

Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges

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Table of Abbreviations

BP	British Petroleum
BG	BG Group
CSR	Corporate Social Responsibility
EIRIS	Ethical Investment Research Services
FPIC	Free, Prior, and Informed Consent
FSC	Forest Stewardship Council
IADB	Inter-American Development Bank
ICMM	International Council on Mining and Metals
IFC	International Finance Corporation
ILO	International Labor Organization
IPIECA	International Petroleum Industry Environmental Conservation Association
NGO	Non-Governmental Organization
RAIPON	Russian Association of People of the North
RRSE	Regroupement pour la responsabilité sociale des entreprises
RSPO	Roundtable on Sustainable Palm Oil
The Declaration	The Declaration on the Rights of Indigenous Peoples
U.N.	United Nations
WRI	World Resources Institute

I. Executive Summary

This report explores the benefits that Talisman Energy Inc. (“Talisman”) might derive and the challenges it might encounter if it were to adopt a policy to secure the free, prior, and informed consent (“FPIC”) of indigenous peoples¹ potentially impacted by its global operations. Talisman commissioned this report at the request of two responsible investors, Bâtirente and Regroupement pour la responsabilité sociale des entreprises (“RRSE”). The World Resources Institute (“WRI”), a think tank and thought leader on FPIC, was asked to provide a third party commentary on it. The scope of the report, as agreed by Talisman, the responsible investors, and WRI, includes the legal history of FPIC, the opportunities and challenges attendant to a FPIC policy, FPIC best practices, and guidance on FPIC policy language and implementation guidelines. The report does not encompass a review of the effectiveness of Talisman’s existing

indigenous peoples policies and practices, although the responsible investors requesting the report noted that Talisman “is ahead of the curve in terms of corporate social responsibility and transparency.”² The perspectives expressed in the report are intended to be inclusive, and draw upon the expertise of a range of community engagement and FPIC experts.³

FPIC is one of a number of indigenous rights that are specifically enumerated in international documents. Talisman and a number of its peer companies already have policies and practices in place to respect the longer-standing international norm of engagement with indigenous peoples who will be affected by development activities. Indeed, meaningful engagement is a critical process for companies that seek a social license to operate.⁴ FPIC can be understood, in fact, as a heightened and more formalized form of community engagement to be utilized when a project has substantial impacts on

¹ Although definitions of the term “indigenous peoples” vary, a frequently cited U.N. definition is: “Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.” U.N. Subcommission on the Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7/Add. 1-4 (March 1986), ¶ 379. Many definitions also require self-identification as an indigenous person and/or peoples. This document uses the terms “indigenous peoples,” “communities,” and “groups” interchangeably, for ease of reference, but the same international legal rights would attach regardless of the term used in the context of this paper.

² Letter from Bâtirent and RRSE to Talisman (23 Dec. 2008) (on file with authors).

³ The authors engaged with individuals at the following organizations: the U.N. Office of the High Commissioner on Human Rights, the IFC, the IFC Compliance Advisor Ombudsman, International Council on Mining and Metals, Newmont Mining, De Beers, CDA Collaborative Learning Projects, Canadian Environmental Law Society, Amazon Watch, Oxfam America (U.S. and Peru), the Indian Law Resource Center, World Wildlife Fund (Peru), Paul Joffe, KAIROS, Royal Dutch Shell plc, Anglo-American plc, Borealis, Futuro Sostenible, and the North-South Institute. The ideas expressed and recommendations offered in this report, however, should in no way be ascribed to these organizations or individuals with whom the authors engaged.

⁴ According to responsible investor Ethical Funds: “The social license to operate is outside of the government or legally-granted right to operate a business. A company can only gain a social license to operate through the broad acceptance of its activities by society or the local community. Without this approval, a business may not be able to carry on its activities without incurring serious delays and costs.” “Learn the Lingo, ‘social license to operate,’” Ethical Funds, available at <https://www.ethicalfunds.com/en/Investor/ChangingTheWorld/AboutSRI/Pages/LearnTheLingo.aspx>.

indigenous groups.⁵ Although this report is focused on FPIC, it builds upon the assumption that community engagement is an essential baseline for company behavior that helps ensure respect for human rights when company projects will affect communities.

FPIC derives from a number of legal and normative sources. International Labor Organization (“ILO”) Convention No. 169, a binding legal document, requires party States Parties to obtain the FPIC of indigenous peoples before resettling them, although this application of FPIC is conditional – if States do not receive indigenous peoples’ consent, they may relocate them in accordance with national law.⁶ The United Nations (“U.N.”) Declaration on the Rights of Indigenous Peoples (“the Declaration”) calls on parties to obtain the FPIC of indigenous peoples in the context of development projects that affect them. The Declaration is soft law rather than a binding legal document, but it is likely to influence national laws and jurisprudence over time, and soft law can evolve into hard, binding law. The U.N. General Assembly’s approval of the Declaration in 2007 signaled a victory for indigenous people and provided momentum to the principle of FPIC.

These international legal documents look primarily to governments, not companies, to obtain FPIC from indigenous peoples. Yet this could change.⁷ FPIC is rapidly gaining momentum, and this paper captures only a snapshot of the concept, which will continue to develop. Although international law does not appear to impose a requirement directly on companies to gain FPIC, the evolution of FPIC in international law will affect companies.⁸ National and regional legal systems are beginning to incorporate the right of indigenous peoples to be involved in decisions regarding development projects that will impact them, which in some instances has led to the denial or alteration of concessions that had been offered to multinational companies by the State. In addition, non-legal entities, such as the Inter-American Development Bank (“IADB”) and the Roundtable on Sustainable Palm Oil (“RSPO”), recently have started to apply the principles of FPIC directly to companies.

The policies and practices of a small but growing number of mining companies also incorporate the principles of FPIC – that consent is free, prior, and informed – to varying degrees. The oil and gas industry, however, has less frequently used FPIC in policy or practice. Evolving legal, social,

⁵ Throughout this report, the terms “engagement” and “consultation” are used somewhat interchangeably. Practitioners increasingly prefer the term “engagement,” as it suggests not only dialogue but also joint problem-solving and working together in a collaborative problem-solving process. In contrast, some understand “consultation” to refer to the company sharing information with the community without genuine collaboration. See, e.g., “Building Bridges: From Community Consultation to Community Engagement,” *Twenty-first Century Dialogue*, available at <http://www.21stcenturydialogue.com/resources/Janette%20Poster%20Final.pdf>. International legal instruments and company policies, however, tend to use the term “consultation,” so the report uses this term when discussing those particular instruments and policies.

⁶ See, e.g., “Indigenous & Tribal Peoples’ Rights in Practice: A Guide to ILO Convention No. 169,” ILO (2009), available at http://pro169.org/res/materials/en/general_resources/IPsRightsInPractice-singlepages.pdf.

⁷ International legal documents are generally assumed to address the roles that States should play. The Declaration is not always explicit about which actors should obtain consent, so a court could theoretically interpret it to create responsibilities for companies. Under standard rules of interpretation, however, this is unlikely.

⁸ When States violate some international rights, for example, companies can be found to be complicit in those violations.

and reputational risks provide reasons for extractive companies to examine indigenous peoples issues and consider whether seeking FPIC would better enable them to play an appropriate role in the realization of indigenous rights while more effectively protecting their social license to operate.

Companies considering a policy that incorporates FPIC principles face a number of potential benefits and challenges to their operations, relationships, and reputation. FPIC might enhance a company's ability to obtain and maintain a social license to operate in some countries. Yet in countries where indigenous communities feel that their rights are well-protected and are not demanding FPIC, it might add little more benefit than a robust engagement process. Furthermore, obtaining FPIC is challenging because it can be difficult to identify the relevant indigenous peoples and define an appropriate negotiation process.⁹ In addition, FPIC could heighten existing tensions between indigenous and non-indigenous communities if companies accord differential treatment to indigenous people. On the other hand, seeking consent could improve the reputation of companies in the eyes of civil society, responsible investors, and indigenous groups if the companies can demonstrate that they follow a suitable process.

Adhering to the principles of FPIC could also affect companies' market access and regulatory and legal risk. Companies that seek FPIC might obtain better market access if the government is concerned about

indigenous rights and social unrest. On the other hand, some governments might wish only to develop natural resources as rapidly as possible and give concessions to companies that are certain to exploit them – with or without FPIC. Efforts by companies to secure consent could adversely affect relations with the host government if the companies are construed to be undermining national sovereignty – although if companies present FPIC as a means of mitigating social risk, such an outcome is less likely. In some instances, regulators might view companies that seek FPIC more positively and be more helpful during the regulatory process. At the same time, other regulators might feel that companies have layered an unnecessary and time-consuming requirement on top of the existing process. Adopting a policy that incorporates FPIC principles would likely lower legal risks in the long-term, particularly in countries that voted for the Declaration.

This report is premised on a number of assumptions. First, understanding the distinct, although complementary, roles and capabilities of States and companies is critical. As the U.N. Special Representative for Business and Human Rights has noted, States and companies have different, although complementary, roles regarding human rights. Because the roles of States and companies are distinct, even if a government fails to meet its human rights duties, this does not release the company from its independent human rights responsibilities.

Given that the roles of States and companies

⁹ The question of which entities can give consent is one of the driving issues behind this report. Actors operating in the Peruvian Amazon face challenges determining and agreeing upon which federations and communities have the power to give consent to extractive industry projects. "Statement on Talisman's Oil Project in the Peruvian Amazon," Amazon Watch (11 Nov. 2008), available at http://www.amazonwatch.org/newsroom/view_news.php?id=1681.

are different, it is not surprising that the precise meaning of FPIC as it applies to governments is not likely to be the same for companies. Companies do not hold the power to seek FPIC in a manner that is truly “prior” as ILO Convention No. 169 and the Declaration appear to utilize the term, whereby a State gains consent before a concession is granted. Companies can, however, adhere to the principle of gaining consent “prior,” and seek consent before commencing specified stages of operations. Therefore, this report refers to “community agreement based on FPIC principles” to highlight the ways in which these principles can be defined and operationalized in a corporate context, which sometimes varies in subtle but important ways from the State context. In some instances, the paper also refers to consent. This should be understood to be synonymous with “community agreement based on FPIC principles.”

The report also assumes that consent and engagement are closely related concepts that can form part of the same process. Companies always should engage with project-affected communities. Consent is added on top of normal engagement processes in certain circumstances, and includes a more formalized process and outcome. The terms engagement and consent should not be used interchangeably, as consent is a heightened or extra layer added to the engagement processes that companies normally undertake.

The report concludes that, in the long-term, the benefits for oil and gas companies of obtaining community agreement based on FPIC principles, and thereby both supporting their social license to operate and reducing legal and reputational risks, may outweigh the substantial challenges of securing consent. This is particularly likely in States that voted for

the Declaration and in places where the rights of indigenous peoples are poorly protected in law or practice.

In light of global trends, it would be both timely and wise for Talisman to consider incorporating FPIC principles into its indigenous peoples or community policy. Because jurisprudence and consensus around FPIC is changing so rapidly, and companies have so little experience implementing the principles of FPIC, Talisman should review its policy within three years. The concepts upon which such a policy could be based include the following:

- The principles of FPIC should be embedded within a broader indigenous peoples or community engagement policy. Consent forms one aspect of how a company approaches indigenous rights. Concepts such as engagement are necessary elements of gaining consent, and of an indigenous peoples or community policy;
- Consent is best understood as a formalized, documented, and verifiable social license to operate. It provides an additional, more formalized process in addition to the normal engagement processes that companies utilize;
- Companies that seek consent should, at a minimum, obtain it from indigenous peoples living on the land and, in addition, should take all possible steps to design projects to avoid resettlement;
- Consent is free if indigenous communities are informed that they can reject the company’s specified activities, and are in fact able to do so without a sense of coercion;

- The community and company should formally agree upon and record the process through which the community will determine and express its consent or lack thereof;
- The process of gaining consent should incorporate traditional indigenous decision-making procedures as agreed upon with the community, while taking culturally appropriate steps to include marginalized groups;
- The process of gaining community consent must comply with national laws and regulations, while taking into account the company's policy to the greatest extent possible;
- Indigenous peoples should express their consent in a formal, written agreement with the company or other formal documentation;
- After an indigenous community formally provides its consent, a company must continue to engage with the community in order to maintain that consent – and, thus, the company's social license to operate; and
- FPIC has developed to address the situation of indigenous peoples. To address and mitigate all social risk, however, companies will also need to engage with potentially impacted non-indigenous people.

II. The Evolution of FPIC in International Law and Voluntary Initiatives

This section presents the legal and policy climate surrounding FPIC. The concept of informed consent has a substantial pedigree in various areas of the law. For instance, FPIC is required under international soft and hard law for medical experimentation.¹⁰ In addition, Europeans and indigenous peoples in the Americas engaged in consent processes during colonization, although an unlevel playing field meant that agreements were not always respected.¹¹ The modern application of FPIC to indigenous peoples derives primarily from ILO Convention No. 169 and the U.N. Declaration on the Rights of Indigenous Peoples, which focus chiefly on the role of the State. The statements of U.N. Treaty Bodies and regional human rights courts also provide evidence of the growing international support for the right of indigenous peoples to give or withhold FPIC to development projects affecting them. The requirements of international institutions such as the International Finance Corporation (“IFC”) and multi-stakeholder initiatives such as the RSPO help describe how companies

can play a role in ensuring that they have the FPIC of affected communities. The development of rights specifically for indigenous peoples is due to the need to address the historic marginalization of indigenous peoples in many societies, including a failure to recognize their historical use of land and a lack of opportunity for them to participate meaningfully in national political systems due to geographic, linguistic, and cultural barriers.¹² When international laws, global standards, and multi-stakeholder guidelines are viewed holistically, it is clear that the rights of indigenous peoples, including FPIC, have gained substantial momentum in recent years, with implications for the roles of both States and companies.

A. International Legal Standards

International law first contemplated the right of indigenous peoples to give FPIC in ILO Convention No. 169, Concerning Indigenous and Tribal Peoples in Independent Countries, which calls for FPIC to resettlement. It does not clearly articulate a consent standard for development projects. Rather, it establishes the right of indigenous peoples to be consulted regarding development projects

¹⁰ The requirement of FPIC for medical experimentation is found in the Nuremberg Code, as well as a number of other international protocols regarding medical testing. Some of the cases in the Nuremberg Trials after World War II helped establish this norm. A U.S. circuit court recently ruled that informed consent to medical testing is part of the “law of nations” – a specific, universal, and obligatory legal norm – and thus is actionable under the Alien Tort Statute. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009).

¹¹ See, e.g., 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), available at http://www.forestpeoples.org/documents/law_hr/fpic_ips_text_only_aug04_eng.pdf.

¹² The IFC Performance Standards on Indigenous Peoples refer to such historical problems: “Performance Standard 7 recognizes that Indigenous Peoples, as social groups with identities that are distinct from dominant groups in national societies, are often among the most marginalized and vulnerable segments of the population. Their economic, social and legal status often limits their capacity to defend their interests in, and rights to, lands and natural and cultural resources, and may restrict their ability to participate in and benefit from development.” “IFC’s Performance Standards on Social & Environmental Sustainability Performance,” IFC (2006), p. 28 ¶ 1, available at [http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/\\$FILE/IFC+Performance+Standards.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf) [hereinafter “IFC Performance Standards”]. Similarly, the Declaration’s preamble refers to the concern that “indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.” U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (13 Sept. 2007), Preamble, available at <http://www.un-documents.net/a61r295.htm> [hereinafter U.N. Declaration on the Rights of Indigenous Peoples].

that would affect them. Furthermore, the State can override the requirement of FPIC for resettlement if it follows appropriate legal procedures that allow for the effective representation of indigenous peoples.¹³ The Convention also addresses indigenous peoples' "right to decide their own priorities for the process of development," which is not quite a consent requirement but bears a strong resemblance to one.¹⁴ Although the Convention only explicitly provides for FPIC for resettlement – and the State can override the FPIC requirement – it helps establish the principle that indigenous peoples should play a pivotal decision-making role regarding projects that will affect them. The Convention creates collective – as opposed to individual – rights for indigenous peoples to control their lands and resources, meaning that indigenous peoples as a group exercise the rights.¹⁵

Only a small number of States have become Signatories to the Convention. For these

States, the Convention is binding, although, depending on their national legal structure, the elements of the Convention may only become fully effective if they pass implementing legislation. The Convention is not binding on States that are not parties to the Convention, but it is a persuasive authority for the global community with respect to FPIC.

The most important recent legal development was the U.N. General Assembly's adoption of the Declaration on the Rights of Indigenous Peoples in September 2007, with 143 votes in favor, 4 States in opposition, and 11 abstentions.¹⁶ The Declaration is soft law, not a treaty, and thus is not legally binding on States. The principle of FPIC for development projects was one of the most controversial aspects of the Declaration. The adoption of the Declaration after many years of debate suggests there is momentum behind the right to FPIC. The Declaration on the Rights of Indigenous Peoples articulates

¹³ "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." Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72 ILO Official Bull. 59 (1989), Art. 16.2 [hereinafter ILO Convention No. 169].

¹⁴ "The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development." ILO Convention No. 169, *supra* note 13, Art. 7.1. At the same time, if the State "retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands," the State need not gain the consent of indigenous peoples to exploit those resources. Rather, "governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands." ILO Convention No. 169, *supra* note 13, Art. 15.

¹⁵ See, e.g., James Anaya, "International Human Rights and Indigenous Peoples: the move towards the multicultural state," 21 ARIZ. J. INT'L & COMP. L. (2004).

¹⁶ Australia and New Zealand have since indicated that they support the Declaration, and the Canadian government has announced plans to endorse it, in line with the Canadian Constitution and laws. See "Speech from the Throne," Canadian Governor General (3 Mar. 2010), available at <http://www.speech.gc.ca/eng/media.asp?id=1388>. See also "Momentum slowly builds behind U.N. Indigenous Declaration," China View (19 May 2009), available at http://news.xinhuanet.com/english/2009-05/19/content_11397949.htm. The U.S. has indicated that it may change its position as well. U.S. U.N. Press Release, No. 064 (20 Apr. 2010).

the right in a number of circumstances.¹⁷ Of greatest interest for oil and gas companies, it calls on States to consult with indigenous peoples through their representative institutions to gain their FPIC “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.”¹⁸ States may delegate this responsibility to companies, in a manner similar to the delegation of the Crown’s duty to consult with aboriginal peoples in Canada. In sum, the Declaration is indicative of substantial momentum behind the indigenous rights movement, although the many years required for its adoption hint at the difficulty and complexity of the issues it encompasses.

Since the Declaration is soft law, it is not legally binding on States. To date, few

States have incorporated the standards into their domestic law, perhaps in part because the Declaration was only so recently approved. Over time, it is likely that the Declaration will start to “harden,” becoming more authoritative as it is used as the foundation for legal decisions and regulations in various States. When soft law standards become part of the “consistent conduct of States acting out of the belief that the law requires them to act that way,” they become customary international law and thus binding on States.¹⁹ With regard to the Declaration on the Rights of Indigenous Peoples, that process is just beginning.²⁰

Whether the Declaration is hard or soft law matters, but only up to a point.²¹ As it starts to affect the domestic legal framework and social expectations within which companies operate, it becomes a factor companies

¹⁷ The Declaration also specifies that FPIC is required for relocation; before adopting and implementing legislative or administrative measures that may affect indigenous peoples; and for storage or disposal of hazardous materials in the lands or territories of indigenous peoples. The Declaration provides for redress with respect to their cultural, intellectual, religious, and spiritual property taken without their free, prior, and informed consent or in violation of their laws, traditions, and customs, and for the redress, by means that can include restitution or, when this is not possible, just, fair, and equitable compensation, for the lands, territories, and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used, or damaged without their free, prior, and informed consent. U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 12.

¹⁸ U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 12, Art. 32.2.

¹⁹ Rosenne Shabtai, *Practice and Methods of International Law*, New York: Oceana (1984), p. 55. For instance, many would argue that sections of the U.N. Declaration of Human Rights have crystallized into customary international law. Typically, for a norm to become customary international law, states must (1) act in conformity with the norm; and (2) believe that their behavior is required by law (often called *opinion juris*). States as yet do not act in conformity with the norm of FPIC. Although there is a concept called “instant custom,” it is a truly rare occurrence in international law, and almost undoubtedly has not been achieved in the case of the Declaration on the Rights of Indigenous Peoples.

²⁰ Courts have started to refer to the Declaration in their legal decisions. For instance, the Supreme Court of Belize cited to the Declaration as a persuasive authority in a 2007 case, noting that it contains general principles of international law and that the Belize government had voted for it in the U.N. General Assembly. The Court ordered the government to demarcate and document the indigenous peoples’ land and to cease from acts that might affect the indigenous peoples’ enjoyment of their land unless the indigenous peoples provide informed consent. *Coy v. Belize*, Claim No. 171, Supreme Court of Belize (18 Oct. 2007), available at http://www.law.arizona.edu/depts/iplp/advocacy/maya_belize/documents/ClaimsNos171and172of2007.pdf. It is of relevance to Talisman that Canadian courts have shown a willingness to draw on international law standards in the past.

²¹ Soft law standards can be linked to practical implications for those who violate them. In the area of business and human rights, such standards can have concrete effects because national law incorporates them, socially responsible investors use them to screen companies, and advocates utilize the standards to shame wrong-doers. For further discussion, see U.N.G.A., Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, U.N. Doc. A/HRC/4/035 (9 Feb. 2007). See also John Ruggie, “Treaty Road Not Traveled,” *Ethical Corporation* (May 2008), available at http://www.hks.harvard.edu/mrcbg/news/ruggie/Pages%20from%20ECM%20May_FINAL_JohnRuggie_may%2010.pdf.

may need to take into consideration as part of their risk mitigation process. This is particularly important given the risk that some countries may apply the principle retroactively, which would affect existing company concessions.²² Furthermore, the Declaration provides an important normative basis for and gives traction to the claims of indigenous peoples, who are likely to become more assertive now that they have won their long battle at the U.N. to move the Declaration through the General Assembly.

The relatively new U.N. Permanent Forum on Indigenous Issues also will provide an epicenter from which indigenous peoples can build a united advocacy front. The Forum has increased indigenous peoples' knowledge of their rights, as well as the strategies that other communities have utilized to obtain their goals, which in turn is likely to cause more indigenous peoples to claim their rights through effective campaigning. At the same time, the length of time required for the U.N. General Assembly to approve the Declaration on the Rights of Indigenous Peoples, even

though it is not a binding instrument, points to the still considerable resistance of some governments to the requirement of indigenous peoples' FPIC to development projects.

A number of additional international bodies have made statements that refer to the right of indigenous peoples to give FPIC to development projects affecting them and their land. The Inter-American Court of Human Rights has ruled several times in the past decade that States are not meeting their obligations to obtain FPIC before handing concessions to private parties. In one case, it suggested that a government should review the concessions it had given and consider revising them if needed to ensure the survival of the tribal group.²³ U.N. Treaty Bodies also have called on States to respect the rights of indigenous peoples to FPIC and to provide for restitution of property taken without consent.²⁴

None of these international conventions, declarations, legal decisions, or recommendations apply directly to

²² For instance, the diamond mining company Alexkor was required to give back land to the Richtersveld people in South Africa, who had been forcibly removed more than 90 years before. The case is discussed further in Section IV.

²³ See, e.g., *Case of the Saramaka People v. Suriname*, Judgment, IACHR, Series C, No. 172 (28 Nov. 2007), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf [*Case of the Saramaka People*]. The Court states, "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. With regards to the concessions already granted within traditional Saramaka territory, the State must review them, in light of the present Judgment and the Court's jurisprudence, in order to evaluate whether a modification of the rights of the concessionaires is necessary in order to preserve the survival of the Saramaka people." *Case of the Saramaka People*, ¶ 194.

²⁴ Several U.N. Treaty Bodies recently have made official statements supporting the right of indigenous peoples to FPIC. For instance, the Committee on the Elimination of Racial Discrimination (CERD) issued a recommendation that calls for States to ensure that "no decisions directly relating to [indigenous peoples'] rights and interests are taken without their informed consent" and also calls for restitution of land taken without their informed consent. U.N. Office of the High Commissioner for Human Rights, CERD, *General Recommendation No. 23: Indigenous Peoples*, Annex V, U.N. Doc. A/52/18 (18 Aug. 1997), ¶ 4(d). A number of governments hold that the recommendations of the Treaty Bodies have no legal authority, but they all the same have persuasive power and also often point to where the energy of the human rights community is moving and evolution in the law is likely to occur.

companies or create binding duties for them under international law.²⁵ Rather, they call on the State to obtain the FPIC of indigenous peoples for the use of their land before it hands out concessions. This is a legal duty for countries that have signed ILO Convention No. 169 and wish to resettle indigenous peoples. Although ensuring the consent of indigenous communities to extractive projects is primarily the responsibility of the State, companies are still affected by the evolution of law in this area.²⁶ When the State has not sought or been granted consent to hand out a concession, and this conflicts with the expectations of indigenous peoples using that land, companies are left to face the resulting social unrest, and may face risks to the investments they have made in the area. Therefore, to protect themselves from operational, reputational, and even legal risk, a small number of companies are voluntarily seeking consent after they are

granted concessions.

B. Standards Directly Applicable to Companies

Some new standards that apply to companies have incorporated the principles of FPIC. Recent years have seen the development of international guidelines that clearly apply to companies, although they have no binding force. The Secretariat of the Convention on Biological Diversity developed the Akwe: Kon Guidelines in 2004 to support the Convention.²⁷ They are intended to serve as “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.”²⁸ The Akwe: Kon Guidelines call on governments or

²⁵ Some statements in the U.N. Declaration on the Rights of Indigenous Peoples are in the passive voice, but most clauses specifically call on States to implement the measures, and international hard and soft law standards primarily place duties on States. See U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 12.

²⁶ The U.N. Special Representative for Business and Human Rights, John Ruggie, highlighted this corporate responsibility to respect internationally recognized human rights in his 2008 report, which has gained widespread support from States, civil society, and business. Respecting rights means to not infringe upon them. U.N.G.A., Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (7 Apr. 2008) [hereinafter *Protect, Respect and Remedy: A Framework for Business and Human Rights*]. Although not specifically addressed by the Special Representative, companies may, as part of their responsibility to respect human rights, have a responsibility to respect the rights of indigenous peoples to FPIC if it gains acceptance as an internationally recognized human right. In addition, if FPIC someday becomes part of the “law of nations” that U.S. courts recognize for Alien Tort Statute claims, companies could someday be held legally liable for complicity in government violations of FPIC. Most of the international law standards that the U.S. courts consider part of the law of nations have, however, been accepted globally for many years.

²⁷ The Convention only applies to States and does not include a clear articulation of FPIC, although a Convention working group has since interpreted it to refer to consent.

²⁸ “COP 7 Decision VII/16, Article 8(j) and related provisions,” Convention on Biological Diversity, Conference of the Parties, ¶ F, available at http://www.cbd.int/decision/cop/?id=7753#_ftn58. Article 8(j) of the Convention on Biological Diversity calls on signatory States to obtain the “approval” of holders of knowledge of the uses of biodiversity: “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 and promote their wider application with the approval and involvement of the holders of such knowledge...” U.N. Convention on Biological Diversity (29 Dec. 1993), 1760 U.N.T.S., Art. 8(j), available at <http://www.cbd.int/doc/legal/cbd-un-en.pdf>. The working group on the relevant clause (8j) has interpreted it to refer to consent. See, e.g., “COP 5 Decision V/16: Article 8(j) and related provisions,” Convention on Biological Diversity, Conference of the Parties, available at <https://www.cbd.int/decision/cop/?id=7158>.

the “proponent of a development proposal” – presumably a business – 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.”²⁹ The Akwe: Kon Guidelines are not binding on States or companies, but they do provide persuasive support for FPIC principles and their relevance when the impact of a project is on land that is sacred or used ceremonially.

International financial institutions have incorporated certain aspects of FPIC into their policies that apply to companies. These policies are not international law, but they do have normative force and signal a gradual shift in the global approach to indigenous rights. Furthermore, international financial institutions often include these policies as conditions in loan agreements to companies or governments, which gives them binding legal effect in the contracts. The IFC’s Performance Standards and the World Bank’s Safeguard Policies were updated in 2006 to include a requirement of free, prior, and informed consultation with indigenous

peoples for IFC or World Bank-supported projects that are likely to adversely impact them.³⁰ The IFC’s Policy on Social and Environmental Sustainability requires the IFC to review potential projects for “broad community support” if the project is likely to have significant adverse impacts on communities.³¹ Civil society groups have criticized the IFC Performance Standards for falling below the standard of consent, as well as for insufficient transparency regarding what the IFC considers to indicate consent, and a failure to give communities a sufficient role in deciding what indicates their consent. Despite these criticisms, some have suggested that the standard of free, prior, informed consultation leading to broad community support sounds akin to a consent requirement. The Performance Standards are currently under review, and the IFC is considering whether to move to a consent standard.³² Even if the Performance Standards are not changed, the inclusion of a requirement of free, prior, informed consultation in 2006 suggests the momentum behind increased recognition of indigenous rights. The debate over the IFC

²⁹ Secretariat of the Convention on Biological Diversity, Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment 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 Montreal (CBD Guidelines Series) (2004), ¶ 8, available at <http://www.cbd.int/doc/publications/akwe-brochure-en.pdf> [hereinafter Akwe: Kon Guidelines].

³⁰ For a further discussion of the World Bank’s Safeguard Policies on indigenous peoples, see Fergus MacKay, “The Draft World Bank Operational Policy 4.10 on Indigenous Peoples: Progress or more of the same?” 22 ARIZONA J. OF INT’L AND COMP. LAW (2005). The World Bank’s policies also address the need for consultation with communities, indigenous and non-indigenous. The World Bank Safeguard on Environmental Assessment requires that the project proponent “consults project-affected groups and local nongovernmental organizations (NGOs) about the project’s environmental aspects and takes their views into account,” for many projects. World Bank Safeguard Policies, OP 4.01 - Environmental Assessment, The World Bank Group (January 1999), available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064724~menuPK:64701637~pagePK:647096~piPK:64709108~theSitePK:502184,00.html>.

³¹ “Policy on Social and Environmental Sustainability,” IFC (2006), ¶ 15, available at [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_SocEnvSustainability2006/\\$FILE/SustainabilityPolicy.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_SocEnvSustainability2006/$FILE/SustainabilityPolicy.pdf).

³² The IFC Performance Standards have come under constant criticism from civil society since their 2006 revision. The World Bank Extractive Industries Review, which informed the revision of the IFC Performance Standards in 2006, strongly supported the right of indigenous peoples and affected communities to FPIC, but the IFC Performance Standards did not follow the Extractive Industries Review’s recommendation on indigenous peoples. The Extractive Industries Review concluded that “indigenous peoples and other affected parties do have the right to participate in decision-making and to give their free prior and informed consent throughout

Performance Standards also indicates the need to define what evidence demonstrates consent, and the disagreement about who should make that determination.

The IADB Operational Policy on Indigenous Peoples also touches on issues of informed consent. The IADB requires informed consent of indigenous peoples to resettlement before it will fund a project.³³ The IADB stipulates that for projects of particularly significant potential adverse impacts that carry a high degree of risk to the physical, territorial, or cultural integrity of the affected indigenous peoples or groups, the proponent 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 socio-cultural viability of the operation.”³⁴ In other

words, companies must gain agreement from the communities, thus demonstrating that the company has a social license to operate.

Finally, the European Bank for Reconstruction and Development explicitly requires companies to obtain FPIC in its latest Environmental and Social Policy, issued in 2008. The Policy’s Performance Requirement 7 “recognises the principle, outlined in the U.N. Declaration on the Rights of Indigenous Peoples, 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.”³⁵ The project proponent must obtain and document consent for activities that are on traditionally used land that would affect the livelihoods, or cultural, ceremonial, or spiritual uses, that define the identity and community of the indigenous peoples;

each phase of a project life cycle.” “Striking a Better Balance – The World Bank Group and Extractive Industries: The Final Report of the Extractive Industries Review,” The World Bank Group (17 Sept. 2004), Vol. I, available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTOGMC/0,,contentMDK:20306686~menuPK:592071~pagePK:148956~piPK:216618~theSitePK:336930,00.html> [hereinafter “Final Report of the Extractive Industries Review”]. The Extractive Industries Review considered that for indigenous peoples, FPIC is an internationally guaranteed right, while for local communities, it is an essential part of obtaining a social license to operate. The Extractive Industries Review also noted that FPIC “should not be understood as a one-off, yes-no vote or as a veto power for a single person or group. Rather it is a process by which indigenous peoples, local communities, government and companies may come to mutual agreements in a forum that gives affected communities enough leverage to negotiate conditions under which they may proceed and an outcome leaving the community clearly better off.” “Final Report of the Extractive Industries Review,” p. 22.

³³ The IADB Resettlement Policy states: “Indigenous Communities. 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. The Bank will, therefore, only support operations that involve the displacement of indigenous communities or other low income ethnic minority communities, if the Bank can ascertain that: (i) the resettlement component will result in direct benefits to the affected community relative to their prior situation; (ii) customary rights will be fully recognized and fairly compensated; (iii) compensation options will include land-based resettlement; and (iv) the people affected have given their informed consent to the resettlement and compensation measures.” “Involuntary Resettlement: Operation Policy and Background Paper,” IADB (October 1998), p. 2, available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=362109>.

³⁴ “Operational Policy on Indigenous Peoples,” IADB (22 Feb. 2006), ¶ 4.4 (iii), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=691261>.

³⁵ Cathal Doyle, “Free Prior Informed Consent (FPIC) – a universal norm and framework for consultation and benefit sharing in relation to indigenous peoples and the extractive sector,” Paper prepared for Office of the High Commissioner of Human Rights Workshop on Extractive Industries, Indigenous Peoples and Human Rights (December 2008), p. 6, available at http://www2.ohchr.org/english/issues/indigenous/docs/workshops/Doyle_Antonivanov_Moscow_workshop.doc.

would lead to their relocation; or would affect their cultural resources.³⁶ The recent date of this policy reflects the rising importance of FPIC.

In addition to the guidelines of international financial institutions, the growing acceptance of the need to seek indigenous people's consent can be seen through the statements of a number of multistakeholder bodies. These initiatives have no immediate legal effect but reflect changes in societal understandings of best practice and social justice. The World Commission on Dams was one of the first multistakeholder bodies to address FPIC.³⁷ The Commission was an independent, international, multistakeholder process that addressed controversial issues associated with large dams. The Commission included FPIC as a policy best practice, recommending: "Where projects affect

indigenous and tribal peoples, such processes are guided by their FPIC."³⁸

A number of other multistakeholder initiatives that focus primarily on the role of companies, such as the Forest Stewardship Council ("FSC") and the RSPO, also use FPIC terminology. The RSPO is of interest because its members are supposed to implement the principles of FPIC.³⁹ More specifically, suppliers of palm oil are supposed to be audited to demonstrate that they received consent from communities – not only indigenous peoples – where they operate. The RSPO provides a more in-depth view of what consent looks like in practice, as it provides evidentiary criteria as part of its certification system.⁴⁰ In other words, it is an early attempt to define what consent looks like in practice for a particular industry, although its

³⁶ "Environmental and Social Policy," Performance Requirement 7, European Bank for Reconstruction and Development (May 2008), p. 7, available at <http://www.ebrd.com/about/policies/enviro/policy/2008policy.pdf>.

³⁷ The Commission was established in 1998 and presented its findings in 2000.

³⁸ See "Dams and Development: A New Framework for Decision-Making," World Commission on Dams (2000), p. xxxiv, available at <http://www.dams.org/docs/report/wcdreport.pdf> [hereinafter "Dams and Development: A New Framework for Decision-Making"]. A wide range of donors supported the World Commission on Dams, including U.N. agencies, governmental development agencies, foundations, international financial institutions, and companies.

³⁹ RSPO members include large multinationals such as Unilever, Cadbury, Kellogg's, Seventh Generation, and Johnson & Johnson, as well as their suppliers, retailers, banks and investors, and NGOs.

⁴⁰ Principle 2, Criterion 2.2 of the RSPO states: "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." The indicators require that impact assessments relating to social and environmental impacts be made publicly available. Indicators for the requirement that indigenous peoples and local communities be able to express their values through their own representative institutions include: establishment of a procedure for identifying legal and customary rights and a procedure for identifying people entitled to compensation. The principle that the right to use the land can be demonstrated and is not legitimately contested by local communities with demonstrable rights can be evidenced through "documents showing legal ownership, history of land tenure and the actual legal use of the land," as well as "[w]here there are, or have been, disputes, additional proof of legal acquisition of title and that fair compensation has been made to previous owners and occupants; and that these have been accepted with free, prior, and informed consent." "RSPO Principles and Criteria for Sustainable Palm Oil Production," Roundtable on Sustainable Palm Oil (March 2006), Principle 2, Criterion 2.2, available at http://www.rspo.org/files/resource_centre/RSPO%20Principles%20&%20Criteria%20Document.pdf [hereinafter "RSPO Principles and Criteria"]. The principle that use of the land for palm oil does not diminish the legal rights, or customary rights of others without their FPIC is to be certified based on maps showing the extent of recognized customary rights and copies of negotiated agreements detailing the process of consent. To certify the existence of a mutually agreed system for dealing with complaints and grievances, which is implemented and accepted by all parties, it must be demonstrated that the system resolves disputes in an effective, timely, and appropriate manner. Negotiations regarding compensation for loss of legal and customary rights are indicated by the "establishment of a procedure for identifying legal and customary rights and a procedure for identifying people entitled to compensation," as well as a requirement that "[t]he process and outcome of any negotiated agreements and compensation claims is documented and made publicly available." "RSPO Principles and Criteria," Principle 6, Criterion 6.4.

implementation process has been subjected to some critiques.⁴¹

The FSC is a multistakeholder certification initiative that provides principles and criteria for the sustainable development of forestries. The FSC also, in slightly less explicit language, requires that member companies show that their wood was obtained with the FPIC of local communities.⁴²

In contrast, the International Council on Mining and Metals (“ICMM”), a key industry group for mining companies, has not adopted a standard of FPIC. The ICMM’s Position Statement on Mining and Indigenous Peoples includes strong requirements for consultation with potentially affected indigenous peoples from the beginning of activities, even before exploration begins. Its Position Statement also requires members to seek broad community support for new projects or activities and include a recognition that, “following consultation with local people and relevant authorities, a decision may sometimes be made not to proceed with developments or exploration even if this is legally permitted.”⁴³

The ICMM’s Position Statement indicates that FPIC is certainly on the radar screen of the mining industry. At the same time, it points to ongoing uncertainty among the

extractive industry regarding whether it is the responsibility of companies to obtain consent, particularly when this places companies in conflict with national laws, regulations, or political agendas. It also reflects the view of many companies that the process is more important than a single moment where communities give consent. Some companies are concerned about the difficulty inherent in identifying affected indigenous groups and implementing a legitimate consent process. Finally, some ICMM members noted that although they often in practice seek consent, they would not make a public commitment due to the risk that they might not gain consent with regard to a highly valuable concession that they would be unwilling to forego, regardless of community opposition. The International Petroleum Industry Environmental Conservation Association (“IPIECA”), the ICMM’s counterpart organization for the oil and gas industry, has no stated policy on indigenous peoples.

The emergence of certification systems such as the RSPO and the FSC indicate the growing acceptance of the principles of FPIC by industry leaders in certain sectors. On the other hand, resistance from the ICMM depicts tension among the corporate sector regarding its appropriate role in the indigenous rights debate. At the same

⁴¹ For instance, members of the RSPO have been accused of developing palm oil plantations without the consent of indigenous peoples. See, e.g., Angus Stickler, “The end of the jungle?” *BBC News* (8 Dec. 2009), available at <http://news.bbc.co.uk/1/hi/8400000/8400852.stm>.

⁴² Their criteria require that “Local communities with legal or customary tenure or use rights shall maintain control, to the extent necessary to protect their rights or resources, over forest operations unless they delegate control with free and informed consent to other agencies.” The Guidance Document for this criteria notes that it should be assumed to include: “[t]he right to ‘free and informed consent’, including the right to grant, withhold or withdraw consent.” “FSC Principles 2 and 3: Guidance on Interpretation,” FSC-GUI-30-004, FSC A.C. (March 2006), pp. 5, 7, available at http://www.fsc.org/fileadmin/web-data/public/document_center/international_FSC_policies/guidance_documents/FSC_GUI_30_004_EN_Guidance_on_FSC_P2_and_P3_2005.pdf.

⁴³ “ICMM Position Statement on Mining and Indigenous Peoples,” ICMM (May 2008), ¶ 9, available at <http://www.icmm.com/document/293> [hereinafter “ICMM Position Statement on Mining and Indigenous Peoples”].

time, the ICMM calls for members to consult from the earliest stage of activities, to develop agreements with indigenous peoples regarding the benefits that accrue to them, and contemplates the possibility that without broad community support, projects might not go forward.

Although it is not possible to entirely resolve the conflicts among industry standards, all of these initiatives demonstrate an increasing recognition that industry has an important role to play in realizing the rights of indigenous peoples. The standards reflect the dilemma with which companies currently struggle: do companies, as opposed to States, have a role in obtaining consent even if the State has already given them the concession, or is their obligation limited to genuine engagement and consultation with indigenous communities?

FPIC is closely related to a number of other firmly established rights. Although States hold the primary and legal duties to realize these rights, it is increasingly agreed that companies have a responsibility to respect human rights – e.g. not to infringe upon them. These firmly established rights include the rights to housing, food, and a decent livelihood, which can be affected when land is taken from indigenous people, or their ability

to make a living is affected by industrial projects.⁴⁴ Similarly, FPIC can be understood as one means to respect the right to take part in cultural life, which can be damaged if indigenous knowledge is taken and sold without consent, or an unwanted influx of workers move into an indigenous village, bringing weapons, modern technology, and alcohol, thus fundamentally changing the culture of the community.⁴⁵ Gaining FPIC can help companies avoid infringing upon other rights as well. For instance, it can enable companies to avoid complicity in violations of the right to life and freedom of expression.⁴⁶ This is because obtaining consent helps mitigate the likelihood of indigenous protests against company projects, which can lead to the intervention of government security forces, attacks on protestors, and consequent loss of life.

III. Defining and Operationalizing FPIC Principles

The FPIC of indigenous peoples remains a contentious issue, and only recently gained acceptance into non-binding international law through the adoption of the Declaration. The dispute over whether FPIC should be required at all, even of States, much less of companies, appears to have limited the

⁴⁴ These rights are found in the International Covenant on Economic, Social, and Cultural Rights, which is one of the fundamental building blocks of the international human rights system. U.N.G.A., International Covenant on Economic, Social, and Cultural Rights (16 Dec. 1966), U.N.T.S. vol. 993, p. 3, available at <http://www2.ohchr.org/english/law/cescr.htm> [hereinafter International Covenant on Economic, Social, and Cultural Rights].

⁴⁵ See International Covenant on Economic, Social, and Cultural Rights, *supra* note 44, Art. 15.

⁴⁶ These rights are found in the International Covenant on Civil and Political Rights, U.N.G.A., International Covenant on Civil and Political Rights (16 Dec. 1966), U.N.T.S. vol. 999, p. 171, available at <http://www2.ohchr.org/english/law/ccpr.htm>.

discussions and consensus-building needed to define exactly what a workable consent process would look like in practice. The Declaration was adopted so recently that national and human rights courts have not provided interpretations of what State-implemented process is sufficient for FPIC, because the few cases that these courts have heard involved instances in which the State entirely failed to seek FPIC, rather than instances in which the process was inadequate. Furthermore, the parties that drafted the Declaration remain deeply divided on the meaning of its language, making it difficult to rely on preparatory papers to divine the meaning of various phrases in the Declaration.⁴⁷ Examples from industry are few and far between, and most derive from the mining sector, which has a distinct physical footprint and follows different stages with different risks than an oil and gas project.

It is clear that consent is only meaningful when combined with other processes such as engagement that are both company good practice and called for in ILO Convention No. 169 and the Declaration. Company statements regarding consent are therefore best embedded within a more general policy on indigenous peoples or community engagement practices. This

section incorporates elements of community engagement good practice because FPIC is so intimately tied to community engagement.

A. Indigenous Rights and Interests That Relate to the Need for Consent

International legal documents, multistakeholder initiatives, the statements of indigenous rights organizations, and the policies of companies increasingly suggest that consent should be sought when company activities will impact indigenous peoples.⁴⁸ For instance, the Declaration indicates that consent should be sought for development projects when the project will affect the lands and resources of indigenous peoples.⁴⁹ Yet, what interests of indigenous peoples are protected?⁵⁰

Development projects potentially impact the rights of indigenous people, such as the rights to food, shelter, and culture. As part of their responsibility to respect human rights, companies have an obligation to address these impacts so as not to infringe upon the rights of community members, whether or not they are indigenous.

FPIC creates an additional layer of protection to address the fact that projects affect a number of indigenous interests that the

⁴⁷ The authors' interviews with several individuals involved in negotiating and drafting the Declaration, including towards the end of the process, indicated that States and indigenous groups remained divided regarding the meaning of much of the language that is in the Declaration. Therefore, the materials used to prepare the Declaration by various groups, which typically could be utilized to illuminate the meaning of the Declaration, are unlikely to reflect a common understanding or intent among the negotiating parties.

⁴⁸ The statements of the U.N. Special Representative for Business and Human rights also support the emphasis on impacts. The Special Representative has defined the scope of the corporate responsibility to respect human rights to be based on impact. *Protect, Respect and Remedy: a Framework for Business and Human Rights*, *supra* note 26.

⁴⁹ The Declaration calls on States, not companies, to obtain this consent, but for social and legal risk reasons, as discussed in Section IV, companies may want to ensure that consent has been obtained.

⁵⁰ There are no *travaux préparatoires* for the Declaration, and indigenous people and States were deeply divided regarding the meaning of many parts of the Declaration, so it is difficult to interpret its provisions.

State has not always effectively protected. Potentially, those interests could include settlement on the land; use of the land for hunting, gathering, and trapping, as well as seasonal occupation; use of neighboring land to sustain livelihoods; and the value of land that is seen as sacred or is used for ceremonial purposes.

(1) Traditional Claims to the Land

In many contexts – and not only in developing countries – the land rights of indigenous peoples are under dispute. For instance, in Canada, the government recognizes indigenous land rights, but a number of First Nations are still negotiating land claims with the government. In other countries, communities have limited access to the legal system due to poverty, lack of knowledge of their rights, and the sheer physical distance of the courts, so they may not have laid claim to their land rights. In still other countries, the legal system may not contemplate communal land rights or land rights based on traditional usage, making it all but impossible for indigenous peoples to have their land rights legally recognized.

Even when the government does not recognize the land rights of indigenous peoples, companies have found that they need to negotiate with and gain the consent of the traditional users of the land. When companies fail to gain consent of traditional occupiers and users of the land, and use the land for extractive purposes, such use can

deeply affect the ability of indigenous people to maintain their traditional way of life and support themselves. This, in turn, can lead to social unrest and conflict that continues for decades. For instance, the failure to address the concerns of the groups indigenous to the Nigerian Delta has led to decades of conflict and reputation-damaging lawsuits, and companies have lost access to some areas of their oil concessions.

A number of companies' policies recognize the need to address project impacts on indigenous people, whether or not the government has recognized their land rights. Furthermore, taking account of indigenous land usage is of great importance to indigenous peoples themselves, and thus is an important means by which the company can develop a positive relationship with them.⁵¹ In fact, some companies have gathered data about indigenous communities' traditional use of land, which in turn helped indigenous groups establish their traditional occupancy of the land.⁵² The company's efforts to identify which land is traditionally occupied and used by indigenous peoples may provide the evidence that the community needs to establish its claim. This generates at least two benefits for the company: the goodwill of the indigenous community, and a better defined legal operating environment for companies. At the same time, it could cause tension with the local government if the government does not want to recognize those land rights.

⁵¹ For example, the Forest Peoples Programme, a respected indigenous rights NGO, lists recognition of the land rights of indigenous peoples as a key element of FPIC. Colchester and MacKay, *supra* note 11.

⁵² In the Philippines, WMC Limited helped indigenous groups seek title to their land by sending out archeological and ethnographic teams to identify traditional territory. "Mining and Indigenous Peoples: Case Studies," International Council on Metals and the Environment (July 1999) [hereinafter "Mining and Indigenous Peoples: Case Studies"].

Government maps often do not accurately reflect the precise traditional land usage of indigenous peoples, and it is risky to rely on such maps. It is imperative that before companies start exploration, they hire someone with the expertise to make these determinations. This may be an anthropologist, social geographer, or another person with deep expertise in understanding indigenous groups and mapping their use of the land.⁵³ This person also must be able to determine how particular indigenous groups make decisions. Perhaps most importantly, companies should look for someone with an appreciation of indigenous cultures and with a record of engaging productively with them, who will treat them with respect and integrity.

In practice, a growing number of companies contract people with these specialties when entering new sites. For example, BG Group (“BG”) recently carried out ethnographic, baseline, and cultural heritage studies on its land in Australia for its Queensland Curtis LNG project to identify the appropriate representatives of traditional owner groups with whom to negotiate land access for the project.⁵⁴ This expertise should help companies establish a factual basis on which to base their decisions regarding which groups have genuine traditional claims to the land on and near the project.

In some cases, the government or NGOs have conducted a thorough mapping of

indigenous peoples’ use of the land. This will make the task of identifying relevant groups easier, but does not obviate the need for the company to retain the expertise of someone who specializes in understanding and engaging with indigenous groups. In addition, companies should check with local groups to ensure that publicly available land usage maps are considered accurate and legitimate.

(2) Resettlement

The need for States to obtain the FPIC of indigenous peoples is most firmly established when the project would lead to their relocation. ILO Convention No. 169 has supported this premise for a number of years. NGOs and other civil society actors also focus on relocation because it affects a broad array of human rights. For instance, indigenous people who lose access to their traditional lands may face great challenges in meeting their most basic economic and social needs. They also may lose access to certain aspects of their cultural heritage that are tied to the land and developed over hundreds of years.

(3) Indigenous People Living on the Land

The argument that companies should obtain the consent of those living on the land where the project will be sited even if indigenous people would not be resettled is also strong.

⁵³ The World Bank’s Operational Policy 4.10 on Indigenous Peoples calls for the use of such experts to conduct assessments. “Operational Policy 4.10 on Indigenous Peoples,” The World Bank Group (July 2005), available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html>. The RSP0’s certification process requires evidence of mapping. “RSP0 Principles and Criteria,” *supra* note 40.

⁵⁴ “2008 Sustainability Report,” BG (2008), available at http://resourcecentre.blacksunplc.com/download/bg_group_sr_2008/sustainability_report_2008.pdf.

International guidance specifically supports this.⁵⁵ On a more practical level, it is clear that development activities that take place on the lands where indigenous peoples live are likely to have significant impacts on that group of people. Furthermore, people who co-exist next to company activities also have the greatest ability to cause operational disruptions, so their consent may be most critical from a risk management perspective.

(4) Indigenous People Who Use the Land Seasonally or for Resource Extraction

A number of international documents, national laws, and indigenous peoples NGOs have emphasized the importance of addressing impacts on indigenous peoples when projects will affect their use of the land to fish, hunt, and trap, as well as seasonal occupation. For instance, laws and regulations in Canada require consultation with indigenous groups whose land rights, or traditional usage rights, such as use of land for fishing, hunting, and trapping, will potentially be affected.⁵⁶ The Guidance Notes to the IFC Performance Standards also support this view to some degree. IFC Performance Standard 7 on Indigenous Peoples requires that companies fairly compensate “communities of indigenous peoples who no longer live on the lands affected by the project, but who still retain ties to those lands through customary

usage, including seasonal or cyclical use.” These standards reflect the need to engage with and compensate such users of the land, but they do not explicitly call for consent.

The Declaration’s language is not entirely clear, but it seems to indicate that consent should be sought in such instances, as it calls for FPIC “prior to the approval of any project affecting their lands or territories and *other resources* [emphasis added], particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”⁵⁷ The Declaration is not binding, but it suggests where national and international hard law may someday arrive. The pronouncements of other human rights bodies and financial institutions such as the European Bank for Reconstruction and Development indicate that interests in hunting, fishing, and other resource extraction form part of indigenous peoples’ property rights.⁵⁸

Some company policies recognize the importance of community engagement when projects will impact indigenous peoples’ access to hunting and fishing grounds. For instance, BP’s Human Rights Guidance does not require consent, but it requires that impacts on local residents’ livelihoods, such as restricted access to fishing areas, be managed along with impacts such as

⁵⁵ The Declaration on the Rights of Indigenous Peoples calls for consent when development projects will affect the lands of indigenous peoples.

⁵⁶ See, e.g., *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 3 S.C.R. 388, 2005 SCC 69.

⁵⁷ The Declaration also calls for redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 12, Art. 32.2.

⁵⁸ “States must obtain the consent of indigenous and tribal peoples to carry out large-scale development or investment projects that have a significant impact on the right of use and enjoyment of their ancestral territories.” *Case of the Saramaka People*, ¶ 136 (citing to the UNCERD Committee).

resettlement.⁵⁹ The company policies and practices that incorporate the principles of FPIC, however, appear to apply it in the context of resettlement or operations on the land where indigenous peoples live. This may be because it is challenging to identify which economic or cultural interests should trigger a consent process, and it would significantly increase the number of groups from whom companies would be seeking consent, making an already challenging process yet more complex.

From the perspective of a company seeking to maintain a social license to operate, it makes sense to start a dialogue with these groups from the beginning. At the moment, there is little guidance regarding when economic and cultural interests are significant enough and sufficiently affected that a company should seek consent, which makes it difficult for a company to operationalize this expectation. As these expectations become more clearly delineated in the State context, companies are likely to find themselves under increasing pressure to seek consent when particular economic or cultural interests are implicated.

(5) Indirectly or Potentially Affected Communities

Companies also need to consider impacts on indigenous communities downstream from a project that may be negatively affected by extractive projects upstream. Environmental, social, and human rights impact assessments should reveal whether the project is likely to affect them. If the company's activities are

likely to negatively affect the community's right to health, food, water, or standard of living, this constitutes an impact on the community's human rights. Furthermore, it affects their land and resources, a situation which the Declaration on the Rights of Indigenous Peoples specifically references. Finally, when pollution of the water and air has affected the ability of indigenous peoples to survive through hunting, fishing, and other traditional activities, it has led to physical conflict as well as lawsuits. For instance, villagers in the Nigerian Delta allege that the pollution of waterways and land through years of drilling, and the resulting effects on the ability of communities to support themselves, are a major source of the current conflict that has claimed numerous lives and impeded extractive sector business operations. Indigenous groups in Ecuador have sued Chevron for alleged effects on their health and livelihoods due to oil pollution. These situations indicate that a company's social license to operate can be tied to neighboring communities that the company's activities may affect. To proactively manage potential risks, companies may therefore want to consider seeking the consent of these groups as well, although this needs to be balanced against the complexity involved in any consent process.

In some cases, the company's environmental and social impact assessment may indicate that no impacts will affect communities downstream. The community may, nonetheless, be concerned, and this creates social risk for the company. Therefore,

⁵⁹ "Human Rights: A Guidance Note," BP plc (2006), available at http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/downloads/BP_Human_Rights_2005.pdf.

it is important that the company engage these groups – ideally before they express concerns about the company’s activities. One way to effectively gain their confidence and assuage potential concerns is to include them in conducting the impact assessment process for their area.

(6) Impacts on Indigenous Heritage Sites

Indigenous rights NGOs suggest that companies should seek the consent of groups for whom the land has cultural significance because it is regarded as sacred, contains graves, or is used for religious ceremonies. The IFC Performance Standards emphasize this set of interests as well, requiring informed consultation if the project will affect the use of land for cultural, ceremonial, or spiritual purposes. The Declaration’s language is not entirely clear, but it seems to suggest that the State should seek FPIC to “take” cultural, religious, or spiritual property,⁶⁰ and that indigenous peoples have a right to maintain access to places of cultural significance.⁶¹ The European Bank for Reconstruction and Development’s requirements for companies mirror this expectation.

A recent legal decision in Australia that denied a company the right to operate a mine due to effects on a place of cultural

significance to an indigenous community indicates that this issue will receive increased attention over the coming years.⁶² This landmark case was the first to deny a company a mining lease on land granted under the Native Title Act. The judge held that the concerns of the aboriginal peoples, which centered on the substantial effects on a site of cultural significance, should be weighed more heavily than the potential economic benefit or public interest if the project proceeded.⁶³ The aboriginal peoples did not live on the land, and the decision turned on issues of cultural heritage. This decision, while still an outlier, is an example of the potential legal risk a company may face if it does not seek consent for impacts on cultural heritage. To avoid operational and potentially legal risk, companies need to be aware that they are operating on land that indigenous groups view as sacred and make adjustments as needed to ensure that company activities are acceptable to the indigenous communities.

From a social risk perspective, it may be helpful for the company to seek and receive the consent of these groups. Failure to show respect for indigenous peoples’ sacred places has created significant problems for companies in the past. Newmont’s challenges in Yanacocha arose partly because the company planned to develop a new mine in an area considered sacred by local communities.⁶⁴ Some companies in

⁶⁰ It is not clear whether the Declaration is referring in this instance to intellectual or real property: “States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.” U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 12, Art. 11.2.

⁶¹ Indigenous peoples have “the right to maintain, protect, and have access in privacy to their religious and cultural sites.” U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 12, Art. 12.1.

⁶² See section II for more discussion of this case.

⁶³ The case was decided by the National Native Title Tribunal (NNTT). *Western Desert Lands Aboriginal Corporation (Jamukurnu - Yapalikunu)/Western Australia/Holocene Pty Ltd*, NNTTA 49 (27 May 2009).

⁶⁴ Steven Herz, Antonio La Vina, and Jonathan Sohn, Eds., “Development Without Conflict: The Business Case for Community Consent,” WRI (July 2007).

Australia found that aboriginal opposition to their mining practices derived in large part from the fact that the company's activities were on sacred land, and the company had failed to demonstrate respect for the land in accordance with aboriginal culture.⁶⁵ At the same time, few or no companies have sought consent when their activities would only affect indigenous peoples' cultural heritage. This is an area where extractive company practices may change in the coming years.

Companies have used a number of mechanisms to address the concerns of indigenous peoples regarding their cultural heritage. Companies have conducted ceremonies with indigenous peoples that the indigenous peoples believe are needed for the use of sacred lands. De Beers used local "heritage monitors" at its Victor Mine. These monitors accompanied construction workers who were laying a transmission cable and dug shallow holes along the proposed path of the pipeline to see if bones or artifacts

were uncovered, which were then analyzed.⁶⁶ Whether the company needs to take steps to protect heritage and how that is most appropriately accomplished will depend on the heritage at risk and whether it is a priority for the community.

(B) Identifying Which Groups Are Impacted

For a company that seeks to implement a consent policy in its global operations, deciding which groups need to give consent is a key challenge.⁶⁷ First, companies must determine which groups are indigenous. Definitions of which groups are indigenous vary, and are often predicated in part on self-identification.⁶⁸ ILO Convention No. 169 also covers "tribal" groups,⁶⁹ and the Inter-American Court of Human Rights accords essentially the same protection to tribal and indigenous groups, including the duty of the State to consult them

⁶⁵ For instance, Argyle Diamonds developed a mine in a sacred aboriginal site, the Barramundi Gap, which caused years of strained relations that the company later remedied by seeking consent from the community. "The Argyle Participation Agreement: Breaking New Ground," Argyle Diamonds (2007), available at <http://www.argylediamonds.com.au/docs/BreakingNewGround.pdf> [hereinafter "The Argyle Participation Agreement: Breaking New Ground"].

⁶⁶ "Victor News," De Beers Canada Victor Project, Issue No. 2, Quarter 1 (2006), available at http://www.debeerscanada.com/files_2/pdf_documents/vpn-q1-06.pdf [hereinafter "Victor News"].

⁶⁷ See, e.g., Draft, "Free, Prior, Informed Consent: Indigenous Perspectives," North-South Institute (February 2009), available at http://www.nsi-ins.ca/english/pdf/NSI_FPIC_brochure_march_5.pdf [hereinafter "Free, Prior, Informed Consent: Indigenous Perspectives"].

⁶⁸ IFC Performance Standard 7 defines indigenous peoples as "a distinct social and cultural group possessing the following characteristics in varying degrees: Self-identification as members of a distinct indigenous cultural group and recognition of this identity by others; Collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories; Customary cultural, economic, social, or political institutions that are separate from those of the dominant society or culture; An indigenous language, often different from the official language of the country or Region." The IFC also notes that "Ascertaining whether a particular group is considered as Indigenous Peoples for the purpose of this Performance Standard may require technical judgment." "IFC Performance Standards," *supra* note 12, Performance Standard 7.

⁶⁹ The Convention applies to "tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations." ILO Convention 169 also applies to Indigenous 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, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions." It also notes self-identification as indigenous as a key criteria. ILO Convention No. 169, *supra* note 13, Art. 1.

and gain consent for development projects with major impacts on them.⁷⁰

Determining which indigenous groups live on the land; traditionally hunt, gather, and trap on it; use it seasonally; or have a spiritual, sacred connection to it can be difficult. Environmental, social, human rights, and cultural heritage impact assessments are a critical part of this process, along with the mapping of land usage described earlier.

Indigenous groups may present conflicting claims to land, with each group denying other groups' traditional usage of the land. If no group holds legal title, the company can end up in an untenable position, without the legal power or the ability to determine who is in the right. De Beers Canada has encountered this particular problem several times. The company now asks First Nations to discuss it among themselves and resolve the matter so that the company does not become the interlocutor. The approach seems to be working reasonably well thus far, although it may not be appropriate for all situations around the world, as it carries the risk that the company will accidentally increase the risk of conflict. The process of identifying affected groups is considerably simpler when indigenous land title is well-defined and not contested.

In instances where a number of groups are affected, some companies have tiered their negotiations, starting with those most directly affected. One company operating in Canada first negotiated with those "most" affected, which were those who would have major infrastructure on their land. The company

then negotiated with those who would have increased traffic through their land and cable lines running through the land. The order in which the company negotiated also appears to have corresponded to the order in which the company needed access to the land for advanced exploration activities.

The lack of clear indigenous legal title to land and the dearth of written records of land usage and its cultural significance creates additional challenges for companies that seek community agreement based on the principles of FPIC. The use of experts who are trained to understand indigenous cultures and map their land use will facilitate the process significantly. When groups disagree about who has traditionally used the land, and available evidence does not help solve the quandary, the company may best manage this risk by requiring the indigenous groups to resolve it themselves as a precondition to entering into negotiations with the company.

Isolated tribes pose a particular conundrum for companies. These tribes live in the Amazon and have chosen to avoid contact with the outside world. Contact with them would put them at risk of Western diseases. They also have made a choice to remain in isolation that many agree should be respected. Governments often do not know or fail to identify where such groups are located, so companies may not realize that they are operating near them. Companies cannot seek their consent since they have chosen to be uncontacted – which, it is argued, implies that they do not wish to

⁷⁰ The Inter-American Court defines tribal groups as those with "social, cultural and economic traditions different from other sections of the national community, identifying themselves with their ancestral territories, and regulating themselves, at least partially, by their own norms, customs, and traditions." *Case of the Saramaka People*, ¶ 79.

negotiate. The best manner to address this issue is not clear, but companies certainly should conduct due diligence, including inquiring with local indigenous communities, to identify whether they are operating near isolated tribes.

(1) Identifying Legitimate Representative Organizations

Because many of the pertinent indigenous rights are collective in nature, companies should seek consent from indigenous people through their group decision-making structures, rather than from individuals. A number of international standards articulate the need to include traditional decision-making bodies in the process. It can be quite challenging to determine which of these decision-making bodies are legitimate representatives that deserve a seat at the table. These bodies, sometimes called federations in Latin America, are often in competition with one another. New federations are formed, and claim to represent particular indigenous nations. Federations come in a number of sizes, and can operate on the local, subnational, national, and transborder levels. As a starting place, companies should include any representative bodies that the project-affected indigenous communities want to represent them. This is, however, a topic that is hotly contested and deserves further discussion.

(2) Tribal Groups

Tribal and indigenous groups are not precisely the same. Tribal groups, for instance, might have arrived on the land later. Some international legal standards apply to both, such as ILO Convention No. 169. As noted previously, the Inter-American Court of Human Rights has interpreted indigenous rights to also apply to tribal groups, such as the “Maroons” in Surinam. Canadian courts also indicate that many of the rights accruing to First Nations groups also apply to groups such as the Metis, who are not “indigenous” in the more traditional sense of the word because they emerged as a group within the past three hundred years.⁷¹ Most companies in practice appear to apply their policies to both indigenous peoples and tribal groups. This practice is recommended because in some instances, the rights of both are protected, and it prevents the company from becoming caught up in arguments over the precise status of such groups.

(3) Non-Indigenous Groups

FPIC is most established as an international norm in the context of indigenous peoples. A number of companies noted in interviews, however, that when a company is operating in an area that includes both indigenous and non-indigenous people, it is risky to focus on one group and not the other, particularly if benefits accrue to one but not the other.⁷² Perhaps, in such a situation, a company

⁷¹ The Metis are the descendants of First Nations people who intermarried with Europeans, and who possess their own distinct lifestyle and culture.

⁷² WMC Limited found that it had to negotiate with both indigenous and non-indigenous groups at the same time in the Philippines. The right of indigenous peoples to consent to development in the Philippines are much more well-established than the right of other groups to give FPIC. All the same, to avoid resentment and resulting social risk, the company found it needed to engage with non-indigenous communities at the same time. “Mining and Indigenous Peoples: Case Studies,” *supra* note 52.

would not need to go through a full “consent” process with a non-indigenous community. It would certainly seem wise, however, to devise an extensive engagement process and develop a benefit-sharing agreement with the non-indigenous communities to prevent competition and resentment between communities.

(C) Ensuring that Consent is Free

A group of U.N. agencies maintain that “free” means “no coercion, intimidation, or manipulation.”⁷³ Interviews with indigenous rights organizations suggest that, most importantly, indigenous groups need to feel like they can say “no.” This is complicated when a government has already given a license to the company for the activity. In such cases, the company would need to clearly express to the community its willingness to not initiate the project if the community did not grant its consent. In the case of the De Beers Victor Lake project in Canada, the company explicitly stated in public documents posted on the internet that it would not pursue the project if the First Nation community did not give its consent. These documents were in English and the First Nation’s language. Depending

on where the community is located and how it accesses information, companies may need to develop other, non-written means to express their requirement of consent before they initiate the project.

If there is a military presence near the community, the company may be wise to work with the government to minimize that presence. This would reduce any sense of community coercion if the military and indigenous groups do not have positive relations, and it would likely help minimize the risk of conflict.⁷⁴

Giving a community sufficient time to understand the activities the company wants to conduct on the community’s land also helps reduce any sense of coercion. Civil society has called for consent to be sought sufficiently in advance of any authorization or commencement of activities and respect to be shown for the time requirements of indigenous engagements and consensus-building.⁷⁵ A number of companies also note that companies and communities often operate on very different timelines.⁷⁶ Companies tend to make relatively quick decisions, while communities require more time to process information and conduct an

⁷³ 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 (17 Feb. 2005), ¶ 46 (i) [hereinafter *Report of the International Workshop on Methodologies regarding Free, Prior, Informed Consent and Indigenous Peoples*]. These include timely provision of information in the right forms and languages. Of course, civil society organizations also must take full account of the right of indigenous peoples to make free decisions.

⁷⁴ For instance, in the case of BP’s Tangguh Project in Papua, the community made it clear that the arrival of the Indonesian military would likely be a deal-breaker, due to the Indonesian military’s history of abusing the rights of local indigenous groups.

⁷⁵ Colchester and MacKay, *supra* note 11.

⁷⁶ “Mining and Indigenous Peoples: Case Studies,” *supra* note 52.

internal dialogue. This may require a shift in the company's mindset, as well as the adjustment of project deadlines.

(D) Obtaining Consent Prior to Activities

Most indigenous rights groups regard the term "prior" to mean that consent should be given before the government grants a company the right to a concession. In practice, governments typically give concessions without seeking the FPIC of indigenous communities beforehand. This is deeply problematic for companies, as consent then can never be "prior" in the most absolute sense of the word.⁷⁷ It is for this reason that companies cannot implement FPIC as it is meant in international legal documents that refer to the duties of States. Rather, the principles underlying FPIC can be re-interpreted to give guidance to companies.

Companies can gain consent before they start various phases of their activities. A meeting of U.N. agencies concluded that, in the State context, consent should be "sought sufficiently in advance of commencement or authorization of activities, taking into account indigenous peoples' own decision-making processes, in phases of assessment, planning, implementation, monitoring, evaluation and closure of a project."⁷⁸ Our interviews indicate that indigenous rights

groups interpret "prior" as it applies to companies to mean, as a starting point, gaining consent before exploration begins.⁷⁹ They also understand it to mean that the company should gain consent from the community before making major changes to the project, such as drilling, expanding the project significantly, altering the technology used in the project such that the impacts on the community change, or closing down the project.

Community engagement best practices clearly point to the need for companies to engage at the exploration stage. The experiences of two extractive companies formerly operating in Peru provide illustrative examples of the costs that can arise when companies do not engage sufficiently early and the benefits that accrue when companies gain a social license to operate starting at the exploration stage.

The experience of Manhattan Mining at its Tambogrande site highlights what can happen when a company does not engage with the community during the exploration phase. Manhattan Mining conducted exploration and gained a concession from the federal government without dialogue with the community. The community, in turn, stiffly opposed the project, held an unofficial vote

⁷⁷ It may become difficult or impossible for a company to implement the principles of a FPIC policy when the state moves people off the land with no process of law at the same time that it grants the concession. In such instances, the company can walk away from the concession for fear of being blamed for forced resettlement, or it can compensate the people removed. The first option does little, however, to improve the situation of the people who were resettled, and another company almost inevitably will develop the concession in any case.

⁷⁸ *Report of the International Workshop on Methodologies regarding Free, Prior, Informed Consent and Indigenous Peoples*, supra note 73, ¶ 48.

⁷⁹ Similarly, the Indian Law Resource Center notes: For consent to be "prior," it must be given before any significant planning for the proposed activity has been completed, and before each decision-making stage in the proposed activity's planning and implementation at which additional relevant information is available or revised plans are proposed. U.N. Department of Economic and Social Affairs, Division for Social Policy and Development, *Contribution of the Indian Law Resource Center: Indigenous Peoples' Right Of Free Prior Informed Consent With Respect To Indigenous Lands, Territories and Resources*, U.N. Doc. PFI/2004/WS.2/6 (17-19 Jan. 2005).

against it, and the company lost access to the concession due to concerted and continuous community opposition, despite the support of the national government for the project. In contrast, Shell created dialogue with the community from the start of its exploration for the Camisea project. This allowed Shell to revise its project planning in ways that made the project more acceptable to the community, such as not building access roads and instead using rivers and helicopters to deliver supplies.⁸⁰

Beginning community engagement early is a better practice partly because activities such as drilling test wells could cause disturbances to local communities. Even seismic activities can affect wildlife and fish populations. Communities that have not previously observed extractive activities may be alarmed, while communities that have observed previous, irresponsible extractive activities may expect more of the same and become hostile unless the company makes a concerted effort to engage them. Thus, it is a risk management practice for companies to begin communicating at the exploration stage with communities to alert them to the company's planned activities.

Yet engaging the community before exploration starts is different from gaining

consent before exploration begins. Gaining consent before exploration begins may not, at the moment, seem feasible to companies in some sectors for three key reasons.

First, it is difficult for companies to gain consent to a project before they know the likely scope and lifespan of a project. During exploration, companies such as Talisman, which often operate in areas that have not been previously explored, do not know whether they will find oil or gas, or how much, and therefore are unable to predict the likely scope of the project and its likely negative and positive impacts on local communities. The likelihood of a find of oil or gas is less than 50% for projects in areas that have not previously been explored.⁸¹

Many oil and gas companies therefore engage in a significant amount of exploration that is short-lived in duration, and after which they exit the area. A full-blown, formalized consent process may not seem feasible for such short-term activities. As exploration draws to a close, the company has a better sense of the project's likely scope and lifespan, enabling the community to help design and consent to a specific development plan for the project.⁸²

⁸⁰ Shell withdrew from the Camisea project because of issues that were not related to its relations with the community. Another company took over the project and reportedly has put fewer resources into community engagement than Shell. A number of former and current NGO employees have noted that Shell's expertise and emphasis on community engagement made a real difference in local acceptance of the project.

⁸¹ Estimates vary regarding the success of "wildcat" drilling – drilling in unexplored areas – but most claim that the success rate is well below 50%. The estimate of 45% comes from "Report on 10 Year Energy Trends (1994-2003) Highlights Increased Oil and Gas Production and a Healthy Remaining Resource Base," IHS Energy (18 Oct. 2004), available at http://energy.ihs.com/News/Press-Releases/2004/pr_101804-trends.htm.

⁸² Exploration looks different in the oil and gas versus the mining sector, and logging functions on yet a different model. This highlights the prospect that FPIC might look different according to sector. Most examples of consent processes derive from the mining sector, and such models may not translate perfectly to the oil and gas sector. Oil and gas operations often are more dispersed across a wider area, meaning that oil companies would need to seek consent from a larger number of communities, and the probabilities of exploration success are different for the two sectors. These differences may affect the appropriate timing and process for seeking consent, and is a topic which business and civil society should further explore together.

Second, if companies were to seek consent at the exploration stage, it might exacerbate the problem of unrealistic expectations among the community members. The mere presence of an oil and gas company in poor areas can create expectations of wealth and benefits. A detailed discussion of the benefits, as well as the negative impacts, that would accrue to the community if a project took place would create more specific expectations. Given that the company would not know at this stage whether there is any oil or gas, and therefore whether any project would occur in the first place, such expectations might lead to grave disappointment or individuals becoming indebted in expectation of a future windfall.

In many instances, communities perceive the arrival of a multinational oil and gas company as the harbinger of future wealth. If the company discusses the development that might occur if it proceeds to the operations phase, communities might start to plan with that future in mind. This problem is not peculiar to indigenous peoples or developing countries. For example, when land leases for exploration are not utilized in the U.S., and the landowners therefore do not receive money, this can cause significant disappointment among the landowners, who may have made future financial plans based on receiving that money.⁸³ The problem is exacerbated in communities with lower levels of education, little experience with contracts, and limited knowledge of the oil and gas industry.

On the other hand, a number of NGOs that work closely with indigenous groups expressed the concern that after exploration has begun, it becomes very difficult for indigenous groups to refuse the project. Indigenous groups may see the project as a *fait accompli* and feel that it is not possible to stop it. In addition, the benefits of the project may seem more immediate than the costs because the more significant costs have not been felt. For instance, the company may have provided health services to the community during the exploration stage. Yet, in contrast, the most significant potential negative impacts, such as an oil spill, are unlikely to occur at this stage.

Third, the impacts of the exploration stage are, from the perspective of oil and gas companies, relatively minimal. Few personnel are on the ground, the risk of significant environmental impact is small, and the impacts are generally short-lived. It is argued that during the exploration stage, it is more reasonable to commence a meaningful engagement process that incorporates the concerns of indigenous people into decision-making about project design in order to establish a social license to operate, without going through a more formal and documented consent process.

In contrast, civil society has argued that exploration does substantially impact communities, including indigenous peoples. For instance, the entry of an exploration team into a remote area can bring debilitating disease. In addition, explosions during

⁸³ Such expectations lead to concrete actions that can put people in worse positions. For instance, one individual interviewed noted that when contracts are signed with landowners in North America, under which the landowners get no benefit unless the oil and gas is exploited, and with no promise that it will be, the landowners have been known to assume that the activity will occur, and put themselves in financially worse positions, for instance by obtaining third mortgages based on the assumption that oil extraction will occur.

exploration can frighten wildlife, temporarily affecting a food source upon which indigenous people may depend for their livelihoods. The appropriate design of the exploration process could help mitigate these impacts, for instance by forbidding company workers from approaching indigenous people or organizing detonations so as to have a minimal effect on wildlife. There clearly is an opportunity for companies and civil society, including indigenous peoples, to further discuss the impacts of exploration.

It is likely that a credible consent policy would, at a minimum, need to apply to phases of company activities that have a significant impact on indigenous populations. For instance, the Inter-American Court of Human Rights calls for the State to seek FPIC when a *large-scale* development project would have a *major* impact on the property rights of a tribal group to a large portion of their territory [emphasis added].⁸⁴ Such legal opinions support the view that, at a minimum, FPIC should be sought before oil and gas companies set up more permanent operations. Engagement that incorporates indigenous concerns into decision-making regarding project design is critical for all stages of activities on indigenous lands.

In other words, there is a minimum standard of engagement that applies throughout all stages of company activities through which indigenous communities have an opportunity

to help guide the design of the project. In some instances, as the impacts become more significant and enduring, the degree of community engagement increases and companies should consider seeking FPIC. During exploration, companies should, at a minimum, make it clear to communities that they will have an opportunity to formally give or deny consent for the operational stage if it proceeds.

(E) Ensuring that Consent Is Informed

It is in the interest of both the company and the community that the community be well-informed regarding the likely impacts of the project on their lives, both positive and negative. This will decrease the risk that indigenous peoples will feel that they were deceived or treated unfairly, or that they will argue that their agreement with the company was premised upon false information. A group of U.N. agencies maintains that the information that needs to be provided includes: the nature, size, pace, reversibility, and scope of any proposed project or activity; the purpose of the activity; the duration of the activity; the locality of the areas that will be affected; a preliminary assessment of the likely economic, social, cultural, and environmental impacts, including potential risks; the personnel likely to be involved in the execution of the project; and the procedures that the project may entail.⁸⁵ In addition, communities should be informed

⁸⁴ “[I]n addition to the consultation that is always required when planning development or investment projects within traditional Saramaka territory, the safeguard of effective participation that is necessary when dealing with major development or investment plans that may have a profound impact on the property rights of the members of the Saramaka people to a large part of their territory must be understood to additionally require the free, prior, and informed consent of the Saramakas, in accordance with their traditions and customs.” The Court also stated: “regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions.” *Case of the Saramaka People*, ¶¶ 137, 134.

⁸⁵ *Report of the International Workshop on Methodologies regarding Free, Prior, Informed Consent and Indigenous Peoples*, supra note 73.

of their rights and the duties of the State and companies.⁸⁶ The information also needs to be in appropriate languages⁸⁷ and conveyed in a culturally appropriate way. Companies should not assume that community leaders or elders will always transmit information back to their communities.⁸⁸ Most successful community engagement efforts have used a combination of small group and community-wide information-sharing sessions.

It is critical that the company disclose both the potential positive and negative impacts of the project. Manhattan Mining failed to gain a social license to operate during the exploration phase of its Tambogrande project in Peru. The community held a vote that revealed overwhelming opposition to the company's activities. Among a range of issues, the community complained that it did not receive sufficient information on the potential negative social and environmental impacts of the mine. Rather, the company only provided information regarding the potential benefits, which appears to have created distrust of the company.⁸⁹

In some instances, companies will need to spend substantial resources to ensure that the communities are fully informed and understand the project. Indigenous groups

may possess very different knowledge levels regarding extractive projects depending on how isolated they are and how active the extractive industry has been in their area. Therefore, the steps a company will need to take to ensure the community truly understands the project will vary. In instances where the community has little or no experience with the oil and gas industry, some companies have taken members of those communities to see similar sites that use the same or comparable technology. In almost all instances, the company will need to engage in an iterative process of sharing information so that the community's knowledge base expands sufficiently for it to understand technical information and interpret the outcomes of the environmental and social impact assessments.

Impact assessments provide a potentially highly effective avenue for the company to both inform the community of the likely effects of the project and to build a relationship with the community. A number of extractive companies are starting to design and conduct environmental and social impact assessments in partnership with communities, partly at the demand of the communities.⁹⁰ For instance, Shell

⁸⁶ The Akwe: Kon Guidelines call for countries or proponents of a development project to share information with indigenous peoples regarding obligations under national and subnational laws as well as subregional, regional, and international agreements. They also suggest that the government or project proponent should provide some guidance on how FPIC might be implemented. They specifically call for countries to share the following information with communities: "identify the proponent, contain a brief summary of the proposal, the sites and communities likely to be affected, anticipated impacts (if any) on conservation and...cultural and social impacts, arrangements for public consultation, contact details, key dates in the life of the project, including those regarding impact assessment procedures..." Akwe: Kon Guidelines, *supra* note 29, ¶ 10.

⁸⁷ Herz et. al., *supra* note 64.

⁸⁸ Both Shell at its Camisea project in Peru and BP at its Tangguh project in Papua, Indonesia have received praise for widespread consultations, which involved all parts of society in a mix of large as well as intimate meetings.

⁸⁹ Susan Bass, "Prior, Informed Consent and Mining: Promoting the Sustainable Development of Local Communities," *Environmental Law Institute* (July 1999).

⁹⁰ For example, community participation in impact assessments has been incorporated into some Impact-Benefit Agreements in Canada.

has designed impact assessments based on community input and conducted joint assessments with communities in Canada. Those involved in participatory assessments note that it offers several advantages. First, it provides a way for the company and community to engage in a substantive way early in the process. Second, it helps alleviate any community suspicions that the results of the impact assessments are not accurate or are misleading, since they are involved in developing the methodology and in generating the findings.⁹¹

Other companies also are working with indigenous communities to design and implement traditional practices impact assessments. These studies help communities and companies understand how the project will affect traditional ways of life and other aspects of community culture, which often is not among the data that social and environmental impact assessments generate.

In sum, companies need to share the information with communities that will enable them to make an informed decision that seems fair to them over the years. This often will require developing the capacity of communities to understand technical issues, and in some instances may necessitate transporting some members to a similar site. The manner in which the information is disseminated will vary widely, according to the culture and technological capacity

of the community. The co-design and implementation of environmental, social, and traditional practices impact assessments provides a particularly effective way to combine informing the community with the process of building a relationship. Companies should take care to share information with the community as a whole and not assume that the community leaders will reliably transmit information.

If the consent process occurs before the operations phase, as this report recommends, instead of before the exploration phase, companies could more effectively ensure that consent is informed. When the exploration stage is ending, companies have a much better sense of the potential scope of their future activities. They also know whether or not they are going to stay in the area, assuming the indigenous community grants them consent, so they can raise more accurate expectations regarding the positive benefits the project could bring to the indigenous community as well as the scope of potential negative impacts.

(1) Capacity Building

Obtaining community agreement will almost always require a robust community engagement approach. As the North-South Institute notes, “the distinction between consultation and free, prior, and informed consent is false. Consultation must lead to free, prior, and informed consent in order for a project to go ahead on ancestral lands.”⁹²

⁹¹ In the authors' experience, even in relatively non-adversarial settings, communities have expressed mistrust of environmental assessments that the government or company carried out with little explanation to the community, much less engagement or participation by the community. A community member who had observed the contents of a company environmental impact assessment recently expressed his view to one of the authors that the questions in the impact assessment were biased in favor of the company. Such concerns seem to be quite common.

⁹² Viviane Weitzner, “Consultation Versus Consent: Going Beyond Reframing,” The North-South Institute (2005), p. 8, available at http://www.nsi-ins.ca/english/pdf/Consultation_consent.pdf.

Most of the examples in which companies have worked best together with indigenous groups have involved extensive outreach, community participation in assessment and monitoring, effective grievance mechanisms that include community members, and a negotiation process with the community. Some of these elements are best practices whenever a company is situated near a community – indigenous or otherwise.

Community participation processes often require community capacity building. Capacity building is particularly important when a company is seeking consent from an indigenous community. The requirement that consent be informed can demand extensive information sharing between the community and the company in a culturally appropriate manner. Additionally, working with the community to develop a process by which the community will give consent takes time. The community may require third party capacity building if it has not previously had to make decisions incorporating technical issues, long-term impacts, and nuanced written agreements. In contrast, groups that have negotiated with extractive companies before may be well-prepared for the process and have a good understanding of the potential impacts of extractive projects. In fact, many indigenous peoples have highly developed negotiation skills. All the same, the communities are likely to require additional technical and legal knowledge. Capacity building could include developing mediation skills in the community, sharing technical knowledge, or training community members to conduct environmental or social impact monitoring.

Capacity building requires funding, and, in many instances, the only funding available is through the company. This arguably creates a conflict of interest if, for instance, the community uses company money to hire an outside adviser to support the negotiating process or explain the law or technical aspects of the proposed activity. This is an ongoing challenge, but there are some means to minimize company influence over those who are supposed to support the community or act as neutral third parties. In some countries, such as Canada, the government has helped fund community capacity building. Companies operating abroad could also look to their home governments for funding to support community capacity building that the government, and not the company, would administer to the community. Foundations or international financial institutions might provide resources. In some instances, NGOs help provide funding. When the government is not able or willing to fund capacity building, and funding from NGOs or international financial institutions is not available, company money could be placed in an escrow or segregated account, and the communities could then select their own trusted advisers and capacity builders and pay them from that account. Some companies have incorporated language on how money will be provided to pay for community external advisors and capacity building in a framework agreement that lays out the entire negotiation process.

Not only communities require capacity building. Company employees and contractors often require capacity building as well. Company employees and contractors need to be made aware of company policies on indigenous peoples and how to implement them. They also may require training regarding how to

interact appropriately across cultural divides. Companies need to train contractors, as well as direct company employees, because the actions of the contractors will be perceived as those of the company and have caused problems in the past. A number of companies have policies in place that require training for employees and contractors working near indigenous populations.

In sum, capacity building often is an essential element of gaining the consent of indigenous peoples and also is an important part of any serious community engagement process. Ideally, funding and support for the community would be available from third parties, such as home and host governments and international financial institutions. When it is not, communities and companies can develop methods to set aside money so that the company provides funding, but communities are able to hire consultants of their choice, and those consultants do not report to the company.

(F) Defining Consent

The principle of consent is among the most controversial in the debate over the nature and extent of indigenous rights. A number of governments have expressed the view that an indigenous right to consent is an invasion of national sovereignty. 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.

Consent occurs when the indigenous group gives assent or approval to a company activity.⁹³ As a number of indigenous rights organizations note, and common sense supports, the principle of free consent can only meaningfully exist when groups also have the ability to say “no” to a project.⁹⁴

This definition indicates that consent and engagement are not synonymous terms. Engagement is a necessary ingredient to obtain informed consent. It is also a critical process to obtain the company’s social license to operate, whether or not the company additionally undertakes a formal consent process. Without engagement, communities would not have the information to make an informed decision, nor would they have a relationship with the company that would lead them to trust the company’s intentions. Ongoing engagement is also critical to maintaining the FPIC of indigenous peoples. An ordinary engagement process, however, does not make it clear to a community that it can reject the development project, nor does engagement ordinarily provide a way for the company to evidence the fact that they have community consent. Engagement and consent are intimately connected, but they are not the same.

Companies that accept this definition of consent still face a number of operational questions.

⁹³ The Merriam-Webster’s online dictionary defines consent as: “to give assent or approval.” “Consent,” Merriam-Webster Online Dictionary (2010), Merriam-Webster Online, available at <http://www.merriam-webster.com/dictionary/consent>.

⁹⁴ See, e.g., Weitzner, *supra* note 92.

Through what process can consent be given? What percentage of the community must agree to the activity? How can consent be measured? Who represents the community? How can marginalized groups be included in the process?

The discussion below refers to a number of related but distinct terms. A consent agreement is the document in which communities express consent to a project under specified conditions, which may include compensation for negative impacts and other benefits to the community. An agreement regarding the consent process is a document in which the communities and company both agree on the process through which the community will express its consent or lack thereof.

(1) *The Consent Process*

(a) Traditional decision-making structures

A number of international standards suggest that companies should seek consent from a community's traditional decision-making structures. The Declaration on the Rights of Indigenous Peoples calls for States to consult with the "indigenous peoples concerned through their own representative institutions" to gain their FPIC.⁹⁵ A meeting of U.N. agencies concluded that "Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions... This process may include the option of withholding consent."⁹⁶ The RSPO requires that "Any negotiations concerning

compensation for loss of legal or customary rights are dealt with through a documented system that enables indigenous peoples, local communities, and other stakeholders to express their views through their own representative institutions."⁹⁷ Additionally, the ICMM's Position Statement on Mining and Indigenous Peoples supports working through traditional decision-making structures: "Engagement, wherever possible, will be undertaken through traditional authorities within communities and with respect for traditional decision-making structures and processes."⁹⁸

Working with a community's traditional decision-making bodies presents a number of challenges. A company must first accurately identify the decision-making bodies. In the past, companies have claimed that they received consent from community leaders without conducting sufficient due diligence regarding the status of those leaders in the community. Communities have then withheld a company's social license to operate, as they felt that they were not represented by the self-proclaimed leaders. In some communities, multiple decision-making bodies exist, and the company must deal with all of them if it does not wish to alienate some segments of the community. One indigenous rights organization suggests that the correct question to ask is not who the leaders are, but how the community makes decisions.⁹⁹ Yet, even a company with the best of intentions may find it challenging to identify legitimate decision-making processes. Furthermore, companies with human rights

⁹⁵ "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." U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 12, Art. 32.2.

⁹⁶ *Report of the International Workshop on Methodologies regarding Free, Prior, Informed Consent and Indigenous Peoples*, *supra* note 73, ¶ 47.

⁹⁷ "RSPO Principles and Criteria," *supra* note 40, Principle 6, Criterion 6.4.

⁹⁸ "ICCM Position Statement on Mining and Indigenous Peoples," *supra* note 43, p.3.

⁹⁹ "Decision-making in the Lokono Communities of West Suriname," VIDS [Association of Indigenous Village Leaders in Suriname] (January 2008), available at <http://www.nsi-ins.ca/english/pdf/IDB%20VIDS%20final%20decision%20making%20english.pdf>.

policies need to ensure that the traditional decision-making process is not in conflict with internationally recognized human rights, such as non-discrimination.

To understand how a community makes decisions regarding land use and other concessions, one could ask how decisions traditionally were made regarding giving permission to another group to use community land seasonally for fishing or other activities.¹⁰⁰ This approach asks the community to share its cultural traditions and includes them in the process. A company should also look for consent from co-existing organizational structures within a community. These often include a governmental figure, a locally elected official, and the heads of any indigenous organizations or councils that make decisions for the community.

Relying on traditional decision-making structures in indigenous populations can be challenging because, in some instances, traditional culture has begun to break down, and communal decision-making processes are no longer robust. In such instances, indigenous rights organizations argue that the community would need time and capacity building support to revive old decision-making structures or devise new ones.

(b) Community agreement regarding the consent process

Some commentators have suggested that the community should help determine and agree to the process by which it will give or withhold consent. For instance, the World Commission on Dams indicated that communities should

indicate how they will express consent at the start of the process – which could be expressed in an agreement regarding the consent process. This might be based on traditional decision-making structures. It could, however, be based on new or hybrid decision-making structures, which would be particularly helpful if the community has ceased using traditional decision-making structures. This approach could help shape a positive relationship between the company and the community because it empowers the community from the start. It also sends a clear signal that the company is different from many of its peers and will work with the community on equal footing rather than imposing its will.

There are several examples in which the community is co-developing the community engagement process that will lead to an impact-benefit agreement. Impact-benefit agreements between a company and a community are typically required in Canada before extractive projects can proceed. The agreement outlines the benefits that will accrue to the community, and the compensation it will receive for project impacts. The Anglo-American Pebble Creek project, located in Southwest Alaska in an area where Native Americans make up the majority of the population, is an example where the community helped design the negotiation process that led to the impact-benefit agreement. The Pebble Creek Partnership is launching an independently facilitated stakeholder dialogue to address economic development and environmental issues related to the project. The stakeholders will decide what the dialogue process looks like. The dialogue process also allows the stakeholders to commission research to address concerns.¹⁰¹

¹⁰⁰ This suggestion was raised by an employee of an international organization who often mediates between companies and indigenous organizations (interview on file with authors).

¹⁰¹ "Report to Society 2007," Anglo-American plc (2007), available at http://www.investis.com/aa/docs/gr_2008_04_15.pdf [hereinafter "Anglo-American Report to Society"].

In a similar manner, Placer Dome and the community created a series of agreements for the Musselwhite Mine in Ontario, Canada. The first agreement established the process that would be used to develop an impact-benefit agreement – which serves as an example of an agreement on the consent process.¹⁰² This approach could be adapted to allow communities to determine the structure of the negotiation process through which consent to the project may be given.

Similarly, the Treaty 8 First Nations of Alberta have developed their own consultation policy and consultation guidelines framework. This document lays out their expectations regarding what information should be provided to them, how their interests will be addressed, as well as the need for capacity building to ensure informed decision-making. The guidelines require that the company agree in writing that it will not proceed with a project until the consultation is complete and an impact-benefit agreement is in place.¹⁰³

This approach may be time-consuming. For instance, when Placer Dome developed a series of agreements, including one which defined the process through which consent would be given, with First Nations in Ontario, Canada, it took two years to sign the final “Musselwhite General Agreement.”¹⁰⁴ Furthermore, the community sometimes may need external support and capacity-building to develop an appropriate decision-making process. At the same time, community engagement processes with indigenous peoples tend to be fairly time-consuming in any case due to cultural differences and communication

challenges, so it is unclear whether such an approach would add much time or expense. As a number of company representatives emphasized, shaping the relationship carefully at the beginning can save significant time and expense later.

(c) Company-imposed processes

Companies can, and in some cases do, impose their own consent process on the community. This initially appears to simplify and streamline the process, and allow for lessons learned from other project sites. It can present a number of problems, however, in the context of indigenous peoples. The continuation of indigenous culture is an essential goal of the indigenous rights movement, so imposing a process from outside that may be at odds with the community’s culture is inherently in conflict with indigenous rights. The company also may accidentally assume the role of “king-maker,” whereby the company creates new leaders in the community, thus disrupting traditional culture and heightening the risk of conflict between traditional and new powerbrokers. Finally, companies that impose their own process may be perceived to be perpetuating a tradition of domination of indigenous peoples by external forces, which will not support positive relations in the future.

(d) Legislatively-imposed processes

Some countries have developed procedures through which a company is to undertake engagement or seek consent. This process

¹⁰² “Mining and Indigenous Peoples: Case Studies,” *supra* note 52.

¹⁰³ “First Nations Consultation Guidelines Framework,” Treaty 8 First Nations of Alberta (27 June 2005) (on file with authors).

¹⁰⁴ “Mining and Indigenous Peoples: Case Studies,” *supra* note 52.

forms the baseline of what the company must do. In some instances, where the company's policies require more sharing of information or indicate that engagement or consent processes should start at an earlier phase, the company may benefit from following additional processes above that required under the law.

In some instances, the State may purport to carry out a consent process. If this process does not meet the company's own standards, the company could inform the State that its policies require that it carry out additional processes, and the company could then follow those procedures.

There are instances when the State's law or policy might forbid or make it impossible for the company to carry out an engagement or consent process. The company's policy should provide an exception for the requirement that it seek support based on FPIC principles in such instances. At the same time, the company's due diligence process should take this possibility into account. The company should consider whether it will be able to operate effectively in a State that takes this approach to its indigenous people. For instance, if the State forcibly relocates people, the company may face a very unfriendly operating environment or a risk of becoming complicit in human rights violations.

(e) Ensuring that consent processes are inclusive

Relying on traditional decision-making structures in a community can be problematic because marginalized groups, such as women and youth, may not be included in the process. This should concern companies for a number of reasons. If women are not involved in decision-making, the impacts that affect them specifically may not be effectively addressed, leading to potential problems. For instance, women may be harassed if large numbers of men are brought to a remote area to work on a project. If a project affects nearby water supplies, women may have to walk further to gather water, which in turn affects their ability to run their households.

Including youth in decision-making is important because they may envision the future of their community quite differently than their elders. They may desire a modern way of life or, in other instances, may be embracing their people's traditional ways, leading to the rejection of modern social and economic systems. If their wishes are ignored by their elders, they may be unhappy with the decision made, leading to social unrest and potential conflict over the years.

Most commentators appear to be in agreement: women, youth, and other potentially marginalized groups need to somehow be incorporated into the decision-making process. The IFC Performance Standards¹⁰⁵, the World Commission on Dams,¹⁰⁶ U.N. experts,¹⁰⁷ and leading

¹⁰⁵ The IFC Performance Standards require that women, youth, and other potentially disenfranchised groups be included in the process. See "IFC Performance Standards," *supra* note 12, Standard 7.

¹⁰⁶ See "Dams and Development: A New Framework for Decision-Making," *supra* note 38.

¹⁰⁷ A meeting of U.N. agencies concluded that "the inclusion of a gender perspective and the participation of indigenous women are essential, as well as participation of children and youth, as appropriate." *Report of the International Workshop on Methodologies regarding Free, Prior, Informed Consent and Indigenous Peoples*, *supra* note 73, ¶ 47.

indigenous rights organizations such as the Forest Peoples Programme¹⁰⁸ and the North-South Institute¹⁰⁹ all agree on this point.¹¹⁰ Indigenous rights do not trump other internationally recognized rights, such as the principle of non-discrimination. Furthermore, if the company does not include a broad spectrum of the community in the process, it increases the risk that those not included could later form a faction that is opposed to the project. The question is not whether the process should be inclusive, but rather how to include such groups while also respecting local culture and traditional decision-making structures.¹¹¹

The manner in which a company includes marginalized groups will likely vary according to the constraints of the indigenous culture. In some instances, including women overtly in decision-making processes could lead to reprisals against them. To address different cultural understandings of the appropriate roles of women and youth, the facilitator could present the inclusion of women, youth, and other marginalized groups as part of the company's culture that the indigenous community needs to respect, just as the company needs to respect the indigenous community's culture. Facilitators could also meet with women and youth separately, in a culturally appropriate forum, to listen to their views. The precise manner through which the voices of marginalized groups are included will need to be tailored to the

specific situation. The facilitator, however, should be explicitly required to include those groups in the decision-making process in his or her terms of reference. Company policies or guidelines should require the inclusion of marginalized groups in the decision-making process.

Consent processes should be inclusive not only of marginalized groups, but of the community as a whole to ensure the company's social license to operate. Companies need to be aware that if they only engage the top-level traditional authorities, they may not gain sufficient community support. At its Camisea project, Shell initially engaged with the heads of the relevant indigenous federations, whose decision-making structure echoed the traditional decision-making process of the indigenous communities. The company flew the federation leaders to seminars on the project. The community, however, felt that it was excluded from the process, as the leaders allegedly did not effectively share the information they received from the company. As a result, Shell carried out a large number of community meetings to include more people in its information sharing process. Similarly, Shell initially sought the agreement of local leaders when it was signing land use contracts, but then realized that the leaders might not truly be representative of the community, so Shell instead sought land access through community assemblies.

¹⁰⁸ Colchester and MacKay, *supra* note 11. The Environmental Law Institute makes a similar argument that marginalized groups must somehow be included in the process. Bass, *supra* note 89.

¹⁰⁹ The North-South Institute emphasizes the need to include youth, who are often left out of the decisions by the elders of aboriginal communities in Canada. Viviane Weitzner, "Dealing Full Force," The North-South Institute (January 2006).

¹¹⁰ The company representatives we interviewed also emphasized the need for inclusivity (interviews on file with authors).

¹¹¹ The North-South Institute includes as an unanswered question in this arena: "How are the views of women, youth, and elders taken into account in consent processes[?]" "Free, Prior, Informed Consent: Indigenous Perspectives," *supra* note 67, p. 1.

Although companies may deal most regularly with a small number of community representatives, they still need to ensure that information is transmitted to the rest of the community, and that the views of the community are included in the process, as Shell's experience suggests.¹¹² This objective provides support for working with the community to develop a consent process that may utilize traditional decision-making structures, but also could incorporate a more inclusive approach that has the support of various segments of the community.

(2) Documenting and Measuring Consent

Few companies have explicit consent policies, and, perhaps as a result, few have developed official standards to measure whether they have the consent of the community. Some with extensive community engagement programs use a "you know it when you see it" approach, where they assume that if there were significant community opposition, their community engagement teams would identify the lack of consent. The IFC Performance Standards, which are similarly non-specific, include a requirement of broad community support, which sounds very similar to a requirement of consent. The broad community support standard has been seen by some as toothless, in part because the IFC has required minimal documentation of broad community support, an issue that is currently under review.

Such an approach does not seem optimal for a company with a public, official

policy to seek agreement based on FPIC principles. A consent standard will be of the greatest benefit to the company if consent is demonstrable to external stakeholders such as civil society and responsible investors, who have demonstrated increasing interest in rating companies based on their informed consent policies and how they are implemented. Communities could explicitly give consent through a number of mechanisms, outlined below. An explicit, documented, formally agreed upon process would also help the company counter unjustified criticism.

Communities could express consent through a vote. The Environmental Law Institute implicitly suggests that it is legitimate for communities to express consent or lack thereof through a community vote.¹¹³ The community affected by the Tambogrande Project in Peru voted against the project. In this case, the company did not impose the mechanism of a community vote.¹¹⁴ The community itself organized that vote, so the community determined the process through which non-consent occurred. In some instances, where communities are familiar with the concept of voting by individual ballot, as it was near the Tambogrande Project, voting may be a legitimate process through which consent can be given or withheld. A one-time vote on the company project, however, by itself produces limited benefits, as it would provide no information on how future disagreements about the project are to be managed, nor would it contain details regarding the precise contours of the

¹¹² Bass, *supra* note 89. Our conclusions are also based on discussions with individuals involved in the project.

¹¹³ Bass, *supra* note 89.

¹¹⁴ Bass, *supra* note 89.

project to which the community believes it is consenting. At a minimum, there would need to be documentation that the community knew exactly what it was agreeing to so that it is clear that consent was informed.

If a community decides to hold a vote, companies should consider what percentage of support is sufficient to assure the company that it has the consent of the community and is in firm possession of a social license to operate. The Environmental Law Institute does not provide a percentage threshold that would be considered a signal of consent, but it does provide some indication. The Environment Law Institute argues that the World Commission on Dams' expectation that consent be negotiated via traditional decision-making structures is an implicit recognition that the consent of every member of an affected community is not required.¹¹⁵ None of the indigenous rights groups interviewed for this study claimed that for consent to be established, every single member of a community needs to support the project.¹¹⁶ The Environment Law Institute considered a 68% support rate among the Innue of Voisey Bay to be sufficient, but noted that a 50% vote for the project would be much less clear.¹¹⁷ On a more practical note, a number of company representatives who were interviewed noted that if 49% of the community opposes the project, the company's social license to operate is not assured.

It is increasingly common practice for companies to develop written agreements with indigenous communities. The RSPO supports this approach, requiring as evidence for its certification system that: "The process and outcome of any negotiated process and outcome of any negotiated agreements and compensation claims is well documented and made publicly available." The practice is increasingly common in Canada and Australia.¹¹⁸ The written agreements often detail the benefits that will accrue to communities, establish monitoring mechanisms, set up grievance mechanisms, and specify which future project milestones will require the consent of the community. The agreements could specifically state that the community gives its consent to particular activities, which would protect the rights of both the community and company. In some instances, communities have selected representatives to help negotiate the document, followed by a community vote to accept or reject the document. If the community does not have a history of using written language, the agreement could be made verbally and videotaped, along with critical parts of the negotiation process.

The use of a written agreement to express indigenous consent finds support not only in company-community practice but also is invoked by various international authorities. For instance, the World Commission on Dams indicates that "negotiations should

¹¹⁵ One NGO publication suggests that in some instances, indigenous communities use consensus as their means of making decisions. Weitzner, *supra* note 92. Yet seeking consensus is not the same as a requirement that everyone vote for a project in a Western-style voting process.

¹¹⁶ Bass, *supra* note 89.

¹¹⁷ "RSPO Principles and Criteria," *supra* note 40, Principle 6, Criterion 6.4. These "impact benefit agreements" have become standard practice for some extractive companies operating in Canada, particularly mining companies.

¹¹⁸ See "Dams and Development: A New Framework for Decision-Making," *supra* note 38, p. 217.

result in demonstrable public acceptance of binding formal agreements.”¹¹⁶ The IFC’s Environmental and Social Review Procedures look to written agreements as validation methods for support or objection to the project.¹¹⁹ A number of indigenous rights groups favor a formal agreement as a product of the negotiations between the company and community.¹²⁰ The negotiation of such an agreement provides ample opportunities for information-sharing and relationship building.

Some companies have negotiated agreements with communities that are a formal closure to a consent-seeking process. For instance, De Beers explicitly told the First Nation most impacted by its Victor Project that it would only commence mining with the consent of the community. De Beers embedded this promise in an agreement it made during the exploration phase. The community and company devised the negotiation process through which the community would express consent together and embedded that process in an agreement. De Beers then negotiated with the community to develop an impact-benefit agreement. The impact-benefit agreement explicitly gave consent to De Beers’ mining activities.

If companies decide to negotiate such agreements as a means of demonstrating

the existence of consent, it is important they and the indigenous community document the entire process. De Beers documented all aspects of the negotiation and found this to be helpful. If the community decides to utilize traditional consensus processes with no explicit vote, De Beers asks for a document describing the processes the community undertook and that expresses their consent. Obtaining consent in an explicit form such as an agreement, with thorough documentation of how the community approved of that agreement, can prove to be extremely helpful. When members of a community with which De Beers had negotiated an impact-benefit agreement later claimed that they had not given consent because they had been off the reservation, De Beers was able to present documentation that the community had undertaken a thorough process and had sought the input of First Nation members living off of the reservation. Such documentation may also come to be required by responsible investors that consider whether a company has procured informed consent and thus obtained a solid social license to operate.

In sum, consent can be articulated using a culturally appropriate process. It is probably best for the long-term relationship between the company and community that consent be expressly given in a document

¹¹⁹ The IFC’s Environmental and Social Review Procedures list the following as validation methods for support or objection to the project: written agreements such as Memorandums of Understanding, Heads of Agreement, Indigenous Peoples development plans; Land Acquisition plans, and so on; client records, photographs, media reports, personal letters, or third party accounts, regarding events/demonstrations/other activities for the project undertaken by project-affected communities, with high relative levels of participation. See “Environmental and Social Review Procedures,” IFC (2009), available at <http://www.ifc.org/ifcext/sustainability.nsf/Content/EnvSocStandards> for more information. The IFC, however, has been critiqued for failing to obtain sufficient evidence of broad community support, so it is unclear whether these guidelines lead to optimal outcomes. Further, the written documents that the IFC lists would need to be tailored to specifically include the specific activities to which the community is consenting.

¹²⁰ See, e.g., Colchester and MacKay, *supra* note 11. See also Bass, *supra* note 89. WRI calls for FPIC to be “formally recognized through binding negotiated agreements.” Herz et al., *supra* note 64.

that also specifies other expectations about the parties' future relationships, including how they will monitor the environment; social impacts; and effects on heritage; how they will resolve disputes; and for what new project milestones consent will need to be re-established. Companies must find a balance between ensuring that the process chosen meets the company's standards and simultaneously does no harm to the traditional fabric of the indigenous community. Perhaps companies could devise a set of minimum acceptable processes, which would include elements such as a demonstrable giving of consent, with several potential mechanisms specified, and the requirement of inclusion of marginalized groups in the process.

(G) Ongoing Engagement and Maintaining Consent Via Monitoring and Grievance Mechanisms

Companies and indigenous rights NGOs agree that consent needs to be ongoing. From a company perspective, this means that ongoing engagement is necessary so that the company can maintain its social license to operate and thus, implicitly, the consent of the community. From an indigenous rights perspective, it is more likely to mean that the community's consent should be sought for major milestones in the project. In the context of development projects, they would likely argue that consent is relevant to the full project cycle including but not limited to project assessment, planning, implementation, monitoring, evaluation, and

closure where projects may affect or impact indigenous peoples.¹²¹ This proposition can be intimidating for companies. Most companies would agree that they need to maintain community support in order to operate effectively, yet receiving consent only for specific activities creates uncertainty about the future of the project. At the same time, from a community perspective, it is not necessarily logical to agree to unbounded project development in whatever manner the company considers to be appropriate.

In an effort to reconcile these conflicting interests, impact benefit agreements between communities and companies sometimes articulate the milestones in the project at which the company will need to engage in another process of obtaining consent that culminates in a written agreement expressing consent. This could include, for example, a significant expansion of the project. This appears to be the best way to marry the differing interests of the community and company.

Consent processes should support a positive and interactive relationship over the years. For this reason, agreements between companies and communities sometimes embed a number of mechanisms designed to manage their relationships. These include joint monitoring approaches and effective dispute resolution mechanisms.¹²² Including these in the agreement provides assurance to the community that their views will continue to be heard after the agreement is completed.¹²³

¹²¹ *Report of the International Workshop on Methodologies regarding Free, Prior, Informed Consent and Indigenous Peoples, supra note 73.*

¹²² In a meeting of a number of U.N. agencies under the auspices of the U.N. Permanent Forum, some participants viewed FPIC as an "evolutionary process that could lead to co-management and decision-making by indigenous peoples on programmes and projects affecting them." *Report of the International Workshop on Methodologies regarding Free, Prior, Informed Consent and Indigenous Peoples, supra note 73, ¶ 17.*

¹²³ *Report of the International Workshop on Methodologies regarding Free, Prior, Informed Consent and Indigenous Peoples, supra note 73.*

(1) Community Participation in Project Monitoring

International voluntary guidelines support the need for community participation in monitoring. For example, the RSPO calls for community participation in the monitoring of social impacts.¹²⁴ This could include the participation of indigenous peoples in the design of impact assessments as well as project monitoring after the company's work is underway. Joint or community monitoring mechanisms and jointly run dispute resolution bodies are emerging best practices that should help a company maintain its social license to operate and gain community approval if it wants to expand the project in the future.

To enable ongoing relationship-building, companies increasingly are working with communities to establish community or joint monitoring bodies, a practice that also is supported by NGOs.¹²⁵ These monitoring bodies may focus on a variety of issues, including the environment, social impacts, cultural heritage, or monitoring the agreement between the company and community.¹²⁶ They provide a natural forum for regular and substantive discussions between the community and the company.

There are numerous examples of extractive companies utilizing such mechanisms in both developing and developed countries.

For instance, WMC Limited worked with the community at its Tampakan Project in the Philippines to develop a community-based environmental monitoring system. De Beers Canada's Victor Mine hired community members as part of the environmental monitoring team. The mine also uses "Heritage Monitors," who accompany construction teams to determine whether any bones or artifacts are uncovered.¹²⁷ At its Snap Lake Project, De Beers Canada signed an environmental agreement with the community and government that establishes the Snap Lake Monitoring Agency, which tracks implementation of the agreement and De Beers' environmental performance. The Agency consists of representatives of aboriginal communities, with support from a secretariat, and expertise from a technical and science panel as well as a Traditional Knowledge panel. Such embedding of community participation in monitoring is an increasingly common practice, and a way of reassuring the community that they will continue to have interaction with the company.

(2) Grievance Mechanisms

Grievance mechanisms provide another way for companies and communities to maintain relationships and manage problems that arise. While perhaps not a technical requirement of "consent," almost all successful examples of community

¹²⁴ "Aspects of plantation and mill management that have social impacts are identified in a participatory way, and plans to mitigate the negative impacts and promote the positive ones are made, implemented and monitored, to demonstrate continuous improvement." "RSPO Principles and Criteria," *supra* note 40, Principle 6, Criterion 6.1.

¹²⁵ Herz et al., *supra* note 64. See also Colchester and MacKay, *supra* note 11.

¹²⁶ Talisman has utilized Traditional Monitors for some of its projects in Canada. According to our understanding, the Monitors are only used before the project is developed. The mechanisms above would expand community participation into later stages of the project.

¹²⁷ "Victor News," *supra* note 65.

engagement include some sort of grievance mechanism that can address problems as they emerge.¹²⁸ Grievance mechanisms are increasingly embedded in agreements between companies and communities as well. These mechanisms enable them to manage any contention about whether the agreement is being carried out appropriately, as well as other disputes that may arise. It is important to set up such a mechanism from the start, even if it is relatively informal.¹²⁹

The U.N. Special Representative for Business and Human Rights has noted that establishing grievance mechanisms for projects is an important element of the corporate responsibility to respect human rights.¹³⁰ The IFC Performance Standards also call for grievance mechanisms. Some companies routinely include grievance mechanisms not only when they are dealing with indigenous peoples but for all communities that their projects significantly affect.¹³¹

Grievance mechanisms are an important element of relationship management at a number of different stages in the relationship between the community and company. In early stages, they may be less formalized. Community members could be informed who in the company's community engagement team they should contact if they have a concern. As the company's activities

continue, and its ongoing presence becomes more certain, dispute resolution mechanisms need to be better defined and acceptable to the community. An emerging recommended practice is to embed a blueprint for a dispute resolution mechanism in the agreement that embodies consent.¹³² Grievance mechanisms have been built into a number of impact benefit agreements in Canada. Disputes and differences in interpretation are almost certain to arise around a document that articulates the scope of community consent and sets conditions for the future relationship between the company and community, so a plan to manage those differences needs to be in place.

Although the agreement may be legally enforceable, it would be preferable to agree to set up a less formal preliminary mechanism where disputes can be resolved before they escalate. Indigenous groups are unlikely to have significant funds available to sue in court, courts are likely to be very distant, and such a process often is extremely lengthy. From a company perspective, lawsuits are time-consuming and reputationally damaging. Finally, lawsuits are a notoriously poor means to resolve problems in ongoing relationships. Notably, non-legal grievance mechanisms should not supplant the rights of individuals

¹²⁸ Foley Hoag conducted an extensive review of Newmont's community relationships around the world. The need for an effective grievance mechanism was a key finding. "Newmont Community Relationships Review, Global Summary Report," Foley Hoag, LLP (March 2009).

¹²⁹ U.N. agencies also noted that "[f]ree, prior and informed could be strengthened by establishing procedures to challenge and to independently review these processes." *Report of the International Workshop on Methodologies regarding Free, Prior, Informed Consent and Indigenous Peoples*, *supra* note 73, ¶ 48.

¹³⁰ "Protect, Respect and Remedy: a Framework for Business and Human Rights," *supra* note 26.

¹³¹ For example, Anglo-American's SEAT process applies across its global operations and recently added a tool to help projects establish a grievance mechanism.

¹³² For instance, the World Commission on Dams states that an agreement that articulates consent should include "implementable institutional arrangements for monitoring compliance and redressing grievances." "Dams and Development: A New Framework for Decision-Making," *supra* note 38, p. 217.

or communities to seek legal redress, but rather should provide a mediation-focused alternative. An effective and locally available grievance mechanism therefore should be described in the agreement to resolve disputes that arise, both those related to the agreement and those that arise regarding relations between the company and community members more generally.

The perceived legitimacy of such a mechanism is important. It may be preferable for grievance mechanisms to be managed by the community, as mechanisms run exclusively by the company can create the appearance of a conflict of interest. The RSPO supports this approach, calling for “a mutually agreed and documented system for dealing with complaints and grievances, which is implemented and accepted by all parties.”¹³³ A company-controlled grievance mechanism also misses an important opportunity to work with the community and develop community-company relationships.

A potential mechanism could begin with a panel of community members to whom individuals could report concerns.¹³⁴ If the panel is unable to resolve the dispute, it raises the issue to a group composed of both community members and company representatives. This enables the person who originally raised the complaint to be anonymous to the company, which can be important when the company is the main employer in the area so that employees do not fear losing their jobs. At the same time, the community panel can screen out frivolous complaints.

As another approach, one can imagine a process through which the indigenous group and company would each suggest several names or organizations, and the other party would choose one of those names to form a dispute resolution committee. Alternatively, if an external mediator is used to develop an agreement between the community and company, and both parties are comfortable with that interlocutor, that individual could act as a mediator for significant disputes that arise over time. If payment is needed, money could be placed in escrow.

In sum, community participation in monitoring as well as participatory grievance mechanisms are emerging practices that are likely to support a healthy working relationship between the company and community over time. These mechanisms are starting to be embedded in agreements between communities and companies. As an assurance to all parties that they will continue to interact regularly and will have a mechanism to resolve disputes, participatory monitoring and dispute resolution mechanism could be included in the agreements that provide community consent.

IV. Benchmarking of Company Policy Language

Extractive companies address indigenous rights in a variety of manners. A handful of mining and oil and gas companies have policies that address gaining consent for resettlement or where their activities will otherwise impact communities. Several have made statements, verbally or in reports, indicating that in specific instances they

¹³³ “RSPO Principles and Criteria,” *supra* note 40, Principle 6, Criterion 6.3.

¹³⁴ An individual working for a NGO suggested this approach, which she had seen implemented at a company project (interview on file with authors).

seek consent for their activities and do not proceed when they have not received it. A larger number of companies address the need for consultation with indigenous peoples. No companies have a stand-alone policy on FPIC. Rather, consent and engagement form part of their community, indigenous peoples, or human rights policies.

The companies reviewed are those that are most involved with the CSR agenda and thus presumably are most likely to have consent policies. The fact that only a few of them have policies that include the principles of FPIC – as opposed to policies on consultation – indicates that this issue so far has enjoyed limited uptake in company policy. The mining sector shows greater uptake than the oil and gas companies. At the same time, it appears that extractive companies are paying greater attention to indigenous issues, including developing detailed implementation guides for these issues. Responsible investors also are starting to place greater emphasis on consent policies and implementation. In short, very few companies have policies that incorporate consent, but they will come under increasing pressure to adopt them in the coming years.

The authors reviewed company-wide policies, published statements, annual sustainability reports, public statements, and implementation guidelines to assess how multinationals approach indigenous rights. Company policies are brief and provide little detail about company positions on the rights of indigenous peoples. Public statements and annual sustainability reports tend to provide a more precise account of how the company addresses these issues. Company

implementation guidelines are not always publicly available, and tend to contain more detail regarding the company's approach. Company policies seem to lag behind public statements, implementation guidelines, and annual reports, with the latter being more likely to commit the company to consent and consultation processes.

The authors looked for statements that directly addressed the company's relationship with indigenous peoples. Additionally, the authors reviewed statements that contained the language "consent" as well as variants on that language that the IFC utilizes, such as "free, prior, informed consultation" or "broad community support." The authors considered policies on consent; free, prior, and informed consultation; or broad community support, whether they referred to indigenous peoples only or communities more generally. The authors also analyzed company policies on resettlement and whether they conformed with IFC standards or the Declaration on the Rights of Indigenous Peoples.

The report surveys seventeen high-profile oil, gas, and mining companies that have undertaken significant commitments to CSR and human rights and therefore would be most likely to have policies on indigenous peoples. It includes all the participants in the Voluntary Principles on Security and Human Rights and most of the members of the ICMM, as well as several other companies that have gained recognition for their community engagement and consent practices. The companies surveyed are those with Western brand recognition and experience with corporate social responsibility initiatives, which makes it more

likely that they would have a policy on FPIC. Notably, this is not a neutral sample of global extractive companies but rather a sample of those most likely to have progressive indigenous policies.

In addition, a number of other companies should have consent policies that cover specific situations. Companies such as Cadburys, Unilever, and Nestle that are part of the RSPO should, in theory, have policies in place requiring that their suppliers obtained consent for the use of land for palm oil plantations, although recent research indicates that few of them have publicly available policies that include FPIC principles. The members of the FSC should also have consent policies. The policies of companies that engage in activities similar to Talisman and manage the same types of risk seem most relevant, however, and the benchmarking exercise is therefore limited to other extractive companies with active CSR programs.

(A) Publicly Available Policies, Published Statements, and Guidelines

(1) Policies on Consent and Consultation

Approximately half of the companies surveyed, have developed global policies that refer to consent; free, prior, and informed consultation; or broad community support. A handful of other companies maintain policies on consultation with indigenous communities, but their language does not emulate the standard contained in the Declaration on the Rights of Indigenous Peoples, nor the IFC language, which seems to draw on the principles of the Declaration.

The corporate policy statements of one-third of the companies refer to free and informed consent. Some of them use the term in reference to general development activities, while one only applies the principle of consent to resettlement. Some specify what they believe “prior” means in a corporate context. Based on the wording and placement of their policies, it appears that the policies of Xstrata, De Beers, and Occidental apply to all affected communities, while the policies of Rio Tinto and Anglo-American refer to consent specifically in the context of indigenous peoples. Some policies, such as Repsol’s, commit the company to seeking consent in some instances, but also note that the company may, without consent, proceed with the project.

- De Beers’ policy refers to seeking free and informed consent:
 - » De Beers 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.”¹³⁵
- Rio Tinto’s policy refers to seeking free and informed consent:
 - » Rio Tinto claims: “We strive to achieve the free and informed consent of indigenous people to proceed with developments.”¹³⁶
- Anglo-American uses a consent standard for resettlement:
 - » “[O]ccasionally, for a nation’s

¹³⁵ “Community Policy,” De Beers Canada (September 2007), available at http://www.debeersgroup.com/ImageVault/Images/id_1416/ImageVaultHandler.aspx.

¹³⁶ “Human Rights Policy,” Rio Tinto, available at www.riotinto.com/documents/Human_rights_policy.pdf.

greater good, it's decided that there is no alternative but for some indigenous people to resettle. When that happens, we work only on the basis of informed consent from the indigenous people themselves."¹³⁷

- Repsol states that it will seek the agreement of indigenous communities if the government does not carry out free, prior, informed consultation as called for in ILO Convention 169. If Repsol is unable to obtain agreement, it will publish its decision regarding whether or not to go forward with the project, and if it does go forward with the project, the steps it took to promote dialogue, compliance, and agreement.
 - » “In cases where, for whatever reason, the state has not carried out prior, free and informed consultation as per that stipulated in the ILO Convention 169, Repsol will endeavour to obtain the agreement of indigenous communities through the implementation of a Community Relations Plan drawn up on the basis of dialogue with legal representatives of interested communities.”
 - » “In cases where the state has not carried out the prior, free and informed consultation, and the attempts at dialogue by Repsol
- with the interested communities are unsuccessful, Repsol will make its decision as to whether or not to continue with the investment project and, where it decides to proceed, will outline, in detail, the steps it has taken to promote compliance, dialogue and agreement.”¹³⁸
- Occidental’s policy is more ambiguous but uses a consent standard for at least some situations, depending on the status of national law:¹³⁹ “To the extent consistent with the laws of the applicable jurisdiction, Occidental is also committed to consulting with, and seeking the pre-approval of, any legitimate local communities affected by its business operations in order to minimize potential negative impacts on such communities as well as its operations.”¹⁴⁰
- Xstrata’s policy includes consent language as well: “We seek to maintain broad-based ongoing community support for our activities throughout our operations’ life cycles. We consult with communities as early as possible and establish appropriate mechanisms for ongoing consultation, feedback and grievance resolution. This includes fair and equitable processes for engagement with indigenous and local communities including, where relevant, free prior informed consent.”¹⁴¹

¹³⁷ “Indigenous Peoples Statement,” Anglo-American plc, available at <http://www.angloamerican.co.uk/aa/development/society/indpeople/>.

¹³⁸ “Política de relaciones con comunidades indígenas,” Repsol YPF, available at http://www.repsol.com/es_es/corporacion/responsabilidad-corporativa/etica_y_transparencia/derechos_humanos/politica-comunidad-indigena.aspx.

¹³⁹ It is unclear whether Occidental means that it will seek consent unless seeking consent conflicts with national law, or whether it means it will only seek consent when national law requires that it seek consent.

¹⁴⁰ “Human Rights Policy,” Occidental Petroleum Corporation, ¶ B.4, available at http://www.oxy.com/Social_Responsibility/human_rights/Pages/human_rights_policy.aspx [hereinafter “Occidental Human Rights Policy”].

¹⁴¹ “Corporate Profile,” Xstrata plc, p. 3, available at http://www.xstrata.com/assets/pdf/xcu_brochure_200804.en.pdf.

- ConocoPhillips committed to obtaining agreement before any operations in Peru, but not as a general policy: “ConocoPhillips, in compliance with Peruvian government expectations and regulations, enters into a written agreement, called a “convenio” with each community. The “convenio” documents the consent of the community and details the compensation agreed to for disruptions in land-use or activities caused by the seismic operations.”¹⁴²

Other companies refer to the standards or principles found in ILO Convention No. 169 which upholds the principle of consent but, at the same time, allows the government to resettle indigenous peoples without consent if it follows appropriate procedures set forth in national law.¹⁴³

- BG states: “We have regard to the principles of ILO Convention No. 169 on Indigenous and Tribal Peoples, wherever our operations may impact the human rights of indigenous peoples.”¹⁴⁴
- De Beers notes that its policy, “consequently meets and exceeds major international requirements relating to the rights of local communities and indigenous peoples like ILO Convention

No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples.”¹⁴⁵

- ExxonMobil claims, “Our approach is consistent with the principles of the ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, the United Nations Declaration on the Rights of Indigenous Peoples, and the World Bank Operational Policy and Bank Procedure on Indigenous Peoples. When addressing the concerns of indigenous communities, we seek to develop and implement focused engagement activities respecting their traditions and cultures, such as subsistence lifestyles.”¹⁴⁶

Several companies use language drawn from the IFC Performance Standards, which arguably are less demanding than a consent policy.

- Newmont uses language regarding “broad community support” rather than consent: “Newmont acknowledges that achieving broad community support for its projects is critical to our business success and to our ability to live up to our commitment to sustainable development...we believe consultation

¹⁴² “Peru: Integrating Sustainable Development,” ConocoPhillips Company, <http://www.conocophillips.com/EN/susdev/ourapproach/peru/Pages/index.aspx>. A number of companies, including Talisman, interpret Peruvian law to require the consent of affected communities before activities can begin.

¹⁴³ “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 No. 169, *supra* note 13, Art. 16.2.

¹⁴⁴ “Human Rights policy,” BG Group, available at <http://www.bg-group.com/sustainability/Policies/Pages/HumanRightspolicy.aspx>.

¹⁴⁵ “Engaging with communities,” De Beers, available at <http://www.debeersgroup.com/en/Sustainability/Communities/Engaging-with-communities/>

¹⁴⁶ “Community Relations Management,” Exxon Mobil, available at http://www.exxonmobil.com/Corporate/community_rights_mgmt.aspx [hereinafter “Exxon Community Relations Management”].

should occur freely and voluntarily.”¹⁴⁷

- ExxonMobil states: “We respect property rights in the countries where we operate. Only with the free, prior, and informed consultation of impacted communities will we implement new operations.”¹⁴⁸
- Statoil simply states that it recognizes the rights of indigenous peoples – which could be interpreted in a number of ways.

(2) The Timing of Consent

Few of the company policies examined specify at what point the companies seek consent. It is unclear whether these policies intend for consent to be obtained before exploration begins, or contemplate seeking consent at a later phase.

At least two companies suggest that they will seek consent when there is impact. Occidental states that it “is also committed to consulting with, and seeking the pre-approval of, any legitimate local communities affected by its business operations.”¹⁴⁹

De Beers’s policy suggests that it will seek free and informed consent prior to “significant mining operations” that will have a “substantial impact.”¹⁵⁰ The De Beers policy aligns with the Inter-American Court’s interpretation of when consent processes should occur for development projects – when there is substantial or major impact. It is likely that the company does not

consider the early exploration phase to have “substantial impact,” so consent would apply later in the process. De Beers Canada has maintained the De Beers consent policy but added another policy that calls for “seeking free, prior, informed consultation with a community prior to commencing exploration activities.”¹⁵¹ This latter policy implies that consultation applies before exploration, while the consent requirement applies sometime after exploration begins.

(3) Policies on Resettlement

It is likely that a policy stating that a company seeks consent for substantial impacts implicitly includes FPIC for resettlement. Nevertheless, the report separately analyzes the resettlement policies of the seventeen companies because of the emphasis that responsible investors are now placing on this issue, as well as the specific discussion of consent for resettlement in ILO Convention No. 169.

Half of the companies have publicly available policies or statements on the resettlement of indigenous peoples or communities more broadly. Six companies said they adhered to the World Bank/IFC standards on involuntary resettlement or used the IFC’s language requiring consultation and compensation. Two companies have policies that claim their practices meet the standards on resettlement found in the Declaration on the Rights of Indigenous Peoples, which require the informed consent of indigenous peoples

¹⁴⁷ “Beyond the Mine: Free, Prior, and Informed Consultation,” Newmont Mining Corporation (2008), p. 83.

¹⁴⁸ “Exxon Community relations management,” *supra* note 146.

¹⁴⁹ “Occidental Human Rights Policy,” *supra* note 140, ¶ B.4.

¹⁵⁰ “Community Policy,” De Beers Canada (September 2007).

¹⁵¹ “Community Policy,” De Beers Canada (September 2007).

before resettlement can occur, as well as just compensation. One company noted that it met internationally recognized standards for resettlement without defining which standards it considered to be internationally recognized.

(B) Verbal Statements and Confidential Implementation Guidelines

Consideration was also given to the implications of documents and statements that are less likely to subject the company to legal and social risk. These include public statements that are spoken rather than written, as well as implementation guidelines that were shared with the authors on a confidential basis. Both of these create reduced legal risk for the company because they are less likely to be cited to by stakeholder groups or form the basis of a false advertising or unfair competition lawsuit.¹⁵² In essence, they are less binding on the company. One could, therefore, view their contents as more aspirational in nature, or as an indicator of where the company may move after it is confident it can live up to the standard.

Some of the confidential implementation guidelines contain a consent requirement, even though the companies' publicly available policies do not. The guidelines do not constitute a large enough sample to establish a trend, but suggest that some companies might, on a practical level, be moving toward a consent requirement, while not wanting

to be held to it publicly. In a few instances, the companies do not have a public consent requirement for their projects, but company representatives stated in confidential conversations that they operate on the principle that they need consent.

Public statements also indicate that some companies are going further than their policies. Anglo-American's policy refers to consent only in the case of resettlement. Its Chairman, Sir Mark Moody-Stuart, recently made a public statement to investors in which he suggested that the company sometimes looks for consent for projects: "In many cases we actually need formal consent of the communities in one form or another," and noted that "often a formal process of acceptance by the community is necessary."¹⁵³ Anglo-American's annual report points to a number of instances in which it did not develop a concession or part of a concession because a community did not consent to its presence.¹⁵⁴ For instance, Anglo-American has decided not to explore one section of its Manmanok exploration lease in the Cordillera region of the Philippines because it did not receive "broad community support" from the indigenous groups in that area. They are exploring other parts of the concession because they received free prior informed consent from 52 out of 54 representatives of two other indigenous groups, as well as the support of the municipality and four districts.¹⁵⁵

¹⁵² Confidential guidelines are not available to the public, and therefore cannot mislead consumers as to the company's practices, which is the basis for a false advertising or unfair competition suit. Verbal statements might still lead to claims of false advertising or unfair competition, but in practice, it seems that they less often form the basis for lawsuits. Verbal statements also may reveal more about the direction the company is heading or its aspirations because executives sometimes speak spontaneously.

¹⁵³ Sir Mark Moody Stuart, Live webcast to the responsible investor community, Anglo-American plc (3 June 2009), available at <http://www.angloamerican.co.uk/>.

¹⁵⁴ "Anglo-American Report to Society," *supra* note 101.

¹⁵⁵ "Anglo-American Report to Society," *supra* note 101.

The ongoing development of implementation guidance on indigenous issues suggests that concerns about indigenous peoples and their engagement or consent are high on corporate agendas. A number of companies, including Anglo-American and De Beers, are in the process of designing detailed implementation guidance on indigenous peoples. These are likely to address informed consent or the engagement process. Additionally, the ICMM is about to produce good practice guidelines on engaging with indigenous peoples.

In addition to Anglo-American, a few other companies that do not have consent policies have walked away from projects when they were unable to gain consent. For example, Gazprom stopped its exploration in the Yamal-Nenets autonomous district in Russia after the Russian Association of People of the North (“RAIPON”) commissioned several academic experts to carry out an ethnological study that concluded that the project would have negative effects on the community.¹⁵⁶ BG’s annual report implies that it may in some instances feel obligated to obtain consent for its drilling activities.¹⁵⁷ It appears that companies are applying the principle of informed consent in at least some instances in developing and developed countries.

(C) Emerging Expectations of Responsible Investors

The EIRIS research discussed above provides insight into the criteria that responsible investors utilize to examine company policies and practices on indigenous peoples. To achieve a good or advanced level rating from EIRIS, which signifies that the company is adequately managing risk and potential opportunities, companies must have a consent policy.¹⁵⁸

EIRIS treats resettlement policies for indigenous peoples distinctly from general consent policies. To achieve a limited or intermediate rating for resettlement policies, which means the company is not adequately managing the risks and potential opportunities arising from resettlement, the company must have a commitment to the World Bank Operational Directive on Involuntary Resettlement, which includes a requirement of free, prior, informed consultation and a requirement of compensation. To achieve a rating of good or advanced, the company must publicly acknowledge its commitment to Article 10 of the U.N. Declaration on the Rights of Indigenous Peoples, which requires FPIC for the relocation of indigenous peoples and requires their agreement on fair compensation. Alternatively, a company can achieve a rating of good or advanced if it has

¹⁵⁶ *Report of the International Workshop on Methodologies regarding Free, Prior, Informed Consent and Indigenous Peoples*, supra note 73.

¹⁵⁷ In a section entitled, “K’ahsho Got’ine Lands Corp: negotiations to permit our drilling,” BG discusses pre-drilling negotiations with the local indigenous community. See also “Sustainability Report,” BG (2008), available at http://resourcecentre.blacksunplc.com/download/bg_group_sr_2008/sustainability_report_2008.pdf.

¹⁵⁸ This information is contained in personal correspondence on file with the authors.

a policy that states it will obtain the consent of indigenous peoples before resettlement, that indigenous peoples will not be moved except as an extraordinary measure, and that they will be compensated.

The increased focus of responsible investors on indigenous consent and resettlement provides an incentive for companies to develop publicly available policies that will meet the expectations of investors.

V. Opportunities and Challenges of Seeking Consent

For many years, indigenous groups have demanded that extractive companies seek FPIC for their projects. Very few companies, however, have made explicit public commitments to obtain the consent of indigenous peoples to development projects – although some have verbally stated the importance of gaining consent, or included consent as a requirement in their internal protocols. The issue of consent is still highly contentious for many companies. This section delves into the hypothetical benefits and challenges of a company-wide policy that adheres to FPIC principles. Given the limited experience of the oil and gas sector with FPIC, however, it is difficult to gauge all of the challenges and benefits that companies adopting a FPIC policy will encounter.

(A) Operations and Social License to Operate

(1) Company Relationships with Indigenous Groups

The most obvious risk of a policy to seek the consent of indigenous peoples is that the indigenous community might exercise its

right to say “no” to a development project. Companies have walked away from extractive projects because communities were opposed to their presence, and the companies feared they would not be able to operate effectively. The more profitable the opportunity, the more difficult it is for companies to walk away. In practice, experience suggests that when companies carry out careful, genuine engagement processes, communities rarely withhold consent. The risk that they will deny consent, however, remains.

On the other hand, a corporate policy establishing a requirement of indigenous peoples’ FPIC, and supported by operating guidelines based on best community engagement practices, could increase the likelihood that the company would be granted a social license to operate and would be able to maintain it. Historically, companies have sometimes gained their social licenses to operate through robust community engagement practices, without an overt policy on community consent. The Declaration on the Rights of Indigenous Peoples, however, may cause a shift in the expectations of indigenous peoples and lead them to increasingly expect and demand that companies seek their consent. This is particularly likely to be true in countries whose governments voted for the Declaration in the U.N. General Assembly.

A consent policy could help the company gain credibility in regions where the relationship between indigenous peoples and extractive companies or the government has been badly damaged. In areas where irresponsible extractive activities have caused severe environmental or social damage, and indigenous peoples have had little voice regarding development projects affecting

them, indigenous groups are likely to distrust extractive companies. The relationship dynamics between the company and indigenous people in such instances need, in essence, to be reset. A well-communicated and implemented consent process could help distinguish the company from those that have come before it, which may have promised to consult or engage with the community but delivered disappointing results. Communities might perceive a significant difference between companies that promised to consult with them, but failed to do so, and a company that promises to let them say no to a development project, and supports credible processes for that decision-making process.

At the same time, consent may create little improvement in the company's social license to operate in countries in which the company already has a robust engagement process in place. Additionally, it is possible that indigenous community expectations will differ in countries whose governments voted against the Declaration, such as the U.S. and Canada. In these countries, the government has not promised to support FPIC, so indigenous people have a more limited ability to argue that the company should be carrying out a FPIC process – at least until it becomes a more established principle of international law. Furthermore, the countries that did not vote for the Declaration have fairly developed systems to protect indigenous rights, and indigenous people already are

able to vindicate many of their rights through the judicial system, which may somewhat diminish calls for companies to seek consent. In such instances, a consent process might add time and complexity to the process without substantially improving the company's license to operate.

Gaining consent requires a significant outlay of company time and resources. The cost of gaining consent, however, is almost undoubtedly significantly less than the cost of losing the company's social license to operate. Newmont's Yanacocha mine in Peru is one of the best known examples of what can happen when communities are not consulted regarding contentious projects and do not give their consent to a project. Newmont faced many days of operational stoppages, leading to an estimated \$1.69 billion dollars cost due to project delays.¹⁵⁹ Further, bowing to overwhelming community pressure, the company was forced to agree to never develop the Quilish Mine, worth an estimated \$2.23 billion.¹⁶⁰ Indeed, the company eventually asked the government to revoke its permit to explore Quilish.¹⁶¹ This experience clearly provoked change within Newmont, which is currently participating in one of the most extensive stakeholder engagement processes ever undertaken at its Akyem mine in Ghana.¹⁶²

The costs of having operations shut down or losing access to a concession are very high.

¹⁵⁹ Herz et al., *supra* note 64. This example is also discussed in Kirk Herbertson, Maria Athena Ballesteros, Robert Goodland, Isabel Munilla, "Breaking Ground: Engaging Communities in Extractive and Infrastructure Projects," WRI (2009), available at http://pdf.wri.org/breaking_ground_engaging_communities.pdf.

¹⁶⁰ Herz et al., *supra* note 64.

¹⁶¹ Herz et al., *supra* note 64.

¹⁶² The Akyem mine is still controversial among Ghanaian environmentalists but reportedly has managed to gain a significantly larger share of community support than it initially enjoyed.

In contrast, the cost of a robust community engagement process is comparatively low, and probably often would be similar to the cost of a consent process, although this would depend in part on the size and complexity of the communities involved. The community engagement process for Shell's Malampaya natural gas project in the Philippines cost approximately \$6 million, compared to total project costs of \$ 4.5 billion.¹⁶³ An experienced company manager estimated the costs for the process of gaining community agreement at the beginning of a specific controversial and extremely large mining project in a densely populated area to be approximately \$ 1.5 – 2 million per year. The manager noted that in a less densely populated area, or for a smaller project, the costs might be significantly less.

It is difficult to judge exactly what the benefits and challenges of a consent policy would be for an oil and gas company because there is so little experience with seeking to implement FPIC principles in the sector. The relatively few examples of companies seeking and obtaining consent come primarily from the mining sector, but it is not clear that the experiences of mining companies translate easily to the oil and gas sector. The process and costs of gaining consent, for example, are likely to be different for the oil and gas sector. Early exploration activities such as seismic testing are unlikely to lead to more permanent operations. In sites that have not previously been explored, which are often located in the developing world, the probability of exploration leading to a find is very low – approximately 45%. Although a few mining companies arguably have sought

consent at the exploration phase, it is difficult for oil and gas companies to justify the costs of securing consent at such an early stage, as it is more likely than not that the company will not find any oil or gas, and the impacts of activities such as seismic tests are relatively short-lived. On the other hand, if the company does not gain community consent to the exploration phase, it could set a tone that will make gaining community consent more challenging if the company moves on to the operational phase.

A policy to seek FPIC might shift the power dynamics between the company and communities. Companies that publicly state that they require indigenous peoples' consent before they pursue an activity might face a different negotiating environment with communities. The company, in theory, would have a weak bargaining position, and communities could ask for far more benefits than they ordinarily request. Some company representatives noted that in places such as Canada, where companies are sometimes required to develop impact benefit agreements with indigenous communities, indigenous groups effectively bargain for considerable economic benefits from the company. The benefits accruing to the indigenous communities in such situations typically are not unreasonable – in fact, such increased benefits are a predictable result of equitable bargaining positions – but they suggest that a consent policy could increase companies' financial costs beyond those that would accrue from a robust community engagement process. In instances where communities in a particular area would be satisfied with a robust community

¹⁶³ Herz et al., *supra* note 64. See also Herbertson et al., *supra* note 159.

engagement process and would not demand that the company seek their consent, the company would create an additional hurdle for itself without necessarily obtaining a firmer social license to operate than its peers.

(2) Intra and Inter-Group Dynamics

Seeking FPIC could have unintended effects on local power relationships that could create operational risk. The power dynamics of indigenous groups and their representatives can be difficult for companies to decipher. The entry of a new player, such as a multinational company, might change those dynamics which, in turn, could lead to conflict within the indigenous community that eventually affects the company as well. New leaders may emerge who seek to gain power or resources from the company's presence. On the other hand, the new leadership may represent a legitimate split in opinion among the community. These power dynamics shift control and power among the indigenous communities, which can in turn lead to conflict, as well as confusion for the company. A FPIC process requires that a decision be made regarding who can speak for the community and what processes should be followed, which could further exacerbate nascent conflicts.

A FPIC policy could also affect relations between indigenous and non-indigenous communities and, in so doing, increase the company's operational risk. Company representatives and some human rights experts have expressed concern that non-indigenous groups perceive FPIC policies as providing indigenous communities with special treatment, thus heightening inter-group tensions, particularly in areas where

the two groups are interspersed. For example, in Canada, the law already provides some extra protection for indigenous peoples in the context of resource development. This causes companies to negotiate differently with indigenous peoples, and often leads to greater economic benefits for indigenous populations. This has prompted complaints from some non-indigenous people who would like to go through the same negotiation process and receive equivalent economic benefits. It is possible that formally stating that the company will obtain consent from indigenous peoples could exacerbate such tensions, especially as a consent policy would likely further improve the negotiating position of the indigenous community. Yet it has also been argued that it is better for companies to be transparent about the different types of consultation they carry out with different groups, as this removes the appearance of secrecy and allows concerns to be aired.

Companies may be able to address the risk that non-indigenous groups will feel they are treated unequally in two ways. First, in all cases, they should undertake a significant engagement process with affected non-indigenous groups, and ensure that mutually agreed-upon benefits accrue to them. Second, they could also seek the formal consent of the non-indigenous population. This option would be particularly appropriate where non-indigenous groups are especially vulnerable for various historical reasons. Seeking consent from all groups, indigenous and non-indigenous, is most likely to alleviate social tensions and lower the risk of regulatory challenges from those who feel that they were treated unequally, but it would raise costs, in terms of time and money, for the company, at least in the short-term.

(B) Market Access

The attitude of the host government might significantly affect whether seeking FPIC creates more or less regulatory risk for companies, depending on how the government balances the rights of indigenous peoples with the desire to develop natural resources as rapidly as possible.

Respecting the principle of FPIC could help a company gain access to markets in States that are committed to the rights of indigenous people or have a sizeable and vocal indigenous community. Strong records of negotiating effectively and respectfully with indigenous peoples could serve as an indicator that the company is less likely to provoke protests akin to those that indigenous groups in Peru recently launched. A formal consent process may provide a more measurable marker than an engagement process. Additionally, as countries begin to incorporate FPIC into their statutes and case law, their governments may favor companies that already know how to effectively engage in the process of gaining consent from indigenous peoples. In fact, one company noted that a Canadian provincial government preferred working with it rather than its peers because the government knew that the company had a consent requirement and would have to establish a positive working relationship with the community. In short, a company that has policies and processes in place to obtain FPIC might prove less likely to cause internal

conflicts and may be deemed a better long-term business partner for governments.

If a government places a premium solely on developing natural resources as rapidly as possible, the company may have difficulty accessing that country market. Government decision-makers may fear that the company will fail to get consent, and therefore not develop the concession. Such decision-makers might turn to companies that are more certain to develop the concession, possibly at a faster rate, even though such companies may be less able to maintain their social license to operate in the long run.

Some companies expressed concern that they might damage their relations with host governments by appearing to undermine State sovereignty through the adoption of a FPIC policy and process. Although most governments voted for the Declaration on the Rights of Indigenous Peoples, such support does not always indicate a willingness to implement the Declaration. Governments generally maintain that they control the subsurface minerals for the good of the population as a whole. When a company seeks the consent of indigenous peoples, that act could be viewed as undermining the government's position. In fact, the position that a State can, entirely at its own discretion, hand out concessions to resources on the lands of indigenous peoples is not in alignment with the recent decisions of human rights courts.¹⁶⁴ In such a context, the company would be left to deal with a conflict

¹⁶⁴ The State's position may conflict with recent decisions of the Inter-American Court, which indicate that indigenous peoples' rights to their traditional lands include the natural resources on them. The State can in some instances limit those property rights, but for concessions that will have a major impact on the indigenous peoples' property rights, it must obtain FPIC. *Case of the Saramaka People*.

between national laws and international human rights standards. Additionally, in some instances, national law provides for engagement or consent processes that the government is supposed to conduct with indigenous peoples. If the company were to conduct its own consent process, this could be construed as indicating that the government's process is not perceived to be of sufficient quality.

Whether these problems arise depends in part on how the company discusses the topic with the government. If the company presents the process to the government as a means of securing a social license to operate and of maintaining a positive and peaceful presence in the country, it is less unlikely that the government will be opposed. On the other hand, if local or provincial officials were eager simply to see local resources developed as expeditiously as possible, presumably enhancing the tax base and the government's power, they might grow frustrated with company policies that could slow that process or potentially lead to a conclusion in which the concession was not developed at all.

Finally, seeking FPIC creates a risk that communities will reject projects, and companies will lose access to valuable concessions. This is a concern that underlies many companies' resistance to adopting a consent policy. Companies have addressed instances where they did not obtain a social license to operate in a variety of manners, including agreeing to not develop the areas of their concessions in which they did not receive community support. Such an approach might help mitigate this particular risk.

(C) Regulatory Issues

A policy on FPIC could help or hinder a company's navigation through the regulatory system, depending on the government's attitude toward indigenous peoples and development. In theory, in light of the support of many governments for the Declaration, a company that seeks FPIC should find it easier to pass regulatory hurdles. From the perspective of government regulatory bodies, a company that has gained FPIC through a documented process has almost surely met any legally imposed engagement requirements. Over time, it could become known that the company regularly not only meets regulatory requirements, but goes beyond them, leading regulators to trust the company and expedite the process. Seeking FPIC through a robust procedure also would likely minimize indigenous community complaints about the process.

On the other hand, gaining FPIC could require extra time and steps that are not legally mandated. This could cause regulators to feel that the company requires extra attention or review time, worsening the company's relationship with the regulators. The company also could face challenges meeting its regulatory deadlines.

It has been argued that in certain conditions, the company's ability to meet its regulatory obligations could face specific roadblocks. For example, non-indigenous people located near the proposed project site could challenge the process that the company pursued and seek to block permitting for the company unless they receive the same treatment as the indigenous communities, leading to more problematic relations with regulators.

Identifying indigenous groups and their decision-making processes is another significant challenge. Different indigenous groups might dispute who has traditionally lived on the land or uses it seasonally. This could make the company path forward dependent on the resolution of legal disputes, where indigenous peoples are able to utilize the court system to settle their disputes, or it could force the company to become the arbiter of such disputes where the court system is not able to effectively resolve such disputes.

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. In some countries, the laws fail to protect indigenous rights, including traditional land rights. In other countries, particularly those that have ratified ILO Convention No. 169, the law protects indigenous rights to be consulted or consent to some degree, but not to the same extent that the more recent Declaration indicates. Laws and regulations on engagement or consent processes in these countries are often imperfectly implemented. Finally, several governments that have not ratified ILO Declaration No. 169 and that opposed the Declaration

have, over many years, developed their own complex systems for addressing indigenous rights. These systems and legal doctrine are still evolving to further protect indigenous rights, but they do not typically center on the principle of “consent.”¹⁶⁵ 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.

(D) Legal Risk

Gaining indigenous consent now, even if it is not required by law, might reduce future legal risk. It would, for example, protect companies if the law evolves to incorporate FPIC and is applied retroactively – which is more likely in countries that voted for the Declaration. The law could evolve through court decisions that interpret existing statutes in light of evolving international legal standards or it could change due to statutory developments. Alternatively, the legal rights applied to companies that did not gain FPIC could change in the host country if a populist president who garners votes from indigenous peoples were to come into power. The Declaration on the Rights of Indigenous Peoples calls strongly for redress and restitution where land was taken from

¹⁶⁵ For instance, a number of provincial governments in Canada are moving towards Revenue Sharing Agreement requirements for the mining sector. These require that aboriginal communities receive benefits from mining and compensation for impacts, but they do not explicitly require that companies, on behalf of the Crown, gain the FPIC of the communities. It could be argued that they implicitly require consent, as the project typically cannot proceed without the signing of the Impact-Benefit Agreement. Sam Adkins, Thomas F. Isaac, Robert J. Miller, Kristyn Annis, “Canada: Recent Developments in Resource Sharing with First Nations,” (30 July 2009), available at <http://mondaw.com/article.asp?articleid=83780&rss=7&print=1>.

indigenous peoples without their FPIC.¹⁶⁶ Companies are likely to bear some of that burden as countries start to implement the Declaration unless they can demonstrate that they obtained the consent of affected indigenous peoples.¹⁶⁷

A fairly recent court case in South Africa demonstrates the risk of courts retroactively applying the principle of consent. The Richtersveld community brought a claim against the State and the company Alexkor for the restitution of its land, which the state had given as a concession to Alexkor, a diamond mining company. The State had forcibly removed the Richtersveld people in the 1920s. The South African Constitutional Court found that the Richtersveld people had a “right of communal ownership under indigenous law.”¹⁶⁸ The Court noted that the law that dispossessed the Richtersveld Community of its land had discriminatory impacts because of its “failure to recognise and accord protection to indigenous law ownership while, on the other hand, according protection to registered title. The inevitable impact of this differential treatment was racial discrimination against the Richtersveld Community which caused it to be dispossessed of its land rights.”¹⁶⁹ The

court returned the land to the Richtersveld Community and the Community obtained a 49% stake in the company.¹⁷⁰ Although the ruling was based on interpretations of South African law and did not draw on international standards, it exemplifies how changing social understandings of the customary land rights of indigenous peoples can have very real and retroactive impacts on companies that have concessions to use formerly indigenous land.

Rio Tinto’s Argyle Diamonds sought the consent of indigenous communities partly due to what it viewed as inevitable changes in the law. Argyle Diamonds sought and obtained the consent of impacted indigenous groups after it had been operating for years even though it was not legally required to do so at the time. Argyle Diamonds observed changes in the legal system that suggested that “a native title legal claim by Traditional Owners was inevitable – and best anticipated by Argyle Diamonds initiating direct dialogue to address differences in a constructive manner.”¹⁷¹ Legal trends of the sort witnessed in Australia and South Africa are unlikely to abate.

FPIC is unlikely to create significant legal risk for a company. It is possible that a non-

¹⁶⁶ “Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.” U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 12, Art. 28.1.

¹⁶⁷ Indigenous people are less likely to sue the company if they helped define their relationship with the company and are satisfied with that relationship.

¹⁶⁸ *Alexkor Ltd. and Another v. Richtersveld Community and Others*, (CCT19/03) ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 Oct. 2003), ¶ 62, available at <http://www.saflii.org/za/cases/ZACC/2003/18.html>.

¹⁶⁹ *Alexkor Ltd. and Another v. Richtersveld Community and Others*, (CCT19/03) ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 Oct. 2003), ¶ 99, available at <http://www.saflii.org/za/cases/ZACC/2003/18.html>.

¹⁷⁰ The South African government helped pay for the community’s acquisition of part of the company, which presumably lessened the impact on the company.

¹⁷¹ “The Argyle Participation Agreement: Breaking New Ground,” *supra* note 65, p. 11.

indigenous person could sue the company, claiming that the company is discriminating against non-indigenous people, especially when local indigenous community members are officially favored or given a quota in company hiring practices. There have been no reports of anyone bringing this type of lawsuit however, and its viability would depend on the national legal framework. National courts might look to the decisions of the Inter-American Court of Human Rights, which have not supported such arguments.¹⁷²

In a worst case scenario, the company could be sued under a false advertising and unfair competition theory for failing to live up to its CSR policy, although very few cases have been brought under this theory and none successfully.¹⁷³ As long as the company's statements about its processes are accurate and phrased in aspirational language, the risk of such a lawsuit is limited. For instance, a company that claims "it makes best faith efforts to attain FPIC" or will "seek FPIC" and, in fact, does make such efforts would be less legally vulnerable than a company that claims "it will obtain FPIC." This is because it is easier to demonstrate that the company made efforts to attain consent than to demonstrate that it in fact attained consent,

given the lack of agreement regarding how to verify consent. The risk of such lawsuits highlights the importance of drafting company policies carefully, and only making claims that the company can demonstrate it fully meets. Extraordinary circumstances could also preclude the company from obtaining consent. For instance, a government could threaten to take away a concession if Talisman proceeded with a formal consent process, or the indigenous community could be in the midst of an internal conflict that makes it impossible to engage in a political process.

(E) Reputational Risk

An oil and gas company that adopts and implements a FPIC policy would establish itself as a leader in the area of indigenous rights. Only one international oil and gas company currently has an official consent policy.¹⁷⁴ The principle of consent has made slightly greater headway among mining companies, several of which have adopted FPIC principles in policy or practice, at least for some projects. Presumably, it would enhance the company's reputation among NGOs and some governments, as well as indigenous people themselves. This would

¹⁷² "[T]he State's argument that it would be discriminatory to pass legislation that recognizes communal forms of land ownership is also without merit. It is a well-established principle of international law that unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination. Legislation that recognizes said differences is therefore not necessarily discriminatory. In the context of members of indigenous and tribal peoples, this Court has already stated that special measures are necessary in order to ensure their survival in accordance with their traditions and customs (*supra* paras. 78-86, 91, and 96)." *Case of the Saramaka People*, ¶ 103.

¹⁷³ In *Kasky v. Nike*, 539 U.S. 654 (2003), a consumer activist argued that Nike's press releases, letters to newspapers, and letters to university presidents and athletic directors contained factual information that was false and violated the Unfair Competition Law and False Advertising Law. For example, the company claimed that its workers abroad worked in conditions that were in compliance with local safety laws, when a number of reports indicated that this was not always the case. The case settled. California's laws on standing were later changed to make it more difficult to bring such cases.

¹⁷⁴ Occidental's policy contains language regarding consent: "To the extent consistent with the laws of the applicable jurisdiction, Occidental is also committed to consulting with, and seeking the pre-approval of, any legitimate local communities affected by its business operations in order to minimize potential negative impacts on such communities as well as its operations." "Occidental Human Rights Policy," *supra* note 140, ¶ B.4.

in turn increase the company's ability to interact positively with NGOs and responsible investors, and should help shield the company from NGO campaigns, boycotts, and adverse shareholder resolutions.

There is a risk, however, that adopting a consent policy may not provide strong reputational protection. The company might create risk by claiming to be more progressive than its peers. When a company claims to be performing at a particularly high standard, responsible investors and NGOs are likely to notice any aberrant behavior. A higher standard makes the company more noticeable, and it will be more apparent if the company falls short of its own policies.

Furthermore, there are definitional questions that may diminish the benefits accruing to a company that seeks community agreement based on FPIC principles. Although such a policy would support positive relations with many members of civil society, the company could nevertheless be publicly critiqued if it does not implement FPIC principles in the precise manner that interested parties consider preferable. So few companies or governments have implemented FPIC that there is still considerable room for disagreement regarding its meaning and practical fulfillment.

For example, at what stage is consent

sufficiently "prior?" Evolving international legal standards indicate that States should obtain consent prior to awarding concessions – although the Inter-American Court's interpretation requires States to seek consent for activities with major impacts. The meaning of "prior" in a company context needs clarification, and is likely to differ from its meaning for States. In the meantime, this ambiguity in meaning creates a risk that companies that seek and obtain consent in good faith will still be criticized because the State awarded the concession without obtaining consent.

Similarly, the company and third parties may have different perspectives regarding who represents the affected indigenous community. Should the company consult with the local indigenous representative organizations whose members are likely to be affected by the project, or should the highest-level umbrella federation be consulted, even though many of its members are unlikely to feel the effects of the project, and may even reside in a separate country? Guidance on this point is limited, in part because the Declaration is still new, and its text contains ambiguities that governments and courts have not yet clarified.¹⁷⁵

Additionally, some aspects of FPIC principles are and probably will always be difficult to implement. Identifying "legitimate"

¹⁷⁵ The U.N. Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people said the following when the Declaration was adopted: "Indigenous peoples' ancestral lands and territories constitute the bases of their collective existence, of their cultures and of their spirituality. The Declaration affirms this close relationship, in the framework of their right, as peoples, to self-determination in the framework of the States in which they live." Press Release, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Adoption of Declaration on Rights of Indigenous Peoples a historic moment for human rights, UN Expert says (14 Sept. 2007), available at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/2F9532F220D85BD1C125735600493F0B?opendocument>. This statement suggests that the right to self-determination is enjoyed within national frameworks rather than across international borders. Therefore, it seems unlikely that the Declaration will be interpreted to require the consent of transborder indigenous peoples umbrella organizations. It seems unlikely that a State would seek the FPIC of indigenous groups not within its territory, particularly as this might cause conflicts with neighboring States. If States are unlikely to be required to gain the permission of indigenous organizations that cross national borders, it follows that companies should not be expected to do so, either.

representative organizations is a continuous challenge. The company and civil society may disagree on which are legitimate. The choice of a particular representative organization in turn can affect whether the community gives consent and on what terms. In some geographic areas, the membership and representativeness of organizations frequently change due to shifts in local politics and allegiances. A company, however well-meaning, runs the risk of “getting it wrong” in the eyes of civil society or the local community.

Similarly, companies face considerable difficulty in defining an acceptable standard of consent in their policies. Civil society and various international guidelines posit an expectation that consent will be attained via traditional decision-making structures. The ways that communities make decisions will vary even within a single project area. This makes it difficult for companies to have a one-size-fits all approach to consent. Furthermore, the traditional process may be seen as illegitimate by some external groups or members of the community, meaning that companies may still be criticized despite their best efforts.

Additionally, expectation management is always a challenge. The company could inadvertently create false expectations within a community if it were to implement a consent process before it knew whether there was oil or gas on the land. In many instances, communities perceive the arrival of a multinational oil and gas company as the harbinger of future wealth. If the company discusses the development that might occur

if it proceeds to the operations phase, communities might start to plan with that future in mind.

This problem is not peculiar to indigenous peoples or developing countries. For example, when land leases for exploration are not utilized in the U.S., and the landowners therefore do not receive money, this can cause significant disappointment among the landowners, who might have made future financial plans based on receiving that money. The problem is exacerbated in communities with lower levels of education, little experience with contracts, and limited knowledge of the oil and gas industry. This particular risk can be managed to some degree if the company reaches out to the community and explains that it is only in the exploration phase, and that it may not find any oil or gas, in which case it will leave. Experience suggests that despite such efforts to create reasonable expectations, and to manage those expectations, communities may nevertheless assume that further oil and gas development will occur, and make financial and other plans accordingly. Such disappointment could damage the company’s reputation with indigenous communities in that country.

(F) Investors

The benefits of consent policies and practices are likely to increase in the future because responsible investors are developing criteria that reward companies that have FPIC policies and can provide evidence that they effectively manage their relations with indigenous peoples. In June 2009,

the Ethical Investment Research Services (“EIRIS”) released a report in which it rated over 250 companies regarding risks linked to their relationships with indigenous peoples. This is noteworthy because EIRIS is one of the largest providers of independent research into the social, environmental, and ethical performance of companies, and provides data to over seventy institutional clients. In the UK, EIRIS clients manage over 60% of UK ethical funds. Along with several other factors, the report looked at whether the company had a policy for FPIC or engagement, as well as whether it had established a policy that forbids involuntary resettlement except for in extraordinary circumstances.

The U.N. Principles on Responsible Investing hosted a meeting in June 2009 focused on corporations and indigenous rights, demonstrating the heightened attention that investors are bringing to this issue. NGOs are also starting to benchmark the policies of extractive companies with respect to indigenous rights.¹⁷⁶ This will bring increased attention to the indigenous policies and approaches of extractive companies and will provide greater rewards to those that employ best practices.

¹⁷⁶ Oxfam America authored a draft report in summer 2009 that critically benchmarks the indigenous policies of extractive companies. “Review of Major Mining, Oil, and Gas Company Policies on Free Prior and Informed Consent and Social License” (September 2009).

VI. Recommendations for Talisman Energy

There are compelling reasons for companies to consider adopting a policy that incorporates FPIC principles. The momentum behind principles governing indigenous rights has increased in recent years, particularly with the U.N. General Assembly's adoption of the Declaration. Although the Declaration is not binding, domestic and regional human rights courts have already begun to reference it in their rulings, and have found that States violated their human rights obligations by handing out concessions without FPIC. Such legal cases create a risk that companies could lose their concessions, even though companies have no direct, legally binding duty under international law to obtain FPIC. These judgments are particularly likely to be applied to countries that voted for the Declaration. In addition, a FPIC policy would help Talisman respect other human rights, such as the rights to food, housing, and cultural life. Furthermore, when combined with other critical aspects of indigenous rights, such as engagement that integrates communities into decision-making, consent may better assure a social license to operate. Finally, a consent standard may provide a competitive advantage to Talisman, as it will better meet the demands of responsible investors for good performance on indigenous rights than a policy based solely on engagement.

At the same time, almost no oil and gas companies have policies that incorporate consent, and consent policies are rare among the mining sector as well. Such policies are almost non-existent in other industries. Given the dearth of company attempts to implement FPIC principles, and the lack of detailed legal guidance, it is difficult to definitively assess how a company could best implement such a policy across a broad range of jurisdictions and cultures, nor is it certain that a consent process would necessarily lead to a stronger social license to operate than a robust engagement process. In some States, particularly those that voted against the Declaration, a consent policy could be inconsistent with laws and regulations, create conflicts with regulators, or limit market access. It will remain uncertain how significant such barriers are until more companies seek consent and share their experiences.

Talisman would be substantially ahead of its peer oil and gas companies if it included FPIC principles as part of its indigenous peoples policy.¹⁷⁷ Such a policy should refer to gaining “community agreement based on FPIC principles” to clarify the fact that some of the terms in FPIC, especially “prior,” may have different meanings for companies than for States.

Given the limited experience of the oil and gas industry with explicitly seeking consent, if Talisman opted to adopt a policy incorporating FPIC principles, it might first pilot it in new ventures in a limited number of jurisdictions. In addition, Talisman would lead its peers if it included sufficient detail in its policy to clarify how and when it would seek FPIC. If Talisman were to adopt a policy incorporating FPIC principles, it should review it in three years

¹⁷⁷ Policy guidance on FPIC principles could instead form part of a community policy. This would be most appropriate if Talisman were to consistently apply the policy to all communities, rather than only indigenous ones.

to ensure that it takes into account more developed legal and industry understandings of FPIC, as they are likely to evolve rapidly.

If Talisman determines that adopting a policy of community agreement based on FPIC principles will help the company to more effectively manage its legal and reputational risks, and differentiate itself from its competition in a favorable manner, it should consider the following recommendations in establishing such a policy.

(A) Scope and Application of FPIC Principles

(1) Policy Recommendations

- If Talisman's policy includes the principles of FPIC, such language should be part of a broader indigenous peoples or community engagement policy.

Seeking community agreement based on FPIC principles is one of a number of practices that a company could adopt that reflect international human rights law as it applies to indigenous peoples and that help companies maintain their social license to operate. Consent is intricately interwoven with consultation and engagement with indigenous communities. Consent only supports a company's social license to operate if it is built on a robust engagement process. 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. This underscores the importance of implementing guidelines that emphasize engagement with the community, and embedding FPIC principles within that process, in locations where the policy of seeking community agreement based on FPIC principles applies.

Language incorporating FPIC principles could also be included as part of a community or human rights policy so that it applies to all communities. The momentum behind FPIC is strongest, however, for impacts affecting indigenous and tribal peoples, as it is a means for addressing historical injustices. Consent processes could be applied to other communities on an ad-hoc basis, as needed to manage operational and social risk.

Ordinarily, if Talisman sought community agreement based on FPIC principles, it would act above and beyond any existing legal requirements that it consult with communities. If, for instance, national laws require the disclosure of less information than Talisman's policy and implementation guidelines, Talisman generally should look to the higher standard. Going beyond minimum legal requirements should not be deeply problematic unless seeking support based on FPIC principles conflicts with national law or regulations, or the State makes it impossible to apply FPIC principles – for instance, by blocking the company's access to the communities, forbidding the company to carry out a consent process, or forcibly resettling communities after giving the company the concession. In such instances, Talisman might not

be able seek support based on FPIC principles.

Talisman should review its policy in three years for a number of reasons. First, FPIC is being incorporated into national and international law and standards, primarily via national court decisions, and this could render Talisman's policy obsolete. Second, it may prove problematic over the long run for Talisman to not implement the policy in only a few countries, as indigenous groups in those countries of operation may question why it does not apply to them, particularly as FPIC becomes more accepted as a global standard.

(2) Implementation Guidelines

- Talisman's due diligence process for new projects should explore potential host State approaches to FPIC, including whether a government's laws or policies conflict directly with FPIC, as well as whether the government seeks consent, and, if so, the process through which it does so.

If the State makes it illegal or impossible to carry out consent processes, or it is likely to forcibly relocate indigenous people in a manner inconsistent with international standards, this creates significant operational, reputational, and legal risk for Talisman, as the company might subsequently be deemed complicit in such violations.

- If Talisman's incorporates the principles of FPIC, Talisman should attempt to include language to allow the cancellation of contracts if Talisman is unable to obtain agreement before going forward with operations.

It is possible that in a country in which Talisman has stated that it will seek community agreement based on FPIC principles before entering the operational phase of a project, Talisman will not be able to get the indigenous community's consent. Talisman should try to negotiate contracts in such countries that allow it to cancel the agreement based on failure to obtain agreement.

(B) Traditional Usage of Land

(1) Policy Recommendations

- Talisman's indigenous peoples or community policy should address indigenous peoples' traditional use of the land, particularly those residing on the land. Such a policy is particularly important in countries that have ratified ILO Convention No. 169 or voted for the Declaration.

Indigenous legal title is often not afforded by national law, particularly in developing countries, either because the law does not recognize communal rights or because indigenous peoples have limited access to or protection from national courts. The livelihoods and cultures of indigenous peoples, nevertheless, are often intimately tied to their land. A number of

Talisman's peer oil and gas companies, as well as mining companies and Talisman itself, engage with people who traditionally use the land in a manner virtually identical to that followed for legal land owners. Addressing this traditional usage enables companies to identify and consult with the people that their activities may affect

(2) Implementation Guidelines

- Talisman's implementation guidelines should emphasize the need to identify customary usage of land, as well as legal title, starting at the exploration phase.
- This information is helpful both for initial engagement and for later consent processes. In countries where Talisman decides to seek community agreement based on FPIC principles, mapping the traditional usage of the land would help identify groups from whom Talisman would seek consent. The research is necessary because indigenous land usage is sometimes not recognized by governments, even where indigenous peoples have used the land for centuries. Identifying the groups whose interests are affected will prove a challenge in some instances. The guidelines should call for mapping that starts before the company begins exploration so the company knows which groups it will encounter. In areas where the relationships between various indigenous groups are complex, Talisman's guidelines would call for the company to hire an expert, such as an anthropologist, who can effectively conduct such mapping. Talisman should seek to design projects so as to avoid the prospect of resettling indigenous people.
- If Talisman's policy incorporates the principles of FPIC, in instances in which a project's design cannot be changed to avoid resettlement, Talisman should seek consent for the resettlement of indigenous people and ensure their just compensation, as outlined by the consent agreement.

ILO Convention No. 169 has long established the principle that indigenous communities should not be resettled without their consent, although it provides an exception when the State follows appropriate national laws to relocate them that include effective representation for indigenous peoples. The Declaration applies FPIC to a broader set of impacts that includes resettlement. Company policies and practices most often support seeking consent in the context of resettlement, as opposed to other impacts on indigenous people, in part because companies have not wanted to risk being regarded as complicit in forced resettlement and any human rights violations that might accompany it, and in part because FPIC was first applied to relocation in ILO Convention No. 169. Forced resettlement can also lead to community unrest and heightened attention from civil society and the media, and thereby negatively impact the company's operational and social risk.

Any FPIC principles-based policy should state that the company will ensure that just compensation is provided when indigenous peoples consent to relocation. The requirement of compensation reflects the Declaration, the IFC Performance Standards, and the policies of a

number of extractive companies, and also addresses the growing expectations of Responsible Investors.

- Talisman should design projects to avoid impacts that would affect the ability of indigenous people to earn a living through their traditional means of livelihood and compensate them for any such impacts that cannot be avoided.
- Talisman should design projects to avoid affecting sites of cultural significance to indigenous groups and should provide for continued access to such sites, even if the project is located in that area.
- Talisman should consider seeking consent from indigenous groups when projects would be located on lands that they traditionally use, and the project would adversely affect their existing means of earning a living, or would impact cultural, ceremonial, or spiritual uses that define the identity and community of the indigenous people.

The application of FPIC to impacts on traditional livelihoods and culturally sacred places is less established, even in the State context, where it is not outlined in any binding hard law instruments. The Declaration, which is non-binding on States and does not appear to directly address companies, suggests that consent is needed when projects take place on traditionally used indigenous lands, which appears to include economic use. Similarly, the Declaration requires redress when cultural or religious property is taken without consent. The European Bank for Reconstruction and Development requires companies to obtain consent for such impacts, hinting at the developing expectations of international financial institutions, as well as civil society.

Arguably, there are practical reasons for seeking consent for activities that significantly affect livelihoods or cultural sites. The loss of an ability to make a living is precisely the type of issue that lead to social unrest and a loss of the company's social license to operate. Similarly, effects on important or sacred sites can cause social upheaval, despite the fact that their value cannot be quantified.

Yet implementing a policy to seek consent for activities with impacts on livelihoods or sites of cultural importance is problematic. The Declaration does not clarify the extent of economic use, nor the degree of cultural significance that a site must have, to trigger the need for consent. Similarly, it is not clear how significant the company's impacts must be on these interests. Including these types of impacts in the policy might significantly expand the number of groups from which the company must obtain consent. Furthermore, until these impacts are better defined, they introduce a significant amount of uncertainty regarding the groups with which the company should obtain consent, which makes implementation challenging.

Talisman would need to consider ways to define economic and cultural usage that would enable it to identify groups whose interests are substantially affected. Given the lack of

external guidance, this may be challenging at the present moment. Talisman should, at a minimum, revisit these issues in three years when it reviews its policy, as at that point in time, courts and other institutions may have provided more guidance.

(C) Free

(1) Policy Recommendations

- If Talisman's policy incorporates the principles of FPIC, Talisman should define "free" to mean that consent is not coerced by actors under Talisman's control or influence in locations where the policy of seeking community agreement based on FPIC principles applies.
- If Talisman adopts the principles of FPIC, the resulting policy should note that Talisman will not proceed with operations in an area where, based on a process agreed upon with the community, a potentially impacted indigenous community rejects the project, or where the company does not have the support of a majority of the community.

The terminology of engaging with indigenous peoples in a manner that makes the process free from coercion is set out in a number of documents, perhaps most notably, the IFC Performance Standards. If a community gives consent, but it is nonetheless perceived that the consent was coerced, the process is likely to create community resentments that could later adversely affect the project.

(2) Implementation Guidelines

- If Talisman decides to seek community agreement based on FPIC principles, Talisman should inform the indigenous communities that the company will not commence specified stages of activities without consent. This information should be in writing in the local language, if possible, and also should be shared verbally.

The implementation guidelines should contain elements to ensure that consent is free. Use of the term "free" implies that Talisman would tell an impacted indigenous community that it will move ahead with the project only if it has the community's consent in locations where the policy of seeking community agreement based on FPIC principles applies. In line with the company policy proposed above, the guidelines should call for this to be communicated to the indigenous peoples in the local language in writing, and orally if some of the community is illiterate.

- If Talisman's policy incorporates the principles of FPIC, the company should not start construction or other operational stage activities until it receives a clear indication of community consent through a process agreed upon with the community.

Starting construction for operational phase activities prior to receiving community agreement would significantly undermine the indigenous community's confidence in the company's statement that it will only operate if it receives consent. Accordingly, it would inhibit the community's belief in its ability to say no to the project.

- Talisman should adjust its timelines to take into account the community's decision-making processes, as well as the time it will take for the community to understand the potential positive and negative impacts of the oil and gas industry.

Indigenous decision-making processes are sometimes slow-moving. To ensure that communities do not later complain that they were forced to prematurely make a decision, Talisman should ensure that its timelines are realistic. Whether, and the extent to which, timelines might need to be adjusted will depend in part on how the community makes decisions, and in part on the community's previous experience with the oil and gas industry. Communities that have had previous, positive experiences with extractive companies are likely to need less time.

- If Talisman's policy incorporates the principles of FPIC, Talisman should consider bringing in a third party observer who can confirm that the process was free from undue influence. This observer would be agreed upon by the company and the community.

In many situations where oil and gas development is controversial, and the company seeks community agreement to its operations, accusations arise that the company used undue influence or coercion to affect the decision-making of the community. Alternatively, some companies have accused civil society groups of similar tactics. Such suspicions damage the engagement process and taint the results. If undue influence is a concern for the company or community, they should agree upon a third party observer who can monitor whether either side is coercing or otherwise unduly influencing parties to the negotiation.

(D) Prior

(1) Policy Recommendations

- If Talisman's policy incorporates the principles of FPIC, Talisman should seek consent prior to activities with "substantial impacts" on indigenous peoples in locations where the policy of seeking community agreement based on FPIC principles applies.

The few legal interpretations of the Declaration indicate that States should seek consent before handing out concessions that will have "major" or "profound" impacts on indigenous communities. By analogy, companies should seek consent before undertaking activities with substantial or major impacts on indigenous groups. As was noted above, this probably means, at a minimum, that Talisman would seek consent for its operational phase. In comparison, exploration activities such as seismic testing have relatively limited and

temporary impacts on communities, although this is contested. Furthermore, a consent process at such an early stage, when there is high probability the company will not proceed to the operations phase, could create unrealistic expectations in the community. The fact that company policies either do not specify when consent should occur or link it to when there are impacts or “substantial impacts” is indicative of the confusion regarding at what stage consent is needed, and perhaps also reflects the practical challenges of implementing a consent process during exploration.

- Talisman should be aware, however, that some civil society organizations are of the view that consent should be obtained before any exploration occurs. Particularly in locations where the relationship between indigenous communities and the extractive sector is particularly poor, Talisman would consider seeking consent for some or all of its exploration activities, which might help improve its relations with the community.
- Talisman should comply with laws that require it to obtain consent for exploration.
- In all instances, prior to and during exploration, and throughout all stages of the project, Talisman should carry out extensive engagement that affects decision-making.
- If Talisman’s policy incorporates the principles of FPIC, during exploration, Talisman should inform communities that they will have the opportunity to provide or refuse consent if exploration is successful and the project is poised to proceed.

Consultation with indigenous communities and disclosure of key information about the company’s activities is a standard that is established in ILO Convention 169, as well as the IFC Performance Standards, and the practices of companies, including Talisman, that want to establish and maintain their social license to operate. Starting to engage at such an early stage is in line with the ICMM Position Statement on Indigenous Peoples and the policies of a number of extractive companies. Furthermore, there is a minimum standard of engagement that applies throughout all stages of company activities through which indigenous communities have an opportunity to help guide the design of the project. In some instances, as the impacts become more significant and enduring, an extra level of community engagement is needed, and companies should seek FPIC. Consulting extensively even before exploration begins would help Talisman obtain its license to operate when it commences exploration and gain consent for later activities, where applicable.

(2) Implementation Guidelines

- If Talisman’s policy incorporates the principles of FPIC, Talisman’s implementation guidelines should define company activities that are likely to generate substantial impacts that would trigger the need for consent before the company undertakes the activities. The written consent agreement with the community should define the activities to which the community agrees and outline what significant new stages of the project would trigger an additional consent process.

There is little authoritative guidance regarding what oil and gas activities trigger the need for companies to seek consent. The limited experience of oil and gas companies also makes it difficult to identify an industry norm. Guidance from the Inter-American Court of Human Rights suggests that States should obtain FPIC for development activities with “major” or “profound” impacts, while De Beers’ policy uses the term “substantial impacts.” Talisman’s implementation guidelines should define what it considers to be “substantial impacts.” For instance, the commencement of the operational phase of the project could create substantial impacts and trigger the need for a consent process. Later on, other substantial impacts that could trigger a new consent process might include, for instance, major and unanticipated changes to the operational phase of the project. Additionally, any plan to relocate indigenous people would require consent.

- If Talisman adopts a policy of seeking community agreement based on FPIC principles, Talisman’s guidelines should highlight for employees that it would be unreasonable to expect indigenous communities to consent to all unspecified future activities, when they have no knowledge of the nature of those activities or their scope.

If Talisman were to gain consent for all future company activities, without specifying what those activities are or their scope, there could subsequently be a backlash, when new, unexpected, and significant project expansions surprise indigenous communities and bring impacts that they had not contemplated.

- If Talisman’s policy incorporates the principles of FPIC, the implementation guidelines should describe a baseline engagement process that Talisman would commence prior to and during exploration, as well as during the consent process and after the communities give consent to the enumerated activities.

The implementation guidelines should note the need for sustained community engagement during the exploration stage and throughout the life of the project in all locations. Engagement should involve a wide spectrum of the indigenous community, and should proceed at the local level via a mix of larger public meetings and smaller engagements.

(E) Informed

(1) Policy Recommendations

- If Talisman adopts a policy of seeking community agreement based on FPIC principles, Talisman’s indigenous peoples or community policy should stipulate that it will seek consent that is informed, where information is shared in a culturally appropriate manner. Such information includes a balanced treatment of potential positive and negative impacts of the project.

If consent is not informed, indigenous people may later feel deceived, which, in turn, could have a significant impact on the company’s license to operate. A number of bodies, including

the ICMM and the IFC, support the principle of sharing information openly with indigenous peoples as part of the engagement process.

The policy should define informed consent to mean that the company will share both potential positive and negative impacts. Historically, companies that failed to share negative impacts also have failed to gain the trust of the community and, in at least one instance, lost the ability to physically access a concession.

It is important that Talisman provide information in a culturally appropriate manner, including utilizing local languages and spoken as well as written media, to ensure that consent is informed. This aligns with the practices of a number of companies, and addresses the realities of some indigenous people, as not all members of the indigenous community necessarily speak the national language or are literate.

- Talisman should commit to sharing information on an ongoing basis.

To ensure that informed consent is maintained, Talisman's indigenous peoples or community policy should commit to keeping the community informed on an ongoing basis in all locations. This helps build trust in the long term, and provides a mechanism for continuing dialogue and exchanges of information.

- If Talisman's policy incorporates the principles of FPIC, before communities give consent, and as early as possible in the process leading to consent, Talisman should inform them of the potential impacts of all stages of the project cycle to the extent that Talisman is able to predict those impacts, even if it is not yet known exactly when some stages will occur.

For communities to be fully informed, they need to understand the implications, positive and negative, of not only the initial operational stage, but also, for instance, the potential impacts of closing down operations.

- If Talisman's policy incorporates the principles of FPIC, Talisman should publicly disclose the process to be used to gain consent, as well as the contents of the agreement containing consent, to the extent that this does not compromise confidential commercial information nor disclose information that the indigenous community wants kept confidential.

Sharing information regarding the process used to gain consent, and the general contours of the agreement achieved with the community, would help build the confidence of third parties in the process and provide it with legitimacy.

(2) Implementation Guidelines

- If Talisman adopts a policy of seeking community agreement based on FPIC principles,

to meet the requirement that consent is informed, Talisman should share information including: the purpose, scope, reversibility, and likely duration of the proposed activity; initial evaluations of the social, economic, environmental, and heritage impacts of the activity; the areas that will be affected; the personnel likely to be involved; the procedures the activity probably will involve; and the legal rights of the community and the company regarding the development project.

If Talisman carries out a consent process before the operational phase of the project, after exploration is well underway, it should have a much better understanding of the scope of the project. Before exploration, if the area has not previously been explored, oil and gas companies do not know if they will find anything, nor what the scale of the find will be, and, therefore, they cannot give the community a reliable forecast of potential company activities. Talisman should share as much of the above information as possible with the community during the exploration phase, but accurate information simply may not be available regarding all of the above issues. Such information is critical, however, for a consent process, and should be available by the operational phase.

- Information should be shared in the local languages. If many community members are illiterate, the information would be shared in community meetings, as well as in writing if possible.
- Information should be shared in a manner that reaches the broader community, rather than only the leadership.

Companies have found that if they only engage with indigenous leaders, information is often not transmitted to the rest of the community. A mix of small and large meetings ensures inclusiveness, and also allows for more in-depth conversations.

- If Talisman's policy incorporates the principles of FPIC, the implementation guidelines should require an evaluation of the capacity building that the indigenous peoples may need to be able to understand technical aspects of the project.

The implementation guidelines should require an evaluation of the capacity building that the indigenous peoples may need to be able to understand technical aspects of the project. Broad-based understanding of a project often helps reduce fear of the unknown. The guidelines should note that, for a decision to be informed, the community members need to be able to envision the activities to which they give consent, which may require training on environmental issues, visual models, or visits to similar sites. Otherwise, the indigenous communities may claim later that their consent was not legitimate, as it was given without adequate information.

- The guidelines should encourage Talisman personnel to include the indigenous community

in the design and implementation of environmental, social, and/or cultural heritage impact assessments.

Participatory assessments better ensure that communities are informed and trust the results of such assessments. Other extractive companies increasingly use such participatory assessments. Such assessments are carried out in a number of ways, including community-only assessment committees or committees composed of stakeholders representing various backgrounds and interests, including those of both the community and company. The community would select several individuals to participate on such impact assessment committees. The effective participation of these individuals may necessitate capacity building or external advice, which is an expectation that Talisman would build into the guidelines. Community members are more likely to trust the results of impact assessments when their friends and neighbors are involved in the collection and evaluation of the information. Additionally, it provides an opportunity for the company and indigenous community to develop a working relationship through a concrete project. Such participatory assessments are especially important in locations where the degree of trust between the community and extractive companies is low.

- The implementation guidelines should suggest the use of participatory monitoring of impacts on the environment, social issues, or heritage interests, or a combination thereof.
- The implementation guidelines should also recommend the use of participatory assessments to identify land use and ecosystem dependency during exploration and later phases. This in turn may help identify communities with which Talisman needs to conduct consent processes, if it adopts a policy that incorporates FPIC principles.

Participatory monitoring is a mechanism that an increasing number of extractive companies are employing globally and is a means through which the community's community agreement based on FPIC principles can be maintained. It provides a way to maintain contact and build trust with the community on an ongoing basis. The community should select the individuals to participate in monitoring activities. The guidelines should allow for the monitoring to be carried out jointly with the company, by the community on its own, or in tandem with other stakeholders. The guidelines should note that, to be effective, the community members may need capacity building.

Although the implementation guidelines should recommend participatory assessment and monitoring, such mechanisms would only be helpful if the community expresses interest in them after Talisman personnel raise the idea. Otherwise, they are unlikely to be effective or meaningful mechanisms for community engagement and the sharing of information.

The implementation guidelines should suggest that arrangements for participatory assessment or monitoring be included in the agreement with the community if they will

be used in the operational phase. Participation in the design or implementation of impact assessments might begin early in the exploration stage, before the community has given formal consent to the company's activities. Any participation in impact assessments or monitoring that will take place after activities such as drilling start, however, likely would be included in the agreement between the company and community. Similarly, if the indigenous community wants to engage in participatory monitoring, the consent agreement between the company and the community should reflect that arrangement.

Capacity building is a critical building block that enables informed consent. Therefore, Talisman's guidelines should address who would receive capacity building, as well as how it will be funded.

- Talisman's implementation guidelines should address the potential need for capacity building for both the indigenous community and company personnel and contractors.
- The guidelines should note that if Talisman provides funding, it would be structured in a transparent manner that preserves community autonomy, while protecting confidential clauses of agreements.
- If Talisman's policy incorporates the principles of FPIC, the guidelines should call for arrangements for ongoing community capacity building, including financial resources, to be included in the consent agreement so that the situation is transparent to all parties and external observers, except where certain commercial clauses are subject to confidentiality.

Capacity building for indigenous communities could include, for example, technical advice and negotiation support prior to the community agreeing to phases of activities, and technical training in order to participate in joint monitoring or assessments.

The guidelines should also require that Talisman employees and contractors working in indigenous areas receive training to enhance their understanding of indigenous cultures and to ensure that they engage respectfully with the local indigenous communities.

Talisman could initially seek funding for such capacity building from third parties, such as host and home governments, as well as multilateral institutions. If these entities are unable or unwilling to provide such funding, and the indigenous group has insufficient resources, Talisman would need to provide funding for these capacity building activities. The guidelines would call for Talisman to provide such funding in a manner that does not present an appearance of undue influence over the community or the experts the community hires. This is usually best accomplished by setting up a bank or escrow account for the indigenous community, from which the community transparently reports its use of the funds. The funds

should be provided in installments, with each installment only being released if the use of the last installment has been reported back to the company.

(F) Consent

(1) Policy Recommendations

- If Talisman's policy incorporates the principles of FPIC, the indigenous peoples or community policy should define community agreement based on FPIC principles to include a formal, written agreement with the community.
- Such a consent agreement should address the compensation that the community will receive if the project leads to negative impacts.

A formal, written agreement would help Talisman demonstrate to third parties that it obtained consent to specific activities. A formal agreement could also help better define the parameters of the parties' future relationship, thus clarifying roles and responsibilities and creating reasonable expectations on all sides. It would form a standard that would support future dispute resolution, and protect the rights of all parties involved. Such a formal agreement fits within the best practices of a number of extractive companies in Canada, Australia, and some developing countries, and reflects one of the IFC's measurements of broad community support.

Where it is feasible, Talisman should seek to have the policy endorsed and signed by the government. This helps protect both Talisman and the indigenous community from any later attempts by the government to undermine it or declare it invalid.

- If Talisman's policy incorporates the principles of FPIC, they should commit Talisman to seek consent via a process that respects the traditional decision-making structures of the community in locations where the policy of seeking community agreement based on FPIC principles applies. The process should be mutually agreed upon and recorded, while also complying with and building upon any applicable laws and regulations.

Agreeing on the process has the benefit of establishing a negotiating relationship between the community and company before consent to the activity is sought. It also avoids evoking the historical experiences of indigenous peoples, in which external parties have intruded on indigenous lands without consideration for the views, needs, or cultures of the original inhabitants.

This approach allows communities to utilize their traditional decision-making structures, but it also allows for flexibility, in case traditional decision-making structures no longer exist or need to be supplemented to be consistent with the principle of non-discrimination, including taking into account groups that would otherwise not be represented.

Where the law mandates a process, such as a vote, that process should form the starting place for the negotiation. Talisman should explain to the indigenous community that it must carry out this process, but it is willing to add to it, for instance by also consulting with the community's representative organizations, or by sharing more information than is required by law, so that the process meets its own policy.

- A consent process should be inclusive of the views of marginalized groups, including women and youth.

A number of international documents, including the IFC Performance Standards, underscore the importance of including groups such as women that often suffer discrimination. Notably, the principle of non-discrimination is a core element of Talisman's commitment to universal human rights. Non-discrimination is part of the Universal Declaration of Human Rights, and one of the most established principles in international human rights law. Including women in the process does not necessarily mean that they must be part of an official negotiating team if that is not culturally viable, but the company should regularly seek their views and incorporate them.

(2) Implementation Guidelines

- If Talisman adopts a policy of seeking community agreement based on FPIC principles, the implementation guidelines should highlight the need to examine and record how the indigenous communities that Talisman encounters make decisions, and how marginalized groups could be incorporated in that decision-making.

This would help Talisman understand the social dynamics of the indigenous groups during the engagement phase. This information would be critical if Talisman later sought their consent to company activities, as Talisman would need to work with the community to devise a process that takes into account traditional decision-making structures, to the extent that they can be made to fit within processes mandated by law. Determining traditional community decision-making processes is challenging because different groups may seek power by depicting their roles in different and contradictory ways. It is, therefore, especially important that someone with expertise regarding the social dynamics of the indigenous peoples be involved in this process.

- If Talisman's policy incorporates the principles of FPIC, the guidelines should indicate that Talisman would negotiate with any bodies that the affected communities claim represent them and want included in the process.
- The implementation guidelines should consider ways in which traditionally marginalized groups can be involved in the consent process in a culturally appropriate manner if Talisman adopts a policy of seeking community agreement based on FPIC principles.

Ordinarily, women and youth would be included in committees and other groups that are key to the process. Where this approach meets resistance from the indigenous people, the guidelines should call on Talisman personnel to find other means to seek their views, such as small, informal meetings with these groups carried out in a culturally appropriate manner.

- If Talisman's policy incorporates the principles of FPIC, the implementation guidelines should also provide guidance regarding how Talisman and the community would arrive at an agreement.

Specifically, Talisman's implementation guidelines should articulate an expectation that the company would negotiate with the indigenous community regarding the process itself through which the company and community will seek and express agreement. This process would be summarized in a written agreement.

Establishing mutual expectations regarding the process for expressing consent would enable Talisman to establish a positive working relationship with the indigenous peoples. In addition, it would demonstrate respect for traditional decision-making structures in the community while offering an opportunity to ensure that marginalized groups are included in the process. It also would protect Talisman to some degree from external challenges that the process used to gain consent was illegitimate.

- Talisman should follow any national laws or regulations that guide how it should consult or seek consent from communities or, more specifically, indigenous people.
- Talisman should perform a gap analysis to identify where the national law or regulation falls in relation to its own standard.

Talisman must follow national laws. Few countries require companies to seek consent for their activities, and requirements for engagement are sometimes weak. Talisman could in most instances, nevertheless, supplement the nationally mandated processes with elements of its own policy. It should perform a gap analysis to identify where the national law or regulation falls (usually below) its own standard. For instance, if national law mandates a lesser amount of information disclosure, Talisman could still provide the information that its guidelines suggest sharing with the community. Similarly, in a country where Talisman applies FPIC, Talisman should seek a written agreement even if the law does not call for it. In the few countries that specify a consent process, Talisman should start with that framework and work with the community to supplement the process to include, for example, the community's representative organizations. If the government forbids any changes to the process, Talisman has no choice but to follow the law.

- If Talisman's policy incorporates the principles of FPIC, the guidelines should require Talisman to document all meetings, telephone calls, and other steps in the process. The guidelines should also call for Talisman to encourage the community to do the same. Talisman should monitor to ensure that such documentation occurs.

The documentation should describe who was present and how decision-making was conducted, as well as the information that was presented. Such documentation could be in writing and/or videotaped, depending in part on the literacy level of the indigenous people and whether there are cultural prohibitions regarding being videotaped. This documentation would help Talisman and the community resolve any subsequent disputes regarding their agreement. It would also protect Talisman from allegations that it did not carry out the process as promised, that it did not share key information, or that the process excluded certain groups.

(G) Grievance Mechanisms

(1) Policy Recommendations

- Talisman's indigenous peoples or community policy would recommend that Talisman set up non-judicial grievance mechanisms that involve both the community and company.¹⁷⁸

These mechanisms would serve as a means to resolve issues at the local level and maintain positive relationships, although such grievance mechanisms should in no way impede the legal rights of those involved in the dispute.

(2) Implementation Guidelines

- During exploration, before the company's activities begin to significantly impact the community, the implementation guidelines could propose that Talisman establish a simple grievance mechanism, such as a local company telephone number to call if community members have easy access to telephones, or a regularly scheduled meeting in the indigenous community where individuals can raise concerns.
- If Talisman's policy incorporates the principles of FPIC, when Talisman prepares to enter the operational phase and is ready to seek consent from the indigenous community to proceed with development activities, the guidelines could call for the establishment of a more formal grievance mechanism.
- If Talisman's policy incorporates the principles of FPIC, the consent agreement with the community would describe the grievance mechanism that would be used to resolve any disputes regarding the meaning of the agreement or other disputes that arise.

Grievance mechanisms would allow Talisman to address disagreements and concerns when they arise, whether the concern involves the consent agreement or company-community relations more broadly. These non-judicial grievance mechanisms should be mediation-oriented in nature, and should not supplant legal remedies. They should help address problems in a less

¹⁷⁸ In addition to being an important means of risk mitigation, the U.N. Special Representative on Business and Human Rights, John Ruggie, has noted that grievance mechanisms are part of the due diligence process through which companies can meet their responsibility to respect human rights. "Protect, Respect and Remedy: a Framework for Business and Human Rights," *supra* note 26.

adversarial manner so that concerns do not escalate. Non-judicial grievance mechanisms also hold the potential to be more timely and less costly than the court system, particularly in remote areas, where the judiciary's reach is often limited and transparency may be in doubt.

The guidelines could provide the following structures as options. The community could appoint a panel to which individual members report concerns. That panel could raise issues to the company as needed. Such an approach provides a level of anonymity to the individual. Alternatively, the company and indigenous community could each provide several names as potential members of a grievance mechanism. The company then would select several names from the community's list, and the community would select from the company's list. Both of these alternatives include the indigenous peoples in the process, which creates opportunities for productive interaction between the community and company. They also ensure that the company is not put in a position of being its own judge.

(H) Interactions with Non-Indigenous Communities and Relocated Indigenous Communities

(1) Policy Recommendations

As was noted earlier, FPIC is a standard that has arisen primarily in the area of indigenous rights. It is therefore logical that FPIC principles be addressed within the context of Talisman's approach to indigenous people. The implementation guidelines can provide guidance on how to address non-indigenous communities situated near indigenous communities.

(2) Implementation Guidelines

- The guidelines should note that Talisman should consider applying stakeholder engagement practices, such as participatory impact assessments and environmental and social monitoring and grievance mechanisms, to non-indigenous groups.
- Talisman's guidelines should address appropriate steps to take when recently resettled indigenous groups are intermingled with indigenous groups that have long-standing ties to the land.
- If Talisman's policy incorporates the principles of FPIC, Talisman might want to extend the process of obtaining agreement to non-indigenous groups in some instances for risk mitigation reasons. Factors suggesting that non-indigenous groups should be incorporated in the process include instances when:
 - » The indigenous and non-indigenous people live close together or are intermingled to a significant degree; and
 - » The indigenous and non-indigenous people have a history of poor relations with each other.

The principle of FPIC for development projects evolved in the context of indigenous peoples as a means to address historical injustices and prevent their repetition.¹⁷⁹ Accordingly, it does not appear to apply to other communities. Moreover, the operational guidelines laid out here may be too onerous for Talisman to apply in full to all communities. This does, however, create a risk of the appearance of favoritism or unequal treatment if non-indigenous communities are located next to indigenous communities. If relations between indigenous and non-indigenous people are already poor – for instance, because they are competing for scarce resources – differential treatment could trigger conflict. In any event, Talisman personnel should ensure that benefits accrue to non-indigenous as well as indigenous peoples if they are both located close to the project sites.

VII. Recommendations for Other Stakeholders

Although the authors were originally asked to provide recommendations only for Talisman Energy, it became clear to us, as well as the company, responsible investors, and WRI that there is a need for further dialogue between stakeholders regarding what FPIC looks like in practice. Thus far, the debate has focused on whether companies should adopt FPIC policies, rather than how companies would operationalize such a policy in a manner that is feasible for the company and satisfactory to civil society and indigenous peoples. From a company perspective, guidance is lacking with respect to what FPIC would demand on an operational level. Such uncertainty makes it difficult for companies to adopt policies based on the principles of FPIC.

Over time, legal decisions and regulations may clarify what FPIC means in practice for States, and perhaps, by analogy, for companies. Yet this will be a slow process. Furthermore, courts are unlikely to become involved in operational details, and they are unlikely to devise optimal systems, given that judges lack relevant practical experience. Courts are more likely to specify what not to do, rather than what positive actions should be taken.

Although the conversation between companies and civil society regarding FPIC has often been contentious, the research conducted for this paper suggests that there is more commonality between civil society and socially responsible companies than either expects. Furthermore, there are concerns on both sides that need to be shared in order to develop a practical and commonly accepted formulation of FPIC for business.

- A small, multistakeholder working group should work together in a confidential setting to determine how FPIC would be implemented.

¹⁷⁹ See, e.g., the Preamble of the Declaration, which refers to the concern: “that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.” U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 12, Preamble.

- This working group should consist of business, civil society, including indigenous organizations, and, if possible, government.
- The multistakeholder group should be convened and funded by a credible party. This could be an individual, a think tank, or a government that is acceptable to all stakeholders.
- The multistakeholder group should aim to produce guidelines regarding how business should implement FPIC.

As this report indicates, certain issues related to FPIC are particularly unclear or disputed. Companies are unsure how to address these issues, and their chosen approaches may lack legitimacy from the perspectives of third parties. The multistakeholder group should try to address these areas that lack clarity or are subject to disagreement, which include:

- At what project stage should companies seek consent? How can the timing be made viable from a commercial perspective while meeting the expectations of civil society? Does the timing of a FPIC process vary by industry?
- What economic and cultural impacts lead to the need to obtain FPIC from an indigenous community? Should a minimum threshold of impact on these interests be required?
- Which representative organizations should be included in the consent process? Who decides this?
- How can independent third parties best provide support and legitimacy to the process?
- When are government FPIC processes sufficient, and does this mean that the company does not have to seek consent separately?

About the Authors



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**Annex: World Resources Institute's
Commentary on Foley Hoag's Report**



**World Resources Institute's Commentary on
Foley Hoag LLP's Report for Talisman Energy
April 29, 2010**

Foley Hoag LLP's report emerged out of a shareholder proposal¹ to Talisman Energy from socially responsible investors Bâtirente and Regroupement pour la Responsabilité Sociale des Entreprises (RRSE). In response to this dialogue, Talisman commissioned Foley Hoag to conduct a feasibility study on the adoption of a corporate policy on free, prior and informed consent (FPIC). In March 2009, Bâtirente and RRSE invited WRI to provide a third party commentary on the report. WRI agreed to participate on an independent and pro bono basis.

In the report, Foley Hoag defines FPIC as “a formalized and documented social license to operate.” FPIC is emerging as an effective way to prevent conflict, empower indigenous peoples, and reduce the harmful impacts of development projects in poor areas. It can help companies and host governments to identify and respect the human rights of indigenous peoples and vulnerable communities, increase the legitimacy of a project in the eyes of local and international stakeholders, and reduce the risks of conflict and reputational damage for project proponents.

We appreciate the opportunity to comment on this report, which will become an important milestone in improving the understanding of FPIC within the extractive industries sector. We commend Foley Hoag for preparing such a thoughtful, well-researched report. In this document, we provide our perspective on the report: its scope, content, and Talisman's plans for taking this process forward.

Significance of the report

Whether companies commit to “FPIC” or “broad community support” or other categories of community engagement, it is clear that responsible companies recognize the need for indigenous peoples to agree to their presence within their territories. The challenge is to identify what this means for companies on an operational level, and how companies can demonstrate to others that they have gained consent from affected peoples.

This report is an important step in that direction. It demonstrates a concrete approach to analyze and define more clearly how companies can seek and demonstrate consent from indigenous peoples. It is critical that companies, indigenous peoples, and civil society

¹ After Talisman agreed to a dialogue and feasibility study, the investors withdrew their proposal.

continue dialogue on implementing FPIC, so that companies will become more comfortable with using the term “FPIC,” and so the discussion can move beyond semantic labels. Only through collective dialogue will we be able to develop on-the-ground processes to credibly gain and maintain the consent of indigenous peoples.

Scope of the report

The report resulted from a multi-stakeholder process that took place over the course of a year. Talisman set the parameters of the research with input from Bâtirente and RRSE. The process, agreed upon with Bâtirente, RRSE, and WRI, enabled Foley Hoag to reach out to a wide variety of stakeholders. Talisman encouraged a process that allowed for frank and open exchange of ideas. As a result, Foley Hoag was able to produce a study that portrays an honest and fair “snapshot” of where FPIC practices currently stand.

As with all studies of this level of complexity, it is impossible to be comprehensive. The report effectively builds the business case for FPIC, by outlining many current best practices for ensuring that companies have the consent of indigenous peoples in a way that is free, prior, and informed. We believe that Talisman would have received additional value from this research had the scope of the report also included:

- Greater outreach to indigenous leaders (Foley Hoag made efforts to do so, but with limited response). In particular, the report could have explored in greater detail how some indigenous peoples already have FPIC decision-making protocols in place.
- Recommendations on how to integrate FPIC into the management systems of a global company such as Talisman.
- A case study that explores local community dynamics, such as the ongoing conflicts between indigenous peoples and companies in Peru.

Content of the report

Building the business case for FPIC

Discussions on FPIC often hit an immediate roadblock when the question arises: “does consent mean that indigenous peoples have a veto?” If a company considers this question in isolation, the value of FPIC may not be apparent. Rather than understanding consent only as a veto right, the report emphasizes how gaining and maintaining FPIC can ensure that the company has a social license to operate throughout the project cycle. When viewed in this way, FPIC can be a cost-saving measure and a safeguard (both for companies and communities) against many of the project’s environmental and social risks. The report effectively builds the business case for FPIC, by considering questions such as:

- How does FPIC fit into community engagement?

- How does FPIC fit into the project cycle?
- Who is responsible for what – the government, company, or community?

The report understandably focuses on the corporate perspective on FPIC. However, it is important to emphasize that from the viewpoint of indigenous peoples, it does not matter whether FPIC makes business sense. From a rights-based perspective, if a company's activities potentially infringe on indigenous peoples' rights, FPIC is necessary. It is important for companies to respect this viewpoint. In addition to the recommendations in the report, we recommend that companies conduct a human rights impact assessment at the onset of the project in order to identify whether they risk infringing on peoples' rights.

Issues that require further discussion

We appreciate how the report dives into depth on complex political, cultural, and legal issues. Given the breadth of this topic, the report understandably leaves some gaps; but it is certainly one of the most comprehensive analyses of FPIC that we have encountered. The report raises several issues that would benefit from further discussion, including:

- **When should a company seek FPIC?** The report recommends that “Talisman should seek consent prior to activities with ‘substantial impacts’ on indigenous peoples in locations where the policy of seeking community agreement based on FPIC principles applies.” The proposed FPIC policy hinges on the meaning of “substantial impacts.” Yet this phrase may have various interpretations: Who determines what impacts are substantial? Is there a body of precedents to guide this determination? How are indigenous peoples involved in the process to determine what is substantial? It is unclear where to draw the line. For example, if health risks exist two kilometers downriver from project facilities, are these risks substantial? If the company locates the pipeline ten meters from a house or crops, in order to avoid resettlement, are these risks substantial? Many indigenous peoples argue that FPIC applies to *any* activities that affect their territory—including villages, hunting and fishing grounds, ancestral lands, and spiritual places.
- **Should a company seek FPIC during the exploration phase?** Talisman's business model is predicated on exploring in high risk areas, and as a result, several sections of the report consider whether to apply FPIC during the exploration phase. The report acknowledges both sides of this debate, and concludes that FPIC should *not* take place before the exploration phase, except perhaps where relations between the company and indigenous peoples are especially strained. The report argues that in many cases, the exploration phase does not have “substantial impacts” on indigenous peoples, and that negotiating with them before the scope of a proposed project is known can create false expectations. However, as the report notes, many indigenous peoples and NGOs argue that the exploration phase itself can create

risks and disrupt the lives of local communities. Furthermore, indigenous peoples may perceive that once exploration begins, they do not have the ability to withhold their consent to a project, thus affecting any consent processes later in the project cycle. As a result, many NGOs advocate that the company *should* seek FPIC before the exploration phase. The debate between these two viewpoints remains heated. The report provides much useful guidance on how to engage indigenous peoples during the exploration phase. However, we believe that Talisman would benefit if the report proposed a set of principles for deciding when to ensure FPIC before exploration, rather than concluding that FPIC is not necessary before this phase.

- **What is an “indigenous people” and who represents them?** One of the most difficult challenges of implementing FPIC is to identify which indigenous peoples to engage, and who represents them. This is also a challenge of community engagement more broadly. If not done carefully, a project can “divide and conquer” communities. Conflict can ensue when some members of a community support the project, while others oppose the project. The report considers this issue in great depth, and provides many useful recommendations on how to identify community leaders and representatives, how to include women and marginalized groups, and how to ensure that leaders speak on behalf of the people. While this is an important step, we believe that further discussion is merited on issues such as how to identify an “indigenous people,” how to engage in areas such as Peru where local and regional indigenous representatives do not necessarily agree, and how to determine whether a spokesperson is truly representative of the people. Additionally, we believe that neither companies nor individual communities will always be able to effectively identify an “indigenous people” and its leaders on a unilateral basis. As such, we recommend further discussion on how to use independent facilitators to run an FPIC process.
- **How should a company resolve conflicts between its FPIC policy and local laws?** The report finds that companies should comply with local law, but that there is a strong business case to go beyond the law. Difficulties emerge, however, when local law or government officials hinder the opportunities for a company to seek FPIC, e.g. by setting a time limit on consultations, restricting which communities to engage, or failing to recognize the rights of indigenous peoples. The report notes that “If the government forbids any changes to the process, Talisman has no choice but to follow the law.” While the report also provides several recommendations on how to manage relationships with governments, this would benefit from further discussion. Companies would benefit from further guidance on issues such as: (1) performing a gap analysis to identify where the national law or regulation falls in relation to the company’s policy; (2) gaining FPIC from indigenous peoples when the government has already granted concessions without engaging them; (3) withdrawing from a project if a country’s FPIC and indigenous peoples laws are insufficient; (4) withdrawing if the government forbids the company to exceed

the laws; and (5) working jointly with other responsible companies to encourage governments to adopt FPIC policies. Companies should consider these issues before beginning any project.

Challenges of moving forward

After finalizing the report, Talisman may take steps to adopt an FPIC policy and implementation guidelines. We anticipate two challenges in moving forward:

- **Will Talisman apply an FPIC policy across all of its operations?** It remains unclear whether Talisman will apply an FPIC policy to its operations in Canada and the United States. At the time that Talisman commissioned the report, neither government had expressed support for FPIC nor endorsed the UN Declaration on the Rights of Indigenous Peoples. Yet this may change soon: Canada recently announced its intention to endorse the UN Declaration, and the United States is reviewing its position.² At the same time, the report describes several examples where mining companies have gone beyond the requirements in Canada to gain FPIC from indigenous peoples. Given the recommendation that Talisman pilot test this policy, there are important lessons to be learned by applying the policy in the United States and Canada. Talisman should seek to apply an FPIC policy globally.
- **Will Talisman apply its FPIC policy to current operations?** The report does not provide recommendations on how Talisman could apply an FPIC policy to operations that are already underway. According to reports by the NGO Amazon Watch, for example, Talisman is operating in the Peruvian Amazon in an area that affects the Achuar indigenous people. Amazon Watch reports that the Achuar have expressed opposition to Talisman's presence, stemming in part from their prior interactions with oil and gas companies. While Talisman may have differing views on whether the Achuar people have provided their FPIC, the report provides a useful framework for moving discussions forward in a constructive manner.

Recommendations

We see this report as a valuable tool for Talisman, as well as other companies and affected communities. The report could serve as the basis for dialogue with communities, NGOs, and other companies. In particular, we recommend that Talisman:

- **Make the report available to local communities** by translating it into relevant languages, posting it on the corporate website, and providing it directly to communities.

² Government of Canada, Speech from the Throne, 3 March 2010, Ottawa, <http://www.speech.gc.ca/eng/media.asp?id=1388>; Remarks by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, at the UN Permanent Forum on Indigenous Issues, 20 April 2010, <http://usun.state.gov/briefing/statements/2010/140600.htm>.

- **Use the report as a framework for discussions with local communities and NGOs** that have approached Talisman with concerns.
- **Inform industry groups and associations** about the lessons learned of developing and implementing an FPIC policy.

Finally, we support Foley Hoag’s recommendation to review the FPIC policy after three years. Experience with FPIC implementation is growing, and we expect that FPIC will emerge as an industry standard in the coming years. We believe that Talisman has the potential to gain first-mover advantage in this space, and that these efforts will enhance Talisman’s competitive advantage as a leader among energy companies.

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