



Planning and Managing for Positive Legacies



Chapter 2.2 Free, Prior and Informed Consent (FPIC)

BACKGROUND

For more than a quarter century the international community has recognized that special attention needs to be paid to the individual and collective rights of indigenous peoples.⁴⁵ The following rights of indigenous peoples are especially relevant in relation to industrial-scale mining developments:⁴⁶

- The right to self-determination, by virtue of which indigenous peoples freely determine their political status and pursue their economic, social and cultural development;
- Rights to property, culture, religion, and non-discrimination in relation to lands, territories and natural resources, including sacred places and objects;
- Rights to health and physical well-being in relation to a clean and healthy environment;
- Rights to set and pursue their own priorities for development; and
- The right to make authoritative decisions about external projects or investments.

TERMS USED IN THIS CHAPTER

Collaboration ■ Consultation ■ Corporate Owner ■ Critical Cultural Heritage ■ Existing Mine ■ Free, Prior and Informed Consent (FPIC) ■ FPIC Scoping ■ Grievance ■ Grievance Mechanism ■ Host Country Law ■ Indigenous Peoples ■ Mining Project ■ Mining-Related Activities ■ New Mine ■ Operating Company ■ Rights Holder ■ Stakeholder ■ Vulnerable Group ■

These terms appear in the text with a dashed underline. For definitions see the Glossary of Terms at the end of the document.

Both States and corporations should respect these rights. Corporations may demonstrate such respect by obtaining the Free, Prior and Informed Consent (FPIC) of indigenous peoples and providing culturally appropriate alternatives and adequate compensation and benefits for projects that affect indigenous peoples' rights.⁴⁷

Key elements of the requirement for consent of indigenous peoples have been recognized by international law since 1989, when the General Conference of the International Labour Organization adopted Convention 169 on Indigenous and Tribal Peoples.⁴⁸ Since 1989, FPIC has gained broader application and more widespread support in national laws and various international instruments and bodies.⁴⁹

OBJECTIVES/INTENT OF THIS CHAPTER

To demonstrate respect for the rights, dignity, aspirations, culture, and livelihoods of indigenous peoples, participate in ongoing dialogue and engagement, and collaborate on strategies to minimize impacts and create

⁴⁵ United Nations. 2008. Guidelines on Indigenous Peoples' Issues. www.un.org/esa/socdev/unpfii/documents/UNDG_guidelines_EN.pdf

⁴⁶ Anaya, J. 2013. Extractive Industries and Indigenous Peoples. Report of the Special Rapporteur on the Rights of Indigenous Peoples. UN Doc. A/HRC/24/41. Para. 28. Available at: unsr.jamesanaya.org/study/report-a-hrc-24-41-extractive-industries-and-indigenous-peoples-report-of-the-special-rapporteur-on-the-rights-of-indigenous-peoples

⁴⁷ IFC. 2012. Performance Standard 7 Indigenous Peoples. Objectives and Paras. 9 and 14. Available at: www.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES

⁴⁸ ILO. Convention 169. Available at: www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm

⁴⁹ For a detailed discussion of recent international jurisprudence related to FPIC see: Gilbert, J. and Doyle, C. 2011. "A New Dawn over the Land: Shedding Light on Collective Ownership and Consent." pp. 24-42. Available at: roar.uel.ac.uk/2648/1/A_New_Dawn_Over_the_Land_-_Shedding_Light_on_Collective_Ownership_and_Consent.pdf

benefits for indigenous peoples, thereby creating conditions that allow for indigenous peoples' free, prior and informed consent and decision-making regarding mining development.

SCOPE OF APPLICATION

RELEVANCE: An operating company may provide evidence that this chapter is not relevant if it can prove that there are no indigenous peoples whose legal or customary rights or interests may be affected by the company's exploration or mining activities, or potential mine expansions. Examples of rights or interests may include lands, territories and resources that indigenous peoples possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired; livelihood, cultural or spiritual activities or places; or critical cultural heritage.

NEW VS. EXISTING MINES: New mines shall meet the requirements in this chapter. At existing mines, where FPIC was not obtained in the past, operating companies will be expected to demonstrate that they are operating in a manner that seeks to achieve the objectives of this chapter. For example, companies may demonstrate that they have the free, informed consent of indigenous peoples for current operations by providing evidence of signed or otherwise verified agreements, or, in the absence of agreements, demonstrate that they have a process in place to respond to past and present community concerns and to remedy and/or compensate for past impacts on indigenous peoples' rights and interests. In alignment with this chapter, such processes should have been agreed to by indigenous peoples and evidence should be provided that agreements are being fully implemented by the companies.

Additionally, it should be noted that if there are human-rights-related impacts on indigenous peoples that have not been mitigated or remediated at existing mines, they will need to be addressed as per Chapter 1.3; and other unremediated impacts may be addressed through the operational-level grievance mechanism as per Chapter 1.4. (See also the "Cross References to Other Chapters" table below).

Both new and existing mines shall obtain the free, prior and informed consent of indigenous peoples if there are proposed changes to a company's plans or activities that may significantly change the nature or degree of an existing impact, or result in additional impacts on indigenous peoples' rights, lands, territories, resources, properties, livelihoods, cultures or religions.

OVERLAP WITH NATIONAL LAWS: The State always holds the primary duty to protect indigenous peoples' rights. Nothing in this chapter is intended to reduce the primary responsibility of the State to consult with indigenous peoples in order to obtain their FPIC and protect their rights. However, IRMA recognizes that in the absence of national laws, or in the exercise of their right to self-determination, some indigenous peoples may wish to engage with companies without State involvement.

As per Chapter 1.1, if national FPIC laws exist, companies shall abide by those laws. Where a host government has established an existing legislative framework that requires or enables agreements between mining companies and indigenous communities (as in Australia), it may not be necessary for companies to run a parallel FPIC process based on the requirements of this chapter. It would, however, be necessary for companies to demonstrate to IRMA auditors that the process whereby the agreement was reached conformed with or exceeded IRMA FPIC requirements and met the general intent of this chapter (for example, there was no express or implied threat to invoke compulsory powers if agreement could not be reached, and the community was advised at the outset that the company would not undertake an activity in the absence of community consent).

Free, Prior and Informed Consent (FPIC) Requirements

2.2.1. Policy Commitment

2.2.1.1. The operating company shall have a publicly available policy that includes a statement of the company's respect for indigenous peoples' rights, as set out in the United Nations Declaration on the Rights of Indigenous peoples.⁵⁰

2.2.1.2. The operating company shall ensure that indigenous peoples potentially affected by the company's mining-related activities are aware of the policy.

2.2.2. General Requirements

2.2.2.1. The operating company shall conduct due diligence to determine if the host government conducted an adequate consultation process aimed at obtaining indigenous peoples' informed consent prior to granting access to mineral resources. The key findings of due diligence assessments shall be made publicly available and shall include the company's justification for proceeding with a project if the State failed to fulfill its consultation and/or consent duties.⁵¹

2.2.2.2. New mines shall not be certified by IRMA unless they have obtained the free, prior and informed consent (FPIC) of potentially affected indigenous peoples.⁵² The circumstances for obtaining FPIC include situations where mining-related activities may affect indigenous peoples' rights⁵³ or interests, including those that may: impact on lands, territories and resources;⁵⁴ require the physical relocation of people; cause disruption to traditional livelihoods; impact on critical cultural heritage; or involve the use of cultural heritage for commercial purposes.

2.2.2.3. For new and existing mines, the operating company shall obtain FPIC from indigenous peoples for proposed changes to mining-related activities that may result in new or increased impacts on indigenous peoples' rights or interests.

2.2.2.4. If indigenous peoples' representatives clearly communicate, at any point during engagement with the operating company, that they do not wish to proceed with FPIC-related discussions, the company shall recognize that it does not have consent, and shall cease to pursue any proposed activities affecting the rights or interests of the indigenous peoples. The company may approach indigenous peoples to renew discussions only if agreed to by the indigenous peoples' representatives.

⁵⁰ Available at: www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

⁵¹ The company shall make all documents relating to the due diligence process available to the IRMA auditor for review.

⁵² This requirement only applies at new mines that have the potential to affect the interests or rights of indigenous peoples. If there are no indigenous peoples who may be affected, then there is no need to obtain FPIC. Instead, requirements in Chapter 2.3 apply.

⁵³ Indigenous peoples' rights include traditional rights, which are defined as "Rights which result from a long series of habitual or customary actions, constantly repeated, which have, by such repetition and by uninterrupted acquiescence, acquired the force of a law within a geographical or sociological unit. It also encompasses the rights of Indigenous and Tribal Peoples established by the ILO Convention 169." (Source: Forest Stewardship Council)

⁵⁴ These include lands, territories and resources that indigenous peoples possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

2.2.3. Free, Prior and Informed Consent (FPIC) Scoping

2.2.3.1. The operating company shall:

- a. Consult with indigenous peoples and others, and review other relevant data to identify indigenous peoples that own, occupy or otherwise use land, territories or resources that may be affected by the mining project;
- b. Disclose to indigenous peoples, in a culturally appropriate manner, the preliminary project concepts and/or proposed activities, and the indigenous peoples' right to FPIC.

2.2.3.2. The operating company shall collaborate with indigenous peoples' representatives and other relevant members of affected communities of indigenous peoples to:

- a. Identify the appropriate means of engagement for each group of indigenous peoples (e.g., tribe, nation, population);
- b. Identify indigenous peoples' rights and interests that may be affected by the proposed activities;
- c. Identify additional studies or assessments needed to determine the range and degree of potential impacts on indigenous peoples' rights or interests; and
- d. Identify if there are capacity issues that may prevent full and informed participation of indigenous peoples. If issues are identified, the operating company shall provide funding or facilitate other means to enable indigenous peoples to address capacity issues in their preferred manner; and
- e. Ensure that the community as a whole/collective has meaningful opportunities to be involved in these processes.

2.2.3.3. The operating company shall collaborate with the indigenous peoples' representatives to design and implement plans to address the information gaps and needs identified through the scoping process.

2.2.4. Determine FPIC Processes⁵⁵

2.2.4.1. If there is more than one distinct indigenous peoples' group (e.g., tribe, nation, population) that may be affected by the operating company's mining-related activities, they may be included in a coordinated process or separate FPIC processes, as desired by the indigenous peoples.

2.2.4.2. If the potentially affected indigenous peoples have an FPIC protocol in place or under development, the operating company shall abide by it unless changes are agreed to by the indigenous peoples' group(s). Otherwise, the operating company shall jointly develop and document, in a manner agreed to by indigenous peoples' representatives, the FPIC process or processes to be followed.

2.2.4.3. The operating company shall make information on the mutually-agreed FPIC processes publicly available, unless the indigenous peoples' representatives have explicitly requested otherwise.

2.2.5. Implement FPIC Process

2.2.5.1. The operating company shall document, in a manner agreed to by the indigenous peoples, the FPIC process that was followed.

⁵⁵ This may be carried out concurrent with 2.2.3. Also, there may be a desire to establish different FPIC processes for different stages of development (e.g., exploration, mining, closure) or based on various triggers (e.g., major expansion of the mine). For example, a process to obtain FPIC during the exploration stage may be less onerous than a process established to obtain FPIC for a mine development proposal, as the mining stage will likely have greater potential impacts on indigenous peoples' rights and interests, require more assessment, more dialogue around impact mitigation, remediation compensation, project benefits, etc.

2.2.5.2. The operating company shall publicly report, in a manner agreed to by the indigenous peoples, on the FPIC process that was followed and its outcome.

2.2.5.3. If the process results in consent being given by indigenous peoples to certain mining-related activities, an agreement outlining the terms and conditions shall be signed or otherwise validated by the operating company and the representative(s) of the indigenous peoples. The agreement shall be binding and shall be made publicly available unless the indigenous peoples' representatives explicitly request otherwise.

2.2.6. Failure to Obtain Indigenous Peoples' Consent

2.2.6.1. For new mines, IRMA certification is not possible if a mining project does not obtain free, prior and informed consent from indigenous peoples.

2.2.7. Implementation and Ongoing Engagement

2.2.7.1. The operating company shall collaborate with indigenous peoples to monitor implementation of the FPIC agreement, and document the status of the commitments made in the agreement.

2.2.7.2. Engagement with indigenous peoples shall continue throughout all stages of the mining project.

NOTES

FPIC, in the context of this standard, requires that engagement with indigenous peoples be free from external manipulation, coercion and intimidation; that potentially affected indigenous peoples be notified that their consent will be sought, and that notification occur sufficiently in advance of commencement of any mining-related activities; that there be full disclosure of information regarding all aspects of the proposed mining project in a manner that is accessible and understandable to the indigenous peoples; and that indigenous peoples can fully approve, partially or conditionally approve, or reject a project or activity, and companies will abide by the decision.

Because of the requirement that FPIC be free from external manipulation, coercion and intimidation, an FPIC process cannot be undertaken in situations where indigenous or tribal peoples are living in voluntary isolation (see also Chapter 3.7, requirement 3.7.5.5). Consequently, IRMA will not certify a mine if affected communities include indigenous peoples living in voluntary isolation.

The chapter uses the term indigenous peoples, recognizing that there may be peoples for whom this chapter applies who prefer to use other terms such as tribal, aboriginal, First Nations, *Adivasi*, etc., but who have the right to FPIC according to international and/or host country laws. For the purposes of interpreting this standard IRMA uses a definition presented in the IRMA Glossary of Terms, which is from guidance published by the United Nations Permanent Forum on Indigenous Peoples.

CROSS REFERENCES TO OTHER CHAPTERS	
CHAPTER	ISSUES
1.1—Legal Compliance	As per Chapter 1.1, if there are <u>host country laws</u> related to <u>free, prior and informed consent</u> , the company is required to abide by those laws. If IRMA requirements are more stringent than <u>host country law</u> , the company is required to also meet the IRMA requirements, as long as complying with them would not require the <u>operating company</u> to violate <u>host country law</u> .
1.2—Community and Stakeholder Engagement	Chapter 1.2 applies to engagement with <u>stakeholders</u> , including <u>rights holders</u> such as <u>indigenous peoples</u> . Therefore, in addition to meeting the requirements above, engagement with <u>indigenous peoples</u> shall conform to the requirements in Chapter 1.2. In particular, criterion 1.2.3 is important to ensure that <u>indigenous peoples</u> have the capacity to fully understand their rights and <u>collaborate effectively</u> in <u>FPIC</u> process, including in the collection of relevant information. Also, 1.2.4 ensures that communications and information are in culturally appropriate languages and formats that are <u>accessible</u> and understandable to affected <u>indigenous peoples</u> , and that information is provided in a timely, manner.
1.3—Human Rights Due Diligence	If <u>indigenous peoples'</u> human rights have been infringed upon at <u>existing mines</u> , a company will be expected to <u>mitigate</u> and <u>remediate</u> the impacts as per Chapter 1.3. This includes human-rights-related impacts on <u>indigenous peoples</u> from past activities at <u>existing mines</u> that have not been adequately <u>mitigated</u> or <u>remediated</u> .
1.4—Complaints and Grievance Mechanism and Access to Remedy	<u>Grievances</u> or concerns related to the implementation of <u>FPIC</u> and any related agreements may be addressed through the operational-level <u>grievance mechanism</u> , or other mechanisms for handling <u>grievances</u> as long as those mechanisms have been agreed to by the <u>indigenous peoples</u> and the company. Complaints or <u>grievances</u> related to unremediated or unsatisfactory <u>mitigation</u> of impacts from past <u>mining-related activities</u> may also be raised through the operational-level <u>grievance mechanism</u> as per Chapter 1.4.
2.1—Environmental and Social Impact Assessment and Management	Some of the aspects of <u>FPIC scoping</u> may be carried out as part of the ESIA (e.g., relevant data collection and studies), however, it is likely that engagement with <u>indigenous peoples</u> will take place before the ESIA process begins, since it would be in the company's best interest to know prior to undertaking the significant step of ESIA whether or not potentially affected <u>indigenous peoples</u> are even interested in pursuing an <u>FPIC</u> process related to mineral development.
2.4—Resettlement	As per requirement 2.4.6.3, if a <u>mining project</u> requires the displacement of <u>indigenous peoples</u> , the <u>operating company</u> shall not proceed with resettlement unless it obtains <u>FPIC</u> from affected <u>indigenous peoples</u> .
2.6—Reclamation and Closure	As per requirement 2.6.6.1, if there is the potential that the <u>mining project</u> will require <u>long-term water treatment</u> , this must be explicitly addressed as part of the <u>free, prior and informed consent process</u> .
3.7—Cultural Heritage	As per requirement 3.7.5.1, where impacts may occur to <u>indigenous peoples'</u> <u>critical cultural heritage</u> , negotiation shall take place through the <u>FPIC</u> process, unless otherwise specified by the <u>indigenous peoples</u> . Chapter 3.7 (requirement 3.7.5.5) also prohibits new exploration or mining in areas where <u>indigenous peoples</u> are known to live in voluntary isolation, both to respect those peoples' right to self-determination and recognizing that <u>FPIC</u> is not possible when <u>indigenous peoples</u> reject contact and the presence of persons who do not belong to their people in their lands and ancestral territories.