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FREE, PRIOR AND INFORMED CONSENT AND THE WORLD BANK GROUP

by Robert Goodland*

FROM PARTICIPATION TO CONSENT

Community participation¹ is part of the trust-building process necessary for developers to earn a social license to operate and is a standard component of corporate social responsibility. The World Bank Group (“WBG”) now requires meaningful participation. Effective participation means agreement on precautions, mitigation, and compensation. The distribution of benefits between the developer, local and central government, and affected communities is also a central element of participation. This process starts well before permitting and licensing, and leads to public acceptance and consent.

“Meaningful participation” if properly implemented, can achieve free, prior informed consent. However, the term “meaningful participation” is open to various interpretations, depending on who is managing the participation.² While the WBG requires meaningful participation, the Bank has not completely implemented actual consent as a prerequisite to all projects.

FREE PRIOR INFORMED CONSENT

Free, prior informed consent (“FPIC”), here abbreviated to “consent”, is a process to improve development. While not perfect, FPIC is a vast improvement on using force in development or imposing involuntary conditions on impacted people. Consent provides potentially impacted communities with information about a proposed development and fosters their consent. It begins with the provision of details on the nature of a proposed action, as well as the risks, benefits, and alternatives to the proposed action. FPIC can be a process to protect consumers by providing relevant information for them to make informed choices, and it is a tool to provide developers with a “social license” to operate. The FPIC process is the main means of ensuring that potentially affected communities have all necessary information at their disposal in order to negotiate on equal terms with project proponents. Balanced negotiation demands education of stakeholders (governments, proponents, affected communities) on their rights and responsibilities. Such negotiations between asymmetrical parties usually need advocates, facilitators, and technical assistance.

FPIC requires affected communities to agree to a project before it goes ahead. The seeds for this position have been gradually strengthening since the early 1980s, when there was the first international acceptance of the idea that displacement of people should not go ahead if the potentially affected communities found it unacceptable. The goal is that all displacement should be so attractive that it would be entirely voluntary; “general acceptance” would be the norm. Oustees would become project beneficiaries.

According to the concept of FPIC, any form of develop-

ment that depends on the use of force, involuntary action, and increasing poverty has become unacceptable. The form of development must change so that it is consensual and democratic. If there is significant broad-based opposition, a project is likely to fail. Consequently, development projects, such as reservoirs in densely populated farmland that depend on mass involuntary displacement³, should be redesigned. Alternatively, FPIC might be achieved by guaranteeing benefits to the impacted communities through insurance, performance bonds, or escrowed trust funds.

In the mid-1990s, the WBG ruled that “meaningful consultation” must be interpreted as the possibility of saying no. With the veto power comes the correlative power to negotiate on equal terms with the project proponent. This does not mean a single obdurate family can cancel a project; eminent domain should remain available for such cases, but resorted to only sparingly.

FPIC helps the poor more than the rich, who usually are not pressured into accepting potentially harmful actions, partly because the rich have more power. The poor tend to accept riskier jobs and less safe labor conditions, and may provide consent more readily than the rich because of need. Therefore, even though consent is a necessary condition for a development project to be permitted, it may not be sufficient.

HISTORY OF FPIC

THE WORLD BANK GROUP AND “MEANINGFUL CONSULTATION”

Giving consideration to people affected by development is a relatively new process. In the 1950s and 1960s, people potentially harmed by a project might be warned, but rarely helped. “You can’t make an omelet without breaking eggs” was often heard, even within the WBG. By the late 1980s, though, “meaningful consultation” became mandatory in WBG-assisted projects. Meaningful stakeholder participation became mandatory in 1992. The WBG’s Legal Department interpreted the term “meaningful” to mean that the communities being consulted had a right to say “no” to the proposal. Consultation and participation ring hollow if the potentially affected communities can say anything except “no”.

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One of the earliest formal codifications of FPIC was in the Nuremberg Code of 1947 concerning the conditions under which research and experimentation could be carried out on human beings. Consent is still intensively discussed in the field of medical ethics. The International Bill of Rights, International Covenant on Economic, Social and Cultural Rights, and International Covenant on Political and Civil Rights all clearly provide for self-determination and free pursuit of people's own development⁴. The Organisation for Economic Cooperation and Development ("OECD") and United Nations systems have increasingly relied on consent. The UN Declaration on the Rights of Indigenous Peoples and the Inter-American Declaration on the Rights of Indigenous Peoples explicitly recognize FPIC. The UN International Labor Organization's ("ILO") Convention 169 provides for free prior informed consent in cases of displacement. The UN Food and Agricultural Organization's ("FAO") Code of Conduct was amended in 1989 to make consent mandatory. The 1989 Basel Convention on hazardous wastes, the 2001 Stockholm Convention on Persistent Organic Pollutants ("POPs"), and the 2002 Convention on Biological Diversity all contain strict FPIC requirements. The Rotterdam Convention on Free Prior Informed Consent was adopted in 1998. Consent has long been a requirement for indigenous peoples who may potentially be impacted by a development project.⁵

The main characteristics of FPIC are that it is: (1) freely given; (2) fully informed; (3) obtained before permission is granted to a proponent to proceed with the project; and (4) is consensual.

"FREELY – GIVEN"

"Freely-given" means that potentially affected people must freely offer their consent. Consent must be entirely voluntary. In other words, they must not be coerced or tricked into consent.

"FULLY – INFORMED"

"Fully-informed" means the affected people know and understand as much about their own rights and the implication of the proposed project as do the proponents, so that both sides can negotiate with equality of information. This requires two categories of information.

First, the weaker and more vulnerable of the two sides must understand their rights, specifically historic territorial rights: their rights to lands on which they have been living for generations, and their rights of access to the natural resources on which they depend, such as fish in the nearby river. Indigenous peoples have the right to self-determine the course and pace of their own development. As a result, facilitating the process of consent is usually best done by neutral agents. This may preclude the WBG from acting as the facilitator for a consensual process, as it usually has a vested interest in the positions of governments and corporations as much as in the rights of potentially affected peoples.⁹

The second category of information concerns the nature of the project being contemplated by the proponent. Affected people must understand the potential harm and risks that they might accrue if they accepted the project. Worst-case scenarios and potential disasters need to be understood. In the experience of many indigenous peoples, rivers do not die. It may be beyond their imagination for a river to die. However, an industry can easily kill a river. The possible death of a river, the sterilization of an area of ocean, or the irreversible removal of a tract of forest is not easy for many indigenous peoples to imagine. In the experience of many indigenous groups, even the damage from a rare and devastating forest fire is not irreversible. Regeneration restores many resource needs after as few as five or ten years. Showing a cartoon or video film of a similar project or accident elsewhere cannot be assumed to sufficiently bring affected people up to speed for the "fully informed" comprehension criterion.

It is also not possible to obtain consent if the people involved have never seen an example of the project proposed. It does no good asking peoples' views on a gold mine if they do not know what a gold mine is. Similarly, even if the people have seen a country road, it is not legitimate to ask them to imagine a proposed highway. If a person is asked about the acceptability of a reservoir – "like the farm pond you know well, only thousands of times bigger" – imagination will not provide an adequate basis for a valid response.

In the case of Ontario, the government thought it impossible to reach fully-informed consent on their proposal to construct new nuclear power plants. The government therefore

IMPLEMENTING FPIC IN THE WORLD BANK GROUP

FPIC is still not always accepted as a requirement for development projects:

- (a) In 2000, the World Commission on Dams ("WCD") called for FPIC to be applied for indigenous peoples involved in dam projects.⁶ WCD amplified adjudication procedures and did not mention veto power. WCD's recommendation was rejected by the WBG.
- (b) A call for FPIC for non-indigenous peoples to be included in the 2001 revision of the WBG's involuntary resettlement policy was similarly rejected by the WBG.
- (c) In February 2003, the WBG announced its "high risk/high reward" policy of resuming finance for big infrastructure projects and a new water strategy paper emphasizing big dams, after a decade-long suspension. Civil Society responded with *"Gambling with Peoples' Lives: What the World Bank's New 'High Risk/High Reward' Strategy Means for the Poor and the Environment"*⁷, urging the WBG to adopt FPIC.
- (d) Nevertheless, FPIC is sought these days in some WBG projects, though it is not yet clearly mandated by WBG policies.⁸

financed a learning experience that would enable potentially affected people to understand the questions that would in the future be asked of them. Such “intervener financing” is now commonplace. Intervenor financing augments the affected community’s capacity to design studies, ask the right questions, and assimilate the results – all before deciding on FPIC.

In the case of dams, for instance, people are bussed to the nearest dam so they can understand what a reservoir is like and spend some days talking in detail with the people previously impacted by a relatively old project. Explaining what a project will be like is not easy. While scale models, videos, maps, diagrams, and photographs may help, they are unlikely to suffice. The affected people, or their representatives, need to visit similar projects and talk with people who have been through similar impacts firsthand. “Fully-informed” is the means to equality of negotiation. Many societies require building reciprocal relationships before negotiations can legitimately begin. Incomplete information means the people’s lack of information is being exploited by the proponent.

“PRIOR”

“Prior” means consent has to be obtained before permission is granted to the proponent to proceed with the proposed project that will affect the communities. This must occur well before a financing agency considers the request to finance the project. Consent is best achieved as part of the Environmental Assessment / Social Assessment (“EA/SA”) process: the impacts are predicted together and mitigation is also designed together.

“CONSENT”

“Consent” means harmonious, voluntary agreement with the measures designed to make the proposed project acceptable to the potentially affected communities. FPIC does not demand absolute consensus; a significant majority suffices. A majority of 51% suffices in democratic elections, which may be used as a guide to the definition of a “significant majority”.

There are many mechanisms for achieving consent, although they may be called by different terms. Plebiscites (direct single issue votes) and referenda (votes on a proposal or subsequent endorsement of an agreement reached by leaders or a legislative body) are two mechanisms used on occasion. For instance, should your nation join the European Union, or shall we permit Wal-Mart to build in our community? Some municipalities might also mandate referenda on assuming debt before issuing bonds for a new thruway. If there is substantial opposition to the proposed project, consent becomes less achievable. Although there are no hard and fast rules about the fraction of the community that must agree, the point is usually less important than it first appears. Most relevant societies discuss important issues together as a community, with leaders or representatives, and often for days on end, until the spirit of consensus is reached. The New York Stock Exchange was created through long negotiations by 24 brokers pow-wowing in the shade of a Buttonwood Tree on Wall Street, Manhattan, on 17 May 1792; hence the “Buttonwood Agreement”. In Botswana, such indabas or parleys commonly last for several days.

CANADA’S FIRST NATIONS, FPIC, AND EXTRACTIVE INDUSTRIES

When Canada wanted to extract hydrocarbons from the Yukon and Mackenzie Valley territories of Canada’s Indigenous People, or “First Nation”, the 1974-1977 Royal Commission headed by Supreme Court Judge Thomas R. Berger agreed with the First Nations’ rejection of the project because the likely impacts looked too severe, the offered benefits too meager, and the promises aspirational. Since then, political evolution and forceful legislation have improved protection for the First Nations and strengthened their bargaining power, in part by devolving control from Ottawa to the First Nations. The First Nations now have some ownership rights over both surface and sub-surface resources. In 2001, most of the potentially impacted First Nations negotiated a financial stake in the pipeline: oil corporations and First Nation now have become partners, and it looks as if the First Nation will provide consent. Pipeline planning began in earnest in 2003. Apparently, the 30-year delay has been justified.

The bottom line of FPIC is that the affected communities must understand that they will benefit from the proposed project, and that these specific benefits will far exceed any worst-case scenario of unforeseen impacts. Affected communities must become convinced that prudent mechanisms are in place to guarantee their benefits, compensation will be just, and rehabilitation will ensure the communities are clearly better off with the project. In addition, affected people must understand that they will be fully involved in legally enforceable monitoring to ensure compliance with whatever they are consenting.

WHO APPROPRIATELY REPRESENTS A COMMUNITY?

Many societies are not homogeneous entities with shared values and norms. Communities tend to differentiate and fragment. Many societies function with chosen leaders, but may also include competing individuals and factions. The chosen representatives may have different abilities to assert the views of the community. In such situations, it is essential that truly legitimate representatives be sought and involved in FPIC, rather than the usual easier-to-identify village elites. Most representatives discuss the current issue being negotiated in detail with the larger group in order to seek ratification (or rejection) of a status.

Because it has been common practice for proponents to latch onto a certain representative and deal only with them from the outset, great care must be exercised that the representatives retain broad legitimacy throughout the process. The FPIC process can be manipulated. Proponent selection or acceptance of a representative tends to increase fragmentation.

From the representatives’ side, their task is not easy, even assuming they have the best interests of their own society as

their topmost priority. Negotiations may change over the years, so it will not be easy for the representative to know whether to insist that 20% of the royalties devolve to the affected communities, or whether to hold out for 50%, or more.

FPIC FOR ALL COMMUNITIES, NOT JUST INDIGENOUS PEOPLES

FPIC was accepted earlier for indigenous peoples than for non-indigenous communities. The rationale for this is the belief that indigenous peoples' livelihood and culture are more dependent on their relationship to customary lands. Hence, indigenous peoples are more likely to suffer from displacement than non-indigenous communities. It is true that indigenous peoples are indeed more dependent on customary resources than many other communities. There is a continuum of dependence on customary resources, with indigenous peoples clustered at one end, peasants and the rural poor in between, and the urban poor less connected. Proneness to suffering (or worse) if displaced or severely impacted is certainly one criterion for consent. But the other criterion is inclusion, freedom to choose one's fate, meaningful participation in decisions affecting one's community; in short, democracy. Why is it that the rural poor can be displaced against their will, but other peoples cannot? Can development have a double standard and advocate democracy for some, but autocracy for the rest? FPIC should be applied to all communities, certainly for indigenous peoples, but also the poor in general.

NEGOTIATION FOR FPIC

Consent revolves around negotiation, which can work only when the two negotiating parties have the same information and are not overly unbalanced in power. It can be very difficult for the weaker partner to negotiate, partly because the playing field shifts every year, the price of the product sought by the proponent may fluctuate, and the rules and laws governing development and human rights change through the years. Some nations use referenda in such cases, especially when a municipality would take on the future debt. If a municipality wants to widen a road or build a new school, it needs consent before issuing bonds.

Eminent domain cannot be applied widely to villages or communities. Where consent has been obtained properly from all potentially impacted communities, one or two holdouts against the consent of the community could possibly be circumvented through eminent domain, but even then, compensation combined with development benefits for the affected families would have to be fair and just.

Potentially affected people organize themselves to comprehend their rights and the potential risks of the proposal, and have to be able to negotiate an "Impacts and Benefits Agreement". In

other words, the affected communities must be able to balance potential risks or costs on the one hand, with what is being offered by the proponent or sought by the community on the other hand. Labor unions often have a role in empowering the poor to improve the benefit/impact ratio.

There is little "best practice" precedent on which to base negotiations. Some local impacted communities receive no royalties. A community might receive 20% of royalties, but this might then be deducted from what the central government previously allocated to that community, making the net benefit fall back to zero. Some impacted communities seek 100% of royalties for resources extracted from their lands. In the Chad-Cameroon oil pipeline case, 5% of royalties were allocated to the oil-producing region. If the detailed, written terms of the negotiation process are widely acceptable to the potentially affected people, consent has been achieved. FPIC is earned when there is demonstrable public acceptance of the transparently negotiated agreement.

IFC'S ALLAIN & DUHANGAN HYDROPROJECT *Himachal Pradesh, India*

The International Financial Corporation ("IFC"), a part of the WBG, and the Hydroproject's proponent were accused on 13 Nov 2003 of "unduly pressurizing" the affected communities, which had rejected the Environmental Resources and Management Corporation's environmental and social assessment of this \$192 million, 192 MW project as totally unacceptable. The affected people claimed they were not at all informed, much less consulted. The IFC refused to translate the EA/SA into Hindi in February 2004. The Hydroproject's standard requirement of a "No-Objection Certificate" would not suffice for FPIC.¹⁰ The affected communities insist on an independent panel and public hearings (after they have read a Hindi EA/SA report). The results of the hearings are to be public documents and should go to IFC's board along with other documentation before their decision.¹¹

HOW MANY FPICs SUFFICE?

Is FPIC perpetual or can FPIC be revoked when necessary? It may not be clear whether FPIC is a once-off landmark, never to be rescinded, or if it has to be renewed annually, with every significant change in the project status, or with changes in the affected society.

For instance, Peru's Yanacocha gold mine, the second largest in the world, was financed by IFC in 1993 with little or no consultation and refusal to recognize that many of the affected people are indigenous. The first La Quinoa expansion in 2000 led to civil unrest and police brutality as the affected people had

started to suffer from polluted water, mercury toxicity and cyanide-related acidity. IFC claimed that FPIC was not needed for the second expansion on Mount Quilish. The Newmont Mining Corporation claimed to have already reached FPIC, but nearly all of the surrounding communities are protesting the second stage of expansion. The Mayor of nearby Cajamarca opposes the Quilish stage, and one poll showed more than 60% of people also oppose it. By the time the expansion was being planned, the people had been so severely impacted by the first few years of operation that they passed an ordinance in 2002 legally protecting the sacred mountain, a major source of water. Newmont Mining is appealing the ordinance. In such a case, a second FPIC should be sought.

IFC also claimed to have achieved FPIC in the case of Laos's Sepon gold and copper mine discovered by Rio Tinto Zinc, Inc. ("RTZ") in 1995, but no Laotian had ever seen a gold mine, so it is unclear how well-informed the affected people actually were. In 2001, Oxfam International sent a governmental environmental official to the Philippines to see a similar gold operation.

POLICY RECOMMENDATIONS FOR FPIC IN THE WORLD BANK GROUP

1. Economic development should not rely on force. Coercion means people are being excluded and are forced to subsidize the developer.
2. The WBG should mandate FPIC for all operations (e.g., displacement) involving indigenous and non-indigenous peoples, and all projects impacting communities.
3. The WBG should strengthen its policies on consultation, participation, disclosure and transparency so that FPIC is the main criterion to be used as a social license to operate, hence as the WBG's main tool in deciding whether to support the operation once FPIC has been legitimately obtained.
4. As genuine consensus is difficult and time consuming to obtain, it is best sought by reputable objective and independent agents, rather than either by the proponent, the government, or the WBG.
5. The WBG should clarify the conditions under which eminent domain is permissible.

THE WBG, FPIC, AND HUMAN RIGHTS

FPIC is a more participatory approach to resource allocation, because it helps to democratize natural resource-led development.¹² On the continuum between the poles of democracy and autocracy, consent lies at the democratic pole, while invol-

untary displacement is at the autocratic pole. As an economic organization, the WBG should remember that economics works only under voluntary circumstances, and does not work under coercive circumstances.

THE WORLD BANK GROUP'S POLICY ON HUMAN RIGHTS

Adopting relevant and widely agreed labor principles (e.g., those of the ILO) seems preferable to the WBG's current case-by-case ad hoc approach. A first step would be to adopt ILO's "Core Labor Standards". The WBG's decade of tergiversation on whether to adopt the core labor standards against slavery and extreme forms of child labor¹³ is not reassuring. If a client country denies its citizenry the rights of association and collective bargaining, the WBG must question if it needs to be more persuasive and proactive and more of a leader, rather than just accepting such denials.

The WBG's Chief Economist has written that the principle of equality underlies poverty reduction: human rights principles involve equality, or equal value of individuals in society, or equality of opportunity.¹⁴ It is difficult for the WBG to admit that poverty reduction via the trickle-down theory has been too indirect, slow, and inefficient. However, in 2000, the WBG committed to the Millennium Development Goals, which includes direct poverty reduction.

Critics often claim that the WBG's posture on human rights lags behind that of the rest of the UN family, and also behind industry leaders. According to the World Bank's 2002 *Development and Human Rights*, more than 190 countries have ratified the six main human rights conventions; the WBG has not¹⁵. In the past, the WBG has emphasized that its articles prohibit use of non-economic criteria in lending; hence human rights, it is claimed, should not be used in lending decisions.

THE WBG'S CAUTIOUS PROGRESSION INTO HUMAN RIGHTS

The WBG is progressing to cautious engagement in a few specific areas of human rights. As long ago as 1982, the WBG adopted its official policy on indigenous peoples¹⁶, which is essentially a human rights rather than an economic policy. The World Bank's ("WB") General Counsel, Ibrahim Shihata, started publishing statements dealing with human rights issues in 1988. In 1993, he wrote that "balanced development can only be achieved if the basic human rights are secured for persons affected by development"¹⁷ (*henceforth referred to as "Shihata's Threshold"*).

The WBG still distinguishes between economic well-being, which is the focus of its efforts, and political rights, which are said to fall outside the WBG's legitimate scope. On the other hand is the view enunciated by noted economist Amartya Sen in a speech to the WBG in 2002: "Political rights . . . are not only pivotal in inducing social responses to economic needs, they are also central to the conceptualization of economic needs themselves."¹⁸ Economics has a creditable history of attending to social justice, equality, and human rights dating back to John Stuart Mill and John Rawls.

The WBG's first paper on human rights (1998) generally accepted property rights and participation rights, but failed to state that the WBG had an obligation to respect human rights. However, it did state that the WBG believes that creating the conditions for the attainment of human rights is the central and irreducible goal of development. Since then, the WBG has increasingly alluded to human rights, and in three specific instances, egregious violations have been commendably acted upon¹⁹.

ADOPTION OF ILO CORE PRINCIPLES

The WBG's policies prohibit it from supporting actions that violate conventions ratified by a member country. Although ratification of conventions is open only to sovereign nations, the WBG can support client countries in their application of conventions they have ratified. Since 1988, ILO has made enforcement of its eight core conventions a condition of ILO membership. They are applicable whether or not the country has ratified them. The WB is aware of ILO's conventions, but it has made a determination (more than once) that it would not adopt or apply any of them. Nevertheless, IFC started applying two of ILO's core principles against slavery and extreme forms of child labor in 1997 to all IFC and Multilateral Investment Guarantee Agency ("MIGA") investments.²⁰

At the 2000 IMF/WBG Annual Meetings in Prague, WBG President Wolfensohn promised to grapple with human rights issues. In May 2002, he asked staff to draft a Human Rights Strategy²¹ without overstepping the WBG's mandate or compromising "our advantage of political neutrality". While he stated that the WB supports the promotion of all four core labor standards, the institution does not apply conditionality on these standards in its lending. Promotion of the standards is better than none, but some critics have argued that refusing to uphold the standards as conditions for loans undermines their implementation. In fact, the WBG sometimes recommends violation of these standards²².

The World Bank's 1995 World Development Report on labor is generally positive about trade unions, but emphasizes that "low cost labor is the main comparative advantage of poor countries." The International Development Association's ("IDA") Replenishments 12 (in 1999) and 13 (in 2002) pushed the reluctant WBG by mandating an assessment of core labor standards in some Country Assistance Strategies, which has started in a few select IDA countries. However, WBG's rhetoric on corporate social responsibility, including ILO's core labor standards and corporate codes of conduct, is largely still aspirational. While ILO's core standards are slowly being considered, in practice they are commonly overridden to enhance labor market flexibility, reduce labor costs, or to act in an industry friendly manner.

Reconsidering whether to do business in countries with gross human rights violations is not yet systematic in the WBG. However, the WBG's reinvigorated priority of reducing poverty directly involves the advancement of human rights. A key question is the extent to which the WBG continues supporting governments systematically abusing human rights and with little commitment to reducing poverty.

THE STRUGGLE OVER AUSTRALIA'S JABILUKA URANIUM

Uranium was discovered in 1971 on Aboriginal lands. The miners – Energy Resources of Australia and RTZ – claim there would be acceptable impacts on the indigenous peoples, Kakadu National Park/UN World Heritage Site, and posted a \$30 million performance bond. The Mirrar, another indigenous group, much of Australian civil society, several senate investigations, and a special UN mission disagreed. Demonstrations, civil disobedience, blockades and mass arrests over a period of thirty years helped to stop mining by about 2000. The miners started to transport mined radioactive ore to its origin deep underground in 2003. The affected people are expected to regain their veto power in 2004.²³

CURRENT STATUS AT THE WORLD BANK

"SHIHATA'S THRESHOLD" – DETERMINING WHERE TO DRAW THE LINE

The Bank's Human Rights Strategy promised by President Wolfensohn four years ago is not yet available. The situation currently seems to be that if and when the WBG judges that human rights violations have started to affect economic development, WBG staff will then be permitted to address such issues. The WBG has been criticized for financially supporting Suharto's Indonesia, Mobutu's Zaire, Marcos' Philippines, and the Democratic Republic of the Congo. That there was a struggle for the WBG to cease lending to apartheid South Africa²⁴ suggests that finding the threshold at which human rights start to influence economic development is not easy for the WBG to specify, although pellucid for civil society. On the other hand, the WBG refrained from investing in Burma/Myanmar, because allegations of slavery had become inescapable. Had slavery started to affect economic development, thus crossing "Shihata's threshold"? At least in some places, slavery appears to have been abolished because of the belief that it is morally wrong. In fact, gross social injustice often becomes morally unacceptable long before it crosses Shihata's threshold of influencing economic development.

Ascertaining Shihata's threshold criterion at which human rights abuses begin to influence economics has become more difficult as economic wisdom has changed. For example, the main reason adduced by the WBG for not supporting trade unions and collective bargaining over the last 20 years was that they are not economic. That abruptly changed in 2003. The WBG's new survey of more than one thousand studies on the effects of unions and collective bargaining shows that they reap significant economic benefits.²⁵

STEPS TAKEN

It is difficult to ascertain what the WBG is doing about human rights; they are scarcely alluded to in the official web-site, and there does not seem to be an identified focal point or unit.

- The WBG now considers that labor unions, collective bargaining and other civil liberties are “economic”, according to WBG’s own research.²⁶
- The International Court of Justice has ruled that the WBG’s articles need to be interpreted in the context of contemporary law, in which human rights are of international concern, rather than political matters exclusively the purview of domestic governments.
- WBG President Wolfensohn stated in 1999 that no equitable development is possible without protection of human rights.
- A draft Human Rights Policy approach paper was discussed by WBG Executive Directors in May 2003, but was rejected. Industrial country representatives were positive, but developing country representatives feared human rights could be misused as a form of protectionism.
- IFC’s Peter Woicke raised the need for a Safeguard Policy on Human Rights at least twice during the 2002-2004 independent Extractive Industry Reviews.²⁷ In addition, he published his desire for an official new human rights safeguard policy in the *Financial Times*, and again on Human Rights Day (10 December 2003).
- Almost all WBG member countries have ratified human rights standards in international conventions.
- The WBG’s policies prohibit it from supporting violations of member countries’ commitments to uphold international treaties, including human rights obligations.
- Shihata himself ruled that obligations under the UN Charter (Article 103) prevail over the WBG’s Articles of Agreement.
- The World Bank’s January 2004 draft “Management Response”²⁸ to the independent Extractive Industry Review did not accept its recommendations on FPIC and human rights, nor even the two ILO Core Labor Standards adopted by IFC in 1997. President Wolfensohn distanced himself from the WBG January 2004 Management Response to the report, and ordered a more positive re-think. He then postponed the rethink until after the April 2004 Annual Meetings, then until the summer.
- President Wolfensohn and IFC’s VP Peter Woicke both presented supportive human rights speeches on 1st March 2004 at the “Conference on Human Rights and Development” in New York. Since mid-2003, human rights focal points have been nominated in each Vice-Presidency. Senior VP and General Counsel Roberto Danião, appointed

October 2003, is said to be more positive on human rights than his predecessors.

THE LEGITIMACY OF FREE PRIOR AND INFORMED CONSENT

If fully-informed, potentially-affected communities reject a proposed project, but the project proceeds over their objections, democracy and freedoms will have been undermined. The use of eviction and forced displacement without consent implies autocracy, not democracy. This cannot be construed as a social license to operate. FPIC balances the national interest with community rights. Clearly, it would not be in the national interest if an extraordinarily lucrative mine, for example, was held hostage by one absentee family with a house on the lode. In such a case, eminent domain could rightly be used. But if the capital city sits on a big lode, the developers would not dream of annexing the city. Where potentially affected people are rich, have a voice, and are numerous, projects do not go ahead. Developers want to go ahead only when the impacted people are poor, indigenous, or few in numbers. In the continuum between one family and a major city, when should eminent domain be used, and when should consent be required? The WBG’s paramount goal of poverty reduction cannot be achieved by forcing risky projects on the poor. FPIC protects the poor so they do not suffer as much from impacts by the development.

Free prior informed consent has been accepted by a dozen UN institutions and many others in cases involving indigenous peoples.²⁹ FPIC does not preclude the infrequent use of eminent domain in individual cases. The World Bank Group mandates “meaningful consultation,” which it has interpreted to include the right to say “no” to a proposal. Therefore, under its own rules, the WBG should follow FPIC, but is loath to clarify this inconsistency.³⁰

ACKNOWLEDGEMENTS

I am most grateful for the useful comments of Dr. Ted Scudder, professor of anthropology and sociology at Cal Tech. Dr. Scudder specializes in involuntary resettlement, and is about to publish his magnum opus (published by Earthscan, <http://www.earthscan.co.uk>).



ENDNOTES:

Free, Prior and Informed Consent and the World Bank Group

¹ Most economic development projects depend on shifting humans. Displacement is traumatic, sometimes gravely so. Urban resettlement often works because even though the oustees are removed from their dwellings, their jobs, society and relationships remain intact. Urban oustees usually receive another house in a nearby street. Rural displacement usually fails, thus intensifying poverty, according to all internal World Bank examinations. This is probably the worst feature of economic development today; it is also the only case where economic development relies on coercion, and does not try to seek consensus. This means the poor subsidize the proponent who externalizes resettlement costs. There has been improvement in the means by which rural people are moved. Forty years ago, a village may have been warned to move out of the way in a few days. Later, the villagers were informed they would have to move in a few months. A decade or so later, they may have been consulted to see if they would prefer to move to site A or site B. Consultation then progressed to the affected people being asked how and to where they would be moved. A decade later, participation supplanted consultation. Potentially affected people started to participate in resettlement planning. The next improvement was 'meaningful participation', interpreted by Ibrahim Shihata, WBG General Counsel, to mean the village could reject being evicted.

² For detailed case studies showing how FPIC has been approached in the case of mining, see S. Bass, P. S. Parikh, R. Czebiniaak & M. Filbey, *Prior Informed Consent and Mining: Promoting the Sustainable Development of Local Communities*, Environmental Law Institute, 2004, available at http://www.elistore.org/reports_detail.asp?ID=10965 (last visited June 25, 2004).

³ There are viable, economic and proven alternatives to hydro-reservoirs displacing many people. Reservoirs, especially in densely populated areas, are not necessary for water supply. Irrigation is unfortunately probably necessary, and some irrigation needs reservoirs. In this sole case, oustees must be guaranteed to become project beneficiaries and be substantially better off with the project. In this case, consent can be expected.

⁴ See also J. Athialy, *Free Prior Informed Consent of Communities in Large Hydroprojects : The Case of the James Bay Projects (2003)* (Clark University).

⁵ See generally P. Bosshard, *Free Prior Informed Consent: No Longer a Question of Omelettes and Eggs*, Presentation to the Berne Declaration (March 8, 2004). See also D. CALLIES, D. CURTIN & B. MCCUTCHEON, *BARGAINING FOR DEVELOPMENT: A HANDBOOK ON DEVELOPMENT AGREEMENTS, ANNEXATION AGREEMENTS, LAND DEVELOPMENT CONDITIONS, VESTED RIGHTS AND THE PROVISION OF PUBLIC FACILITIES* (Environmental Law Institute 2003).

⁶ DAMS AND DEVELOPMENT: A NEW FRAMEWORK FOR DECISION-MAKING (World Commission on Dams 2000), available at <http://www.dams.org/report/contents.htm> (last visited June 25, 2004).

⁷ P. Bosshard, J. Bruil, K. Horta, S. Lawrence, and C. Welch, *Gambling with People's Lives: What the "High-Risk / High-Reward" Strategy Means for the Poor and the Environment*, Environmental Defense, Friends of the Earth, International Rivers Network, 2003, available at <http://www.foe.org/camps/intl/worldbank/gambling/Gambling.pdf> (last visited June 25, 2004) [hereinafter *Bosshard*].

⁸ EXTRACTING PROMISES: INDIGENOUS PEOPLES, EXTRACTIVE INDUSTRIES AND THE WORLD BANK (M. Colchester, A. L. Tamayo, R. Royillas & E. Caruso eds., Tebtebba Foundation 2003).

⁹ *Id.*

¹⁰ Bosshard, *supra* note 7.

¹¹ This decision was influenced by H. Thakkur, *Lessons Unlearned? The Case of India's Allain Duhangan Dam and the World Bank*, WORLD RIVERS REVIEW, Feb. 2004, available at http://www.irn.org/pubs/wrr/issues/WRR_V19_N1final.pdf (last visited June 25, 2004).

¹² K. Slack, *Sharing the Riches of the Earth: Democratizing Natural Resource-Led Development*, ETHICS & INTERNATIONAL AFFAIRS, Winter 2004 (Publication of the Carnegie Council on Ethics and International Affairs).

¹³ N. Stern, *Development and Human Rights*, Speech delivered to the London School of Economics (2003). Stern made the important point that we need to be able to distinguish between the relative importance of different rights. For example, the Universal Declaration gives equal weight to free primary education as to paid holidays. Similarly, the Declaration upholds the right of patent protection. Stern asks: "Does this mean it is wrong to campaign for generic versions of drugs freely traded between developing countries?"

¹⁴ *Id.*

¹⁵ In 1995, Ibrahim Shihata, World Bank Group General Counsel, ruled that participation of affected people requires the two human rights, those (a) of 'free expression and (b) of assembly.' He noted that the violation of political rights, when extensive and pervasive, "could impose itself as an issue in the Bank's decisions." The Bank's country creditworthiness risk analyses would include major risks of human rights violations. The Bank's 1998 *Development and Human Rights* alludes to governance lending leading to a broader range of human rights. Its Comprehensive Development Framework mentions that human rights need to be protected.

¹⁶ The WBG's policy on indigenous peoples, originally written by Dr. Goodland in 1982, evolved through the years. For example, seven years later, ILO adopted their similar Convention 169. The EU Council of Ministers adopted their indigenous peoples resolution in 1998, and the Asian Development Bank adopted essentially the same policy in 1998 (OP 7.10). The World Commission on Dams upheld the policy in 2000.

¹⁷ Ibrahim Shihata, *The World Bank Legal Papers*, Dordrecht Kluwer Law (2000). See also THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS AND LECTURES (Ibrahim Shihata ed., World Bank 2001)

¹⁸ Amartya Sen, Presentation to the World Bank (2002).

¹⁹ (a) Allegations of slavery on Myanmar's Yadana gas pipeline in 2000 led the WBG to drop the largest Thai electrical generation component the day before Board presentation. (b) WBG President Wolfensohn personally interceded against gross mistreatment of critics of the Chad-Cameroon oil pipeline, managing to spring the leader of the opposition, Ngarlely Yorongar, out of a torture chamber and into exile in Paris in May 2001. (c) President Wolfensohn called Chinese Premier Zhu Rongji in c.1999 to free two researchers imprisoned while investigating the WBG's fiercest controversy, the Western Region Project. This was a major improvement in the WBG's position on slavery as a non-economic, sovereignty or political issue, therefore off limits to WBG discussion.

²⁰ ILO's 'Fundamental Conventions' include: (a) freedom of organization, (b) collective bargaining, (c) forced labor, (d) discrimination, (e) minimum age and (f) child labor. The UN's treaty on women's rights has been ratified by 170 nations over the last 23 years. The International Court of Justice ruled that violation of human rights is a breach of the state's obligations to the international community as long ago as 1971.

²¹ President Wolfensohn invited Mary Robinson, then UN High

Commissioner on Human Rights, to present a major speech on Human Rights to WBG officials in 2001, and commemorated the anniversary of the UN Human Rights Convention by publishing a collection of essays related to human rights.

²² For example, in Argentina in 1999-2000, the WB urged that the Labor Code restrict collective bargaining. In Croatia in 2000, the WB urged the government to annul negotiated collective agreements and decree wage reductions. Pakistan in 2001: the CAS for Pakistan supported annulling labor agreements. Mexico in 2001: the WB urged phase-out of collective bargaining. Georgia in 2002: privatization violated collective bargaining agreements. When union organizers were fired in 2002 in the WBG-supported Chad-Cameroon Oil Pipeline project, the WBG refused to act.

²³ R. MOODY, *THE GULLIVER FILE: MINES, PEOPLE LAND: A GLOBAL BATTLEGROUND* (Pluto Press 1992).

²⁴ Apartheid began in the early 1960s. In 1973, the UN concluded that Apartheid was a 'crime against humanity.' In 1986, the USA passed the Anti-Apartheid Act. Apartheid ended in the early 1990s, and the WBG resumed lending to South Africa in 1997.

²⁵ T. Aidt and Z. Tzannatos, *Unions and Collective Bargaining* :

Economic Effects in a Global Environment, World Bank Publication No. 24730, 2003 [hereinafter *Aidt*].

²⁶ J. Isham, D. Kaufman & L. Pritchett, *Civil Liberties, Democracy and Performance of Governments*, *THE WORLD BANK ECONOMIC REVIEW*, 1997, available at <http://www.worldbank.org/research/journals/wber-mast.htm> (last visited June 25, 2004). See also *Aidt*, *supra* note 25.

²⁷ Dr. Emil Salim, *The 2003 Independent Extractive Industries Review: Final Report to the World Bank Group*, *EXTRACTIVE INDUSTRIES REVIEW*, 2003, available at <http://www.eireview.org/html/EIRFinalReport.html> (last visited June 25, 2004).

²⁸ *Management Response to the Independent Extractive Industry Review*, World Bank, Jan. 23, 2004. For the most recent version of the Management Response (June 2004), see <http://www.worldbank.org/ogmc/> (last visited June 25, 2004).

²⁹ Fergus MacKay, *Indigenous People's Right to Free, Prior and Informed Consent and the World Bank's Extractive Industry Review, Forest People's Program*, available at <http://forestpeoples.gn.apc.org/briefings.htm> (last visited June 25, 2004).

³⁰ See (Extractive Industries Review 2003).