



**UGANDA CONSORTIUM ON
CORPORATE ACCOUNTABILITY**

U C C A

**UGANDA: POLICY BRIEF ON THE NEED TO PROMOTE
‘ACCESS TO INFORMATION’ AND RESPECT FOR
‘FREE, PRIOR AND INFORMED CONSENT’ IN ALL
DEVELOPMENT PROJECTS THAT AFFECT COMMUNITIES**

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I. INTRODUCTION

Between 2010 and 2019, Uganda's GDP doubled in size from an initial UGX 64.23 trillion (US \$16.9 bn) to UGX 128.49 trillion (US \$ 33.8 bn) in nominal terms.¹ Between 2017 and 2018, Foreign Direct Investments also grew from US \$802.4 million (2017) to US \$1.336 billion (2018), thereby marking a 66.5% growth.²

Uganda is also aiming at attaining middle income status within the next few years, and commencing domestic oil production in 2022.³

In the course of these and more economic leaps, Uganda is focusing a lot of its resources on the development of physical infrastructure, particularly within the transport and energy sectors.⁴ The Government considers an efficient and reliable supply of electricity in addition to a reliable water transport and communications infrastructure to be key economic drivers going forward.⁵ In fact, under its 2019/20 national budget,⁶ the works and transport sector is allocated 6.4 trillion shillings (15.8% of the total budget) while the energy sector is allocated 3 trillion shillings (7.4% of the total budget).

As the Government executes large development projects to facilitate further growth, the need to assess and consider the environmental and social impacts of these activities becomes more imperative, and this is where the interrelated concepts of Free, Prior, and Informed Consent (FPIC; defined in Section II below) and Access to Information (ATI; defined in Section III) come to the fore.

As a principle, FPIC requires the consultation and effective participation of 'indigenous peoples' in all development projects that affect them. Complementarily, the Access to Information principle requires that in the context of that consultation and effective participation, the project-affected persons (PAPs) should have access to all the pertinent information concerning the development project and its effects—both positive and negative—so that their engagement is from an informed point of view.

It is in the best interests of the Government of Uganda and its people for FPIC to be inculcated into

1 Third National Development Plan (NDP III, 2020/21 to 2024/25), Government of Uganda, January 2020, pp. xvi and 2. In October, 2019, the Uganda National Bureau of Statistics estimated Uganda's GDP to be 122.6 trillion shillings (approximately US \$33.3 billion), and stated that in the year 2018/19 alone, Uganda's economy had grown by 6.5%. Source: Martin Luther Oketch, 'Uganda's Economy Expands to Shs. 122.6 Trillion' *Daily Monitor* (Kampala, 10 October 2019), www.monitor.co.ug/News/National/Uganda-s-economy-expands-Shs122-6-trillion/688334-5306772-65o4hv/index.html. Last accessed on 10th December 2019.

2 Patricia Akankwasa, 'Foreign Direct Investments Rebound' *The Independent* (Kampala, 29 May 2019). www.independent.co.ug/foreign-direct-investments-rebound/. last accessed on 11th December, 2019.

3 Nidhi Verma and Promit Mukherjee, 'Uganda Expects First Oil Production to be Delayed to 2022 - Minister' *Reuters* (New Delhi, 13 February, 2019). www.reuters.com/article/oil-uganda-tanzania/uganda-expects-first-oil-production-to-be-delayed-to-2022-minister-idUSL3N20833P. last accessed on 19th December, 2019.

4 Refer to Uganda's Second National Development Plan (NDPII), 2015/16-2019/20 in general.

5 PWC, 'Industrialisation for Job Creation and Shared Prosperity: Uganda National Budget Bulletin 2019/20' *PWC* (Kampala, June 2019).

6 The 2019/20 National Budget totaled to 40.5 trillion shillings.

all Government-related development projects and other large scale investment projects as a matter of both policy and law.

This Policy Brief explains why, and addresses the two interlinked concepts of Free, Prior and Informed Consent (FPIC) and Access to Information (ATI).

II. FREE, PRIOR, AND INFORMED CONSENT (FPIC)

‘Free, Prior, and Informed Consent’ is a principle to the effect that where a development project will affect indigenous peoples and other communities, it is incumbent upon the Government and its development partners to ensure the consultation and effective participation of all affected people prior to the execution of the project.⁷

The principle is mainly derived from International Law, and has its foundation in human and peoples’ rights such as the right to self-determination, but also has social, economic, and political factors that necessitate its adoption.⁸

Normatively, FPIC is articulated by the *United Nations’ Declaration on the Rights of Indigenous Peoples* (UNDRIP), the *International Labour Organisation’s Indigenous and Tribal Peoples Convention No. 169* (ILO C169), several Policies of the World Bank,⁹ and even guidelines created by specialised UN Committees such as the Committee on the Elimination of Racial Discrimination and the Committee on Economic Social and Cultural Rights.¹⁰

Each of the components of FPIC is explained below:

FREE

This component requires that there should be no coercion of the project-affected people. Their participation and consultation should be obtained without compulsion or undue influence.

PRIOR

The ‘Prior’ component requires that participation and consultation of the project-affected people should be undertaken prior to the execution of the project or commencement of its substantive implementation and not after.

INFORMED

In order to make the participation and consultation process effective, the project-affected people should have a sufficient knowledge and understanding of what the project will entail. This requires full disclosure of information, access to information, and sensitisation.

7 Mauro Barelli, ‘Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead’ (2012) Vol. 16(1) *International Journal of Human Rights*, pp. 2-4. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1991731, last accessed on 9th December, 2019.

8 Tara Ward, ‘The Right to Free, Prior, and Informed Consent: Indigenous Peoples’ Participation Rights within International Law’ (2011) Vol. 10(2) *Northwestern Journal of International Human Rights*, pp. 54-84.

9 See the World Bank’s Environmental and Social Framework Policies of 2016. <https://projects.worldbank.org/en/projects-operations/environmental-and-social-policies>, last accessed on 14th December 2019.

10 See for example, General Recommendation No. 23 of the UN Committee on Elimination of Racial Discrimination (‘Indigenous Peoples’).

CONSENT

This component means that the consent of project-affected people should be sought prior to the commencement of the project. The component, however, does not normatively extend so far yet as to say that where consent is withheld, the development project must not proceed. Such a veto power is not yet firmly established. It does, however, require that the process must be such that the People have an actual, and practical opportunity or possibility of influencing changes within the Project, otherwise their participation and consultation will be a façade and the principle will therefore not have been observed.

In other words, Government and its development partners have to approach and conduct the consultation and effective participation of project-affected persons with an open mind that is amenable to new suggestions and criticisms, and with a willingness to make reasonable compromises.

The above components are all integral and should be observed in order for FPIC to be validly implemented.

Importantly, the third component ('Informed') is the most essential component for the valid and legitimate participation of the People. Without this component, their participation cannot be held to be effective, and without their effective participation, FPIC will not be held to have been present, thus tainting the project. The section below discusses it briefly.

III. ACCESS TO INFORMATION (ATI)

In order to effectively participate in consultations regarding development projects, affected Peoples should be equipped with accurate, relevant, updated, and sufficient information about the Project and its impact in order to properly appraise the Project's extent, impact, advantages and disadvantages and to effectively communicate their views, suggestions, and consent.¹¹ Access to Information (ATI) regarding development projects ensures that the participation and consultation of project-affected persons is meaningful as they are well informed and all pertinent disclosures are made beforehand. In this context therefore, Access to Information (ATI) is essential to FPIC.

Facilitating ATI in this respect further requires that consideration be made of the target peoples' languages and dialects, and of their literacy level. The modes of transmission of information must therefore be appropriate and effective for the purpose, able to directly reach the greatest possible number of individual members of the affected community.

Uganda's domestic laws already provide for access to information in the possession of the State as a fundamental right of all its citizens (Article 41 of the Constitution of Uganda). And so even

11 Mauro Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead' (2012) Vol. 16(1) International Journal of Human Rights, pp. 1-24. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1991731, last accessed on 9th December, 2019.

independently of FPIC, ATI is already an important part of Uganda's laws and policies. Also applicable are the Access to Information Act, 2005 and the Access to Information Regulations, 2011.

ATI and FPIC also find grounding within the National Objectives and Directive Principles of State Policy that precede the substantive text of the Constitution of Uganda, 1995.¹² These Objectives and Policies bind the Government, its organs and agencies, all citizens, organisations and other bodies, and all persons in general.

While most of the Objectives are relevant to FPIC and ATI in one way or another, Objective 9 is the most central. It states that, "The State shall take all necessary steps to involve the people in the formulation and implementation of development plans and programmes which affect them."

Section 6.0 of this brief contains suggestions for how to go about facilitation of ATI, while section 4.0 below advises on why the Government of Uganda should definitively adopt FPIC and ATI as State Policy within its developmental agenda.

IV. WHY THE GOVERNMENT SHOULD ADOPT 'FPIC' AND 'FPIC-BASED ATI' AS STATE POLICY

The Government of Uganda should expressly adopt and implement FPIC and ATI as State Policy for the following eight reasons:

1. Uganda's existing laws and policies already accord with FPIC and ATI;
2. Uganda's key development partners subscribe to FPIC and ATI, and require their observance in their operational policies;
3. If Uganda is to achieve sustainable development and live up to contemporary standards of environmental and social responsibility, compliance with FPIC and ATI is imperative;
4. Compliance with FPIC and ATI will eliminate important economic and security risks that are posed by large development projects which do not meet the approval or understanding of the project-affected Peoples, and ensure project success at a lesser financial and social cost than would otherwise be incurred;

¹² Also, Article 8A(1) of the Constitution of Uganda, 1995 [as amended by the Constitution (Amendment) Act, 2005] states that, 'Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy.' For a legal perspective of Article 8A above and the National Objectives in general, see Kansiime M. Taremwa and Lisandra Kabagenyi (2019), "Long Walk to Justiciability: Article 8A and Uganda's National Objectives and Directive Principles of State Policy" Volume 15 Issue 2, Makerere *Law Journal*, pp 1-17.

5. Compliance with FPIC and ATI will positively impact the relationship between the Government and its people rather than create animosity and mutual distrust;
6. Compliance with FPIC and ATI will extensively curtail corruption and ensure full value-realisation of the investments made in the development projects concerned because of a heightened level of transparency;
7. Compliance with both FPIC and ATI will boost local content; and
8. Adopting and implementing FPIC and ATI as policy positions will market Uganda as a model destination for environmentally and socially responsible Foreign Direct Investments, and development assistance or partnerships, thereby accelerating her growth and development.

The above reasons are each briefly explained below.

4.1. Uganda's Existing Laws and Policies That Advance Respect for FPIC and ATI

The Concepts of Free, Prior, and Informed Consent (FPIC) and Access to Information (ATI) are not new to the laws and policies of Uganda. They already find articulation and support within them, and so Government is not being called upon to adopt a radically new approach to development.

Uganda's Constitution, 1995 is preceded by a set of National Objectives and Directive Principles of State Policy (NO&DPSP) that are meant to guide the State in 'taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society.'¹³ These Objectives and Directive Principles also have legal force by virtue of Article 8A of the Constitution.¹⁴

Para. 10 of the NO&DPSP emphasises the role of the People in development and obligates the State to "take all necessary steps to involve the people in formulation and implementation of development plans and programmes which affect them."

On that basis therefore, the State is enjoined by this Constitutional policy directive to facilitate the participation and consultation of the People in the implementation of development Projects that affect them. By implication, respect for principles enshrined within the FPIC framework is a Constitutional mandate.

Furthermore, Article 41 of the Constitution of Uganda guarantees the right of all citizens of Uganda to access information in the possession of the State, subject to a very narrow set of exceptions, these

¹³ Para. I(i) of the National Objectives and Directive Principles of State Policy

¹⁴ *Male Mabirizi Kivanuka v. the Attorney General*, Consolidated Constitutional Petitions 49/17, and 3, 5, 10, and 13 of 2018, Constitutional Court of Uganda at Mbale, at p. 649—per Justice Elizabeth Musoke.

being; ‘...information [that] is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person.’ These exceptions are very narrow and will rarely if ever, apply to shield non-disclosure of information about development projects. In addition to Article 41 of the Constitution, the Access to Information Act, 2005 and the Access to Information Regulations, 2011 also provide a legal framework for ATI.

Article 26 of the Constitution also protects the right to own property, and is to the effect that compulsory acquisition of property may only be done in the public interest and subject to additional requirements such as prompt prior payment of adequate compensation to the affected property owners. It is opined that the ‘public interest’ requires observance of FPIC and ATI.

Importantly, rights and freedoms not expressly provided for in the Constitution are nevertheless applicable because of Article 45 of the Constitution. This further shows that important rights like self-determination, which underpin FPIC (and therefore ATI as well) are also legally protected.

Even within existing Government Policies, support for FPIC and ATI is present. In Uganda’s National Land Policy of 2013, Government undertakes to “Adopt an open policy on information to the public and seek consent of communities and local governments” concerning the prospecting and mining of minerals and petroleum.¹⁵

Additionally, Uganda’s draft Mining and Mineral Policy, 2018, which is yet to be adopted, makes mention of the need to ‘promote respect for human rights through free, prior, and informed consent and consultations while accessing surface rights for mineral projects.’ This is listed as a key action toward the objective of protecting and upholding gender, equity and human rights within the mineral industry.¹⁶

Similarly, Uganda’s 2015 Implementation Action Plan for the National Land Policy of 2013, the Government lists as one of the criteria for selecting which National Land Policy Actions to prioritise, whether an action aligns with donor priorities or interests, including Free, Prior, and Informed Consent and transparency.¹⁷

In conclusion, a number of Uganda’s laws and policies make provisions for meaningful consultations and engagements with communities on matters that affect them and thus support the categorical inclusion of the interrelated concepts of FPIC and ATI, and the Government is called upon to cement this position.

15 Strategy 30, p. 15.

16 Mining and Mineral Policy for Uganda, 2018, Objective 7, Strategy 7, key action iii, p. 26.

17 Section 4.1(iii), p. 11.

4.2. *Uganda's key development partners subscribe to FPIC and ATI, and require their observance in their operational policies*

Some of Uganda's key development partners include the United Nations and its specialised agencies, the World Bank, private multinational financial institutions, and private donors and donor agencies. Most of these partners recognize that "Indigenous Peoples (or as they may be referred to in the national context) may be particularly vulnerable to the loss of, alienation from or exploitation of their land and access to natural and cultural resources." Thus, in all their operations, they adhere and require adherence of all their partners to respect for FPIC.

As such, it is essential for Uganda as a key partner to adopt FPIC principles, in order to enhance protection of affected communities in all development projects and ensure strengthened co-operation between Uganda and its partners and other stakeholders.

The World Bank, for example, currently functions in line with a set of policies known as the Environmental and Social Framework (adopted in 2016) and applying to all new World Bank investment project financing as of October 2018. The World Bank notes that, "We know from experience that including environmental and social considerations into project design and implementation improves development outcomes."¹⁸

The Bank further "recognizes the importance of early and continuing engagement and meaningful consultation with stakeholders [and requires] the Borrower to engage with stakeholders, including communities, groups, or individuals affected by proposed projects, and with other interested parties, through information disclosure, consultation, and informed participation in a manner proportionate to the risks to and impacts on affected communities."

Under its Environmental and Social Framework (ESF), the World Bank requires borrowers to abide by set Environmental and Social Standards. One of these Standards, Standard No. 7, applies to "indigenous peoples/Sub-Saharan African historically underserved traditional local communities." According to the Bank, its borrowers must obtain the Free, Prior, and Informed Consent of affected indigenous peoples when the circumstances referred to in Standard No. 7 are present.¹⁹ The ESF standards provide that for the purposes of Standard 7, consent means "the collective support of affected indigenous peoples and communities for the project activities that affect them, reached through a culturally appropriate process".²⁰ This Standard No. 7 comprehensively covers the Bank's understanding of FPIC.

With regard to the United Nations, support for FPIC is discernible from several sources, including the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) which provides that:

1. Indigenous Peoples shall not be forcibly removed from their lands and relocated without

¹⁸ <https://projects.worldbank.org/en/projects-operations/environmental-and-social-policies>, last accessed on 14th December 2019.

¹⁹ World Bank, *Environmental and Social Framework* (2016, p. 10).

²⁰ Ibid. (World Bank, E&S Policy).

- their Free, Prior, and Informed Consent (Article 10);
2. States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their FPIC before adopting and implementing legislative or administrative measures that may affect them; (Article 19) and
 3. Indigenous Peoples have the right to redress for lands, territories and resources that have been confiscated, taken, occupied, used or damaged without their FPIC [Article 28(1)].

The UN's support for FPIC is also discernible from the International Labour Organisation's Convention No. 69 (Indigenous and Tribal Peoples' Convention, 1989), and the writings of UN Committee on the Elimination of Racial Discrimination (General Recommendation No. 23).

Furthermore, even private multinational financial institutions are increasingly adopting FPIC as an operational policy either because they are World Bank partners, or because they believe in its necessity. Over 105 financial institutions in 38 countries around the world, including ABSA Group Limited, Barclays PLC, Ecobank, Standard Bank of South Africa Limited, and Standard Chartered PLC, are members of the 'Equator Principles' Association and therefore subscribe to a risk management framework that provides a minimum standard of due diligence to guide environmentally and socially sound decision making in the provision of project finance advisory services, project finance itself, and loans.

Principle 5 of the Equator Principles provides that, "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 Equator Principles Financial Institution, whether a project has adequately incorporated affected communities' concerns."

Lastly, private donors are also in a unique position to demand adherence to FPIC as a contemporary best practice and valid concern.

Thus, it is in the interest of the Government's and the people's continued benefit from development partnerships for FPIC to be adopted and implemented as State Policy and as a matter of law.

4.3. If Uganda is to achieve sustainable development and live up to contemporary standards of environmental and social responsibility, compliance with FPIC and ATI is imperative

FPIC is fundamental to project sustainability and sustainable development.²¹ This is because it draws attention to the environmental and human factors of development and economic growth. First, FPIC ensures that development projects which will have a significant impact on the environment are redesigned or altered so as to conserve the environment or significantly minimise their impact upon it.

Environmental protection is critical for sustainable development because it facilitates development that meets the present needs without affecting the ability to meet future needs. It is concerned with the measured and careful use of natural resources and ecosystems with a view to preservation for future and continuing needs. FPIC plays a considerable emphasis on the appraisal of the environmental effects of a project, and how these should be positively resolved.

Secondly, because FPIC inculcates the views, suggestions, and conditions of the project-affected peoples, it plays an important role in raising human development standards or at the very least, preventing their retrogression.

Uganda's current laws and policies support the adoption of a sustainable environment and sustainable development agenda. Objective 27 (1) of Uganda's National Objectives and Directive Principles of State Policy enjoins the State to 'promote sustainable development and public awareness of the need to manage land, air and water resources in a balanced and sustainable manner for present and future generations.'

Objective 27(3) also requires the State to 'promote and implement energy policies that will ensure that people's basic needs and those of environmental preservation are met.' Environmental protection also features prominently within Uganda's Constitution (Article 39 and Chapter 15).

Environmental protection and sustainable development are also the main focus of Uganda's National Environment Act, 2019 and its regulations that set up clear frameworks that require environmental impact assessments of all development projects before implementation.

In its most recent and third National Development Plan for Uganda (2020/21 to 2024/25), Government affirms its commitment to attaining the Sustainable Development Goals (2030 Agenda) and to furthering investment in sustainable development projects.²² Sustainable Development is therefore central to Uganda's development policy, and as FPIC is also central to sustainable development, it is advisable that the Government further adopts and inculcates FPIC and FPIC-based ATI in its development activities.

21 See Oxfam, 'Guide to Free Prior and Informed Consent' (2010). www.culturalsurvival.org/sites/default/files/guide-to-freepriorinformedconsent_0.pdf, last accessed on 20th December, 2019.

22 Third National Development Plan (NDP III, 2020/21 to 2024/25), Government of Uganda, January 2020, Paras. 22, 39, 111, 147, 166, 178, 199, 216, 233, 252, 277, 294, 306, etc.

Additionally, Uganda's National Climate Change Policy, 2015 also emphasizes the critical role of sustainable development in combating climate change and its effects. The State's National Oil and Gas Policy, 2008 also extensively inculcates a focus on sustainable development.²³

Additionally, the proposed Social Impact Assessment and Accountability framework by the Ministry of Gender Labour and Social Development is further demonstration that the State is alive to the social impacts of development projects on communities and is already making steps favourable to the adoption of FPIC to strengthen community participation and engagement in all projects that affect them and enhance social protection measures for vulnerable communities.

All in all, the Government should specially adopt a policy of FPIC in order to augment its laws, policies and efforts in favour of people centred sustainable development.

4.4. Respect for FPIC and ATI Key in addressing Economic and Security Risks in Development Projects

Compliance with FPIC and ATI will eliminate important economic and security risks that are posed by large development projects which do not meet the approval or understanding of the Project-Affected Persons (PAPs), and ensure project success at a lesser financial and social cost than would otherwise be incurred.

Uganda is a peaceful country with a commendable level of security. It is in the best interests of maintaining this level of peace and security that the social, economic, political, and security risks of large development projects be effectively and proactively managed by implementing FPIC.

As the experiences of other countries such as Nigeria demonstrate, large development projects that are implemented (imposed) without the meaningful engagements and approval of affected peoples tend to draw their resentment, criticism, and sabotage, and tend to create a real potential for violence, protests, and social upheaval.²⁴

FPIC helps to obtain the people's approval/acquiescence or at the very least, their principled and respectful disapproval but acceptance. This enables the project to be implemented without the social, economic, political, and security risks associated with non-consultation and non-participation of the local populace and makes a tremendous difference in terms of the financial, social, security and time cost of a development project. For this reason, Government should adopt FPIC as State Policy as a strategic position.

²³ See pp. viii, 7, 16, 19, 20, and 37 of Uganda's National Oil and Gas Policy, 2008.

²⁴ Refer, for example, to the anti-oil protests and movements in the West African Niger Delta. Also See Darin Christensen, 'Concession Stands: How Mining Investments Incite Protests in Africa' (2018) Int Organ. www.ncbi.nlm.nih.gov/pmc/articles/PMC6677272/. last accessed on 20th December, 2019. Also See Jędrzej George Frynas, 'Corporate and State Responses to Anti-Oil Protests in the Niger Delta' (2001) 100(398) African Affairs, pp. 27-54. <https://academic.oup.com/afaf/article-abstract/100/398/27/23112>. last accessed on 20th December, 2019.

4.5. Compliance with FPIC and ATI will positively impact the relationship between the Government and its people rather than create animosity and mutual mistrust

Seeking the FPIC of project-affected peoples will extensively and positively enhance the relationship between the Government and its people. Conducting FPIC activities shows the people that:

1. The Government is carrying out vital development projects for the national good;
2. The Government cares about them and how its actions may impact them; and that
3. The Government values their views and opinions and genuinely considers them when making its decisions.

The utility in this is self-evident. With an enhanced public image and a positive relationship with its people, the Government will be able to seamlessly execute many more development projects with a lot less socio-political, economic, and security risks and downsides. In the long run, applying FPIC will therefore confer infinite benefits to the Government and its people and should be adopted as State Policy.

4.6. Compliance with FPIC and ATI will extensively curtail corruption and ensure full value-realisation of the investments made in the development projects concerned, because of a heightened level of transparency

Compliance with FPIC and its integral component, Access to Information, is vital for combating corruption. This is because FPIC ensures transparency, full disclosure, and public scrutiny of a development project. The absence of secrecy reduces the opportunities for corruption and makes it a lot more difficult for backroom dealing to be done.

The Government recently renewed its fight against corruption.²⁵ Adopting FPIC will be an instrumental tool in this renewed fight and should, for that reason, be adopted as State Policy.

²⁵ www.parliament.go.ug/news/3308/museveni-oulanya-renewed-efforts-against-corruption. last accessed on 20th December, 2019.

4.7. Compliance with both FPIC and ATI will boost local content

Adherence to the concept of FPIC boosts local content because it facilitates local participation and consultation. This opens the way for project-affected communities to suggest and come up with ways in which they may benefit from projects as contributors of labour, supplies, or in any other beneficial way. In so doing, affected communities are able to harness opportunities and this boosts the local economy.

Adherence to FPIC in this respect will also complement the Local Content Bill, 2019 that will soon become law if assented to by the President. The Local Content Bill, 2019 seeks to place local content obligations on the exploitation of public resources and on economic activities that require state licensing, in order to prioritise Ugandan citizens and businesses in public procurement, to ensure the transfer of technology and skills to Ugandans, and to implement local content in general.

Hence, it is advised that FPIC and FPIC-based ATI be expressly adopted as State Policy for these reasons.

4.8. Adopting and implementing FPIC and ATI as policy positions will market Uganda as a model destination for environmentally and socially responsible Foreign Direct Investments, and development assistance or partnerships, thereby accelerating her growth and development

Adopting the concept of FPIC will increase Foreign Direct Investment by marketing Uganda as a corruption-free and transparent economy where business may be done conscientiously by considering not just profit margins, but also environmental and human development.

This will especially be true given that most financial institutions and investment groups are increasingly subscribing to the Equator Principles and to general Corporate Social Responsibility models that take engage affected communities as key partners in all development projects.

In the long run, Uganda will be able to attract the right kind of development partners and investors that will be alive to its interests and those of its peoples, in addition and not exclusion to their own.

V. WHO ARE THE INDIGENOUS PEOPLES THAT FPIC APPLIES TO? AND SHOULD FPIC BE UNIFORMLY APPLIED THROUGHOUT UGANDA?

The concept of Free, Prior, and Informed Consent is commonly discussed in the context and for the benefit of 'indigenous peoples'. The UN does not define 'Indigenous Peoples' for fear of unnecessarily narrowing down the scope of communities covered by the numerous protections accorded to them, but the following definition is apt for use:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.²⁶

In determining whether a community is one of indigenous peoples, the following factors may be considered:²⁷

1. Occupation of ancestral lands or part of them;
2. Common ancestry with the original occupants of the land;
3. Shared culture; and a
4. Shared languages among others.

Applying the above definition and factors, it is clear that most communities and societies in Uganda will qualify as indigenous peoples whose FPIC is necessary in the context of development projects.

Moreover, citizenship by birth and therefore primordial membership within the Ugandan State is predicated on membership within an indigenous community that is listed among the 65 indigenous communities currently recognised under Schedule three of the 1995 Ugandan Constitution.²⁸

It therefore follows that the concept of FPIC is extensively applicable to all parts of Uganda—as long as affected communities identify themselves within the confines of the factors noted above.

Additionally, it would be ill-advised and inequitable to accord FPIC to some communities and deny it to others. Government would be embarking on a futile exercise of justifying why some communities are more indigenous or equal than others and this will be a recipe for disunity.

26 Working definition used by Jose R. Martinez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his study on the Problem of Discrimination against Indigenous Peoples.

27 See 'The Concept of Indigenous Peoples' Background paper prepared by the Secretariat of the Permanent Forum on Indigenous Issues for use at the Workshop on Data Collection and Disaggregation for Indigenous Peoples (New York, 19-21 January, 2004, p. 2).

28 See Article 10 of the Constitution of Uganda, 1995 and schedule 3 thereto as well.

Consequently, the Government should adopt FPIC as a policy that applies uniformly and universally throughout Uganda to all communities in Uganda that may be affected by investment and development projects. This part of the policy may be further expounded and delineated in detail within the policy statements and regulations or other laws made for that purpose.

VI. STRUCTURING ACCESS TO INFORMATION UNDER FREE PRIOR AND INFORMED CONSENT

Having previously demonstrated the importance and necessity of adopting FPIC as State Policy, and the importance of 'Access to Information' within FPIC, it is now important to delineate guidelines for how this said access to information under FPIC may be structured and facilitated procedurally. It should be noted that this is a brief outline; a more detailed explanation or delineation is apt for inclusion within an expert report and the final policy documents.

In most cases, at the start of a development project, all pertinent information is often in the possession of the State and its development partners. Project affected communities will have little or no information, or may be insufficiently learned to appreciate the project documents and make the proper inquiries on the effects of the proposed project on their livelihood. As such, it is imperative that the State adopts a policy of 'gratuitous full disclosure' rather than a policy of full disclosure only upon public inquiries/requests for specific information.

In other words, the State should not wait for affected communities to make requests for information from it, using the bureaucratic legal procedures in place under the Access to Information Act, 2005 and Access to Information Regulations, 2011.

Instead, the State should gratuitously and fully disclose such information at each of the following stages:

1. The Originating Stage

Consequently, the Government should adopt FPIC as a policy that applies uniformly and universally throughout Uganda to all communities in Uganda that may be affected by investment and development projects. This part of the policy may be further expounded and delineated in detail within the policy statements and regulations or other laws made for that purpose.

2. The Initial Stage

Under this stage, feasibility studies and tests are conducted, and financing is sought. Furthermore, the initial paperwork and administrative procedures are put in motion.

3. The Final Decision-Making Stage

Here, the Government and its partners must make the decision on whether to substantively embark

on implementation of the project or not, or whether to significantly alter it.

4. The Implementation Stage

Here, the project is executed.

5. The Post-Implementation Stage

This stage covers the period after immediate execution and extends even to the periods in which the development may no longer be in use.

At each of the above stages, Government should make its disclosures in the following manner:

1. By issuing periodic reports to the media, civil society, political representatives, and traditional rulers or community leaders;
2. By liaising with Local Government Councillors to transmit information to the people; and
3. By using mass media such as radio stations to directly communicate with the People.

Furthermore, the Government should ensure that transmission of information accounts for local languages and dialects to ensure that the people are able to fully understand the information shared and that it is able to reach the greatest possible number of members of the project-affected communities.

Additionally, the Government's contact information—especially toll-free lines—should be publicly availed so that any member of the community may directly seek and obtain information concerning the project and how it will affect them. Using the same communication channel, the ordinary members of the community should be able to convey to the Government their own views and suggestions on what should or can be done differently. Other structures should also be put in place to enable reception of feedback from the project-affected communities.

All pertinent information should also be availed over the internet so that there is a permanent and continuously accessible record of it.

In addition to gratuitous full disclosure of all project-related information, the Government should still be subject to the ordinary access to information procedures provided under the Access to Information Act, 2005 and the Access to Information Regulations, 2011 which may then be used to compel disclosure and even clarification of pertinent information either excluded from the gratuitous full disclosure or insufficiently explained within it.

The Government should also work with Civil Society Organisations and both State and private experts to ensure that disclosed technical information is capable of being ably and accurately explained to the affected communities and the people of Uganda in general.

However, it is important to ensure that formal organisations, officers, and community leaders who function as the link between government and the ordinary members of affected communities, do not misrepresent or under-represent the views of the ordinary members of the community and are not compromised by Government and project implementing partners.

In reaching out to members of project-affected communities directly, the Government should further be mindful of and actively promote the consultation and participation of special interest groups such as women, the youth, and persons with disabilities.

Lastly, records of the entire process and all interactions should be well maintained.

Conclusively, it is envisaged that the major structural participants in the ATI process component of FPIC include:

1. The individual members of the project-affected communities;
2. Special interest groups within the project-affected communities (such as women, the youth, and persons with disabilities);
3. Government line ministries, and agencies whose mandate significantly encompasses the subject of the relevant development project;
4. The Government's development partners;
5. Government Information Officers;
6. Local Government Councils;
7. Traditional rulers/leaders;
8. Civil Society Organisations; and
9. Experts, preferably under their professional associations if any.

Streamlined roles for each of these will be necessary to construct an effective administrative mechanism to properly implement the ATI component in FPIC.

VII. POTENTIAL SETBACKS POSED BY FPIC

Adherence to the principle of FPIC may come with some attendant disadvantages, but these are far outweighed by the benefits and can be mitigated.

FIRSTLY, strict adherence to FPIC may scare away some investors and partners that do not believe in its utility. However, by not engaging with these investors, the Government will rid itself of partners who are averse to transparency and social and environmental responsibility and/or do not care for the interests of the peoples of Uganda. It will be able to deal with partners it can trust to be transparent, responsible, and dependable, and can trust that its people's best interests will be protected if it engages with those said partners.

SECONDLY, it may be argued that FPIC will cause delays in project implementation, but this assertion is exaggerated. Adherence to FPIC will in fact save time by reducing the possible objections and negative reactions to project implementation, thereby saving the Government and its partners valuable time, economic, and social costs. Furthermore, the process will be less prone to corruption and this will save the Government and the people considerable monies that can be used to implement even more development projects.

In any case, the potential downsides to compliance with FPIC may be greatly minimised. Putting in place precise and well-designed procedures for the conduct of FPIC processes will, for example, save time and expenses.

Consequently, this Brief maintains its advice to Government to adopt and implement FPIC and FPIC-based ATI as State Policy.

VIII. CONCLUSION AND PROPOSED ROADMAP

In conclusion, it is in the considered and best interests of Uganda and her peoples for the Government of Uganda to adopt and implement the dual and interconnected concepts of Free, Prior, and Informed Consent and Access to Information in the context of development projects.

Adopting and implementing FPIC and ATI will confer the benefits referred to in Section IV above and contribute to the real and accelerated all-round sustainable development of Uganda.

It is herein suggested that, as a roadmap, the Government takes the following steps:

1. Cabinet should pass a resolution establishing FPIC and ATI as a definitive policy position and proceed to both draft an official policy to that effect and to amend its other policies to inculcate it;
2. Government should further adopt a National Action Plan on Business and Human Rights that incorporates the concepts of FPIC and ATI;

3. The Access to Information Act, 2005 and Regulations made thereunder should be amended to include, as a legal requirement, 'gratuitous full disclosure' of project information as advised in section 6.0 above;
4. Government may also commission expert studies on how best to conduct FPIC processes, before making laws to concretise those processes and their implementation. It may also consult its development partners on the best way to proceed; and
5. The implementation process should then be monitored, reported on, and periodically reviewed for improvements.



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Free Prior Informed Consent

The consent is free, given voluntarily and without coercion, intimidation or manipulation. A process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, expectations or timelines that are externally imposed.

The consent is sought sufficiently in advance of any authorization or commencement of activities.

A collective decision made by the right holders and reached through a customary decision-making processes of the communities.

The engagement and type of information that should be provided prior to seeking consent and also as part of the ongoing consent process.