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What is Free, Prior and Informed Consent?

HIGHLIGHTS

- FPIC represents a meaningful consultation process by which indigenous communities can determine how development decisions are made. In certain circumstances it might equate to the right for indigenous communities to reject an industrial project.
- An FPIC process should be mutually agreed in advance, respect local customs, and be documented. Community FPIC protocols can clarify expectations in advance.
- A signed agreement is often the final outcome of an FPIC process. This should document all agreed aspects of the negotiation and be legally binding, but also open to review and revision if circumstances change considerably.
- FPIC needs to be maintained through repeated FPIC processes prior to significant changes, and through an effective grievance mechanism in case of any breaches of agreement.
- If the outcome of an FPIC process is a 'No', then this should be documented and respected. The agreement should stipulate a minimum period during which no further approaches will be made to the community. An alternative land use designation may be sought to make the decision permanent.

In the context of indigenous rights and the development process, the principle of free, prior and informed consent (FPIC) derives from indigenous peoples' right to self-determination and their right to property through ownership or traditional use. It is established in a number of international human rights conventions, international soft law instruments and ethical standards, which outline the responsibilities of both governments and industry. Most of these relate to indigenous (or tribal) peoples, but some industry standards extend the application of FPIC to all significantly affected local communities. There is a strong business case for government and industry to obtain FPIC in the context of extractive industry development. An FPIC process is an effective way to build trust with local communities and significantly reduce the risk of conflict. Much work still needs to be done to develop a common understanding of how to interpret and implement FPIC. This briefing explores the text of selected international instruments along with different perspectives on interpreting these documents. It also considers some of the key challenges associated with implementing FPIC in practice.

Why is FPIC important for the extractive industries?

Indigenous resource users are concerned about industrial activities encroaching on lands and waters that they depend on for their traditional livelihood activities. This is more urgent as threats increase from multiple sources (including mining, oil and gas extraction, wind farms, roads and electric power lines). Indigenous communities are building awareness about their rights and civil society organisations are gaining strength. This, together with the use of social media, has stimulated a growth in activism to protect indigenous rights, particularly in the context of industrial projects.

International hard and soft law, national law, industry standards and individual company policies are increasingly incorporating specific requirements to seek the consent of indigenous peoples prior to undertaking certain activities likely to harm their traditional livelihoods and cultures. Governments, businesses and investors are concerned about the cost of conflicts and the practical and reputational risks of failing to respect indigenous rights. Extractive industry companies are also being publicly judged on their policies relating to indigenous peoples (Oxfam, 2015; Overland, 2016). Thus, in the context of mineral resource development there is a strong incentive for both governments and companies to improve their performance in protecting and respecting indigenous rights.

Which international instruments require FPIC?

While FPIC is commonly referred to as a right, it is not a right in itself, but a mechanism by which indigenous peoples can exercise their right to self-determination, as well as other universal human rights including the right to property, culture and non-discrimination (Hanna and Vanclay, 2013). The use of FPIC to protect indigenous rights in the context of major development projects emerged in the mid-1980s, as indigenous peoples sought to defend their right to self-determination in the face of projects that pursued the involuntary displacement of indigenous communities.

FPIC requires proponents of development projects to consult meaningfully with local indigenous communities with the aim of obtaining their (informed and freely granted) consent before starting up major development projects on the lands that they traditionally own and use. In some cases, such as an industrial activity that requires resettlement, some international instruments specifically state that an indigenous community's refusal to grant consent equates to a veto on that activity (see Section 4).

The principle of FPIC is enshrined in international hard and soft law, notably the legally binding **International Labour Organisation Convention 169 on Indigenous and Tribal Peoples (1989) (ILO 169)**, adopted by 22 countries to date, and the non-legally binding but influential and universally supported **UN Declaration on the Rights of Indigenous Peoples (2007) (UNDRIP)**, as well as other international human rights treaties (Lehr, 2014; APF and OHCHR, 2013; Doyle and Cariño, 2013).

According to ILO 169 and UNDRIP, obtaining FPIC is primarily a government responsibility, and in practice governments ought to carry out an FPIC process before allocating licences that give companies the right to explore and extract resources from indigenous peoples' lands.

Companies are also expected to respect international human rights, a responsibility underscored by the **UN Guiding Principles on Business and Human Rights (UN Guiding Principles) (2011)**. These principles establish expectations of both government and industry in the sphere of business and human rights. While they do not make an explicit reference to FPIC, they refer to UN instruments that have elaborated on indigenous rights. In his former role as UN Special Rapporteur on indigenous peoples, James Anaya stated that 'the rights that corporations should respect include the rights of indigenous peoples as set forth in the UN Declaration on the Rights of Indigenous Peoples and in other sources' (Anaya 2012, p.15).

The **Organisation for Economic Co-operation and Development (OECD) Guidelines on Multinational Enterprises** have adopted the UN Guiding Principles and therefore have incorporated the same requirement to respect the internationally recognised rights of indigenous peoples. The OECD (2016) has produced detailed 'Due diligence guidance for meaningful stakeholder engagement in the extractive sector'. Annex B. of these guidelines is focused specifically on engaging with indigenous peoples. The guidance includes discussion on when and how to engage in consent processes with affected communities, including what to do if consent is withheld.

In recent years, some environmental and social standards of international financial institutions have explicitly incorporated requirements for free, prior and informed consent (to replace earlier requirements for FPI *consultation*). These include the **International Finance Corporation (IFC) Environmental and Social Performance Standards**, which were revised in 2012. Companies borrowing money from the IFC are obliged to meet these requirements as a condition of the loan. The **Equator Principles Financial Institutions** have adopted the IFC standards and therefore the same commitment to FPIC.¹ Other international financial institutions such as the European Bank for Reconstruction and Development and the Inter-American Development Bank have adopted similar standards.² The IFC is the private sector lending arm of the World Bank, which incorporated the 'consent' terminology only in the 2016 revision of its safeguard policies.

The industry association for mining, the **International Council on Mining and Metals (ICMM)** revised its Position Statement on Indigenous Peoples and Mining (ICMM, 2013) to include an explicit commitment to 'work to obtain FPIC', which is binding on its corporate members. The **UN Global Compact** calls for companies to respect internationally proclaimed human rights (Principle 1) and ensure they are not complicit in human rights abuses (Principle 2), which indirectly means a commitment to respect ILO 169, UNDRIP, the UN Guiding Principles and the IFC Performance Standards. Other international standards not directly related to oil, gas and mining offer relevant insights and definitions. For instance, the **Forest Stewardship Council (FSC)** has developed a comprehensive FPIC policy for its sustainable forestry certification programme (FSC, 2012).

Table 1 summarises the FPIC requirements included in five significant international instruments that are relevant to oil, gas and mining developments: ILO 169, UNDRIP, the UN Guiding Principles, the IFC Performance Standards, and ICMM's Position Statement on Indigenous Peoples and Mining.

TABLE 1. Summary of FPIC requirements in selected international instruments

Instrument	FPIC requirements
<p>International Labour Organisation Convention No.169 on Indigenous and Tribal Peoples (ILO 169) (1989)</p>	<p>According to Article 6, governments are obliged to consult with indigenous peoples ‘through their representative institutions’, and ensure they can freely participate at all levels of decision-making on legislative or administrative measures that may affect them. Consultation ‘shall be undertaken in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures’. Article 15 grants indigenous peoples the right to participate in the use, management and conservation of the natural resources pertaining to their lands. Where the state owns mineral resources, they must consult with indigenous peoples before undertaking exploration or exploitation. According to Article 16, indigenous peoples shall not be removed from their lands. In exceptional cases, resettlement ‘shall take place only with their free and informed consent’. If consent cannot be obtained, the government can only move ahead following appropriate procedures established by national law, ensuring the effective representation of the peoples concerned.</p>
<p>United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007)</p>	<p>States are obliged to ‘consult and cooperate in good faith with indigenous peoples through their own representative institutions to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them’ (Article 19); and prior to the approval of any project affecting their lands, territories and resources, particularly in connection with use of minerals, water, or other resources (Article 32). Article 10 states that indigenous peoples ‘shall not be forcibly removed from their lands or territories’ and ‘No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.’ Similarly, no storage or disposal of hazardous materials shall take place without FPIC (Article 29).</p>
<p>United Nations Guiding Principles on Business and Human Rights (2011)</p>	<p>Principle 12 states: ‘The responsibility of business enterprises to respect human rights refers to internationally recognised human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organisation’s Declaration on Fundamental Principles and Rights at Work.’ The commentary to this principle adds: ‘Depending on circumstances, business enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. ...’</p>
<p>International Finance Corporation (IFC) Environmental and Social Performance Standards (2012)</p>	<p>Free, prior and informed consent first appeared in these performance standards during their revision in 2012. Up to that point, the term free, prior and informed <i>consultation</i> applied throughout. IFC’s Performance Standard 7 requires that companies carry out due diligence (e.g. impact assessments) and an FPIC process (according to a set of actions stipulated in the standard) if the project will have a negative impact on lands and natural resources under traditional ownership or customary use (clause 14). Companies shall avoid relocation, and if that is impossible they should only proceed with the project if they obtain FPIC (clause 15). The same applies if a project has a significant impact on critical cultural heritage (clauses 16 and 17).</p>
<p>International Council on Mining and Metals (ICMM) Position Statement on Indigenous Peoples and Mining (2013)</p>	<p>The ICMM position statement was revised in 2013 to include a commitment for its members to ‘work to obtain the consent of indigenous communities for new projects (and changes to existing projects) that are located on lands traditionally owned by or under customary use of Indigenous Peoples and are likely to have significant adverse impacts on Indigenous Peoples, including where relocation of Indigenous Peoples and/or significant adverse impacts on critical cultural heritage are likely to occur’ (Commitment 4). Where ‘consent is not forthcoming despite the best efforts of all parties, in balancing the rights and interests of Indigenous Peoples with the wider population, government might determine that a project should proceed and specify the conditions that should apply. In such circumstances, ICMM members will determine whether they ought to remain involved with a project’ (Commitment 6).</p>

Sources: Texts of the relevant instruments; ILO, 2013; APF and OHCHR, 2013

How is FPIC interpreted?

In international instruments relating to industrial development and indigenous peoples, the concepts of 'consultation' (including 'meaningful consultation'), 'participation' and 'benefit sharing' are as important as 'consent'. Related commitments have been considerably strengthened in recent years both for indigenous and non-indigenous local communities (IFC, 2012; ICMM, 2013; OECD, 2016). It is now no longer acceptable for a project developer to visit a community and give a PowerPoint presentation with a question and answer session, and then tick the 'consultation' box. Yet there is an important distinction between 'consultation' or 'participation' and 'consent', and this has been at the heart of debates around the question: 'What is FPIC?'

In 2011, the former UN Special Rapporteur James Anaya (2011, p.15) observed that:

[T]he lack of a minimum common ground for understanding the key issues by all actors concerned entails a major barrier for the effective protection and realisation of indigenous peoples' rights in the context of extractive development projects. [This], coupled with the existence of numerous grey conceptual and legal areas, has invariably proved to be a source of social conflict.

As the text of human rights conventions and international soft law instruments are subject to interpretation in particular contexts, accepted understandings are developed through the analysis of legal case history (Price, 2010; Lehr, 2014; Heinämäki, 2015; Åhrén, 2016; Land, 2016). This is particularly important in understanding how an obligation to obtain FPIC according to international law plays out in a particular location with its own set of national, regional and local legal and regulatory requirements. Some of the broader definitional questions relating to FPIC are discussed below.

Definition and scope

The UN Expert Mechanism on the Rights of Indigenous Peoples (2011, p.20) emphasises the close links between FPIC and indigenous peoples' right to self-determination, stating:

The duty of the State to obtain indigenous peoples' free, prior and informed consent entitles indigenous peoples to effectively determine the outcome of decision-making that affects them, not merely a right to be involved in such processes.

The use of the word *determine* indicates that 'consent' implies a greater level of control over the outcome than the term *influence* would suggest, for instance. The UN Permanent Forum on Indigenous

Issues (2015) defines the key elements of an FPIC process as follows:

- i. People are not coerced, pressured or intimidated in their choices of development;
- ii. Their consent is sought and freely given prior to authorisation of development activities;
- iii. They have full information about the scope and impacts of the proposed development activities on their lands, resources and wellbeing; and
- iv. Their choice to give or withhold consent over developments affecting them is respected and upheld.

While many focus on FPIC as being rooted in the (collective) right to self-determination, it is also legally based on the (individual) right to property, cultural rights and the right to non-discrimination (Heinämäki, 2015). Åhrén (2016, p.206) argues that the obligation to obtain FPIC is 'always a result of the applicability of an underlying material right'. Thus, in relation to the right to property '[O]ne must first determine whether an indigenous community has established a material right to property over a territory through traditional use. Only subsequently can one proceed to analyse what practical elements are included in that right [such as FPIC] ...' In his former role as UN Special Rapporteur on Indigenous Peoples, James Anaya (2013, p.9) emphasised that formal legal ownership of the land is not a prerequisite of a consent process:

Indigenous peoples' territories include lands that are in some form titled or reserved to them by the State, lands that they traditionally own or possess under customary tenure (whether officially titled or not), or other areas that are of cultural or religious significance to them or in which they traditionally have access to resources that are important to their physical well-being or cultural practices.

FPIC may be interpreted as a strict legal procedure, or more loosely as an approach. Åhrén (2016), for instance, views FPIC as 'nothing more than a way to effectuate a certain element of an underlying material right [such as] indigenous communities' property rights to territories traditionally used'. Hanna and Vanclay (2013), on the other hand, argue that FPIC is more of a philosophy of good practice. Cariño and Colchester (2010) propose focusing on the 'spirit of FPIC,' which means that development projects need to respect people's cultures and unique paths to self-determination rather than endangering their survival. On that basis, Buxton and Wilson (2013) developed guidance on implementing the 'spirit of FPIC' in extractive industry projects, by respecting individual and collective rights and enabling people to have a meaningful voice in transparent, deliberative decision-making processes relating to their own development.

Does FPIC ever equate to a veto?

For many people, the whole point of FPIC is that it grants indigenous communities the right to say no to an industrial development proposed to take place on their lands. Oxfam's Emily Greenspan (2015) states: 'In order for FPIC policy commitments to have any real meaning for communities, companies must recognise that communities may choose to say no to oil or mining development'. The chair of the Inter-American Commission on Human Rights Rose-Marie Belle Antoine says: 'Yes, you have a right to say no. ... Otherwise what is the meaning of consent?' (cited in Greenspan, 2015). Reinford Mwangonde of Malawi states: 'FPIC has to be grounded in the principle that a community or a people have the right to accept or turn down a project' (interviewee cited in Doyle and Cariño, 2013, p.17).

Both ILO 169 and UNDRIP distinguish between the state obligation to **have consent as the objective of consultation** before an action is taken, and the state obligation to **obtain the consent** of the indigenous peoples concerned before an action is taken. Clear statements have been made to clarify that 'having consent as the objective of consultation' does not equate to a veto right (ILO, 2013). Legal experts Axmann and Gray (2016) observe that:

[A]n increasingly prevailing perspective on FPIC at the international level is that in most circumstances, FPIC is considered an objective of a process of consultation and participation with Indigenous Peoples, rather than a veto right, except in certain limited circumstances.

Yet those 'limited circumstances' do exist (notably in cases of resettlement), although it is difficult to find statements in official documents or third-party analysis that the 'obligation to obtain consent beyond the general obligation to have consent as the objective of consultations' does definitively equate to a veto. The challenge in interpreting ILO 169 is that Article 16(2) which requires governments to **obtain the consent** of indigenous peoples in the case of resettlement is followed by quite a large caveat:

Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

By contrast, UNDRIP's Article 10 is more definitive:

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just

and fair compensation and, where possible, with the option of return.

IFC's Performance Standard 7 on Indigenous Peoples (clause 15) states clearly that its clients should not go ahead with resettlement without the consent of the people:

The client will consider feasible alternative project designs to avoid the relocation of indigenous peoples from communally held lands and natural resources subject to traditional ownership or under customary use. If such relocation is unavoidable the client will not proceed with the project unless FPIC has been obtained.

This makes sound business as well as moral sense as the risks of a conflict are much greater if a project is actively opposed by the local community, and conflict can be costly and reputationally damaging for investors. By contrast, ICMM (2013, Commitment 6) allows its member companies to decide themselves whether to remain involved in a project if the community says 'no' but the government still wants to pursue the project (see Table 1).

The threat of FPIC equating to a veto has created anxiety on the part of both companies and governments (Lehr and Smith, 2010; Axmann and Gray, 2016), even though it has been made clear that individuals or small groups within a community cannot veto a project (ICMM, 2015; Lehr, 2014; Doyle and Cariño, 2013). Efforts have also been made to counter the 'fear narratives' surrounding the term 'veto' by providing evidence that indigenous peoples are not simply anti-development and they are frequently willing to seek a balance between economic development for the benefit of their own and the broader society with a commitment to long-term protection of their lands and resource base (Land, 2016).

Lehr and Smith (2010, p.37) argue that rather than being seen as a threat, companies should see an FPIC process, even with the potential for a veto, as a robust risk mitigation strategy:

[G]aining consent through a formal and documented process may provide a stronger license to operate than a typical engagement process. ... The process may better assure that, despite changes in government and political trends, the company will not become a target due to local opposition to its project.

From the perspective of indigenous peoples themselves, the interpretation of FPIC needs to incorporate the right to withhold consent without engaging in lengthy consultation and negotiation processes (Doyle and Cariño, 2013). This is not made explicit in international standards or official commentaries, but the right has been exercised in

practice through use of community protocols and moratoriums, notably in Canada (ibid). It is also worth noting that in practice, certain processes, whether or not they are derived from international standards requiring FPIC, have provided indigenous communities living close to project sites (e.g. in Norway, Canada and Russia) the opportunity to say 'no' to industrial development, be that through devolved decision-making processes, extensive consultation, or local referendums.

Should FPIC apply to non-indigenous communities?

FPIC is enshrined in instruments that relate to the rights of indigenous peoples, broadly defined. ILO 169 relates to 'indigenous and tribal peoples' while UNDRIP deliberately contains no definition of 'indigenous' as the indigenous peoples involved in its negotiation did not want to restrict the application of the Declaration too narrowly. The principle of FPIC is embedded in indigenous peoples' right to self-determination against a background of centuries of colonial or quasi-colonial resource development policies implemented by central governments. However, to say that FPIC should only apply in the case of a resource development taking place close to an officially recognised 'indigenous' community denies the complexity associated with identifying and defining indigenous communities. Both the term 'indigenous' and the term 'community' are equally problematic.

Some peoples who self-identify as indigenous, or are categorised as indigenous by anthropologists, are not recognised as such by their governments. In some cases non-indigenous communities depend on traditional resource use practices in places that they have inhabited for generations. Some communities practice traditional resource use but may be made up of both indigenous and non-indigenous peoples, related by generations of familial ties. In some cases a fully indigenous 'community' may be split between those who practice traditional livelihoods and those who do not. It would also be unwise to ignore the challenges presented in a country (such as Nepal for instance) where the majority of the population is indigenous. Some groups may also seek to claim indigenous rights and benefits in the context of a development project, even if they do not depend on the local natural resource base.

In acknowledgement of such challenges, consent processes are sometimes required not only for indigenous communities but for all *significantly affected local communities*, for example by the Forest Stewardship Council (FSC) certification scheme (FSC, 2012). ICMM's Position Statement on Indigenous Peoples (ICMM, 2013, p.3) states:

Irrespective of the local context, ICMM members reject any discrimination or disadvantage that may be related to culture, identity or vulnerability and will seek to apply the principles embodied in this position statement to groups that exhibit the commonly accepted characteristics of Indigenous Peoples.

It is also good practice in environmental and social impact assessment to identify 'vulnerable groups' that may be particularly sensitive to the effects of an extractive industry project. The term 'vulnerable groups' might encompass indigenous peoples not living on the land; non-indigenous ethnic minorities; women and young people; the elderly; people with disabilities; and others. These groups all need to be granted particular consideration in a project-related due-diligence process, although this will not extend to the right to grant or withhold consent.

What should an FPIC process look like?

The most important piece of guidance on an FPIC process is that the approach should be agreed in advance with the indigenous communities in question and should respect and follow their preferred ways of making decisions. James Anaya has stated that companies should 'defer to indigenous decision-making processes without attempting to influence or manipulate the consultation process' (Anaya, 2013, p.17). Time is required to reach agreement on who within the community will negotiate with the developers: (a) in order to agree the process; and (b) in subsequent communication leading to a final decision in favour or against the development (see Section 6.4 below).

International standards tend to refer to the need for FPIC consultation and negotiation to be undertaken 'in good faith'. As a legal term, this relates to a process that is characterised by the following: 1) all parties acting honestly; 2) each party respecting the legitimate interests of the other(s); and 3) no party acting in a manner that is arbitrary, capricious or intended to cause harm to the other party.⁴

In advance of negotiations around industrial projects, indigenous communities, particularly in Canada, but increasingly in other countries including Ghana, Indonesia and Colombia, are starting to establish their own FPIC protocols which set the ground rules for how outsiders should communicate with them in relation to a proposed development project (Gibson Macdonald and Zezulka, 2015; Doyle and Cariño, 2013; Yangmaadome *et al.*, 2012; Swiderska *et al.*, 2012). FPIC protocols can also be used as a tool for communities to assert their rights over their own territories and reject unwanted projects (Doyle and Cariño, 2013).

A signed agreement is frequently the final outcome of an FPIC process. This should document all agreed aspects of the negotiation and be legally binding, but also open to review and revision if circumstances change considerably. Indeed Lehr and Smith (2010, p.8) assert that: 'Consent is best understood as a formalised, documented and verifiable social license to operate.'

Two perspectives on an FPIC process

The boxes below summarise the key elements of an FPIC process identified by indigenous peoples and investors respectively. Box 1 summarises these key elements from the perspective of representatives of indigenous communities in Asia-Pacific, Latin America, Africa and North America, interviewed for a project (Doyle and Cariño, 2013). Box 2 describes the activities that the IFC requires its clients to undertake to implement an FPIC process. It should be noted that the IFC imposes separate requirements on its clients to carry out an environmental and social impact assessment and management plan, and to establish a community grievance mechanism.

Both perspectives place emphasis on assessment and documentation. The indigenous perspective has much greater emphasis on the use of customary practices and the need for the indigenous community to define the approach. This perspective also emphasises the need to negotiate an Impact Benefit Agreement as part of the FPIC process, something that is increasingly seen as good practice (Hanna and Vanclay, 2013; Papillon and Rodon, in press). The investor perspective focuses heavily on company responsibility to minimise harm and mitigate investment risks.

Those seeking to implement an FPIC process thus need to be aware of all the regulatory or procedural requirements that they are obliged to follow according to their own particular circumstances. But above all, they need to be willing to discuss the process and agree the terms and conditions of the engagement in advance with authorised community representatives. Transparency and documentation of the process and its outcomes will help to build trust and acceptance in the longer term. Effective, mutually agreed grievance procedures and independent monitoring arrangements will also ensure that any issues are addressed and resolved in a timely fashion.

BOX 1. Indigenous views on key elements of an FPIC process

Important elements of an FPIC process highlighted by representatives of indigenous peoples include the following:

- **Mutual agreement on the FPIC procedures in advance:** Procedures should be determined by the community, based on customary law and practices, or a combination of customary and state-sanctioned decision-making processes, depending on the community's preference.
- **Consensus-building:** This is a process whereby different parts of the community can be included in decision-making in accordance with their customary practices. This may include community general assemblies as well engagement at different levels with different groups within the community. A generous time-frame should be allowed to enable the community to reach consensus.
- **Provision of full information:** (a) about the company and the project, and (b) about the FPIC process and the community's rights in the context of that process.
- **Participatory impact assessments:** These might include environmental, social and human rights assessments and should be carried out with the involvement of the people concerned, taking into account and fully responding to people's comments and concerns, and with prior agreement on who should carry out these impact assessments (external consultants are frequently not trusted).
- **Negotiation of benefit sharing arrangements** that give the community a fair and reasonable share of the benefits from the project. Benefit sharing goes beyond compensation for damages and might include support for job creation, education and infrastructure; a share of the royalties or equity shares in the company. Communities also expect to decide what kinds of social project are to be supported in the community.
- **The signing of an FPIC Agreement:** This may be in the form of a Memorandum of Agreement of an Impact Benefit Agreement between the parties, and should take the form of legal contracts with the force of law.
- **Grievance mechanism:** The agreement should specify channels to address grievances if there is any breach of the agreement. The grievance mechanism(s) should be determined by the community, should respect their customary law and judicial institutions, and the community should identify who will monitor and enforce the agreement. This might be a multi-stakeholder monitoring team combining representatives of the community, the government and other independent bodies.

Source: Based on Doyle and Cariño, 2013, pp.17-25

BOX 2. IFC-defined activities required to implement an FPIC process

According to IFC Performance Standard 7 (clause 14), companies implementing an FPIC process should take the following steps:

- Document efforts to avoid and otherwise minimise the area of land proposed for the project;
- Document efforts to avoid and otherwise minimise impacts on natural resources and natural areas of importance to Indigenous People;
- Identify and review all property interests and traditional resource uses prior to purchasing or leasing land;
- Assess and document the Affected Communities of Indigenous Peoples' resource use without prejudicing any Indigenous Peoples' land claim. The assessment of land and natural resource use should be gender inclusive and specifically consider women's role in the management and use of these resources;
- Ensure that Affected Communities of Indigenous Peoples are informed of their land rights under national law, including any national law recognising customary use rights; and
- Offer Affected Communities of Indigenous Peoples compensation and due process in the case of commercial development of their land and natural resources, together with culturally appropriate sustainable development opportunities, including:
 - Providing land-based compensation or compensation-in-kind in lieu of cash compensation where feasible.
 - Ensuring continued access to natural resources, identifying the equivalent replacement resources, or, as a last option, providing compensation and identifying alternative livelihoods if project development results in the loss of access to and the loss of natural resources independent of project land acquisition.
 - Ensuring fair and equitable sharing of benefits associated with project usage of the resources where the client intends to utilise natural resources that are central to the identity and livelihood of Affected Communities of Indigenous People and their usage thereof exacerbates livelihood risk.
 - Providing Affected Communities of Indigenous Peoples with access, usage and transit on land it is developing subject to overriding health, safety and security considerations.

Source: IFC Performance Standard 7, clause 14

Operational challenges

Some of the main conceptual challenges have been discussed above, such as variable interpretation of the text of international standards; whether or not FPIC equates to a veto right; and whether the right to FPIC should be extended to non-indigenous communities. As is evident from the discussion, the answers are rarely clear-cut. Four broad categories of operational challenge are discussed below.

Uneven application of standards

ILO 169 is legally binding, but has only been ratified by 22 governments. UNDRIP is a UN instrument and has the support of all nations, but is not legally binding, and it may also conflict with national law, which frequently lags behind international law (Lehr, 2014). ICMM's Good Practice Guide on Indigenous Peoples (2015) refers to a statement by the UN Department of Economic and Social Affairs (2008, p.18) that 'in most countries, neither indigenous peoples nor any other population group actually have the right to veto development projects that affect them'. Yet some national constitutions have explicit statements about the primacy of international law and respect for internationally recognised human rights (Peters, 2009).

Similarly, the standards of international financial institutions (IFIs) only apply when the IFI is providing financial support to a particular company or consortium in the context of a particular industrial project. While there is a long list of IFIs that have adopted FPIC (there are 84 Equator Principles Financial Institutions, for instance), there are also many projects that are not financed by IFIs, notably those run by government-funded national oil, gas and mining companies. ICMM has just 23 corporate members, which have signed up to follow their principles. In general, the companies that sign up to voluntary ethical initiatives are larger companies with the funds and the expertise within their companies to engage effectively with communities, and reputations that could be put at risk. Frequently the first companies to visit a community are junior exploration companies, which generally have fewer resources and less experience; significant time and budget constraints; are involved in activities with a high degree of uncertainty; and are hardly known by civil society organisations, so less affected by negative publicity.

Early engagement: the roles of government and companies

ILO 169 and UNDRIP state that governments need to consult and obtain FPIC in the early stages of planning and project implementation. Challenges arise for companies if a government has not met its obligations, and companies need to understand these risks, carry out adequate due diligence, and proactively engage with governments to address the risks (IFC, 2007). If a government has granted a concession to a company without adequate community consultation, this is a major risk for the company, which may invest considerable amounts of money in exploration or even construction only to find they have to abandon the project due to community opposition. In some countries, this may also serve as grounds for the company to sue the government, which is a risk that governments should be aware of (Doyle and Cariño, 2013).

In the early stages of exploration and project planning, there is frequently very little information available on the precise community impacts of a full project, and prior to exploration it will be uncertain whether any resources will be found at all. This underscores the importance of ensuring that consultation and consent processes are repeated when new decisions are made or new information becomes available that could affect a decision, including when a company starts work in a community and when companies change, e.g. between exploration and construction phases of a development. Lack of available information should not be an excuse for not engaging with the local community. Moreover, a community may not require full information to know that they do not want their territories included into a map of possible areas for mineral exploration.

Who should give or withhold consent in a particular case?

According to both ILO 169 and UNDRIP, governments need to consult with indigenous peoples through 'their representative institutions'. This can be interpreted in different ways at different scales. For instance, some Greenlandic leaders have suggested that the existence of its Inuit government itself represents the *de facto* implementation of UNDRIP. Yet when top-down decisions have been made relating to mining close to local communities, the public has protested (Wilson, 2015). So what level is most appropriate for granting consent? Should decisions be made by national- or regional-level

representative bodies (e.g. indigenous parliaments or associations); local municipalities; councils of elders; or small family or clan groupings that manage resource-use activities on the land?

The scale of representation may depend on what is under discussion (e.g. a discrete project or the allocation of mineral exploration licences across a broad area). In some cases the 'local community' is easy to identify, in other cases there may be many affected 'communities' of different sizes, including small family groups who may migrate periodically across the geographical area in question. A social baseline study will be required to identify who may be affected by the decision or proposed activity, including rights holders, customary resource users, and others. Indigenous representatives interviewed for a study on FPIC (Doyle and Cariño, 2013, p.18) observed that:

[C]ustomary practices of debate and deliberation – taking into consideration different points of view – lead to a united and collective decision and ensure that the decision reached is the correct one for the community and is firm and binding on all parties. Dissenting opinions are dealt with in the process of arriving at a consensus such that individuals cannot veto the decision of the whole community. The internal consensus-making component of FPIC processes therefore has to be exhaustive, taking the time to reach consensus in a culturally appropriate manner, and all-inclusive to avoid the potential for the proposed activity to create divisions in the community.

This represents an ideal model of consensus building. However, not all communities find it easy to reach consensus: there may be weak leadership; irreconcilable internal differences; extreme poverty that precludes meaningful participation or prolonged debate (IFC, 2014). Moreover, different formal and customary governing structures may co-exist in one community and so consultation needs to take place at different levels, ensuring inclusivity by age and gender (Tauli Corpuz, cited in Greenspan, 2015). Separate institutions may be established by the community specifically to represent their interests in negotiations with a company, but where outsiders attempt to establish local institutions in parallel with traditional community institutions, these are likely to fail if they do not enjoy community support (Doyle and Cariño, 2013).

Maintaining trust and respecting local decisions

Although information sharing is a basic element of FPIC, it is often problematic. A key challenge lies in whether people trust the information. Communities tend to be wary of factual evidence provided by governments and companies, and the assessments carried out by external consultants. The evidence brought to a consultation also needs to be accessible: not overly technical and not containing too much jargon. It is important for consultation to take place in the language of the indigenous community and with respect for local traditions of information sharing (for example in the case of a predominantly oral society). However, translation of assessment documentation can be very cumbersome and it may be better to combine summarised printed information with in-depth question and answer sessions and focus groups. Communities need time to read, analyse and understand any documentation provided. In some cases, civil society groups can help communities to understand impact assessments but this cannot substitute for direct engagement between community representatives and the experts who have prepared the material (Wilson *et al*, 2016).

A key question raised in relation to FPIC is how to determine whether consent has been granted. The chair of the Inter-American Commission on Human Rights, Rose-Marie Belle Antoine observes that there are considerable gaps in the way that states and companies implement indigenous rights, even where national laws and company policies are in place: 'Companies, like states, often believe that once some kind of consultation has been held – even where there is opposition from indigenous peoples – they can go ahead because there is some sort of "license"' (cited in Greenspan, 2015). With an FPIC process it

is critical not only to mutually agree the process in advance, but also to mutually agree how to know when consent has been given or withheld. The outcome of an FPIC process is frequently a signed agreement containing the agreed conditions such as benefit sharing arrangements, social projects, future consultation schedules and provisions for grievance resolution. Community protocols might also help in setting expectations in advance of negotiating an agreement. Whatever the situation, all parties need to make sure in advance that people are clear on what they are deciding and how.

Consent and mutual trust also need to be maintained over the lifetime of a project. Disagreements, tensions and conflict may arise in the course of the project and should be addressed through an agreed grievance mechanism, with the possibility of mediation in case of an intractable conflict. At certain points, a renewed FPIC process may be required (e.g. in case of a change in project ownership or the construction of a new facility). If the community has withheld consent, then this should also be confirmed officially with a signed FPIC agreement. A minimum time limit could be included during which the state or companies will not make any further approaches to the community.

It may be appropriate to agree alternative actions to support the community decision and ensure no further approaches from industrial planners or companies. For example, an official change in land-use within the regional spatial plan may ensure that traditional lands are taken out of consideration as potential mine sites. Given the potentially restrictive nature of 'protected' land categories, such a decision may also be significant for the community and will therefore require a similar FPIC process.

Recommendations

There is a strong business case for both governments and industry to engage in FPIC processes with communities prior to making policy decisions or undertaking activities that will have a significant impact on indigenous peoples' way of life or their resource base. Yet there is a lack of shared understanding about the interpretation of international ethical standards and how these are implemented in practice. Recommendations on how to build this shared understanding and strengthen the capacities of all stakeholders to engage meaningfully in FPIC processes include the following:

- **Communities should develop their own FPIC protocols:** The process of developing an FPIC protocol allows a community to build consensus and establish their priorities and favoured procedures in advance of any project. Thus they can do it within their own timeframe and without external pressure. For developers, a community protocol provides clarity and reassurance about issues such as appropriate procedures and community representation. Communities at different levels and scales, from the municipality to the nomadic family or clan grouping, can undertake the exercise of developing an FPIC protocol.
- **Government and companies need to build their own capacities:** Project developers are frequently required to use professional judgment. They will need to work with and seek advice from community representatives, anthropologists, lawyers and others to help them make critical decisions. It is extremely important for government and company representatives to spend time in the communities to build their own understanding of the context and to build mutual trust. Busy executives and officials need to make time for this and money should be spared for travel to communities even if budgets are tight.
- **Communities need to be consulted in the earliest stages of industrial development:** It is a big risk for companies to invest in exploration activities if governments have not consulted in advance with local communities. Despite a lack of concrete information on potential opportunities and impacts at this time, it is important to engage communities in the earliest stages. Junior exploration companies need to build the skills and experience to carry out meaningful community engagement.
- **Documenting the process provides transparency, clarity and commitment:** It is important to have a documented process, in order to offer clarity to all

participating parties and to provide evidence and reassurance to third parties such as investors. A document can be used as a reference point in case of future disagreement. An FPIC agreement needs to have the weight of a legal contract, without which it may not be respected or trusted. Parties should also be able to revisit the agreement and review and revise it if there are significant changes in circumstances.

- **A 'No' needs to be respected:** If the outcome of an FPIC process is a 'No', then this should be formally documented and respected. The agreement should stipulate a minimum period during which no further approaches will be made to the community. An alternative land-use designation may be sought to make the decision permanent. This is likely to require a further FPIC process if that option was not part of the original negotiations.
- **Consent needs to be maintained:** Maintaining consent means having agreed channels for resolving grievances and enabling access to remedy in case of breach of agreement, with mediation if required. Significant changes in a project, such as change of ownership or construction of a new facility, may require a renewed FPIC process.
- **Build understanding case by case:** A true understanding of how FPIC works is only possible in the particular context of a given situation. Case studies of how FPIC is sought, granted or withheld in practice are therefore extremely important, including anthropological research based on fieldwork, and the analysis and publication of legal case history.

The value of FPIC as a respectful, deliberative process of meaningful engagement with indigenous and local communities is increasingly well understood. FPIC is a legal requirement in international hard and soft law, some national law, and some industry good practice standards. It is also a philosophy of respectful community engagement. Applying the 'spirit of FPIC' in all community engagement will help companies and government agencies to build trust and avoid conflict. It will also help to address operational challenges such as the uneven application of standards, and the difficulties of interpreting hard and soft law in different situations. Whatever the particular context, communities deserve to be respected, to have their voices heard and be able to determine the direction of their own development if industrial activities are planned to take place on the lands that they traditionally own and use.

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1. The Equator Principles Financial Institutions require adherence to IFC Performance Standards in so-called Non-Designated Countries. In Designated Countries, they require adherence to relevant host country laws, regulations and licences relating to environmental and social issues. For more on the Equator Principles see: <http://www.equator-principles.com/>

2. See: <http://www.ebrd.com/home> and <http://www.iadb.org/en/inter-american-development-bank.2837.html>

3. See: <http://www.worldbank.org/en/news/press-release/2016/08/04/world-bank-board-approves-new-environmental-and-social-framework>

4. Source: <http://www.lexology.com/library/detail.aspx?g=02bfc70b-374f-4d4c-adfd-1d0cad9f48fe>

Acronyms and abbreviations

APF	Asia Pacific Forum of National Human Rights Institutions
FPIC	free, prior and informed consent
FSC	Forest Stewardship Council
ICMM	International Council on Mining and Metals
IFC	International Finance Corporation
ILO	International Labour Organisation
OECD	Organisation for Economic Cooperation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights.
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UNGPs	UN Guiding Principles on Business and Human Rights

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