

Policy pointers

■ **FPIC is crucial to ensuring** quality investment in extractive industry developments, and responsible investors are pushing companies to develop FPIC policies.

■ **FPIC's potential to** empower communities and promote sustainable development is often undermined by: fears of handing veto power to communities; uncertainty over how to elicit consent (and from whom); and debates over government and companies' relative responsibilities.

■ **Companies need to meet** their formal and legal obligations to implement FPIC, and understand the risks of operating in regions where governments have failed to meet their own FPIC obligations.

■ **Companies can enhance** stakeholder engagement further by implementing 'the spirit of FPIC' — that is, deliberative processes leading to mutual agreement on development decisions — throughout their operations, including with non-indigenous communities that are affected by a project.

Making consent work for quality investment in the extractive industries

Resource conflicts between local people and oil, gas or mining companies can devastate communities, damage corporate reputations and cause costly delays. Companies are striving to mitigate these risks through more meaningful community engagement on resource rights and project benefits. International law, indigenous rights groups and, increasingly, investors are pushing governments and companies to seek the free, prior and informed consent (FPIC) of local communities before undertaking potentially harmful activities, especially in cases of resettlement. There is much debate over the definition of consent, who should grant it and how, and the roles of governments and companies in making sure it happens. Companies could cut through these debates by turning their focus to the 'spirit' of FPIC and mainstreaming this into industry practice.

Oil, gas and mining industry operations are moving into increasingly sensitive environments — including lands used by indigenous and local people for livelihoods activities and cultural practices. Resource conflicts can destabilise and weaken communities. They can also hit company reputations as well as their profits: a major mining project might lose US\$20 million per week in delayed production.¹ Companies and investors increasingly recognise that meaningful community engagement on resource rights and project benefits is an important way to mitigate such risks and secure a 'social licence to operate'.

Free, prior and informed consent (FPIC) is a hard-won indigenous peoples' right to engage in a timely dialogue with developers, to agree on when and where to carry out activities that may have a significant impact on their lives and local environment, and to agree 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. FPIC as a right is established in international conventions, notably the International Labour Organisation Convention 169

on Indigenous and Tribal Peoples (ILO 169, 1989); in soft law, for example, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007); and, in a few cases, in national law (in Peru, Australia and the Philippines).

FPIC has also been incorporated into international good practice standards that are directly applicable to extractive companies. In 2012, the Performance Standards of the International Finance Corporation (IFC) were revised to require companies using project finance from the IFC to seek free, prior and informed consent — rather than the previous requirement of free, prior and informed consultation — in cases of project-related resettlement. Other international financial institutions and banks have followed suit, or even pre-empted the IFC. Responsible investors are increasingly pushing companies to develop FPIC policies.²

Defining FPIC

The key elements of FPIC were outlined in 2005 by the UN Permanent Forum on Indigenous Issues (UNPFII). These are: (i) that people are "not coerced, pressured

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or intimidated in their choices of development”; (ii) that “their consent is sought and freely given prior to authorisation of development activities”; (iii) that they “have full information about the scope and impacts of the proposed development activities on their lands, resources and wellbeing”; and (iv) that “their choice to give or withhold consent over developments affecting them is respected and upheld”.³

Since 2005 there has been much debate about the interpretation of FPIC, with no single definition being universally adopted. There is little debate over the terms ‘free’ and ‘informed’. ‘Prior’ consent may not always be within the control of a company (for example, where governments are responsible for allocating concessions). Requirements for companies to seek FPIC tend to relate to a specific project activity, such as siting facilities and project-related resettlement. The notion of ‘consent’ is the most controversial. Following the IFC and others, ‘consent’ can be interpreted as mutual agreement reached via a pre-agreed and transparent process, with ongoing communication, negotiation and reaffirmation of consent over the course of the project cycle. The question of whether consent should equate to a community veto is still hotly debated (see section on consent and veto).

Deliberating sustainability: why FPIC is important for shaping quality investment

Quality investment balances environmental sustainability, poverty reduction, economic diversification, human capital development and social justice for host communities, while also delivering an acceptable risk profile and rate of return for investors. Proponents of FPIC argue that in taking decisions relating to the future wellbeing of a society, the more participatory a process, the greater its ability to balance stakeholder viewpoints and thereby lead to socially and politically viable developments — the aim of quality investment. The sustainability of the choices made often depends on whose views are voiced at the table and how these are deliberated. The diversity of perspectives on sustainable development makes it essential to debate this wide range of views.

Project-affected communities often prioritise rights to land and resources, employment and other opportunities for increasing their living standards. Indigenous peoples also emphasise the recognition of their rights to self-determination and cultural practices. Governments may focus on increasing foreign investment and profitable resource development in the interests of society more broadly. National and international non-governmental organisations (NGOs) may prioritise environmental conservation. For companies, sustainability is frequently interpreted as sustained profit-making and competitive development. Businesses therefore see employment creation, skills training, environmental and human rights protection — in essence, securing a ‘social licence to operate’ — as essential to ongoing success. Implemented well, an FPIC process should enable the full range of perspectives to be voiced and debated in good faith, so as to reach mutually agreed decisions that reflect the interests of all legitimate parties.

Source: Buxton and Wilson, 2013⁶

There is emerging good practice in extending the scope of FPIC application to non-indigenous populations who are significantly affected by a project.⁴ This broad scope addresses the difficulty in identifying indigenous peoples in some contexts, the lack of recognition of indigenous peoples by some governments, and the extent of significant project impacts on non-indigenous people in many cases. A key issue in interpreting and applying FPIC is the relative responsibilities of government and companies. ILO 169 and UNDRIP are directed at governments, whereas the requirements of international financial institutions are aimed at companies. Companies should also be aware of the risks of operating in countries where governments have failed to meet their obligations under international law.⁵

Consent and veto

Governments and companies have often been reluctant to engage with FPIC because of the fear that consent equates to handing the power of veto over to local communities. This fear is compounded by a lack of sufficient case study evidence on who should grant consent and what consent should look like in practice. Companies have tended to avoid a formal FPIC process where it is not a legal obligation or requirement related to project finance, due to this fear of a veto and the risk of undermining the authority of the state where FPIC is not required in national law. This weakens FPIC’s broader potential to empower communities and to frame constructive dialogue. We therefore see consent having the 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.

Nonetheless, an authentic FPIC process needs to offer the possibility of a veto. Allowing people this option rarely results in them applying it, and it may enable a company to secure greater support and trust from communities than a regular consultation process would have achieved. Moreover, during an FPIC process companies are in a position to negotiate, whereas in a severe conflict they may not be able to prevent a project from closing down. Some companies are starting to say that they would rather pull out of a project than continue without a social licence to operate. Having the right to veto on the table is both a valid option in a deliberative process and a way to rebalance the power relations around the negotiating table.

The spirit of FPIC

Companies must meet their legal and contractual obligations to ensure that FPIC processes take place. This entails understanding how to respond to the range of legal frameworks, regulations, standards

and conditions for project finance that require FPIC, as well as the risks of operating in situations where governments have failed to meet their own obligations. Yet, rather than taking a purely compliance-based view of FPIC, companies can also enhance community relations and reduce project risks by understanding the essence or ‘spirit’ of FPIC and implementing this throughout their operations, regardless of legal and third-party obligations. By doing this, companies can avoid stalling potentially constructive dialogue through fear of sparking a community veto or antagonising a host government.

Understanding the spirit of FPIC equates to understanding what it means to respect individual and collective rights and for people to have a meaningful voice in deliberative decision making about their own development. 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 that lead to mutual agreement on future development. The mutually agreed decision could be to reject further development of a mine, or to avoid constructing a pipeline in a specific area, but that decision will be reached together. To this end, all parties need to come to the table willing to hear other perspectives, accommodate the interests of other parties and build a shared understanding, even if views are divergent.

Key principles, processes and institutions

An FPIC process is essentially a platform for engagement between communities, companies and governments to achieve mutual agreement on the way forward, including impact mitigation measures and compensation and benefits packages. A key challenge lies in understanding what the platform should look like, in terms of institutions, principles and values. Companies, governments and civil society need to know the range of flexible systems for participation and deliberation and how these can be used in a way that reflects the knowledge, values, practices and norms of local communities. Taking time early on to establish the correct process is crucial to ensuring a successful outcome for all parties. A critical issue is determining who is representing the interests of communities and making sure there is fair representation of all interests.

The following key principles underpin the spirit of FPIC:

- FPIC is implemented through deliberative processes.** Deliberative processes allow all participants to share information and have their views heard. This requires making accurate and relevant data available to all participants; ensuring equal consideration of all positions, based on their

Consent or consultation: the Philippines and Canada

The case of FPIC in the Philippines shows why it is important for the spirit of FPIC to be implemented — and why this is not always guaranteed simply by enshrining FPIC in law. The Philippines Indigenous Peoples’ Rights Act of 1997 (IPRA) is regarded as progressive in that it requires FPIC and also that consensus be determined in accordance with the customary laws and practices of indigenous communities. But the guidelines have little flexibility in implementation, allowing insufficient time for traditional decision-making processes. This has led to protests and violence against mineral developments, and in 2012 the National Commission on Indigenous Peoples issued an Administrative Order to revise the FPIC guidelines.

In contrast, the Canadian government argues that the concept of consent fails to balance the rights of indigenous peoples against those of non-indigenous Canadians, and therefore does not support consent in law. The government recognises the right to free, prior and informed consultation but argues that maintaining an equitable and fair balance of interests is more important than consent per se. Nonetheless, Canada’s flexible institutions offer indigenous groups the possibility of having a meaningful voice in decision making. Consultative boards have been set up under the Comprehensive Land Claims Agreements to resolve conflicts between aboriginal peoples’ land rights and resource developments. These boards, with both community and government representation, have the right to reject a development. The Screech Lake uranium mine, for example, was rejected due to the ecological and cultural significance of the area to aboriginal communities. Although any such decision can, by law, be overruled by the federal government, this has never happened.

Source: Buxton, 2012⁷

supporting evidence and not on who is advocating a particular view; and ensuring that all participants sincerely weigh all arguments put forward.

- An FPIC process is designed flexibly and with community participation.** Processes are agreed in advance between all parties. Local traditions and customary practices should be reflected in decision-making processes and in logistical elements such as language, ceremony and dress, timing, and venue. The process should be responsive to the needs of all stakeholders as and when they arise. This flexibility should be communicated up front, and participants should regularly reflect on whether the process is effectively engaging all stakeholders and considering all relevant issues.
- The exercise empowers local communities to engage constructively on an equal footing and make informed decisions.** Companies may partner with local civil society and NGOs to build the capacity of local communities to engage in dialogue prior to the FPIC process. There is a need to ensure that discussions are not captured by local elites and that views are heard from typically marginalised groups — such as women, young people and indigenous peoples — through parallel dialogues that feed into the main dialogue, for example. All parties should have access to the same information, and communities need to trust the source of information and the methodologies.

Like other good practice standards in stakeholder engagement, FPIC or the spirit of FPIC needs to be maintained across the project life cycle — from exploration through to decommissioning. Further good practice guidance is provided by the IFC and industry associations.⁹

A three-point framework for action

We have developed a three-point framework for companies considering how to apply FPIC principles in their operations. The framework allows for three levels of application, depending on a company's levels of confidence, understanding and preparedness, as well as the relevant demands, awareness, skills and capacities of local communities and governments.

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 is intended to challenge companies to move beyond a culture driven by minimal compliance-based thinking, towards one based on greater understanding of the importance of meaningful stakeholder engagement — an understanding that should benefit business as well as communities.

Notes

- ¹ Davis, R., Franks, D.M. 2011. The costs of conflict with local communities in the extractive industry. Paper presented at the First International Seminar on Social Responsibility in Mining, Santiago, Chile, 19-21 October 2011. See www.shiftproject.org/publication/costs-conflict-local-communities-extractive-industry. ■ ² Lehr, A.K., Smith, G.A. 2010. *Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and challenges*. Foley Hoag LLP, Boston. See www.foleyhoag.com/NewsCenter/Publications/ebooks/Implementing_Informed_Consent_Policy.aspx. ■ ³ UNPFII. 2005. *International Workshop on Methodologies regarding FPIC and Indigenous Peoples*. UN Permanent Forum on Indigenous Issues. E/C.19/2005/3. See www.un.org/esa/socdev/unpfi/documents/workshop_PRIPIC_Report.pdf. ■ ⁴ FSC. 2012. *FSC Guidelines for the Implementation of the Right to Free, Prior and Informed Consent (FPIC)*. Version 1, Final Draft. Forest Stewardship Council, Bonn. ■ ⁵ IFC. 2007. *ILO Convention 169 and the Private Sector*. International Finance Corporation, Washington, DC. See http://www1.ifc.org/wps/wcm/connect/cba33980488556edba6fa6a6515bb18/ILO_169.pdf?MOD=AJPERES. ■ ⁶ Buxton, A., Wilson, E. 2013. *FPIC and the extractive industries: a guide to implementing the spirit of free, prior and informed consent in industrial projects*. IIED, London. See: <http://pubs.iied.org/16530IIED>. ■ ⁷ Buxton, A. 2012. The spirit of FPIC: lessons from government-community-relations in Canada and the Philippines. In: Swiderska, K. (ed.) *Biodiversity and Culture: Exploring community protocols, rights and consent*. Special edition of Participatory Learning and Action, No. 65. IIED, London. See <http://pubs.iied.org/G03398>. ■ ⁸ See: ICMM. 2010. *Good Practice Guide: Indigenous peoples and mining*. International Council on Mining and Metals, London, www.icmm.com/page/84155/our-work/projects/articles/indigenous-peoples; IFC. 2007. *Stakeholder Engagement: A good practice handbook for companies doing business in emerging markets*. International Finance Corporation, Washington DC, http://www1.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/publications/publications_issues-and-emerging-good-practice.

Looking ahead: capturing FPIC in practice

Although much has been written about what FPIC means in principle and plenty of good practice guidance is available, there are few reports on the benefits and challenges of putting FPIC into practice. Companies such as De Beers, Rio Tinto, Talisman Energy and Xstrata have made public commitments to seek FPIC prior to any activities likely to have a significant impact on local communities. In Peru, where FPIC is a legal obligation, ConocoPhillips concluded written agreements with affected communities, documenting the community consent and the details of the agreed compensation for disturbance due to land use and seismic activities. Much more evidence on how FPIC or the spirit of FPIC has been implemented in practice — and the related benefits for communities and business — would help to increase understanding and reduce anxiety and confusion about contentious issues such as the community power of veto. This would enhance efforts to increase the uptake of FPIC in national legislation and company policy, and might also encourage companies to mainstream the spirit of FPIC into their operations across the board, over and above their legal and third-party obligations.

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For more detailed discussion of the points highlighted in this briefing, see the paper by the authors given in note 6.

About the series

A commercial investment's 'quality' determines whether it promotes or undermines inclusive sustainable development in low-income countries. This briefing is part of an IIED series that investigates the notion of quality investment across different sectors and themes. Individual briefings do not start from a specific definition of quality investment. Rather, a final briefing will review the series and discuss implications for such a definition.

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