



# Indigenous Peoples’ Rights and the Role of Free, Prior and Informed Consent

A Good Practice Note endorsed by the United Nations Global Compact Human Rights and Labour Working Group on 20 February 2014

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The UN Global Compact is a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labor, environment, and anti-corruption. In June 2006, the Global Compact Board established a Human Rights Working Group. In light of the growing recognition that labour rights are human rights and in order to ensure a coherent approach, the Chairs and members of the Human Rights Working Group and Labour Working Group merged to create the Human Rights and Labour Working Group in 2013. The goal of the Working Group is to provide strategic input to the Global Compact’s human rights and labour work. The following is one of an ongoing series of notes on good business practices on human rights endorsed by the Working Group. Rather than highlighting specific practices of individual companies, Good Practice Notes seek to identify general approaches that have been recognized by a number of companies and stakeholders as being good for business and good for human rights.

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*In addition to this Good Practice Note, see the following UN Global Compact resources relating to the rights of indigenous peoples:*

***The Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples and Practical Supplement of Case Examples***, available at:  
[unglobalcompact.org/Issues/human\\_rights/indigenous\\_peoples\\_rights.html](http://unglobalcompact.org/Issues/human_rights/indigenous_peoples_rights.html)

***The Human Rights and Business Dilemmas Forum*** is an online forum where stakeholders are invited to explore challenges, case studies and potential good practice on human rights and business themes. Visit the indigenous peoples’ rights theme at: [human-rights.unglobalcompact.org/dilemmas/indigenous-peoples](http://human-rights.unglobalcompact.org/dilemmas/indigenous-peoples)

## I. Executive Summary

Historically, companies have faced significant challenges when managing their relationships with indigenous peoples. As businesses operate in increasingly remote areas, their ability to act in a manner respectful of the rights of indigenous peoples will only grow in importance. Indeed, companies face particularly acute challenges when operating on or near traditional indigenous lands. This is in part because indigenous peoples are particularly vulnerable to the impacts of commercial developments. Moreover, indigenous peoples enjoy special international rights, above and beyond those that apply to other communities. To respect these rights, companies must update their policies and procedures, and grapple with a new paradigm for engagement.

The right of indigenous peoples to give or withhold free, prior, and informed consent for the use of their lands, resources, traditional knowledge, or intellectual property (“FPIC”) is one of these special protections for indigenous peoples. It is a recent development in international law that has rapidly gained widespread support, although it is not always effectively implemented in national law or practice. Companies wishing to respect this right should build upon their existing consultation processes so that they can demonstrate that they obtained consent for their activities. Yet obtaining FPIC in a “check-the-box” manner is not sufficient to ensure that the company respects the rights of indigenous peoples. This is because FPIC is not an end in of itself, but rather a process that in turn protects a broad spectrum of internationally recognized human rights.

This Good Practice Note provides background on the history of FPIC, without taking a definitive viewpoint on its legal status. Indeed, FPIC is relevant to business regardless of its precise legal status since lenders, indigenous peoples, civil society, and other stakeholders increasingly expect companies to obtain consent. The Good Practice Note also explores the business case for obtaining FPIC and the challenges that are likely to arise in the process; outlines current company good practices to obtain FPIC; and discusses emerging practices that not only support FPIC but also long-term benefits for affected indigenous communities.<sup>1</sup>

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<sup>1</sup> This Good Practice Note draws on the research process the author used to draft a report on FPIC (Amy K. Lehr and Gare A. Smith, *Implementing a Corporate Free, Prior and Informed Consent Policy*, Foley Hoag, available at <http://www.foleyhoag.com/publications/ebooks-and-white-papers/2010/may/implementing-a-corporate-free-prior-and-informed-consent-policy>, pages 58-59.). For that report, the author interviewed as list of entities developed in collaboration with the World Resources Institute and two social responsible investors, Bâtirente and Regroupement pour la responsabilité sociale des entreprises (“RRSE”). The report was passed to a number of additional reviewers made up of indigenous peoples, as well as companies and other organizations. All views herein are those of the author and should not be attributed to Foley Hoag LLP.

## II. Human Rights Standards

International law and norms regarding indigenous peoples have evolved rapidly in recent years. The right to FPIC flows from and is intended to protect a number of human rights embodied in treaties and other international law. These include the rights to self-determination, property, health, development, and cultural life. Indigenous peoples are particularly likely, compared to other groups, to experience infringements on these rights due to development projects both because they typically have a special and symbiotic relationship with their lands and because they often suffer from discrimination and systemic lack of representation in host state legal systems.

International Labor Organization (“ILO”) Convention 169 establishes a legally binding duty for ratifying governments -- which are primarily Latin American -- to consult with indigenous communities regarding development projects, and to obtain their consent for resettlement.<sup>2</sup> The Inter-American Court of Human Rights interpreted this in 2007 to require that governments obtain the FPIC of indigenous and tribal peoples before undertaking development projects with significant impacts.<sup>3</sup> In 2009, the African Commission on Human and Peoples’ Rights issued a similar ruling requiring the consent of protected collective groups to projects affecting them.<sup>4</sup> U.N. Treaty Bodies have similarly reiterated the requirement that indigenous peoples provide consent for certain commercial activities.<sup>5</sup>

In 2007, the U.N. General Assembly voted in favor of the U.N. Declaration on the Rights of Indigenous Peoples (“UNDRIP”).<sup>6</sup> The UNDRIP states that governments shall obtain the

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<sup>2</sup> “Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.” ILO Convention 169, Indigenous and Tribal Peoples Convention, entered into force 5 Sept. 1991, Article 16 [hereinafter “ILO Convention 169”].

<sup>3</sup> Case of the Saramaka People v. Suriname, Judgment, IACHR, Series C, No. 172 (28 Nov. 2007). Notably, this case extends the requirement to obtain FPIC to another marginalized group, the Maroons. ILO Convention 169 similarly extends to tribal as well as indigenous peoples.

<sup>4</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, 296/03, African Commission on Human and Peoples’ Rights, para. 291.

<sup>5</sup> See, e.g., the Committee on the Elimination of Racial Discrimination, General Recommendation 23, Rights of indigenous peoples (Fifty-first session, 1997), U.N. Doc. A/52/18, annex V at 122 (1997), reprinted as U.N. Doc. HRI\GEN\1\Rev.6 at 212 (2003), or Committee on Economic, Social, and Cultural Rights, Concluding Observations: Colombia, Nov. 30, 2001, W/C.12/1/Add.74. The Conference Parties for the Convention on Biological Diversity have also interpreted the Treaty to require the consent of indigenous peoples for the use of their traditional knowledge. Decision V/.16 Article 8j and Related Provisions UN Doc. UNEP/CBD/COP/5/23 (22 June 2000) paras 81 & 235. For further discussion, see Cathal Doyle & Jill Cariño “Making Free, Prior & Informed Consent a Reality, Indigenous Peoples and the Extractive Sector” (2013) [www.piplinks.org/makingfpicareality].

<sup>6</sup> The precise legal status of the rights that the UNDRIP articulates is complex, and it is beyond the scope of this Note to explore them. Although the UNDRIP is on its face a soft law instrument, experts have argued that certain rights in the UNDRIP are binding because either they are already states’ duties under international human rights treaties, or they form part of customary international law. For the argument that aspects of the UNDRIP and

FPIC of indigenous peoples for development projects.<sup>7</sup> Governments also are to provide redress when indigenous cultural, intellectual property, or genetic resources are taken without consent.<sup>8</sup> The UNDRIP enjoyed almost unanimous support, and no governments currently oppose it. The adoption of the UNDRIP indicates a substantial shift in global backing for the rights of indigenous peoples.<sup>9</sup>

The legal sources above are generally understood to address the role of governments, not companies, when engaging with indigenous peoples. Nevertheless, companies should seek to avoid complicity in violations of human rights, including the rights of indigenous peoples. Obtaining FPIC is one process that can help companies in this effort. Moreover, a variety of non-legal but influential sources, such as the lending policies of multilateral banks and multi-stakeholder codes of conduct, have articulated the expectation that companies obtain FPIC. For example:

- The European Bank of Reconstruction and Development and the Inter-American Development Bank have recently adopted loan policies that require the FPIC of indigenous peoples in some instances.
- The 2012 International Finance Corporation (“IFC”) Environmental and Social Performance Standards (“IFC Performance Standards”) include a requirement of FPIC for certain projects affecting indigenous peoples, which represents a shift from the prior requirement of free, prior, and informed *consultation*.
- Multi-stakeholder codes of conduct such as the Roundtable on Sustainable Palm Oil and the Forest Stewardship Council refer to FPIC.
- In 2013, the members of the International Council on Mining and Metals adopted a commitment to seek FPIC for projects or new stages of projects expected to have significant impacts on indigenous peoples.<sup>10</sup>

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indigenous peoples’ rights more broadly have become customary international law -- and thus binding on governments -- see the Hague Conference 2010: Rights of Indigenous Peoples, International Law Association, pages 43-52, available at [www.ila-hq.org/...cfm/9E2AEDE9-BB41-42BA-9999F0359E79F62D](http://www.ila-hq.org/...cfm/9E2AEDE9-BB41-42BA-9999F0359E79F62D).

<sup>7</sup> U.N. Declaration on the Rights of Indigenous Peoples, U.N. General Assembly, Resolution adopted by the General Assembly, October 2, 2007, A/RES/61/295, Articles 32 (2), available at [www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) [hereinafter “UNDRIP”].

“Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.” UNDRIP, Article 31. Although the concept of FPIC is relevant for companies that wish to commercialize indigenous traditional knowledge or genetic resources, this Good Practice Notice focuses on FPIC in the context of development projects.

<sup>9</sup> The concept of FPIC in certain contexts is also referenced in a number of other hard and soft international legal documents, as well as the statements of U.N. Treaty Bodies.

<sup>10</sup> International Council on Mining and Metals Position Statement on Indigenous Peoples and Mining, May 2013, <http://www.icmm.com/publications/icmm-position-statement-on-indigenous-peoples-and-mining>.

- The 2013 Equator Principles, which are social and environmental lending policies adopted by a substantial number of commercial banks and applied to certain loans and advisory services, also require FPIC for certain projects.

Finally, Global Compact Principles 1 and 2 and the U.N. Guiding Principles on Business and Human Rights (“U.N. Guiding Principles”) are of relevance for companies seeking to respect the rights of indigenous peoples.<sup>11</sup> Principle 1 of the Global Compact calls upon companies to respect and support the protection of internationally proclaimed human rights; and Principle 2 calls upon them to ensure that they are not complicit in human rights abuses.

The U.N. Human Rights Council’s unanimous endorsement of the U.N. Guiding Principles reaffirms the corporate responsibility to respect human rights as the global standard for all businesses. This responsibility means that businesses should avoid infringing on the human rights of others and should address adverse human rights with which they are involved. In order to meet the responsibility, the Principles stipulate that enterprises need to have in place certain policies and processes to know and show that they are respecting human rights. These include a policy commitment to respect human rights, a human rights due diligence process, and processes to enable the remediation of adverse human rights impacts. These are also the key elements underlying all human rights-related good business practices.

The U.N. Guiding Principles note that the responsibility to respect human rights refers to all internationally recognized human rights, “which is understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.”<sup>12</sup> The Guiding Principles do not explicitly discuss FPIC or the UNDRIP, but they add that “business enterprises may need to consider additional standards...In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples.”<sup>13</sup> The U.N. Special Rapporteur on the Rights of Indigenous Peoples notes that it is “evident...that the rights that corporations should respect include the rights of indigenous peoples as set forth in the U.N. Declaration on the Rights of Indigenous Peoples and in other sources.”<sup>14</sup> The UNDRIP of course includes FPIC.

The U.N. Special Rapporteur on the Rights of Indigenous Peoples clarified the role of FPIC, noting that consultation and consent together are a special requirement safeguarding a

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<sup>11</sup> For a discussion of the relationship between the Guiding Principles and the human rights principles of the UN Global Compact, see the explanatory note available here:

[http://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/Resources/GPs\\_GC%20note.pdf](http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/GPs_GC%20note.pdf)

<sup>12</sup> U.N. Guiding Principles on Business and Human Rights, II (A)(12).

<sup>13</sup> U.N. Guiding Principles on Business and Human Rights, II (a)(12), Commentary.

<sup>14</sup> U.N. Special Rapporteur on the Rights of Indigenous Peoples, U.N. Human Rights Council, 21st session, A/HRC/21/47, 6 July 2012, para. 59.

number of substantive human rights that are firmly established in international law.<sup>15</sup> Such rights include the right to self-determination, right to property, right to cultural life, right to health, and right to a decent living. Thus, companies should not focus on consent for its own sake, but rather understand it as a process that provides special protection for indigenous peoples in order to safeguard a number of their human rights that historically have been harmed by corporate and governmental activity.

Overall, the concept of FPIC is on the ascent in international law. Domestic regulations, on the other hand, lag substantially. As a result, companies are often caught between international standards and national regulations and practices that fall below them. The U.N. Guiding Principles on Business and Human Rights call on companies to adhere to international standards when national requirements lag. Doing so can protect companies from a variety of risks while preventing negative human rights impacts.

### **III. The Business Case for FPIC**

#### **A. Gaining a Social License to Operate**

Indigenous peoples are increasingly cognizant of international normative developments, due to the penetration of the internet and cellular phones into even remote areas of the world. As a result, some are aware of the UNDRIP, and might expect companies to obtain their consent. A company that fails to do so from the beginning of the relationship might find it challenging to gain a social license to operate because the community might feel that the company did not respect its human rights. This risk appears to be growing.

Companies have in fact lost access to their projects due to the opposition of indigenous peoples, both temporarily and permanently. They have forfeited millions of dollars due to operational delays, and in some instances have decided not to develop concessions at all due to the resistance of indigenous peoples.<sup>16</sup> Moreover, governments have revoked concessions due to ongoing indigenous protests.<sup>17</sup>

In contrast, when companies implement the steps necessary to obtain FPIC, they can develop closer relationships with and benefit from improved understanding of communities, which can translate into a better partnership in the long run.

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<sup>15</sup> U.N. Special Rapporteur on the Rights of Indigenous Peoples, Human Rights Council, 21st session, A/HRC/21/47, 6 July 2012, p. 49.

<sup>16</sup> See, e.g., Amy K. Lehr and Gare A. Smith, Implementing a Corporate Free, Prior and Informed Consent Policy, Foley Hoag, available at <http://www.foleyhoag.com/publications/ebooks-and-white-papers/2010/may/implementing-a-corporate-free-prior-and-informed-consent-policy>, pgs 58-59.

<sup>17</sup> Marianne Voss and Emily Greenspan, Community Consent Index: Oil, Gas, and Mining Company Public Positions on Free, Prior, and Informed Consent, Oxfam America, p. 16.

## B. Avoiding Reputational Risk

Companies operating in indigenous areas, particularly in sensitive biological locations such as the Amazon, have faced shareholder suits, become the subject of highly critical documentaries screened on well-known television shows, and served as the focus of ongoing non-governmental organization (“NGO”) campaigns. Indigenous leaders have also made headlines by appearing at corporate annual shareholder meetings. Enterprising NGOs also are seeking to create a “race to the top” by reporting on and ranking company policies on indigenous peoples.<sup>18</sup>

## C. Avoiding Legal Risk

Companies increasingly face legal risk when they do not obtain FPIC, or even when the consultation process is insufficient. This is due to significant gaps between host government national laws and practices versus host government international commitments and constitutional requirements. These gaps arise because few countries have laws requiring FPIC, even though they supported the UNDRIP and in some instances ratified ILO Convention 169. In some instances, national courts have held governments to their international commitments and found that the governments -- or the companies acting on behalf of the governments -- should have obtained FPIC before allowing a project to progress.<sup>19</sup> Moreover, the Inter-American Court on Human Rights has ruled numerous times that governments should have obtained consent for development projects, rulings that can leave project proponents in legal limbo. Companies thus have lost access to their concessions because they or the government failed to obtain FPIC, even though national statutes and regulations only required consultation with indigenous peoples.<sup>20</sup> The U.N. Guiding Principles -- as well as the desire to mitigate risk -- suggest that companies grappling with these legal gaps should adopt the higher standard.

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<sup>18</sup> See generally Marianne Voss and Emily Greenspan, *Community Consent Index: Oil, Gas and Mining Company Public Positions on Free, Prior, and Informed Consent*, Oxfam America.

<sup>19</sup> Indeed, the legal systems of a number of Latin American countries automatically incorporate the government’s international commitments. For instance, in Colombia, such commitments are treated with the same importance as constitutional law. As a result, in 2009, the Colombian Constitutional Court ruled that the government should seek the informed consent of indigenous peoples affected by a significant development project -- a ruling that reflects Inter-American Court of Human Rights jurisprudence and its incorporation into national law. Constitutional Court of Columbia, Seventh Hall of Revision, Judgment T-769, Alvaro Bailarin et. Al vs Ministry of the Interior and Justice et al., 29 Oct. 2009. See also *Cal v. Attorney General of Belize*, Nos. 171 & 172, (Belize 18 Oct. 2007), *available at*

[https://www.law.arizona.edu/depts/iplp/adovaccy/maya\\_belize/documents/ClaimsNos171and172of2007.pdf](https://www.law.arizona.edu/depts/iplp/adovaccy/maya_belize/documents/ClaimsNos171and172of2007.pdf).

<sup>20</sup> Pharmaceutical and cosmetic companies and scientific research institutions have also faced threats of lawsuits due to their failure to obtain the consent of indigenous peoples to use their traditional knowledge of their tissues. To the author’s knowledge, in most instances, the organization settled with the indigenous group before a lawsuit was filed, so it is not yet known if such a case would gain traction in national courts. To avoid the risk of a lawsuit or reputational damage, such organizations are increasingly obtaining the consent of indigenous peoples in these situations.

Host government requirements might also differ from those of lenders, such as the Equator Banks or IFC. Lenders' requirements are often enshrined in contracts between companies and lenders. A failure to exceed national law in order to meet lenders' expectations could lead to a contractual dispute that would in turn affect the project.

#### **D. Opportunities for Future Development Projects**

In some instances, companies report that governments give them preferential treatment due to their ability to adeptly engage with and obtain the consent of indigenous peoples. Conversely, companies that have negatively impacted indigenous peoples may find heightened resistance if they seek to operate new projects in indigenous areas where their poor reputation precedes them. Multilateral banks or other lenders also may prove more willing to provide loans to companies with a proven track record of obtaining FPIC in a manner that leads to ongoing, positive relations with communities.

### **IV. Challenges and Pitfalls**

#### **A. Failure to Obtain Consent**

The most obvious challenge for a company that seeks FPIC is that it might fail to obtain consent and be unable to move forward. A company's inability to obtain FPIC is a strong indicator that it does not possess a social license to operate, so proceeding in such instances could lead to operational shut-downs and adverse media attention, regardless of whether a company has a policy requiring consultation or consent.

#### **B. Government Tensions**

In some instances, governments may wish for projects to commence as rapidly as possible, and view FPIC -- or even meaningful consultation -- as an impediment to their revenue streams. Companies therefore might need to negotiate for additional time and help the government understand the long-term benefits of obtaining the consent of the local indigenous community.

Companies might also face challenges when governments carry out consent or consultation processes, but these do not meet international standards -- or even the requirements of domestic law. Resulting legal challenges are addressed in Section III (C) and political considerations and recommendations in Section V (C).

#### **C. Exacerbation of Conflict**

Companies have expressed concern that obtaining the consent of indigenous peoples, but not other project-affected groups, could create new inter-communal tensions. Companies of

course have the option of obtaining the consent of all project-affected groups, although this may not be feasible.

Obtaining FPIC – or even consultation -- could potentially exacerbate conflict within indigenous groups in a number of ways. Companies reportedly sometimes fail to identify and engage with the traditional leaders of the community, thus acting as “kingmakers” for new leadership. This can create new points of tension within indigenous communities and highlights the need to fully explore the dynamics of decision-making and power within the relevant indigenous communities at an early stage.

Yet even if companies accurately identify and work through traditional decision-making structures, the process can increase conflict. Many communities, indigenous or not, encompass various factions that compete for scarce resources. Gaining FPIC – or a social license to operate – typically involves an agreement between the company and indigenous people regarding the allocation of benefits. When these accrue primarily to one faction or support its agenda, this can exacerbate conflict. Such challenges already arise when companies carry out consultation processes with indigenous groups. Companies might not be able to completely avoid such effects, but the more fully they understand the dynamics of the particular indigenous group with which they engage, the more likely they are to navigate the FPIC process without creating conflict within communities.

#### **D. Engaging with Marginalized Groups**

As discussed below, companies should obtain consent through a process that incorporates traditional decision-making structures. In some indigenous cultures, women, youth, and other groups are inadequately represented in such structures. Companies then face a tension between the human right to non-discrimination and the desire to respect tradition. Although challenging, companies have navigated this problem by working with indigenous peoples to devise a more inclusive engagement process, in some instances integrating additional consultations with women or other marginalized groups.<sup>21</sup>

### **V. Current Good Practice**

#### **A. Develop a Policy**

A company that has or is likely to have a physical footprint in indigenous areas should develop a policy to address how it engages with indigenous peoples, including when it will seek

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<sup>21</sup> Examples of steps companies can take to ensure indigenous women are included in engagement processes are provided in Good Practice Guide: Indigenous Peoples Guide, International Council on Mining Metals, available at <http://www.icmm.com/library/indigenouspeoplesguide>.

consent.<sup>22</sup> The policy should articulate a minimum standard that the company will meet, even if national law does not require it. It should provide a basic outline of the process through which the company will seek to obtain consent. Since this process should reflect the traditional decision-making approach of the relevant indigenous peoples, the policy should provide for flexibility. The company should also set up systems to effectively manage ongoing interactions with indigenous communities throughout the project's life cycle. When developing this policy, the company should review guidance from lenders such as the IFC, as well as the U.N. Treaty Bodies, to determine which impacts would trigger the policy's application (see Section V (C) (1) for further discussion).

A company should make a policy commitment to conduct due diligence on potential acquisitions to ascertain whether the entity previously operating the project engaged effectively with indigenous communities. If not, such prior missteps could delay the project, and would require the company to invest significant time and resources to bring the project into line with its own standards on indigenous peoples.

## **B. Conduct Due Diligence and Impact Assessments**

When projects affect the rights of indigenous peoples, companies should adapt their social or human rights due diligence processes and impact assessments to address a broader range of topics than is typical.<sup>23</sup> Topics requiring special attention include:

(1) **Legal Due Diligence:** Companies should identify national legal requirements regarding indigenous peoples, the host government's international commitments, and how national courts have interpreted the government's duties to indigenous peoples. They should also examine whether regional human rights courts, U.N. Treaty Bodies, or U.N. Special Rapporteurs have opined on the matter.<sup>24</sup> Legal due diligence should also identify national laws and practices relating to land title, including whether the government recognizes collective land rights, and the extent to which indigenous peoples have received formal title for their lands. This is typically an area of risk for companies, since some governments do not recognize the collective land rights of indigenous peoples, or only provide title for an area much smaller than the groups have traditionally used and occupied. This legal due diligence should help companies identify the gaps between national law and practice versus international law.

(2) **Due Diligence Regarding Culture and Decision-making Structures:** Companies should undertake research to understand the structure and decision-making processes of the

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<sup>22</sup> A company that utilizes the cultural heritage or genetic resources of indigenous peoples should do the same.

<sup>23</sup> The International Council on Mining and Metals identifies how the typical due diligence process may need to be expanded for projects affecting indigenous peoples. Good Practice Guide: Indigenous Peoples Guide, International Council on Mining and Metals, <http://www/icmm.com/library/indigenouspeoplesguide>, Section 3.3.

<sup>24</sup> For instance, the U.N. Special Rapporteur for Indigenous Peoples makes country visits and issues annual reports, which in some instances provide country-specific guidance on FPIC, and more generally articulate when development projects are considered to infringe on indigenous rights.

affected indigenous groups, including any divisions or potential sources of conflict. Such an investigation should consider whether the government recognizes certain indigenous organization to be official representatives of the communities, and examine whether those communities indeed perceive them to be legitimate representatives. At an early stage, companies can consult with experts on the relevant indigenous culture, particularly if they have no presence on the ground and are not yet sure whether they will even pursue a project. If companies need to obtain FPIC, they should engage with the indigenous peoples themselves to understand the culture and traditional decision-making structures, and jointly develop a consultation process.

(3) Cultural Heritage Impact Assessments: In addition to environmental, social, and human rights impact assessments, companies should conduct assessments of the project's impact on traditional knowledge and cultural heritage. As discussed in Section VI, companies should consider carrying out such assessments jointly with the affected peoples.

### **C. Undertake Consent Process**

The precise process that companies follow to obtain consent will vary depending on the traditional decision-making structures of the indigenous peoples with which they engage, as well as the complexity of the project. The considerations relevant to developing a consent process are discussed in Section V(C)(5). Generally, companies that seek to obtain consent for their projects should work in close collaboration with affected indigenous peoples to:

- Develop a negotiation process that specifies the stages of the project that the negotiation will address;
- Document the agreed-upon negotiation process; and
- Document the outcome of the negotiation process.<sup>25</sup>

Companies can build upon their existing community engagement practices, although these may require significant adjustments to meet the parameters outlined below in order to ensure that consent, if provided, is free, prior, and informed.<sup>26</sup> Documentation of all stages of the process is particularly important so that companies can demonstrate why they believe they obtained FPIC, as well as to meet the requirements of certain lenders.

In some instances, governments might carry out consultation processes or seek to obtain the consent of indigenous peoples. If the government's approach falls short of international standards, a company that commits to obtaining FPIC will need to find a way to complete the

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<sup>25</sup> IFC Performance Standard 7 suggests such an approach, as do a number of NGOs. IFC Performance Standards (2012): Guidance Note 7: Indigenous Peoples.

<sup>26</sup> Consultation and obtaining consent are linked. Consent is impossible without consultation. Free, prior, and informed consent, however requires steps above and beyond a free, prior, and informed consultation process. For instance, a company may in fact obtain community support through a consultation process, but FPIC implies that a company should be able to formally demonstrate that support. Moreover, in contrast to consultation, FPIC suggests that a community can reject the project rather than simply provide input into its design.

process without offending the government. The IFC Performance Standards also suggest that companies should seek to fill gaps in governmental processes in order to obtain FPIC.<sup>27</sup>

Given the potential sensitivity of such discussions with governments regarding gaps between national and international law, and those of lenders, companies should identify how they will work with the host government to obtain consent.<sup>28</sup> Companies should consider negotiating with host governments to develop contractual clauses or a memorandum of understanding stipulating that projects will only go forward if the affected indigenous peoples provide their consent.

### **(1) Impacts that Prompt the Need for FPIC**

According to the IFC Performance Standards, companies should obtain consent when a project would be associated with the following potentially adverse impacts on indigenous peoples:

- Impacts on lands and natural resources subject to traditional ownership or under customary use (including seasonal use);
- Relocation of indigenous peoples from lands or natural resources under traditional use;
- Significant impacts on critical cultural heritage essential to the identity or culture of indigenous peoples, such as sacred waterways or rocks;
- Use of cultural heritage for commercial purposes, including knowledge, innovations, or practices.<sup>29</sup>

Although the IFC's commentary provides a starting point, it does not fully clarify when a project is considered to have a potentially adverse impact on land, natural resources, or cultural heritage. Moreover, it does not address a number of human rights impacts that human rights bodies have indicated might necessitate FPIC. For instance, an influx of workers to an area near -- but not on -- an indigenous population's land might bring disease, increased violence, and harm to the indigenous people's traditional way of life. This the type of potential adverse impact for which FPIC most likely should be sought. Human rights mechanisms such as the Inter-

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<sup>27</sup> Notably, the U.N. Special Rapporteur on the Rights of Indigenous Peoples has suggested that companies should not assume the role of obtaining consent because this is the duty of the host government. Given that most host governments do not currently seek or obtain consent, this leaves companies in a quandary.

<sup>28</sup> Although some of those countries' highest courts have declared such regulations invalid due to the state's international obligations. See, e.g., C-366/11, May 11, 2011 (Colombian Constitutional Court declaring portions of the Mining Code invalid because it would affect indigenous and Afro-Caribbean people, and the government had failed to consult them as required by international law).

<sup>29</sup> IFC Performance Standards (2012): Guidance Note 7: Indigenous Peoples, GN 27.

American Court of Human Rights and the U.N. Treaty Bodies<sup>30</sup> provide detailed guidance regarding when potential infringements on rights would prompt the need to obtain FPIC.<sup>31</sup>

Importantly, companies should not simply rely on the host government's identification of indigenous groups or demarcation of their lands when determining whether a project will impact indigenous peoples. Governmental failure to recognize indigenous peoples and provide legal protection to their lands is a key factor behind ongoing injuries to indigenous rights.<sup>32</sup> Therefore, companies should conduct their own analysis of which groups are indigenous, and what lands and resources they have traditionally controlled or used.<sup>33</sup>

## **(2) "Free"**

For consultation or consent to be free, the indigenous people involved in the process should feel free from coercion and manipulation. This means, for example, seeking to ensure that there is not a sudden influx of government troops to the area, which could be highly intimidating.<sup>34</sup> It also implies allowing sufficient time for the engagement process to occur, so that indigenous communities do not feel rushed, or believe that the process was mere window-dressing. A company may find this challenging because slowing down the project accrues financial costs. This price, however, is likely to be small compared to those stemming from an inadequate engagement process -- costs such as sabotaging of the project, protests blocking access to the project, or a lawsuit contesting the company's right to develop the project.

For consent to be free, communities need to feel able to reject the project. This option should be clearly articulated to the communities. In one instance of good practice, a company operating in Canada explicitly stated in documents posted on the internet in the indigenous people's language that it would not pursue the project without their consent.

## **(3) "Prior" and Other Timing Considerations**

The meaning of "prior" is controversial. Organizations that focus on indigenous rights indicate that consent should occur before a government gives a concession to a company, and

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<sup>30</sup> For example, see General Comment 21: Right of Everyone to Take Part in Cultural Life, CESCR Committee, E/C.12/GC/21 December 2009 (identifying aspects of indigenous peoples' cultural rights that are protected by FPIC).

<sup>31</sup> For further discussion of when consent should be obtained, see, e.g. Cathal Doyle and Jill Carino, Making Free, Prior, and Informed Consent a Reality: Indigenous Peoples and the Extractive Sector," Indigenous Peoples Links, Middlesex University School of Law, and the Ecumenical Council for Corporate Responsibility," May 2013, p. 20.

<sup>32</sup> Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, A/HRC/15/37, 19 July 2010, para. 55.

<sup>33</sup> IFC Performance Standard 7 mandates that companies respect traditional land ownership even if indigenous peoples do not hold legal title. Moreover, it creates an expectation that companies ascertain whether a group is an indigenous people – implying that companies should not simply rely on the government's official designations. IFC Performance Standards (2012): Performance Standard 7: Indigenous Peoples.

<sup>34</sup> Indeed, by voting for the UNDRIP, governments committed to only sending military troops to indigenous areas after consultation with indigenous peoples, and in pursuit of a public interest. UNDRIP, article 30.

certainly before commercial activities commence. In contrast, some companies note that, in reality, the government almost never consults or obtains consent before tendering concessions, and argue that this is not likely to be a viable option for companies. They suggest a different timeline, noting that they carry out a large number of exploration activities that never progress to production, and it therefore would not be practicable to carry out substantial consultation or consent processes for exploration.

Human rights courts and other human rights bodies have laid out slightly varying parameters for exactly when FPIC should occur. They all emphasize, however, the fact that consent is intended to protect the substantive rights of indigenous peoples, including the right to self-determination, cultural life, livelihoods, and so forth. When, exactly, a particular project risks negatively impacting those rights, thus prompting the need for consent, might vary substantially by industry and context.<sup>35</sup> It is certainly the case that international and national courts have in some instances called for FPIC before exploration begins.

Therefore, to consistently meet the minimum standards that regional human rights courts, national courts, and U.N. treaty bodies might impose, companies would be well-advised to ensure that consent has been obtained before exploration begins. Such an approach also provides a solid footing for long-term relations with the affected communities.

Experts argue that not only should consent be given at the start of a project, but that it must be obtained prior to major new milestones of a project that present human rights risks. This is sensible enough, since communities cannot consent to unforeseen activities. For instance, it is suggested that companies should obtain consent prior to major changes to a project, such as a substantial projection expansion, or the closure of the project.<sup>36</sup>

#### **(4) “Informed”**

Indigenous communities should be informed of factors that enable them to understand the project and engage in decision-making. This should include but is not limited to: the nature, size, reversibility, and scope of any project; the duration of the activity; and the likely economic, social, cultural, and environmental impacts of the project.<sup>37</sup> When companies provide full

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<sup>35</sup> Indeed, companies and indigenous peoples provide highly differing views regarding when activities cause significant impacts. For instance, some companies suggest that seismic activities have no permanent effects on communities, and therefore such impacts are not significant. Indigenous peoples have argued that the incursion of often-unannounced contractors conducting seismic work on their land can spread disease, affect wildlife, and infringe on their culture.

<sup>36</sup> To add to the challenge, some argue that consent must be provided anew if a company sells an asset. See, e.g. Cathal Doyle and Jill Carino, Making Free, Prior, and Informed Consent a Reality: Indigenous Peoples and the Extractive Sector,” Indigenous Peoples Links, Middlesex University School of Law, and the Ecumenical Council for Corporate Responsibility,” May 2013, at 20.

<sup>37</sup> See U.N. Economic and Social Council, Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior, Informed Consent and Indigenous Peoples*, U.N. Doc. E/C.19/2005/3, 7 Feb. 2005.

information to communities regarding potential project impacts, not only does this support consent that is informed, but it also mitigates the risk that indigenous peoples will feel they were misled, which can badly damage company-community relationships in the long-term.

The steps companies should take to ensure that indigenous communities are adequately informed depends on the specific situation. In all instances, information must be communicated in a comprehensible manner. Companies should translate it into the local language. In areas with high levels of illiteracy, companies have used drawings or other media to explain the potential impacts of projects. Additionally, companies operating in undeveloped, remote regions have flown community members to view similar operations in nearby countries so they have a genuine understanding of the project.<sup>38</sup>

In many instances, companies might need to support capacity building for indigenous communities so that they better understand the technical aspects of projects, as well as complex legal documents. In order to make capacity building and technical advice as unbiased as possible, companies have placed funds in escrow accounts that communities can use to hire advisors of their choosing. In rare instances, company home governments have supplied funding for community capacity building. Companies also should train their own employees and contractors regarding how to engage with indigenous communities so that they develop a positive and respectful working relationship.

Companies have begun to develop innovative practices to ensure that communities are informed, including designing and conducting joint impact assessments. These practices are discussed in Section VII. Such approaches offer useful methods to not only inform communities of impacts but also support their confidence on that data. Collaborative approaches to information-gathering also support mutual understanding between companies and communities.

In sum, ensuring that indigenous communities fully understand the potential positive and negative impacts of a project is not always a simple process, but it is crucial for developing a positive long-term relationship. It is therefore important that companies budget sufficient time and human resources to carry out this work.

## **(5) “Consent”**

Consultation and consent are separate but related concepts. In order to obtain consent that is free, prior, and informed, companies must engage in meaningful, good faith consultations. Consent, however, means agreement to a company activity, not merely consultation. It can be understood as a formal, documented social license to operate, based on a mutually agreed process that is respectful of indigenous peoples’ customary decision-making processes. Consent is one of the most controversial in the debate over indigenous rights because it is related to

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<sup>38</sup> For more examples, see, e.g. Amy K. Lehr and Gare A. Smith, Implementing a Corporate Free, Prior and Informed Consent Policy, Foley Hoag.

indigenous peoples' right to self-determination and their ability to control their own resources, which might conflict with the interests of the host government.

If a company seeks the consent of an indigenous community, it faces a number of practical challenges. The UNDRIP states that governments should obtain consent from indigenous peoples' representative structures and through their traditional decision-making processes.<sup>39</sup> Presumably, companies should do the same. Companies should work with experts and indigenous communities themselves to identify legitimate representative structures. In some instances, such structures have disintegrated, in which case the community may need expert support to devise a decision-making process.

Notably, consent typically does not enable a one-person veto. The process used to obtain consent rarely would allow one person's opposition to the project to prevent it from going forward, because few traditional decision-making structures are structured in that manner.

Although the process to reach consent will likely reflect the community's traditional decision-making approach, assuming those have not disintegrated, companies should ensure that it includes marginalized groups, such as women and youth. This helps meet international human right standards and ensures that the project indeed has the general support of the community. This can be a challenging conversation, but companies should work with the community to devise mechanisms to consult with such groups where needed and enable them to have input into the decision.<sup>40</sup>

As a sign of respect, companies should consider sending company representatives with status similar to that of indigenous leaders at key junctures in the process, rather than only having relatively junior personnel involved in the engagement.

As was noted in Section V(C), the company should also negotiate an agreement with the community that describes the engagement process and how the community will express its consent -- or lack thereof. The company and community should then document that they followed that process.<sup>41</sup> Such a written accord enables the company to defend the negotiation and any final agreement reached if either is later challenged.

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<sup>39</sup> 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." UNDRIP, Article 32.

<sup>40</sup> Examples of steps companies can take to ensure indigenous women are included in engagement processes are provided in Good Practice Guide: Indigenous Peoples Guide, International Council on Mining Metals, <http://www.icmm.com/library/indigenoupeoplesguide>.

<sup>41</sup> The client will document (i) the mutually accepted process between the client and Affected Communities of Indigenous Peoples, and (ii) evidence of agreement between the parties as the outcome of the negotiations." IFC Performance Standards (2012): Performance Standard 7: Indigenous Peoples.

Consent should be memorialized, ideally in a written format. Consent could also be captured through video recording if the community is mostly illiterate. The agreement should state:

- The nature of the project;
- Any benefits that will accrue to the community;
- Mitigation steps the company will take to address risks;
- The stage of the project that the agreement includes;
- Project milestones at which the company would need to obtain consent for additional activities or other planned steps; and
- Monitoring mechanisms or any other means through which the community and company will continue to engage.

Even after a community expresses consent to a project, a company should continue to engage with the community in order to maintain its social license to operate. A company may also need to later obtain consent for unforeseen and substantial changes to the project. For these two reasons, some companies set up mechanisms that enable ongoing interactions with communities that keep both sides informed, and allow concerns to be addressed, as discussed in Section VII.

## VI. Emerging Practices

Key emerging practices include the development of joint assessment and monitoring approaches, jointly administered grievance mechanisms, and innovative approaches to benefit-sharing.

For example, companies have worked with indigenous communities to develop joint impact assessment and/or monitoring mechanisms to measure effects on the environment, human rights, and cultural heritage. Companies and communities have also set up joint mechanisms to monitor the implementation of the consent agreement itself. To create such assessments, companies work with communities to identify the issues to be assessed or jointly develop performance indicators, since particular communities may value different factors. Community members then help carry out the assessment or monitoring activities.<sup>42</sup>

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<sup>42</sup> For examples of such joint assessment and monitoring mechanisms, see Amy K. Lehr and Gare A. Smith, *Implementing a Corporate Free, Prior and Informed Consent Policy*, Foley Hoag, pp. 46-49. The importance of such arrangements is emphasized in Marcus Colchester and Fergus MacKay, “In Search of Middle Ground: Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent,” *Forest Peoples Programme* (2004), p. 27, available at [http://www.forestpeoples.org/documents/law\\_hr/fpic\\_ips\\_text\\_only\\_aug04\\_eng.pdf](http://www.forestpeoples.org/documents/law_hr/fpic_ips_text_only_aug04_eng.pdf).

Such joint mechanisms can lead to a number of benefits. The communities better understand the impacts of the projects, which supports consent that is informed. Working together helps develop relationships between the companies and communities, thus supporting a continuous feedback loop. Moreover, companies might better understand project impacts because indigenous communities often possess unique insights into their lands, social structures, and cultural heritage. Such mechanisms require extra time to develop and may necessitate capacity building so that community members can rigorously measure impacts. Such time is likely to be well-spent, since communities are less likely to doubt the results of assessments they help implement.

Not only do such mechanisms lead to practical long-term benefits and support consent that is genuinely informed, but international law also calls for them in the context of development projects. ILO Convention 169 states that studies should be carried out, “in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.”<sup>43</sup> Such approaches also reflect the concept of genuine partnership embodied in the UNDRIP.

Companies have also worked closely with indigenous communities to develop jointly-run grievance mechanisms.<sup>44</sup> Effective grievance mechanisms enable problems to be identified and addressed before they escalate, and are part of the corporate responsibility to respect human rights as defined in the U.N. Guiding Principles on Business and Human Rights. In some instances, the company and community each choose a member to join a panel that addresses grievances. Alternatively, the company nominates several potential panel members, and the community selects one of them, and vice-versa. Such approaches create an opportunity for joint problem-solving and enhance the credibility of the grievance mechanisms.

Benefit-sharing is another area in which practice continues to evolve. Traditionally, companies offer benefits to the indigenous communities affected by the project, most often in the form of cash, jobs, or social development funds. If the community and company come to a formal agreement before a project begins, such benefits are often included therein.

The U.N. Special Rapporteur on the Rights of Indigenous Peoples has critiqued these arrangements, noting that indigenous peoples often do not believe these benefits outweigh the

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<sup>43</sup> ILO Convention 169, Article 7. See also the discussion in Cathal Doyle and Jill Carino, *Making Free, Prior, and Informed Consent a Reality: Indigenous Peoples and the Extractive Sector*, Indigenous Peoples Links, Middlesex University School of Law, and the Ecumenical Council for Corporate Responsibility, May 2013, p. 14.

<sup>44</sup> Jointly-developed and implemented grievance mechanisms are discussed at more length in Amy K. Lehr and Gare A. Smith, *Implementing a Corporate Free, Prior and Informed Consent Policy*, Foley Hoag, pp. 46-49. See also Steven Herz, Antonio La Vina, and Jonathan Sohn, Eds., “Development Without Conflict: The Business Case for Community Consent,” WRI (July 2007), p. 25, available at <http://www.wri.org/publication/development-without-conflict>.

costs of the project. He has called for benefits that genuinely support the development and self-determination of the affected indigenous peoples, rather than one-time pay-outs. Moreover, he recommends a paradigm shift, noting that “benefit sharing must be regarded as a means of complying with a right, not as a charitable award...to secure social support for the project.”<sup>45</sup>

The understanding of benefit-sharing as a right, not charity or risk mitigation, supports an emerging practice. The Special Rapporteur highlights the fact that indigenous peoples typically do not receive a percentage of project revenues, despite their supposed control over their resources. In rare instances, however, indigenous peoples form companies that receive a stake in the business itself.<sup>46</sup> Although such arrangements are still uncommon, especially in the developing world, they offer a new framework for shaping the relationship between indigenous peoples and companies that merits further exploration.

## VII. Conclusion

The legal and practical guidelines regarding indigenous peoples’ rights are evolving rapidly and require companies to update their approaches. Companies should ensure that they carry out effective due diligence on indigenous peoples’ rights and traditions before undertaking projects. They should adjust their policies and procedures to address the right to FPIC found in the UNDRIP, which is supported not only by significant human rights jurisprudence, but also the most recent IFC Performance Standards and the 2013 Equator Principles. The process to obtain FPIC should be developed in collaboration with the affected indigenous peoples and should respect their traditional decision-making methods.

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<sup>45</sup> Report of the U.N. Special Rapporteur on the Rights of Indigenous Peoples, Human Rights Council, 15th session, A/HRC/15/37, 19 July 2010, para. 79.

<sup>46</sup> Such arrangements, although still unusual, are an emerging practice in countries such as Canada.