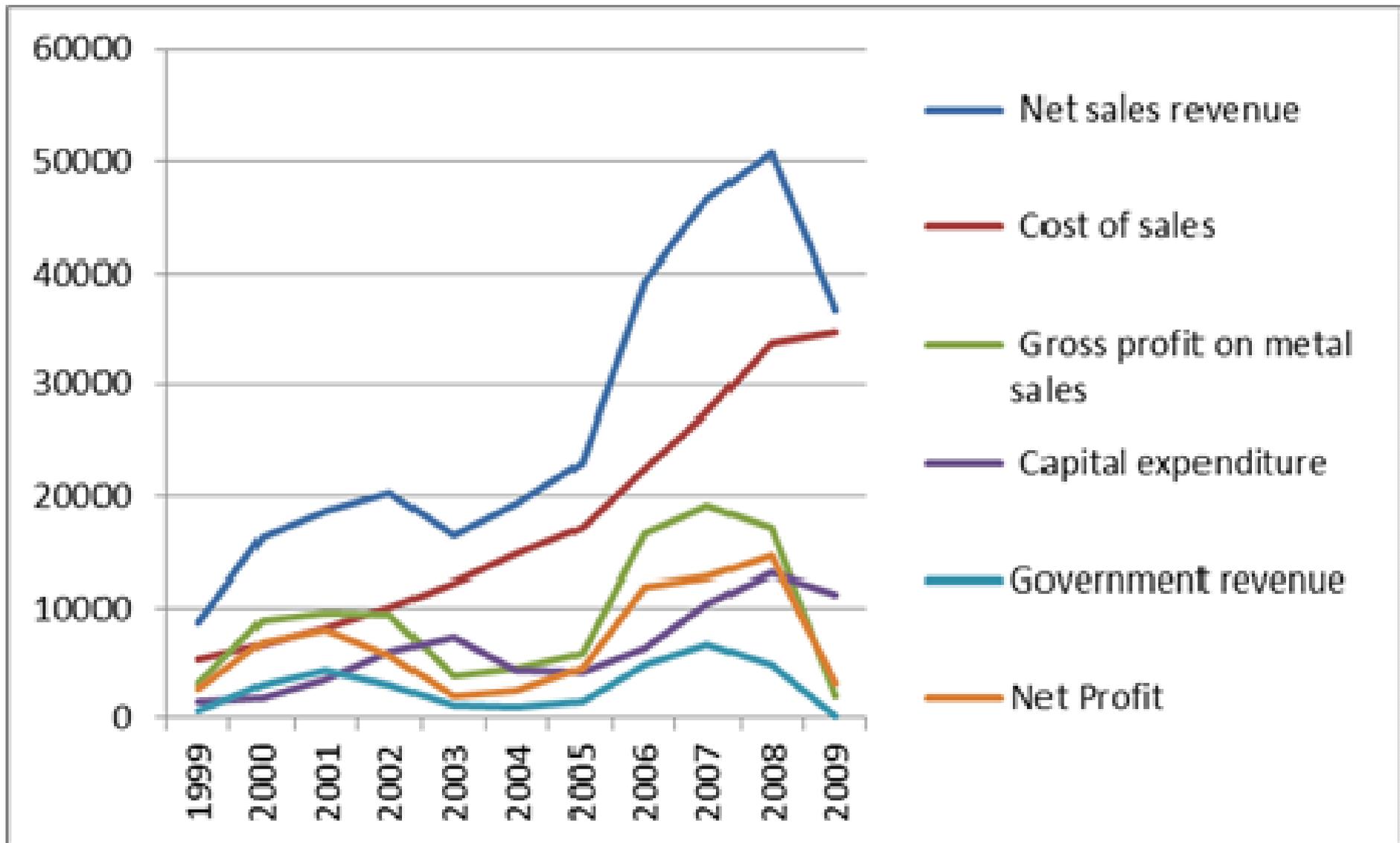


# **Free Prior Informed Consent**

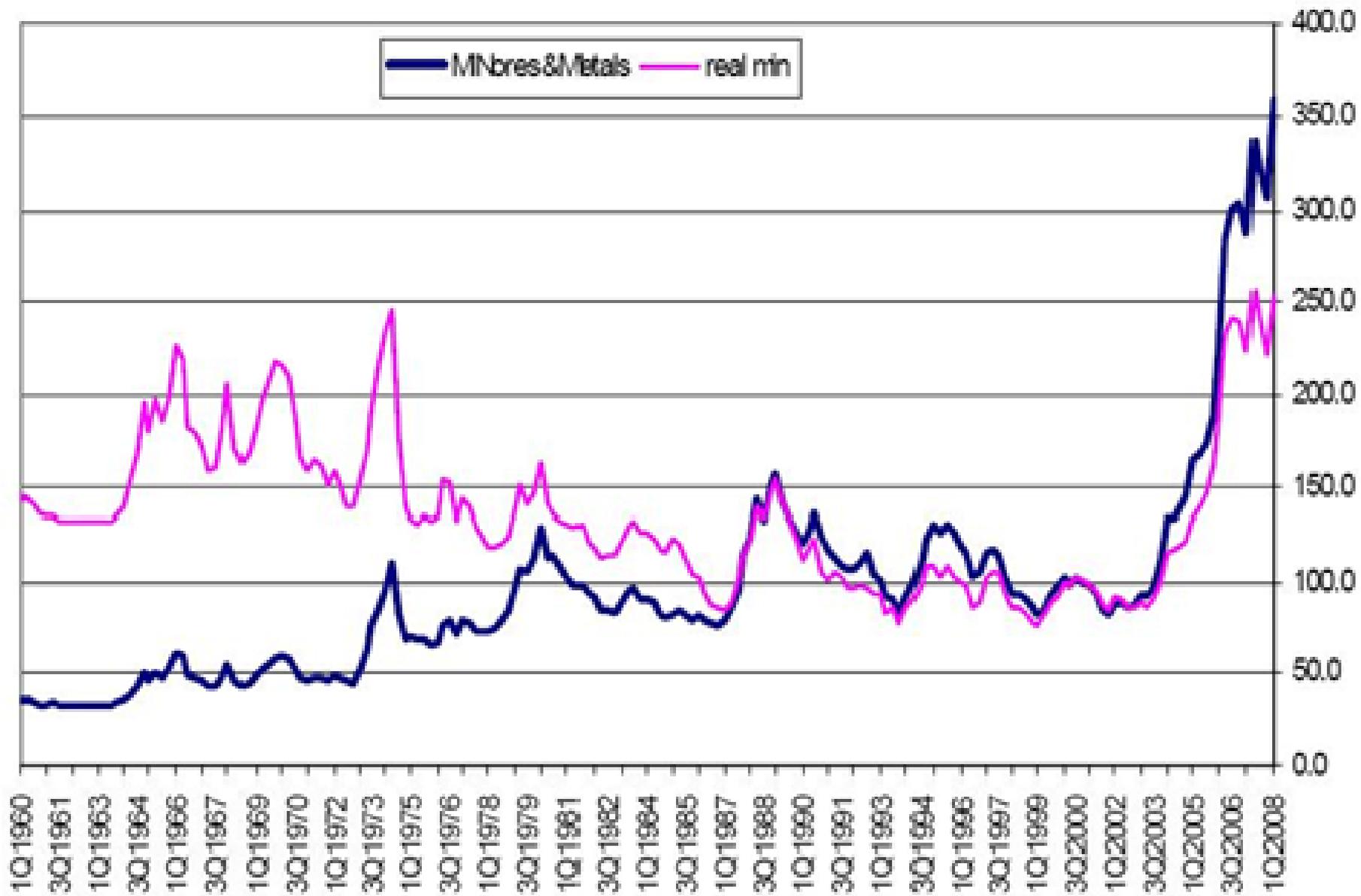
**In South Africa**

# **In South Africa among the multiplicity of issues impacting on this problem are;**

- The lack of rural development by central government
- Poor local governance capacity
- Poor coordination between government departments
- Poorly consulted legislative processes involving the mining industry
- The manner of engagement of mining companies with local communities
- Unresolved issues pertaining to land at a legislative and economic level
- The exploitation of insecure tenure
- The failure of government to adequately perform ministerial discretionary functions in various legislation pertaining to land, environment and minerals, coupled to too much discretion in the legislation in the first place
- The frequent conflation of the government departments as player and referee. (the rabbit assigned to guard the lettuce patch syndrome)
- The socioeconomic state of rural communities and huge power imbalances between such communities, the state and mining companies
- The manner in which CSR is conceived and implemented by mining companies
- The conspiracy of assumed agreement that places mining as the only development option and therefore the relocation of communities to be seen in terms of the question how and not if



The financial crisis saw gross profits at Anglo Platinum drop by nearly 90% from 2008 to 2009. At the same time the company **shed approximately 20% of its jobs** dropping from 80,446 to 64,695 in the period.



## Exploitation of minerals Africa

- Increased commodity prices mean more marginal resources are tapped (usually without regard for externalised costs- implications for sustainability)
- WBG strategies have led to reduced rents for governments and communities because of incentives for FDI
- the commodity boom has seen mergers and acquisitions concentrating power in fewer global mining companies which has effectively strengthened their bargaining position (states and communities)

## Background to the work on FPIC

- Meeting in Polokwane 2009
- Different communities may want different things from interaction with mines
- a fundamental principle that everyone agreed with was that; There should be **“free, prior and informed consent in a fair process and sharing benefits where there is agreement”**

## FPIC Trends and Instruments

“Many years ago for instance a community may have been notified to vacate a few weeks before a dam flooded the valley in which they lived. A decade or so later, they may have been consulted to see if they would prefer to move to site A or site B. Consultation then progressed to the affected people being asked how and to where they would be moved. A decade later, participation supplanted consultation. Potentially affected people started to participate in resettlement planning. The next improvement was 'meaningful participation', interpreted by Ibrahim Shihata, WBG General Counsel, to mean the village could reject being evicted.”

## Some FPIC Instruments

- ILO Convention 169
- UN Food and Agricultural Organization's ("FAO") Code of Conduct
- UN REDD + Programmes and UNEP
- U.N. Declaration on the Rights of Indigenous Peoples 2007 (4 objections and 11 abstentions)
- Trade related Prior Informed Consent e.g. hazardous chemicals
- The World Commission on Dams
- Forest Stewardship Council ("FSC")

## Consultation Standards (examples)

- World Bank Safe Guard policies
- World Bank Group's Extractive Industry Review  
FPIC recommended but rejected
- IFC Standards are consultation based
- Equator principles (finance sector)
- International Council on Mining and Metals  
("ICMM")
- MPRDA

## Soft policy and legislation

**Commitment 9 of the Mining Stakeholders' Declaration on strategy for the sustainable growth and meaningful transformation of South Africa's Mining Industry released on the 30 June 2010, states, "Mine Community Development: Recognising that mine communities form an integral part of mining development, hence a realization that there has to be meaningful contribution towards community development, both in terms of size and impact, in keeping with the principles of the social licence to operate. Parties henceforth commit to attain the following;**

- Develop guidelines and adhere to community consultation processes;
- Develop a partnership approach towards mine community development and consider establishment of regional (social) development funds for effective implementation of social and labour plans;
- Implement and monitor social labour plan undertakings  
.....etc

## Indigenous and Locally Affected Communities

- In the growing body of multilateral and private standards around FPIC some instruments refer to indigenous peoples while others refer to indigenous and local communities. There is a tendency however, for a distinction to be drawn between indigenous people and local/affected communities where there exists a duty to gain consent from an indigenous people but only a duty to consult local/affected communities.
- E.g. The Russian meeting of the UN experts group on indigenous peoples.
- Oxfam Australia guideline to FPIC makes this same distinction.

- This is largely an artificial distinction where the right to FPIC should rather be understood in the context of economic marginalization at global and local level and in terms of global historical processes such as colonization.
- In Africa and parts of Asia with a history of colonial dispossession the assigning a meaning of aboriginal to the meaning of indigenous does not make sense. Thus by separating Africans for example, into indigenous and non-indigenous groups, separate classes of citizens often equally marginalised are being created with different rights.

- The African Commission on Human and Peoples Rights (ACHPR) in an advisory opinion on the 2007 UN Declaration on the Rights of Indigenous Peoples, “Moreover, in Africa, the term indigenous populations does not mean “first inhabitants” in reference to aboriginality as opposed to non-African communities or those having come from elsewhere. This peculiarity distinguishes Africa from the other continents where native communities have been almost annihilated by non-native populations. Therefore, the ACHPR considers that any African can legitimately consider him/herself as indigene to the continent.” Advisory opinion May 2007

- The ACHPR also adopt an approach of providing a framework for a definition of indigenous including self definition, connection to the land from a cultural and survival perspective and marginalisation from the 'national hegemonic dominant mode of production.
- Core rationale for the special rights based focus of indigenous populations is the form of marginalisation from the dominant power system
- Rural populations experience similar marginalisation and the practice of the MPRDA has strengthened this marginalisation

## Emergent African Trends

- **Rights based**
  - **African Charter on Human and Peoples' Rights**
  - case of the removal of Endorois people
  - In the judgement; the African Commission was of the view that, “in any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, **but also to obtain their free, prior, and informed consent, according to their customs and traditions.**”
- **Economic Development**
  - e.g. The African Mining Vision

# **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.

- **Chapter II: Minerals as State Resources**  
**Article 4: Acquisition or Occupation of Land for Mining**
  - s4 Member States shall designate some lands as ‘no go zones’ for mining activities if such lands have peculiar risks to the preservation of security including areas which have environmental, social and cultural sensitivity to mining operations.

# Compared to SADC Protocol on Mining

## General Principles

- 8. Member States shall promote economic empowerment of the historically disadvantaged in the mining sector.

## Article 6: Promotion of Private Sector Participation

- 1. Member States shall adopt policies that encourage the exploration for and commercial exploitation of mineral resources by the private sector.
- 2. Member States undertake to develop a mechanism that will enable the private sector's continued participation in the sector.
- 3. Member States shall strive to create a conducive environment for attracting local and foreign investment to the Region and to the mining sector in particular

## 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.

# Benefit Sharing

- The other emergent approach is, instead of providing a veto right of consent to affected persons, to simply legislate a quantum of benefit sharing via profit, equity or royalty mechanisms e.g. s104 MPRDA but also apparent in other countries
- Royalties Act is silent
- Of the total proven PGM reserves currently being mined communities control about 0.5% and about 0.7% of probable reserves.
- FPIC sets up the possibility of a negotiated relationship but manipulation is an ever present possibility – perhaps a legislated minimum for benefit sharing
- Royalties or Equity – informed decision necessary on a case by case basis (Treasury has suggested equity)
- What about correcting past injustices? (environmental and social debt?)
- Deeper exploration of the externalised costs – determines the community break even point before sharing even begins

## Developing the FPIC concept

- It is about establishing a bargaining relationship
- Can be backed up by legislative minimums e.g. royalties
- Would need to be applicable to state and private
- The land question is central
- Developing application of communal law linked to strengthened administration under IPILRA can develop FPIC
  - Defining community
  - What constitutes consent (who gives it)
- FPIC can not exist within the current MPRDA framework
- Has use in a rural development framework
- Breaks the absolute mining as the only development option approach (conspiracy of assumed agreement)
- Has relevance to the often localised external costs of mining
- Has linkages to the Ruggie Framework of respect, protect and recourse to remedy (are systemic issues with Ruggie though)

## **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.

## Strategies/Issues

- Possibility to combine land based legal claims as a basis to define FPIC rights and practice
- Use current legislation e.g. potential IPIIRA procedures with FPIC in mind
- Possibility of appeal in terms of international justice standards
- Campaigning at a SADC level for more enlightened protocols
- MPRDA is a central obstacle to the realisation of FPIC
- Promotion of alternative development paradigms
- What if a community wins a battle?

Please contact us with inputs and  
suggestions

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