

FPIC AND THE EXTRACTIVE INDUSTRIES

A guide to applying the spirit of free, prior and informed consent in industrial projects

ABBI BUXTON AND EMMA WILSON – 2013



SHAPING
SUSTAINABLE
MARKETS

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Photo by

Pei-Ju Wang, from summer of 2012 in Poigan Bay, Quebec, Canada, where members of the Algonquins of Barriere Lake community were protesting clear-cutting on their traditional territory. For more information on their struggles for environmental protection and self-determination, please see www.barrierelakesolidarity.org

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ACRONYMS AND ABBREVIATIONS

CBD	Convention on Biological Diversity
FPIC	Free, prior and informed consent
FSC	Forest Stewardship Council
ICMM	International Council on Mining and Metals
IFC	International Finance Corporation
ILO 169	<i>International Labour Organization Convention 169 on Indigenous and Tribal Peoples</i>
IPIECA	the global oil and gas industry association for environmental and social issues
UNDRIP	<i>United Nations Declaration on the Rights of Indigenous Peoples</i>
UNPFII	United Nations Permanent Forum on Indigenous Issues



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EXECUTIVE SUMMARY

Oil, gas and mining companies are increasingly aware of the need to secure and maintain a 'social licence to operate'. Implementing a project without the support and trust of local communities can lead to operational delays, financial costs and litigation; even project closure, violence and loss of life. Increasingly, good practice leaders are going beyond legal requirements and striving to achieve more meaningful levels of community engagement as a way to avoid these risks.

Free, prior and informed consent (FPIC) is an indigenous peoples' right established in international conventions, notably the *ILO Convention 169 on Indigenous and Tribal Peoples* (1989), in soft law, notably the *UN Declaration on the Rights of Indigenous Peoples* (2007), and, in a few cases, in national law (in Peru, Australia, and the Philippines). FPIC is a requirement to engage in dialogue with communities and come to an agreement on when and where to carry out activities that may have a significant impact on local people and the environment, and the nature of related compensation and benefits packages. FPIC is a way of addressing the power differentials in negotiations, where communities all too often have a much weaker voice than government and companies. A key argument in support of FPIC is that the more participatory a process, the more likely decisions will lead to more sustainable, socially acceptable and politically viable resource

development. This paper seeks to articulate the relevance of FPIC to company policy and practice, while also providing a balanced consideration of the relative responsibilities of government and civil society.

There are an increasing number of business drivers for companies to engage with the concept of FPIC. The International Finance Corporation (IFC)'s revised Performance Standards of 2012 require its clients (companies) to seek FPI *consent* (rather than the previous requirement of FPI *consultation*) in relation to resettlement. Other international financial institutions and banks have followed suit (or indeed pre-empted IFC). The *UN Guiding Principles on Business and Human Rights* (2011) place responsibility on governments to **protect** human rights and companies to **respect** human rights in line with national and international law. Responsible investors are also interested in companies' FPIC policies (EIRIS, 2009). As a result, leading companies are beginning to incorporate FPIC language into their policies and internal implementation guidelines (Lehr and Smith, 2010).

This paper explores what we term the 'spirit of FPIC', the key elements of which are deliberation and considering all options equally and fairly. We focus less on how to follow the letter of the law (which differs in different contexts) and more on understanding the essence of what it means to

respect individual and collective rights, and for people to have a meaningful voice in deliberative decision-making processes about their own development.

The definition of FPIC provided by the UN Permanent Forum on Indigenous Issues (UNPFII, 2005:12) is that: (i) people are 'not coerced, pressured or intimidated in their choices of development'; (ii) 'their consent is sought and freely given prior to authorisation of development activities'; (iii) they 'have full information about the scope and impacts of the proposed development activities on their lands, resources and well-being'; and (iv) 'their choice to give or withhold consent over developments affecting them is respected and upheld' (UNPFII, 2005:12).

Since 2005 there has been much debate about the definition of FPIC with no single definition being universally accepted. There is little debate over interpretation of 'free' and 'informed'. 'Prior' consent – as we discuss – may not always be within the control of a company (for example, where governments are responsible for allocating concessions). Requirements for companies to elicit FPIC tend to focus on application to a specific project activity, such as siting facilities and project-related resettlement. The notion of consent is the most controversial. Following the IFC, the World Commission on Dams (WCD, 2000) and others, an emerging consensus can be

identified around interpreting 'consent' as mutual agreement through a pre-agreed and transparent process, with a continuous process of communication and negotiation over the course of the project cycle. The question of a community veto is still hotly debated, as we discuss in this paper. Regarding the scope of application of FPIC, there is emerging good practice in extending this to non-indigenous populations who are significantly affected by a project (WCD, 2000; CBD, 2004; FSC, 2012).

A key area of debate is the sharing of responsibility for implementing FPIC – is it government or company responsibility? To date, FPIC has been regarded largely as the responsibility of governments, while companies have tended to avoid a formal FPIC process where it is not a legal obligation or requirement related to project finance. This reluctance to engage is partly due to companies' discomfort with the prospect of handing over the power of veto to local community representatives. The notion of a one-time, one-sided power of veto often alienates companies – and indeed governments – especially as there is still insufficient case study evidence on how to identify *who* should grant the consent, and *what* consent should look like in practice. The fear of a veto can thus undermine FPIC's broader potential to empower communities. We see consent having

greatest positive impact if it is seen not as a one-way approval process, but a two-way negotiation where power relations are equalised in a structured, transparent and mutually agreed process. If one party wishes a project not to go ahead, this is brought to the table and debated openly and in good faith. A joint decision not to go ahead with a project may well be the outcome – as demonstrated by a Canadian case that we cite in this study.

At a basic level, the business case for adopting FPIC policies and processes relates to compliance with national and international (hard and soft) law, company policy and the requirements and standards of project lenders and company shareholders. At a deeper level, an FPIC process can allow companies to build understanding and appropriate operational responses to local issues and concerns in a timely fashion. An FPIC process can align closely with companies' existing good practice in stakeholder engagement even if not labelled as 'FPIC'. Where it is not possible – or necessary – to follow FPIC to the letter, we argue that implementing the 'spirit of FPIC' in company operations can still enhance the social licence to operate.

Based on this thinking, we have developed a three-point framework for companies that are considering how to develop FPIC policies and apply FPIC principles in their operations:

- 1. Comply with requirements for FPIC under international and national law, company policy and obligations to third parties, such as project lenders.**
- 2. Implement the 'spirit of FPIC' throughout the project life-cycle, by employing timely, transparent, deliberative processes to reach mutual agreement on future developments, whether or not this is required by third parties.**
- 3. Apply the 'spirit of FPIC' not only to indigenous communities, but to all significantly affected local communities, in line with emerging good practice guidance.**

The framework allows for three levels of application, depending on the levels of understanding and preparedness of the company in question, and the relevant demands and capacities of local communities and governments. It starts with a minimal compliance-based approach, where company policy is to meet legal requirements and third-party

obligations, such as to project lenders. This evolves to a deeper and more meaningful engagement with the 'spirit of FPIC', based on company policies that promote deliberative processes aimed at building mutual trust whether or not FPIC is required by law or by third parties. The third point is application of the 'spirit of FPIC' not only to indigenous communities but also to non-indigenous local communities that are significantly affected by a project. The framework broadly indicates an evolution in company policy, though there is some cross-over between the elements. For instance, the principles and institutions relating to implementing the 'spirit of FPIC' are relevant to companies taking a purely compliance-based approach in their policy regarding FPIC.

While providing some case study detail, this paper represents a largely conceptual coverage of FPIC. Our guidance should be considered alongside the plentiful step-by-step guidance that exists on implementing FPIC. We provide references to such guidance where we feel that it aligns with the approach we outline in this paper.

FOREWORD

Free, prior and informed consent (FPIC) is undoubtedly an important market governance mechanism for sustainable development – albeit one that can take different forms. It is an indigenous peoples' right established in international conventions and declarations, notably the *ILO Convention 169 on Indigenous and Tribal Peoples* and the *UN Declaration on the Rights of Indigenous Peoples*, and in some national laws, for example the Philippine's *Indigenous People's Rights Act*. FPIC is a requirement to engage, in a timely way, with communities and come to an agreement on when and where to carry out project activities that might impact their lives and local environment.

Growing demand for minerals and natural resources, concerns over resource scarcity, and rising prices are driving extractive industry companies to operate in new environments to obtain the resources they need. Technological advances have made it much easier for civil society to collectively organise and protest in response to the actions of businesses, and to get access to information about projects and their related rights. The costs of getting relations with communities wrong and not obtaining a 'social licence to operate' is increasingly recognised by companies. Meaningful implementation of FPIC – both before a project starts and during the lifecycle of a project – can be key to avoiding conflict with communities and ensuring that extractive industry projects contribute to sustainable development.

FPIC is being increasingly incorporated into voluntary market governance mechanisms of interest to Shaping Sustainable Markets, such as the Forestry Stewardship Council's (FSC) forestry certification scheme and the Roundtable on Responsible Palm Oil. FPIC is also gaining traction within project finance and with investors. The International Finance Corporation, for example, has revised its Performance Standards of 2012, requiring its clients (companies) to seek FPI *consent* in relation to resettlement – rather than the previous requirement of FPI *consultation* – signalling a much stronger interpretation of the concept. Responsible investors are increasingly taking an interest in a company's stance on FPIC and in how it manages social risk. All of these factors are driving companies to think more seriously about the ways in which they engage with local communities and FPIC.

But companies have struggled to implement FPIC effectively, partly because there is a lack of agreement on exactly what FPIC should look like – who provides consent, what does it look like, and who has the lead responsibility: governments or companies? This challenge of implementation is similar to the challenges faced by many other mechanisms that the Shaping Sustainable Markets research programme has analysed. While companies are getting better at understanding environmental issues and impacts and how to manage them, many are still grappling with the challenges of effectively managing social risks. And there remains a disconnect between company policies and principles, and the action on the ground required to address social issues.

While legal recognition of FPIC is a big achievement for indigenous rights groups, not all countries – even those who have ratified ILO 169 – have enshrined it in their own national law. Moreover, enshrining FPIC in law doesn't guarantee effective implementation or positive outcomes.

This paper plays an important role in helping extractive industry companies understand how they can engage with FPIC. It offers a three-point framework to guide companies in first of all understanding the international framing of FPIC and legal obligations to respect this right, and also in going further by understanding the essence – or 'spirit' – of FPIC and implementing this throughout their operations. This includes application of FPIC to all local populations – including non-indigenous peoples who will be significantly affected by a project, following FSC's recently published guidelines on FPIC. The paper also looks at the risks and challenges associated with implementing FPIC, for example the risk of undermining state authority; difficulties in identifying indigenous peoples; and knowing when consent has been achieved. The paper is particularly useful for companies in offering a number of key principles that can help in achieving the spirit of FPIC as well as some practical guidance and references to further sources of step-by-step guidance.

INTRODUCTION

'You don't get your social license by going to a government ministry and making an application or simply paying a fee... It requires far more than money to truly become part of the communities in which you operate.'

Pierre Lassonde, President of Newmont Mining Corporation (www.sociallicense.com).

Gaining and maintaining a 'social licence to operate' is becoming a necessary part of doing business for oil, gas and mining companies. Operating without the support and trust of the local communities can lead to violence, litigation, operational delays, project closure and both financial and human loss (see for example Box 4). Companies are being forced to engage with these issues in a more meaningful way as even the most remote communities are becoming more connected and more aware of their rights. They have growing expectations of the benefits that large-scale resource development should be able to bring and the safeguards that should be in place.

An increasing number of good practice leaders among companies are going beyond legal requirements and striving to achieve higher levels of community engagement as a way to avoid these risks and increase their shareholder value (IPIECA 2012). Free, prior and informed consent (FPIC) is a foundational and therefore crucial part of gaining the social licence to operate – if implemented properly. In essence, it's the first step.

FPIC is a way of addressing the power differentials in negotiations, where communities all too often have a much weaker voice than government and companies. This paper explores what we term the 'spirit of FPIC', the key elements of which are deliberation and considering all

options equally and fairly. We focus less on how to follow the letter of the law (which differs in different contexts) and more on understanding the essence of what it means to respect individual and collective rights, and for people to have a meaningful voice in deliberative decision-making processes about their own development.

DEFINITION

FPIC is an indigenous peoples' right established in international conventions, notably the *ILO Convention 169 on Indigenous and Tribal Peoples* (1989),¹ as well as in soft law, notably the *UN Declaration on the Rights of Indigenous Peoples* (2007), and in some cases, national law. The key elements of FPIC were outlined in a report of the 2005 UN Permanent Forum on Indigenous Issues (UNPFII) International Workshop on Methodologies regarding FPIC and Indigenous Peoples. These are:

- people are 'not coerced, pressured or intimidated in their choices of development'
- 'their consent is sought and freely given prior to authorisation of development activities'
- 'they have full information about the scope and impacts of the proposed development activities on their lands, resources and well-being', and
- 'their choice to give or withhold consent over developments affecting them is respected and upheld'.

Yet there is still no single accepted definition of FPIC despite considerable discussion and debate in recent years, based on usage of the term in specific local contexts, and in relation to specific activities, from accessing genetic resources to extractive industry development. In 2012 BSR – a

1. For more information and the text of the convention, see: <http://www.ilo.org/indigenous/Conventions/no169/lang-en/index.htm>

membership-based business network originally known as Business for Social Responsibility – convened a workshop on FPIC and business. At this workshop, participants ‘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’ (BSR, 2012:6). We can also look back to the pioneering work of the World Commission on Dams (WCD, 2000:281), which stated that FPIC ‘involves a continuous, iterative process of communication and negotiation spanning the entire planning and project cycles’.

Building on its concept of ‘informed consultation and participation’, which is applicable to all community engagement, the International Finance Corporation (IFC) defines FPIC as a process ‘established through good faith negotiation between the client and the Affected Communities of Indigenous Peoples’. Companies seeking finance from the IFC are required to 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’. The IFC further notes that ‘FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree’ (IFC, 2012: Performance Standard 7).

There is little debate over interpretation of ‘free’ and ‘informed’. ‘Prior’ consent – as we discuss – may not always be within the control of a company (for example, where governments are responsible for allocating concessions). Requirements for companies to elicit FPIC tend to focus on application to a specific project activity, such as siting facilities and project-related resettlement. The notion of consent is the most controversial. Following the IFC, the World Commission on Dams (WCD, 2000) and others, an emerging consensus can be identified around interpreting ‘consent’ as mutual agreement through a pre-agreed and transparent process, with a continuous process of communication and negotiation over the course of the project cycle. The question of a community veto is still hotly debated, as we discuss in this paper. Regarding the scope of application of FPIC, there is emerging good practice in extending this to non-indigenous populations who are significantly affected by a project (WCD, 2000; CBD, 2004; FSC, 2012; see also the justification in Section 4).

In short, for the purposes of this paper, the essence of FPIC is considered to be a deeper commitment to engage, leading to shared agreement about a project’s development.

CONSENT AND VETO

In the past, FPIC has been regarded primarily as the responsibility of governments, while companies have frequently avoided implementation of a formal FPIC process where it is not a legal requirement or a project finance obligation. Part of the reason for this lack of engagement with the concept on the part of companies is that FPIC is often framed in black and white terms requiring a yes/no answer. The notion of a one-time, one-sided power of veto often alienates companies – and indeed governments – especially as there is still insufficient case study evidence on how to identify *who* should grant the consent, and *what* consent should look like in practice.

The fear of a veto can thus undermine FPIC’s broader potential to empower communities. It can stall constructive engagement on what it might mean for a company to implement FPIC in practice. We therefore see consent having greatest positive impact if it is interpreted not as a one-way approval process, but a two-way negotiation where power relations are equalised in a structured, transparent and mutually agreed process. If one party wishes a project not to go ahead, this is brought to the table and debated openly and in good faith. A joint decision not to go ahead with a project may well be the outcome – as demonstrated by a Canadian case that we cite in this study (see Box 7).

KEY DRIVERS

When faced with the complexity of issues raised by calls to apply FPIC voluntarily, companies may respond by drawing attention to their existing community engagement policies and their compliance with national law and international good practice standards, arguing that these are equivalent to FPIC. This kind of response can undermine relations with indigenous rights groups and other stakeholders. It is important to acknowledge, however, that an FPIC process can indeed align closely with companies’ existing good practice in stakeholder engagement even if not labelled as ‘FPIC’. But this should be seen as an argument for greater engagement with FPIC debates, rather than the opposite. Engaging more precisely with the principles of FPIC can be a way

to enhance stakeholder engagement practices for the benefit of the business as well as communities.

Responsible companies are increasingly aware that they need to have policies relating to FPIC. A key driver in shaping the thinking of industry and investors was the 2003 *World Bank Extractive Industries Review*, which included recommendations for the World Bank Group, including the IFC, to include FPIC in their Performance Standards.² In 2012, the IFC revised its Social Performance Standards to include FPI *consent* (rather than the previous requirement of FPI *consultation*).³ A further driver has been the roll-out of the UN's *Guiding Principles on Business and Human Rights* in 2011, which place responsibility on governments to **protect** human rights and companies to **respect** human rights in line with national and international law (see Box 3). In May 2011, the Organisation for Economic Co-operation and Development (OECD) also updated its *Guidelines for Multinational Enterprises* to strengthen human rights standards, including those relating to indigenous peoples (see Table 2). Significantly, the new Guidelines expect companies to respect human rights

independently of a state's ability or willingness to fulfil their own human rights obligations (Muchlinski, 2011).⁴ Responsible investors are increasingly interested in companies' FPIC policies and implementation guidelines (EIRIS, 2009) and leading extractive companies, such as Rio Tinto and Anglo American, are beginning to incorporate FPIC language into their policies (Lehr and Smith, 2010).⁵ These are persuasive signals that companies should begin to adopt FPIC policies as a matter of good practice.

In 2011, the UN Special Rapporteur on Indigenous Peoples, Professor James Anaya, identified 'natural resource extraction and other major development projects in or near indigenous territories as one of the most significant sources of abuse of the rights of indigenous peoples worldwide' (UN, 2011b:18). He is currently leading a study on extractive industries and indigenous peoples, exploring the relative roles of governments, industry and communities, and among other things how to improve levels of engagement and enhance mutual understanding. The final report from Professor Anaya's study, with a series of recommendations, will be presented to the Human Rights Council in 2013.

2. See reports and comments at: <http://go.worldbank.org/T1VB5JCV61>

3. The IFC Performance Standard No.7 on Indigenous Peoples includes the requirement for FPI consent in the case of resettlement. All standards and guidance notes can be downloaded on the IFC website at: http://www1.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Sustainability+Framework/Sustainability+Framework+-+2012/Performance+Standards+and+Guidance+Notes+2012/

4. For more information on the OECD Guidelines for Multinational Enterprises, see: <http://www.oecd.org/daf/inv/mne/>

5. See, Rio Tinto's Human Rights Policy: http://www.riotinto.com/documents/Human_rights_policy.pdf; and Anglo-American's Indigenous Peoples Statement: <http://www.angloamerican.co.uk/aa/development/society/indpeople/>

BOX 1: WHY FPIC FOR SUSTAINABLE DEVELOPMENT?

One argument for free, prior and informed consent is that in taking decisions relating to the future wellbeing of a local society, including business decisions, the more participatory a process, the greater its ability to balance economic, environmental and social considerations and thereby lead to socially and politically viable developments. Determining the best outcome for sustainable development often depends on whose views are voiced at the table and how these are deliberated. The diversity of perspectives on sustainability makes it essential to voice and debate this wide range of views in order to achieve decisions that satisfy all legitimate parties.

For example, indigenous communities' perspectives on sustainability typically emphasise the recognition of rights to land and natural resource use, self-determination and existing socio-cultural practices (Colchester, 2010; Sawyer, 2004). However, indigenous and non-indigenous project-affected communities may contain a range of perspectives, with some viewing sustainable development primarily in terms of employment, business development or other opportunities for increasing their living standards. Others may express concern for environmental impacts related to local resource use or conservation, while others may be more concerned about securing support from extractive industry projects for infrastructure, education, culture, sport and health facilities (Wills, 1991; Wilson and Blackmore, 2013).

National and international non-governmental organisations (NGOs) may prioritise environmental issues, for example NGO campaigns to protect the Western Gray Whale from oil and gas projects off Sakhalin

Island in the Russian Far East,⁶ or the Greenpeace protests against oil extraction off the shores of Greenland based on the heightened environmental risks associated with deep-water oil drilling in the Arctic (Greenpeace, 2010).

For government agencies, the emphasis tends to be on increasing foreign investment and profitable exploration of natural resources in support of economic development and the broader interests of society. In developing and emerging economies, the focus is frequently on support for infrastructure development (e.g. roads, pipelines, port infrastructure) and the inclusion of national industrial partners and local support businesses in resource extraction projects (Ward, 2009). However, good intentions can be hampered by corruption, mismanagement or a lack of capacity (Humphreys *et al.*, 2007).

For industry, sustainability is frequently interpreted as being synonymous with sustained profit-making and competitive development. As such, creating employment and training opportunities and ensuring environmental and human rights protection – in essence, securing a 'social licence to operate' – may require additional investment, but these activities are seen as essential to the ongoing success of the business. For Rio Tinto, for example: 'Our approach to sustainable development and business integrity are, we believe, competitive advantages for us. They help us gain access to high quality resources and business development opportunities. In addition they allow us to attract talented people, engage with communities, reduce environmental impacts, manage risks effectively and decrease operating costs. This enables us to give more confidence, and deliver higher returns, to our stakeholders'.⁷

6. See more information on the Western Gray Whale Advisory Panel on the website of the International Union for the Conservation of Nature (IUCN) at: <http://www.iucn.org/wgwap/wgwap/>

7. See description of Rio Tinto's sustainable development strategy at: http://www.riotinto.com/index_ourapproach.asp

THE IMPLEMENTATION CHALLENGE

While policies are important, it is the implementation of FPIC that poses the real challenge. There remains a disconnect between understanding of environmental and social risks and practical implementation of risk mitigation measures, between company policies (often framed as 'values' and set at the level of corporate headquarters) and the action on the ground required to address issues.

IIED recently carried out a review of the mining industry's progress since the Mining, Minerals and Sustainable Development (MMSD) project.⁸ The review, *MMSD+10: Reflecting on a decade of mining and sustainable development*, concludes that despite an increasingly sophisticated understanding of mining's contribution to sustainable development within the industry, good strategic intentions, and examples of good practice, the complexity of local experience at mine sites results in highly variable implementation of good practice standards (Buxton, 2012b).⁹ The challenges of implementation are particularly acute when considering complex social issues relating to indigenous and local communities that require specific and locally appropriate responses. Respondents to the *MMSD+10*

survey observed that 'community involvement overall cannot be considered an area of achievement, and remains one of the biggest challenges for minerals and sustainable development' (*ibid*:18).

The operational risks that FPIC is meant to address are precisely those most challenging for companies, in terms of practical implementation. Although much has been written about what FPIC means in principle and much good practice *guidance* is offered – indeed many companies have devised their own detailed implementation guidelines (Lehr and Smith, 2010) – there is little evidence of what good implementation actually looks like in practice.¹⁰

The legal requirement for FPIC by itself does not guarantee positive outcomes for communities. For example, while FPIC has been incorporated into national law in the Philippines, it has been possible for companies to evade compliance with those laws. Canada, on the other hand, has resisted establishing legal requirements for FPIC, but has developed community engagement practices that offer the flexibility to create meaningful dialogue between government, companies and communities leading to more successful outcomes (see more in Section 3).

8. The Mining, Minerals and Sustainable Development Project (MMSD) was an independent two-year project of research and consultation looking at how the mining and minerals sector could contribute to the global transition to sustainable development. See: <http://www.iied.org/mining-minerals-sustainable-development>.

9. The *MMSD+10* review was based on 36 semi-structured interviews to gather perceptions of stakeholders in mining companies, civil society groups, industry and commodity associations, and independent consultants. The report can be found at: <http://pubs.iied.org/16041IIED.html>.

10. More case studies have been produced relating to the palm oil and forestry sectors (see for example: Lewis *et al.*, 2008; Colchester, 2010; Chao *et al.*, 2012; and other case study publications of the Forest Peoples Programme, available to download at: www.forestpeoples.org/guiding-principles/free-prior-and-informed-consent-fpic).

THREE-POINT FRAMEWORK

This paper argues that successful implementation of FPIC requires an understanding of the 'spirit of FPIC' that can inform practice and ensure responsiveness to local realities. As noted above, we focus on what it means to respect individual and collective rights, and ensuring people have a meaningful voice in deliberative decision-making processes related to their own development. By outlining a framework for implementing the 'spirit of FPIC', we offer a way for extractive companies to approach development of FPIC policies and implementation guidelines.

BOX 2: THE THREE-POINT FRAMEWORK

1. Comply with requirements for FPIC under international and national law, company policy and obligations to third parties, such as project lenders.
2. Implement the 'spirit of FPIC' throughout the project life-cycle, by employing timely, transparent, deliberative processes to reach mutual agreement on future developments, whether or not this is required by third parties.
3. Apply the 'spirit of FPIC' not only to indigenous communities, but to all significantly affected local communities, in line with emerging good practice guidance.

This paper is targeted primarily at companies, and those working with them, who are looking to engage with FPIC in a meaningful way. It is also relevant to governments and civil society organisations seeking to develop a better understanding of company roles and responsibilities. The three-level framework is intended as a challenge to companies to move beyond a culture driven by minimal compliance-based thinking towards one based on a greater understanding of the importance and benefits of deliberative stakeholder engagement processes and jointly-agreed outcomes. By understanding and working towards achieving 'the spirit of FPIC' with all communities, as a set of transferrable principles, companies operating in multiple jurisdictions are more likely to adopt consistent good practice in stakeholder engagement in all their resource developments, regardless of legal jurisdiction or the legal status of those impacted.

Section 1 expands on the business case for FPIC and the value for companies in properly engaging with and implementing FPIC. Sections 2–4 expand on the three points of the framework. In concluding, the final section offers some recommendations on good practice, referencing key sources of step-by-step guidance in the existing literature.

ONE

THE BUSINESS CASE FOR GETTING FPIC RIGHT

The business case for securing a 'social licence to operate' is increasingly well understood and accepted by company chief executive officers (CEOs). It is based largely on the need to minimise operational risks arising from conflict and to ensure appropriate levels of stakeholder participation in the development of a resource. To secure a 'social licence to operate' requires, at a minimum, compliance with laws and obligations to third parties. Yet, by going *beyond* compliance to mitigate so-called 'non-technical risks', companies are increasingly realising that they can build greater trust and social legitimacy within local communities. This is particularly important in cases where legal frameworks are inadequate or poorly enforced.

In this section we provide an argument for why FPIC can be an effective tool for companies to help achieve a social licence to operate. FPIC is essentially a process for achieving and maintaining approval and acceptance of a project by building the legitimacy and credibility of the project and ultimately establishing trust between project proponents and local stakeholders. Maintaining FPIC equates to maintaining the social licence throughout the life of the project. Moreover, the process of seeking FPIC can align well with companies' existing good practice in stakeholder engagement (see Section 2, Box 5). Adopting targeted FPIC policies and processes can be a way to enhance stakeholder engagement practices for the benefit of the business as well as communities.

It is important to understand the relative roles and responsibilities of governments and companies in natural resource developments. The work of the UN Special Representative on Human Rights, Professor John Ruggie, has brought this discussion to the fore in recent years (see Box 3 below). As noted in the Introduction, FPIC is often seen primarily as the responsibility of governments, and companies have tended to avoid a formal FPIC process where it is not a legal obligation or requirement of project finance institutions or shareholders. The *ILO Convention 169 on Indigenous and Tribal Peoples* (1989) and the *UN Declaration on the Rights of Indigenous Peoples* (2007) emphasise the government responsibility for seeking FPIC. And in practice, it is governments who grant extractive industry concessions and licences and therefore should take the lead on any FPIC process prior to allocation of these (although in many cases, specific locations for project activities are not known at that time).

However, in the majority of cases governments have not sought FPIC prior to granting a concession or licence. In cases where governments are signatories of ILO 169, this has implications for companies who may be accused of complicity in failure to meet the requirements of the convention (see IFC, 2007b). As noted above, the revised *OECD Guidelines* expect companies to respect human rights independently of a state's ability or willingness to fulfil their own obligations (Muchlinski, 2011). Increasing responsibility

placed on companies with regard to human rights (see also Box 3), and an increasing number of cases where conflict has ended in project closure or huge financial losses (see Box 4) suggest that companies may wish to ensure a consent process is initiated as soon as possible. Lehr and Smith (2010) note:

'Companies have expressed concern that indigenous communities will exercise a right to veto projects. This is a possibility. At the same time, particularly given the recent momentum regarding FPIC on the international stage, gaining consent through a formal and documented process may provide a stronger license to operate than a typical engagement process. In fact, consent may be better understood as a formalized and documented social license to operate. The process may better assure that, despite changes in government and political trends, the company will not become a target due to local opposition to its project.' (Lehr and Smith, 2010:37)

In Section 3 we explore further the question of whether consent should be considered as equating to a veto or not. In that section we argue that deliberative processes need to consider the option of rejecting a project or industrial activity if that is the position of one party in that process. However, the decision to reject the project or activity needs to be the mutually agreed outcome of that deliberative process.

Not only do companies have a strong interest in maintaining consent for a project more broadly but further in making sure that site-specific consent processes are carried out as individual sites for project facilities, pipelines and camps are negotiated. In many ways, these site-specific processes are more critical to the communities. Good practice dictates that alternative sites be identified and considered as part of an environmental and social impact assessment, where appropriate.¹¹

11. IFC Performance Standard 1 on impact assessment states: 'For greenfield developments or large expansions with specifically identified physical elements, aspects, and facilities that are likely to generate potential significant environmental or social impacts, the client will conduct a comprehensive Environmental and Social Impact Assessment, including an examination of alternatives, where appropriate' (IFC, 2012:3, footnote 11).

BOX 3: PROTECT, RESPECT AND REMEDY: HUMAN RIGHTS RISING UP THE BUSINESS AGENDA

A key driver for companies to engage more meaningfully with the human rights agenda, including indigenous rights, has been the work of Professor John Ruggie, the UN Special Representative on Business and Human Rights. The *UN Guiding Principles on Business and Human Rights* (2011) highlight the relative and inter-dependent roles of governments to protect and companies to respect nationally and internationally recognised human rights. 'Respect' means to act with due diligence to avoid infringing human rights and to address adverse impacts of project activities. In cases where human rights are not protected or respected sufficiently, Ruggie calls for access to appropriate forms of remedy, such as non-judicial grievance procedures (Rees, 2010; Wilson and Blackmore, 2013).

Although the Ruggie principles are not legally binding but rather framed as a 'social expectation', emergent case law (on both human rights and company law) may strengthen the legal relevance of the principles to companies. Ruggie's work has therefore galvanised efforts on the part of companies to sharpen up their human rights-related policies and procedures, including consideration of the legal and corporate responsibility implications of the FPIC agenda (Lehr and Smith, 2010). The *Guiding Principles* have also inspired the European Commission to develop its own sector guidance on business and human rights, starting with three pilot sectors including oil and gas (IHRB, 2012). The UN Special Rapporteur on Indigenous Peoples, Professor James Anaya, who has been carrying out a survey of the extractive industries, is looking to build on the work of Professor Ruggie, through development of 'specific guidelines or principles aimed at helping States, corporate actors and indigenous peoples in fulfilling the responsibilities that arise from international indigenous rights standards' (UN 2011b:19).

KEY ELEMENTS OF THE BUSINESS CASE FOR SEEKING FPIC

Recent years have seen new articulations of the strengthened business case for FPIC. Below we highlight some key elements:

- **Respecting the law**, if a country has passed national laws specific to FPIC and/or has obligations under international law, such as having ratified ILO 169 (IFC, 2007b; ICMM, 2010a);
- **Meeting third party obligations**, for example demonstrating compliance with project finance requirements, such as IFC's Performance Standard 7 on Indigenous Peoples (IFC, 2012), the performance standards of other international finance institutions and the Equator Principles¹² (see Section 2 and Table 2);
- **Building trust with local communities**, to ensure sound local negotiations, smooth-running operations and the swift resolution of minor issues; also in legacy cases where relations between communities and extractive industries or government have been damaged following earlier company activities (IFC, 2007a; Lehr and Smith, 2010; Colchester, 2010);
- **Avoiding conflict**, public demonstrations or social tension, where, at the extreme end, conflict can cause huge unanticipated costs, especially where it results in litigation and compensation costs, loss of operational days, violence and loss of human life (see Sohn, 2007 and Box 4 below);
- **Effective and efficient project management**, such as avoiding time lost through worker action or community protest or litigation; saving time on prolonged negotiations around compensation and benefit sharing where the rules of negotiation have not been agreed in advance; and gaining better knowledge and access to information by building relations with communities, researchers and NGOs (Lehr and Smith, 2010; Sohn, 2007);
- **Optimising local content (procurement of local goods and services, and hiring local workers)** including meeting government requirements for local content in investment agreements; gaining project efficiencies from local hiring and procurement; building local relations and managing expectations in relation to job creation and enterprise development; identifying local skills and optimal areas for local content development; and understanding the local situation sufficiently to plan training and skills development in a timely fashion (Wilson and Kuszewski, 2011; IFC and EAP, 2011);
- **Getting social investment right** by aligning community spending with local needs and priorities; identifying local skills that can be developed for local content development; optimising use of core competencies for the benefit of communities (Wilson and Kuszewski, 2011; IFC and EAP, 2011);
- **Being the 'employer of choice'**, by attracting and retaining talented and enthusiastic staff both locally and in companies' home countries, by not only providing good prospects and a safe working environment, but also by being 'seen to be doing good' in the world (and of course not 'doing bad'). For example, BP states: 'BP is the employer of choice for more than 96,000 people. [...] The idea of being 'a force for good'

12. See: <http://equator-principles.com/>

BOX 4: CONSENT, CONFLICT AND THE BOTTOM LINE

The World Resources Institute report *Development without Conflict: The business case for community consent* (Sohn, 2007) presents lessons from a number of case studies that demonstrate evidence of the direct links between conflict and the bottom line. In Argentina, Meridian Gold failed to properly engage and inform local communities on the potential benefits and risks of the Esquel Gold Project, leading to overwhelming rejection of the project in a public referendum. The company may now never be able to access the estimated USD 1.33 billion in gold reserves. In Peru, Newmont Mining Corporation was forced to close the Minera Yanacocha Gold Mine Project after major tensions between the company and community – sacrificing USD 2.23 billion in reserves. These figures do not include the additional costs of operational disruptions, litigation and enhanced security in cases of community conflict. In Nigeria, oil conflict in the Niger Delta led to the execution of Ken Saro Wiwa and other activists, with a huge reputational cost for Shell. In 2009 Shell agreed to settle human rights claims, charging its Nigerian subsidiary with

complicity in torture and killing. The settlement provides USD 15.5 million to ten plaintiffs, including family members of the deceased, and will be used to establish a trust fund for the Ogoni people.¹³

A survey of 40 individuals working within and with the extractive industries (Davis and Franks, 2011) revealed: 'The most frequent [conflict-related] costs identified by interviewees were the costs arising from lost productivity due to delay. The greatest costs were seen as the opportunity costs arising from the inability to pursue future projects and/or opportunities for expansion or for sale, as a result of company–community conflict. The costs cited by interviewees as the most often overlooked were those resulting from the additional staff time needed when conflicts arise or escalate (*ibid*: 3–4). The survey suggests that a major mining project with capital expenditure between USD 3–5 billion might face a loss of roughly USD 20 million/week in delayed production in Net Present Value terms. A major mining exploration might lose around USD 10,000 per day in wages, idle machinery and other costs.

13. For more on the Ogoni case see: http://wiwavshell.org/documents/Wiwa_v_Shell_Settlement_release.pdf

underlines all our activities worldwide. So the way we work is guided by values – integrity, honest dealing, treating everyone with respect and dignity, striving for mutual advantage, transparency and contributing to human progress.¹⁴

- **Maintaining investment security and ensuring future investment opportunities**, reducing the risk of project sponsors pulling out or governments attempting to gain an increased stake in the project; ensuring future investment from public and private sponsors, and government access to further resources and business opportunities (Fenton Krysiak, 2007; Sohn, 2007; Ward, 2009).
- **Contributing directly to poverty reduction or poverty prevention** and so helping to increase potential markets for their products and to reduce the risk of social unrest.

FPIC AND THE SOCIAL LICENCE TO OPERATE

The website <http://sociallicense.com>, set up by Ian Thomson of On Common Ground Consultants Inc. and Robert Boutilier of Robert Boutilier and Associates, explores the notion of a social licence to operate in a way that chimes closely with current thinking on FPIC. Thomson and Boutilier define the social licence as ‘existing when a project has the ongoing approval within the community and other stakeholders, ongoing approval or broad social acceptance and, most frequently, as ongoing acceptance’. They go on to state:

‘At the level of an individual project the Social License is rooted in the beliefs, perceptions and opinions held by the local population and other

stakeholders about the project. It is therefore granted by the community. It is also intangible, unless effort is made to measure these beliefs, perceptions and opinions. Finally it is dynamic and non-permanent because beliefs, perceptions and opinions are subject to change as new information is acquired. Hence the Social License has to be earned and then maintained.’ (Thomson and Boutilier, 2012)

Thomson and Boutilier articulate a progression from **social legitimacy** to **credibility** and finally **trust** as being the normative components of a social licence to operate. Table 1 draws on this framework as a basis for comparison with a range of guidance documents that set out the key goals of an FPIC process – that is, a deeper commitment to engage than mere consultation, leading to clear agreement about a project’s development (BSR, 2012) – and how to achieve them.

THE RISKS OF GETTING FPIC WRONG

There are risks in not properly implementing an FPIC process, but there are also risks and challenges in implementing it, even where this takes place in good faith. These relate to the processes for implementation as well as the principle itself.

- **The risk of undermining state authority:** A company implementing FPIC may be seen as undermining the state’s role in determining the use and management of its natural resources. In most countries, the state owns all rights to subsoil resources, such as oil, gas and minerals. A good company-government relationship is crucial to agreeing mutually beneficial terms on how to develop the resource. ‘Prior’ consent, in

14. See BP as ‘featured employer’: http://www.rigzone.com/jobs/featured_employer.asp?e_id=507 (accessed March 2013)

TABLE 1: UNDERSTANDING FPIC AND THE SOCIAL LICENCE TO OPERATE

THE SOCIAL LICENCE TO OPERATE	FPIC
Social legitimacy	
<p>Thomson and Boutillier suggest that gaining social legitimacy is the starting point for a process of achieving the social licence. This is based on open and honest engagement with the community about the project, and understanding and being able to work within local norms.</p> <p>‘Social legitimacy is based on established norms, the norms of the community, that may be legal, social and cultural and both formal and informal in nature. Companies must know and understand the norms of the community and be able to work with them as they represent the local “rules of the game”. Failure to do so risks rejection. In practice, the initial basis for social legitimacy comes from engagement with all members of the community and providing information on the project, the company and what may happen in the future and then answering any and all questions.’</p>	<p>This is the starting point for FPIC – engaging in a way that is locally appropriate. Implementing the deliberative processes and ensuring flexibility in achieving FPIC, as outlined in this paper, will help ensure that local norms are fully incorporated within the decision-making processes.</p> <p>This is further supported by the Akwe:Kon Guidelines on cultural impact assessment, which state in Article 53: ‘Prior informed consent corresponding to various phases of the impact assessment process should consider the rights, knowledge, innovations and practices of indigenous and local communities...’ (CBD 2004:21).</p>
Credibility	
<p>Thomson and Boutillier suggest companies can achieve credibility by consistently sharing reliable information, and by drawing up formal agreements to clarify expectations, commitments, roles and responsibilities.</p> <p>‘The capacity to be credible is largely created by consistently providing true and clear information and by complying with any and all commitments made to the community. Credibility is often best established and maintained through the application of formal agreements where the rules, roles and responsibilities of the company and the community are negotiated, defined and consolidated. Such a framework helps manage expectations and reduces the risk [of] losing credibility by being perceived as in breach of promises made, a situation common where relationships have not been properly defined.’</p>	<p>A key feature of an FPIC process is the open and honest sharing of reliable project information. Processes are documented and agreed in advance between company and community. A written agreement, such as an Impact Benefit Agreement (IBA) is often the outcome of an FPIC process (Lehr and Smith, 2010).</p> <p>The CBD (2004:21) calls for ‘the use of appropriate language and process; the allocation of sufficient time and the provision of accurate, factual and legally correct information’ in an FPIC process.</p> <p>The IFC Guidance Note 7 (2012:6) states 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.’</p>
Trust	
<p>For Thomson and Boutillier, trust is a core element of a social licence to operate. This is achieved over time, through shared experiences and collaboration.</p> <p>‘Trust, or the willingness to be vulnerable to the actions of another, is a very high quality of relationship and one that takes both time and effort to create. True trust comes from shared experiences. The challenge for the company is to go beyond transactions with the community and create opportunities to collaborate, work together and generate the shared experiences within which trust can grow.’</p>	<p>A key goal of the FPIC process is to build trust and demonstrate that FPIC is being maintained over the lifetime of the project. Trust is built over time through consistent relationship building.</p> <p>Lehr and Smith (2008:71) state: ‘It is through consistent and respectful engagement with the community that the company will gain the trust it needs to operate effectively in the future. A piece of paper giving consent provides little guarantee of better operating conditions if it is not accompanied by strong relationships.’</p>
<p>Source: Thomson and Boutillier (2012)</p>	

the sense of ILO 169, means prior to a concession being granted, which only a government can do. Thus a company does not have a legal right to elicit consent, which along with recognising the status of indigenous peoples, is the responsibility of the state. Moreover, in cases where governments have not met their own obligations to secure FPIC, the company is placed in a difficult position (IFC, 2007b). On the one hand, the company has a responsibility to do all it can to ensure that indigenous and local people's rights are respected. On the other hand, unilateral actions may be perceived as undermining the government's position.

- **Difficulties in identifying indigenous peoples:** It is not always easy to identify 'indigenous peoples' in a country, and therefore determine to whom the right to FPIC should apply. This again is often an issue which governments feel they are entitled to decide. If FPIC applies only to indigenous peoples, as is the case in most international and national law, then identifying indigenous peoples affected by the development is a prerequisite for implementation. Not all those peoples claiming to be indigenous are recognised as such by their governments (as seen in Malaysia, China and Botswana for example), and others only recognise certain 'indigenous' groups and not others (for example in Russia). Moreover, 'communities' are rarely homogenous, geographically bounded entities. For example, some people may migrate towards the project area for work, or there may be contested and overlapping land claims. Identifying the relevant indigenous peoples to be included in the negotiation process is often a key challenge for companies (Lehr and Smith, 2010:26–27). Following FSC (2012) and Buxton (2012a) this paper suggests that companies apply FPIC to

all communities likely to be affected within their corporate community engagement process (see more in Section 4). This may go some way to alleviating these risks.

- **Customary decision-making processes versus corporate procedures:** The decision-making cultures of communities and companies are generally very different. Companies tend to prefer short processes to agree long-term commitments, whereas communities tend to feel more comfortable with extensive, participatory decision-making and flexible outcomes that can be subsequently modified (Lehr and Smith, 2010:29–30). Incorporating customary decision-making in FPIC processes is a key part of the UN and other guidance on applying FPIC. However, it can be difficult for 'outsiders' to understand local processes and therefore there is a risk of confusion, purposeful and unintentional manipulation of the correct processes (by company and community representatives alike), and further marginalisation of vulnerable groups within the community (Chao *et al.*, 2012). Traditional decision-making may even exclude women and other vulnerable groups. Section 3 explores good practice on engaging marginalised groups in FPIC processes.
- **Managing stakeholder perceptions and expectations:** Companies cannot assume that application of an FPIC process will be universally welcomed by communities and other stakeholders. While an FPIC process would seek to accommodate traditional decision-making, since the company is an 'outside agent', any attempt to promote FPIC or greater inclusion of traditionally 'excluded' elements of the community may be seen as undermining local hierarchies, or imposing 'Western' values. Other stakeholders may perceive FPIC as

'anti-development' or 'anti-capitalist'. For companies, one concern is that an FPIC process might unrealistically raise the expectations of indigenous and local people about potential benefits (Lehr and Smith, 2010:32). However, the IFC guidance on stakeholder engagement (IFC, 2007a:5) states:

'Taking a proactive approach means fighting the instinct to delay consultation because it is still early days and you don't have all the answers yet or are worried about raising expectations. The reality, most likely, is that people's expectations are already raised in some form or other, and that speculation about the project and the company is beginning to circulate. Early engagement provides a valuable opportunity to influence public perception and set a positive tone with stakeholders early on. Be clear upfront that there are still many uncertainties and unknowns, and use early interactions with stakeholders as a predictor of potential issues and risks, and to help generate ideas and alternative solutions on early design questions.'

- **Knowing when consent has been achieved:** Understanding what consent means continues to be one of the single greatest challenges in applying FPIC. Failing to get this right is failing to achieve the FPIC of the communities. The IFC Guidance Note 7 on Indigenous Peoples notes that, 'FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree', but emphasises that the process of negotiation needs to be mutually agreed in advance. This would include clear guidance on how to understand when consent has been achieved.
- **The risk of a veto:** As noted above, companies are often uncomfortable with the possibility that a process of seeking FPIC might result in a community applying a veto. Nonetheless, an authentic FPIC process needs to be able to offer the possibility of veto. As Lehr and Smith (2010:37) have noted, allowing people this option very rarely results in them applying it, and instead frequently results in a company securing a stronger licence to operate than a regular consultation process might have achieved. Moreover, in an FPIC process, companies are in a position of negotiation, whereas in a situation of severe conflict, companies may not be in any position to influence whether or not the project is closed down. Some companies are starting

to say that they would rather pull out of a project than operate without a social licence to operate. Having the right to veto on the table is both a valid option within a deliberative process and a rebalancing of the power differentials in the room – with communities too often being the weaker players in negotiations (Swiderska, 2012).

- **Cost:** As noted by BSR (2012:5) FPIC can 'stretch company capabilities and resources when navigating the legal and practical complexities associated with FPIC implementation'. However, companies need to balance this against the possible costs of allowing dissatisfaction to grow into conflict, as demonstrated in its extreme form in Box 4 above.

APPLYING THE THREE-POINT FRAMEWORK

FPIC can be a highly complex and sensitive area for a company to address. Yet there is a clear business case for companies to engage with the FPIC debates and apply FPIC processes to build trust and 'good neighbour' relations with indigenous and local communities. There is a business case for applying FPIC at all levels of our three-point framework:

1. At a basic level, the business case relates to compliance (with national and international law, company policy, and obligations to third parties such as shareholders and project lenders).
2. At a deeper level, establishing a social licence to operate depends greatly on the local context and requires a company to respond to local expectations, norms and cultural practices. The adoption of policies to apply the 'spirit of FPIC' across a company's operations (regardless of legal and third-party obligations) can help companies to build trust and develop appropriate operational responses to emerging issues in a systematic and timely fashion.
3. With this in mind, it is not too great a stretch to appreciate the benefit to business of applying processes that embody the 'spirit of FPIC' to significantly affected communities that are not indigenous, or are mixed indigenous and non-indigenous.

Sections 2–4 offer more detail about our three-point process for engaging with FPIC, emphasising the need to be flexible and alert to all the risks discussed above.

TWO

ACHIEVING COMPLIANCE

Engaging with FPIC level 1: Comply with requirements for FPIC under international and national law, company policy and obligations to third parties, such as project lenders.

Recent years have seen substantial momentum and improved articulation of the responsibilities of companies and governments relating to social, environmental and human rights, as noted in the previous section. This section outlines the requirements that companies can be expected to meet if they take a compliance-oriented approach to FPIC. Further guidance on the framework for compliance with international legal and voluntary requirements and national legislation is provided by IPIECA (the global oil and gas industry association for environmental and social issues)¹⁵ (IPIECA, 2012) and the law firm Foley Hoag (Lehr and Smith, 2010).

RESPECTING THE LAW

The most pervasive and oft-quoted of international laws to incorporate FPIC is the *International Labour Organisation (ILO) Convention 169 on Indigenous and Tribal Peoples*. The convention requires governments to elicit the FPIC of indigenous peoples in the specific case of

resettlement, while also granting indigenous peoples other rights such as the right to participate in the development process and decide their own priorities. ILO 169 is binding on the 22 countries that have ratified it.¹⁶ However, of these countries, few have enshrined it within their national laws¹⁷ and others have narrowed its application and/or face difficulties in achieving true implementation. Moreover, the convention allows governments to enact compulsory relocation in exceptional circumstances in compliance with due legal process. An IFC guidance note on ILO 169 for the private sector states:

'The Convention is clear about what is required in the process of consultation. Article 6.2 states that the consultations should be carried out "in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures." This lack of veto within the Convention is reinforced by the provisions on land rights and relocation in Article 16, which allows for compulsory relocation in certain exceptional circumstances' (IFC, 2007b:6).

While ILO 169 is only indirectly applicable to companies as it refers to the responsibilities of the

15. When IPIECA was set up in 1974 the acronym stood for the International Petroleum Industry Environmental Conservation Association. In 2009, IPIECA stopped using the full title as they felt it no longer accurately reflected the breadth and scope of their work. They are now known as IPIECA, the global oil and gas industry association for environmental and social issues.

16. Although different figures exist in different parts of the ILO website, one official page confirms 22 ratifications and lists them as follows: Argentina; Bolivia; Brazil; Central African Republic; Chile; Colombia; Costa Rica; Denmark; Dominica; Ecuador; Fiji; Guatemala; Honduras; Mexico; Nepal; Netherlands; Nicaragua; Norway; Paraguay; Peru; Spain; Venezuela (see http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO. Accessed on 17 March 2013)

17. Countries with FPIC in national law: Australia, Philippines, Peru.

state, certain companies, such as BG Group and ExxonMobil make reference to ILO 169 in their policies (Lehr and Smith, 2010:53; Voss and Greenspan, 2012:20). Arguments for doing so include the fact that the convention is often taken as reference by indigenous peoples' groups in their engagement with companies. Moreover, if a government's actions result in a project failing to meet the requirements of the convention, the operating company itself may be subject to accusations of violating the convention. This has occurred in the context of some IFC-financed projects in Latin America, leading to tense community relations and project delays (IFC, 2007b). Companies may be accused of putting pressure on the government to evade its responsibilities or may be seen as violating rights protected under the convention if they fail to meet a request of the government such as organising adequate consultation processes (*ibid*).

Article 15 (5) of the UN's 1992 *Convention on Biological Diversity* (CBD) states that, 'Access to genetic resources shall be subject to prior, informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party'. The Nagoya Protocol to the CBD requires countries to ensure prior, informed consent or approval and involvement of indigenous – and local – communities for access to traditional knowledge and genetic resources held by them. The CBD is binding on the 193 countries that have ratified it.¹⁸ In 2004, the CBD Secretariat produced the (voluntary) *Akwe:Kon*

Guidelines on cultural impact assessment developed by parties to the convention to support CBD implementation.¹⁹ The guidelines call on governments, or the 'proponent of a development proposal' (for example an extractive company), to establish 'a process whereby local and indigenous communities may have the option to accept or oppose a proposed development that may impact on their community' (CBD, 2004:9). The guidelines are non-binding on states and companies, but support the argument for applying FPIC principles when a resource extraction project might affect sacred sites or lands and waters that are important for traditional resource use activities.

Very few countries have explicitly incorporated FPIC into their national legislation (Philippines, Australia and Peru). Nonetheless, national law increasingly incorporates requirements to carry out community consultation, although not necessarily in the shape of FPIC. Often these are a mandatory aspect of environmental impact assessments, although guidelines on how to consult with communities are rarely provided in the law. In cases where consultation is required by law, a failure to do so can lead to legal sanctions, undermine relations with the government and local communities, lead to local conflict and risk the loss of future investment opportunities. A company may, however, find itself having to meet different legal requirements in the different jurisdictions it operates in.

18. For a list of parties and signatories to the CBD, see: www.cbd.int/convention/parties/list/

19. *The Akwe:Kon Guidelines* are 'voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities'.

As Lehr and Smith note:

'A company that operates across a variety of jurisdictions with very different legal and regulatory frameworks faces particular challenges in adopting and implementing a globally applicable FPIC policy that can meet all governmental requirements while also incorporating a consistent company approach... Companies that create a detailed implementation process by which to gain consent in all jurisdictions may find conflicts between their 'one-size-fits-all' guidelines and the processes mandated by host governments, or they may be accused of creating greater regulatory headaches for the government by exceeding the local legal standards' (Lehr and Smith, 2010:63).

ConocoPhillips does not have a company policy relating to FPIC. However, in Peru, where it is a legal obligation, the company committed to securing FPIC before any operations. They entered into a written agreement (or *convenio*) with each community, documenting the community consent and the details of the agreed compensation packages for disturbance due to land use and seismic activities, with each community where they were operating.²⁰ ICMC's Guidance on Indigenous Peoples' and Mining (ICMM, 2010a:2) observes the following:

'In a growing number of countries, there is now legal recognition of the rights of Indigenous Peoples to negotiate the terms and conditions under which minerals development will take place on their land. In some cases, this extends to a legally recognized right to grant or withhold consent. Companies that have a poor reputation

for dealing with Indigenous Peoples, or lack experience in this area, are more likely to encounter delays and difficulties in negotiating and finalizing agreements.'

OBLIGATIONS TO THIRD PARTIES

A key aspect of the compliance agenda is how conditionalities are applied to loans financed by international finance institutions. As they are binding on their clients, loan conditionalities allow the lenders to have a direct influence on company performance. However, since use of project finance is not obligatory, this means that companies can choose whether or not to subject themselves to such conditionalities. Some choose to do so as a way of increasing their credibility in the eyes of government and civil society stakeholders.

As early as 1998, the Inter-American Development Bank (IDB) stated that it would 'only support operations that involve the displacement of indigenous communities or other low income ethnic minority communities' if it could ascertain that 'the people affected have given their informed consent to the resettlement and compensation measures' (IDB, 1998:2). The *IDB Operational Policy on Indigenous Peoples* (2006) states that for projects of significant potential adverse impacts on indigenous peoples, the proponent needs to demonstrate that it has 'through a good faith negotiation process, obtained agreements regarding the operation and measures to address the adverse impacts as necessary to support, in the Bank's judgment, the sociocultural viability of the operation' (IDB, 2006: 4.4 (iii)).

20. See www.conocophillips.com/EN/susdev/ethics/peru/Pages/index.aspx. Accessed March 2013.

TABLE 2: FPIC AT A GLANCE: LEGAL OBLIGATIONS AND VOLUNTARY STANDARDS

INSTRUMENT	APPLICATION OF FPIC	BINDING/ NON-BINDING
International hard law – applicable to states		
<i>International Labour Organisation (ILO) Convention 169 on Indigenous and Tribal Peoples (1989)</i> ²¹	ILO 169 requires governments to elicit the FPIC of indigenous and tribal peoples in cases of resettlement. The Convention allows governments to enact compulsory relocation in exceptional circumstances, in compliance with due legal process.	ILO 169 is binding on the 22 countries that have ratified the convention.
<i>UN Convention on Biological Diversity (CBD) (1992)</i> [<i>The Akwe:Kon Guidelines</i> on cultural impact assessment (2004)]	Article 15 (5) states: 'Access to genetic resources shall be subject to prior, informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.' The Nagoya Protocol to the CBD requires countries to take measures to ensure prior, informed consent or approval and involvement of indigenous and local communities for access to traditional knowledge and genetic resources held by them. [<i>The Akwe:Kon Guidelines</i> call on governments and companies to establish 'a process whereby local and indigenous communities may have the option to accept or oppose a proposed development that may impact on their community' (CBD 2004:9).]	The CBD and Nagoya Protocol are binding on the 158 countries that have ratified the convention. ²² [<i>The Akwe:Kon Guidelines</i> are non-binding on states and companies.]
International soft law – applicable to states		
<i>UN Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007)</i>	Article 10 states: 'Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.' Article 29 (2): 'States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.' Article 32 (2): '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.'	Non-binding unless enacted in national law, but compliance is expected in the 144 countries that have endorsed the Declaration. Compliance is monitored by the UNPFII and the UN Human Rights Council.

21. For more information see: www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm.

22. For a listed of parties and signatories to the CBD, see: www.cbd.int/convention/parties/list/

INSTRUMENT	APPLICATION OF FPIC	BINDING/ NON-BINDING
Case law – applicable to states		
<p>The Saramaka People v Suriname (Inter-American Court of Human Rights)</p> <p>(Case related to alleged violations committed by the state against the members of the Saramaka people, a tribal community living in the Upper Suriname River region.)</p>	<p>The Court ordered the State of Suriname to:</p> <p>‘... delimit, demarcate, and grant collective title over the territory of the members of the Saramaka people, in accordance with their customary laws, and through previous, effective and fully informed consultations with the Saramaka people, without prejudice to other tribal and indigenous communities. Until said delimitation, demarcation, and titling of the Saramaka territory has been carried out, Suriname must abstain from acts which might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the territory to which the members of the Saramaka people are entitled, unless the State obtains the free, informed and prior consent of the Saramaka people.’</p>	<p>Legally binding court ruling. Has become part of case law.</p>
Third part obligations (project finance and certification) – applicable to companies		
<p><i>International Finance Corporation (IFC) Performance Standards</i> (2012)</p>	<p>Performance Standard 7 now requires companies to elicit free, prior and informed consent from indigenous peoples in cases of resettlement; where indigenous knowledge is to be used for commercial purposes, and in other cases of ‘significant adverse’ impact.</p> <p>(Prior to 2012, the IFC required only ‘free, prior and informed consultation’ and ‘broad community support’, but stopped short of ‘consent’.)</p>	<p>Binding on companies that are IFC investment clients.</p> <p>(Broadly regarded as international good practice, e.g. adopted by the Equator Banks).</p>
<p>Inter-American Development Bank (IDB)</p> <p><i>Involuntary Resettlement Operation Policy</i> (1998) and <i>Operational Policy on Indigenous Peoples</i> (2006)</p> <p>(IDB is also bound by rulings of the Inter-American Court of Human Rights – see Saramaka case above)</p>	<p>IDB will ‘only support operations that involve the displacement of indigenous communities or other low income ethnic minority communities’ if it can confirm that ‘the people affected have given their informed consent to the resettlement and compensation measures’ (IDB, 1998:2).</p> <p>For projects with significant potential adverse impacts on indigenous peoples, the proponent should demonstrate that it has ‘through a good faith negotiation process, obtained agreements regarding the operation and measures to address the adverse impacts as necessary to support, in the Bank’s judgment, the sociocultural viability of the operation’ (IDB, 2006: 4.4 (iii)).</p>	<p>Binding on companies that are IDB investment clients.</p>

INSTRUMENT	APPLICATION OF FPIC	BINDING/ NON-BINDING
<p>European Bank for Reconstruction and Development (EBRD)</p> <p><i>Environmental and Social Policy</i> (2008)</p> <p>Performance Requirement 7 (Indigenous Peoples)</p>	<p>Performance Requirement 7 recognises that ‘the prior informed consent of affected Indigenous Peoples is required [for specified activities*], given the specific vulnerability of Indigenous Peoples to the adverse impacts of such projects’ (EBRD, 2008:51). ‘The client will enter into good faith negotiation with the affected communities of Indigenous Peoples, and document their informed participation and consent as a result of the negotiation’ (<i>ibid</i>: 56).</p> <p>*This relates to activities that are on traditionally used land, or would affect livelihoods, cultural, ceremonial or spiritual uses, or would lead to resettlement; or affect cultural resources.</p>	<p>Binding on companies that are EBRD investment clients.</p>
<p>Asia Development Bank (ADB)</p> <p><i>Indigenous Peoples Safeguards</i> (2012)</p>	<p>Clients are required to: ‘Ascertain the consent of affected Indigenous Peoples communities to... (i) commercial development of the cultural resources and knowledge of Indigenous Peoples; (ii) physical displacement from traditional or customary lands; and (iii) commercial development of natural resources within customary lands under use that would impact the livelihoods or the cultural, ceremonial, spiritual uses that define the identity and community of Indigenous Peoples.’</p> <p>‘Consent’ refers to ‘a collective expression by the affected Indigenous Peoples communities, through individuals and/or their recognized representatives, of broad community support for such project activities. Broad community support may exist even if some individuals or groups object to the project activities’ (ADB, 2012:5).</p>	<p>Binding on companies that are ADB investment clients.</p>
<p>Forest Stewardship Council (FSC)</p> <p><i>Principles and Criteria</i> (revised in 2012) for the FSC certification standard</p>	<p>FPIC is a requirement in the revised FSC Principles and Criteria, relating to two distinct situations:</p> <ol style="list-style-type: none"> 1. to determine if the indigenous peoples or local communities whose legal or customary rights to resources or land in or near the management unit may be affected by management activities agree to the proposed operations and the manner in which they are planned 2. to seek authorisation from indigenous peoples or local communities if a certified Organization intends to use their traditional knowledge. <p>FSC and its members decided in their 2012 revision of the FSC certification standard to expand the application of FPIC for all projects to non-indigenous communities.</p>	<p>Binding on companies seeking to secure and retain FSC certification.</p>

INSTRUMENT	APPLICATION OF FPIC	BINDING/ NON-BINDING
Multi-stakeholder initiatives – applicable to member companies		
<p>World Commission on Dams (WCD)</p> <p><i>Dams and Development: A new framework for decision-making</i> (WCD, 2000)</p>	<p>The WCD was one of the first multi-stakeholder bodies to address FPIC. It included FPIC as a best practice policy recommendation: 'Where projects affect indigenous and tribal peoples, such processes are guided by their FPIC' (WCD, 2000: xxxiv).</p>	<p>Non-binding but sent a strong message to policy-makers. Supported by development agencies, companies, financial institutions.</p>
<p>Roundtable on Sustainable Palm Oil (RSPO)</p> <p><i>Principles and Criteria for Sustainable Palm Oil Production</i> (2007)</p>	<p>Principle 2 (2.2): 'Use of the land for oil palm does not diminish the legal rights, or customary rights, of other users, without their free, prior, and informed consent'. Requirements include procedures for identifying legal and customary rights and people entitled to compensation; documentary evidence of land ownership, legal acquisition of title and fair compensation; documentation and publication of the process and outcome of negotiated agreements and compensation claims.</p>	<p>Binding on companies that have signed up to RSPO.</p>
<p>Organisation for Economic Co-operation and Development (OECD)</p> <p><i>Guidelines for Multinational Enterprises</i> (2011) (Annex to the OECD <i>Declaration on International Investment and Multinational Enterprises</i>, adopted in 1976; adhered to by 44 governments)</p>	<p>The guidelines do not specifically mention FPIC, however the 2011 revision states that: '[E]nterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; persons belonging to national or ethnic, religious and linguistic minorities; women; children; persons with disabilities; and migrant workers and their families.'</p> <p>According to the revised guidelines, companies are expected to respect human rights independently of a state's ability or willingness to fulfil their own human rights obligations.</p>	<p>Compliance with the OECD guidelines is voluntary, but a report can be submitted to National Contact Points if a company is not acting or investing in accordance with the guidelines.</p>

INSTRUMENT	APPLICATION OF FPIC	BINDING/ NON-BINDING
<p>International Council on Mining and Metals (ICMM) <i>Position Statement on Mining and Indigenous Peoples</i> (2008) and <i>ICMM's Position on FPIC</i> (2010)</p>	<p>According to the <i>Position Statement on Mining and Indigenous Peoples</i> ICMM members commit to: 'engage and consult with Indigenous Peoples in a fair, timely and culturally appropriate way throughout the project cycle. Engagement will be based on honest and open provision of information, and in a form that is accessible to Indigenous Peoples. Engagement will begin at the earliest possible stage of potential mining activities, prior to substantive on-the-ground exploration. Engagement, wherever possible, will be undertaken through traditional authorities within communities and with respect for traditional decision-making structures and processes.' (ICMM, 2008:3)</p> <p><i>ICMM's Position on FPIC</i> (Davy, 2010) states: 'Where governments have not fully embraced FPIC, companies cannot endorse it unilaterally.' However it notes that ICMM recognises that 'in some instances where legal licence to mine is not matched by a social licence to operate, a decision may be made not to proceed with mining.'</p>	<p>Applicable to ICMM member companies.</p>
<p>IPIECA, the global oil and gas industry association for environmental and social issues <i>Indigenous Peoples and the Oil and Gas Industry</i> (2012)</p>	<p>The guidelines acknowledge the 2012 IFC performance standards and revised use of 'consent' rather than 'consultation', but go on to state: 'Although there is a certain amount of consensus between governments, NGOs and companies on the need for free, prior and informed consultation with Indigenous Peoples in negotiation and decision-making processes, the concept of consent is not universally accepted' (IPIECA, 2012: 19).</p>	<p>Non-binding on companies.</p>

The European Bank for Reconstruction and Development (EBRD) included a requirement for FPIC in its *Environmental and Social Policy* (2008). Performance Requirement 7 (Indigenous Peoples) recognises that 'the prior informed consent of affected Indigenous Peoples is required [for specified project-related activities], given the specific vulnerability of Indigenous Peoples to the adverse impacts of such projects' (EBRD, 2008:51). 'The client will enter into good faith negotiation with the affected communities of Indigenous Peoples, and document their informed participation and consent as a result of the negotiation' (*ibid*: 56). This relates to activities that are on traditionally used land, activities that would affect livelihoods, cultural, ceremonial or spiritual uses, would lead to resettlement; or affect cultural resources.

A key development was the 2012 revision of the IFC Performance Standards to incorporate the term 'consent'. IFC requires companies to elicit FPIC from indigenous peoples specifically in cases of resettlement, when indigenous peoples' knowledge is to be used for commercial purposes, and in other cases of 'significant adverse' impact. Prior to this, the IFC required only 'free, prior and informed *consultation*' and 'broad community support', but stopped short of 'consent'.

Although the IFC Performance Standards apply only to its own investments, they are broadly regarded as international good practice on what it means to abide by social and environmental standards. For example, the Equator Principles, launched in 2003, are aimed at managing environmental and social risk in project finance. The 77 Equator Principles Financial Institutions have committed to following the IFC Performance Standards.²³

To assist companies in complying with its performance standards, the IFC developed a handbook: *Stakeholder Engagement: A good practice handbook for companies doing business in emerging markets* (IFC, 2007). Even in 2007, this handbook reflected a shift towards more FPIC-style approaches to stakeholder engagement, relating to both indigenous and non-indigenous communities, as illustrated in Box 5. While these good practice recommendations are non-binding on the client, they are generally used as guidance by the project proponent and by auditors who carry out due diligence activities.

Other international initiatives and standards exist that can also serve to guide extractive companies on environmental and social best practice. The World Commission on Dams (WCD) was one of the first multistakeholder bodies to address FPIC in 2000. It included FPIC as a best practice policy, recommending: 'Where projects affect indigenous and tribal peoples, such processes are guided by their FPIC' (WCD, 2000: xxxiv). The Forest Stewardship Council (FSC), which is binding on those seeking to secure and maintain FSC certification, and the Roundtable on Sustainable Palm Oil (RSPO), which is binding on its members, require consent from all communities significantly affected by the activities of companies (Colchester, 2010; Chao *et al.*, 2012; see also Table 2 above).

COMPANY POLICY COMMITMENTS

Extractive industry associations have not gone so far as to recommend or require that companies seek the FPIC of local communities. Company members of IPIECA are not bound to IPIECA recommendations or statements, but are closely involved in the drafting of guidance and in related

23. See www.equator-principles.com.

BOX 5: FPIC AND THE IFC GUIDANCE ON GOOD PRACTICE IN STAKEHOLDER ENGAGEMENT

The IFC's 2007 publication, *Stakeholder Engagement: A good practice handbook for companies doing business in emerging markets*, notes the importance of building trust, mutual respect and understanding. As these take time to develop, it is good practice for companies to engage with stakeholders in the early stage of a project (pre-feasibility or pre-exploration) especially in the context of the more complex or controversial projects (pp.4–5). Openness and transparency are highly valued by stakeholders; a lack of information or the perception that a company is being secretive can undermine trust (p.28). People need to have a say in decisions that affect their lives: 'Public participation includes the promise that the public's contribution will influence the decision' (p.35).

A good consultation process (p.38) takes place early enough to have an effect on project decisions, and is informed by relevant information that is disseminated in advance. It is meaningful, inclusive and culturally appropriate, and is free from manipulation or coercion. The consultation is documented, with reporting on feedback to participants, and is ongoing as required during the life of the project.

The IFC guidance suggests that negotiated agreements might be appropriate where stakeholder concerns present a significant risk to project operations or company reputation. A signed agreement outlining the respective roles and responsibilities of the company and affected stakeholders provides clarity, predictability and security. Negotiations should be entered into 'in good faith' with an open mind, a willingness to engage, and a genuine desire to reach agreement and find solutions (p.64). A further level of engagement is achieved by strategic partnerships between companies and communities, government or NGOs, involving joint activities that help to build social capital (p.66).

The handbook makes special reference to engagement with indigenous peoples, where '[t]he aim is to ensure cultural appropriateness and to help affected communities gain a genuine understanding of the impacts of the project and the proposed mitigation measures and benefits' (p.51). It references Article 6 of the *ILO Convention 169 on Indigenous and Tribal Peoples*, which states that consultation with indigenous peoples should take place 'in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures' (p.49).

Source: IFC (2007a).

working groups. The IPIECA guidelines, *Indigenous Peoples and the Oil and Gas Industry*, were updated in 2012 acknowledging the new IFC performance standards, including the revised use of 'consent' rather than 'consultation'. However, they make no recommendations to companies to follow IFC guidelines on consent, stating, 'Although there is a certain amount of consensus between governments, NGOs and companies on the need for free, prior and informed consultation with Indigenous Peoples in negotiation and decision-making processes, the concept of consent is not universally accepted' (IPIECA, 2012:19).

In the mining industry, ICMM's ten sustainable development principles and various position statements, are binding on its member companies, who are independently audited on their compliance with these commitments.²⁴ ICMM's *Position Statement on Mining and Indigenous Peoples* obliges its members to 'respect the rights and interests of indigenous peoples as defined within applicable national and international laws' and to: 'engage and consult with Indigenous Peoples in a fair, timely and culturally appropriate way throughout the project cycle. Engagement will be based on honest and open provision of information, and in a form that is accessible to Indigenous Peoples. Engagement will begin at the earliest possible stage of potential mining activities, prior to substantive on-the-ground exploration. Engagement, wherever possible, will be undertaken through traditional authorities within communities and with respect

for traditional decision-making structures and processes.' (ICMM, 2008:3).

ICMM's *Position on FPIC* is currently publicly available only as an article in the ICMM newsletter *Good Practice* (Davy, 2010). It indicates that ICMM recognises that 'in some instances where legal licence to mine is not matched by a social licence to operate, a decision may be made not to proceed with mining.' However, the article also states: 'Where governments have not fully embraced FPIC, companies cannot endorse it unilaterally.' This reflects discussions at the IUCN/ICMM Roundtable on FPIC in January 2008 where the Mining Council of Australia stated:

'Any formal determination to confer a power of veto or consent (in this case, land access and use) to a local community is the prerogative of government. Should the sovereign government make that determination, only then does the Mining Council of Australia consider to be joined in the manner of its operationalization' (IUCN and ICMM, 2008:6).

This highlights a key challenge in implementing FPIC: companies may still feel they are undermining state authority by conferring the power of consent to communities, and therefore jeopardising that all-important relationship with government. Thus they may feel more comfortable with a policy that focuses on compliance and does not pro-actively seek to introduce processes where these are not already required by law.²⁵

24. See more at www.icmm.com/our-work/sustainable-development-framework/assurance.

25. In the absence of national legal requirements, companies can refer to UNDRIP, which has been endorsed by 114 countries. However, in practice they may still be deterred from doing so by their reluctance to undermine their relations with government.

BOX 6: FOLEY HOAG AND OXFAM: ANALYSES OF COMPANY POLICY ON FPIC

In a report commissioned from the law firm Foley Hoag by Talisman Energy on the request of its responsible investors, Lehr and Smith (2010) summarise the results of a survey of 17 leading extractive companies on their policies, company statements and implementation guidelines relating to FPIC. About half of the companies surveyed had global policies that refer to the terms 'consent'; 'free, prior, and informed consultation'; or 'broad community support'. A more recent review of 28 companies' policies and positions on FPIC was completed by Oxfam America (Voss and Greenspan, 2012). Five of the companies reviewed by Oxfam (Inmet, Newmont, Rio Tinto, Talisman and Xstrata) have made explicit public commitments to free, prior and informed consent. In its *Community Policy*, De Beers (Canada) (not covered by the Oxfam report) states its commitment to: 'Respecting community governance and always seeking a community's free and informed consent prior to initiating any significant operations that will have a substantial impact on their interests' (De Beers, 2007). ConocoPhillips committed to

obtaining consent before any operations in Peru, where it was required by law, but does not have a broader company policy on FPIC (Lehr and Smith, 2010:53).

Some companies (including BP, ConocoPhillips, ExxonMobil and Repsol) do not explicitly commit to FPIC, but state that their approach is consistent with international standards that outline consent principles, including UNDRIP, ILO 169 and IFC's 2012 Performance Standard No.7 on Indigenous Peoples (Voss and Greenspan, 2012). Lehr and Smith (2010) observe that some companies keep FPIC language out of their policies but include it in their implementation guidelines for internal use. Voss and Greenspan (2012) note that where companies do address FPIC in their policies and public commitments, they are generally brief and provide little detail on the process of implementation. However, Talisman Energy, who commissioned the Foley Hoag report, is seen as pushing ahead by 'describing in general terms what its FPIC process actually looks like, with some details on implementation, as well as by defining some of the key terms such as timing and consent' (Voss and Greenspan, 2012:20).

THREE IMPLEMENTING THE SPIRIT OF FPIC

Engaging with FPIC level 2: Implement the 'spirit of FPIC' throughout the project life-cycle, by employing timely, transparent, deliberative processes to reach mutual agreement on future developments, whether or not this is required by third parties.

A company's ability to establish a social licence to operate depends greatly on the local context and requires the company to respond to local expectations, norms and cultural practices. Therefore a compliance-only approach to FPIC may be insufficient to build mutual trust and understanding in all project contexts, or to maintain good practice standards in all jurisdictions. We argue that by embedding the 'spirit of FPIC' in community engagement practices throughout the project life-cycle and across the contracting chain, companies can create a strong foundation for building trust and understanding, and for developing appropriate operational responses to local issues in a timely fashion. This additional investment makes sound business sense as it ensures that operations are viable in the long term.

THE 'SPIRIT OF FPIC'

Certain aspects of the FPIC agenda – for example, when it is defined as a right to veto and/or when it appears to undermine the authority of the state – can alienate companies who may otherwise seek to implement international good practice in community engagement. This paper argues that the 'spirit of FPIC' does not hinge on handing over the power of veto to communities – rather it balances the power relations between companies, communities and the government, through deliberative processes leading to mutual agreement on future development. The mutually agreed decision could be to reject further

development of a mine or hydrocarbon project, or the construction of a pipeline in a specific area, but that decision will be reached together.

The essence of an FPIC process is building shared values and goals, establishing frameworks, procedures and appropriate terminology for dialogue, discussing project implementation options and possible impacts, negotiating terms and agreements in advance, with a process for re-visiting them on a regular basis. The 'spirit of FPIC' requires the balanced and conscientious consideration of company, community and government interests. To this end, all parties need to come to the table willing to open their own minds and accommodate the interests of other parties. In this section we explore some of the more contentious issues, and offer a justification for implementing the 'spirit of FPIC' as a matter of good business practice.

AN APPROACH TO 'CONSENT'

As noted in previous sections there is on-going disagreement on how to define 'consent' in FPIC. In this section we consider some of the issues in the consent debates and urge companies to look beyond the black-and-white interpretation of 'consent' as a community's power of veto.

Many indigenous peoples' representatives argue that consent should amount to a veto power and regard this as an expression of the right to self-determination inherent within FPIC. Alternative arguments assert that giving any individual community decision-making power over natural resources can have an impact on the country as a whole – on decisions that are therefore the preserve of a democratically elected government. On the other hand, the needs of indigenous and other poor and marginalised groups are often not prioritised in government decision-making.

For companies, the relationship between consent and veto is complex. As noted in Section 2, Lehr and Smith (2010:37) argue that if a company secures community consent through a formal, documented process, this may result in a stronger licence to operate than a regular engagement process, while the possibility of a veto may not even arise. A consent process may mitigate the risk of future local opposition that in extreme cases could shut down a project – which would equate to a de facto veto that companies are in no position to resist. Thus in the worst case scenario, failing to address the issue of consent where it would have been appropriate may lead to the veto that a company was trying to avoid.

The UN Special Rapporteur on the Rights of Indigenous Peoples, Professor James Anaya observes:

'The Declaration [on the Rights of Indigenous Peoples] 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" (article 19). This provision of the Declaration 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' (UN, 2009: par. 46).

Maintaining the right to consent as the 'objective of consultation' is intended to redress the imbalance of power and/or capacity between companies and indigenous peoples or local communities by empowering communities, but not by encouraging them to make decisions to further political objectives or unreasonable demands (FSC, 2012). Political justification for this argument can be seen in the case of Canada (see Box 7).

BOX 7: CONSENT OR CONSULTATION: THE CASE OF CANADA

The Canadian government argues that FPI **consent** fails to balance the rights of indigenous peoples against those of non-indigenous Canadians, and therefore does not support **consent** in law, but upholds FPI **consultation**. The Canadian constitution therefore recognises the right to consultation but argues that maintaining an equitable and fair balance of interests is more important than consent *per se*. Mechanisms and structures are therefore put in place for consultation through boards, set up under the Comprehensive Land Claims Agreements to resolve conflicts between aboriginal people's land rights and resource developments, which include both indigenous and local government representatives. These boards with both community and government representation have the right to reject a development. This happened in the case of the Screech Lake uranium mine, which was rejected by the board due to the ecological and cultural significance of the area to the aboriginal communities (WISE, 2009). Although any such decision can, by law, be overruled by the federal government, this has never happened.

Source: WISE Uranium Project (2009).

THREE IMPLEMENTING THE SPIRIT OF FPIC CONTINUED

We argue that while FPIC does indeed hinge on consent, this is related less to the notion of communities having a veto, and more to the idea of parties coming round a table to debate, negotiate and come to agreement where all positions (and parties) are considered equal. For a deliberative process to work most effectively, all parties need to come to the table willing to open their minds to the views of others and seek mutually acceptable solutions or agreement.

The recent BSR report on FPIC and business suggests that the proper implementation of FPIC 'ultimately requires an application of FPIC principles that effectively balances the expectations of affected indigenous peoples, civil society, government, and companies' (BSR, 2012:6). The option of not having a particular project or activity take place in a certain location should therefore remain on the table during those deliberations, if that is a view held by one party, and may be a *mutually agreed solution*.²⁶

26. The possibility remains that despite good faith deliberations, no mutually agreed solution is found. In such cases it would make sense for the community position to be respected, as moving ahead with a project may pose considerable risks for the community and the company. However, even that decision may not be a straightforward matter. Further analysis of case study material and lesson-sharing within the industries would help to develop a better understanding of such scenarios and how to deal with them.

BOX 8: POWER GAMES

Power is present in just about any relationship. Creating a space for discussion will not in itself overcome the differences in power between people in the room. Communities increase their **power to** participate in an FPIC process through capacity building (e.g. in negotiation skills, in understanding legal processes) and increasing knowledge through information. FPIC is further intended to give communities **power over** decision-making processes to ensure they are equal participants in the decision-making process. However, **decentred power** exists not just in people but in institutions, from the processes, to the dress and words used. This sort of power is much more difficult, if not impossible, to overcome or neutralise. Being aware of these power differences and making efforts to ensure those considered to have less power are given the opportunity to shape the rules of the game – bringing in their own social and cultural norms – will help slowly adapt the institutions and create shared values that put all parties on a more equal footing. The 'spirit of FPIC' process outlined here aims to address these power differentials, but it is important for all parties to be aware of these challenges in implementing an FPIC process.

Source: Power theory based on Nelson and Wright (1995).

INSTITUTIONS FOR ACHIEVING THE 'SPIRIT OF FPIC'

Rather than seeing FPIC as a black-and-white process of achieving a 'yes' or 'no' answer, companies need to view it as a platform for engagement between communities, companies and governments to achieve a common agreement on the way forward. A key challenge lies in understanding what the FPIC 'platform' looks like, in terms of institutions, principles and values, and how to get there. Companies, governments and civil society need to understand the range of flexible systems for participation and deliberation and how these can be used to achieve the 'spirit of FPIC'. These systems will involve deliberative and participatory decision-making processes which reflect the knowledge, values, practices and norms of indigenous and local communities.

We have identified three key principles or values to define an effective FPIC platform, which may be distinct from, and additional to, those that shape good practice engagement. These are expanded on in more detail below.

1. FPIC is implemented through **deliberative processes**.
2. The process is **designed flexibly and with community participation to accommodate customary practices, human rights, and the need to reach shared decisions**.
3. The exercise **empowers local communities to engage constructively on an equal footing and make informed decisions**.

Like other good practice standards in stakeholder engagement, the 'spirit of FPIC' needs to be **maintained across the project life-cycle** – from inception/exploration through to closure – in line with maintaining the social licence to operate.

1. Deliberative processes

Deliberative processes allow for the sharing of information from all participants, and consideration of all views equally based on the evidence shared. Such processes enable a discussion in which all values and positions are relevant. Deliberative approaches are based on a fundamental assumption that all parties in the discussion want to reach an agreement and not just promote their own interests. Such approaches are therefore expected to lead to agreement along new lines of common interest and shared values (Wilson and Mason, 2012; Mason, 2008; Habermas, 1975).

There are numerous articulations of good deliberation but the following four characteristics, based on a model of deliberation devised by Fishkin (2009), are fundamental:

1. **Information sharing:** Accurate and relevant data are made available to all participants.
2. **Substantive balance and equal consideration:** Different positions are compared based on their supporting evidence, and not on who is advocating a particular view.
3. **Diversity:** All major positions relevant to the matter at hand are considered.
4. **Conscientiousness:** Participants sincerely weigh all arguments.

Information sharing

One of the defining concepts of FPIC is 'information sharing'. This has long been a basic requirement of good practice in stakeholder engagement (e.g. IFC, 2007a). However, the key questions in the context of FPIC are what information needs to be shared and how that should be done, and to what ends.

Information needs to be gathered and shared in a way that is transparent, locally appropriate, and respectful towards community rights and knowledge systems. The way in which information is presented will be a key part of a deliberative process. For example, information presented in English only and in a complex, written form may not be appropriate for local cultures if information sharing is typically verbal and in the local language; see case studies from Canada in White (2006) and Armitage (2005).

It is important that communities trust the information that is being gathered and used in making decisions that relate to their future. Communities may wish to hire their own consultants to undertake impact assessments, for example. Alternatively, these can be undertaken by independent consultants who are proficient in participatory research. This is important in empowering local communities but also ensuring information is gathered in a locally appropriate way.

Ensuring that communities trust the source of information and the methodologies is an important first step in gathering and sharing the information. Moreover, it is also important to allow communities enough time to understand, share and discuss the information amongst themselves and develop their response, which may entail developing a common

BOX 9: SAKHALIN INDIGENOUS
PEOPLES DEVELOPMENT PLAN,
RUSSIA

In the case of the Sakhalin-2 project in the Russian Far East, the local indigenous population expressed mistrust of the company's environmental, social and health impact assessment (ESHIA), demanding an anthropological expert review (an option referred to in Russian law but rarely implemented) and compliance with the *Akwe:Kon Guidelines* on cultural impact assessment. In response the company, Sakhalin Energy, commissioned an independent review of its impact assessment documentation to identify any gaps relating to the needs or concerns of the indigenous population. Following this, a five-year indigenous peoples' development plan was negotiated. *The Sakhalin Indigenous Minorities Development Plan (SIMDP)* was developed in a participatory manner, with direct engagement between indigenous representatives and company experts to resolve environmental and social concerns. The plan was developed under the leadership of Gregory Guldin, an anthropologist with international development experience. As a result, the company and community representatives were able to mutually agree impact mitigation measures and benefit sharing arrangements. A second five-year plan or Phase 2 of the SIMDP was developed with full government participation and using an FPIC approach, whereby the process was mutually agreed in advance and all participants agreed on the outcomes of the deliberation (Roon, 2006; Novikova and Wilson, 2013).

vision or position. This can take time given the consensus culture of some indigenous communities.

Appropriate and full information needs to form the basis for coming together for shared decision-making. This is fundamental to the spirit of FPIC. This principle applies to concession maps, standard operational procedures and concession contracts as well as when undertaking environmental, social, health and human rights impact assessments and land tenure studies.

Diversity

'Diversity' requires a space where all positions are considered equally, and it requires flexibility of process and empowerment of local communities. It is important to ensure that marginalised communities are properly represented and that discussions are not 'captured' or dominated by local elites. Frequently elites gain disproportionate influence in the development process as a result of their superior social, political or economic status. It is also important that the views of typically marginalised groups, such as women, young people and indigenous peoples, are heard. The interests, experiences and views expressed by these groups can be very different and traditionally may not be part of decision-making. Therefore while respecting customary decision-making processes it is necessary to ensure that they are non-discriminatory and are inclusive of women, youth, people with disabilities and indigenous groups.

The World Bank has developed recommendations to ensure social inclusion and has studied the challenges of avoiding 'elite capture' of participatory processes (World Bank, 2011).²⁷

27. More resources can be found on the World Bank social development pages at: <http://go.worldbank.org/8WWCZQW5Q0>

The World Bank guidance is useful in framing an FPIC process, including identifying subgroups within the community (looking at gender, generation, ethnicity), especially those at risk of exclusion; developing procedures and techniques to promote their participation; and employing participatory monitoring and evaluation approaches, based on diversity-sensitive indicators. Intermediaries who are working with communities, such as NGOs and local government, need to have relevant expertise in working with these groups and in using participatory techniques.

Substantive balance

As Box 1 demonstrates, and as indicated above, different stakeholders have different views on what sustainable development means. Making decisions on the most appropriate trade-offs for the development of a resource is a necessary part of the deliberative process and requires that all positions and supporting evidence be fully considered. Achieving 'substantive balance' in an

FPIC process is necessary to ensure all articulations of sustainable development of the resource are respected.

The practice of mediation has substantial experience to draw upon in ensuring diversity of representation and substantive balance in a dialogue process. Application of these techniques does not need to be limited to incidences where conflict has already taken hold. Rees (2010) argues that mediation can support 'inclusion, participation, empowerment and attention to vulnerable individuals and groups' in disputes between companies and communities. She concludes that mediation has made some progress particularly in addressing power imbalances between parties: 'More work is needed to understand how far the mediation model can go in providing greater transparency and supporting systemic change, thereby bringing individual remedy together with the broader public interest' (Rees, 2010:22).

BOX 10: THE OK TEDI MINE DIALOGUES, PAPUA NEW GUINEA

At the Ok Tedi gold and copper mine in Papua New Guinea (PNG), 90 million tonnes of tailings and waste rock were being disposed of in the river, sediment was causing flooding over thousands of square kilometres, and tens of thousands of people had lost their land and livelihoods. Relationships between the company and community were deteriorating. In 2006, Australia-based mediation consultancy, Pax Populus, was invited to design a process for renegotiating compensation and benefits agreements covering 152 villages as a way to assist the company in seeking informed consent to continue operating. Pax Populus used a mediation-based 'informed consensus' negotiation. The main dialogue forum was supported by regional and village-level dialogues (500 village meetings held over 18 months). A multistakeholder group of community leaders, the government, Ok Tedi Mining

Ltd (OTML) and the major shareholder (PNG Sustainable Development Foundation) initially agreed the process. The major dialogue forum included three delegates from each region, the mine area landowners, OTML senior management, PNG sustainable development foundation, the PNG national government and Western Provincial Government. An innovation was the use of NGOs to represent the interests of those who may not have such a strong voice in such processes. Not only was an NGO included to represent the voice of 'women and youth,' but another was also included to represent 'the voice of the river', i.e. the environmental interests at stake in the debates. An agreement was reached with a high level of consensus after 18 months, resulting in benefits valued at over USD 400 million in recognition of increased environmental impacts.

Source: Paxpopulus (2013).

THREE IMPLEMENTING THE SPIRIT OF FPIC CONTINUED

Conscientiousness

A process to implement the 'spirit of FPIC' requires that participants come to the table with the mind to sincerely consider all arguments, and not simply pay lip service to approval of a prior agreement. Underlying the deliberative processes should be new 'social learning' that requires all participants to be open to new ideas and willing to accommodate the interests and views of others. For participants to be conscientious and give equal consideration to all views, they need to approach discussions with this state of mind.

Building shared understanding and common interests is foundational to dialogue processes. The Forests Dialogue,²⁸ an international multistakeholder dialogue platform on sustainable forestry, describes a good dialogue as one that 'dispels stereotypes, builds trust, enables people to be open to perspectives that are very different from their own, and prepares for collaborative action' (TFD, 2011:4). TFD emphasises that 'ownership, support and promotion of the results by participants are key factors to the success of each dialogue and initiative' (2011:5).

In the wake of the *Exxon Valdez* oil spill of 1989 a process was established to found the Alutiik Museum on Kodiak Island, Alaska, funded by oil spill funds. Mason (2008: 109) documents the emerging collaboration between the Native Alutiit and university-trained anthropologists, historians and linguists, as decisions are made on how to disburse the government funds. Mason notes that:

'Collaborations between Alutiit and academics (and with governments and Native corporations) do not assume common goals nor are they part of a simple sharing of information. Those collaborations however do signal negotiation between differing interest groups (government

and local communities, scientists and lay people) ... In fact, collaborations often redefine the interests of multiple actors by creating new interests and identities and by joining stakeholders along new axes of common purpose.'

The process for agreeing the *Sakhalin Indigenous Minorities' Development Plan* (see Box 9) has been criticised for reducing over time the scope of issues covered by the multistakeholder dialogue. While the indigenous peoples initiated the dialogue by protesting against environmental impacts of the oil and gas projects in the area and a perceived lack of fairness in benefits distribution, the current dialogue revolves primarily around benefits distribution (Novikova and Wilson, 2013). This is partly because many of the environmental issues have been resolved (as the construction period is now over), but one might also argue that a 'new axis of common purpose' has been established, and all three parties have developed a strong sense of ownership over the current shared process.

2. Flexibility

Flexible design is crucial to implementing the 'spirit of FPIC' and in particular for incorporating customary practices and diverse viewpoints as discussed above.

Having a legal framework in place for FPIC may be necessary to create a space for deliberation and dialogue. However, as the Philippines case shows clearly, these frameworks will fail unless they incorporate existing practices and social norms and are flexible in continuing to adapt as new norms and practices evolve. The *Philippines Indigenous Peoples' Rights Act of 1997* (IPRA) is regarded as one of the most progressive laws on FPIC, in both requiring FPIC per se, and in

28. For more on The Forests Dialogue see http://environment.yale.edu/tfd/uploads/TFD_Summary_811.pdf.

requiring that consensus should be determined in accordance with the customary laws and practices of indigenous communities. However, the guidelines have little flexibility in implementation and contradict these very practices (for example, allowing only 55 days to make a decision, which is likely to be insufficient time for traditional decision-making processes). This has led to protests and violence against mineral developments in the Philippines. There has been so much controversy that in 2012 the body charged with implementing the IPRA – the National Commission on Indigenous Peoples (NCIP) – issued an Administrative Order for revised guidelines on FPIC and related processes. These new rules (when finalised) will require an FPIC process for each major mining phase – including exploration and development.

The Philippines case also shows the risks of undermining the spirit of FPIC by defining processes in a ‘top down’ and legalistic way. Legal frameworks should seek to codify existing practices but still allow flexibility for new norms to develop. This is very much in line with guidelines from the UN Permanent Forum on Indigenous Issues, among others, that highlight the importance of customary practices and decision-making processes in determining how FPIC is implemented.

Local communities and governments can work together to define and develop processes that reflect shared values. In Canada, the boards that are set up with representation of government and aboriginals to co-manage resources are allowed to create their own rules and policies. This leads to greater flexibility in institutional design (see Box 11 on the unplanned technical sessions organised to discuss the Snap Lake Diamond Project).

What this means in practice is that there is no single institutional design for FPIC. Each process will be unique to the social, cultural and political environment of the local community. Stakeholders may also find that the ‘rules of the game’ need to change in the middle of a discussion or process.

BOX 11: SNAP LAKE DIAMOND PROJECT, CANADA

In consultations over the Snap Lake Diamond Project in Canada, unplanned technical sessions were organised in parallel with the main consultation process to orally discuss specific issues coming out of the consultations (with each issue being given two days and being overseen by an independent moderator). These were found to be the best way to achieve consultation leading to a joint decision with face-to-face dialogues and open discussions between the mine proponent's experts and the aboriginal government representatives, civil society and federal government (Fitzpatrick *et al.*, 2008). As a participant noted: ‘...when you get to the technical sessions where you have the proper people there to discuss issues you get resolution so much quicker, and you can see where people stand on the issues, and as a whole, you can get all the parties involved, and I see that as being much more effective’ (*ibid*: Interview 6).

Source: Fitzpatrick *et al.*, (2008).

As long as this is done in a way that furthers and/or respects the principles of deliberative processes then this kind of flexibility should be encouraged. The Canadian case is a good example of how institutions have adapted to allow deeper discussion and the incorporation of new viewpoints.

3. Empowering local communities

In line with the FSC (2012) and others, an FPIC process should serve to empower local communities. Few communities have the capacity to engage in complex negotiations with companies and governments over natural resource projects. Local and national governments tend to be more influential in discussions, which can undermine the ability of the company to engage directly with the community and undertake public consultation and disclosure in a meaningful way.

But empowering local communities is not an easy task. It is particularly difficult for companies to do this, as the very act of 'empowering' by a company can be 'disempowering'. For example, by empowering one set of local actors, another set may be disempowered. However, there are many case studies and guidance on how to do this well, identifying roles for companies, governments and local communities (e.g. Shrumm and Jonas, 2012; Swiderska, 2012; Wakeford and Singh, 2008).

Mutual respect and shared ownership of the process, which are fundamental elements of corporate-community engagement best practice, are also key to ensuring local communities feel empowered within the FPIC process. The Sakhalin Indigenous Minorities' Development Plan (Sakhalin Energy, 2006 and 2010; see Box 9 above) is an example of how shared ownership of a process can ensure success. Indigenous members of the Sakhalin-2 project SIMDP Working Group have stated that the approach to developing the SIMDP is 'unprecedented' in their

BOX 12: SUAL ALUMINIUM PROJECT

An environmental and social impact assessment can reveal the lack of experience of communities in large industrial developments. This was the case for the Siberian-Urals Aluminium Company (SUAL), which wanted to build a new aluminium complex in a remote region of Russia (the Komi Republic). The company identified that community voices were not being heard and were frequently overpowered by government representatives and NGOs who had different interests. The assessment revealed the need for capacity building to ensure that communities could engage equitably and effectively in the consultation process – i.e. to ensure fair deliberation. SUAL sponsored a programme to build capacity in the community. They organised visits to the project sites, which helped them to reach a broader range of stakeholders and improve relations between communities, local government and the company. Local participants felt that this was useful in improving their understanding of the project and shaping their expectations about possible impacts and benefits. Company managers gained first-hand experience of community concerns, a clear picture of potential risks, and a better idea of the impact mitigation measures they would need to consider. Stakeholders also helped the company understand how best to present the assessment findings to the public.

Source: IFC (2007a).

experience, and ‘involves genuine collaboration’: ‘Decisions have been made collectively and Indigenous Peoples have been treated as equal partners. We have been able to establish a dialogue with Sakhalin Energy, which has helped us to build mutual trust and understanding’ (IFC, 2007a: 55).

As discussed above, decision-making processes for FPIC need to incorporate customary practices that allow indigenous communities to properly reflect their values and consider indigenous knowledge alongside ‘Western scientific’ knowledge. This will allow indigenous peoples’ perspectives to be considered more equally alongside those of governments and companies, which are conventionally dominant. Identifying representatives of minority groups and making provision for these voices to be heard can help empower these often marginalised groups. In this, it is important to find ways of addressing the power imbalances that are inevitable with bringing companies, communities and government into a room together (see Power games in Box 8), and allowing time for representatives to go back to their communities to consult them at key stages of the process.

One way to help satisfy stakeholder concerns and promote transparency is to involve project-affected stakeholders in monitoring the implementation of mitigation measures or other environmental and social programmes. Such participation, and the flow of information generated through this process, can also encourage local stakeholders to take a greater degree of responsibility for their own environment and welfare in relation to the project, and to feel empowered that they can do something practical to address issues that affect their lives. Participatory monitoring also tends to strengthen relationships between the project and its stakeholders.

BOX 13: NGO MONITORING OF THE BTC PIPELINE IN AZERBAIJAN

BP in Azerbaijan collaborated with the Open Society Institute on an NGO Monitoring and Audit Programme during construction of the Baku-Tbilisi-Ceyhan (BTC) pipeline. This initiative helped to build the capacity of local NGOs to review the environmental and social impacts of the pipeline, including environment, cultural heritage, human rights and local procurement. The programme also promoted informed dialogue between the developers and local civil society. Participants who had been involved in the NGO monitoring programme were impressed by the high standards and modern technology that BP had employed for environmental protection, which set a new benchmark for Azerbaijan. Some complained that BP did not meet all of its commitments relating to human rights, infrastructure or community support. Overall, however, they felt that the dialogue they had had with BP during the monitoring process had been open and constructive. During this time, the NGOs had direct access to company experts to resolve issues that they had identified. However, NGOs were disappointed when the programme ended and communication with the company could not continue in such an open and intense fashion.

Source: IPIECA (2006); Wilson, *et al.* (2013).

FOUR

APPLICATION TO ALL LOCAL COMMUNITIES

FPIC implementation level 3: Apply the 'spirit of FPIC' not only to indigenous communities, but to all significantly affected local communities, in line with emerging good practice guidance.

There is practical and commercial justification and an emerging trend in good practice guidance in support of a broader application of 'the spirit of FPIC' to **all communities significantly affected by project operations**. This section highlights the importance of identifying the communities to which an FPIC process should apply, and understanding why that segment of the population might require a targeted deliberative process to ensure that they do not lose out or see a reduction in their well-being as a result of the extractive industry development.

JUSTIFYING A WIDER APPLICATION

FPIC has been conceived of as a right for indigenous peoples for two primary reasons. Firstly, indigenous peoples have historically been marginalised from political decision-making processes due to geographic, linguistic and cultural barriers or their social, legal and economic status. Secondly, hard and soft law often recognises indigenous peoples' deeper spiritual, cultural and economic connection with their land and resources. However, there is an increasing trend of applying FPIC more broadly to 'tribal', 'traditional' and 'local' communities, recognising that all communities should have a meaningful role in making decisions on projects that affect them in a significant way (WCD, 2000; CBD, 2004; WRI, 2005; FSC, 2012). Indeed, FPIC is based on the

right to self-determination within the *UN Universal Declaration on Human Rights*, which is applicable to all peoples and not just indigenous communities. The Inter-American Development Bank (IDB) *Resettlement Policy* states:

'Those indigenous and other low income ethnic minority communities whose identity is based on the territory they have traditionally occupied are particularly vulnerable to the disruptive and impoverishing effects of resettlement. They often lack formal property rights to the areas on which they depend for their subsistence, and find themselves at a disadvantage in pressing their claims for compensation and rehabilitation' (IDB, 1998:2).

The *ILO Convention 169* applies to indigenous peoples but also to tribal peoples, which it defines as:

'peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country...at the time of the conquest or colonization or the establishment of the present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions' (ILO, 1989).

This is broader than the ILO definition of indigenous peoples and has been regarded as applying to, for example, *garifunas* (or *maroons*) in Central America, who are descendants of escaped African slaves, and not considered indigenous in the traditional sense.

Article 8(j) of the *Convention on Biological Diversity* (CBD) requires parties to the convention to 'respect, preserve and maintain knowledge,

innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity... This article applies to both indigenous and local communities on the basis that non-indigenous communities may have lived on the land long enough to have a strong association with, and reliance on, the land's resources. This has recently become a major point of discussion within the CBD and work is being done to better understand how to define and identify local communities. More guidance is likely to follow.

ICMM (2010a:7) highlights the challenges of applying a single definition of 'indigenous' in the case of their operations in Indonesia:

'Indonesia is an archipelago of 17,508 islands and has hundreds of distinct native ethnicities, languages and dialects across the country. For these reasons it is usually problematic to use the word "indigenous" in an Indonesian context. The communities around BHP Billiton's Maruwai Coal Project in Central Kalimantan reflect the country's demographic diversity. The area remains widely populated by Dayaks, who are the indigenous inhabitants of Borneo. Company personnel generally use the word "local" or refer specifically to people in terms of their Dayak and Bakumpai ethnicity as appropriate in reference to surrounding communities.'

The Forest Stewardship Council (FSC) and its members decided in their 2012 revision of the FSC certification standard to expand the application of FPIC for all projects to non-indigenous communities. The reason given by the

FSC, and the wide range of experts it spoke to during its consultation process on FPIC, are that all significantly affected local communities should be afforded the right to FPIC on the basis of the following (FSC, 2012:15):

1. the right to meaningful participation in environmental decision-making (UNEP, 1992)
2. the right to control access to their lands and resources (CBD, 2011)
3. contemporary standards of public participation as a hallmark of legitimate governance
4. basic principles of equity and justice (WRI, 2005:72)
5. the UN Declaration on the Right to Development: 'Everyone has the right to development' (Hill, 2010:4).

This is equally relevant to oil, gas and mining companies. This may help companies overcome some of the definitional issues regarding indigenous peoples – for example in Africa where the term 'indigenous peoples' is controversial and the capacity to implement specific legal provisions (if in place) is limited (ILO and ACHPR, 2009);²⁹ or in India where indigenous peoples are not officially recognised.

29. See more on the work of the ILO at www.ilo.org/indigenous/Activitiesbyregion/Africa/lang-en/index.htm.

IDENTIFYING WHICH COMMUNITIES TO ENGAGE

Identifying which communities an FPIC process – or a stakeholder engagement process more broadly – should apply to is a fundamental step (IFC, 2007; Lehr and Smith, 2010; FSC, 2012). It is important to understand why local communities and groups ought to qualify for special consideration, be it due to their specific vulnerabilities, the scale of impacts that they are likely to experience, or other factors.

A social impact assessment early on in the project design will require identification of peoples and communities to be included within the FPIC process. The FSC provides extensive guidance in their FPIC guidance document on how to identify rights holders and their representative institutions. The FSC guidance states:

'It is the responsibility of the Organization [company] to make a well informed judgment on the identification of rights holders and of their rights. The Organization can seek advice from specialists and local stakeholders and can ask an independent party to verify its judgment' (FSC 2012:26).

Seasonal use rights of vulnerable groups (e.g. pastoralists) should also be considered. There may be additional rights for indigenous peoples for which companies should look to the UN Permanent Forum on Indigenous Issues for guidance.³⁰

BOX 14: IDENTIFYING LOCAL COMMUNITIES

Based on the FSC definition, local communities are communities of any size that are in or adjacent to the development project, and also those that are close enough to have a significant impact on the economy or the environmental values of the project or to have their economies, rights or environments significantly affected by the management activities or the biophysical aspects of the project. However, pastoralists and other mobile or semi-nomadic peoples may not be close to the area, but may still be significantly affected if they depend on the area's natural resources (e.g. water) on a seasonal basis, or at times of hardship (e.g. drought). Unlike the definition given to indigenous people, there is no element of self-identification in defining local communities. A local community of 'any size' significantly impacted by the project activities will be classified as such.

Source: FSC (2012).

30. The UNPFII library is at <http://social.un.org/index/IndigenousPeoples/LibraryDocuments.aspx>.

It is becoming good practice in social impact assessment to identify 'vulnerable groups' in a project context, a term that often encompasses indigenous peoples. There are other groups that may need to be highlighted for special attention in a given project context, including women, youth, non-indigenous ethnic minorities, people with disabilities, and others. The World Bank identifies typical examples of social exclusion that companies and other development proponents need to be aware of, such as:

- When cultural practices restrain women from attending or speaking at community meetings, resulting in under-investment in health services, literacy programs, water supply systems, and other interventions typically more valued by women
- When the needs of HIV/AIDS affected people fail to be identified as community priorities due to shame, denial, and social isolation
- When input and participation from indigenous groups is curtailed because programme materials and planning discussions are in languages unfamiliar to them (World Bank, 2011).

BOX 15: IDENTIFYING INDIGENOUS PEOPLES

FSC has developed a broad and easy-to-use definition of indigenous peoples in their guidance on FPIC. Indigenous people and groups of people are defined as those that can be identified or characterised as follows:

- self-identification as indigenous peoples at the individual level, and acceptance by the community as their member (this is the key characteristic or criterion)
- historical continuity with pre-colonial and/or pre-settler societies
- strong link to territories and surrounding natural resources
- distinct social, economic or political systems
- distinct language, culture and beliefs
- form non-dominant groups of society
- resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.

Source: FSC (2012).

CONCLUSIONS AND RECOMMENDATIONS

In this paper we have highlighted the need for extractive industry companies to understand FPIC and be able to respond appropriately to situations that may require them to apply FPIC or the 'spirit of FPIC' in engagement with local stakeholders. Given the foundational role of FPIC in creating a social licence to operate, it is desirable for companies to have a policy that incorporates FPIC. This might be a stand-alone policy or part of a broader stakeholder engagement or indigenous peoples' policy (Lehr and Smith, 2010).

Our three-point framework offers companies three levels at which to apply FPIC. All of them require meeting international good practice standards of community engagement as a minimum.

1. Comply with requirements for FPIC under international and national law, company policy and obligations to third parties, such as project lenders.
2. Implement the 'spirit of FPIC' throughout the project life-cycle, by employing timely, transparent, deliberative processes to reach mutual agreement on future developments, whether or not this is required by third parties.
3. Apply the 'spirit of FPIC' not only to indigenous communities, but to all significantly affected local communities, in line with emerging good practice guidance.

Increasingly companies need to comply with a range of requirements for FPIC, according to international and national law, project finance conditionalities and other third party obligations. As this paper has also demonstrated, applying the 'spirit of FPIC' can be an integral part of attaining a 'social licence to operate', and can enhance stakeholder engagement measures for the benefit of companies, communities and government. As with the social licence to operate, FPIC needs to be maintained throughout the life of a project –

and during decommissioning. FPIC is part of an ongoing informed dialogue that companies establish with communities. As such, FPIC is not a one-off negotiation: it needs to be secured for each new development that is likely to have a significant impact on communities and their livelihoods.

Striving to achieve the 'spirit of FPIC' puts in place a foundation for dialogue and trust building that is crucial in maintaining the social licence to operate. Recognising this as a deliberative process in which all parties' views are considered goes some way to addressing the concerns of some FPIC critics, about interpretations of FPIC that suggest it requires handing over the power of veto to local communities. However, while shifting the focus away from veto to constructive negotiation, the right of parties to veto proposals during the process may still need to be respected, if agreement cannot be reached. This is an area where further case study material would be helpful to guide thinking around how such situations would be managed in practice.

Identifying rights holders and affected groups is a key starting point for an FPIC process. This needs to be done through a rigorous environmental, social and health impact assessment in the earliest stages of the project (see below). Broadening the scope of FPIC to significantly affected local groups – not only indigenous peoples – allows companies to base their approach on impacts and vulnerability as well as the identification of rights holders.

FPIC processes need to be agreed in advance with those involved. Local customary processes are key to determining the deliberative decision-making processes for achieving the spirit of FPIC, but so is being inclusive of all people and ensuring all values and worldviews are considered. Representation – who is representing the

interests of communities and ensuring there is fair representation of all interests – is a critical issue in organising an FPIC process. Taking time early on to establish the correct process for achieving the spirit of FPIC is crucial to ensuring a successful outcome for all parties.

RECOMMENDATIONS AND RESOURCES

The recommendations in this section are arranged in line with the three-point framework. Each level is cumulative, so level two needs to incorporate the recommendations from level one, and so on. This guidance needs to be considered alongside the plentiful good practice guidance that exists on implementing FPIC, which we feel aligns with the approach we have suggested here, but goes into more detail on the practical steps. We provide a set of transferrable principles which can be used to maximise the potential for FPIC to empower communities and secure and maintain a social licence to operate. We have included key references under each of the three levels.

1. Comply with requirements for FPIC under international and national law, company policy and obligations to third parties, such as project lenders.

As part of a company's indigenous people's policy or a stakeholder engagement policy a compliance-oriented approach to FPIC needs to acknowledge the following key points:

- **Companies need to be aware of the international hard and soft law that may affect their operations:** Companies may run the risk of being accused of complicity if they fail to recognise human rights in the absence of government protection of those rights (IFC, 2007b). More guidance is expected to follow on implementing the *UN Guiding Principles on Business and Human Rights*. Individuals within a company need to be aware of and internalise the values behind UNDRIP and ILO 169, through training on these key documents and in stakeholder engagement techniques and principles. Companies can also hire more people with a background in anthropology and social science and/or direct experience of working with the affected communities.
- **A compliance-only policy will require different approaches in different jurisdictions:** FPIC has only been incorporated into national law in a small number of countries (notably the Philippines, Australia and Peru). A compliance-only policy will make it difficult for companies to develop approaches and systems that can be applied in all countries where they operate, as different jurisdictions will have different regulations. It also makes it difficult to build core competencies within the company relating to FPIC. Companies will need to be aware of the specific legal requirements in the particular jurisdiction where they are operating, which will mean engaging local legal experts and experts in indigenous and human rights.
- **To guard against accusations of 'complicity', companies need to carry out due diligence on state responsibilities and how these have been carried out:** A company needs to satisfy itself that the government has consulted meaningfully with all affected communities prior to the company entering the region in a way that is consistent with the government's commitments, for example as a signatory to UNDRIP and ILO 169 (see IFC, 2007b:8). Companies can also invite appropriate government agencies and other third parties to join the key consultation meetings with the local communities, to ensure that government continues to meet its obligations.

- **Compliance-based approaches need to focus on implementation and should not rely solely on paperwork to demonstrate compliance:** In addition to well-written policies, the accompanying implementation guidelines need to be feasible and accessible for all parts of the operations and contracting chain to implement in practice. Appropriate and effective implementation standards need to be enforced through training and supervision, excellent communication, and monitoring of appropriate indicators, with third party oversight. Where additional commitments are made on a project-specific level (e.g. to project lenders), these need to be made known to all relevant parties well in advance of signing contracts and implemented alongside company standards (see also Wilson and Kuszewski, 2011).
- **More guidance and analysis required from industry associations:** Industry associations have not made strong statements on whether their member companies should be applying FPIC in their projects. This is likely to change as debates and practices evolve and more pressure is put on industry associations, and others, to ensure that good practice outlined at the policy level is implemented on the ground in way that has meaningful impacts for local communities (see Buxton, 2012a).
- **Careful documentation of consultation processes and government participation will underpin the legitimacy of a process and allow a company to address subsequent challenges to the process:** Companies need to carefully document consultations with indigenous peoples, including government participation in such consultations. In addition

to keeping a record of the subjects of the consultation meetings and the persons who attended, companies will find it helpful to document the information delivered during the meetings, the concerns expressed, and the responses and commitments made by the company and the government in response to those concerns (see IFC, 2007a:10). This information also needs to be shared with any contractors (or government departments) who may be responsible for meeting commitments made at these meetings, so as to avoid subsequent failure to meet commitments.

Key resources

- Guidance from law firm Foley Hoag for companies considering implementing an FPIC policy (Lehr and Smith, 2010)
- IFC guidance for companies relating to ILO 169 (IFC, 2007b)
- ICMM guidance on indigenous peoples (ICMM, 2010b)
- IPIECA guidance on indigenous peoples (IPIECA, 2012); see also a range of guidance and case study materials at: <http://www.ipieca.org/topic/social-responsibility/indigenous-peoples#ti29811>
- Guidance on conflict-sensitive business practice (International Alert, 2005)
- EC consultation documents relating to implementation of the *UN Guiding Principles on Business and Human Rights* (notably the oil and gas sector guidance) (IHRB, 2012)

Full details of the above resources can be found in the References.

2. Implement the ‘spirit of FPIC’ throughout the project life-cycle, by employing timely, transparent, deliberative processes to reach mutual agreement on future developments, whether or not this is required by third parties.

In order to achieve the ‘spirit of FPIC’, a company needs to ensure:

- **The process for FPIC is deliberative.** As outlined in Section 3, this requires: information sharing, ensuring accurate and relevant data are made available to all participants in advance; substantive balance and equal consideration, to allow different positions to be compared based on their supporting evidence and not on who is advocating a particular view; diversity, with all major positions relevant to the matter at hand considered; and conscientiousness, with participants sincerely weighing all arguments put forward.
- **Processes are agreed mutually between all parties in advance of the start of the deliberation.** These processes need to reflect local traditions and customary practices of decision-making. The decision-making process should reflect and complement local practices and avoid reinforcing power imbalances in key logistical elements such as language, ceremony and dress, timing, venue and oral formats.
- **Opportunities for each party to collect their own data and make their own assessments.** All parties should have access to the same information. Ensuring that communities trust the source of information and the methodologies is an important first step in gathering and sharing the information.

- **Flexibility in the mutually agreed processes for dialogue and engagement.** Being responsive to the needs of all stakeholders as and when these needs arise is crucial to ensuring a rigorous FPIC process. This will require making this flexibility clear upfront and regularly reflecting on whether the process is effectively engaging all stakeholders and considering all relevant issues.
- **Capacity building to ensure community representatives can participate as equals in the process.** Companies can work with local NGOs to build the capacity of local communities to engage in dialogue prior to the start of the dialogues and throughout the process. Ensure that discussions are not captured and dominated by local elites. For example, strive to make the views of typically marginalised groups such as women, young people and indigenous peoples heard through parallel dialogues that feed into the main dialogue.

Key resources

Research into flexible systems for participation and deliberation will provide companies with guidance on how to achieve the spirit of FPIC. In addition to the following list of references, companies may find that NGOs are able to provide up to date and successful examples of innovations to achieve these goals.

- IFC good practice guidance on stakeholder engagement (IFC, 2007a)
- *Akwé:Kon Guidelines on cultural impact assessment* (CBD, 2004)
- Toolkit for facilitators on community decision-making (Shrumm and Jonas, 2012); see also the website at: www.community-protocols.org

- UN primer on capacity building (Wignaraja, 2009)

On participatory mapping:

- *Mapping Indigenous Lands: A practical guidebook* (Chapin and Threlkeld, 2008)
- *Good Practices in Participatory Mapping* (IFAD, 2009)

Participation techniques:

- *Participation works! 21 Techniques of Community Participation for the 21st century* (nef, 1998)
- *Participatory Learning and Action series*, International Institute for Environment and Development (IIED), London. See www.iied.org/pla including Swiderska (2012)
- World Bank website on participation and civic engagement: see <http://go.worldbank.org/FMRAMWVYVO>

Full details of each resource can be found in the References.

3. Apply the ‘spirit of FPIC’ not only to indigenous communities, but to all significantly affected local communities, in line with emerging good practice guidance.

Identifying which groups need to be included in deliberations is a fundamental aspect of the FPIC process:

- **Identification of affected groups needs to be based on a robust environmental, social and health impact assessment process**, which will identify affected groups, including rights holders, and will allow for the assessment of potential impacts and levels of vulnerability of the affected groups. The impact assessment process needs to be discussed in advance with

the affected communities so that they trust the outcomes of the process and to minimise the risk of a subsequent challenge to those outcomes. Participatory approaches should be used where appropriate.

- **It is important to ensure that the needs of specific groups are respected**, including women, young people, people with disabilities and indigenous groups and mobile populations. This may involve separate dialogues for these groups and identifying a representative for the group to be involved in the main discussions (as outlined in point 2 above). Intermediaries such as NGOs and local government who are working with specific groups need to have expertise in working with these groups and using participatory techniques.
- **Monitoring and evaluation systems** will need to reflect the specifics of the groups, include specific indicators related to these groups in monitoring and evaluation systems, and involve all stakeholders in monitoring and evaluation processes.

Key resources

- FSC guidance on identifying affected communities (FSC, 2012)
- Guidance and resources on the specific rights of indigenous peoples: *Resource Kit on Indigenous Peoples’ Issues* (UNPFII, 2008)
- Guidance on the rights of marginalised groups: *Marginalised Minorities in Development Programming: A resource guide and toolkit* (UNDP, 2010)
- On inclusion of marginalised groups: World Bank Community Driven Development guidance (World Bank, 2011)

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FPIC AND THE EXTRACTIVE INDUSTRIES

A GUIDE TO APPLYING THE SPIRIT OF FREE, PRIOR AND INFORMED CONSENT IN INDUSTRIAL PROJECTS

Oil, gas and mining companies are increasingly aware of the need to secure and maintain a 'social licence to operate'. Implementing a project without the trust and acceptance of local communities can lead to operational delays, financial costs and litigation, possibly leading to project closure, and/or violence and loss of life. Free, prior and informed consent (FPIC) is an indigenous peoples' right, established in international conventions, requiring companies to engage with communities to agree together on how projects are implemented; it is also a crucial part of gaining the social licence to operate.

There is a growing set of FPIC requirements for companies to comply with, and responsible companies are increasingly aware that they need to have policies relating to FPIC. This paper offers guidance to those companies who are looking to engage with FPIC in a meaningful way.

It focuses on exploring 'the spirit of FPIC', a deeper commitment to engage with local communities to reach shared agreement, allowing people to have a meaningful voice in deliberative decision-making processes related to their own development.

The authors offer a three-point framework of transferable principles to implement the 'spirit of FPIC', as well as references to the plentiful step-by-step guidance that already exists on implementing FPIC and other good practice in stakeholder engagement. The framework is intended to challenge companies to move beyond a culture driven by minimal compliance-based thinking, towards one based on a greater understanding of the importance of effective stakeholder engagement practices; an understanding which should benefit business as well as communities.



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