



**Arctic Oil and Gas Research Centre
Ilisimatusarfik, Greenland**

**BRIEFING NOTE #3: 23rd NOVEMBER 2016
FREE, PRIOR AND INFORMED CONSENT**

On Saturday 8th October, Rachael delivered a paper at the [4th Arctic Circle Assembly](#) in Reykjavik on *Free, Prior and Informed Consent in Large-Scale Development Projects in the Arctic*. She used the presentation to explain the history of free, prior and informed consent in international legal instruments and how it is emerging as a principle of customary international law. She showed how consultation and participation – as required by the ILO Convention on Indigenous and Tribal Peoples from 1989 – are no longer enough: developers should now seek free, prior and informed consent from Indigenous Peoples on whose territories they seek to operate or whose resources will be impacted by large-scale development.

Articulated in the UN Declaration the Rights of Indigenous Peoples 2007, the principle of free, prior and informed consent was most recently expressed in the American Declaration on the Rights of Indigenous Peoples 2016. Free, prior and informed consent is required for projects supported by the World Bank by virtue of the International Finance Corporation's Environment and Social Performance Standards 2012. The principle has also found support in a number of United Nations human rights monitoring committees such as the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Racial Discrimination. The regional human rights courts for the Americas and for Africa have likewise held that the free, prior and informed consent of affected Indigenous Peoples is required for certain kinds of activities.

However, the precise parameters of free, prior and informed consent are much debated. In particular, some argue that consent must be *obtained* from Indigenous Peoples before projects can lawfully proceed (i.e. it gives Indigenous Peoples a right to veto activities). Others contest that it is enough that free, prior and informed consent be *sought* in good faith but that projects can go ahead even if indigenous communities object.

During the presentation, Rachael explored the four terms and raised a number of questions that she hopes the Arctic Oil and Gas Research Centre will explore over the coming years.

Free: How is the autonomy of the community ensured? Who represents the community, how and what is the basis of their authority? How do different members of an indigenous community experience the engagement in the consultation process? What if

there are two or more indigenous peoples with historic rights over the area concerned that hold opposing views over the project?

Prior: When in the process must the consent be sought and/or obtained? Is it an ongoing requirement, especially for multi-decade extraction activities? Once given, can consent be retracted, especially if the project deviates from the original plan? If consent is refused, can the community later change its mind and approve a project?

Informed: What does it mean to be 'informed'? How can scientific and technical data be expressed in ordinary language? Are there requirements for translation into indigenous languages? How can developers and State bodies also be informed of all relevant information, for example, in respect of indigenous knowledge regarding wildlife or the spiritual significance of potentially affected areas? In short, how can the various epistemologies at play be translated in a mutually comprehensible manner?

Consent: How is the consent of the community measured? Is there a popular vote and if so, how is the relevant electorate selected and what threshold of approval is required? Is a representative institution given authority to decide and why is that institution preferred?

Slides from the presentation are available on the Arctic Oil and Gas Research Centre website in the "News" section.