



Engaging With Free, Prior, and Informed Consent

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About This Report

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The report is based on a literature review and includes input and ideas from those who attended the BSR-sponsored Free, Prior, and Informed Consent Workshop for Extractives Companies held in London on June 19, 2012. Special thanks to those who attended including our guest speaker, Dr. Conrad Feathers of the Forest Peoples Programme and those representatives from the extractives and financial services sectors, the International Council on Mining and Metals (ICMM), and the International Petroleum Industry Environmental Conservation Association (IPIECA).

Any errors found are those of the authors. Please direct comments or questions to Jasmine Campbell at jcampbell@bsr.org.

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Introduction

As part of a BSR-sponsored series of events called [Building Shared Value in a Complex World](#), BSR held a Free, Prior, and Informed Consent Workshop for Extractives Companies in London on June 19, 2012 (hereafter referred to as the BSR Workshop). Representatives from the mining, oil and gas, and financial services sectors discussed current thinking surrounding FPIC and, more specifically, its application to interactions with indigenous peoples. Dr. Conrad Feathers of the Forest Peoples Programme presented an NGO perspective on FPIC that further enriched the analysis and recommendations resulting from these discussions.

Participants highlighted several topics that require further examination:

- » The general interpretation and application of FPIC
- » The interpretation and application of consent and whether it equates to a right to veto
- » The state's relationship with FPIC and its effect on corporations
- » The relationship between FPIC and the UN Guiding Principles on Business and Human Rights¹ (UN Guiding Principles)
- » The relationship between FPIC and stakeholder engagement practices
- » The extent to which FPIC, the social license to operate, and benefit-sharing are intrinsically linked



Free, prior, and informed consent (FPIC) may be characterized by the following major attributes:

- » It has its roots in a number of legal and normative principles focused primarily on engagement and consultation with indigenous peoples on issues that impact their land and rights.

¹ Ruggie, J. *UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework*, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, March 21, 2011, www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf.

- » Presents numerous definitional, legal, procedural, and accountability challenges for states, companies, affected indigenous populations, and civil society.
- » Integrates concepts such as consent, consultation, right to veto, good faith, and representation. These concepts are highly nuanced, subject to interpretation, and significantly impacted by international law, domestic legislation, standards, and guidelines.
- » Offers best practices for stakeholder engagement that can be used as participatory tools throughout project development in sectors, such as oil and gas, mining, forestry and paper, food and beverage, and fisheries and gaming.²

FPIC can assist companies in mitigating risks associated with both *the social and legal license to operate* by improving the quality of social impact assessments, by supporting the corporate responsibility to respect human rights,³ and by strengthening corporate stakeholder engagement effectiveness. Failure to adequately address FPIC, particularly in the context of addressing the rights of indigenous populations, has resulted in numerous court cases, advocacy campaigns, and adverse attention to companies pursuing large-scale extractives, infrastructure, and other commercial projects.

Though FPIC has the potential to mitigate these risks as well as to strengthen indigenous peoples' and communities' relationships with companies, it remains a concept that presents several challenges. Namely, FPIC can:

- » Test notions of state sovereignty (and boundaries of corporate activities) through its recognition of indigenous peoples' rights to land and resources.
- » Disadvantage a company's access to permits for project development where a company pursues FPIC, but the state does not recognize or promote it.
- » Stretch company capabilities and resources when navigating the legal and practical complexities associated with FPIC implementation.

This report:

- » Summarizes the major discussion points from the recently held BSR Workshop.
- » Raises awareness regarding FPIC principles and their relevance to corporate performance.
- » Highlights the major challenges, opportunities, and high-level implications facing companies that want to adopt best practices related to stakeholder engagement and risk management.
- » Invites companies to embrace the concept of FPIC by integrating its principles into their stakeholder engagement management plans (SEMPs).

² This paper is focused on FPIC's application to issues affecting indigenous people; however, FPIC principles may arguably be extended to companies engaging with non-indigenous communities affected by projects.

³ Ruggie, J. *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development, Protect, Respect, and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, April 2008, www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf.

Interpreting FPIC and Consent: Legal Frameworks and Standards

Since there is no universally applicable definition of FPIC, it must be understood through the lenses of international and national legal frameworks. An understanding of these frameworks is necessary for developing robust best practices related to engagement with indigenous peoples (and broader stakeholders), which ultimately requires an application of FPIC principles that effectively balances the expectations of affected indigenous peoples, civil society, government, and companies.

BSR Workshop attendees acknowledged that the definition of consent, its application, and its implementation remain unclear and that it can be difficult to distinguish between the concepts of consultation and consent. Despite the lack of clarity, attendees generally agreed that securing consent from indigenous peoples means a deeper commitment to engage than mere consultation. To achieve the former, the parties must reach a clear agreement about a project's development.⁴

More specifically, the distinction between consent and consultation comes down to whether indigenous peoples' have a right to veto a project during the decision-making processes that make up its development. Whereas Oxfam Australia interprets FPIC as a right to veto, other institutions, such as the World Bank, suggest that it is not.⁵

FPIC AND INTERNATIONAL FRAMEWORKS AND STANDARDS

Some states have chosen to apply principles of both consultation and consent through an international legal framework addressing FPIC principles, which commenced more than 20 years ago with the establishment of the International Labour Organization (ILO) Convention No. 169.⁶ More recently FPIC, with respect to indigenous peoples, has been incorporated into wider international frameworks and standards through its incorporation into the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)⁷ and the updated version of International Finance Corporation (IFC) Performance Standard 7 (PS7)⁸ and the associated Guidance Note 7 (GN7).⁹

⁴ However, it also argued (and follows logically) that consultation implies an ultimate objective of consent.

⁵ International Finance Corporation, *ILO Convention 169 and the Private Sector: Questions and Answers for IFC Clients*, 2007, p. 6, [www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_ILO169/\\$FILE/ILO_169.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_ILO169/$FILE/ILO_169.pdf).

⁶ ILO Convention No. 169 was adopted in 1989, came into force in 1991, and was ratified by 20 countries, mostly in Latin America, *Indigenous and Tribal Peoples Convention*, ILO 169, 1989, www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm. In addition the notion of FPIC was cited in the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, (adopted September 1998); the Convention on Biological Diversity, specifically Article 8(j) (adopted May 1992); and the Cartagena Protocol on Biosafety to the Convention on Biodiversity (adopted January 2000) ..

⁷ *UN Declaration on the Rights of Indigenous Peoples*, March 2008, www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

⁸ IFC, *Performance Standard 7 Indigenous Peoples*, January 1, 2012, www1.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES.

⁹ IFC, *Guidance Note 7 Indigenous Peoples*, January 1, 2012, www1.ifc.org/wps/wcm/connect/50eed180498009f9a89bfa336b93d75f/Updated_GN7-2012.pdf?MOD=AJPERES.

The application of FPIC is also guided by the UN Guiding Principles that were endorsed by the UN Human Rights Council on June 16, 2011,¹⁰ and provides clarity on the role of states and corporations regarding business and human rights.

ILO 169

“Convention No. 169 is a legally binding international instrument, which deals specifically with the rights of indigenous and tribal peoples. Today, it has been ratified by 20 countries. Once ratified, the country has one year to align legislation, policies, and programmes to the Convention before it becomes legally binding. Countries that have ratified the Convention are subject to supervision with regards to its implementation.”¹¹

Both consultation and consent and their application were introduced in ILO 169. While Article 15 refers to consultation with respect to rights related to natural resources, Article 16 applies consent as the standard for resettlement matters (although with a qualifying statement in *italic* below).

Article 15. Consultation: “The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management, and conservation of these resources.

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 programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.”

Article 16. Consent: “Where the *relocation* of these peoples is considered necessary as an exceptional measure, such relocation shall take place *only with their free and informed consent. 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.*”

While ILO 169 provides the foundation for FPIC principles, its implementation is also limited by:

- » Only 20 countries have ratified the convention
- » The inconsistent and varied application of existing FPIC legislation from country to country
- » The remaining lack of clarity on what constitutes adequate consultation and achievement of consent and differences between the two concepts

¹⁰ *Human Rights and Transnational Corporations and Other Business Enterprises: Resolution Adopted by the Human Rights Council*, UN General Assembly, www.business-humanrights.org/media/documents/un-human-rights-council-resolution-re-human-rights-transnational-corps-eng-6-jul-2011.pdf.

¹¹ *Indigenous and Tribal Peoples Convention*, ILO 169, 1989, www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm.

UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The concept of consent was recognized in the 2007 UNDRIP.¹² Though the declaration is a nonbinding instrument and, consequently, does not lend itself to the usual rules of international law applied to binding international instruments (such as ILO 169), it does acknowledge the vulnerabilities of indigenous peoples' and affirms their rights with somewhat stronger language (concerning projects affecting their land or resources) than the provisions contained in ILO 169:

“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.”¹³



In 2007 the UN Permanent Forum on Indigenous Issues (UNPFII), an advisory body to the Economic and Social Council (ECOSOC) with a mandate to discuss a range of indigenous issues, defined FPIC and, in particular, consent in the following way:¹⁴

¹² *UN Declaration on the Rights of Indigenous Peoples*, March 2008, www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

¹³ Article 32(2), *UN Declaration on the Rights of Indigenous Peoples*, March 2008, www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

¹⁴ UN-REDD Programme, *Guidelines on Free, Prior, and Informed Consent*, Draft, December 2011, http://www.unredd.net/index.php?option=com_docman&task=cat_view&qid=1333&Itemid=53

Expanding on the UN Permanent Forum's definition of FPIC (2003):

Free: 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: Refers to a period of time in advance of the activity or process when consent should be sought, as well as the period between when consent is sought and when consent is given or withheld.

Informed: Refers to the type of information that should be provided prior to seeking consent and also as a part of the ongoing consent process.

Consent: A decision made by indigenous peoples and local communities through customary decision-making processes. The collective right to give or withhold consent applies to all projects, activities, legislative and administrative measures and policies (and their associated processes and phases) that directly impact lands, territories, resources, and livelihoods of indigenous peoples and other local communities. Consent must be sought and granted or withheld according to the unique formal or informal political-administrative dynamic of each community.

As BSR Workshop attendees pointed out, some states are reluctant to entertain the adoption of UNDRIP for fear that consent equates to a right to veto. The concern is that a right to veto may be intrinsically linked to a right to self-determination, which in turn can allow communities to manage their development independent from the state—a notion that begins to challenge traditional concepts of state sovereignty.

Nevertheless, the UN General Assembly has adopted UNDRIP, and as such, it reflects the collective view of UN members regarding the rights of indigenous peoples'. Though nonbinding, its adoption does have legal relevance. Members are expected to take into account this declaration in good faith; as such, this may reflect obligations of states under other sources of international law, including customary laws.¹⁵

INTERNATIONAL FINANCE STANDARDS

The IFC introduced FPIC into its Sustainability Framework¹⁶ through its revision of Performance Standard 7 (PS7)¹⁷ in 2012. The IFC Performance Standards are also the basis for the Equator Principles,¹⁸ a voluntary set of standards developed by private sector banks to guide their social and environmental risk in

¹⁵ Equality Team of the International Labour Standards Department, *ILO Standards and the UN Declaration on the Rights of Indigenous Peoples*, Information note for ILO staff and partners, January 9, 2007, www.ilo.org/indigenous/Resources/Publications/WCMS_100792/lang-en/index.htm.

¹⁶ The IFC's Sustainability Framework consists of policy on environmental and social sustainability, performance standards, and access to information policy. Learn more about all these subjects at www1.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability+Sustainability+Framework/.

¹⁷ IFC, *Performance Standard 7*, new version effective January 1, 2012, www1.ifc.org/wps/wcm/connect/50eed180498009f9a89bfa336b93d75f/Updated_GN7-2012.pdf?MOD=AJPERES.

¹⁸ *Equator Principles*, June 2006. Please note: The IFC's revised Performance Standards apply to the Equator Principles Framework that also take effect as of January 1, 2012, www.equator-principles.com/resources/equator_principles.pdf.

project financing. Importantly, the IFC recently incorporated FPIC principles into the revised draft of the Equator Principles (EP III).¹⁹

The IFC attempted to clarify the meaning and application of FPIC through GN 7, stating that FPIC “. . . will be established through good faith negotiations between the client and the Affected Communities of Indigenous Peoples. The client will document (i) the mutually accepted process between the client and the 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.”²⁰

Whereas PS7 previously referred to consultation, the revised version introduces “consent,” even though its application may be limited to new projects or certain types of project loans vis-à-vis the Equator Principles. The parameters for seeking consent are somewhat defined through the notion of establishing good faith negotiations, a legal term that can differ in meaning depending on the jurisdiction to which it is applied. Furthermore, whereas consultation implies only an exchange of information among the company, regulators, and those affected by the project,²¹ consent encompasses the power to transfer or share decision-making authority with those who will be directly affected and, where possible, through their representative institutions.

The adoption of FPIC into lending and investment standards demonstrates its potential impact on private sector development. Though PS7 and the EP III are limited in their application to those companies financed by the Equator Banks and/or the IFC, companies that avoid FPIC by using alternatively sourced funds and/or loans for projects may nevertheless be subject to national legislation addressing FPIC or a ‘de facto’ veto by the affected community.

THE UN GUIDING PRINCIPLES

The importance of the relationship between human rights and the business practices of large multinational companies in the extractives sector has gained further support from international bodies, including the International Council on Human Rights Policy, the UN High Commissioner for Human Rights, the ILO, and the Inter-American Court of Human Rights.²² The most recent endorsement of the UN Guiding Principles by the UN Human Rights Council²³ enhances the basic need for corporations to incorporate human rights considerations into their business practices.

These UN Guiding Principles aim to help distinguish between government and business responsibility by upholding the notion of state sovereignty and

¹⁹ Equator Principles III, *Draft and Summary of Key Changes*, 13 August 2012 www.equator-principles.com/index.php/ep3.

²⁰ IFC, *Guidance Note 7*, January 1, 2012, paragraph 12, p. 7 www1.ifc.org/wps/wcm/connect/50eed180498009f9a89bfa336b93d75f/Updated_GN7-2012.pdf?MOD=AJPERES.

²¹ This information is stemming from a quote by Interfaith Center on Corporate Responsibility (ICCR) cited in the following article, B. Baue, *Communities, Corporations, and the Difference between Consent and Consult*, *Corporate Responsibility Magazine*, www.thecro.com/node/498.

²² L. M. Jimenez, *Community Right to Participate in Mining Policies with Reference to Tinaya and Rio Blanco Mining Conflicts in Peru*, *Institute of Social Studies*, 2008, p. 13, <http://oaithesis.eur.nl/ir/repub/asset/7223/Lenny%20Maritza%20Merino%20Jimenez%20PPM.pdf>

²³ UN Human Rights Council, *Chapter 1: Human Rights and Transnational Corporations and Other Business Enterprises*, July 6, 2011, www.unglobalcompact.org/docs/issues_doc/human_rights/A.HRC.17.RES.17.4.pdf.

delineating the obligations of the state from those of corporations.²⁴ The UN Guiding Principles stipulate that in all circumstances corporations are expected to *respect* human rights while states retain primary responsibility for *protecting* human rights. Similarly, FPIC may be seen as a vehicle for the state to protect and the corporation to respect indigenous peoples' rights.

Such a distinction in responsibilities may be difficult to apply in countries with weaker governance structures, a lack of public institutions, and a lack of resources (human, financial, and technical) to support the public sector and rule of law. These institutional deficiencies coupled with an environment of mistrust between stakeholder groups (e.g., indigenous peoples and government) and indigenous peoples high expectations that companies solve these institutional issues can often lead to confusion around these responsibilities.

Corporations have a business imperative to ensure transparency and accountability; they should be careful not to rely entirely on the state sovereignty principle for addressing FPIC-related challenges. In addition, where governments abuse human rights, companies should avoid complicity and use or increase leverage to influence the state's actions in a positive manner.

FPIC, through a human rights lens, provides an opportunity for corporations to integrate international human rights standards and principles into stakeholder engagement. Incorporating FPIC principles from the international legal frameworks and standards into impact assessments, such as a human rights risk assessment, can promote best practice SEMP in a manner that mitigates risk and promotes the social license to operate.

FPIC AND STATE AND NATIONAL FRAMEWORKS AND STANDARDS

In addition to international legal frameworks and standards, *national law* significantly determines FPIC's application. For example, courts have cited ILO 169 in cases concerning the rights of indigenous peoples', especially in the ratifying countries (for example, Peru, Mexico, Bolivia, Denmark, Ecuador, and Colombia²⁵)—thereby establishing a precedent for implementation at the national level.²⁶

The presence of FPIC within national legislation and regulations is a crucial indicator of the extent to which the state recognizes indigenous peoples within its jurisdiction. Countries such as the Philippines, Malaysia, Australia, and Peru all have national legislation addressing aspects of FPIC for activities affecting the lands and territories of indigenous peoples.²⁷ For example, for more than 30 years Australian states have enforced legislation that permits indigenous peoples to be recognized, consulted, and negotiated with through indigenous-controlled Land Councils with respect to exploration and mining activities.

²⁴ However, a recent report of the UNPFII on the state's duty to protect indigenous peoples who are affected by transnational corporations and other business enterprises argues that a corporation may have exactly the same duties as states, although these duties would be secondary after the state's.

²⁵ MacKay, F. *A Guide to Indigenous Peoples' Rights in the International Labour Organization*, Forest Peoples Programme, www.forestpeoples.org/sites/fpp/files/publication/2010/09/iloquideiprightsjul02eng.pdf.

²⁶ "Application of Convention No. 169 by Domestic and International Courts in Latin America," 2009, www.ilo.org/wcmsp5/groups/public/---ed_norm/---norms/documents/publication/wcms_123946.pdf.

²⁷ Tamang, P. *An Overview of the Principle of Free, Prior, and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices*, Workshop on Free, Prior, and Informed Consent, January 19, 2005.

The reality for many resource-rich states who are not members of the Organisation for Economic Co-operation and Development (OECD) is that they often lack the institutional capacity to adequately address protection measures that will guarantee protection of their citizens' (including indigenous peoples) human rights. The relationship between extractives revenue and national wealth objectives can adversely influence a states' will to protect. Even if a corporation has the best intentions to apply FPIC, a state may be reluctant to follow suit when the project is a priority for the state's economic growth. Such situations may disadvantage FPIC-friendly corporations, with states choosing instead to provide permits, licenses, and state-company joint venture arrangements to corporations that do not otherwise require the application of FPIC.

Given these circumstances, states need to be the primary driver of FPIC and its application. The existence of a right as national law requires all companies—irrespective of their lending conditions, corporate identity, or size—to apply the concept when conducting business affairs in that national jurisdiction.

However, even where states have enacted laws to address FPIC, company due diligence is needed on a case-by-case basis to understand the implications of these laws on both corporate activities and indigenous rights, especially where there are gaps in the legislation pertaining to its implementation.

BSR was recently involved in a mining project applying FPIC legislation in the Philippines and faced the following challenges:

- » **Ambiguity in the legislation** left both the company and stakeholders at a disadvantage. Legislation provided broad guidelines but failed to provide an approved process for obtaining FPIC.
- » **Time and resources** were required to establish an approved process for FPIC with stakeholders, where legislation did not otherwise establish such a process.
- » **Formalizing the process of consent** meant that the company must be able to provide information about the benefits and the costs of the project early in its life cycle.
- » **Informed consent** in an effective manner compliant with its meaning required more time, expertise, and resources than mere consultation.
- » **Social investment** as a requirement of project development affected FPIC where government more strongly influenced the use of investment funds than the community.

Gaps in legislation may exist, but as we shall discuss below, companies can use the international and national frameworks and standards for FPIC to supplement these gaps.

In the case of a joint venture arrangement with government, the state may significantly influence FPIC's interpretation and implementation; however, a company always has the choice to exercise its influence and leverage on government to protect the rights of indigenous peoples' with a view toward mitigating its own social performance risk.

Applying FPIC to Everyday Business

Companies may struggle to incorporate FPIC throughout the project development timeline. Internal community or sustainability teams can and should influence internal project development and finance teams to allow for its implementation.

BSR Workshop attendees explicitly agreed that the language used internally to express FPIC and promote internal buy-in is crucial to ensuring its effectiveness. Such buy-in depends heavily on the following:

- » The impact of project development on indigenous peoples and the existence or absence of domestic FPIC legislation
- » The strength of communication among company departments on matters of social risk and performance
- » The extent to which social issues are understood and integrated internally as matters of importance
- » Effectiveness in managing the expectations of multiple stakeholders, including investors and senior management

Because of the differing interpretations of FPIC principles noted in this document, such as variations across national legislation and unique local circumstances facing individual extractives projects, it is essential for companies to integrate FPIC into their internal communications. Companies must also collectively understand its impact by conducting due diligence on how to incorporate an FPIC-aware approach in their interactions with affected indigenous populations.

THE CONDITIONS FOR APPLYING FPIC

Whether recognized by the state or not, FPIC is relevant in any of the following circumstances:

- » *Projects commencing in countries that have incorporated legislation addressing FPIC:* Where national laws require companies to apply FPIC, companies should implement the relevant laws while recognizing that there are likely to be gaps in the legislation (discussed below) required for FPIC application.
- » *New IFC-funded projects applying PS7, as well as projects that rely on borrowed funds from Equator Banks that in turn apply PS7:* When projects use funding from the IFC or Equator Banks, corporations must apply any existing national legislation as well as the Equator Principles and/or the requisite PS7 and GN7 to their project.²⁸
- » *Where a company is otherwise willing to implement FPIC through their internal policies as a result of social performance risk management priorities and/or by virtue of best practice stakeholder engagement objectives:* FPIC application will largely depend on how a company chooses to implement it. When choosing to apply FPIC, the company should consider the application of the international framework and standards, as well as assess the following details within the relevant location:

²⁸ Companies should be aware that the draft Equator Principles III incorporate aspects of the UN Guiding Principles and the 2012 amendments to PS7.

- a. Recognition of indigenous peoples within state territorial boundaries,
- b. Recognition of FPIC within state and local legislation and regulations, and
- c. Other national legislation that may evoke indigenous peoples' rights in relation to a project.

APPLYING FPIC WHERE LEGISLATION IS ABSENT OR GAPS EXIST

Where gaps exist in national legislation, a corporation should conduct legal due diligence on the relevant international and national legal frameworks and standards noted in this document and consider FPIC as part of its approach to overall risk management and social performance. For example, in situations where national legislation does not exist or is unclear, the company should ensure that through this due diligence-approach, they integrate FPIC considerations into SEMP.

A key consideration is that the extent to which a company may choose to apply, facilitate, or help to define consent (i.e., the option for an indigenous community to approve or disapprove a project's development) is the individual company's decision, unless otherwise prescribed by law.

Inmet's Cobre Panama project is a recent positive and innovative example of a company applying consent where national legislation does not exist.²⁹ The company was confronted with the issue of resettling a number of indigenous families as a necessary first step to developing one of the largest undeveloped copper deposits in the world. In-depth consultation and negotiation processes were developed which, in addition to other factors, incorporated a policy that was developed to recognize indigenous peoples right to free, prior, and informed consent; a right that was further explained to them.

Companies must also keep in mind that in some cases where jurisdictions do not incorporate FPIC directly into legislation, other legislation may provide indigenous peoples a right similar to that of consent. For example, the only laws that existed historically addressing the notion of FPIC in the Russian Federation were those that required companies to consider the local population's opinion when implementing projects involving the development of natural resources. The laws related to environmental impact assessment did not differentiate between the general population and indigenous peoples. As a result indigenous peoples could use such mechanisms to assert their rights to preserve land for future generations, such as in the case of Raisa Tevlina.³⁰ In this case, the owner of a communal family plot said "no" to the assignment of their land for oil production in the Surgut region. The right to develop was provided by Regional Authorities to Surgutneftgas Oil Company and after many months of negotiation Raisa decided to preserve the lands for future generations.

²⁹ International Council on Mining and Metals. *Securing Free, Prior, and Informed Consent at Inmet's Panama Project*, Good Practice, volume 10, June 2012, www.republicofmining.com/2012/06/18/securing-free-prior-and-informed-consent-at-inmet's-panama-project-icmm-june-2012-newsletter/.

³⁰ J. Corpuz, O. Masardule, and M. Todyshev, *Indigenous Peoples Free, Prior, and Informed Consent in the Convention on Biological Diversity: An Overview*, p. 85, Indigenous Peoples' Contributions to COP-8 of CBD, 2006, www.ffla.net/new/es/bibliografia-recomendada/doc_download/63.

“This was not a right to veto; it was standard practice where due to exceptional circumstances project proponents had to accept a zero option.”³¹

In situations where legislation is absent or where implementation gaps exist, corporations must ensure (from a risk mitigation and best practice perspective) that they deploy an engagement process with all of the following attributes. The process must:

- » Not be unilaterally imposed
- » Not be time-bound
- » Be thoroughly documented and agreed to by all parties
- » Be designed with a decision-making process that incorporates traditional or customary decision-making processes, the correct representative institution(s), and the input of vulnerable groups such as women and youth
- » Build capacity within the indigenous communities to understand international and national frameworks and standards
- » Provide technical assistance to indigenous communities in language and modes of communication that ensure a complete understanding of the development phases and processes (including principles, impacts, and alternatives) in advance of project development
- » Encourage indigenous peoples to the use external third-party advice



Findings ways to integrate FPIC into project development plans and SEMP, whether it is part of national legislation or not, is an essential step toward reducing unforeseen risks to a project.

³¹ J. Corpuz, O. Masardule, and M. Todyshev, *Indigenous Peoples Free, Prior, and Informed Consent in the Convention on Biological Diversity: An Overview*, p. 85, www.ffla.net/new/es/bibliografia-recomendada/doc_download/63.

FPIC's Relationship With Stakeholder Engagement Management

Where indigenous peoples are present, whether the state formally recognizes them or not, companies should diligently ensure that these groups are contacted and consulted through their stakeholder engagement framework and management plans for that site. FPIC is no doubt a time-consuming process and is likely to conflict with project development timelines. In the absence of an FPIC process, however, opposition by indigenous peoples may result in a *de facto veto* that causes a far more protracted route toward project development and damages a company's reputation.³²

BSR recommends that corporations conduct their own (or third-party) assessment of how a project is likely to impact indigenous peoples. Corporations can conduct this assessment as a separate activity or through other relevant and customary baseline studies necessary for project development, such as a socioeconomic impact assessment or human rights impact assessment.

INTEGRATING FPIC INTO STAKEHOLDER ENGAGEMENT MANAGEMENT

Where indigenous peoples are identified by expert social scientists through these baseline studies, companies should incorporate the following indigenous-specific studies or other further studies into an SEMP to ascertain land use, socioeconomic conditions, governance processes, and customary practices for decision making and conflict resolution. Companies should conduct such studies prior to project development and update them throughout a project's life cycle. Even in those situations where project development has already commenced, a company may be able to mitigate risks through integrating these findings into project development schedules.



In many corporations, SEMPs also help to prioritize and target social investment initiatives and other local benefits for indigenous peoples as well as the broader local community. These plans are crucial not only for securing permits and a

³² Companies should be mindful that even where a right to veto does not exist, it may be applied indirectly. BSR is of the view that a *de facto veto* exists as a result of civil society demonstrations, riots, and other civil society activities that have the ability to either halt and/or seriously affect mine development.

social license during the project's design and development, but also for preserving strong relationships during the operations phase.³³

PRACTICAL QUESTIONS TO DETERMINE SEMP INTEGRATION

Companies should ask several questions and take practical steps up-front to satisfy due diligence processes and determine whether and if so how, they should integrate FPIC into their project development plans and SEMP.

These questions shall:

- » Determine whether a project affects any indigenous groups.
- » Identify the formal or customary structure representing the affected indigenous communities.
- » Assess how to apply the principles of FPIC.

Illustrative questions include:

- » What mapping has been done to identify the indigenous peoples who may be affected by the project's development?
- » What sources have been used to determine whether the lands and territories in question have been traditionally owned, occupied, or used by the indigenous peoples in question?
- » What mapping has been done to identify the representative institutions of any concerned indigenous peoples?
- » What mapping has been done to identify the FPIC-related laws and regulations within the relevant country?
- » What mapping of recent case law (both domestic and international) has been done to determine the status of FPIC within the relevant location?
- » What principles are driving the engagement process? Does the process ensure that information is shared and that decision making considers the customary processes of the concerned indigenous peoples?
- » Prior to critical decisions such as potential land or resource confiscation, relocation, storage, or disposal of hazardous materials, what engagement process shall be used to determine the types of restitution or "just, fair, and equitable compensation" that the company will offer the indigenous peoples?
- » Where there is a disagreement within the community, how will the company manage individual as well as collective rights?
- » What effort has been made to ensure that the concerned indigenous peoples understand the impacts of project development on lands affecting their livelihoods and living situation, particularly those critical issues related to utilization or exploitation of minerals, water, or other such resources?

³³ To preserve social license and FPIC license, companies must often make very difficult choices when designing social investment programs in order to balance the need to ensure that benefits are reaching communities with that of avoiding the risk of supplanting (or perpetuating the absence of state) responsibility. Benefit-sharing in extractives projects is principally the responsibility of governments who collect taxes, royalties, and other payments for allocation within the respective national, state, regional, and local governments. However, companies can play important roles; for example, initiatives like the Extractives Industry Transparency Initiative (EITI) help to promote transparency, mitigate corruption, support stronger governance, and boost civil society confidence in government activities.

- » What mechanisms are in place to monitor project development and its impact on the concerned indigenous peoples throughout the project's life cycle? What governance structures are used to analyze the project's impact? How neutral are they?
- » Which mechanisms enable the concerned indigenous peoples to review decisions in light of practical implications unanticipated during previous discussions between the parties?

The answers to the questions above will equip corporations to determine how to balance their stakeholders' expectations and tackle FPIC in their stakeholder engagement planning process and SEMPs. In some cases a company may establish a separate SEMP tailored to address precise risk management issues catered toward a particular group of indigenous peoples. In other cases companies may incorporate indigenous peoples concerns into broader SEMPs.

CONSIDERATIONS WHEN INTEGRATING THE FPIC DECISION-MAKING PROCESS INTO AN SEMP

Allowing indigenous peoples enough time to make decisions in a way that embodies their preferred decision-making practices is a key ingredient for successfully incorporating FPIC principles into SEMPs. During the BSR Workshop, participants outlined the factors that companies should consider when including indigenous peoples in the decision-making process.



CAPACITY-BUILDING AND ACCESS TO INFORMATION

Project proponents and states must obtain a good understanding of the views of indigenous peoples, and conversely indigenous peoples must be able to fully comprehend the information provided by corporations. To achieve this understanding, the choice of language and format as well as venues for sharing information are crucial factors. Companies should tailor their engagement approach to provide meaningful disclosure and avoid being perceived as coercive. In addition, complex issues need to be broken down for accessibility and understanding through culturally appropriate communication methods. For

example, an indigenous group may prefer informal storytelling forums over formal meetings or visual materials rather than written ones.

Giving indigenous peoples the time to gain ownership of and make legitimate decisions will also ensure that the parties craft a shared vision likely to support their varying interests. On one hand, this approach can help the state better assess what type of sustainable development makes sense for their country. On the other hand, it can help indigenous peoples gain ownership of a project, understand its practical implications, formulate jointly owned community development initiatives, and build on consent instead of making quick decisions that are likely to be criticized at a later stage in the process.

LEGITIMACY OF REPRESENTATIVES AND DECISION-MAKING PROCESSES

The thorny issue of finding legitimate representation has two major challenges.

Indigenous peoples should be empowered to nominate their own representative, in consideration of their customary practices. Meeting this challenge may prove difficult where legislation calls for a representative body that they believe does not adequately represent their interests.

Political dynamics among indigenous groups may result in multiple claims of representative legitimacy. This in turn, may lead to conflicting agendas and input into the project development and decision-making process.

As a result, a decision-making process that strikes a balance between the official collective rights of the relevant indigenous peoples and different factions or individuals is critical. Getting the decision-making process right is crucial to supporting due diligence.

After all, the extent to which consent applies remains questionable (i.e., whether it can be revoked at some later stage). Much like a social license to operate, consent is clearly not a single decision—it is an ongoing process of engagement, investment, and relationship building.

Engaging With FPIC: Benefits and Challenges

This paper has highlighted the numerous benefits and challenges of corporations engaging with FPIC, some of which are outlined below. FPIC can:

BENEFITS

- » Decrease the risk of financial loss by mitigating the potential of a de facto veto.
- » Increase reputational advantages with civil society, responsible investors, and indigenous groups.
- » Provide an expanded social license to operate for the development of future projects.
- » Help to reinvigorate and/or improve existing internal engagement processes.
- » Mitigate social and legal risks through rigorous engagement processes.
- » Play an appropriately supportive role in the realization of indigenous peoples' rights.
- » Provide corporations with a mandate to leverage states to encourage the protection of indigenous peoples' rights.
- » Better inform risk management databases.

CHALLENGES

- » Invite challenges to a company's operations where FPIC is unsupported by the state.
- » Be seen to undermine national sovereignty.
- » Delay established project development timelines.
- » Contribute to civil unrest where indigenous peoples are regarded as having unwarranted preferential treatment over other community and/or indigenous groups affected by the project.
- » Lead to governments wanting to develop natural resources rapidly, opting instead to provide concessions to companies who do not have FPIC obligations to exploit their resources faster.
- » Use extra financial and human resources to ensure FPIC is included into existing engagement processes.
- » Lead to confusion over what constitutes consent and the extent consent should be voluntarily applied by the company.

Conclusion

Though FPIC outcomes may be contentious, corporations should consider the application of FPIC and a sound decision-making process involving indigenous peoples as good business practices. Growing global awareness of indigenous peoples unique circumstances is adding substantial pressure on both the public and private sector to recognize indigenous peoples' rights, protect their livelihoods, and assure the provision of their economic and social benefits. As a result, companies that fail to a) identify the existence of indigenous peoples affected by their operations, b) ask specific questions as highlighted above, and c) apply FPIC principles may elevate future risks to legal and social license, production timelines, and project development, as well as to their overall reputation.

In order to mitigate unforeseen risks associated with project development, companies should map the existing or potential impacts on indigenous peoples in (or near) the project area, as well as review all national and local legislation (including any domestic or international case laws) relevant to the project's location during its early stages of development. Through this mapping, the company will understand the legal framework and the extent to which legislation may either positively or negatively affect the rights of indigenous peoples' and the proposed project.

FPIC principles can also add rigor to stakeholder engagement and reaffirm good engagement practices as an essential baseline for companies' social performance management systems, risk mitigation, and project development activities. Where companies are reluctant to apply FPIC as a separate process, some of its principles may, at a minimum, be deployed through a combination of baseline studies such as a human rights impact assessment. Companies should incorporate these findings into SEMP, which will help them to mitigate potential social, reputational, and financial losses related to these issues.

Companies that choose not to apply FPIC should carefully weigh this decision against the possible consequences of not following an FPIC-specific process, i.e., through a de facto veto and future claims by indigenous peoples against the government issuance of licenses or against company performance.³⁴

While consent as a formal right to veto may be debatable, securing legal and social license is increasingly linked to robust consultation and engagement processes that seek consensus and agreement. On one hand, the application of consent may seem to impede rapid development and global economic growth; on the other hand, consent has the capacity to conserve, protect, and encourage alternative economic activities in the pursuit of human development and sustainable growth.

³⁴ Recent Supreme Court rulings in Chile have employed the country's ratification of ILO 169 as a basis for determining that existing mandated environmental impact assessments were insufficient to achieve FPIC among indigenous populations.

Recommendations

This report has highlighted numerous considerations when engaging with FPIC in particular, consent. BSR recommends that corporations undertake the following to navigate these concepts their interpretation and application:

- » Conduct due diligence and map national and international laws and regulations related to FPIC and relevant to a project's location.
- » Leverage states to incorporate FPIC into national legislation in pursuit of a commercially stable investment environment.
- » Incorporate FPIC principles into SEMP's using a human rights lens and risk management approach.
- » Articulate the business case for securing internal FPIC buy-in to effectively deploy resources and mitigate risk.
- » Integrate FPIC into project development planning, risk management, and stakeholder engagement management.
- » Support constructive multi-stakeholder forums among states, NGOs, and corporations to enhance awareness of FPIC, encourage states to incorporate FPIC legislation, sharpen understanding of FPIC objectives, and build capacity for its implementation.

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