# The Practice of FPIC:

## Insights from the FPIC Solutions Dialogue

Photo Credit: Ian Mancharia

Developed by

RESOLVE

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# About this Guide

Photo credit: Tom Fisk

Major projects, whether they be in mining, energy or agriculture, have major social and economic impacts. They typically involve limiting access to land and other natural resources. Impacts to the landscape are often significant in the project's lifetime and sometimes permanent.

It is important that companies and communities share information and enter into dialogue to ensure that communities know in advance about how they could be affected, that their concerns can be included in project planning by companies, and that opportunities created for social and economic development align with community aspirations. Communities and companies should agree on how to manage social and environmental impacts, the compensation that should be provided to communities for negative impacts, and how the project can provide benefits to the community.

For Indigenous communities, Free, Prior, and Informed Consent is the process that brings this together and results in a decision by the community to give or withhold its consent for the project.

Major projects are complicated. They go through multiple phases, often with staffing changes, and communities change too. The purpose of this guide is to help communities and companies arrive at a shared roadmap for FPIC decisions about whether to agree to a project and – if so – whether to agree to project changes later. The guide seeks to provide a common structure that can be useful from the perspective of both communities and companies, and help them to organize dialogue in a way that can be practically beneficial throughout the site exploration, development, operations, expansion, and closure processes.

The guide was developed by RESOLVE to capture insights from an ongoing initiative, established in 2012, bringing civil society, Indigenous representatives, and business together to look at practical ways communities and companies can work together during FPIC processes. The FPIC Solutions Dialogue is a collaboration between NGOs, community representatives, and companies with FPIC commitments working together to develop practical guidance to support rights-based decision-making. Through the years, members have shared experiences, challenges, and advice with one another, resulting in several shared insights that have supported members in their own implementation of FPIC principles.

This guide is offered in a humble spirit. We acknowledge that our own understanding of the nuances of FPIC implementation is incomplete and continues to evolve. We also acknowledge that there are a number of important topics that are missing... We expect to maintain, update, and add to this guide as we continue to learn and grow through shared experiences and ongoing dialogue.

This guide is an effort to share those collective insights more broadly. We observe that even when companies are engaging in good faith, disagreements and communication breakdowns can occur. This could stem from a lack of shared understanding and/or a lack of effective communication about the needs, capacities, knowledge, and expectations of all involved. This guide seeks to help companies and communities recognize where such gaps may be present, and offer insights, prompts, and resources to inform a constructive FPIC process suited to the unique needs of the rights-holders and stakeholders involved.

The Guide is organized by decision making milestones to help users recognize the key FPIC considerations associated with each stage in a project lifecycle. Within each milestone, a "for communities" section outlines key considerations, perspectives, and approaches that may be helpful to communities. The "for companies" section highlights similar guidance for companies. We note that these milestones reflect the typical development cycle of extractive projects; while the principles of FPIC remain the same regardless of sector, the specific stages and types of relevant information may be different for other kinds of projects.

Many issues and principles – including agreement-making, gender and inclusivity considerations, and more – also cut across these stages. These issues are included throughout the guide and can also be accessed in aggregate in the "Resources" section.

This guide is offered in a humble spirit. We acknowledge that our own understanding of the nuances of FPIC implementation is incomplete and continues to evolve. We also acknowledge that there are a number of important topics that are missing – particularly the role of government, but also grievance mechanisms, baseline studies and impact assessments, FPIC in ownership transfers and care and maintenance, and many more. We expect to maintain, update, and add to this guide as we continue to learn and grow through shared experiences and ongoing dialogue.

# Acknowledgments

RESOLVE wishes to thank Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), whose funding support enabled the development of this guide.

We thank the many members of the FPIC Solutions Dialogue for their candor in sharing challenges and lessons in FPIC implementation since we first gathered in 2012. This guide would not exist without you. Our discussions, the insights they have generated, and the mutually respectful environment we have cultivated together are the inspiration for this guide, which we hope can also be of service to your communities and colleagues.

We are especially grateful to our peer reviewers: Cindy M. Charleyboy, Gam Shimray, Ikal Ang'elei, Joel Hamago, Josée Artist, Dr. Kanyinke Sena, Miguel Cervantes Rodriguez, Nuskmata (Jacinda Mack), and Vincent Ekka. While we acknowledge that this guide remains incomplete and imperfect, your recommendations have meaningfully improved it and have informed a number of additions that we will strive to integrate in the years to come.

# FPIC Fundamentals

Photo courtesy of Newmont Corporation

Photo courtesy of Laura Eshbach, Landesa

Photo courtesy of Asia Indigenous Peoples Pact

# Policy Context

Free, prior, and informed consent (FPIC) is a right of Indigenous peoples, recognized under international law, which derives from the right of self-determination; the right to freely pursue economic, social, and cultural development; and individual human rights. Its status as a right has been affirmed by various human rights bodies and relevant jurisprudence.

The United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) was adopted by the UN's General Assembly in 2007. UNDRIP explicitly mentions the right of FPIC in the following circumstances:

- before relocation (Article 10)
- prior to the use of Indigenous peoples' cultural, intellectual, religious, and spiritual property (Article 11)
- prior to implementation of legislative or administrative measures that could affect Indigenous peoples (Article 19)
- prior to use of lands (Article 28)
- prior to storage or disposal of hazardous materials on Indigenous peoples' lands (Article 29)
- prior to state approval of "any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources" (Article 32)

As a resolution of the General Assembly, UNDRIP is an international political statement. It carries moral force and has become a policy framework in several countries. National laws are required in individual countries to give it legal force in jurisdictions which have adopted it. However, many countries do not recognize Indigenous Peoples (or only recognize some) and so circumvent FPIC in this manner.

In 1989, **the International Labour Organization (ILO)** adopted the Indigenous and Tribal Peoples Convention (also known as **Convention 169**), which acknowledges the right of Indigenous peoples to be *consulted* when they would be impacted by development projects and "whenever consideration is being given to legislative or administrative measures which may affect them directly" (Article 6, paragraph 1a.) ILO 169 requires that these consultations have to be carried out in good faith and that the "objective of these consultations should be agreement or consent" (Article 6, paragraph 2). Article 16 specifically requires "consent" prior to relocation. ILO 169 has treaty status and legally binding document for the 23 countries that have ratified it.

**Other Policies and Definitions**

Several other voluntary mechanisms exist which require companies to consult and seek consent when projects affect the rights of Indigenous peoples, such as:

- Investor requirements, as in the case of the International Finance Corporation's (IFC) Performance Standard 7, the Equator Principles, or the Green Climate Fund.
- Industry associations, such as the International Council on Mining and Minerals' (ICMM) position statement on Indigenous peoples and mining and associated assurance requirements.
- Voluntary corporate policies
- Participation in voluntary certification schemes, such as Initiative for Responsible Mining Assurance (IRMA)

It is important to note that while several companies have made public commitments to FPIC, either in their policies or on their websites, they may not have clear internal guidance on how to implement FPIC. This Guide seeks to strengthen such implementation.

# Why Governments and Companies Should Respect FPIC

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), specifies that Indigenous peoples have the right to free, prior, and informed consent with regard to their lands, culture, and resources. This right is asserted in the context of self-determination and recognition that Indigenous peoples have suffered from historic injustices. The following preambular text of UNDRIP sets out the context for these rights:

"Concerned that Indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests…

"Recognizing the urgent need to respect and promote the inherent rights of Indigenous peoples which derive from their political, economic, and social structures, and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories, and resources…

"Convinced that control by Indigenous peoples over developments affecting them and their lands, territories, and resources will enable them to maintain and strengthen their institutions, cultures, and traditions, and to promote their development in accordance with their aspirations and needs…"

In addition to the moral obligation to honor human rights, engaging in and honoring the outcomes of FPIC processes is also a means of minimizing and transforming the conflict and violence that has historically been imposed by governments and industries on Indigenous peoples.

**FPIC is the foundation for democratic fair-dealing between communities and companies.**

*— Vincent Ekka, Kurux (Oraon) peoples of India; Head of the Department of Tribal Studies, Indian Social Institute, New Delhi, India*

Disregarding community wishes is also bad business. Research by the Corporate Social Responsibility Initiative at Harvard Kennedy School and the Centre for Social Responsibility in Mining at the Sustainable Minerals Institute at The University of Queensland in Australia found that delays due to protests can be costly: around $10,000 USD per day in early exploration, around $50,000 USD per day in advanced exploration, and up to $20M USD per week of shutdowns during operations. In addition to the financial cost of interrupted operations, there is reputational cost, which can radiate outward to inhibit other partnerships and developments. Investors are increasingly conscious of the material risk associated with failure to respect human rights or manage conflict at sites.

# The Spirit of FPIC

FPIC means that community decisions about prospective development are:

- **FREE** from coercion and manipulation by third parties such as governments, companies, political parties, and NGOs. Also free from manipulation by "elites" within the community; inclusive, accessible processes are critical.
- Made **PRIOR** to the commencement of the activities being decided upon. Communities must also be given the time they need to fully understand and consider options, and to reach a decision.
- **INFORMED**, with communities receiving all the information they need in a manner that is trusted, accessible, and culturally appropriate.
- Premised on the community's ability to give – or withhold – **CONSENT**

This guide frequently refers to "the Spirit of FPIC." By this, we are referring to the following:

- **FPIC is not a "tick box" exercise.** FPIC comprises and is a safeguard for a number of human rights – including the right to self-determination; free pursuit of economic, social, and cultural development; and meaningful participation. Operating in "the spirit of FPIC" means recognizing and supporting the expression of these rights.
- **FPIC means consent.** For communities, the essential value and power of FPIC is not just in consultation, but it is in the ability to give *or withhold* consent. Indigenous communities must have the ability to say 'no' (or 'yes', or 'yes with conditions'). This is true at all stages of a project.
- **FPIC is not a one-time decision.** Formal consent must be secured at several stages throughout the life of a project. In between these milestones, operating in the "spirit of FPIC" means maintaining that consent by engaging proactively and respectfully, in accordance with agreed protocols or processes, so communities are informed, their knowledge and preferences are incorporated into ongoing operations, and so any conflicts or grievances which arise are meaningfully addressed. Projects and communities change over time; agreements may also need to change.
- **It is never too late to incorporate FPIC *principles*.** Planning at the front-end of project development creates the best conditions for good relationships and to enable true consent for a project. However, this is not always feasible – such as when sites are acquired mid-development. In these instances, FPIC implementation can be triggered when changes or expansions to the site are proposed. Relationships can be established, improved, and reinforced; new agreements can be made. Although developing good agreements from the outset is strongly preferred, all is not lost in cases where failing agreements have been inherited, or where the company-community relationship has stagnated. An honest and open assessment of the status quo can be an essential first step in re-setting the tone of a relationship, and can create an opportunity to establish new common goals and monitoring mechanisms.

**FPIC means consent.** For communities, the essential value and power of FPIC is not just in consultation, but it is in the ability to give or withhold consent. Indigenous communities must have the ability to say 'no' (or 'yes', or 'yes with conditions'). This is true at all stages of a project.

# Decision Making Milestones

## PRE-FEASIBILITY

Government/company seeks community consent to access land/take samples.

- Community is provided with the relevant information, including information about their rights.
- In some cases, the community may require supplemental capacity building or expertise to support analysis of the information.
- The community has time to affirm that the information and analysis is trustworthy.
- The community has the time they need to reach a decision about whether to consent to the request, in accordance with the community's customary laws or decision making processes.

⟶ ***IF CONSENT IS GIVEN...***

...company seeks governmental permit for minerals exploration.

## PRE-PERMITTING

Government/company seeks community consent to develop a concession under agreed conditions for impact mitigation, compensation, and shared benefit.

- Community is provided with the relevant information.
- Supplemental capacity building/expertise provided as needed.
- Community has time to assess trustworthiness of information.
- Community has the time they need to reach a decision about whether to consent to the request.

⟶ ***IF CONSENT IS GIVEN...***

...company seeks governmental approval of environmental and social impact assessment; seeks governmental permits for construction and mineral rights.

## CONSTRUCTION AND OPERATIONS

Prior agreements are implemented, monitored, and enforced. Company and government continues to keep community informed, respond to inquiries and grievances, and seek community input on any decisions which could impact the community.

## BEFORE MAJOR CHANGE

Government/company seeks community consent for expansion, changing infrastructure, changing tailings management, under agreement conditions.

- Community is provided with the relevant information.
- Supplemental capacity building/expertise provided as needed.
- Community has time to assess trustworthiness of information.
- Community has the time they need to reach a decision about whether to consent to the request.

⟶ ***IF CONSENT IS GIVEN...***

...company seeks governmental approval of environmental and social impact assessment; seeks governmental permits for construction and mineral rights.

## CLOSURE

Government/company seeks community consent on plan for closure, including environmental reclamation, ongoing maintenance, transfer of infrastructure, etc.

- Community is provided with the relevant information.
- Supplemental capacity building/expertise provided as needed.
- Community has time to assess trustworthiness of information.
- Community has the time they need to reach a decision about whether to consent to the request.

⟶ ***IF CONSENT IS GIVEN...***

...company seeks necessary governmental approvals associated with closure plan, including plans for environmental reclamation, long-term tailings management, etc.

Company, community, and government communicate and consult on updates, problems, or new risks, in accordance with closure plan framework.

We note that these milestones reflect the typical development cycle of extractive projects; while the principles of FPIC remain the same regardless of sector, the specific stages may be different for other kinds of projects.

# Pre-Feasibility

Photo courtesy of Newmont Corporation

When a company explores a prospective area, it needs to collect geological, environmental and social information to see if there is a business case for investment in a project. (Sometimes a government will map the resources before looking for an investor.) This is probably the first time that the community comes into direct contact with company staff, and is a critical time to build the relationship. Companies committed to FPIC will reach out to potentially affected communities and seek to understand how they make decisions. Once these processes are understood, the company may seek permission to visit the land and take samples. Sometimes a company may also seek community permission for larger exploration activity, such as building a camp for geologists conducting research, or the introduction of a drilling rig to aid in gathering samples.

# Key Issues

The significant uncertainty in the pre-feasibility phase can challenge everyone.

- Identification of Indigenous peoples in the region is not always straightforward. In some cases, governments do not acknowledge all – or any – Indigenous peoples. In other cases, and for a variety of reasons (country never colonized, stigmas), a community may not vocally self-identify as Indigenous. These circumstances do not negate their right to FPIC.
- Communities may face a larger-than-normal number of decisions and may request support from the company to finance independent legal, anthropological, or other expert advice. Sometimes the most important resource is time that would be spent in other activities, and companies may be able to assist by e.g., providing childcare or food so that community members are not excluded or burdened by participating in discussions and decision making.
- Communities may have pre-existing perceptions or concerns due to historical extractive activities in the region. They may also have questions about how industrial projects are developed and what implications there may be for the community, their natural resources, and way of life.
- Companies may not have a lot of answers as they are trying in this phase to understand whether a resource project is feasible from a geological, environmental and social standpoint. They are also learning the local context about local communities' history, culture, and decision making processes.
- Companies who exaggerate the benefits, minimize risks, or convey false certainty may lose the confidence of communities if the project falls short on benefits, if unexpected impacts arise, and if risks are not managed.
- Companies acting in the "spirit of FPIC" can offer transparency about what the company does and doesn't know and honor agreements to share information as it becomes available, in a way that is easy for the community (who may not have extensive technical knowledge of the sector) to understand. Even with uncertainty, it is important to discuss the big picture of how a project might expand or evolve over its lifetime, what possible impacts on the community and

> Companies should be frank about what is and isn't known about prospective projects. Raising expectations by speculating about potential outcomes of exploration and likely benefits to a community will undermine the community's ability to trust corporate promises. At the same time, a sense of secrecy can signal disrespect and dishonesty.

infrastructure might emerge, how such impacts are assessed and addressed, and what closure, decommissioning, and rehabilitation processes entail.

- World view is another key issue for compatibility. Indigenous communities are complex, based on their own individual world views, values of ecosystem sustainability, social and cultural complexity, health, and intergenerational equity. These values are the basis for Indigenous economies and may be in fundamental opposition to a project. Understanding this early on can save a company significant investment into a non-viable project.

# For Communities

In the pre-feasibility phase, communities can inform companies of community rights (e.g., hunting rights, existing treaties, etc.), connection and/or collective title to the land, and their traditions or expectations for decision-making. In return, communities can request and expect clear, accessible information from the company, in a culturally appropriate format; the community should also indicate how much time they need to process this information. Critical points to be addressed include understanding the project development processes, as well as what is known, what is still uncertain, what information will be available (and when), and what decisions will be needed from the community (and when). Often this early exploration is conducted by a small company who may plan to sell an asset to a larger operator for development, and communities should ask for clarity about the company's intended role in a potential development.

Communities and companies may need to work together to find the best formats, forums, and processes for sharing new information, providing sufficient time and support for community members to learn and consult internally, ask questions about new information, and to reach any conclusions or decisions needed. For instance, the community may appreciate having company representatives available for regular "office hours" to answer questions, or may request updates (written or verbal) to be shared at community council events, etc.

Photo credit: Debbie Espinosa, courtesy of Landesa

Communities will also want to understand the character and track record of the company – its policies and commitments and how it has upheld them for communities and environments at other sites.

At the same time, it may be helpful for communities to keep in mind that this is a mutual introduction period. Communities can inform companies about local culture and customs, including areas with spiritual value. Communities may find particular value in articulating "community protocols" – community-determined procedures, values, and priorities as a means of instructing companies and others about how decisions are approached and reached by the community.

In this stage, communities can define their tangible and intangible assets (for instance, important eco regions, sacred places, documenting or aggregating historical narratives) and identify initial community priorities. Priorities could include economic or social development objectives, areas for critical protection, or even restoration of cultural heritage (e.g., native language training). Although the feasibility of the project is not yet confirmed, this information can be helpful even if the project does not move forward.

Sometimes communities require assistance to pull this information together and to build their own capacity to process it. Companies may be able to offer resources so that communities can strengthen their community structures, understand companies' structures and processes, and understand project cycles; or to hire independent legal, anthropological, ecological, or other experts to support research and decision making.

It is important for communities to understand that it is quite common for this phase to result in a corporate decision that development is not feasible, so expectations should be realistic about this phase.

# For Companies

In this phase, companies who are committed to FPIC (or who hope to sell a development to a company with an FPIC commitment) should recognize that in addition to beginning to understand the geological feasibility and potential environmental, social, and cultural impacts of the prospective project, they must also seek to understand the local context and begin to secure community confidence by establishing an initial, positive relationship – and ensuring that any agreements are honored in case of sale of the project. Working with anthropologists and others specialists is frequently helpful to identify the peoples who need to be engaged.

**FPIC is a critical and necessary step toward protecting Indigenous peoples' human rights and the ecosystems they are from. FPIC is a starting point in establishing a healthier way of conducting business and relating with diverse Indigenous communities.**

*— Nuskmata (Jacinda Mack), Nuxalk and Secwepemc Indigenous Peoples of North America*

Relevant context includes local history, land rights, current and historic land use and ownership, average income and common sources of income, decision-making processes, vulnerable groups and power dynamics. Community perceptions of the industry – including historic extractive activities – should be understood.

Of first order priority is understanding which community or communities may be impacted by a prospective development, and where the rights of Indigenous peoples are involved. Sometimes this is complex, and it may not be immediately apparent which communities may be affected by a prospective project. Governments may not formally recognize Indigenous communities as such, nor the extent of their right to traditional lands. Past conflicts may have displaced community members who are not currently present but who have traditional ties and rights to areas under consideration for development. Some communities may use an area as extended hunting territory or on a seasonal basis. Where there is a lack of documentation, or conflicting claims, historical narrative studies that collaborate with communities to design and conduct the research can clarify rights-holder and stakeholder identities and to provide valuable insight into local customs and values (including environmental and cultural priorities for conservation). Other social and demographic data of the community (e.g., population, households, birth rate) should be gathered and documented.

As rights-holders and stakeholders are identified, companies can initiate engagement to share information and seek permission for temporary land access. An accurate understanding of community decision-making processes is important to ensure the legitimacy of decisions. Additionally, companies should explore culturally appropriate opportunities for inclusive engagement and information sharing. Discussing how community access to/use of lands and other resources (e.g., hunting, farming) may change during exploration and operations is essential.

Companies should be frank about what is and isn't known about the prospective projects. Raising expectations by speculating about potential outcomes of exploration and likely benefits to a community will undermine the community's ability to trust corporate promises. At the same time, a sense of secrecy can signal disrespect and dishonesty. Honest communication at regular intervals to provide updates about what is being learned, what is still in question, and timelines for gathering and sharing additional information can help to establish a baseline of confidence and lay the groundwork for two-way communication. At the same time, these moments can offer companies an opportunity to get to know the community, asking questions to clarify customs or to understand community priorities and values relative to potential development (e.g., no-go zones, or opportunities to add value in later benefit-sharing agreements).

Although formal agreements relating to impacts and benefits comes in later stages when these are more fully known, companies can begin to negotiate and implement shorter term agreements corresponding to the exploration stage. Successful negotiations and full implementation of these agreements can build the confidence necessary to underpin the relationship in future, more intensive stages of development and operations.

# Pre-Permitting

Photo Courtesy of Newmont Corporation

In the pre-permitting phase, the company will prepare a comprehensive design of the project and then submit the design information to governmental authorities for their approval. Companies who are committed to securing FPIC must consult with and secure consent from affected communities about the design, expected impacts, and mitigation/compensation plans *before* submitting a project design for governmental approval. At this stage, the company has geological confirmation of an asset of interest for development and starts designing the facilities needed to extract the resource. Project design includes planning for efficient extraction and use of power/water resources, while minimizing negative impacts associated with construction and operations of the site, as well as any associated infrastructure such as roads.

Identifying areas of environmental, cultural, or social importance to the community is an essential part of project design. Once a design has been developed, the company should conduct a comprehensive and formal environmental, social (including cultural), and health impact assessment ("ESHIA" – this is a legal requirement for permitting in many countries and a critical good practice). Communities may consider contributing to or seeking/securing resources to conduct their own impact assessments. Communication between the company and community about anticipated impacts and potential mitigation measures is necessary to ensure a common understanding of the project plan and impacts. Where negative impacts cannot be avoided, discussion about mitigation and compensation is appropriate. Other discussion points may include benefit sharing, as well as ongoing processes for information sharing and decision-making throughout operations. These discussions may be iterative as the governmental permitting process ensues, to reflect any revisions to the final project design.

Companies who are committed to securing FPIC must consult with and secure consent from affected communities about the design, expected impacts, and mitigation/compensation plans before submitting a project design for governmental approval.

# Key Issues

Now that the company has decided that it would like to go ahead, more detailed information is available as a basis for discussions between a company and any communities that may be affected. Key issues include:

- Early project design ideas, for consultation and input with communities to advise on areas of environmental, social, or cultural importance. Resources should be allocated to build community capacity to consider these ideas, where needed.
- How the formal Environmental, Social, and Health Impact Assessment (ESHIA) will be conducted, including how the community may contribute, engage, or be consulted
- The anticipated permitting process, including updates as it progresses
- As the ESHIA is conducted, what impacts are likely, what mitigation measures could be possible, and what are community preferences or priorities in mitigation?
- If impacts cannot be mitigated, is the community still willing to consider the project? What compensation is appropriate for these impacts?
- What shared benefits (potentially contingent on the mineral/oil price) should be included in a formal consent agreement?
- How will agreements be managed?

- How will compensation and benefits be financed and delivered? Monitoring and governance are important to factor in.
- What are the ongoing points of information sharing and decision-making, and how will that take place? How will the company report on new discoveries and initiate further consent processes related to prospective changes to project plans?
- Discussion about grievance mechanisms, how they can be accessed; and whether any adjustments are needed to ensure equitable and inclusive access.
- How will potential changes to the project – e.g., expansion, new/joint operating partners, or early closure – be consulted and decided upon? How might these changes affect existing agreements for compensation or benefit sharing?

Governments that do not recognize Indigenous land rights or who do not require FPIC might award a permit without the consent of a community. Where there is no national recognition of Indigenous rights, international law and internationally recognized Indigenous rights should be the guiding principles. A company committed to FPIC will still seek formal consent from affected Indigenous communities prior to commencing construction or operations.

Governments that do not recognize Indigenous land rights or who do not require FPIC might award a permit without the consent of a community. Where there is no national recognition of Indigenous rights, international law and internationally recognized Indigenous rights should be the guiding principles. A company committed to FPIC will still seek formal consent from affected Indigenous communities prior to commencing construction or operations.

# For Communities

In the pre-permitting phase, communities need to *receive* key information from the company in order to be able to *provide* information about community values and priorities and to inform project design. This information exchange is critical to building trust between company and community and to inform the community's decision-making about whether to give consent for the project to move forward.

At this stage, the company has confirmed that there is an asset likely worthy of development and is beginning to consider potential project designs (e.g., where to locate a mill, water access points, etc.). Most governments will require an environmental, social, and health impact assessment (ESHIA) in which the company describes any anticipated impacts and how they will be mitigated or compensated. Communities should have significant input into these assessments and should participate in these decisions, *before* an ESHIA is submitted for government approval.

It is worth noting that company staff are often under pressure from investors or corporate headquarters to secure a permit quickly. However, conflict at sites that do not have community support can be very costly, and communities have the right to insist on careful, informed deliberation at this stage to ensure the development of a fair and durable agreement within a positive relationship.

Communities need to know:

- What is known about the asset (deposit) and any key design considerations (to help the community target feedback about critical lands, cultural sites, or other resources to preserve)?
- When will more be known, and how will the company share that information?
- As design options are explored, what might be the potential impacts (positive and negative) and what are the tradeoffs across options? What are the options for mitigating potential impacts? For impacts that can't be mitigated, what kind of compensation will be provided and when?
- What are the company's legal consultation and permitting requirements and what will that process entail (including timeline for information gathering, submissions, etc.)?

It may be helpful for the community and company to agree on key elements of engagement on these questions, including:

- What issues or processes does the community want to be informed about and/or weigh in on?
- How will the company ensure that specialized, technical information is provided in an accessible and digestible manner (e.g., in relevant languages, easy-to-access format, and/or for community members who may not have legal or engineering backgrounds)? Is external expertise needed? How are experts or consultants to be selected, and paid for?
- Are there existing forums or mechanisms – or would it be helpful to establish new forums/mechanisms – where information can regularly be exchanged?
- Once information is received from the company, what processes need to take place within the community to support inclusive deliberation and decision making? Are there others who need to be consulted?
- How can the company help to facilitate community decision-making in a way that helps to eliminate barriers (e.g., by providing logistical or resource support such as transportation, childcare, etc.) while providing sufficient time and space for community deliberations?

In addition to having a clear process and protocol for sharing information, it is important to build in time to digest information in order to identify important questions, seek advice where needed, and support eventual decision-making.

Additionally, internal (within the community) information sharing is important during this phase to fully determine how all parts of the community will be impacted by any decisions, and to ensure that those most affected by any impacts are satisfied with mitigation or compensation measures.

At the conclusion of this phase, the community will be asked for its consent on a final agreement or set of agreements that permit the project to move forward under certain conditions (impact mitigation, compensation, and benefit sharing). Please also see Agreements.

In addition to having a clear process and protocol for sharing information, it is important to build in time to digest information in order to identify important questions, seek advice where needed, and support eventual decision-making.

# For Companies

Company staff are often under pressure to expedite the permitting process, but if speed comes at the cost of community FPIC, the project could face resistance, costly protests, time/resource-intensive grievances, and both local and global reputational damage.

Companies have their own check-lists for all the engineering tasks and governmental approval processes that take place in this phase, and yet they often fail to include timely community engagement in these plans. While being candid about levels of certainty, it is also important to give communities the necessary time and opportunity to engage and weigh in on some of the most basic elements of operational design. Early and inclusive consultation about core site components can help inform a design that avoids significant social, cultural, or environmental impacts.

In addition to being a key procedural requirement, a good Environmental, Social, and Health Impact Assessment is critical for securing and maintaining FPIC. Among other things, this should include

- Sex-disaggregated baseline data and gender impact analysis
- Assessment of possible human rights impacts
- Vulnerable persons or groups
- Assessment of possible social impacts associated with the likely influx of people and resources and activities in communities, including violence and conflict at home as traditional roles of women and men shift in response to economic opportunities
- Assessment of potential impacts to culture and cultural heritage

It is important to note that communities' baseline knowledge around highly technical processes and tools common to industry, such as ESHIA, is often limited. In addition to ensuring that there is ample time for communities to build their understanding of these types of tools, financial and logistical resources may be needed to support communities in accessing anthropological, ecological, and legal advice, as well as other types of technical support.

One often overlooked but critical part of capacity building may simply be helping communities to know their rights and how to exercise them, understand how to utilize grievance mechanisms, and become familiar with other access to remedy – such as governmental mechanisms. Companies may be reluctant to lead in such capacity building, as this is outside of core expertise; third parties can be hired to facilitate these trainings.

One often overlooked but critical part of capacity building may simply be helping communities to know their rights and how to exercise them, understand how to utilize grievance mechanisms, and become familiar with other access to remedy – such as governmental mechanisms.

Companies should also be aware of their own knowledge gaps and should take the time needed to understand community culture, worldview, traditions, decision making processes, and more.

In this phase, ways that companies can build a relationship of mutual confidence are:

- Regular and predictable information sharing, including information about uncertainties/possibilities (and confidence levels) and processes which may not involve the community

- Make space in their own processes to involve communities (e.g., through Indigenous-led impact assessments)
- Discuss and agree with communities as to the best formats/forums for sharing and receiving information, as well as for dialogue/Q&A, and formal decision-making
- Inquire as to how the company can constructively facilitate – without applying pressure -the community in deliberations and decisions (e.g., providing transportation to meetings, offsetting lost hours by providing meals, ensuring women can participate by providing childcare, etc.)
- Share timelines for when more will be known and commit to sharing updates
- Agree on how and when that information can be shared, how and when the community can be involved in discussion and input, and how a final decision will be made.
- Help to troubleshoot challenges (e.g., if a community needs expert advice in order to understand information or reach a decision, potentially making resources available for them to hire an expert)

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**Getting clear through the principles of FPIC – Free, Prior and Informed Consent – has helped many Indigenous communities get deeper into conversation, awareness, and decision making around development within their Territories and is essential in understanding the possible impacts and benefits of development. It is a step in the right direction in understanding and honoring the Rights of Indigenous Peoples and a movement toward certainty.**

*— Cindy M. Charleyboy, Tsilhqot'in and Secwepemc peoples of North America; Project Coordinator, First Nations Women Advocating Responsible Mining*

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# Construction & Operations

Photo courtesy of BHP

*Construction* begins following community consent for the project and the award of construction and operations permits from the government. *Operations* may take some time to come online as construction and hiring processes progress, before reaching a "new normal." As the planned project becomes reality, so should agreements relating to impact mitigation and compensation, shared benefits and community development, and ongoing decision-making and communication. Relationships and trust can solidify or erode throughout the life of the project depending on how commitments are honored, impacts are managed, and open communication is nurtured.

# Key Issues

Trust and respect between companies and communities can be tested or strengthened as the planned project turns into reality in the development and operations phase. If all involved honor their commitments and maintain open and responsive communications and engagement, this can be a period of mutual benefit and collaboration. However, if the relationship is neglected or if commitments go unmet, challenges and grievances can begin to fester and introduce conflict into the relationship.

Construction brings a flurry of activity and changes. An influx of people, vehicles, and machinery can be accompanied by increased levels of noise and dust, as well as new demands on housing, markets, and other local systems and infrastructures. Most impacts should have been identified – along with mitigation measures – in the environmental and social impact process of the pre-permitting phase, but concerns or tension may arise if reality differs from set expectations, or if impacts arise which were not anticipated. Unmet or delayed commitments can lead to dissatisfaction and distrust.

Site "lifespans" vary significantly, from a few years to several decades. As the site develops and reaches a rhythm of ongoing operations, the agreed systems and protocols for ongoing engagement, communication, and joint decision-making (e.g., monthly meetings, grievance mechanisms, community development plans) may need to be periodically revisited and adjusted to ensure they suit the evolving needs and realities of all involved.

Project ownership and company staffing often changes in the transitions between exploration, construction, and long-term operations. When this happens, efforts may be needed to effectively transfer agreements, commitments, and communication practices. A failure to transfer commitments creates risk of tension and distrust.

The agreements established in the pre-permitting phase should serve as a roadmap for communication and engagement during the development and operations phase. In this stage, communities and companies should be:

- Engaging through a range of methods: regular visits by Community Relations officers; use of a grievance mechanism to collect, resolve, and communicate about challenges or concerns; any established

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recurring meetings; joint committees to oversee or advise on governance of Community Development funds and projects; etc.

- Monitoring and communicating about impacts and their management: how impacts are being monitored and mitigated; any new data or information about cumulative or unanticipated impacts and mitigation options;
- Sharing updates on implementation of commitments: what shared benefits (e.g., revenue shares) established in the agreement have accrued; are any ongoing compensation commitments being met? Are there new opportunities (e.g., new job openings, local procurement opportunities) or ideas to be jointly developed?
- Discussing updates on any new developments related to the project feasibility or potential lifespan: is there any new information about geology or operations, and what are potential implications; how further information will be communicated and considered.
- Periodically assessing the functionality of the relationship: are the processes, protocols, frequency, or triggers for ongoing information sharing and decision making working? Are additional or different roles or functions needed?

# For Communities

In the construction and operations phase, communities' needs partially revolve around their continued ability to engage with and trust the company. This ability is largely contingent on whether the community feels that expectations about impacts flagged during pre-permitting were accurate; whether promised compensation and shared benefit are being delivered; and whether ongoing communication is sufficiently addressing information needs and supporting resolution of any concerns.

If detailed agreements from the pre-permitting phase exist, these can be a useful tool for monitoring how commitments are being met, and for holding companies or governments accountable when they are not delivering as promised. If such documentation does not exist, communities should request that it be developed. Some companies also keep public "Commitment Registers" to document additional commitments relating to issues arising after formal agreements have been signed; communities can encourage this practice. In some jurisdictions, agreements made with the company in the pre-permitting phase are subsumed into larger agreements under legislative arrangements between the state, community, and company. The community and company should request that the more formal agreements make allowance to retain the intent of the pre-permitting agreements.

In addition to meeting commitments, ongoing engagement and communications is also critical for maintaining trust and "the spirit of FPIC" in the operations phase. Ideally, formal agreements will already have identified several mechanisms and forums for communities to request and receive information and to raise and resolve concerns. If these forums are not sufficiently addressing needs as intended, communities might suggest a new approach that would better meet members' needs.

It is an unfortunate aspect of human nature to often take for granted or under-nurture those relationships which are going well or seem to require little maintenance. Many anecdotes exist about company-community relationships which become "stale" or transactional over time. In these situations, even in the absence of major conflicts, communities sometimes feel that they need to "speak up" in order to maintain a company's attention. To avoid stalled relationships, communities and companies may wish to jointly agree to periodic evaluations in which a trusted third party can speak candidly with community members, and separately with company representatives, to flag any areas of concern, distrust, or misalignment. The aggregate results can then be shared with both parties as a basis for a shared assessment of strengths, gaps, and opportunities. If seen as legitimate by community and company, this kind of independent monitoring can be an invaluable tool for verifying perceptions, airing and resolving concerns and grievances before they escalate significantly, and reaffirming commitments and trust.

## Internal Challenges

In addition to meeting commitments, ongoing engagement and communications is also critical for maintaining trust and **"the spirit of FPIC"** in the operations phase.

As impacts are realized and benefits or compensation are distributed, communities can also experience several new internal challenges. Major projects have significant social impacts, which can transform traditional societies and internal social relationships. Developments often attract new people to the area, which can strain existing resources and infrastructure. Long-time community residents may be frustrated by perceptions of inequitable distribution of impacts and benefits (e.g., not everyone can be employed by the company; some may experience more intense impacts than others). This can lead to resentment or even conflict, as well as undue pressures on some community members. For example, local employees sometimes experience pressure to share income with family or friends, or feel that they are expected to be able to unilaterally address individual grievances. Communities may need to adapt to new pressures and risks that require new approaches to internal governance or decision-making. It is important that social and cultural impact assessments in the pre-feasibility stage anticipate and make plans to mitigate or compensate for these impacts – and to monitor changes and impacts throughout the life of the project.

# For Companies

During the construction and operations phase, communities are assessing if expectations match reality and if company and government commitments are being honored. If anticipated impacts were downplayed – or if benefits were overestimated – in the pre-permitting phase, companies should expect that communities will become dissatisfied and distrustful.

Companies should ensure internal sensitivity and awareness of the cultural and social changes generated by the operation, should continue to monitor changes, and adjust – in consultation with the community – processes to manage these impacts in a timely fashion.

**FPIC protects the interests of Indigenous communities, and it also leads to better outcomes for investors and governments.**

*— Dr. Kanyinke Sena, Maasai/Ogiek peoples of Kenya; Director, Indigenous Peoples of Africa Coordinating Committee*

Good corporate practices relating to stakeholder engagement and conflict management can be valuable tools to enhance FPIC processes and to maintain consent throughout a project's lifetime. Extensive information and resources are available to support and guide companies in establishing and maintaining grievance mechanisms, commitment registers, public forums, ongoing community engagement, etc.

The absence of visible tension with the community should not be perceived as a rationale for reducing community engagement. It is worth noting that such an absence can also be a signal that mechanisms for information sharing or capturing grievances are perceived as inaccessible or ineffectual. Further, maintaining the spirit of FPIC – and minimizing financial and reputational risks – requires ongoing investments in the health of the relationship and attention to the implementation of agreements. Companies should track their commitments to communities and monitor how they are being implemented. Periodic third party evaluations may help to ground-truth perceptions, elucidate tensions of which the company is unaware, and provide a shared assessment of how agreements have been implemented. At times, it may be helpful to jointly consider adjustments to the agreed protocols for information-sharing and joint decision-making, to reflect changes in community preferences and needs over time.

# Before Major Change

Photo courtesy of Newmont Corporation

A range of developments may lead to major changes in a project. An additional deposit may be found which could extend the timeline of a project and potentially expand its footprint. Changes to roads, pipelines, energy, or water supply could require adjustments. Companies may encounter financial or strategic changes that lead them to seek to sell, bring on a new operating partner, temporarily enter "care and maintenance," or prematurely close the asset. These kinds of changes bring impacts and opportunities of their own. In reaching a common understanding of changes to the project plan and potential impacts, parties will also develop a supplemental or renegotiated set of agreements confirming mitigation, compensation, shared benefits, and ongoing or new processes for direct engagement and decision-making.

# Key Issues

Issues here are quite similar to the Pre-Permitting phase.

In the case of a prospective expansion or timeline extension, environmental, cultural, and social impacts must be assessed – including on a cumulative basis, along with agreements for mitigation and compensation. The parties may wish to extend or revisit shared benefit agreements.

Photo credit: Monica Vulpin

# For Communities

As in the Pre-Permitting phase, it is important for communities to receive information from the company about the possibilities and what information is still uncertain or needed to better understand the possibilities, in order to reach an informed decision about whether to consent to these changes. Earlier agreements may have outlined processes for navigating the particular scenario at hand; if not, it may be helpful to revisit many of the discussions from the Pre-Permitting phase, including:

- What are the possible paths forward (e.g., expansion, closure)?
- What is known about options relating to these possibilities (e.g., feasibility considerations, timeline, new opportunities, etc.)? Is more information needed to have the full picture?
- How will likely impacts - including cumulative impacts - be assessed (e.g., through a formal Environmental, Social and Health Impact Assessment)? Once impacts are understood, what mitigation or compensation will take place?
- What issues or processes does the community want to be informed about and/or weigh in on?
- How can any specialized, technical information be provided in an accessible manner (e.g., in relevant languages, and/or for community members who may not have legal or engineering backgrounds)? Is external expertise needed? How are experts or consultants to be selected, and paid for?

- Once information is received from the company, what processes need to take place within the community to support inclusive deliberation and decision making? What kind of timeline will allow for the community to digest information in order to identify important questions, seek advice where needed, and support eventual decision-making?
- Are adjustments needed to existing agreements regarding impacts/mitigation/compensation, shared benefits, or ongoing communication and decision-making protocols?
- If new partners are being considered, what is their track record? What will the current company do to ensure a smooth transition for the community, including transfer of commitments?

The result of these discussions should likely be a new set of agreements – either in addendum to or replacing prior agreements – encompassing new mitigation/compensation commitments, shared benefit expectations, and adjustments to protocols for communications and decision-making.

Company staff may transition in these periods, and care should be taken to ensure that their knowledge does not depart with them.

# For Companies

As in the Pre-Permitting phase, companies can earn or lose trust depending on whether relevant information is shared in a timely fashion, with the right people, and whether rights-holders have the opportunity to inform and prioritize discussions about design, mitigation, and compensation – so that communities can ultimately make an informed decision about the future.

Company staff may transition in these periods, and care should be taken to ensure that their knowledge does not depart with them. Communities find it very frustrating when 'companies' forget information that has been shared with them, or promises they have made.

While being honest about any uncertainty, it is important to give communities early opportunities to weigh in on considerations about major changes to a project. Expansions or extensions bring additional social, environmental, and cultural impacts, including cumulative impacts, and the community must be able to advise on the relative priority, acceptable mitigation measures, and appropriate compensation associated with these. Communities may have ideas for how to maximize potential opportunities associated with these changes, and should have the opportunity to contribute these before design proceeds too far. Nearly all of the guidance outlined in the Pre-Permitting phase again applies here.

# Closure

Photo Courtesy of Newmont Corporation

As the site reaches the end of production, an agreed closure plan can provide clarity about economic, property, and environmental transitions, as well as ongoing commitments. Community visioning and landscape-level planning early on in a project life can help to maximize the long-term value that communities receive from a project. Companies and communities share an interest in responsible project closure and post-project restoration to the intended new land-use.

# Key Issues

Closure planning is part of early project design and is often included as part of the Environmental, Social, and Health Impact Assessment in the Pre-Permitting phase. It should account for the community vision for long-term development, if the community so desires. Often, companies practice progressive closure in which a pit or facility is closed and restored as soon as its mineral use is depleted, while other operations continue.

If a closure plan is developed early on, the company often supports capacity building throughout the project that will help prepare the community to achieve its longer-term vision, or can help to convene government or other parties that may contribute to achieving the vision.

If managed correctly, the closure planning and implementation process can create meaningful, positive long-term outcomes for a community and an opportunity for resolution of outstanding grievances or concerns. Without this intentionality, there is risk of new or escalating grievances that can undermine any positive legacy of the project. A poorly closed project can be a major long-term social, environmental, and economic liability for communities.

If managed correctly, the closure planning and implementation process can create meaningful, positive long-term outcomes for a community and an opportunity for resolution of outstanding grievances or concerns. Without this intentionality, there is risk of new or escalating grievances that can undermine any positive legacy of the project... Advance, inclusive planning can ensure that closure creates benefits for communities.

Closure can significantly impact community members in myriad ways. A large project that created several job or procurement opportunities for local communities during operations may find that the area's economy is now largely dependent on the company. Without creation of or linkages to alternative markets and livelihoods, closure can result in economic recession and out-migration. This in turn can negatively affect public services, housing markets, and more. Without appropriate handoff to the government or another actor, communities may lose access to services or infrastructure previously operated by a company, or that infrastructure may fall into disrepair. These effects can be compounded by the absence of tax revenue and royalties once production ceases. Communities are ultimately dependent on government capacity to enforce adequate closure; where this is lacking, communities may be left with an unsafe and even toxic environment.

Advance, inclusive planning can ensure that closure creates benefits for communities. Companies can offer re-training and support livelihood transitions, support landscape-level planning and help to catalyze alternative economies, and address and remedy legacy issues. Social impact assessments in advance of closure are particularly critical for informing processes that can best address the rights, needs and aspirations of the community.

A closure plan should provide for continuity in agreements about environmental impact management including a framework for communications and consultation during and post closure, especially if problems or new risks emerge.

# For Communities

As with the Pre-Permitting Phase, it is important that communities have an opportunity to understand and consider the risks and opportunities associated with closure, in order to consent to a closure plan. For instance, does the community wish to retain company buildings or other infrastructure after the project has concluded, or should the site planted with native species and features to encourage natural reclamation? If community ownership of land was not previously acknowledged by the government, how might the land be returned to the community with acknowledgement of legal title? How can local businesses that provide services and goods to the company diversify their customer base to ensure the business' longevity following site closure?

Communities do well to push for these discussions early on in the project life, as this can:

- ensure that corporate and government resources are allocated to support implementation and enforcement of closure plans
- provide time for full development of a long-term community vision
- allow communities to maximize and leverage community development funding and resources from the company toward that long-term vision
- minimize community economic or other dependence on a single project, in order to smooth the transition when a project is completed
- leverage the company's convening power to bring in other industry and government actors who may be part of that long-term vision

Communities are neither monolithic nor static, and needs and interests may shift throughout the project lifecycle. Plans and processes developed early on can and should be periodically re-evaluated and re-calibrated to reflect the community's evolution.

Of course, communities are neither monolithic nor static, and needs and interests may shift throughout the project lifecycle. Plans and processes developed early on can and should be periodically re-evaluated and re-calibrated to reflect the community's evolution. It is necessary to strike a balance: company commitments and government engagement are needed to ensure that closure is properly planned, and at the same time, that formal agreements do not preclude the ability of the community to evolve alongside the project.

# For Companies

A company committed to securing FPIC for a project must also secure consent for a closure plan.

Planning for closure should begin very early in the project life. Companies can help to convene discussions with nearby communities and businesses to consider how the site can contribute to a larger vision for regional development, conservation, and other priorities. This big-picture or "landscape-level" approach to planning can help to reduce communities' economic dependence on a single project or actor and ensure maximum community value from the life of a project.

Because FPIC has only relatively recently been conceptualized and widely adopted, and as extractive projects often have a long lifespan, projects currently entering closure are unlikely to have been developed under an FPIC process from the outset. However, companies which have made FPIC commitments in recent years can still work to incorporate FPIC processes and principles in latter project stages, including closure; special resources may be needed to build internal and external understanding of FPIC and to establish new engagement processes accordingly.

# Resources

Photo Credit: Harry Thaker

# Agreements

By setting out the respective roles and responsibilities of companies and communities, agreements are a central part of FPIC implementation. Agreements can set out a mutually agreed basis for realistic expectations, and processes for communication and project modifications.

Because large projects change over time, and are complex in scope, several agreements may be appropriate over time. For example, in the pre-feasibility phase of a project, impacts and profitability will be unknown, so a short-term land access and communication protocol would make sense. Detailed plans for closure may not be concluded until a project is mature. When a project affects several communities, multiple agreements may be required. And parties may prefer to have "layered agreements" so that some elements (e.g., communications processes) can be adjusted easily without renegotiating other parts of the agreement. Every project and every community is unique; at the same time, good agreements should cover the following considerations:

1. **Communications and Decision Making Processes**. Companies and communities will be able to interact more effectively when both identify and understand their respective decision-making processes, authorities, and governance structures. It is important for all parties to have details such as the process, frequency, or triggers for ongoing information sharing; decision making protocols, roles, and timelines – including any election or review of representation; the process for flagging, discussing, and addressing conflicts; the potential milestones or issues for which FPIC will be sought; and the process and frequency for re-evaluating and/or revising any of these protocols. Separating the agreement on relationship management from discussions about impacts and benefits provides a stable framework for addressing unforeseen circumstances, project modifications, shifts within company, shifts in the community, or context.

> Agreements between companies and communities should set out implementation and management plans, timelines, contingencies/ accountability mechanisms for addressing unmet obligations, and protocols for managing conflicts and grievances.

2. **Impacts & Compensation**. Communities and companies should reach a shared understanding of the environmental, social, and cultural impacts of a project and how impacts will be managed. This part of the agreement should be informed by baseline environmental, cultural, and social assessments, as well as the formal ESHIA. It should account for changes in community access to lands and other natural resources over the course of the project. It should also describe how impacts will monitored and re-assessed over time to account for cumulative impacts and evolving social and cultural realities, values, and capacities. This is also where company commitments to the community can be recorded in terms of how the company will avoid, mitigate, monitor, manage, and compensate for those impacts. The process for assigning value and distributing compensation for impacts should be discussed (e.g., the value of grassland to a company is different than to a pastoralist; and value is not always monetary for communities). From the standpoint of accountability and flexibility, it is important that agreements specify what happens if companies do not meet these commitments.

3. **Shared Benefits**. Community benefits are different from impact compensation, and it can be useful to distinguish between company compensation for negative impacts, and agreed benefits the company will deliver to the community. When the level of benefits may be contingent on commercial factors like commodity price, this can be included in the agreement. These discussions offer an opportunity for the company and community to develop a common vision and realistic expectations for impacts, future development, and benefits. Agreements may also look at the role of "trust funds" and how they can be governed to reflect diverse needs within the community and to avoid political manipulation.

The process for developing agreements is just as important as finalizing them. Ensuring that communities have sufficient time and resources (including possible external counsel) to fully consider and deliberate about conditions within a prospective agreement is essential to securing free, prior, and informed consent.

Agreements between companies and communities should set out implementation and management plans, timelines, contingencies/accountability mechanisms for addressing unmet obligations, and protocols for managing conflicts and grievances. Allocation of adequate company resources is important for implementation success. In addition to operational and capital budgets that correspond to mitigation, compensation, and community benefits, it can also be important to allocate resources for legal counsel, independent monitors or advisors, or funding/capacity for community members to play identified roles.

The *process* for developing agreements is just as important as finalizing them. Ensuring that communities have sufficient time and resources (including possible external counsel) to fully consider and deliberate about conditions within a prospective agreement is essential to securing free, prior, and informed consent. Please see the Inclusivity and Gender in FPIC resource for additional guidance on the importance of thoughtful, inclusive engagement leading toward agreements. The Agreements and Community Outcomes resource also outlines several considerations for ensuring that agreements lead to positive outcomes for the community.

# Agreements and Community Outcomes

***What constitutes a "good" agreement for Indigenous peoples dealing with extractive industries? Why are some agreements so much better than others? And how can outcomes be improved for Indigenous peoples in negotiated agreements?***

Dr. Ciaran O'Faircheallaigh has conducted research analyzing over forty agreements between extractives companies and Aboriginal communities in Australia to identify the processes and content that most contribute to successful outcomes for communities. Additional detail on the methodology and scale can be found in the Research Methodology sidebar.

Dr. O'Faircheallaigh's findings included the following:

- The relative strength of agreements is not dependent on company policy, industry sector, or company size. Strong and weak agreements were found within the same company and within the same sector, and some of the strongest agreements are with medium-sized companies.
- Some agreements can leave Indigenous peoples worse off than having no agreement. For example, while the national law recognizes the legal right of citizens to participate in an environmental legislation process, one Australian agreement prohibits the community from lodging any objections, claims, or appeals to any government authority under any kind of legislation, including environmental legislation – essentially removing their rights as citizens.
- A common misperception is that strengths in some areas of an agreement are likely to reflect tradeoffs in other areas. However, agreements were generally found to be strong across the board of issue sets, or weak across the board. For example, if financial benefits were minimal, environmental provisions were also likely to be poor.
- Legal regime is important but not definitive. For example, under Australia's Native Title Act (NTA), which governs the majority of

## RESEARCH METHODOLOGY

The analysis draws from nearly fifty agreements from Australia and Canada, reports on community consultation and negotiation processes, and Dr. O'Faircheallaigh's direct experiences in leading consultations. A numeric scale of -1 to +6 was developed for each of the following elements of agreements:

- Cultural heritage protection;
- Participation in environmental management;
- Revenue sharing/royalties;
- Aboriginal employment and training;
- Business development opportunities;
- Land use, land access, and recognition of land rights; and
- Agreement implementation.

This scale is not cumulative. Agreements were ranked at the highest point of the scale on which they fall. For example, the area of *environmental management* was ranked as follows:

- (-1) Provisions that limit existing rights
- (0) No provisions
- (1) Mining company commits to Aboriginal parties to comply with environmental legislation
- (2) Company undertakes to consult with affected Aboriginal people
- (3) Aboriginal parties have a right to access, and independently evaluate, information on environmental systems and issues
- (4) Aboriginal parties may suggest ways of enhancing environmental management systems, and project operator must address their suggestions
- (5) Joint decision-making on some or all environmental management issues
- (6) Aboriginal parties have the capacity to act unilaterally to deal with environmental concerns or problems associated with a project

Australia, if an agreement is not reached within 6 months, a decision about concession award is made by a government tribunal (which nearly always approve the concession), and the community will not receive any royalty. This de facto lack of a veto, paired with the likelihood of impacts without compensation, means that communities under the NTA face tremendous pressure to sign an agreement before the 6 month timeframe expires. While some strong agreements were still reached in NTA territories, there were also many weak agreements in those areas; in contrast, there were *no weak agreements* in the Northern Territory, where a community veto is possible under law.

- Community capacity matters; where strong agreements occurred despite unfavorable policy regimes, communities were able to access strong regional political networks with financial and technical resources to support negotiations, make 'credible threats' of direct political action, and build on regional legal strategies and precedents for strong agreements. (See graphic.)
- The strongest agreements deliver benefits for industry – highly rated agreements, where industry focuses on good process, capacity building, investments, and complying with cultural heritage legislation, can enhance relationships with and garner support from Aboriginal peoples, reduce environmental risks, and enable compliance with cultural heritage legislation.
- Land councils in Australia draw from deep-seated cultural foundations that have taken thousands of years to evolve. The Kimberley Land Council has a system of cultural and economic exchange that involves all groups in the Kimberley, has been in existence for millennia, and is used in transmission of cultural artifacts and organization of regional ceremonies. Through this platform, the Land Council is able to bring together a region and support local agreement-making through strong capacity building.

Dr. O'Faircheallaigh offers some recommendations for building more robust agreements with improved outcomes for communities. These included the following:

- Community controlled impact assessments can help to streamline the eventual negotiation process by building a platform for internal discussions by the community or communities. This process can reveal and begin to resolve tensions within and among communities.
- Although tensions may exist between regional and Indigenous communities, strong regional networks can offer strategic capacity and access to expertise that benefits local communities. The development of robust local representative structures should also be prioritized.
- At a broader scale, there is a need to reform the laws, structures, and institutions that undermine Indigenous negotiation positions and also tend to result in weak agreements.

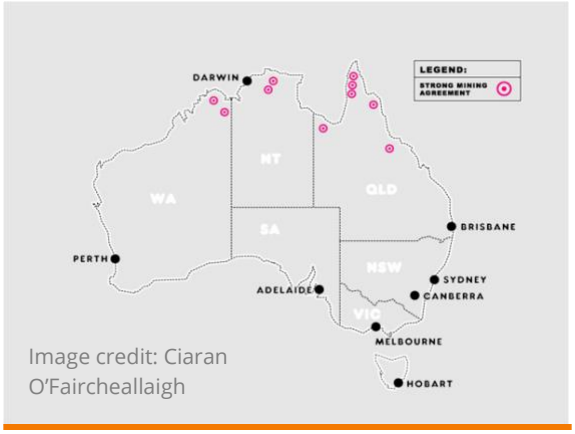

Image credit: Ciaran O'Faircheallaigh

Although communities in Western Australia and Queensland fall under the Native Title Act, which essentially eliminates the possibility of a veto, strong agreements were still possible when communities had access to political networks who could offer legal and financial resources, strategies, and precedents to support negotiations.

# Inclusivity and Gender in FPIC

Inclusivity can positively impact all elements of an extractive project – reinforcing a respectful and equitable work environment, supporting the ability of *all* community members to communicate their concerns and interests, and promoting a respectful relationship between company employees (or contractors) and the community.

It is important that companies proactively and accessibly engage with different groups of women and men, including young people – not just community leaders – in order to avoid issues of "elite capture," gender disparities, or unintended impacts on unrepresented or underrepresented groups within a community.

## What Considerations are Important?

Sometimes company efforts to respect and promote traditional culture in a community make it hard to advance inclusivity. However, sometimes major projects carry risks of negative impacts or marginalization of those who are already disenfranchised. If a company does not recognize internal community concerns or conflicts, they may escalate into social protest. It is particularly important to be aware of the existing elements of power reflected in how (and for whom) local land rights are recognized, how (and by whom) household finances and resources are managed or owned, and how impacts and benefits associated with industrial development may be refracted throughout the community.

Companies must realize that their very presence will have some cultural impacts. Industrial projects bring environmental, social, and economic changes, impacts, and opportunities. But unless the social context and dynamics are well understood, "opportunities" for some may actually exacerbate pre-existing inequities or vulnerabilities within communities.

Photo credit: Debbie Espinosa courtesy of Landesa

At the same time, promoting inclusion does not necessarily need to begin with an explicit conversation about why companies or governments should "change how things are done here." Companies can encourage inclusive behaviors by modeling it in their own workplaces and processes, by recognizing all parts of the community as neighbors, and by actively seeking to engage with and generate benefits for all.

Companies and governments know they should not negatively impact human rights. Rather than aiming for an impractical target of "no impact," companies must commit to a baseline of doing no *harm*, and a goal of doing *good*. A company committing to "do no harm" should translate this objective into its community engagement planning.

## What are the Risks of Ignoring Inclusivity?

Equity can positively impact all elements of an extractive project – reinforcing a respectful and equitable work environment, supporting the ability of all community members to communicate their concerns and interests, and promoting a respectful relationship between company employees (or contractors) and the community.

Inclusion – of women, youth, and minority or marginalized groups – remains an important concern, especially in communities where they may not obviously participate in decision making.

Incorporating inclusivity considerations throughout internal and external corporate practices can be a challenge for numerous reasons. However, a failure to fully incorporate – or "mainstream" these considerations within corporate practice can bring significant risks. A failure to protect against sexual harassment and abuse – both within the company and by employees or contractors operating in the community – also compromises the safety of the community and the workforce. Similarly, any agreement that reflects disenfranchisement by women (or youth, or the elderly, or other marginalized groups within a community) is a potential vulnerability for companies. If a significant population group within a community is dissatisfied, a company will encounter challenges, protests, and other obstacles to productive operations. Such dissatisfaction is prime for visible damage to a company's reputation.

According to Dr. Ciaran O'Faircheallaigh's quantitative research on negotiation conditions, content, and community outcomes from 40+ company-community agreements in Australia, good outcomes for women appear to be correlated with good outcomes for the full community.

### Gender

While most countries have laws that that guarantee gender equality, in practice, women are often disadvantaged. When an understanding of the ways in which women or marginalized communities are or may be impacted is included in social impact analysis, projects are in a stronger position to ensure that everyone's human rights are reflected in FPIC processes.

"Gender" can sometimes be an easy concession in a negotiation, and projects like vegetable gardens or weaving projects can be mistaken for sufficiently addressing these considerations. The extractive sector workforce is still largely male, and corporate cultures often largely view gender or intra-community dynamics as a "social" issue within the purview of Human or Communities Relations Departments.

In addition to understanding potential dynamics related to gender or inclusivity within communities, companies can examine their own role in gender impacts and opportunities to improve practices, both in their own workforce and in community engagement and including through the development and adherence to solid policies on inclusivity and respectful behaviors.

Unintended impacts to women's physical and economic livelihoods due to failure to consider gender can create further vulnerabilities. However, according to Dr. Ciaran O'Faircheallaigh's quantitative research on negotiation conditions, content, and community outcomes from 40+ company-community agreements in Australia, good outcomes for women appear to be correlated with good outcomes for the full community. Companies should therefore seek to bring a gender- and vulnerability-sensitive lens to social impact assessments, consultation practices, and agreements.

Some considerations include:

- Differing relationships to land: while men and women may both have responsibilities around food production, men may be more likely to produce cash crops where women are responsible for subsistence farming and family nutrition. The latter may be undervalued – both by companies and by male representatives in the community – when deals are made to support community relocation. Women often must access land through patriarchal systems in which a husband is the formal land owner; she may receive little or no compensation for land sales but will still have responsibility for providing family nutrition. Use of community land for subsistence farming is common, but this is rarely factored into the award of concessions or compensation packages. Even where employment opportunities are offered as a means of compensation, low-pay positions are unlikely to offset the increased burden of food provision.
- Women are often disproportionally affected by family disruption.
- Gender, racial, or other inequalities may exist across a range of areas: access to information, compensation, livelihood restoration, community decision making, and assets and finance.
- Across all societies, an increase in gender-based violence is correlated with family stress, changes in power structures, and increased access to cash.
- Women and marginalized communities often have less access to remedy.
- Some well-intended efforts have unintended consequences. For instance, gender neutral language can often allow for indirect exclusion of women. Similarly, quotas or rules for quorum without requirements for meaningful participation by women or marginalized groups can preserve a status quo in which those groups are underrepresented.
- Impacts and agency can differ from culture to culture and even site to site; companies should not see women as homogenous "victims."
- Gender-based traditions exist in various cultures, and there is a need to both understand the respective rights and responsibilities of the genders within a household and to take these into consideration during any change, disruption, resettlement, or other event. Specifically, it is important to understand through careful analysis whether customs actively promote inequality (or if they are simply innocuous cultural differences), and the appropriateness of brokering changes in local practices (sensitively, only where it's truly needed, and with forethought about potential unintended consequences). Working within a pre-existing cultural context can be a tricky proposition, particularly when Western companies enter cultural spaces with differing traditions and perspectives (e.g., where the role of women is lacking or limited). Though companies and NGOs do not want to be seen as attacking regional cultures, they may wish to create opportunities for women to play new roles or lead decision-making, or to expand the potential roles that men can play. Companies can help communities to embrace inclusion over the long-term by demonstrating the benefit of gaining input from a range of perspectives, not by setting dictates for local culture.

## What are good practices?

It is important that companies proactively and accessibly engage with different groups of women and men, including young people – not just community leaders, particularly in relation to:

- Information dissemination
- Consulting settings and mechanisms
- Agreement-making mechanisms
- Benefit arrangements

Some good practices for companies applying an inclusivity lens to community engagement include:

- Hosting women-only, youth-only, or similar kinds of meetings for groups that may be marginalized to ensure that these voices can be heard.
- Hosting community events in such a way as to enable participation from groups that may be marginalized (e.g., enabling women's participation by holding meetings at times that do not compete with family responsibilities, providing child care, etc.). Community consultation meetings could also have a standing agenda item for women's, youth, or other groups' concerns to be raised.
- Creating mechanisms and measures that specifically address women's concerns, e.g. using electronic banking tools or mobile phone-based money transfer and banking services to pay women directly; and prioritizing access to essential resources, such as land for subsistence farming, water, and other household activities for which women may be primarily responsible.
- Establishing and socializing engagement mechanisms (as well as grievance mechanisms), and ensuring they are accessible – in a practical way – to women in a community. This can include hiring more women for community liaison teams, gender-sensitive trainings for community liaison teams, and placing community liaison offices in convenient places for women to access them.
- Targeted informational campaigns to women, men, youth, elderly, or other minority communities to seek and affirm buy-in from all quarters.
- Gathering sex-disaggregated data can contribute to better understanding of impacts and benefits and support better decision-making and agreements.
- In the course of environmental, social, and health impact assessments, a land-mapping exercise with women and men, as well as a "responsibility mapping" at a household level, can be a useful tool for understanding issues associated with women's land rights, land use, economic responsibilities and potential vulnerabilities linked to land; as well as potential considerations for gender-sensitive planning.
- Companies should be explicit about how projects will differently impact women and men (and subgroups like youth, elderly, etc.)– and pay attention to how power structures around engagement, benefits, land rights, and financial management may influence women's abilities to provide useful information, share concerns, and understand project effects. Women need to be both properly informed and be involved in decision-making processes.

Photo credit: Debbie Espinosa, courtesy of Landesa

- In many situations, it can be important to socialize men and others in leadership positions to the co-benefit they will receive from ensuring that other group's needs are also met through methods like rights and responsibilities awareness and informational campaigns; for example, the family as a whole will benefit from an increase in its earning capacity.
- While there can be challenges around creating opportunities for women, youth, and others to play new roles, there may similarly be opportunities to offset community concerns by also creating new opportunities for those currently in leadership.
- A good company philosophy is "those who are most impacted by operations should be the ones that most benefit".

# Additional Resources

## FPIC Dialogue Resources

- 2017 FPIC Solutions Dialogue Meeting Summary
- 2018 FPIC Solutions Dialogue Meeting Summary
- 2019 FPIC Solutions Dialogue Meeting Summary
- FPIC within a human rights framework: Lessons from a Suriname Case Study [English] [Dutch]
- From Rights to Results [English] [Spanish]

## Other Resources

- Asia Indigenous People's Pact, various guides on FPIC including *Training Manual for Indigenous Peoples on Free, Prior and Informed Consent*. Access online.
- Cordaid (2016), When oil, gas or mining arrives in your area – practical guide for communities, civil society and local government
- Doyle, C. and Cariño, J. (2013) Making Free Prior & Informed Consent a Reality: Indigenous Peoples and the Extractive Sector, Middlesex University School of Law.
- Equitable Origin (2018) *Enabling FPIC through voluntary standards*. Access online.
- FAO (2016) *Free Prior and Informed Consent An Indigenous peoples' right and a good practice for local communities*. Access online. Practical guidance on how to implement FPIC.
- Hill, C., Madden, C & Collins, N 2017. A Guide to Gender Impact Assessment for the Extractive Industry, Oxfam, Melbourne
- IIED (2013) *FPIC and the Extractive Industries*. Access online.
- IIED (2016) Meaningful community engagement in the extractive industries.
- IRMA (2018) *Company certification standard.* Access online. FPIC requirements for companies.
- Indigenous Rights and Resource Governance Research Group, www.fpic.info
- Kemp, D., Keenan, J., Gronow, J., & Davidson, J. 2009. Why Gender Matters. Rio Tinto.
- OECD (2017) *Guidelines on Meaningful Community Engagement in Extractive Sectors* Access online. FPIC pp. 92-99.
- O'Faircheallaigh, C. 2012. Women's absence, women's power: indigenous women and negotiations with mining companies in Australia and Canada.
- Oxfam (2019) *Consent is Everybody's Business*.
  Pages 11-13 contain a useful and easy-to-read explanation of FPIC. Access online.
- Oxfam (2017). Sustainable Mining: Putting Gender on the Agenda.
- Oxfam (2014) FPIC guides for communities (including in several African languages) and Training Manual. Access online.

- Oxfam (2018) *Free, prior and informed consent in the extractive industries in Southern Africa*. Access online.
- Oxfam (2014) Free, Prior, and Informed Consent in Africa: An Emerging Standard for Extractive Industry Projects
- Oxfam (2019). Sin mujeres indígenas, ¡NO! Sin mujeres indígenas, ¡NO! Aproximaciones desde la implementación de la consulta previa, libre e informada en la industria extractiva en el Perú
- Oxfam (2017) Testing Community Consent: Tullow Oil project in Kenya
- Salcedo-La Vina, C and Notess, L. (2018). A Fair Share for Women: Toward More Equitable Land Compensation and Resettlement in Tanzania and Mozambique.
- UNICEF (2015). Child Rights Toolkit.
- World Bank (2018) *Guidance for borrowers on Indigenous Peoples/ Sub-Saharan African Historically Underserved Traditional Local Communities*. Access online.

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