

Development Futures: An African Round Table on Extractives, Mega Infrastructure and Women's Rights to Consent

Nairobi November 2016

An introduction to Free Prior Informed Consent, discussing limits and possibilities



Why FPIC

- The externalised costs of 'development and accumulation projects are usually displaced onto the weakest the displaced and or host communities and then disproportionately women in these communities.
- It is not just about land and development but has many applications,
- Its about rights and economics. Development paradigms are seen as a given and not to be challenged.
- FPIC is an organising and mobilising process it is not just a right.
- Resettled peoples often suffer the immediate costs while governments incur long-term costs.
- It is hard to resettle urban populations successfully it is almost impossible to recreate a rural community where relations are geospatially defined in relation to land and culture

There are four integrated parts

- Free
- Prior
- Informed
- Consent

Defining Free Prior Informed Consent

**5 definitions of FPIC : Choose the one
you like best.**

1. FPIC is based on principles of self-determination. It is the collective right of indigenous peoples to negotiate the terms of externally imposed policies, programs, and projects that directly affect their livelihoods and well-being.

2. FPIC is a form of decision-making that enables a community to say “yes” or “no” to a proposed project or intervention.

3. Free, prior, and informed consent (FPIC) is consent that is given freely, by people fully informed of the consequences, prior to any decision being made, and according to their own decision-making processes.

4. FPIC is part of a consultation process that allows people to provide input into how their natural resources are managed.

5. FPIC is like Knocking on someone's door and asking to come in.

Grand Chief John

So which one did you like
most?

.... and why?

How did the Right and claims to FPIC Emerge?

Initially applied in the context of medical experimentation at the Nuremberg trials after World War 2

It further evolved from human rights discussions on development through the application of rights to self determination and right to participation found in the;

- Universal Declaration of Human Rights
- African Charter for Human and Peoples Rights
 - State duty to consult – to get consent

Associated in the context of indigenous rights,

- International Labour Organisation's Convention on Indigenous and Tribal Peoples in Independent Countries - 169
- UN Declaration on the Rights of Indigenous Peoples

Regional Human rights Jures Prudence

- The Inter-American Commission on Human Rights
- African Commission for Human and People's Rights

Sources of FPIC rights and claims

- Is FPIC a right?
- International Treaty
- International Customary law
- National Legislation
- Regional and Sub-regional Human Rights Instruments
- National constitution and Legislation
- Customary law
- Community mobilisation
- Lending institutions and industry/company mechanisms (CSR)

Example drawn from the African Charter

Mining statute law by itself often falls short of the community rights contained in the African Charter to:

- economic self determination [article 20];
- own and dispose of their natural resources [article 21];
- social, cultural and economic development [article 22]; and
- property rights of communities living with customary law [article 14].

Consultation vs Consent

- Are these the same concept?
- Broad and poorly defined concepts
- Do different situations mean different standards e.g. removal requires consent but use of land consultation
- Do different groups require different standards e.g. Indigenous and local communities
- National Interest and eminent domain type arguments (state sovereignty)
- Development paradigms are central
- Is FPIC a real veto right

Indigenous rights / affected community rights

- Indigenous rights to FPIC and local or community rights
- Definition of Indigeneity a complex issue in Africa and parts of Africa
- Definition of indigeneity is broad, self defining and related to power
- Who's natural resources
- Geospatial relations and insiders and outsiders

Individual rights / collective rights

- Land rights
- Individualisation of Land rights
- Who has the right of consent
- Sub group collective rights e.g. women
- The importance of geospatial relations in a community
- Communal grazing land

Customary law / National Legislation /Regional instruments

- African Charter for Human and People's Rights
- FPIC is increasingly linked to the right of all people to their land and territories based on customary and historical connection to them.
- Community decision making processes and gender rights within these

Process vs Outcomes

practice of consent

- Is FPIC a moment, a process or an ongoing process
- Must it comply with standardised procedures that are aimed at establishing a certain standard for community engagement
- Tick box approach
- Community defined
- Consensus vs majority

Community

State

Corporation

POWER

Process

Negotiation

Consultation

Unilateral displacement

Outcome

Consent/
Decision
Benefit sharing
No Mining

compensation

Forced removal

Assessment/
Monitoring

Outcome
Indicators

Process
Compliance

Two questions for Group discussion

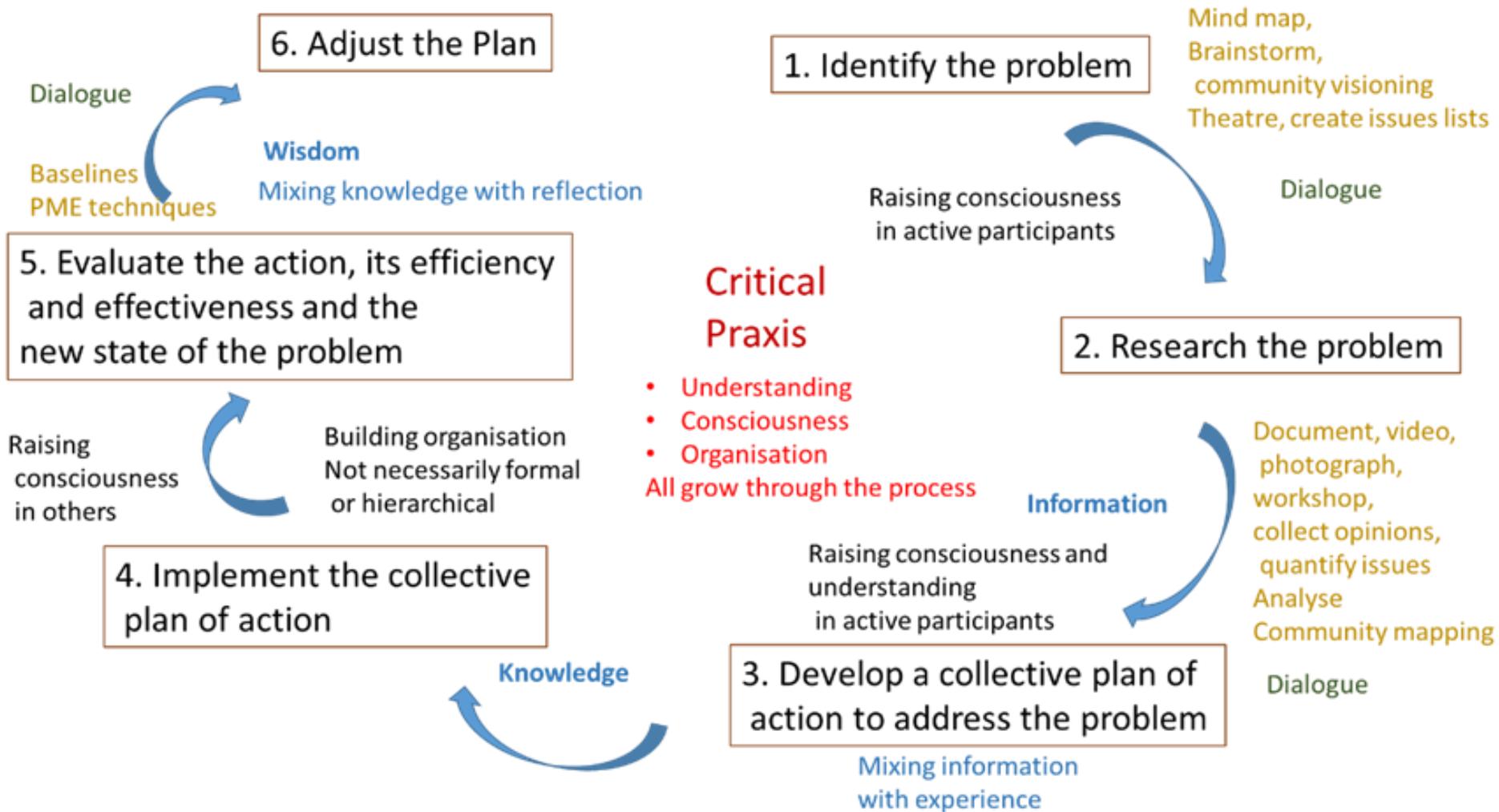
- What are your experiences of consent (or lack of it) in general and women's consent (or lack of it) specifically?
- What concepts, issues or practices in FPIC generally and women's consent specifically do you struggle or have problems with, conceptually or in practice?

Consent rights and principles

- Self determination and development paradigms are key
- Recognised in different contexts but not always equally
 - Original concept in terms of human experimentation (Nuremburg trials)
 - Also relates to trade in waste products for example
 - Rights over our bodies
 - Biological conventions etc
- Core Issues
 - Who gives consent
 - How is consent given
 - When is consent given
 - For what is consent given
- Difference between FPIC and a resettlement procedure – also compensation and benefit sharing

- It attempts to shift the power balance in development decision making
- FPIC is not an approach or procedure, it is decision making about an externally proposed project that is based on consent (the right to say no) which is free, prior and informed
- Who or what a community is becomes an important consideration for the who and how consent is achieved.
- FPIC is not a Panacea – many real problems exist does have strategic and tactical potential
- FPIC offers a way of localising development choices, but can not transform the development paradigm
- FPIC potentially addresses some areas of corruption where it is exercised fully, but also potentially creates corruption opportunities. S21 companies

A participatory action research model as part of an organising and agency approach to FPIC



Consent vs. Consultation

- Consultation is a poorly defined standard
 - WB ‘meaningful participation’
- Consent implies a ‘veto’ right
 - Eminent domain
 - Probably not an absolute veto
- The ability to say No sets up a bargaining relationship
 - Unbalanced parties hence the (FPI) part
 - Historical marginalisation
 - Forced development paradigms vs self determination
- Consultation like negotiation is a process, consent is an outcome

Development Paradigms

- Human rights are undermined by how development happens. The discussion of securing such rights and dealing with corruption can not take place in a socio-economic vacuum.
- A conspiracy of assumed agreement exists as to how society and communities should be developed. Neo-liberal globalisation informed the last 30 years, where are we heading now?
- This is informed by a hegemonic system of capital accumulation which often takes on regional/national characteristics that service the mode of accumulation. e.g. Apartheid played an economic function
- Chronic corruption is indicative of a particular neo-colonial form of accumulation. e.g. Cabral and Fanon and others talk of a comprador bourgeoisie . This is compounded by weak institutions and poor legislation
- Mining legislation often beats other legislation. E.g. Inconsistencies with land and environmental legislation

FPIC is what a Community Says It Is

Beyond redress and restitution the issue of land and communities relations to the land also play a fundamentally important role in how FPIC should be practically interpreted and implemented precisely because these relations are governed by living indigenous or customary law and practice.

It allows customary decision making processes to play a proper role in consent rather than the simple application of an outside and predetermined process.

For the same reason if the community defines prior it can set a timetable that is sensitive to community decision making processes rather than a project imposed timetable.

Indigenous and locally affected communities

- Many instruments distinguish between indigenous communities having a consent right and locally affected communities having a consultation right
 - Sets up hierarchy of rights dependent on a poorly defined concept
 - Itself implies a different standard when ideas such as meaningful consultation are meant to suggest there is no such gap
- Indigeneity not well tested in jures prudencia
- Indigenous definitions are problematic
 - Broad, self defining, assumed first nation
- Importantly Indigenous definition often refers to marginalisation from dominant forms of accumulation
 - Has distinct implications for colonial displacement and imperialist and neo imperialist exploitation of resources
 - Brings International Covenant on Economic, Social and Cultural Rights
- Customary law offers a bridge between these communities and access to FPIC

Trends in domestic legislation and international and regional instruments

- Domestic legislation tends to endorse consultation and definitions of such consultation fall short of even meaningful consultation
- The South African model being promoted through the African mining Vision process under the AU
- There are some good documents e.g. ECOWAS directive on mining but limited implementation, also bad documents SADC Mining Protocol
 - ECOWAS recognises indigenous and local community FPIC
- African Charter on Human and peoples Rights
 - African Commission
 - and Working group

Trends in domestic legislation and international and regional instruments ...

- UN Agencies and instruments
 - UNDRIP
 - ILO 169 (indigenous and tribal)
 - CBD (local and indigenous communities)
 - Special Repertoire (Ruggie Framework – respect –protect –grievance mechanism)
 - FAO (guidelines land use) Indigenous and customary communities
- Financial institutions Safeguard Policies
 - WBG including IFC (FPI consultation) 2012 IFC standard 7 = indigenous consent)
 - Equator Principles (consultation)
 - WBG Extractive Industries Review (Consent change to consultation)
 - Regional Development Bank (varies)
- Multi-stakeholder and Industry Instruments
 - World Commission on Dams (Consent, indigenous and tribal)
 - Forestry Stewardship Council (consent Ind. And local)
 - International Council on Mining and Metals (consultation)
 - Roundtable on sustainable palm oil (RSPO) (consent indig and local)

Compensation and Benefit sharing

- Benefit sharing as an end in itself but also a means to circumventing peoples rights (land and socio economic)
- Legislation can also provide a minimum of benefit sharing to be improved upon through negotiation
- Compensation and the calculation thereof is very problematic particularly where a commercial value approach is used

Going back to definitions: Essentially a compromise definition that emphasises process rather than outcome...consent....Is this the trick of CSR?

“Free prior and informed consent 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**. Companies have to make the offer attractive enough for host communities to prefer that the project happen and negotiate agreements on how the project can take place and therefore give the company a ‘social license’ to operate.”

- From: Salim, E. 2003. Striking a Better Balance: **The Final Report of the Extractive Industries Review**. Extractive Industries Review, Jakarta and Washington, DC. Available at: www.worldbank.org

Status of International Soft Law

Declarations do not have obligations that are technically binding in law

A covenant is a treaty which if ratified does under international law have legal obligation

But

since the Universal Declaration is so widely used as the primary statement of what are considered human rights today, it is often regarded as having legal significance and considered “customary” international law and as the authentic interpretation of the references in the UN Charter.

The Declaration of indigenous people’s rights while not necessarily carrying the same prominence could be argued to have similar ‘customary’ significance by extension of the universal declaration.

International law and instruments mention FPIC both as a right and as a principle.

Three major international instruments address the right to Free and Prior Informed Consent: the ILO Convention 169; the Convention on Biological Diversity (CBD); and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

In addition the **International Covenant on Economic, Social and Cultural Rights** Also has relevance.

Between them, these instruments provide a strong foundation for indigenous peoples to assert that their territories should be legally recognized by government and that their free, prior, and informed consent (FPIC) is necessary before development activities can take place on their territories.

FPIC in the Convention on Biological Diversity

Article 8 (j) of the Convention requires that the traditional knowledge of indigenous peoples and local communities may only be used with their approval;

It requires that each contracting party shall: Subject to its national legislation, 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, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

FPIC in the United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) has the most complete definition of FPIC. The declaration contains strong formal wording regarding the rights of indigenous peoples, including article 26 sections 1 and 2 which state:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

As a result, UNDRIP requires the implementation of FPIC for any activities which may affect indigenous peoples. For example, **Article 10 states:**

Indigenous peoples shall not be forcibly removed from their lands or territories. **No relocation shall take place without the free, prior and informed consent** of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 32 section 2 underlines that it is the State's responsibility to respect FPIC, so as to prevent development projects being forced onto indigenous peoples:

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.**

ILO Convention 169 (1989) Indigenous and Tribal Peoples

Article 15

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

2. In **cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands**, 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. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Where removals are concerned **consent** is required

FPIC in the United Nations Framework Convention on Climate Change (UNFCCC)

Annex 1 of the Ad Hoc Working Group Decision -/CP16 calls for 'promoting' and 'supporting' safeguards for indigenous peoples and local community rights, noting the UN General Assembly's adoption of UNDRIP. This language is only a partial commitment to FPIC, because it will be interpreted within the framework of national laws and circumstances in each country. Even if international REDD+ financing does become contingent on the demonstration of a verified consent process, the question of who has the right to give or withhold consent will be determined under national laws.

Economic Community of West African States

Directive C/DIR.3/05/09 **on the Harmonization of Guiding**

Principles and Policies in the Mining Sector Adopted by the Sixty Second Ordinary Session of the Council of Ministers at Abuja on 27 May 2009

- **Chapter VI: Human Rights Obligations and Mining Activities, Article 16: Sustainable Development and Local Community Interests**
 - “s3. Companies shall obtain **free, prior, and informed consent of local communities** before exploration begins and prior to each subsequent phase of mining and post-mining operations.
 - s4. Companies shall maintain consultations and negotiations on important decisions affecting local communities throughout the mining cycle.”

Chapter VII: Dispute Resolution Article 17: Complaints Procedure

The review procedure of complaints under this article does not preclude a **State, an individual, or any stakeholder from taking the case before the ECOWAS Court of Justice** or invoking arbitration procedure or the jurisdiction of any other international justice system, such as the African Court of Justice or the African Human Rights Court of Justice.

Article 18: Settlement Procedures

Member States shall provide the necessary capacity to local communities in their engagement with mining rights holders in negotiations and in settling mining disputes.

Free

- **FPIC as a common law basis for negotiation**
- **It is part of an on-going process not an event**
- **Freedom respected by the state and corporate entities**
- **Freedom is achieved through balancing power**
- **Freedom from coercion and manipulation**
- **Time is used as a means of coercion (also see prior)**
- **All issues pertaining to land rights and usage are settled prior to a consensus process being initiated**

An indicator that freedom has defined a process both in terms of respect and protection is where;

- a community is left better off regardless of whether the interactions result in consensus/consent for a project to proceed or not.
- There is evidence that a community was actively involved in determining the process of discussions and that such discussions reflect customary decision making mechanisms whilst at the same time ensure the inclusion of vulnerable groups.
- A community surveyed in follow up impact and process study report they felt they could say no. i.e. the survey show people felt they had choice
- There is no conflict during the process, either between members of the community or between communities and state or mine security personnel
- There is an absence of discontent (no expectations gap) where people did not get what they thought they would, i.e. Where an expectations gap exists it is evidence of manipulation of a process either by commission or omission.
- All vulnerable sections of a community are substantially better off as a result of any project and this is as measured against criteria negotiated between the mine and community and advised by independent third parties. Such criteria could, inter alia, cover income levels, health, crime, employment, land access cultural practice, psycho/social and emotional disruption indicators and so on.
- A community reports that it trusts its representatives and there is a common understanding that any representative may be recalled where they do not act in the best interests of the community.
- There is no imposition of a value system as a basis of compensation. E.g the use of the commercial agricultural value of land as a basis for calculating compensation.
- It can be demonstrated that a community has actively chosen its development path.

Prior

- **The development paradigm must enable the notion of prior processes to be properly developed**
- **Prior means a multi-step process aimed at building trust between parties towards a negotiated consensus decision**
- **Prior consent requires sufficient time in order to be culturally appropriate and trust building**
- **Independent process observers**
- **Environmental authorisation process is insufficient to satisfy the notion of prior consent**
- **Significant changes to the plan must also attain prior consent**

An indicator that consent has been achieved in a timely (prior) process both in terms of respect and protection is where;

- There is no time pressure to convene meetings visible during the process and communities may have exercised rights to call off or postpone engagements where such a pressure is perceived or insufficient members are present.
- All government departments have played an adequate role especially pertaining to socio-environmental processes, land issues, land scoping and due diligence by government to ensure land rights are fully protected and communities are aware of these rights.
- Local government has been afforded time and capacity to assess and advise on the implications of any decisions for the provision of services and how the plans impact an accommodate local integrated development plans for example.
- Before mining starts community members are able to demonstrate understanding of how a project fits into the local government integrated development plan.
- There is sufficient time for a community to deliberate internally according to custom and practice of the community and still interact and negotiate with government and or mining corporations.
- Absent landowners/occupiers have been included in processes when returning
- Consensus milestones are identified and agreed upon in writing laying out an engagement process.
- Broad based capacity building for the community to reach an informed decision along with the retention of independent technical advisors must happen prior to a decision.
- Communities must be adequately informed of their rights and the purpose of a FPIC process prior to any initial decision such as for a prospecting right.

Informed

- **capacity building for communities linked to independent expertise (financed) is key to balancing power**
- **Full impact assessment (socio/economic/environment/traditional practices/vulnerability group mapping etc) is necessary and past experience of other communities is a valuable resource**
- **Information may focus on different aspects and capacity at different stages but the long term implication must always be known to all**
- **Mining companies need information and capacity building too to shift a paradigm approach that values community life and development as opposed to a commercial conception of values**
- **Information processes must integrate with local government planning and services delivery**
- **All costs need to be made known and the associate costs calculated over long term time frameworks**
- **The broader availability of land and the cumulative effect of mining applications is important information**
- **People must understand that moving means your status and relation to land becomes that of a settler in a new location**
- **There should be full disclosure of procedural technical and financial information available to the company or project proponent**

An indicator that consent has been achieved from a broad based informed perspective is where;

- There has been full disclosure of procedural technical and financial information available
- All costs need to be made known and the associated costs calculated over long term time frames. (including potentially externalised costs)
- Communities in process reviews demonstrate an understanding of the nature and impact of the proposed project.
- There is a demonstrable understanding of the cost of the project, the cost of alternative sightings for a project and the extent of profits generated by the project specifically but more generally the profitability and prospects of the company
- Communities are able to quantify the subsistence value of their lifestyle and can articulate alternative development paths that have been considered in reaching the consensus
- Communities also consider an integrated impact of mine encroachment at a broader level covering several tribally linked communities and the impact this has on health, access to grazing, food production, socioeconomic and cultural practices as well as impacts on particularly vulnerable groups such as women and youth.
- Communities report that information received could be processed and debated in communal forums as determined by custom and practice in that community. This partly indicates access to competent and neutral third party advice and partly to information being provided being of good quality, constituting full disclosure and being presented in a culturally appropriate form.
- There is an active monitoring system with community representation along with an effective grievance mechanism
- Legal and other professional advisors have not acted with undue influence or too broader mandate in negotiations and other engagements.
- Information has been made accessible at a broad community level and no processes have required a group of representatives to make decisions on behalf of the community due to reasons of supposed confidentiality.
- An initiated process should see strengthened local level democratic practice as a key indicator, regardless of whether minable resources are located or consensus is reached to go ahead with mining.
- Apparent and potential externalised costs to a community have been identified and quantified to assist with reaching an informed decision.
- The community has had access to funded expertise to assist in collecting and representing technical information.
- The community has had access to funded expertise (e.g. NGO/CBO) for building broad based education around their rights as well as technical issues in the project and FPIC process discussions.

Consent

- **Consent must first deal with all issues pertaining to land rights and land claims**
- **Consent is as applicable to state owned mining concerns as that of private mining interests**
- **Customary decision making processes should form the basis of consent process**
- **Consent is an on-going process**
- **On-going monitoring and a commonly develop and implemented monitoring system is critical**
- **Consent is given for the actual impact of change confronting the community**
- **No Consequences for withholding consent**
- **Who gives Consent: The meaning of Community**
- **Group Consensus, Individualised consent, Majority decision, sub group based processes (e.g. IPLRA department procedure)**

An indicator that consent has been achieved through a fair process is where;

- Taking the word root consensus as an approach to consent processes one of the key indicators of a successful consent process would be the absence of conflict between the community, state and or project proponent and also by an absence of conflict in the community itself. There should also be an absence of significant dissenting opinions on the course of development, compensation or relocation issues.
- Where there is clear evidence that the mining company has respected the value and customary practices of a community
- Documentation of research detailing cultural, socio economic, inter group relations and particularly vulnerable groups likely to be heavily impacted is available.
- A documented process including registers is available and neutral third party reports indicate a fair and appropriate engagement process.
- Documented evidence of a process that conforms to the custom and practice of a communities decision making processes along with evidence of meetings where key community decisions are made. (attendance register along with video footage).
- Evidence that there exists a bargaining relationship. Documentation of exchanges should demonstrate positions and movements. If a community for instance make a proposal there should be documented evidence as to the response and reasoning behind this response.
- If the first offer by a company or something similar to it is the outcome the presumption should be that there is no bargaining relationship unless specifically proved otherwise.
- Any community representation is democratically elected under third party observation (e.g the independent electoral commission) and must be subject to recall by that community.
- Socio economic impact data that demonstrates an improvement in various indicators for the community. Such indicators themselves should be the subject of consultations towards consensus.
- Directly affected households are adequately compensated in advance through a transparent proportional and agreed procedure and have endured a minimum of disruption.
- A document setting out benefit sharing arrangements at a community level be they royalties, equity stake or payments or some combination.
- A document setting out agreed upon dispute settlement mechanisms including recourse to third party arbitration and necessary expertise for monitoring purposes
- Evidence of an independent funding mechanism financed but not administered by mining companies and accessible to communities for engaging in informed consent and agreement monitoring processes as well as for legal disputes where such processes break down.
- A post process assessment where communities report on the extent to which they feel they have given consent in an informed manner and felt they meaningfully impacted on the outcome of processes.
- An on-going record of consensus and improvement in circumstances of an affected community. If consent is a process and not an event this would be a key indicator of such a process. Specific milestones should be used to mark the on-going consensus between mine and community.
- Independent process observers and or facilitators reports of fair notice, access and meeting procedures.