



Free and Prior Informed Consent: Interpretations and implications for stakeholders in the extractive industry

The recent endorsement by the government of Canada of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) has given rise to questions about how it will impact resource projects and indigenous groups. Canada's statement of support¹ represents a policy change; the government voted against the declaration in 2007 and had maintained a stance of non-support until now. The endorsement seems to imply that any project that impacts indigenous peoples in Canada is now required to seek free, prior and informed consent (FPIC) – an element contained within several of the Declaration's articles. But some indigenous groups and government critics point to the non-binding nature of the UNDRIP and worry that without regulatory amendments to back up the policy shift, the FPIC aspects of the UNDRIP will not be required or enforced for Canadian projects. On the other hand, government supporters and some industry stakeholders are concerned that if FPIC does become a requirement as a result of endorsing UNDRIP it will unreasonably increase project costs, because seeking consent could cause delays in project operations and require additional resources to negotiate with indigenous peoples.

How FPIC is interpreted, applied and enforced can alter a project's financial commitments, construction timeframes or even its existence in the long term. Understanding different interpretations of FPIC in the extractive industry is important for stakeholders. This short analysis summarizes the history of the term and highlights some of the divergent interpretations of where and when FPIC should be sought, by whom, and what it looks like in practical terms.

History of FPIC in legal and voluntary initiatives

In the extractive industry, FPIC is most commonly applied to projects affecting indigenous peoples. The first international law to refer to FPIC was International Labor Organization Convention No. 169², which calls for states to gain free and informed consent before relocating indigenous peoples. Since then, the right of indigenous peoples to FPIC has been recognized by a number of organizations, most prominently the UN General Assembly. In September 2007, the General Assembly adopted the Declaration on the

¹ Foreign Affairs and International Trade Canada's Statement of support on the UNDRIP can be found at http://www.international.gc.ca/indig-autoch/un_declaration_nov2010_onu.aspx?lang=eng

² ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries can be found at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>



Rights of Indigenous Peoples³, requiring states to obtain free and informed consent before approving projects affecting indigenous peoples – not just projects involving resettlement. Though the Declaration is considered ‘soft law,’ legal commentators believe it will gain more authority over time and be used to guide the decisions of courts in various jurisdictions throughout the world. Organizations such as the Forest Stewardship Council and the Roundtable on Sustainable Palm Oil have taken the definition of FPIC one step further, applying it to all of their projects, not just projects impacting indigenous people. Many large companies have also incorporated FPIC language into their policies, public reports and published statements.⁴

One widely criticized definition of FPIC is the International Finance Corporation requirement that projects involving indigenous peoples need “free, prior and informed consultation” and “broad community support.”⁵ Critics argue that the 2006 update of the IFC Performance Standards should have included consent in its language and view the current wording as a step backwards in the advancement of FPIC principles, especially given the European Bank for Reconstruction and Development’s performance requirement for free, prior and informed consent and the growing movement by other international organizations such as the Asian Development Bank and Inter-American Development Bank to adopt this standard.

Different Applications of FPIC

There are a variety of interpretations of situations in which FPIC should be applied, and by whom⁶.

- For which projects should FPIC be sought? Projects resettling indigenous peoples vs. projects impacting indigenous peoples vs. universal application of FPIC to all projects.

According to ILO 169, FPIC only applies to projects dealing with the resettlement of indigenous peoples. However, many subsequent ‘soft laws’ and conventions promote FPIC for all projects affecting indigenous peoples. Some organizations and companies

³Full text of UN Declaration on the Rights of Indigenous Peoples can be found at: <http://www.un.org/esa/socdev/unpfii/en/drip.html>

⁴Foley Hoag LLP’s Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges summarizes the use of this language by companies and organizations. The report can be found at: http://www.foleyhoag.com/NewsCenter/Publications/eBooks/Implementing_Informed_Consent_Policy.aspx

⁵International Finance Corporation Performance Standards can be at: <http://www.ifc.org/ifcext/sustainability.nsf/Content/PerformanceStandards>

⁶Oxfam Australia’s Guide to Free, Prior and Informed Consent aims to answer the question of how to apply FPIC. The guide aims to ensure that communities are represented in the decision-making process and builds partnerships with companies. The guide can be found at: <http://www.oxfam.org.au/explore/mining/rights-of-local-communities>



take the stance that FPIC should be sought for all projects, whether they involve indigenous peoples or not. So which projects should seek FPIC? Many factors, such as national laws, regulatory regimes and general public support for the project determine this answer.

- Who is responsible for seeking FPIC? State vs. corporate responsibility.

Learning from the experiences of projects in and around indigenous communities, some companies strive to apply the principles of FPIC even though ILO Convention 169 and UNDRIP call for states to be the actors responsible for it. However, companies involved with states on projects often encounter barriers to achieving FPIC. For example, governments sometimes lack adequate resources or have political limitations that prevent them from gaining truly free consent. In other instances, governments may view the granting of mining concessions that bolster government revenues as a higher priority than applying the principles of FPIC. Some states have argued that an indigenous right to consent is an infringement of national sovereignty. As a result, whether a company, a state, or some combination of the two should seek FPIC will depend on national laws, local customs and relationships between government and affected communities.

Varied definitions of FPIC and its components

Just as there is no single interpretation of who should seek FPIC under which circumstances, there is no single agreed-upon definition of FPIC itself. Free and informed are terms that enjoy widespread agreement; free is usually defined as freedom from force, intimidation, manipulation, coercion or pressure by any government, company or other outside actor; while informed is usually defined as affected stakeholders having all relevant information about a project in language understandable to all, with enough time to digest that information. However, the definitions for prior and consent vary from stakeholder to stakeholder.

- When FPIC should be sought depends on how one defines “prior”.

The definition of prior depends on the stakeholders’ view of when consent should take place. One definition requires prior consent to be gained before a concession is granted, while others call for consent to take place before significant impacts occur. Some have called for consent to be given even earlier – during exploration activities, for instance. A more holistic approach investigates factors such as level of impact, who is eliciting consent, who determines whether project impacts are substantial, and the laws of the host country.



- What FPIC looks like once it is sought depends on how consent is defined.

There is wide acceptance that consent means the right to say “yes” or “no” to a project, but ILO 169 does not require unanimity among communities⁷. Does 51-per-cent approval constitute consent? Is two-thirds’ majority approval of a project – a goal some companies strive for – sufficient for consent? Some commentators say the definition of consent should be determined by the decision-making process of the communities in question. But who gets to select the decision-making process to be used? For example, some communities traditionally exclude women from decision-making; does such a process contradict the principles of FPIC? One recent trend that broadens the application of consent is to view it as a process in which communities can assert approval at any or all stages of a project, whereas in the past it was seen as a one-time decision by the community.

Conclusions

In the long-term, organizations should expect more demands for consent; for consent to be sought earlier in the process; and for the principles of FPIC to be applied in more situations, and not only those related to indigenous peoples. Not only are stakeholders increasingly adopting a more expansive definition of FPIC and applying it to more situations, there is growing evidence that there is both a strong business case for a more expansive application⁸ and evidence that FPIC helps build social acceptance throughout the life of the project.

That said, the understanding of whether a company should be, or is, required to seek FPIC for a project; when it should do it; and what consent looks like depends on a variety of factors and continues to evolve. Organizations wanting to manage risk related to FPIC and the potential costs or delays it can bring would do well to track that evolution. More specifically, they need to assess project risk related to FPIC and its local application as part of their earliest due diligence on project feasibility.

⁷ILO Convention No. 169, article 7 (I)

⁸ World Resources Institute’s Development Without Conflict: the Business Case for Community Consent builds a strong case for why business should apply FPIC through a series case studies. The report can be found at: <http://www.wri.org/publication/development-without-conflict>