

SOCIAL PRACTICE

F O R U M



FREE, PRIOR, AND INFORMED CONSENT (FPIC)

A Primer: Lessons from the Field (First Edition, 2020)

Compiled by

The Social Practice Forum (SPF) members who form the FPIC working group include (in alphabetical order) Mafalda Arias, Janet Fishlock, Dana Frye, and Luc Zandvliet, all of whom volunteered considerable amounts of time and energy over the past three years in the development of this document.

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About the Social Practice Forum

The Social Practice Forum (the Forum) was established to provide active leadership on social performance. The Forum's vision is that business, civil society, communities, and government can transform natural resource endowments to create enduring, positive social, environmental, and economic outcomes.

The Forum contributes to this vision by creating a space for members to pool their collective experience, advance ideas and promote progressive practices. Currently, SPF has a membership of almost 60 social performance practitioners drawn from academia and the private and not for profit sectors, and who are based in countries around the world.

More can be found about us at <https://socialpracticeforum.org/>.

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ACRONYMS

AFN	Assembly of First Nations
EIS	Environmental Impact Statement
ESIA	Environmental and Social Impact Assessment
ESF	Environmental and Social Framework
ESS	Environmental and Social Standards
IBA	Impact Benefit Agreement
IACHR	Inter-American Commission on Human Rights
ICMM	International Council on Mining and Metals
IFC	International Finance Corporation
ILO	International Labour Organization
FPIC	Free, Prior and Informed Consent
FPP	Forest Peoples Programme
FSC	Forest Stewardship Council
GN	Guiding Notes
GFN	Good Faith Negotiation
MoU	Memorandum of Understanding
NEPA	National Environmental Policy Act
NGO	Non-governmental Organization
PS	Performance Standards
OECD	Organization for Economic Co-operation and Development
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNSR	United Nations Special Rapporteur

Chapter 1: INTRODUCTION

1.1 ABOUT THIS PRIMER

The Social Practice Forum (the Forum)¹ established a Free, Prior and Informed Consent (FPIC) Working Group with the objective of contributing practical tools and resources to support social performance around FPIC. As social practitioners, our day-to-day work is intimately linked to the emergence and application of international good practice and the transition to more inclusive decision-making that demonstrates respect for Indigenous rights and human rights. We understand first-hand the challenges and complexities that working toward, achieving, and maintaining free, prior, and informed consent represents and the ambiguities that continue to exist.

The FPIC Working Group process began with a compilation of our experiences with company responses to key questions we often hear about FPIC, followed by a compilation of available resources and practical examples from the field and from conversations with Indigenous people. **This document is the first output of the working group. It aims to document and share our collective knowledge of, and exposure to, company efforts to deal with FPIC.**

The questions included and examples highlighted are meant to support practitioners in their work with companies in planning for and applying FPIC and finding clear directions in unclear situations. It is intended to be a living document that will evolve as the Forum's membership grows and as we gain additional experience on the topic. While most of the practical examples presented in this document were gleaned from work the Forum's members have done with companies, we hope to gather more examples from Indigenous peoples for subsequent iterations and, thus, welcome all feedback to this end.

EXPLANATORY NOTE

THIS PRIMER:

- Uses real examples, shared by SPF members or available publicly, that describe existing approaches and efforts.
- Provides practical ideas for practitioners on how to address tough questions.
- Constitutes a living document that will continue to evolve into a collection of useful examples.

THIS PRIMER:

- Is not an FPIC "how-to" guide.
- Does not aim to determine an exact definition of FPIC, consent or any other concept that should be agreed between the parties.
- Does not assess the effectiveness of approaches and efforts presented here.
- Does not weigh in on legal elements or discussions.

¹ The Social Practice Forum is a non-profit organization established in 2014 to provide active leadership on social performance. Further information can be found on our website <https://socialpracticeforum.org/>.

THIS DOCUMENT CONSISTS OF THE FOLLOWING SECTIONS:

Chapter 1: Introduction

Chapter 2: Defining FPIC: What it is and what is not

Chapter 3: Identification of Indigenous people and the Obligation to Achieve FPIC

Chapter 4: FPIC Triggers

Chapter 5: Implementing FPIC

Chapter 6: Demonstrating FPIC

Chapter 7: Next Steps

Chapter 8: Bibliography

Sections Two through Six each consist of a series of questions that practitioners have been confronted with in the field. For each of these questions we point to existing guidance and, where possible, provide practical examples from project work with companies to offer insight and, in some cases, illustrate the tensions and on-going challenges.²

1.2 BACKGROUND CONTEXT

Although the underlying principle that people should be free to make choices about the way they are governed and what happens on their lands has existed for at least as long as recorded history, the notion of ‘Free, Prior and Informed Consent’ (FPIC) is a much more recent concept.

There are numerous international agreements that underpin the basic tenets of FPIC, beginning with the 1945 Charter of the United Nations (UN) that articulates the principles of equal rights and self-determination³. However, it is the ILO Convention 169 (1989) and the more recent UN Declaration on the Rights of Indigenous People (UNDRIP 2007), which recognize FPIC as a process that safeguards the rights of Indigenous people. These international conventions, which numerous countries have ratified, are aimed at holding governments to account.

Moreover, with the evolution of international agreements over the past decade and a half, there has been an accompanying shift in international standards and in the lending requirements of major project financiers⁴. Increasingly, project developers must also demonstrate that they have upheld these rights and considered local people’s interests and concerns from initial project inception through de-commissioning⁵. In projects that could affect Indigenous people, this is not simply about documenting efforts to consult, but providing evidence of efforts to achieve consent. In this regard, the International Finance Corporation’s (IFC) Performance Standard (PS) 7 on Indigenous Peoples has become an important source of guidance for companies and practitioners around FPIC.

But we urge you to go further, to think outside the box, and to raise the bar. We firmly believe that the role of social practitioners is to help companies and communities jointly overcome the challenges around achieving FPIC. In demanding and complex situations, the burden is on the company (and, by extension, on us as practitioners) to find a

² Please note that the identities of the parties involved in the practical examples cited throughout this document are kept anonymous, unless they are drawn from publicly available sources of information

³ Additionally, in their shared Article 1, both the International Covenant on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966) recognize peoples’ right of self-determination and their prerogative to “freely dispose of their natural wealth and resources...” Article 1 also establishes the obligation of signatory states to promote and respect this right of self-determination.

⁴ See 2019 changes to the Equator Principles which bring more project activities into scope, require project ESAs to include an assessment of human rights and increase requirements in relation to respecting the rights of Indigenous Peoples: <https://www.globalelr.com/2019/12/equator-principles-association-adopts-equator-principles-4/>.

⁵ IFC Guidance Note (2012) GN.1 page 2 states ‘in recognition of this emerging business environment that private sector projects are increasingly expected to foster full respect for the human rights, dignity, aspirations, cultures, and customary livelihoods of Indigenous Peoples’.

way to make it work. We challenge you to be guided by the spirit of FPIC and to go beyond the minimum requirements.

1.3 WHO CAN USE THE PRIMER?

It was our intent from the outset that this primer provides useful guidance material from a practitioner's perspective to other social performance colleagues both within and outside of SPF. This includes practitioners with limited or no experience with FPIC, in addition to those who provided us with practical, first-hand experience from the field.

We believe however, that the concept, understanding and implementation of FPIC is of significant interest not just to practitioners, but also members of project-affected communities, companies, and the financial institutions we work with, which is why we have made this document publicly available.

1.4 HOW WAS THE PRIMER DEVELOPED?

Our approach to developing this primer consisted of an initial set of brainstorming sessions within the working group to compile key questions related to FPIC. The initial 35 questions and a proposed table of contents were subsequently workshopped within the SPF membership at our annual meetings in Europe and Canada and revised accordingly. Concurrently, the working group undertook desk-top research and conducted individual interviews with practitioners and Indigenous people to share our questions and solicit practical examples from the 'field'. A first draft of the primer was emailed to the SPF membership, followed by a series of virtual meetings at which members were invited to share their feedback on the draft. Revisions to the document were made and a final draft distributed to the membership for review. This version of the document was formally approved by the SPF Stewards at their January 5th, 2021 meeting.

Chapter 2: DEFINING FPIC: WHAT IT IS AND WHAT IS NOT

In this section we explore how FPIC is described and defined through available guidance and some specific project examples.

2.1 WHAT IS FPIC?

There are different perspectives on what exactly FPIC is – as the questions explored throughout this document demonstrate. Some civil society groups such as Oxfam⁶ consider FPIC to be an extension of well-implemented engagement, whereas others, including RESOLVE⁷, argue that it constitutes a fundamentally different approach that starts from recognition of people’s customary land rights and right to self-determination.

As for companies, in our experience many of them use the approach to FPIC that the IFC lays out in its 2012 Performance Standards and that the International Council on Mining and Metals (ICMM) echoes in its 2013 Position Statement; this approach views FPIC as an extension of consultation that is premised on good faith negotiation to achieve broad-based support for a project (discussed below).

On the other hand, many communities see FPIC as well beyond good engagement (and beyond even very good consultation), extending far beyond both in terms of process and outcome and, ultimately, premised on a recognition of the right to self-determination. There is on-going debate around whether FPIC is a process that safeguards Indigenous **rights** or whether it safeguards populations seen as **marginalized** or **vulnerable**. While the consensus of mechanisms such as the ILO 169 and UNDRIP, as well as how these have been interpreted by expert bodies, confirms the view of FPIC as a process that safeguards substantive rights, much of industry and most countries have yet to embrace this perspective. Rather, they tend to see FPIC as a nice way to protect marginalized or vulnerable populations instead of seeing it as a fundamental mechanism for respecting Indigenous peoples’ rights.

The Social Practice Forum believe that the rights-oriented approach is more consistent with the spirit of FPIC as evidenced by the standard bearers’ (UNDRIP, ILO) embrace of this concept. While we acknowledge that it will be difficult to apply in certain contexts, we urge our members to strive to do so.

Existing Guidance

Neither ILO 169 nor UNDRIP provides an explicit definition of FPIC. However, a number of sources do provide some guidance.

⁶ <https://www.oxfam.org/en/research/testing-community-consent-tullow-oil-project-kenya>

⁷ <https://www.resolve.ngo/docs/merian-expert-advisory-panelfinal-report636870303537629126.pdf>

IFC

While IFC Performance Standard 7⁸ acknowledges that definitions and practices around FPIC are ‘evolving’, it does provide some guidance to project proponents seeking to align with the PS.

“FPIC builds on and expands the process of informed consultation and participation described in Performance Standard 1 and will be established through good faith negotiation between the client and the Affected Communities of Indigenous peoples. The client will document: (i) the mutually accepted process between the client and Affected Communities of Indigenous peoples, and (ii) evidence of agreement between the parties as the outcome of the negotiations. FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree.”

The Guidance Note for PS7 describes FPIC as encompassing both a *process* and an *outcome*, indicating that “the process builds upon the requirements for [informed consultation and participation] (which include requirements for free, prior and informed consultation and participation) and additionally requires Good Faith Negotiation (GFN) between the client and Affected Communities of Indigenous Peoples. The outcome, where the GFN process is successful, is an agreement and evidence thereof”.⁹

The Guidance Note further defines the principles of engagement with Indigenous people to include being voluntary and **free** of any external manipulation, interference or coercion, and without intimidation. It requires a project proponent to ensure Indigenous people are **informed** through having access to relevant project information **prior** to any decision-making that will affect them, and that the process considers existing social structures, leadership, customary institutions and decision-making processes. It highlights the importance of recognizing whether patriarchal traditions and social norms and values exist which may limit women’s participation in decision-making (as well as people who are ‘marginalized’ or ‘vulnerable’) and the need to protect and respect the rights of Indigenous women.¹⁰

SOME INPUT FROM INDIGENOUS LEADERS IN CANADA

- FPIC implies that Indigenous people will have a role in decision-making and design of a project, to incorporate their values and interests.
- FPIC is a process that protects a right. It recognizes the right of self-determination of people over their land, resources and cultural heritage thereby setting the stage for joint decision-making and implementation.
- Companies should clearly understand what FPIC means to the specific Indigenous people with whom they are working.

ICMM

Like IFC, the International Council on Mining and Metals (ICMM) views FPIC as both a process and an outcome. ICMM’s 2013 Indigenous Peoples and Mining Position Statement¹¹ requires its members to:

⁸ https://www.ifc.org/wps/wcm/connect/3274df05-7597-4cd3-83d9-2aca293e69ab/PS7_English_2012.pdf?MOD=AJPERES&CVID=jiVQLD

⁹ <https://www.ifc.org/wps/wcm/connect/9baef8f6-9bd9-4d95-a595-7373059081d4/GN7English2012.pdf?MOD=AJPERES&CVID=meSDVqT>

¹⁰ IFC PS 7 Guidance Note (2012) page 7.

¹¹ <https://www.icmm.com/en-gb/members/member-commitments/position-statements/indigenous-peoples-and-mining-position-statement>

- **Regarding the process:** “adopt and apply engagement and consultation processes that ensure the meaningful participation of Indigenous communities in decision making, through a process that is consistent with their traditional decision-making processes and is based on good faith negotiation.”
- **Regarding the outcome:** “work to obtain the consent of Indigenous peoples where required¹² by this position statement”.

FAO

Whereas the language used by IFC and ICMM can be vague and subjective (“work to obtain consent”), the United Nations Food and Agricultural Organization (FAO) provides a bit more clarity with its definitions:¹³

- **“Free** refers to a consent given voluntarily and without coercion, intimidation or manipulation. It also refers to a process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, expectations or timelines that are externally imposed.”
- **“Prior** means that consent is sought sufficiently in advance of any authorization or commencement of activities, at the early stages of a development or investment plan, and not only when the need arises to obtain approval from the community.”
- **“Informed** refers mainly to the nature of the engagement and type of information that should be provided prior to seeking consent and also as part of the ongoing consent process.”
- **“Consent** refers to the collective decision made by the rights-holders and reached through the customary decision-making processes of the affected Indigenous Peoples or communities. Consent must be sought and granted or withheld according to the unique formal or informal political-administrative dynamic of each community. Indigenous peoples and local communities must be able to participate through their own freely chosen representatives, while ensuring the participation of youth, women, the elderly and persons with disabilities as much as possible.”

The Social Practice Forum recommends that its members use the FAO definitions above as the working definitions of the elements of FPIC and urge our members to bear in mind FAO’s further point that, *“All elements within FPIC are interlinked, and they should not be treated as separate elements. The first three elements (free, prior and informed) qualify and set the conditions of consent as a decision-making process...”*

Practical Examples

Example 1 (Rights-based perspective) – Resolve FPIC Advisory Panel, Merian Case Study, Suriname:¹⁴

The FPIC Advisory Panel made a clear distinction between ‘good engagement’ and FPIC by putting engagement efforts into a human rights – and a commercial rights – framework. Taking such an approach has a number of implications. In the words of the Advisory Panel:

¹² This is clarified later in the position statement: ‘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.’

¹³ *Manual for Project Practitioners. Free Prior and Informed Consent. An indigenous peoples’ right and a good practice for local communities* (FAO, 2016). This document indicates, “The definitions below build on the elements of a common understanding of free, prior and informed consent endorsed by the United Nations Permanent Forum on Indigenous Issues (UNPFII) at its Fourth Session in 2005, and from the UNREDD Programme Guidelines on Free, Prior and Informed Consent”.

¹⁴ <https://www.resolve.nqo/docs/merian-expert-advisory-panelfinal-report636870303537629126.pdf>

- “How the company views the Pamaka’s [the Maroon tribe with whom the company negotiated] claim to land ownership determines the basis upon which negotiation occurs. If the company accepts that the Pamaka have land rights, then the Pamaka become visible as landowners with economic interests with whom the company must engage. Customary land ownership would have provided justification for the Pamaka to negotiate a stronger front-end, benefit-sharing arrangement, such as an equity stake in the project.”
- “While consent agreements do not require the negotiation of an equity stake, and benefit-sharing can take many forms, land ownership provides a more robust framework for meaningful benefit-sharing in a major resource project.”
- “When companies recognize customary land ownership, the nature of consent agreements are stronger because the terms become tied to those rights. This moves beyond achieving good relations with local people and applying the principles of FPIC to the degree that a company chooses.”

Example 2 (Mine closure) – In this case, the challenge was determining what the mine area should look like before the company left. Regulators had certain standards, such as those focused on environmental issues, that the company understood. The community members’ ideas of closure differed significantly from those of the regulators and the company. The community was most interested in whether the land had been healed and whether their relationship to the resources could be re-established. Some of their questions included, can we get back to where we were before this land became so degraded? Can we hold our ceremonies on this land again? Can we teach our children to hunt and fish on this land? In the end FPIC was ‘achieved’ through extensive engagement that resulted in a modified closure plan that addressed the community’s issues and concerns with very specific and measurable targets and with significant involvement of tribal elders.

Example 3 (Land acquisition and resettlement) – For a project in South America where the company and consultants involved believe they were successful in achieving FPIC for land acquisition and resettlement, they attributed it to spending time upfront building constructive relationships. This involved informing people of their rights as Indigenous people, their rights in relation to the IFC Performance Standards, and the company’s responsibilities and obligations with respect to international standards. Gaining access to the land took almost five years and required extensive lead-time to address people’s concerns with mining generally, and the project and its impacts specifically. It was only when people felt assured that the company would respect and protect their rights that discussions on accessing the land could move forward. The resettlement process established negotiating tables. Where the negotiating process was agreed to, similar information was being shared across all tables, and all discussions were recorded. Once all resettlement issues were discussed and agreements reached regarding how the land would be accessed and the people resettled, a detailed Resettlement Action Plan was drafted, reviewed and finalized by representatives of the affected people. At a public event where all affected people were invited, the Resettlement Action Plan was signed with a notary present. As one of the leaders said to the company at this event, this document is the ‘bible’, and if you comply with it, we will continue to support your project. To ensure this happened, joint implementation and oversight committees between the company and the affected communities were established to make sure the company lived up to the agreements throughout the resettlement process. The company and project staff defined FPIC in this situation as “a collective expression of support by displaced Indigenous peoples, reached through an independent and self-determined decision-making process undertaken with sufficient time, in accordance with cultural traditions, customs and practices and in compliance with national law, as appropriate”.

2.2 DOES “CONSENT” MEAN UNANIMITY? A MAJORITY VOTE? SOMETHING ELSE?

Companies would often like to have a straightforward definition of “consent” that does not lend itself to differing interpretations and can be pointed to as incontrovertible evidence that an agreement was reached. We are often asked, what is the threshold for consent? Is it consent if 50% +1 of the community votes in favour of the project? Or is it consent only if every member of the community agrees? This generally misses the point of the FPIC process and the

joint definition of an acceptable outcome, as referenced in the FAO definition of ‘consent’ previously outlined in Section 2.1.

These are also questions that only the parties involved can answer. It has been our experience that the affected Indigenous people and the project proponent (and/or government) together determine what constitutes “consent”, usually by understanding how the Indigenous group reaches consensus amongst itself and by defining parameters for consent for the particular situation. To this end, we have seen companies explore and document the processes by which an Indigenous group typically takes decisions over aspects that affect the entire community and consider the extent to which these processes are inclusive of all Indigenous community members, and respectful of internationally recognized human rights. These two key elements – how communities take decisions and what is required to respect human rights – together can be used to determine a mutually acceptable definition of consent in the context of a resource extraction project. Companies could start by asking the question “What is the process by which this Indigenous community typically takes decisions that affect its members?”

One point of clarification is necessary related to from whom consent should be obtained. For example, if a project affects only a few Indigenous families living on their community’s traditional lands and they are happy with the company presence, should that not be considered consent? However, while individual rights to land are not incompatible with Indigenous collective rights – and we often see individual families exercising communally awarded use or ownership rights over parcels of communally owned land – where land is communal traditional land, any agreement needs to have the blessing of the larger community or group rather than only of individually affected families.

PRACTITIONER NOTE

It is critical to correctly identify all the people and groups whose rights might be affected by a project. If a person or a group’s rights stand to be affected, they have standing to demand protection of those rights in the FPIC process.

Existing Guidance

IFC PS 7 is clear in this regard and states that “FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree”. In paragraph 33 the Guidance Note to IFC Performance Standard goes on to explain that, “*the FPIC process and outcome do not require unanimous support from all members of Affected Communities of Indigenous Peoples. FPIC should be viewed as a process that both allows and facilitates Affected Communities of Indigenous Peoples to build and agree upon a collective position with regard to the proposed development cognizant that individuals and groups within the Affected Communities may retain differing views on various issues pertaining to the proposed development. Such collective “community consent” should derive from the group of Affected Communities as a whole, representing their view vis-à-vis the proposed development.*”

PRACTITIONER NOTE

Practitioners and the companies they work with should not knowingly fuel divisions and conflict within or between communities. There will almost always be people who object to a project. Sometimes they will even be a majority. Sufficient attention should be paid to the traditional decision-making structures independent from the proposed project. If, for example, the tradition is for consent-based decision making, then the practitioner should encourage the company to respect and work with those traditions.

Practical Examples

In some cultures, consent means the approval of the Chief and Council, and/or the council of Elders, a decision that must then be confirmed in a public meeting with the broader community. In other contexts, it is about a show of hands or a nod of heads in a public meeting. Some indigenous groups require the formalization of their consent through ceremonial processes of shared food and drink. Companies leading efforts on FPIC have learned that "the requirements and expectations for companies trying to operationalize FPIC are often inconsistent and unclear across different contexts."¹⁵ Thus, practitioners must work with the affected people to establish a mutually acceptable form of expressing consent.

Example 1: In India, consent is defined by law in the Forest Rights Act and the Land Acquisition Act which state that consent requires that a public meeting be held in the presence of certain officials and that 80% of the people present vote in favour of project development. In practice, simply meeting this law has not necessarily served to respect indigenous rights, perhaps in part, since it establishes a blanket requirement (80% in favour) rather than working with the particular group(s) of affected people to understand what consent means to them. In one case, the relevant ministry approved a project without the company having engaged with Indigenous groups living in the area. Local activism drew international attention and, ultimately, major international investors withdrew their support from the project.

Example 2: In Suriname, one Maroon tribe we worked with defined consent as an agreement signed by all the head captains and confirmed during a public meeting. Other tribes in Suriname, particularly those with stronger rural presence and lower literacy levels, understand consensual agreements to be established through ceremonial processes, rather than written documents. Furthermore, these processes may change rapidly if a community is undergoing urbanization that stigmatizes old ways and encourages westernized agreement processes.¹⁶

Understanding contextual conditions through meaningful dialogue is critical to both defining and seeking consent from an Indigenous community.

Example 3: An extractive company was doing increasingly intensive exploration work in the remote territory of a pastoral tribe. The company wanted the tribe's consent but, being semi-nomadic, the affected tribe's method for reaching consensus on land use takes weeks and sometimes months, allowing time for tribal members to cycle back to a central location. The company's timeline for negotiating access for exploration activities was much shorter than the time required for tribal consensus. So, the company allowed certain individuals who claimed to represent the tribe to deliberate and make decisions. The company's senior Corporate Social Responsibility advisor, who was from a different tribe, advocated for this approach even though it was clear that the self-appointed representatives were promoting their own interests and those of individual clans, thus undermining the communal nature of the tribe's land management traditions.

2.3 DOES FPIC CONFER THE RIGHT TO A VETO?

People often ask if FPIC constitutes a right to veto¹⁷ a project and if withholding consent is the same as a veto. The principal international bodies and mechanisms that are working to advance FPIC today generally agree that the right

¹⁵ https://s24.q4cdn.com/382246808/files/doc_downloads/operations_projects/south_america/documents/Sabajo_Project_Public-Disclosure-abd-Consultation-Plan.pdf

¹⁶ Suriname has compelling examples of this, with researchers documenting situations where even the Pamaka language went from being an important cultural marker to a sign of backwater in the 10-year postwar period, as Pamaka people began seeking jobs outside of their riverine villages. Migge, B and Légise, I. *Exploring Language in a Multilingual Context: Variation, Interaction and Ideology in Language Documentation*. Cambridge 2013.

¹⁷ Veto is defined as 'reject, quash or stop a decision/project'.

to withhold consent or say ‘no’ to a project does not confer the right to veto that project in most cases. However, this alone focuses more on the “letter of the law” than on the “spirit of the law”. In our experience, both international good practice and a well-developed risk management approach guide us away from focusing on whether veto power exists and instead guides us in the direction of working toward consent through the other three elements of FPIC (free, prior and informed).

Existing Guidance

In a 2009 report¹⁸ to the Human Rights Council, the United Nations Special Rapporteur (UNSR), James Anaya, reminds us that UNDRIP “establishes that, in general, consultations with Indigenous peoples are to be carried out in “good faith ... in order to obtain their free, prior and informed consent” (art. 19).” The Special Rapporteur then states that this provision “should not be regarded as according Indigenous peoples a general “veto power” over decisions that may affect them, but rather as establishing consent as the objective of consultations with indigenous peoples.”

Similarly, in a 2013 handbook on ILO 169¹⁹, the International Labour Organization states that “As stipulated by Article 6(2), consultations must be undertaken in good faith and with the objective of obtaining agreement or consent. In this sense, Convention No. 169 does not provide Indigenous peoples with a veto right, as obtaining the agreement or consent is the purpose of engaging in the consultation process and is not an independent requirement.” However, the ILO immediately qualifies this by indicating that “even if the consultation process has been concluded without agreement or consent, the decision taken by the State must still respect the substantive rights recognized by the Convention, e.g. Indigenous peoples’ rights to land and to property. The more severe the potential consequences are for the concerned Indigenous peoples, the greater is the importance of obtaining agreement or consent. If, for instance, the continued existence of an Indigenous culture is at stake, the need for consent to proposed measures is more important than in cases where decisions might result in minor inconveniences, without severe and lasting consequences”.

PRACTITIONER NOTE

The greater the risk to Indigenous people’s substantive rights, the more empowered they should be to stop or impose significant requirements on a project. A full and informed understanding of project impacts and level of risk to Indigenous people’s rights is key to determining a practitioner’s advice to the company with regard to its compliance with corporate, lender or other requirements and risk exposure.

A recent study²⁰ by the UN Human Rights Council’s Expert Mechanism on the Rights of Indigenous Peoples points out that “arguments of whether indigenous peoples have a “veto” in this regard appear to largely detract from and undermine the legitimacy of the free, prior and informed consent concept”.²¹ For both the UN Special Rapporteur and the Expert Mechanism, the crux of the matter is the quality and appropriateness of each element in the FPIC process – free, prior, informed and consent.

Despite this, and on a more immediate and practical level, while the study by the Expert Mechanism makes the point that UNDRIP does not explicitly give Indigenous people a veto right, they consider that “a State or stakeholder that decides to proceed after consent is withheld moves into a legal grey area and exposes itself to judicial review and

¹⁸ James Anaya, *Report to the Human Rights Council, A/HRC/12/34, (14 July 2009)*.

¹⁹ <https://www.ilo.org/wcmsp5/groups/public/---ednorm/---normes/documents/publication/wcms205225.pdf>

²⁰ *Free, prior and informed consent: A human rights-based approach, Study of the Expert Mechanism on the rights of Indigenous People (2018)*.

²¹ *Ibid*, page 8.

other types of recourse mechanisms, potentially including international, regional, and national tribunals, and by indigenous peoples themselves”.²² They mention that a number of countries and stakeholders have endorsed a policy line not to proceed following a “no” by Indigenous peoples and specifically mention the UN Global Compact’s guide on UNDRIP²³ that advises its members not to proceed if consent has been withheld by Indigenous people.

It is worth noting that there are two specific instances in which international law (i.e. UNDRIP) is clear that Indigenous peoples do hold a right to veto: when the relocation of Indigenous peoples from their traditional lands is proposed or when the storage of toxic waste within Indigenous lands is contemplated.

Practical Examples

Example 1: A company in Australia had two mines closely located to each other. One mine is operational whereas the other mine (a world class deposit) was in the process of being permitted. Local Indigenous communities were not pleased with plans to open a second mine and had made their voices heard at every opportunity during engagement related to the operational mine. Relations between the company and community continued to deteriorate, until it became difficult to operate the first mine due to protests related to plans for the second mine. At that point, the company made a public commitment that it would proceed with the second mine only with the consent of the local Indigenous groups.²⁴

²² *Ibid* page 9.

²³ <https://www.unglobalcompact.org/docs/issuesdoc/humanrights/IndigenousPeoples/BusinessGuide.pdf>

²⁴ See <https://www.energyres.com.au/sustainability/progressive-rehabilitation/jabiluka1/>

Chapter 3: IDENTIFICATION OF INDIGENOUS PEOPLE AND THE OBLIGATION TO ACHIEVE FPIC

In this section we discuss the identification of Indigenous people, highlight some of the complexities around establishing identity, and give examples of how we have seen some of these issues addressed.

3.1 HOW DO YOU DETERMINE IF A GROUP IS INDIGENOUS?

To many companies, whether or not groups should be considered Indigenous, and thus whether FPIC might be required, is not always clear. This is especially the case when national authorities do not recognize a particular people as Indigenous or when the group's attachment to the land and / or their ancestral customs have been lost due to forced displacement and assimilation.

Existing approaches have often been highly restrictive in identifying communities as Indigenous, with adverse outcomes for both communities and companies. Restrictive definitions can prove problematic over time, as Indigenous communities self-identify and seek redress from, for example, bodies such as the IFC's independent complaint ombudsman (the CAO) or draw the attention of the international community.

PRACTITIONER NOTE

The role of the practitioner is to help the company work through the challenges of respecting the rights of Indigenous people even if the state does not recognize them as such (and even if they do not self-identify as this can change over time). Ultimately, it is important to avoid arguing whether or not the group is indigenous – it is typically better to guide the company to respect their rights, including FPIC, without outraging the state.

Existing Guidance

There is no universally agreed definition of "Indigenous", in part due to the complexity of issues relating to identity. Any practical discussion of FPIC must acknowledge this. Companies and the practitioners who work with them generally follow the guidelines provided by the UN and IFC in understanding who is 'Indigenous'. Their takes on this topic are summarized below.

The United Nations Permanent Forum on Indigenous Issues

The United Nations has elected not to establish an official definition of “Indigenous” in part because the UN system prioritizes the fundamental criterion of self-identification rather than identification by a third party. Nonetheless, the UN’s Permanent Forum on Indigenous Issues (UNPFII) uses the following working definition developed in 1982:²⁵

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

This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:

- a) Occupation of ancestral lands, or at least of part of them;
- b) Common ancestry with the original occupants of these lands;
- c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);
- d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
- e) Residence in certain parts of the country, or in certain regions of the world; and
- f) Other relevant factors.

On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group).

“This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.”

PRACTITIONER NOTE

There have been examples where the community decides to deny or revoke the membership or even 'indigenouness' of individual members. This can be discriminatory and a violation of the individual's human rights. While a company needs to be careful not to intervene in complex socio-legal questions about communal versus individual rights, the company must respect human rights. In other words, communal denial of individual membership, inhibiting enjoyment of the rights of membership, is, on its face, a human rights question that needs to be well understood before taking any action that condones that exclusion.

²⁵ By Jose R. Martinez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in <https://www.un.org/esa/socdev/unpfii/documents/MCSxxixxiie.pdf> (para. 379-382).

IFC PS 7 states that the term ‘Indigenous peoples’ refers to a distinct social and cultural group possessing the characteristics listed below, in ‘varying degrees’:

- Self-identification as members of a distinct indigenous cultural group and recognition of this identity by others;
- Collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories;
- Customary cultural, economic, social, or political institutions that are separate from those of the mainstream society or culture; or
- A distinct language or dialect, often different from the official language or languages of the country or region in which they reside.²⁶

PRACTITIONER NOTE

Maroons/Quilombolas are examples of populations who may pursue tribal and traditional forest-based livelihoods and cultural processes that they reinstated after escaping enslavement. In practice, international instruments generally treat Maroons and Quilombolas in substantively the same way as they do other types of Indigenous and tribal peoples.

Moreover, when discussing its scope, PS 7 is explicit that it may “apply to communities or groups that have lost collective attachment to distinct habitats or ancestral territories in the project area, occurring within the concerned group members’ lifetime, because of forced severance, conflict, government resettlement programs, dispossession of their lands, natural disasters, or incorporation of such territories into an urban area”.

Practical Examples

Example 1: The representatives of a joint venture (JV) between a government and a private sector mining company argued that, while the international community considered a group of people to be Indigenous, the JV did not believe they fit the criteria. They claimed that the people did not self-identify as Indigenous, had lost their language and culture, were nomadic and so had no attachment to the land, and that their presence on the land in question was simply a result of occasional employment there. Project consultants advised that the JV’s assertion should be fully explained and verified on the ground, and recommended they undertake a study to assess the situation and that this study should involve the group in question and outside experts. The company followed this advice.

Example 2: A company working in a country where ILO 169 is in force and where the regulatory framework identifies the groups that are officially recognized as Indigenous, identified the presence of a group of people on land that the project would directly and significantly impact. Since this group was not identified as Indigenous by the existing regulatory framework, the company did not identify the people as Indigenous or the land as Indigenous land. Thus, the company did not pursue FPIC. As a result, the group brought a court case against the company alleging violation of their rights. This led the courts to delay the project. During the course of subsequent studies and investigations, the

²⁶ IFC PS 7 (2012) page 2.

group was determined to meet all the hallmarks of an Indigenous group (per both the FAO/UNPFII and IFC descriptions above).

PRACTITIONER NOTE

A Human Rights Impact Assessment (or other study) provides an opportunity to have independent experts determine if affected populations are Indigenous. Especially when a human rights focus is integrated into the Environmental and Social Impact Assessment (ESIA), in some cases it still allows for prior consent (e.g., in the case of a pipeline project or the construction of a facility). However, where exploration activities are involved and irreversible impacts on land have already occurred, the ESIA may be too late to obtain prior consent. Note that ESIA's that comply with regulatory requirements are typically inadequate to respect Indigenous rights. The practitioner bears the burden of designing and implementing processes that covers the full scope of these rights.

Example 3: In some parts of South America, to be considered Indigenous the government has instituted a 'certification' process. This process can be time-consuming and expensive. Many people do not bother, in part because they feel there is a stigma attached to being labelled 'Indigenous' and prefer to refer to themselves as *campesinos* (peasants). In this context, a company needed land that was linked to two Indigenous communities and initially wanted to treat as 'Indigenous' only those officially certified. However, after some discussions the company developed a resettlement strategy based on the spirit and substance of FPIC, and established dialogue tables with the affected people – regardless of whether they were considered Indigenous or not. All dialogue table proceedings were recorded, and minutes prepared. Presentations were shared between the different tables, so that people were reassured that there were no separate deals being made. In some instances, people at one dialogue table would propose an idea not raised at others, so these ideas were introduced at all tables. At the end of the dialogue process, a collective agreement for land acquisition and resettlement was signed, which enabled the preparation of individual compensation agreements that each household agreed to.

Chapter 4: FPIC TRIGGERS

A practical question companies face is, under what circumstances is an FPIC process required? After all, seeking to operate in an area where Indigenous peoples have traditional rights does not (yet) necessarily mean that an FPIC process is required. This section summarizes the main triggers for an FPIC process.

Existing Guidance

Guidance abounds with regard to what situations require an FPIC process, with some sources identifying more triggers than others.

IFC and ICMM

IFC PS 7 describes four circumstances requiring FPIC:

1. When a project or commercial development impacts “Lands and Natural Resources Subject to Traditional Ownership or Under Customary Use”.
2. When a project or commercial development requires “Relocation of Indigenous Peoples from Lands and Natural Resources Subject to Traditional Ownership or Under Customary Use”.
3. When a project or commercial development “may significantly impact on critical cultural heritage that is essential to the identity and/or cultural, ceremonial, or spiritual aspects of Indigenous Peoples’ lives”.
4. “Where a project proposes to use the cultural heritage including knowledge, innovations, or practices of Indigenous peoples for commercial purposes”.

To understand when FPIC is triggered according to the existing guidance is it important to understand some of the terms used above.

IFC²⁷ defines **customary use of land and resources** as, “patterns of long-standing community land and resource use in accordance with Indigenous Peoples’ customary laws, values, customs, and traditions... Such uses may be intermittent, may take place in areas distant from settlements, and may not be site-specific”. IFC is explicit in indicating that customary use of land and resources includes, “cultural, ceremonial or spiritual use, and any ad hoc, seasonal or cyclical use of land and natural resources (for example, for hunting, fishing, grazing, or extraction of forest and woodland products)”.

With regard to **critical cultural heritage**, IFC PS7’s footnote 13 indicates that, “this includes natural areas with cultural and/or spiritual value such as sacred groves, sacred bodies of water and waterways, sacred trees, and sacred rocks”.

ICMM’s position statement²⁸ presents the same triggers as IFC and clarifies that this applies to new projects as well as changes to existing projects.

²⁷ <https://www.ifc.org/wps/wcm/connect/9baef8f6-9bd9-4d95-a595-7373059081d4/GN7English2012.pdf?MOD=AJPERES&CVID=meSDVgT>

²⁸ ICMM, ‘Indigenous peoples and Mining’, position statement May 2013.

UNDRIP

Adding more criteria than IFC and ICMM, as well as provisions for redress, UNDRIP holds the following:²⁹

- “States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, **with respect to their cultural, intellectual, religious and spiritual property taken** without their free, prior and informed consent or in violation of their laws, traditions and customs” (Article 11).
- “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent **before adopting and implementing legislative or administrative measures that may affect them**” (Article 19).
- “Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for **the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged** without their free, prior and informed consent” (Article 28).
- “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent **prior to the 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).

Additionally, in certain circumstances, UNDRIP establishes an unambiguous obligation to **obtain** the consent of the Indigenous peoples concerned, beyond the obligation to have consent as the objective of consultations. For example, UNDRIP explicitly requires states to obtain consent of Indigenous peoples in cases of:

- The relocation of Indigenous peoples from their lands or territories (article 10).
- The storage or disposal of hazardous materials on Indigenous peoples’ lands or territories (article 29).³⁰

These articles from UNDRIP give us a general sense of when, in the absence of an adequate state-led process, we should be proactively helping companies find a way to implement FPIC. The Social Practice Forum recommends that its members use these UNDRIP criteria for determining when FPIC is applicable.

Practical Examples

Example 1: As part of the permitting process in Australia, companies must conduct a cultural heritage study that can only be carried out by members of the language group to which the land traditionally belongs. In some cases, the people of these groups live hundreds of miles away and may have never visited the land. Nonetheless, if their rights can be traced back to the area, they will be the group with whom the FPIC process will take place. This is a clear example of national legislation safeguarding traditional rights through the recognition of historical customary use – even where it is no longer practiced. Just as legal ownership of land often can be maintained even when the owner does not make use of that land, this legislation recognizes the same for traditional land rights.

Example 2: In Tanzania, company staff alerted management to the presence of groups from Indigenous families in communities affected by the project (including land acquisition). The prevailing assumption amongst staff was that when Indigenous families were affected by the project, the company ought to seek their consent. In response, the

²⁹ Full UNDRIP resolution with all articles <https://undocs.org/A/RES/61/295> access February 17, 2020

³⁰ United Nations Office of the Human Rights Office of the High Commissioner, ‘Free, Prior and Informed Consent of Indigenous peoples’, September 2013, p. 1.

company commissioned research that found that the families self-identified as Indigenous but that the village was not located on the traditional lands of the Indigenous tribe. Thus, the company felt confident that a specific FPIC process would not be required.

Example 3: In 2007 a mining company acquired another mining company with assets in Australia. The exploration of these assets started 52 years prior to this acquisition, and it was a well-known Indigenous land rights mining dispute where the land had been expropriated without consent. A year following the acquisition, the mining company engaged with the local Indigenous groups to resolve issues around tenure and the legacy from previous owners; after 3 years of negotiations, a contract that addressed the legacies of the past was signed.

Example 4: In East Africa, a company proposed a project in an area with ethnic minority groups. The Government does not recognize such groups as Indigenous people as, it argues, “everyone is Indigenous.” The company commissioned a Human Rights Impact Assessment (HRIA) explicitly requesting a response to the question if certain ethnic minority groups should be considered Indigenous and if FPIC should be triggered. The HRIA concluded that some ethnic minority groups self-identify as Indigenous and that the IFC PS 7 criteria for Indigenous Peoples were met meaning that FPIC should be considered.

Chapter 5: IMPLEMENTING FPIC

In this section we explore some common questions related to the implementation of an FPIC process.

5.1 HOW DO THE PARTIES ESTABLISH WHAT CONSENT IS FOR?

It is essential that communities and companies clearly understand and explicitly agree what the FPIC process and outcome relate to – are they specific to a project phase, a project component or even a particular activity (i.e. project design, specific implementation plan or expected outcome)? This will enable both parties to work toward the same objective and can help minimize confusion around the activities, impacts, timeframes, compensation, benefits, etc. that should be addressed.

Existing Guidance

Although there is limited guidance around how parties establish what consent is for, IFC Performance Standard 7 Guidance Note suggests as a first step that the parties agree on key principles through an overall (FPIC) framework. This is particularly appropriate for situations where all aspects of the project and its location may not yet be known (i.e. exploration phase). Once designs are further advanced and locations known, then specific aspects can be discussed and agreed to. The Guidance Note also suggests the following:

- “Develop forward-looking stakeholder engagement strategies that ensure that relevant stakeholders are aware of potential development pathways;
- Ensure that stakeholders have adequate awareness, understanding and access to information concerning their resource rights (lands, forests, tenure systems, government established compensation frameworks, etc); and
- Commit to implementing a process of FPIC for any subsequent project development adversely impacting Indigenous Peoples in the manner described in GN27.”³¹

Practical Examples

Example 1: For a project in Ecuador, the process of establishing trusting relationships necessary for achieving FPIC was long and hard. The country’s colonial history was fraught with violence, abuse and oppression of Indigenous communities, which was still fresh in many people’s minds. They had their processes and protocols, which required time and trust for the company to understand. Once relationships were established, the company was able to explain its need for signed documents outlining what was agreed. The company and the community decided to have regular ‘signing ceremonies’ based on the community’s protocols. This would meet the company’s need for documenting FPIC, and the Indigenous community’s need to be reassured that they had a ‘way out’ if they so desired. The documents signed were short, one-page contracts with a 6-month time frame, that specified exactly what consent was for.

³¹ GN27 lists the circumstances that trigger FPIC under PS7 as described in Chapter 4 “FPIC Triggers” above.

Example 2: As part of their FPIC process, one company used virtual reality goggles to show traditional owners what the new wharf, port and site facilities would look like prior to construction. In some instances, they brought traditional owners to the place where the proposed project would be built and showed the proposed design through the goggles. In other cases, the company brought traditional leaders to a simulator to demonstrate what the landscape and proposed port facilities would look like from the perspective of a ship captain approaching shore. This technology allowed traditional leaders to gain a perspective and understanding of the project (the ‘informed’ piece) that would have been difficult to explain otherwise.

Example 3: A company acquired a project in West Africa that had been put on hold years earlier. The new company decided that, to improve project economics, the overall project life would be shortened, and staffing would increase. This meant significantly enlarging the size of the operations camp. The original camp design and footprint had been agreed to by the local Indigenous community. The camp was redesigned without engaging or even notifying the community. The new designs were put out for tender, materials were ordered, and the government approved the revisions. Shortly before the work was scheduled to begin, the company engaged with community leaders to explain the design change and show them the new camp footprint. This led to the identification of an immovable sacred site that had been the anchor of this community's identity and spiritual practices since they first inhabited the area. The company acknowledged the need for consent and altered the designs, budget, and schedule accordingly. Time and money could have been saved by seeking consent sooner.

5.2 AT WHAT POINT SHOULD CONSENT BE SOUGHT?

Many companies begin to think about seeking FPIC only when they already have a presence on the ground and identify an immediate need for reliable access to the land or resource, even if only temporarily (e.g. during the exploration phase). At that point, companies effectively already have missed the opportunity to meet FPIC requirements since any process undertaken at that point would not meet the “prior” criterion.

Existing Guidance

IFC Performance Standard 7, in Guidance Note paragraph 34 states that “FPIC entails consent for specific project activities, impacts and mitigation measures as anticipated at the time when consent is given”. The Guidance Note states that “while the agreement should be valid for the duration of the project, for projects with an extended operational lifespan, it is good practice to monitor [Indigenous Peoples’ Plans] or similar action plans and be flexible in adapting them as needed if circumstances change, while maintaining the overall principles, commitments, and mutual accountabilities outlined in the agreement”.

PRACTITIONER NOTE

There are typically at least two key times when consent should be sought - prior to exploration activities or any project impact on the ground; and at an appropriate time during the project design phase (Front End Engineering Design or FEED) to minimize commercial and financial risks associated with design changes identified during the FPIC process. It is important that consent be reconfirmed if there are significant changes to the project design, either planned or unexpected.

While it does not enter into detail about specific project activities or the particulars of an FPIC process, ILO 169 makes clear that consultation should begin early in the project development process. Article 15 reads, “In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands.”

Practical Examples

As part of the country entry protocol or other due diligence, some companies assess if any Indigenous people might be present in or claim rights to the project area or other natural resources that the project could affect. Subsequent visits to the area prior to initiating exploration activities could then conclusively determine the presence or claims of Indigenous people and if FPIC is required.

SOME INPUT FROM INDIGENOUS LEADERS IN CANADA

What might work for one Indigenous group or Nation may not work for another. So, the parties must together:

- Determine what each letter of the FPIC acronym means for that particular project.
- Decide how they will implement FPIC.

Example 1: A company was under pressure to start exploration activities in one tribe's traditional area. The exploration team suggested they would do some initial low-impact scouting, collecting rocks, taking some water samples and 'walk the land.' The General Manager insisted that no sampling be conducted, and no tent be set up in this remote area without first gaining explicit consent from the traditional leadership (who all lived a plane ride away from the area). A meeting was set up with the paramount chief and his cabinet. As it would have been considered highly culturally inappropriate to ask the traditional leadership to sign a paper, it was agreed that the meeting would be videotaped. Company management made their case to the tribe's leadership and formally asked for consent to enter the area and undertake these activities. The traditional authorities gave their consent for the exploration phase but said to the company, "Go do what you need to do. But when you have found what you are looking for, you need to come back to us and discuss next steps." Only after this exercise did the General Manager give the exploration team the OK to set up fly camps.

Example 2: For a proposed underground mine in Western Canada affecting Indigenous people, a company requested that the approach to assessing environmental and social impacts integrate principles of reconciliation and FPIC. The successful proposal demonstrated how the ESIA team would include Indigenous counterparts (i.e. an Indigenous project manager and Indigenous subject matter experts) and how a commitment to FPIC included ensuring that control over the impact assessment process and documentation would remain with Indigenous people. The specifics of exactly how this co-management approach to an ESIA would be operationalized on a daily basis was being worked out step by step with the Indigenous communities – an example of 'creating the road as you walk it'.

Example 3: Seven months after the 1963 opening of an Australian mine, local police in Queensland, forcibly relocated the remaining Indigenous residents of a community, and demolished their homes and church. That same year, the government granted leases to continue mine operations for 84 years. Thirty-eight years later, in 2001, this historical injustice was repaired: consent was sought, an apology issued, and a coexistence agreement signed. The agreement recognized the Native Title of the Indigenous people and acknowledged the conflict and difficult relations between the company and the local Indigenous people.

5.3 HOW DO YOU ENSURE YOU ARE SEEKING FPIC FROM THE RIGHT GROUP?

In situations where companies deal with multiple Indigenous groups – those who self-identify as Indigenous and/or those who are officially recognized as such – it can be risky for a company to recognize one group rather than another as this may provide a certain degree of legitimacy that a company is not in a position to provide. In other instances, companies may simply assume that the tribe located closest to the project area is the traditional landowner. In such situations, it is particularly important that companies engage with the right group(s).

Existing Guidance

Guidance on determining land rights when multiple groups live in the area is not abundant. However, the Inter-American Commission on Human Rights (IACHR) determined that, “Indigenous property rights over territory extend in principle over all of those lands and resources that indigenous peoples currently use, and over those lands and resources that they possessed and of which they were deprived, with which they preserve their internationally protected special relationship – i.e. a cultural bond of collective memory and awareness of their rights of access or ownership, in accordance with their own cultural and spiritual rules.”³²

This is reflected in the IACHR’s determination of the criteria for the identification of traditional land rights:³³

- Evidence of the historical occupation and use of the lands and resources by members of the community;
- Evidence of the development of traditional subsistence;
- Ritual and healing practices therein; and
- The names given to the area in the community’s language.

These criteria can help determine which group or groups have traditional rights to the land.

In this regard, the concepts of land and territory are key. In discussing Indigenous peoples’ rights to land and their natural resources (Articles 13 – 16), ILO 169 highlights this, indicating that “In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship”. And “The use of the term **lands** in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use”.

PRACTITIONER NOTE

Understanding land use patterns is crucial to determining whose consent is required. In some places, Indigenous agriculturalists and pastoralists have a symbiotic relationship around land use, with animals being allowed to graze shortly after the harvests. The consent of both groups is likely required, but the FPIC process is not likely to be the same for both. This may also be true for hunter-gatherers (e.g. those who follow caribou herds). It might also apply to shared fishing grounds/ bodies of water when looking at offshore oil or wind development, or when looking at the impacts of a mine on salmon fisheries.

Practical Examples

Example 1: A mining company commissioned a “Historical Narrative” study to determine which tribes, amongst many, had traditional land rights over the project area and would thus be recognized as a group who should give its consent. The methodology was anthropological in nature and took a highly participatory approach involving discussions with each of the tribes about their traditional areas, map verification, document research, discussions with elders as well as

³² Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc. 56/09 30 December 2009, *Indigenous and tribal peoples’ rights over their ancestral lands and natural resources. Norms and Jurisprudence of the Inter-American Human Rights System*, p. 31

³³ Inter-American Commission on Human Rights, Chapter V. *Indigenous and Tribal Property Rights: General Considerations*, paragraphs C. and D.

field visits to be shown landmarks significant to the tribes, and named in the local language, as evidence of land use. This exercise then determined what tribe the company should recognize as the traditional land right holder.

Example 2: An oil company identified some families belonging to a tribe recognized as Indigenous on land that will be acquired for a pipeline route. The land on which these families live traditionally belongs to another tribe also recognized as Indigenous. The company asked if FPIC was required and, if so, with which group. External experts responded that the presence (on lands that the company wished to acquire and that traditionally belong to another Indigenous group) of Indigenous people who have land that will not be affected by the project's activities, does not trigger an FPIC requirement with this group. Rather, the FPIC process should take place with the traditional landowners. In the case of resettlement of the group living on the land, they would be treated as any other potentially vulnerable project affected households.

5.4 HOW ARE COMPANIES PURSUING FPIC WHERE THE LEGAL FRAMEWORK IS NOT ALIGNED WITH THE REQUIREMENTS OF FPIC STANDARD BEARERS?

As the recognition of Indigenous rights increases, more and more ethnic groups self-identify as Indigenous and articulate their positions in rights-based language. Sometimes they assert their rights through court cases and at other times they make their voices heard in partnership with NGOs.

However, companies are sometimes confronted with situations where states do not recognize groups that self-identify as Indigenous peoples and / or do not recognize their rights under international law. This may be a result of a state's concerns that FPIC interferes with sovereignty or sub-surface rights, a state's belief that Indigenous groups do not merit "special" accommodations, or it may be the result of national efforts to decrease the risk of inter-tribal conflict through establishing a narrative of national unity and equality where no groups are considered "special," including Indigenous peoples. In such contexts, singling out specific groups for agreement making could lead to violent intergroup conflict.

This can pose challenges for companies seeking to obtain funding from lenders who require alignment with international best practice around FPIC or companies simply seeking to align with best practice to meet their corporate commitments.

Some companies seek expert advice to determine their approach when the state does not recognize an Indigenous group or their rights. Such advice may highlight:

- Court cases that provide added credibility to certain groups' claims.
- Opinions by the UN or regional human rights bodies.
- Recommendations by national human rights authorities.
- Precedents set by other companies.

Existing guidance around these situations is limited and somewhat ambiguous.

Existing Guidance

The *UN Guiding Principles on Business and Human Rights* (Guiding Principle 23)³⁴ states:

“In all contexts, business enterprises should:

- a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;
- b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;
- c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate”.

The commentary provided in the Guiding Principles further indicates that:

“Although particular country and local contexts may affect the human rights risks of an enterprise’s activities and business relationships, all business enterprises have the same responsibility to respect human rights wherever they operate. Where the domestic context renders it impossible to meet this responsibility fully, business enterprises are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard.”

PRACTITIONER NOTE

As practitioners it is our role to first, objectively determine if FPIC is triggered, and if so, assist the company on how they should apply it, not whether it should be applied. In a situation of conflicting requirements, the burden is on the company (and the practitioner) to find a way to respect human rights regardless of a state’s position. Practically speaking, if one affected group is not indigenous and another is, but the state denies recognition, the company cannot simply opt out of respecting the indigenous rights of the second group. Indeed, rather than lower the bar, it may be necessary to apply FPIC for both groups. If this poses a commercial or legal risk for the company, the job of the practitioner is to help devise a strategy that meets FPIC requirements under a justification other than indigenous peoples’ rights.

Practical Examples

Example 1 (Rights-based perspective) – Resolve FPIC Advisory Panel, Merian Case Study, Suriname:³⁵

The FPIC Advisory Panel wrote of coming to a better “understanding of the complex social and human rights dynamics associated with working to obtain FPIC in jurisdictions where the broader conditions are not rights-compatible”. In this regard, and as one of their general recommendations to industry, the panel held that:

“To obtain FPIC within a human rights framework, indigenous and tribal peoples’ consent must be on terms that recognize and substantively account for their customary land and resource rights, and other affected rights. This would include affirmation that indigenous and tribal peoples have the power and ability to bargain with a resource

³⁴ https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_eN.pdf

³⁵ https://www.resolve.ngo/docs/merian-expert-advisory-panel_final-report636870303537629126.pdf

developer on the basis of their customary rights, even in contexts where those rights are not fully recognized by the state”.

Example 2: Botswana is a case in point. Successive governments have deliberately sought to minimize ethnic differences and even remove ethnic references in an effort to ensure stability and success in the country. This poses an important challenge to trying to achieve FPIC because it makes it very difficult to attribute Indigenous rights to certain groups. A workaround may be for companies to forego the “Indigenous” label, while pursuing an FPIC process and outcome regardless.

Chapter 6: DEMONSTRATING FPIC

In this section we offer some examples of how companies demonstrate that FPIC has been achieved, and the basis on which the parties assess their success in achieving it (or not, as the case may be).

Existing Guidance

Communities, companies, states and advocacy groups underscore the importance of the parties to FPIC being able to demonstrate that FPIC has been achieved and what the process and outcome entail.

Reporting on an oil project in Kenya, Oxfam found that the company had failed to adequately demonstrate FPIC. Oxfam's key finding in this regard highlighted the need for the company to document the FPIC process thoroughly and transparently which Oxfam considers integral to adequately demonstrating FPIC:

"All respondents felt that the community engagement process had improved in important ways since FPIC was triggered, and that it continues to evolve. However, there is insufficient evidence of compliance with FPIC requirements."

"Without proper, accessible documentation, it is impossible to confirm what information the communities were given during consultations about potential positive and negative impacts of the company's proposed use of land, or to verify the contents of the agreements themselves. Further, there are gaps in the company's efforts to maintain consent following the agreements, most notably a lack of systematic formal discussions with community representatives involving monitoring of progress towards commitments."³⁶

SOME INPUT FROM INDIGENOUS LEADERS IN CANADA

- Companies need written consent that shows a process for information sharing, and participation and collaboration in the project process (something other than an Impact Benefit Agreement (IBA)).
- Companies should be able to demonstrate that Indigenous people participated in the project as partners, shareholders, that there were inclusive discussions with Indigenous leaders, women and non-Indigenous members of a community.
- Companies should demonstrate FPIC with inclusive engagement practices, planning and actions throughout the life of the project.

The study undertaken by the UN Human Rights Council's Expert Mechanism on the Rights of Indigenous People includes a section on documentation, monitoring, reviewing and recourse mechanism for free, prior and informed consent.³⁷ They emphasize that documentation should summarize the steps undertaken to achieve FPIC, and the spirit of the agreement(s) reached by the parties. Documentation should also describe how the process aligns with "*Indigenous peoples' customary norms and traditional methods of decision-making, including diverging opinions and conditional views*". They outline the different forms 'consent' can take, including treaties, agreements, contracts,

³⁶ Oxfam, 'Testing community consent: Tullow Oil project in Kenya', November 2017, p. 5.

³⁷ Expert Mechanism on the Rights of IP, UN Human Rights Council (2018) page 12

memorandums of agreement (or understanding), or *'other document that is satisfactory to the Indigenous peoples'*. They also describe the importance of ongoing monitoring and evaluation of FPIC and the availability of accessible recourse mechanisms for resolving grievances and disputes, all of which should be developed and undertaken with the active participation of the Indigenous communities who are affected.

Practical Examples

Example 1: One company considered it could demonstrate FPIC based on the following criteria:

Free:

- Engagement records show that stakeholders were informed that they are free to engage third parties (e.g. interest groups, traditional authorities, etc.) if they feel pressured.
- There is no evidence, through the grievance mechanism or follow up conversations with individual stakeholders, that any pressure or coercion has occurred.
- During engagements, stakeholders mentioned there have been no obstacles (expenses, opportunity costs, logistical arrangements) that have prevented them from participating.
- Third party groups (NGOs, universities) trusted by the community report there is no evidence of coercion.

Prior:

- Documented approval (in writing or verbally and videotaped) from all potentially impacted tribes and communities to successive stages in project development (e.g. exploration, baseline studies and advanced exploration, construction and operations)
- Signing of an agreement between company and rights holders before any exploration activities commence. This implies, for example, that no water or soil samples will be taken, no fly camp will be set up, etc. prior to approval of the tribe.

Informed:

- On-going engagement by the Social Performance team verifies if grassroots level stakeholders feel adequately informed about the project. Stakeholders are engaged to "explain" what they understand about the project to verify their depth and breadth of understanding and responses are documented.
- The ESIA process includes public sessions with all potentially impacted communities to inform local stakeholders about the approach as well as to validate findings.
- Tribes that do not have traditional land rights that may be affected by the project recognize the project area is located outside of their traditional lands.
- Documented evidence that rights holders have received support of independent experts as determined and selected by themselves.

Consent:

- The company commissioned research to validate its current understanding that signatures of leaders will constitute formal consent of the tribal leadership and on behalf of the wider community.
- Prior to signing the agreement, the draft agreement will be shared with the wider community during public meetings so that community members can provide final feedback to their leaders.



Chapter 7: NEXT STEPS

As we stated at the outset, this is a living document. We know there are many more questions and many more examples that fellow practitioners and Indigenous people have to share, and in order to be relevant and useful, this document will require periodic updates as our membership and experience with FPIC evolves. The question of how often and who will make these revisions, remains to be decided.

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ADDITIONAL RESOURCES

The FPIC Working Group includes these resources because of their practical nature; we are not endorsing any position taken by the various authors on aspects of FPIC. We would also like to respectfully acknowledge that numerous academic papers exist on the topic of FPIC that have not been included here.

Cultural Survival and Rainforest Foundation: Turning Rights into Reality: Issues to Consider in Implementing the Right to Free, Prior and Informed Consent <http://www.culturalsurvival.org/consent>

Forest Peoples Programme (June 2007), Making FPIC – Free, Prior and Informed Consent – Work: Challenges and Prospects for Indigenous Peoples.

Forest Stewardship Council (November 2016), FSC Canada Guidance on Free, Prior and Informed Consent (FPIC).

FPIC Solutions Dialogue (<http://solutions-network.org/site-fpic/>): is a multi-sector initiative to develop practical guidance to support free, prior, informed consent (FPIC) community processes relating to mining, oil and gas projects. RESOLVE is the convener and program secretariat.

IFC, IFC Response to NomoGaia Report: FPIC at the IFC: How Indigenous rights can be better protected in development finance, November 2020 (<http://nomogaia.org/wp-content/uploads/2020/11/IFC-NomoGaia-response-Final-Nov-18-2020.pdf>).

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SOCIAL PRACTICE

F O R U M

About the Social Practice Forum

The Social Practice Forum was established to provide active leadership on social performance. The SPF's vision is that business, civil society, communities, and government can transform natural resource endowments to create enduring, positive social, environmental, and economic outcomes. The SPF contributes to this vision by creating a space for members to pool their collective experience, advance ideas and promote progressive practices.

<https://socialpracticeforum.org/>