

Development Futures: An African Round Table on Extractives, Mega Infrastructure and Women's Rights to Consent

Nairobi November 2016

Institutionalisation of Free Prior Informed Consent



Status of International Soft Law

Declarations do not have obligations that are technically binding in law

A covenant is a treaty which if ratified does under international law have legal obligation

But

since the Universal Declaration is so widely used as the primary statement of what are considered human rights today, it is often regarded as having legal significance and considered “customary” international law and as the authentic interpretation of the references in the UN Charter.

The Declaration of indigenous people’s rights while not necessarily carrying the same prominence could be argued to have similar ‘customary’ significance by extension of the universal declaration.

International law and instruments mention FPIC both as a right and as a principle.

Three major international instruments address the right to Free and Prior Informed Consent: the ILO Convention 169; the Convention on Biological Diversity (CBD); and the United Nations Declaration on the Rights of Indigenous Peoples(UNDRIP).

In addition the **International Covenant on Economic, Social and Cultural Rights** Also has relevance.

Between them, these instruments provide a strong foundation for indigenous and customary communities peoples to assert that their territories should be legally recognized by government and that their free, prior, and informed consent (FPIC) is necessary before development activities can take place on their territories.

FPIC in the Convention on Biological Diversity

Article 8 (j) of the Convention requires that the traditional knowledge of indigenous peoples and local communities may only be used with their approval;

It requires that each contracting party shall: Subject to its national legislation, respect, preserve, and maintain knowledge, innovations, and practices of **indigenous and local communities embodying traditional lifestyles** relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

FPIC in the United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) has the most complete definition of FPIC. The declaration contains strong formal wording regarding the rights of indigenous peoples, including article 26 sections 1 and 2 which state:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

As a result, UNDRIP requires the implementation of FPIC for any activities which may affect indigenous peoples. For example, **Article 10 states:**

Indigenous peoples shall not be forcibly removed from their lands or territories. **No relocation shall take place without the free, prior and informed consent** of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 32 section 2 underlines that it is the State's responsibility to respect FPIC, so as to prevent development projects being forced onto indigenous peoples:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent 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.**

ILO Convention 169 (1989) Indigenous and Tribal Peoples

Article 15

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

2. In **cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands**, governments shall establish or maintain procedures through which they shall **consult these peoples**, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Where removals are concerned **consent** is required

FPIC in the United Nations Framework Convention on Climate Change (UNFCCC)

Annex 1 of the Ad Hoc Working Group Decision -/CP16 calls for 'promoting' and 'supporting' safeguards for indigenous peoples and local community rights, noting the UN General Assembly's adoption of UNDRIP. This language is only a partial commitment to FPIC, because it will be interpreted within the framework of national laws and circumstances in each country. Even if international REDD+ financing does become contingent on the demonstration of a verified consent process, the question of who has the right to give or withhold consent will be determined under national laws.

United Nations Guiding Principles on Business and Human Rights

Failure of a binding treaty on Business and Human rights

John Ruggie – Special representative

Develops the so called Ruggie principles – based on a frame work which placed importance on extraterritoriality.

1. State duty to Protect
2. Business duty to Respect and
3. Access to remedy through grievance

There are distinct but complimentary responsibilities between states and companies. The framework elaborates on the implications for existing obligations and practices for states and businesses and maintains that there can be no human rights offset where by doing good elsewhere HR obligations are removed or abuses excused. The system is a mix of regulatory and voluntary approaches.

State Duty to protect

- Policies
- Regulation
- Adjudication

Extraterritorial jurisdiction over companies not a general requirement in IHRL, but reference is made to developments in international and national practice on ETJ

A standard of conduct – States are not responsible for human rights abuses by private actors, but must take the necessary steps to prevent, punish and redress. They have a duty to protect and promote the rule of law and they should ensure policy coherence between departments.

Corporate responsibility to respect

- Act with due diligence to avoid infringement
- Address adverse impacts on human rights

With the Guiding Principles, United Nations member states have affirmed that business enterprises have an independent responsibility to respect human rights, distinct from obligations of states!

This sets up a due diligence requirement to identify and address impacts

- Access to Remedy vs Access to Justice
 - Similar but there are differences
- Need to remove all barriers for access to justice
- Business and Human Rights looks for short cuts and to privatisation of justice
- Access via
 - Judicial mechanisms
 - Quasi judicial mechanisms
 - Non judicial mechanisms

Relative Mechanism Referrals 2013

	Cases since	Total cases in Africa	Average referrals per year
OECD Guidelines	2000	42	3.2
AFDB IRM	2007	9	1.5
IFC CAO	2006	21	3.0
WBG IP	1996	25	1.5
African Commission	1988	459	18.4
ECOWAS Court of Justice	2004	78	8.7
African Court on HPR (both incarnations)	2006	28	3.6
SADC Tribunal	2007	13	2.6

Remedy requirements

- A. Legitimate** – enabling trust from the stakeholders for whose use they are intended and being accountable for the fair conduct of the process
- B. Accessible** – being known to all affected stakeholder groups, providing assistance where relevant
- C. Predictable** – clear and known procedure with an indicative time frame, clarity on types of processes and outcomes they offer
- D. Equitable** – seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise
- E. Transparent** – keeping parties informed about progress and providing information on the mechanism's performance
- F. Rights-compatible** – outcomes and remedies accord with human rights
- G. A source of continuous learning** – identifying lessons for improving the mechanism and preventing future harms
- H. For operational-level mechanisms:** based on engagement and dialogue

Economic Community of West African States

Directive C/DIR.3/05/09 on the Harmonization of Guiding Principles and Policies in the Mining Sector Adopted by the Sixty Second Ordinary Session of the Council of Ministers at Abuja on 27 May 2009

- **Chapter VI: Human Rights Obligations and Mining Activities, Article 16: Sustainable Development and Local Community Interests**
 - “s3. Companies shall obtain **free, prior, and informed consent of local communities** before exploration begins and prior to each subsequent phase of mining and post-mining operations.
 - s4. Companies shall maintain consultations and negotiations on important decisions affecting local communities throughout the mining cycle.”

Chapter VII: Dispute Resolution Article 17: Complaints Procedure

The review procedure of complaints under this article does not preclude a **State, an individual, or any stakeholder from taking the case before the ECOWAS Court of Justice** or invoking arbitration procedure or the jurisdiction of any other international justice system, such as the African Court of Justice or the African Human Rights Court of Justice.

Article 18: Settlement Procedures

Member States shall provide the necessary capacity to local communities in their engagement with mining rights holders in negotiations and in settling mining disputes.

World Bank Group

- World Bank Inspection Panel
 - World Bank policies
 - Environmental Assessment
 - Natural Habitats
 - Indigenous People
 - Involuntary Resettlement
 - Forests
 - Project Supervision
 - Country Systems
 - **New Environmental and social safeguards**
 - Some interesting developments e.g.
- ESS7. Indigenous Peoples/Sub-Saharan African Historically Underserved
- Traditional Local Communities
- Relocation of Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities from Lands and Natural Resources Subject to Traditional Ownership or Under Customary Use or Occupation
- 31. The Borrower will consider feasible alternative project designs to avoid the relocation of Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities from communally held²⁰ or attached land and natural resources subject to traditional ownership or customary use or occupation. If such relocation is unavoidable the Borrower will not proceed with the project unless FPIC has been obtained as described above;

World Bank Group

- Compliance Advisor/Ombudsman (International Finance Corporation/Multilateral Investment Guarantee Agency)
 - IFC Performance Standards
 - Assessment and Management of Environmental and Social Risks and Impacts
 - Labour and Working Conditions
 - Resource Efficiency and pollution Prevention
 - Community Health, Safety and Security
 - Land Acquisition and involuntary Settlement
 - Bio Diversity Conservation and sustainable management of living natural resources
 - Indigenous people
 - Cultural heritage

United Nations

- International Bill of Human Rights
- Universal Declaration of Human Rights
- Declaration of rights of indigenous people
- International Covenant on Economic, Social and Cultural Rights
 - Optional Protocol
 - Committee on Economic, Social and Cultural Rights
- International Covenant on Civil and political rights
- ILO 87,98,29,105 etc 169 (Indigenous and Tribal Peoples)
 - ILO The Committee of Freedom of Association (CFA) (87,98)
 - The general complaint procedure is governed by articles 26 to 34 of the ILO Constitution (all ratified conventions)
- UN Global Compact
 - 10 principles
 - Global Compact office for complaints (only a way of generating a response not a real mechanism – can pass on to other UN agencies)

OECD Guidelines for MNCs

- Origin - OECD Countries
- Guidelines For MNEs
 - Concepts and principles
 - General Policies
 - Disclosure
 - Human Rights
 - Employment and Industrial Relations
 - Environment
 - Combating Bribery, Bribe Solicitation and Extortion
 - Consumer Interests
 - Science and Technology
 - Competition
 - Taxation
- National Contact Points
 - Two stage (if a case exists, mediation)
 - No firm procedural rules for NCPs
 - Non disclosure during mediation

Regional Development banks

- Inter American Development Bank
- African Development Bank
- European Bank For Reconstruction and Development
- Asian Development Bank
- European Investment Bank
- Southern African Development Bank
- Industrial Development Corporation
- Equator principles

African Development Bank's grievance mechanism

- known as the 'Independent Review Mechanism.' (IRM).
- can request the Bank Group to comply with its own policies and procedures.
- Mandate:
 - The IRM handles requests through two functions, Compliance Review and Mediation (problem solving).
 - For Public Sector projects, the IRM can review compliance with all Bank Group operational policies and procedure.
 - For the Private Sector, compliance reviews are only available for social and environmental policies.

Who can bring a complaint

- **Any group of two or more people** in the country or countries where the Bank Group-financed project is located who believe that as a result of the Bank Group's violation of its policies and/or procedures, their rights or interests have been, or are likely to be, adversely affected in a direct and material way.
- Organisations
- Local Representative
- Foreign Representative (exceptional circumstances)

AfDB Policies

- **Poverty reduction**
- **Cooperation with civil society organizations (CSOs)**
- **Environment**
 - It outlines AfDB's internal mechanisms for ensuring policy compliance and mainstreaming environmental considerations in AfDB operations.
 - The policy also references AfDB's Environmental and Social Assessment Procedures and public consultation requirements.
 - There are separate Environmental and Social Review Procedures for the AfDB's public and private sector lending.
 - The AfDB is currently revising its Environment and Social Assessment Procedures and developing new Environmental and Social Guidelines on Bank Operations through Financial Intermediaries.
- **Involuntary resettlement**
- **Population**

- **Gender**
- **Integrated water resources management**
- **Agriculture and rural development**

Human Rights commissions

- African Commission on Human and Peoples Rights
- The Inter-American Commission on Human Rights
- National Human Rights Commissions
 - Who funds
 - Independence
 - Jurisdiction
 - Powers

Trade and Investment Mechanisms

- U.S. Overseas Private Investment Corporation's (OPIC) Office of Accountability
- Export Development Canada's (EDC) Compliance Officer
- The Nippon Export and Investment Insurance (NEXI) Examiner for the Guidelines on Environmental and Social Considerations in Trade Insurance
- The Japan Bank for International Cooperation's (JBIC) Examiner for Environmental Guidelines
- Industrial Development Corporation

Industry level standards and mechanisms

- International Council on Mining and Metals
 - ICMM sustainable development framework and 10 principles
 - 22 companies and 34 national and regional associations
 - The 10 principles
 - Implement and maintain ethical business practices and sound systems of corporate governance.
 - Integrate sustainable development considerations within the corporate decision-making process.
 - Uphold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by our activities.
 - Implement risk management strategies based on valid data and sound science.
 - Seek continual improvement of our health and safety performance.
 - Seek continual improvement of our environmental performance.
 - Contribute to conservation of biodiversity and integrated approaches to land use planning.
 - Facilitate and encourage responsible product design, use, re-use, recycling and disposal of our products.
 - Contribute to the social, economic and institutional development of the communities in which we operate.
 - Implement effective and transparent engagement, communication and independently verified reporting arrangements with our stakeholders.
 - Report in terms of the GRI
 - Self assessment based annual performance no grievance mechanism
- African Mining Vision
- World Commission on Dams
- Forestry Stewardship Council
- Transparency International

Regional level standards and mechanisms

- African Charter on Human and Peoples' Rights
 - African Commission
- Regional standards
 - ECOWAS Mining Directive
 - SADC Mining Protocol

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Company Level Standards and Mechanisms

- Processes
 - Conveying information
 - Investigation/ adjudication
 - Hybrid investigation-mediation/ adjudication models
 - Dialogue centred models