly entrenched for indigenous communities, there is a growing recognition that all communities should have a meaningful role in making decisions about projects

In the United States, federal law allows for a streamlined relicensing process for operators of hydroelectric plants that can demonstrate they have the consent of affected stakeholders. Pursuant to the Federal Power Act, the Federal Energy Regulatory Commission (FERC) authorizes “new” licenses and renewals for hydroelectric dams.<sup>1</sup> At least five years before a project license expires, the operator must notify FERC of its intent to seek a new license.<sup>2</sup> The licensee must prepare materials on project operations and future relicensing plans. This information serves as a basis for consultations with state and federal agencies, Native American tribes, nongovernmental organizations, affected property owners, and other members of the public to identify the actions needed to minimize adverse environmental and social impacts.<sup>3</sup> Based upon the inputs from these consultations, the licensee conducts further studies and proposes a set of licensing conditions for FERC’s consideration. Approval of these license conditions is a prerequisite for relicensing.<sup>4</sup>

This relicensing process can be quite time-consuming and expensive. However, licensees can significantly reduce the time and expense of gaining FERC approval by demonstrating stakeholder consent through a “settlement agreement” process.<sup>5</sup> Under this approach, local agencies and public stakeholders negotiate directly with the license applicant to develop proposed terms and conditions that include appropriate environmental and social mitigation commitments.<sup>6</sup> Once a settlement has been agreed upon, it is submitted to FERC with the request that all settlement terms and conditions be included as part of the official license. However, since FERC may delete or change some conditions of the agreement, many settlement stakeholders include terms in the settlement that make all settlement conditions legally

binding, regardless of whether they are included in the final government license.

FERC encourages the settlement process because it allows for a more efficient and less contentious relicensing process.<sup>7</sup> And stakeholders on all sides of the process like it because settlement agreements often yield outcomes for the riparian environment and the impacted communities that are superior to those that can be achieved in traditional relicensings.<sup>8</sup>

Trust and inclusion of all perspectives are seen as key elements of good settlement agreement processes. As a result, stakeholders often begin by negotiating protocols of engagement before addressing substantive issues. This allows them to establish a framework for long-term cooperation among all stakeholders and generally reflect the concerns of all parties in a relatively equitable manner. FERC notes that “when the process is successful, a common result is more local control and ownership of the licensing decision, and ongoing local participation during the term of the license.”<sup>9</sup>

#### Notes

1. FERC 2004.
2. *Id.*
3. <http://www.hydroreform.org/hydroguide/7-settlements-as-preferred-basis-for-licenses>.
4. *Id.* There are three relicensing processes: Three Step Traditional, Alternative Procedures, and a newer Integrated Licensing Process.
5. 18 CFR § 385.601 *et seq.*
6. For example, American Whitewater, “Stewardship Relicensing Overview.” Available at: [www.americanwhitewater.org](http://www.americanwhitewater.org).
7. *Id.*
8. *Id.*
9. FERC 2004, pp. 2–7.

that directly affect them, including the ability to refuse to host projects that do not provide adequate benefits or help them to realize their development aspirations.<sup>22</sup> For nonindigenous communities, the case for FPIC is based on (1) the right to meaningful participation in environmental decision making;<sup>23</sup> (2) the right to control access to their lands and resources;<sup>24</sup> (3) contemporary standards of public participation as a hallmark of legitimate governance; and (4) basic principles of equity and justice.<sup>25</sup> The World Commission on Dams concluded:

Public acceptance of key decisions is essential for equitable and sustainable water and energy resources

development. Acceptance emerges from recognizing rights, addressing risks, and safeguarding the entitlements of affected people, particularly indigenous and tribal peoples, women, and other vulnerable groups. Decision-making processes and mechanisms [should be] used that enable informed participation by all groups of people, and result in the demonstrable acceptance of key decisions.<sup>26</sup>

Similarly, the World Bank’s Extractive Industries Review recommended that the rights of local communities to FPIC be respected as a precondition to World Bank funding of extractive industry projects.<sup>27</sup> And the Mining,

Minerals and Sustainable Development project, an industry-led initiative to assess the contribution of the mining sector to sustainable development, concluded:

Land use decisions should be arrived at through a process that respects the principle of prior informed consent arrived at through democratic decision-making processes that account for the rights and interests of communities and other stakeholders, while still allowing for the negotiated use of renewable and non-renewable resources.<sup>28</sup>

While the principle of FPIC is increasingly recognized in both human rights and development discourse, substantial questions remain about how it should best be implemented. Achieving FPIC can undoubtedly be difficult, as significant implementation challenges often arise. But these challenges are not so daunting as to negate the rights and development cases for FPIC described in this section, or the business rationale discussed in the following sections.



CORBIS IMAGES