

## Appendix 1: International development and practice of FPIC

<b>International Justice Instruments</b>	
<b>Codification</b>	<b>Comment</b>
Nuremberg Code of 1947	Generally acknowledged as an early codification of FPIC relating to human experimentation. Medical ethics have had much to say on the notions of consent.
The International Bill of Rights	clearly provide for self-determination and free pursuit of people's own development
International Covenant on Economic, Social and Cultural Rights	clearly provide for self-determination and free pursuit of people's own development
International Covenant on Political and Civil Rights	clearly provide for self-determination and free pursuit of people's own development
<b>UN System</b>	
International Labour Organization's ("ILO") Convention 169	<p>One of the earlier codifications in 1989. "The peoples concerned 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."</p> <p>Article 15</p> <p>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.</p> <p>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.<sup>1</sup></p> <p><i>This instrument focuses mainly on the role of the state and its application has been to Indigenous and Tribal Peoples in</i></p>

<sup>1</sup> <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>

	<p><i>Independent Countries calling for which calls for FPIC to resettlement. South Africa is not a signatory. The convention focuses on development projects and provides for consultation where the projects will affect a community but consent where the project will result in relocation. Although the Convention only explicitly provides for FPIC for resettlement The Convention also addresses indigenous peoples' "right to decide their own priorities for the process of development," which although not an explicit consent requirement bears a strong resemblance to one. The convention sees indigenous and tribal peoples exercising such rights in a group or collective manner not an individualized right.</i></p> <p><i>The statements of U.N. Treaty Bodies and regional human rights courts also provide evidence of the growing international support for the right of indigenous peoples to give or withhold FPIC to projects affecting them.</i></p>
The UN Food and Agricultural Organization's ("FAO") Code of Conduct	Amended in 1989 to make consent mandatory
<b>Trade related Prior Informed Consent</b>	
The 1989 Basel Convention on hazardous wastes	These conventions relate more to the international trade in various listed substances. In general there is an emphasis on countries making informed decisions and having the right to consent or reject imports of substances. The PIC concept built from UNEP and FAO adopting this as a principle.
2001 Stockholm Convention on Persistent Organic Pollutants ("POPs")	
Rotterdam Convention on Free Prior Informed Consent 1998	
2002 Convention on Biological Diversity <sup>2</sup>	The Convention on Biological Diversity calls on signatory States to obtain the "approval" of holders of knowledge of the uses of biodiversity: "respect, preserve and maintain knowledge, innovations, and practices of indigenous <b>and local communities</b> embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider

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<sup>2</sup> <http://www.cbd.int/>

	application with the approval and involvement of the holders of such knowledge...” The working group on the relevant clause (8j) has interpreted it to refer to consent <sup>3</sup> . The Secretariat of the Convention on Biological Diversity developed the Akwe: Kon Guidelines in 2004 to support the Convention. <sup>26</sup> They are intended to serve as “voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous <b>and local communities</b> . The working group on the relevant clause (8j) has interpreted it to refer to consent <sup>4</sup>
UN REDD + Programmes and UNEP	Viet Nam, whose national UN-REDD programme was initiated mid-2009, is currently testing an eight-step process to seek free, prior and informed consent (FPIC) in two pilot districts as part of its overall outcome to increase capacity to manage REDD+ at provincial and district level. This process is based on the principles that: (i) FPIC should be sought for all forest communities and communities living at the margin of forests; (ii) FPIC activities must proactively reach out to communities, and not wait for them to come forward; (iii) homogeneity between communities cannot be assumed; and (iv) rights holders offer primary guidance for customized consent procedures
U.N. Declaration on the Rights of Indigenous Peoples and Tribal Peoples	In September 2007 the U.N. General Assembly’s adopted the Declaration on the Rights of Indigenous Peoples <sup>5</sup> , with 143 votes in favor, 4 States in opposition (Canada, Australia, New Zealand, United States), and 11 abstentions. The Declaration is essentially soft law in that it is not a formal treaty and is therefore not legally binding on states. However this will become increasingly important as individual nations take the notion into their own law. This has relevance in corporate governance speak for risk mitigation especially where such concepts may come to be applied retroactively. In South Africa this was done in through the interpretation of indigenous law and upheld by the Appellate division. The state owned diamond mining company Alexkor was required to give back land to the Richtersveld people, who had been forcibly removed more than 90 years before and pay compensation for minerals extraction.
<b>Lending Institutions</b>	
<b>World Bank Safe Guard policies</b>	In the mid-1990s, the WBG ruled that “meaningful” consultation must be interpreted as the possibility of the impacted community saying no. With this veto power comes the correlative power to negotiate on equal terms with the project proponent. This does not mean that a single obstinate family can cancel a project; eminent domain should remain available for such cases, as long as it is sparingly invoked. On June 4, 2004, the WBG accepted that it “. . . requires a process of free, prior, informed consultation. ... that leads to the affected community’s broad acceptance of the project.” The WB realizes that the

<sup>3</sup> <https://www.cbd.int/decision/cop/?id=7158>

<sup>4</sup> [http://www.wipo.int/export/sites/www/tk/en/folklore/creative\\_heritage/docs/akwekon.pdf](http://www.wipo.int/export/sites/www/tk/en/folklore/creative_heritage/docs/akwekon.pdf).

<sup>5</sup> A detailed description of this process can be found at: <http://tinyurl.com/Viet-Nam-UN-REDD-FPIC>.

<sup>5</sup> <http://www.un.org/esa/socdev/unpfii/en/drip.html>

	<p>“consent” includes the right of a community to reject a proposed project, hence the weasel word “consultation” instead of “consent;” sadly, their August 2 legal</p> <p>The WB sometimes says that it is prevented from fulfilling a clear desire or standard “because it is not economic,” and that its Articles of Agreement prohibit the use of non-economic factors. If the WB wants to comply with its Articles, it has to ensure willing seller/willing buyer. Rejecting FPIC means that the WB is rejecting standard economics and choosing coercion or force instead. This is unacceptable.</p> <p>The WB’s official legal note on FPIC (World Bank, 2004b) was emitted by: (a) the Senior Vice President and General Counsel of the WB, (b) the General Counsel of IFC, and (c) the Vice President and General Counsel of MIGA. Oddly, it fails to distinguish between “consultation” and “consent;” in practice, as of mid-2007, they are converging.</p>
<p><b>World Bank Group’s Extractive Industry Review</b></p>	<p>2003/4 The World Bank’s Extractive Industries Review concluded that all potentially affected communities, indigenous or not, have the right to FPIC. <sup>6</sup></p> <p><b>Ensure Local Communities Receive Benefits from Projects</b>  “The WBG should only support projects that benefit all affected local groups, including vulnerable ethnic minorities, women, and the poorest. The WBG should decline to finance projects where this is not the case or should redesign them to guarantee that the standards of living for local groups clearly improve. The communities closest to extractive projects should become involved in participatory assessments of projects, giving free and prior informed consent to plans and projects and developing poverty reduction plans before projects begin.”<sup>7</sup> P49</p> <p><b>Require Companies to Engage in Consent Processes with Communities Directly Affected by WBG Extractive Industries Projects</b>  “The WBG should ensure that borrowers and clients engage in consent processes with indigenous peoples <b>and local communities</b> directly affected by oil, gas, and mining projects, to obtain their free prior and informed consent. For indigenous peoples, this is an internationally guaranteed right; for local communities, it is an essential part of obtaining social license and demonstrable public acceptance for the project. Participation should start at the project identification and comprehensive options assessment stage, before social and environmental assessment begins. It should lead to an agreed-upon environmental and social management system for construction, operation, and decommissioning. Social and environmental assessments need to be fully participatory and systematically updated as soon as there are plans to change any conditions.</p>

<sup>6</sup> .\WBG Extractive Industries Review\eirchairmanssummary.pdf

<sup>7</sup> The Final Report of the Extractive Industries Review VOL1 Dec 2003 available at [http://bankwatch.ecn.cz/eir/reports/vol1\\_eng.pdf](http://bankwatch.ecn.cz/eir/reports/vol1_eng.pdf)

Free prior and informed consent should not be understood as 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 peoples, local communities, government, 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. Companies have to make the offer attractive enough for host communities to prefer that the project happen and negotiate agreements on how the project can take place and therefore give the company a social license to operate.

Clearly, such consent processes ought to take different forms in different cultural settings. However, they should always be undertaken in a way that incorporates and requires the FPIC of affected indigenous peoples and local communities. The most affected groups are often the poorest and the most vulnerable. Women, ethnic minorities, and indigenous peoples might otherwise not be included in local decision making processes, even though they often bear the brunt of the burden of negative impacts.”<sup>8</sup> P50

***Require Revenue Sharing with Local Communities***

IFC and MIGA should ensure that there will be an open, public planning process to distribute revenues in any proposed oil, gas, and mining projects fairly, whether this is provided for in the national legal framework or established on a project-specific basis, and that the local community will have equal access to the information it needs for meaningful participation in negotiation processes. Revenue and expenditure information should also be publicly available during project implementation.<sup>9</sup>p51

***The Management Response***

The management response to the EIR recommendations did not agree to these concepts in their entirety arguing that FPIC as recommended may be in conflict with the Bank’s Articles of agreement although ‘all Directors agreed with the principle that communities should benefit from projects that affect them.’ While several directors expressed support for the Bank Group’s efforts to strengthen its guidance and procedures for local community participation with respect to EI projects to emphasize informed participation and meaningful consultation as steps in ensuring broad community support whilst a few Directors still expressed support for full FPIC.

President Wolfensohn distanced himself from this response, and ordered a more positive re-think. The final 2004 response of the WBG to the EIR mandated “Prior In formed Consultation...and broad acceptance of the project by affected communities.”

<sup>8</sup> The Final Report of the Extractive Industries Review VOL1 Dec 2003 available at [http://bankwatch.ecn.cz/eir/reports/vol1\\_eng.pdf](http://bankwatch.ecn.cz/eir/reports/vol1_eng.pdf)

<sup>9</sup> The Final Report of the Extractive Industries Review VOL1 Dec 2003 available at [http://bankwatch.ecn.cz/eir/reports/vol1\\_eng.pdf](http://bankwatch.ecn.cz/eir/reports/vol1_eng.pdf)

<p><b>International Finance Corporation's Performance Standards on Social &amp; Environmental Sustainability 2006 (under review for end of 2010)</b></p>	<p>The IFC is part of the World Bank group and some of the ambiguity of the World Banks approach to FPIC spills over into the IFC standard in so far as Consent requirements are concerned.</p> <p>The IFC has 8 standards;</p> <p>Performance Standard 1: Social and Environmental Assessment and Management Systems  Performance Standard 2: Labor and Working Conditions  Performance Standard 3: Pollution Prevention and Abatement  Performance Standard 4: Community Health, Safety and Security  Performance Standard 5: Land Acquisition and Involuntary Resettlement  Performance Standard 6: Biodiversity Conservation and Sustainable Natural Resource Management  Performance Standard 7: Indigenous Peoples  Performance Standard 8: Cultural Heritage</p> <p>The problem of indigenous definitions surfaces here again. Standard 5 has for instance been used by a mining company as the basis of an independent retrospective review of a resettlement process. Besides finding many problems with the relocation just based on standard 5 the review specifically ignored standard 7.</p> <p>At a general level as the policy currently stands, clients are not required to gain the free, prior, and informed consent of affected communities in projects with significant potential impacts. Instead the client must simply demonstrate that it has achieved "broad community support", a far looser requirement. Some have suggested that the standard of free, prior, informed consultation leading to broad community support sounds akin to a consent requirement.</p> <p>A key gap is that the standards contain no overarching policies on human rights or climate change. Ruggie criticizes the standard at <a href="http://www.brettonwoodsproject.org/art-565548">http://www.brettonwoodsproject.org/art-565548</a></p> <p>In general the performance standards 3,5 and 7 are most pertinent to the discussion in this document. Performance standard 5 does place a consultation requirement for affected communities and sets a number of substantive and procedural requirements around relocation. It is not in the intention of this document to analyse the application of this standard in detail as applied to South Africa. Examples of such analysis have been done by Anglo Platinum and the South African Human Rights Commission in the following two documents;</p> <p>It should be noted however that in both these instances the suggestion is that the mine only partially met the standards. The</p>
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	<p>mine concerned has generally countered that the IFC standards were not fully developed at the time of the relocations covered in these texts.</p> <p>Finally given that civil society has criticized these standards for failing to explicitly incorporate a human rights framework and support the notion of FPIC it is suggested that they should not be referred to as ‘International best practice’ instruments.</p> <p>The 2006 to 10 standard 7 did not have explicit fpic (for indigenous people) but standard 7 2012 does.</p> <p><b>IFC on resettlement</b></p> <p>The IFC Handbook on Resettlement proscribes a generic framework model by which relocation should be undertaken according to international best practice.</p> <p>Step 1: Determine the scope of the land acquisition/ define project area of influence and all potential socio-economic impacts within that area;</p> <p>Step 2: Select relocation sites as appropriate;</p> <p>Step 3: Select and justify land acquisition and economic displacement alternatives that minimize adverse environmental impact and relocation in the context of IFC policies;</p> <p>Step 4: Carry out socio–economic and other related surveys as required;</p> <p>Step 5: Establish legal framework for RAP; identify gaps between IFC policy and local requirements;</p> <p>Step 6: Develop and consult with Project Affected Persons (“PAPs”) on entitlements;</p> <p>Step 7: Design restoration/ development interventions in consultation with PAPs;</p> <p>Step 8: Establish and verify monitoring and evaluation indicators;</p> <p>Step 9: Consult and establish a grievance mechanism; and</p> <p>Step 10: Assign implementation and monitoring responsibilities.<sup>10</sup></p>
<p>European Bank for Reconstruction and Development Social and Development policy 2008</p>	<p>Finally, the European Bank for Reconstruction and Development explicitly requires companies to obtain FPIC in its latest Environmental and Social Policy, issued in 2008. The Policy’s Performance Requirement 7 “recognises the principle, outlined in the U.N. Declaration on the Rights of Indigenous Peoples, that the prior informed consent of affected Indigenous Peoples is required [for specified project-related activities], given the specific vulnerability of Indigenous Peoples to the adverse impacts of such projects.”<sup>34</sup> The project proponent must obtain and document consent for activities that are on traditionally used land</p>

<sup>10</sup> [http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p\\_resettle/\\$FILE/ResettlementHandbook.PDF](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_resettle/$FILE/ResettlementHandbook.PDF)

	<p>that would affect the livelihoods, or cultural, ceremonial, or spiritual uses, that define the identity and community of the indigenous peoples; would lead to their relocation; or would affect their cultural resources.<sup>35</sup> The recent date of this policy reflects the rising importance of FPIC.</p> <p>35 European Bank for Reconstruction and Development, Performance Requirement 7<sup>11</sup></p>
The IADB Resettlement Policy	<p>states: “Indigenous Communities. Those indigenous <b>and other low income ethnic minority communities</b> whose identity is based on the territory they have traditionally occupied are particularly vulnerable to the disruptive and impoverishing effects of resettlement. They often lack formal property rights to the areas on which they depend for their subsistence, and find themselves at a disadvantage in pressing their claims for compensation and rehabilitation. The Bank will, therefore, only support operations that involve the displacement of indigenous communities or other low income ethnic minority communities, if the Bank can ascertain that: (i) the resettlement component will result in direct benefits to the affected community relative to their prior situation; (ii) customary rights will be fully recognized and fairly compensated; (iii) compensation options will include land-based resettlement; and (iv) the people affected have given their informed consent to the resettlement and compensation measures.”</p>
Equator Principles	<p>The equator principles take the IFC performance standards as their starting point with regards FPIC and Indigenous people. Like the IFC a regrettable artificial distinction is drawn between indigenous and affected communities. Interestingly when the WBG extractive industries review was published 11 banks as signatories to the equator principles wrote a letter to the WB President objecting to, amongst other issues, the recommended adoption of free prior informed consent as opposed to consultation stating the view that the implementation of the WBG Safeguard Policies is intended to result in effective consultation with affected groups and tangible benefits for local communities.<sup>12</sup></p> <p><b><i>Principle 3: Applicable Social and Environmental Standards</i></b></p> <p>For projects located in non-OECD countries, and those located in OECD countries not designated as High-Income, as defined by the World Bank Development Indicators Database, the Assessment will refer to the then applicable IFC Performance Standards (Exhibit III) and the then applicable Industry Specific EHS Guidelines (“EHS Guidelines”) (Exhibit IV). The Assessment will establish to a participating EPFI’s satisfaction the project’s overall compliance with, or justified deviation from, the respective Performance Standards and EHS Guidelines.</p> <p><b><i>Principle 5: Consultation and Disclosure</i></b></p> <p>For all Category A and, as appropriate, Category B projects located in non-OECD countries, and those located in OECD countries not designated as High-Income, as defined by the World Bank Development Indicators Database, the government, borrower or</p>

<sup>11</sup> <http://www.ebrd.com/about/policies/enviro/policy/2008policy>

<sup>12</sup> The full letter can be seen at [http://www.equator-principles.com/documents/EIR\\_Banks\\_Letter.pdf](http://www.equator-principles.com/documents/EIR_Banks_Letter.pdf)

	<p>third party expert has consulted with project affected communities in a structured and culturally appropriate manner.<sup>4</sup> For projects with significant adverse impacts on affected communities, the process will ensure their free, prior and informed consultation and facilitate their informed participation as a means to establish, to the satisfaction of the EPFI, whether a project has adequately incorporated affected communities' concerns.</p> <p><b>4 Affected communities</b> are communities of the local population within the project's area of influence who are likely to be adversely affected by the project. Where such consultation needs to be undertaken in a structured manner, EPFIs may require the preparation of a Public Consultation and Disclosure Plan (PCDP). <b>5 Consultation</b> should be "free" (free of external manipulation, interference or coercion, and intimidation), "prior" (timely disclosure of information) and "informed" (relevant, understandable and accessible information), and apply to the entire project process and not to the early stages of the project alone. The borrower will tailor its consultation process to the language preferences of the affected communities, their decision-making processes, and the needs of disadvantaged or vulnerable groups. Consultation with Indigenous Peoples must conform to specific and detailed requirements as found in Performance Standard 7. Furthermore, the special rights of Indigenous Peoples as recognised by host-country legislation will need to be addressed. <a href="http://www.equator-principles.com/documents/Equator_Principles.pdf">http://www.equator-principles.com/documents/Equator_Principles.pdf</a></p>
<b>Multi Stakeholder Initiatives</b>	
<b>The World Commission on Dams</b>	The Commission was an independent, international, multistakeholder process that addressed controversial issues associated with large dams. The Commission included FPIC as a policy best practice, recommending: "Where projects affect indigenous and tribal peoples, such processes are guided by their FPIC." <sup>13</sup>
<b>Forest Stewardship Council ("FSC")</b>	
<b>Roundtable on sustainable palm oil (RSPO)</b>	The RSPO is of interest because its members are supposed to implement the principles of FPIC. <sup>38</sup> More specifically, suppliers of palm oil are supposed to be audited to demonstrate that they received consent from communities -- not only indigenous peoples -- where they operate. The RSPO provides a more in-depth view of what consent looks like in practice, as it provides evidentiary criteria as part of its certification. Criterion 2.3 Use of the land for oil palm does not diminish the legal rights, or customary rights, of other users, without their free, prior and informed consent

<sup>13</sup> See Chapter 8, World Commission on Dams, Dams and Development: A New Framework for Decision- Making (2000), available at <http://www.dams.org/>. A wide range of donors supported the World Commission on Dams, including U.N. agencies, governmental development agencies, foundations, international financial institutions, and companies

	<p>Indicators:</p> <ul style="list-style-type: none"> <li>• Maps of an appropriate scale showing extent of recognised customary rights (criteria 2.3, 7.5 and 7.6)</li> <li>• Copies of negotiated agreements detailing process of consent (criteria 2.3, 7.5 and 7.6) Guidance: Where lands are encumbered by legal or customary rights, the grower must demonstrate that these rights are understood and are not being threatened or reduced. This criterion should be considered in conjunction with criteria 6.4, 7.5 and 7.6 . Where customary rights areas are unclear these are best established through participatory mapping exercises involving affected and neighbouring communities. This criterion allows for sales and negotiated agreements to compensate other users for lost benefits and/or relinquished rights. Negotiated agreements should be non-coercive and entered into voluntarily, carried out prior to new investments or operations and based on an open sharing of all relevant information in appropriate forms and languages, including assessments of impacts, proposed benefit sharing and legal arrangements. Communities must be permitted to seek legal counsel if they so choose. Communities must be represented through institutions or representatives of their own choosing, operating transparently and in open communication with other community members. Adequate time must be given for customary decision-making and iterative negotiations allowed for, where requested. Negotiated agreements should be binding on all parties and enforceable in the courts. Establishing certainty in land negotiations is of long-term benefit for all parties. For national interpretations, any commonly encountered situations should be identified. For definition of ‘customary rights’, see definitions.<sup>14</sup></li> </ul>
<p>Framework for Responsible Mining 2005 draft 2</p>	<p>The Framework for Responsible Mining is the result of a call by NGOs, retailers, investors, insurers, and technical experts working in the minerals sector to create a basis for developing responsible sourcing and investing policies.</p>
<p>International Council on Mining and Metals (“ICMM”)</p>	<p>In contrast, the International Council on Mining and Metals (“ICMM”), a key industry group for mining companies, has not adopted a standard of FPIC. The ICMM’s Position Statement on Mining and Indigenous Peoples includes strong requirements for consultation with potentially affected indigenous peoples from the beginning of activities, even before exploration begins. Its Position Statement also requires members to seek broad community support for new projects or activities and include a recognition that, “following consultation with local people and relevant authorities, a decision may sometimes be made not to proceed with developments or exploration even if this is legally permitted.”</p>
<p>The Organisation for Economic Cooperation and Development (“OECD”)</p>	

<sup>14</sup> [http://www.rspo.org/files/resource\\_centre/RSPO%20Principles%20&%20Criteria%20Document.pdf](http://www.rspo.org/files/resource_centre/RSPO%20Principles%20&%20Criteria%20Document.pdf)